

---

# *The European Union as Situation, Executive, and Promoter of the International Law of Cultural Diversity – Elements of a Beautiful Friendship*

Armin von Bogdandy\*

## **Abstract**

*Cultural diversity is an important political and legal topos in the European Union. At the same time, the concern for cultural diversity gives reason for grave reservations towards the Union. This article intends to assist, on the basis of international law, in distinguishing appearance and reality. The Union will be analysed first as a situation of the application of the international law of cultural diversity, secondly as the regional executive of this international law, and thirdly as its global promoter. It shows that international law and Union law reinforce each other. The former conveys to the Union instruments to pursue European unification which at the same time serve its own implementation. Furthermore, it does not set limits to European unity since it protects only cultural pluralism but not state-supporting distinctiveness. A prerequisite for this consonance is that the Union's constitutional law allows for political unity without cultural unity and that international law remains mute about important questions on European unification. The international law perspective thus does not fully exhaust the problem: conformity with international law alone cannot dissipate concern for the future of cultural diversity in the Union.*

\* I would like to thank Anuscheh Farahat, Stefan Kadelbach, Petra Láncoš, Maja Smrkolj, Franziska Sucker, Gabriel Toggenburg and Rüdiger Wolfrum for helpful discussions and information. This article was generated as a lecture for the conference of the German Society for International Law meeting in March 2007 in Halle on the topic of 'Pluralistic Societies and International Law'. Translated by Jenny Grote. Email: bogdandy@mpil.de.

## I Introduction and Basics

### A Problem and General Thesis

*Cultural diversity* is an important topos in the European Union. It is part of the Union's self-portrayal,<sup>1</sup> can be found in diverse legal instruments,<sup>2</sup> and is the rationale behind numerous legal provisions.<sup>3</sup> Moreover, the topic of diversity, and not economic growth, freedom, or equality, characterizes the nature of European unity, at least according to the European motto: 'United in diversity'.<sup>4</sup> To some, this may, however, appear to be window dressing, since the concern for cultural diversity gives reason for grave reservations towards the Union.<sup>5</sup> Its celebration of cultural diversity may simply be a strategy of aggressively confronting the concern that the Union might impair or even destroy cultural diversity by occupying the topic as its own.

A jurisprudential inquiry into the matter can base itself on Union law, on national law, or on international law;<sup>6</sup> the last will be the topic of this article. The pertinent principles, rules, and institutions of international law – such as self-determination, Article 27 of the International Covenant for Civil and Political Rights (ICCPR), the Framework Convention for the Protection of National Minorities, or the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions – in what follows are summarized using the notion of 'international law of cultural diversity', without, however, implying the existence of a proper field of law with specific characteristics. Placing the international law of cultural diversity in the spotlight, the Union will first be analysed as a problematic situation of this international law:<sup>7</sup> the main interest here is to develop this international law as a framework for the law of the Union and to detect possible conflicts (Section 2). Secondly, the Union will be examined as the regional executive of this international law: the interest is here in the mechanisms through which the Union urges the European states to comply with it (Section 3). Thirdly, the focus is on the contribution the Union makes to the global

<sup>1</sup> See, e.g., the Union's self-portrayal on its website, available at: <http://europa.eu/languages/en/chapter/5> (30 Mar. 2007).

<sup>2</sup> E.g., Dec 1983/2006/EC of the European Parliament and the Council of 18 Dec. 2006 on the European Year of Intercultural Dialogue, OJ (2006) L 412/44.

<sup>3</sup> See Art. 6(3) TEU, Arts 87(3)(d) TEC and 151 TEC, Art. 22 Charter of Fundamental Rights.

<sup>4</sup> As foreseen by Art. I-8 TCE; on the motto see Toggenburg, 'Unity in Diversity: Searching for the Regional Dimension in the Context of a Somewhat Foggy Constitutional Credo', in R. Toniatti, M. Dani, and F. Palermo (eds), *An Ever More Complex Union* (2004), at 27–56; Ruffert, in C. Callies and M. Ruffert (eds), *Verfassung der Europäischen Union* (2006), Art. I-8, marginal number 12; this motto is already being used: see [http://europa.eu/abc/symbols/motto/index\\_en.htm](http://europa.eu/abc/symbols/motto/index_en.htm) (19 June 2007) now Declaration 52 to the Lisbon Treaty.

<sup>5</sup> For details, see Haltern, 'Europäischer Kulturkampf', 37 *Der Staat* (1998) 591; Kraus, 'Cultural Pluralism and European Polity-Building', 41 *JCMS* (2003) 665; Galbreath, 'The Politics of European Integration and Minority Rights in Estonia and Latvia', in 4 *Perspectives on European Politics & Society* (2003), at 35–53, 36, and 49.

<sup>6</sup> Institutionally, the pertinent research is located especially with the Institute for Minority Rights of the European Academy Bozen and with the European University Institute: see especially the references to the works of Gabriel Toggenburg and Bruno de Witte in this article.

<sup>7</sup> This notion of *situation* corresponds to the one found in Art. 13 of the Rome Statute of the International Criminal Court: see Williams, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Art. 13, marginal numbers 14 ff.

promotion of cultural diversity (Section 4). Finally it will be discussed whether the law of the Union provides lessons for an international law principle of cultural diversity (Section 5).

The analysis of the EU as situation, executive, and promoter of the international law of cultural diversity is conducted in the light of the multi-level paradigm.<sup>8</sup> Multi-level systems can be understood constitutionally or instrumentally.<sup>9</sup> Understood constitutionally, a multi-level system is based on the idea of an international community which formulates basic requirements for social interaction, and thus for internal law, by using international law.<sup>10</sup> On the one hand, internal law should organically blend in with international law; on the other hand it should generate suggestions for the latter's concretion and development. This perspective dominates Section 2, which searches for the parameters and limits set by international law to European integration from the perspective of cultural diversity.

A multi-level system looks different from the perspective of instrumentalism.<sup>11</sup> Here the focus of interest is on the question of how political agents use norms of international law strategically. This perspective dominates Section 3 regarding the Union as executive of the international law of cultural diversity, as well as Section 4, which analyses the Union as promoter of this international law.

The international law of cultural diversity thus discloses various perspectives of the Union and its law.<sup>12</sup> However, they yield a uniform result which forms the general thesis of this article: i.e., those areas of international law and Union law addressed under the topos of *cultural diversity* reinforce each other. As Section 3 will demonstrate, international law conveys instruments to the institutions of the Union to pursue European unity, while, at the same time, the Union serves the implementation of the international law of cultural diversity: a 'win-win situation'. Moreover, Section 2 will show that international law does not create obstacles for European unity since it protects only cultural pluralism but not state-supporting homogeneity, identity,

<sup>8</sup> Wahl, 'Der einzelne in der Welt jenseits des Staates', in R. Wahl (ed.), *Verfassungsstaat, Europäisierung, Internationalisierung* (2003), at 53 ff.; C. Möllers, *Gewaltengliederung* (2005), at 210.

<sup>9</sup> Constitutionalism and instrumentalism are understood as alternative approaches that can be chosen according to the scientific interest and also combined. It is not asserted that the constitutional perspective on international law is always the adequate one.

<sup>10</sup> On international constitutionalism, see Frowein, 'Konstitutionalisierung des Völkerrechts', 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2000) 427; Uerpmann, 'Internationales Verfassungsrecht', 56 *Juristenzeitung* (2001) 565; Walter, 'Constitutionalizing (Inter)national Governance', 44 *German Yrbk Int'l L* (2001) 170; Bryde, 'Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts', 42 *Der Staat* (2003) 61; Kadelbach and Kleinlein, 'Überstaatliches Verfassungsrecht', 44 *Archiv des Völkerrechts* (2006) 235; Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework Analysis', 15 *EJIL* (2004) 907.

<sup>11</sup> See Krisch, 'Imperial International Law', *Global Law Working Paper* 01/04, available at: [www.nyulawglobal.org/workingpapers/detail/GLWP\\_0104.htm](http://www.nyulawglobal.org/workingpapers/detail/GLWP_0104.htm) (19 June 2007) and 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order', 16 *EJIL* (2005) 369; J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005).

<sup>12</sup> The notion *Union* comprises the EC; see for details von Bogdandy, 'The Legal Case for Unity', 36 *CML Rev* (1999) 887.

*distinctiveness*.<sup>13</sup> Explaining this harmony leads to the bases of Union law and international law. From the point of view of constitutional theory, this harmony rests on Union constitutional law's feature of allowing for political unity without cultural unity.<sup>14</sup> For international law theory it rests on international law's feature of remaining mute about important questions on social and political organization.

### **B The Concept of 'Cultural Diversity'**

But what is it all about? Conceptually, diversity depends on unity, as Hegel's epistemology and Jellinek's seminal contribution on the protection of minorities show.<sup>15</sup> Thus, the concern for cultural diversity develops in opposition to a social unity. It is always about groups desiring to preserve themselves against a coherent unit. On this basis, the term 'cultural diversity' is being used in a variety of different contexts with various and vague meanings and not always obvious intentions. Even the Convention on the Protection and Promotion of the Diversity of Cultural Expressions provides little clarity.<sup>16</sup> In order to grasp the issue, outlining the main debates is more helpful than a conceptual analysis.

The notion 'diversity' first appears in the federal constitutions of Switzerland,<sup>17</sup> Canada,<sup>18</sup> Indonesia,<sup>19</sup> and South Africa,<sup>20</sup> in which the protection of groups has a high significance. In a series of constitutions, the culturally pluralistic composition of society is nowadays protected.<sup>21</sup> The Canadian constitutional discourse on this topic has global relevance since it was the catalyst for the communitarian philosophy which decisively shapes the theory of cultural diversity and has made a great contribution

<sup>13</sup> For a critical inventory, see F. Hanschmann, *Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft* (2008). On the paired notions of multiculturalism and distinctiveness see de Witte, 'The Value of Cultural Diversity', in S. Millns and M. Aziz (eds), *Values in the Constitution of Europe* (forthcoming 2007).

<sup>14</sup> On this premise, see von Bogdandy, 'The European Union as a Supranational Federation', 6 *Columbia J European L* (2000) 27, 'Europäische und nationale Identität: Integration durch Verfassungsrecht?', 62 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2003) 156, at 184 ff and 'Constitutional Principles', in A. von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2006), at 3, 42 ff.

<sup>15</sup> G.W.F. Hegel, *Wissenschaft der Logik I* (1923) (Orig. 1812), at 59; G. Jellinek, *Das Recht der Minoritäten* (1898), at 27, 28, and 30.

<sup>16</sup> See, in particular, the vague definition in Art. 4(1) of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 Oct. 2005; Council Dec. 2006/515/EC of 18 May 2006 on the Conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, OJ (2006) L 201/15; critical of the notion is Fuchs, 'Kulturelle Vielfalt im kulturpolitischen Alltag', in *UNESCO heute online*, Mar./Apr. 2006, available at: [www.unesco-heute.de/0306/themen.htm](http://www.unesco-heute.de/0306/themen.htm) (23 Apr. 2007); more positive is Graber, 'The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?', 9 *J Int'l Econ L* (2006) 553, at 558.

<sup>17</sup> Third recital, Arts 2 and 69(3) Federal Constitution of Switzerland.

<sup>18</sup> Art. 27 Constitutional Act 1982: '[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians'.

<sup>19</sup> Art. 36A (motto: 'United in diversity'); Art. 18A ('Diversity of Regions').

<sup>20</sup> Fourth recital ('United in Diversity'); Arts 30 ff.

<sup>21</sup> Especially in Latin America; see especially Art. 7 of the Colombian Constitution, Art. 2 of the Mexican Constitution, Art. 1 of the Ecuadorian Constitution, Art. 1 of the Bolivian Constitution.

to the international success of the concept.<sup>22</sup> In the centre of this somewhat greying debate is the question of the recognition of the cultural lifestyles and traditions of groups which feel marginalized in a national majority culture.<sup>23</sup> 'Cultural diversity' emerges as an argument of the weak.<sup>24</sup>

On the international level the notion was established in the 1990s with two diverging, even contrasting, intentions.<sup>25</sup> On the one hand, cultural diversity was introduced by UNESCO as a principle of organization of the international community of states. In this respect the term aims at corrections in the process of globalization; it serves as antonym to a culturally uniform global society shaped by the USA.<sup>26</sup> With remarkable parallelism, the defence of Canadian, French, and European cultural politics is converted within the framework of the WTO from *exception culturelle*, which amounts to dead-end reasoning,<sup>27</sup> to *diversité culturelle*.<sup>28</sup> It seems as if UNESCO was just as open for suggestions coming from Canada and France as the World Bank is for those coming from the United States. However, the notion cannot be reduced to culture protectionism, but holds the potential for a comprehensive alternative to the type of globalization shaped by the USA.

The first international use of the notion 'cultural diversity' aims at the defence of national cultural politics, cultural sovereignty, and self-determination against foreign and international influence. Its other use conflicts in a remarkable way with the first: cultural diversity here refers to the existence of international law parameters for national diversity management.<sup>29</sup> The notion of cultural diversity confronts in particular two problems of international minority protection: first the concern for cultural diversity is, in contrast to the protection of minorities, already at first view a concern

<sup>22</sup> See especially W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (1995); J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995); C. Taylor, *Multiculturalism: Examining the Politics of Recognition* (1994).

<sup>23</sup> Habermas, 'Kampf um Anerkennung im demokratischen Rechtsstaat', in J. Habermas (ed.), *Die Einbeziehung des Anderen* (1996), at 237, 239.

<sup>24</sup> C.B. Graber, *Handel und Kultur im Audiovisionsrecht der WTO – Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung* (2003), at 74.

<sup>25</sup> Already in the 1970s, developing countries had tried to establish the related concept of cultural development internationally, but they were unsuccessful: see Art. 7 of the Charter of Economic Rights and Duties of States of 12 Dec. 1974, A/RES/29/3281.

<sup>26</sup> The World Commission on Culture and Development that had been called for by the UNESCO General Conference in 1991 and authorized by the UN General Assembly in 1995 presented the report, 'Our Creative Diversity', which established the notion of 'cultural diversity' internationally. According to the report, this diversity is a prerequisite for development and democracy and is threatened by the global media market.

<sup>27</sup> In particular for a nation with global cultural aspirations: S. Regourd, *L'exception culturelle* (2002).

<sup>28</sup> The idea of a diversity convention was advanced in 1999 by the Cultural Industries Sectoral Advisory Group on International Trade (SAGIT) of the Canadian Ministry for Foreign Affairs and International Trade; on the development see Bernier, 'A UNESCO International Convention on Cultural Diversity', in C.B. Graber, M. Girsberger and M. Nenova (eds), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services* (2004), at 65.

<sup>29</sup> On the notion of 'diversity management' see Thürer, 'Minorities and Majorities: Managing Diversity', 15 *Schweizerische Zeitschrift für Internationales und Europäisches Recht* (2005) 659; J.W. Dacyl and C. Westin, *Governance of Cultural Diversity* (2000).

of everyone, also of the majority, which opens up new potentials for consensus.<sup>30</sup> Secondly, the notion of cultural diversity allows for the presentation of new and immigrant groups as worthy of protection better than the predefined term of minority, and thus enables expansion of the scope of international law.<sup>31</sup>

Now that the context and purpose of the notion have been illustrated, its main normative dimension still needs to be identified. At first view the notion ‘cultural diversity’ appears to be new skins for old wine, be it cultural sovereignty, anti-Americanism, or the protection of minorities. A second glance, however, shows a new normative dimension. The success of the term ‘cultural diversity’ relies conceptually on the theme of ‘identity’. Looking in the relevant international documents for the answer to why ‘cultural diversity’ is worthy of protection, one regularly finds the allusion to its role in the formation and protection of identity.<sup>32</sup> The conceptual innovation of ‘cultural diversity’ as a concern and as a legal term is that it is about the formation of identities, of individual, social, political identities; this is a topic that only established itself as recently as the 1980s,<sup>33</sup> leading into a broad debate ranging from ‘identity politics’ to the right to cultural identity.<sup>34</sup>

This key role accorded to the topic of identity shows the explosiveness of the quest for cultural diversity: theoretically because of the divisive conceptual grounds of the notion,<sup>35</sup> practically because of the explosiveness of identity politics. Although the numerous advocates of ‘identity politics’ share an emancipatory political orientation, the attention focusing on the topic of cultural diversity does not, in general, have a single political outlook: the spectrum of those demanding the preservation and promotion of cultural diversity and of the social identity built upon it ranges from

<sup>30</sup> Apel, ‘Anderssein, ein Menschenrecht?’, in H. Hofmann and D. Kramer (eds), *Anderssein, ein Menschenrecht. Über die Vereinbarkeit universaler Normen und ethnischer Vielfalt* (1995), at 9–19; exactly in this sense see ECHR (Grand Chamber), *Chapman v. UK* (App No 27238/95) 33 EHRR (2001) 18, at para. 93.

<sup>31</sup> The prevailing opinion requires for qualification as a minority that the group members possess the nationality of the state of residence: see Capotorti, ‘Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities’, UN Doc. E/CN.4/Sub.2/384/Rev.1 (1979), para. 57; Ermacora, ‘The Protection of Minorities before the United Nations’, 182 *Recueil des Cours* (1983) 247, at 305 ff. If not nationality, then at least the stability of the residence: see M. Nowak, *CCPR Commentary* (2005), at Art. 27, marginal number 19 ff. The Human Rights Committee on the other hand, includes migrants in the scope of application of Art. 27 ICCPR: General Comment 23, Art. 27, paras 5.1, 5.2 (UN Doc. CCPR/C/21/Rev.1/Add.5 of 8 Apr. 1994); in detail see Wolfrum, ‘The Emergence of “New Minorities” as a Result of Migration’, in C. Brölmann, R. Lefeber and M. Zieck (eds), *Peoples and Minorities in International Law* (1993), at 153; G. Dahm, J. Delbrück, and R. Wolfrum, *Völkerrecht* (2nd edn, 2002), i/2, at 278 ff; Venice Commission, ‘Report on Non-Citizens and Minority Rights’, Strasbourg, 18 Jan. 2007, CDL-AD (2007) 001.

<sup>32</sup> See the 6th recital to and Art. 1 of the Universal Declaration on Cultural Diversity, available at: [www.unesco.org/confgen/press\\_rel/021101\\_clt\\_diversity.shtml](http://www.unesco.org/confgen/press_rel/021101_clt_diversity.shtml) (21 May 2007); 7th recital to the Diversity Convention, *supra* note 16; 6th and 7th recitals to the Framework Convention; Tomuschat, ‘Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights’, in R. Bernhardt, W.K. Geck, G. Jaenicke, and H. Steinberger (eds), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte* (1983), at 952, 956, 958, and 961.

<sup>33</sup> In detail, see von Bogdandy, ‘Europäische und nationale Identität’, *supra* note 14, at 160 ff.

<sup>34</sup> Y.M. Donders, *Towards a Right to Cultural Identity* (2002); Franck, ‘Clan and Superclan’, 90 *AJIL* (1996) 359, at 382 ff.

<sup>35</sup> L. Niethammer, *Kollektive Identität. Heimliche Quellen einer unheimlichen Konjunktur* (2000) is most illuminating.

proponents of national distinctiveness (*diversity as distinctiveness*) to voices advocating an interactive cultural pluralism (*diversity as pluralism*)<sup>36</sup> to voices wanting to bring a national political culture to a higher level of universality.<sup>37</sup> The notion ‘cultural diversity’ is used in different, even diametrically opposed, senses, which seriously affects its usefulness as a legal term.<sup>38</sup>

Attention needs to be paid to the small print. For example, according to one widespread, arguably postmodernism-inspired opinion, cultural diversity is central for the individual identity, since cultural diversity opens up concrete options used by the individual to design its identity.<sup>39</sup> Others argue that the denial of social recognition of cultural means of expression damages the individual identity built upon this recognition.<sup>40</sup> For those concerned more with groups than individuals, cultural diversity is important, as it allows for social and especially political identity, since these identities are constituted on a *proprium*, thus calling for cultural diversity in the sense of *distinctiveness*. Such a social and especially political identity is often considered as constitutive for the formation of groups and social cohesion in general, and as such worthy of protection.<sup>41</sup> But the protection of identity also appears as the overarching reason for and the final objective of human rights guarantees: Article 4 of the Universal Declaration on Cultural Diversity even declares the protection of diversity to be an ‘ethical imperative’. Thus, diversity and identity place established rights like freedom of speech, freedom of religion, and freedom of assembly in a new context<sup>42</sup> and influence their content and limits.

In conclusion, it can be ascertained that the notion ‘cultural diversity’ addresses legal institutions as diverse as national sovereignty, peoples’ right to self-determination, general human rights, and special rights of groups, and this mostly from the perspective of the formation and protection of identity.

### C The Most Important Debates within the EU

The notion of ‘cultural diversity’ appears in a series of debates concerning the European Union. In the following paragraphs these debates will be briefly presented and discussed in order to isolate the most fruitful, which will be elaborated on in Sections 2 and 3.

The law of the Union may threaten cultural diversity or promote it. Can it also remain neutral? The latter may be doubted: if law is conceived as an expression of social practice and every social practice is ennobled to be an expression of cultural

<sup>36</sup> On these two notions, see de Witte, *supra* note 13, at 5.

<sup>37</sup> Habermas, ‘Inklusion – Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie’, in Habermas (ed), *supra* note 23, at 154, 164; W. Reese-Schäfer, *Jürgen Habermas* (3rd edn., 2001), at 129.

<sup>38</sup> On the problem of ‘cultural diversity’ as a notion that effaces important distinctions, see below, Section 5.

<sup>39</sup> Franck, *supra* note 34.

<sup>40</sup> Taylor, ‘Politik der Anerkennung’, in C. Taylor (ed), *Multikulturalismus und die Politik der Anerkennung* (1997), at 13, 21, 24 ff, and 27 ff; Habermas, ‘Religiöse Toleranz als Schrittmacher kultureller Rechte’, in J. Joerden and R. Wittmann (eds), *Recht und Politik* (2004), at 23–35, and 34.

<sup>41</sup> 6th recital to the Universal Declaration on Cultural Diversity, *supra* note 32; 3rd and 4th recitals to the Diversity Convention, *supra* note 16.

<sup>42</sup> See Cholewinski, ‘Migrants as Minorities: Integration and Inclusion in the Enlarged Union’, 43 *JCMS* (2005) 695, at 701.

diversity, then every application of the EC freedoms and every EC harmonization would imply a loss. Without a doubt, supermarkets in Eindhoven and Catania, law firms in Madrid and London are nowadays more similar than 30 years ago; at the same time the variety of goods in these supermarkets and the law firm's personnel are much more diverse due to the single European market. The single European market is a force of cultural convergence as well as of cultural diversity. This article will abstain from an attempt to counterbalance these two tendencies.<sup>43</sup>

The core business of the Union is integration (Article 2 TEU, Article 2 TEC); this means convergence and often standardization. This is why the Union is mainly seen as a threat to cultural diversity. The focus of the oldest and most important debate is on the diversity of national cultures which, in the eyes of many, convey national homogeneity and identity. The success of the programme of the single European market in the early 1990s in particular conveyed law-shaping power to this concern: the pertinent phrases of the German Federal Constitutional Court in its *Maastricht* decision or Article 6(3) TEU may be recalled as examples.<sup>44</sup> Before that, questions had already been raised about under what conditions concern for the protection of national cultures could justify national restrictions on the EC freedoms.<sup>45</sup> From the perspective of international constitutionalism we will analyse below in Section 2 whether there are parameters set by international law for how the Union's law should handle national cultures in order to preserve diversity in the sense of national homogeneity, identity, *distinctiveness*.

In a second scenario concern is expressed that the law of the Union may endanger minorities in the Member States. Thus, the law of the single European market could set aside national institutions protecting diversity, i.e., institutions of cultural pluralism, or even infringe upon Article 27 ICCPR. The decision in the *Angonese* case concerning the language regime in South Tyrol has been perceived as such a threat – wrongly so, as an exact analysis of the decision shows.<sup>46</sup> It is also feared that the legislation under Title IV TEC, especially the European immigration policy, could, by enacting a rigid integration and assimilation policy, be detrimental to the cultural diversity brought by

<sup>43</sup> On the cultural implications, see de Witte, 'The Cultural Dimension of Community Law', 4 *Collected Courses of the Academy of European Law* (1995), at 229. In the case law there are no allusions to the Single Market endangering national cultures: see Joined Cases 60 and 61/84, *Cinéthèque SA v Fédération nationale des cinémas français* [1985] ECR 2605; Case C-148/91, *Vereniging Veronica Omroep Organisatie v Commissariaat voor de Media* [1993] ECR I-487, at para. 9; Case C-379/87, *Groener v Minister for Education and the City of Dublin Vocational Educational Committee* [1989] ECR I-3967, at para. 18; Joined Cases C-338/04, C-359/04, and C-360/04, *Criminal proceedings against Massimiliano Placanica (C-338/04), Christian Palazzese (C-359/04) and Angelo Sorricchio (C-360/04)* [2007] ECR I-1891, at para. 47.

<sup>44</sup> 89 BVerfGE 155.

<sup>45</sup> See especially Case C-154/89, *Commission v. France (Tourist guides)* [1991] ECR I-659; in detail see Craufurd Smith, 'European Community Intervention in the Cultural Field: Continuity or Change?', in R. Craufurd Smith (ed), *Culture and European Union Law* (2004), at 19, 28 ff.

<sup>46</sup> De Witte, 'Language Law of the European Union: Protecting or Eroding Linguistic Diversity?', in *ibid.*, at 205, 227; Toggenburg, 'Die Sprache und der Binnenmarkt im Europa der EU', 1 *European Diversity and Autonomy Papers – EDAP* (2005), available at: [www.eurac.edu/edap](http://www.eurac.edu/edap), at 17 ff; Palermo, 'The Use of Minority Languages: Recent Developments in ECLaw and Judgments of the ECJ', 3 *Maastricht J European and Comp L* (2001) 299, at 305 ff; V. Bansch, *Sprachvorgaben im Binnenmarkt: Sprachenvielfalt und Grundfreiheiten* (2005), at 149 ff; N. Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* (2002), at 284 ff.

immigrants.<sup>47</sup> In this area there is a critical public trying to consolidate migration law and minority law in order to avert this pressure to assimilate; the Commission has in part embraced this approach.<sup>48</sup> The approach is summarized by the sentence: '[t]here should logically come a point where the integration of the migrants ends and minority protection begins'.<sup>49</sup> Yet, this threat does not appear imminent: the requirement of unanimity under Article 63(3)(a) TEC and the diversity of the national immigration policies prevent European *secondary law* from aligning the Member States' management of diversity in the sense of a policy of assimilation. Furthermore it is regularly emphasized that the integration of citizens of third countries must respect their language and culture,<sup>50</sup> and that the ECJ has made it clear that it protects all the relevant rights, including those contained in universal human rights treaties.<sup>51</sup> At present, the law of the Union does not constitute a specific threat to the cultures of autochthonous (native) or allochthonous (immigrant) minorities.<sup>52</sup>

With this, we reach the second dimension: the law of the Union as an instrument for the promotion of cultural diversity in the sense of cultural pluralism. The freedoms and the law of non-discrimination of the single European market, as well as the citizenship of the Union, already promote cultural diversity in the Member States, and this not only through a greater variety of goods in the supermarket and the facilitated residence of immigrant groups with a different cultural background. Numerous rights based on the law of the Union take the pressure of assimilation off those citizens of the Union migrating within the EU, and thus contribute to the cultural diversification of the Member States. This similarly holds true for the growing corpus of European asylum and

<sup>47</sup> With a view to Art. 27 ICCPR, Cholewinski, *supra* note 42, at 709 ff; Peers, "'New Minorities': What Status for Third-Country Nationals in the EU System?", in G.N. Toggenburg (ed.), *Minority Protection and the Enlarged European Union: The Way Forward* (2004), at 149, 160.

<sup>48</sup> On this, see Special Issue 43 *JCMS* (2005), 'Migrants and Minorities in Europe'.

<sup>49</sup> Cholewinski, *supra* note 42, at 697. It is debatable whether this view is fully convincing; cf. for Canada Kymlicka, *supra* note 22, at 15.

<sup>50</sup> Council conclusions of 19 Nov. 2004 on the 'Immigrant integration policy in the European Union', Council Doc. No. 14615/04, at 19 ff, paras 4 and 8. The Council establishes 11 principles for integration policy, which are to safeguard the practice of cultures and religions in the sense of the Charter of Fundamental Rights; on this see Cholewinski, *supra* note 42, at 705 ff. The integration perspective becomes apparent in positive law in the so-called 'Long-term residence Directive', Council Dir 2003/109/EC of 25 Nov. 2003 concerning the status of third-country nationals who are long-term residents, OJ (2004) L 16/44, in particular in the 4th and 12th recitals as well as in Arts 5(2) and 15(3). Also the 4th recital to Council Dir 2003/86/EC of 22 Sept. 2003 on the right to family reunification, OJ (2003) L 251/12, argues for such a perspective. On the concept of integration underlying these legal instruments see Groenendijk, 'Legal Concepts of Integration in EU Migration Law', 6 *European J Migration and L* (2004) 111.

<sup>51</sup> Case C-540/03, *European Parliament v. Council of the European Union (Family reunification)* [2006] ECR I-5769.

<sup>52</sup> However, the integration policy of the EU remains in need of being observed closely, in spite of the general recognition of cultural diversity, since respect for the basic values of the EU called for in numeral 2 of the Council conclusions of 19 Nov. 2004 on the 'Immigrant integration policy in the European Union', Council Doc. No. 14615/04, at 19 ff, as well as the demand for a basic knowledge of the host society's language, history, and institutions in numeral 4 could also lead to a policy of assimilation, especially in the context of their national counterparts: see Joppke, 'Civic Integration Policies for Immigrants in Western Europe', 30 *West European Politics* (2007) 1, at 3 ff; Cholewinski, *supra* note 42, at 708 ff.

migration law. The legal instruments on protection from discrimination enacted under Article 13 TEC also serve the purpose of cultural diversity.<sup>53</sup> The prohibition of discrimination unfolds its protection especially in areas relevant to diversity and sensitive for identity, like the law of names.<sup>54</sup> It is of great importance for the protection of diversity that, according to the ECJ, the principle of non-discrimination requires a differentiated treatment and thus the recognition of diversity, if there are good reasons for the protection of individual identity; this trumps the Member States' interest in the integration of immigrants. Thereby the ECJ approaches the understanding of the Human Rights Committee, according to which Article 27 ICCPR demands differentiated measures.<sup>55</sup>

It would be possible to search for an embedding into international law of this dimension of diversity promotion by the Union and to explore the question to what extent the pertinent case law is inspired by the law of the Council of Europe.<sup>56</sup> But it seems more interesting to trace the specific minority policy of the Union, which uses international law and international institutions to influence national management of diversity for the purpose of the protection of diversity (and not assimilation). Here the development of a multi-level system becomes apparent in which the international law of diversity becomes an instrument for the creation of unity within the Union. With the help of international law and international institutions, the EU breaks into terrain heretofore categorically off-limits, terrain which is of strategic importance for its position of power towards the Member States: the general protection of fundamental rights against national measures (Section 3).

Another debate concerns a global diversity policy of the Union, especially within UNESCO and the WTO. Here the focus is on the position of the Union in the process of globalization and the formulation of a counter-position to that of the USA. From an instrumental perspective it will be demonstrated how the Union commits itself to enforcing certain concerns in international law policies, but also how it might function as a global example (Section 4).

## 2 The EU as Situation: No Protection of National Cultures by International Law

Concern for the diversity of national cultures nurtures reservations towards European integration. It seems particularly relevant for cultures represented by only a few people like the Maltese, Slovenian, or Cypriot. This concern could endanger the current

<sup>53</sup> De Schutter and Verstichel, 'The Role of the Union in Integrating the Roma: Present and Possible Future', 2 *European Diversity and Autonomy Papers – EDAP* (2005), available at: [www.eurac.edu/edap](http://www.eurac.edu/edap).

<sup>54</sup> Case C-148/02, *Carlos Garcia Avello v Belgian State* [2002] ECR I-11613, at para. 40. On this see U. Haltern, *Europarecht und das Politische* (2005), at 372 ff; this conforms to the logic of Art. 11(1) of the Framework Convention for the Protection of National Minorities.

<sup>55</sup> General Comment 23, *supra* note 31, at para. 6.2.; van den Bogaert, 'State Duty Towards Minorities: Positive or Negative? How Policies Based on Neutrality and Non-discrimination Fail', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 37, at 42.

<sup>56</sup> On the interaction of the courts, see Scheeck, 'The Relationship between the European Courts and Integration through Human Rights', 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005) 837.

level of integration if strong national forces came to conceive the Europeanization and thus the convergence of national cultures as threatening the state's unity.<sup>57</sup> Of course it can be doubted whether this connection of a nation state with a national culture is convincing; not just a few authors regard it as anachronistic, even dangerous.<sup>58</sup> This philosophical question is, however, not the topic of this article. In the following it will be discussed whether this concern has an international law dimension, i.e., if international law provides parameters demanding the preservation of national cultures in the process of European integration. This can also be formulated from an actor's perspective: is the international law of cultural diversity a possible basis for a legal action against the Treaty establishing a Constitution for Europe?<sup>59</sup> Can a scientist whose grant application is not being processed by the European Research Council because it is not written in English, but in German, Polish, or Slovenian, defend him- or herself with the help of international law, or can at least the Member State concerned do this?<sup>60</sup>

### A The Sovereignty of the Member States

The most important institution of international law protecting national cultures against uniformization from the outside is national sovereignty. In the classical understanding the sovereign nation state constitutes – like a cheese cover – an overarching unity<sup>61</sup> in and through which a national culture reaches its highest development.<sup>62</sup> Sovereignty in international law protects the state against interference from the outside and allows for cultural individualism.<sup>63</sup> Accordingly, the aspiration for affirmation of the cultural peculiarity of a group often implies the claim to statehood.

<sup>57</sup> In this sense, Georg Jellinek focuses his analysis of the minority problem on a minority's potential to disrupt the political collective: see Jellinek, *supra* note 15.

<sup>58</sup> Habermas, *supra* note 23.

<sup>59</sup> Such an attack is under way; see the legal action before the Federal Constitutional Court of Germany by Peter Gauweiler, available at: <http://www.petergauweiler.de/pdf/PresseerklarungEUVerfassung31.10.06.pdf> (24 Apr. 2007). It is likely to be upheld against the Lisbon Treaty. Apart from the German Federal Constitutional Court, the European Court of Human Rights or the Human Rights Committee could be a further instance of legal protection.

<sup>60</sup> Dec 1982/2006/EC of the European Parliament and of the Council of 18 Dec. 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013), OJ (2006) L 412/1; ERC, The Ideas Work Programme. Final Version, Version agreed by the founding members of the ERC Scientific Council and transmitted to the Commission, 17 Jan. 2007, available at: <http://erc.europa.eu/pdf/ideas-wp-final.pdf> (24 Apr. 2007); on the language question see de Elera, 'The European Research Area', 12 *ELJ* (2006) 559; on this problem see also Schweizer and Kahl, 'Sprache als Kultur- und Rechtsgut', 65 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer (VVDStRL)* (2006) 346, at 386; on the (meagre) possibilities for legal protection see Case C–361/01 P, *Kik v. Office for Harmonisation in the Internal Market* [2003] ECR I–08283.

<sup>61</sup> In detail, see F. Meinecke, *Weltbürgertum und Nationalstaat* (2nd edn., 1911), at 7; K. Doehring, *Völkerrecht* (2nd edn., 2004), marginal number 779.

<sup>62</sup> The idea of the key role of the state underlies the UNESCO Diversity Convention: see in particular Arts 1, 2, 5, and 6.

<sup>63</sup> For a classic formulation, see Permanent Court of International Justice, *SS Lotus*, Judgment of 7 Sept. 1927, Series A, No. 10. On sovereignty see Dahm, Delbrück and Wolfrum, *supra* note 31, i/1, at 218 ff; U. Haltern, *Was bedeutet Souveränität?* (2007), at 75 ff.

Sovereignty is of fundamental importance for the protection of cultural diversity, as recently confirmed in Article 2(2) of the UNESCO Diversity Convention.

Nonetheless, international sovereignty does not serve the protection of national cultures in the process of European integration. The Union as a voluntary association of sovereign states rather constitutes an expression of their sovereignty.<sup>64</sup> Sovereignty in international law even allows for the fusion of one state with another to form a unitary state.<sup>65</sup> Sovereignty maintains relevance only in view of a possible withdrawal from the EU which may, in an extreme case, serve the protection of cultural diversity.<sup>66</sup>

At the most it may be considered whether cultural diversity as a general principle of international law restricts sovereign freedom.<sup>67</sup> The understanding, propagated by UNESCO, of cultural diversity as the common heritage of mankind,<sup>68</sup> i.e., as a universal collective value,<sup>69</sup> points in this direction; this could deprive a state of the free disposition of its national culture, or at least constitute a breach of international law if an international treaty endangering the national culture were concluded. Yet cultural diversity as a concern of international law appears too recent, as not supported by enough state practice, and as stipulated in too few legal instruments for it to be a general principle able to restrict the freedom of states in this respect. Moreover, it would be the first time that general international law imposed restrictions on the supranational integration of states.<sup>70</sup> Last but not least, this would imply setting a vague precept of international law in opposition to the treaties establishing the Union, which, looking at the national procedures of their ratification, enjoy high constitutional legitimacy.

<sup>64</sup> See, e.g., Tuleja, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Polen', in A. von Bogdandy, P. Cruz Villalón and P.M. Huber (eds), *Handbuch Ius Publicum Europaeum* (2007), i, para. 8, marginal number 62; Biernat, 'Offene Staatlichkeit: Polen', in *ibid.* (2008), ii, para. 21, marginal number 40.

<sup>65</sup> On the limits set by international treaty law, see Permanent Court of International Justice Advisory Opinion of 5 Sept. 1931. *Austro-German Customs Union Case*, Series A/B, No. 41.

<sup>66</sup> In detail, see Randelzhofer, 'Staatsgewalt und Souveränität', in J. Isensee and P. Kirchhof (eds), *Handbuch des Staatsrechts* (3rd edn., 2004), ii, ch. 17, at 143, 158; Louis, 'Le droit de retrait de l'Union européenne', 42 *Cahiers de Droit Européen* (2006) 293; von Bogdandy, 'Constitutional Principles', in von Bogdandy and Bast (eds), *supra* note 14, at 3, 30.

<sup>67</sup> On the axiomatic question of the limitation of freedom of action under international law, see Kadelbach and Czaplinski, in C. Tomuschat and J.-M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (2006), at 21 and 83.

<sup>68</sup> Art. 1 of the Universal Declaration on Cultural Diversity, *supra* note 32; 2nd recital to the Diversity Convention, *supra* note 16; the Preamble to ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1650 UNTS (1991) 383 ff; the Preamble to the UN Draft Declaration on the Rights of Indigenous Peoples, UN Doc A/HRC/1/L.3 (23 June 2006).

<sup>69</sup> On the notion of 'common heritage of mankind', see R. Wolfrum, *Internationalisierung staatsfreier Räume* (1984), at 336 ff and 'Common Heritage of Mankind', in R. Bernhardt (ed.), *EPIL* (1992), i/2, at 692–695; K. Baslar, *The Concept of the Common Heritage of Mankind in International Law* (1998), at 38 ff; Joyner, 'The Legal Implications of the Concept of Common Heritage of Mankind', 35 *Int'l and Comp L Q* (1986) 190.

<sup>70</sup> In *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Panel Report WT/DS90/R of 6 Apr. 1999 and Appellate Body Report WT/DS90/AB/R of 23 Aug. 1999 such limits of regional integration were discussed in the light of the WTO; see in detail von Bogdandy and Makatsch, 'Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law', in G. de Búrca and J. Scott (eds), *The EU and the WTO* (2001), at 131–150.

## B The Right to Self-determination of the Member Peoples

The right to self-determination of all peoples stipulated in common Article 1(1) of both Human Rights Covenants explicitly includes the right to cultural development.<sup>71</sup> The right to self-determination thus belongs to the international law of cultural diversity. The rights to self-determination of the European peoples might restrict the Member States' governments when shaping the European Union for the purpose of protecting cultural diversity. In fact, the Union is not infrequently considered an élitist project pushed by politicians in spite of the reservations of large parts of the population. Certainly this question is light years away from the typical area of application of the right to self-determination, which is decolonization. But there are remarkable approaches to giving it additional content, especially with regard to the protection of groups in larger political entities.<sup>72</sup> The peoples of the Member States might constitute such groups *vis-à-vis* the European Union.

Regardless of the contentious and open character of the right to self-determination,<sup>73</sup> many aspects relevant for our topic are undisputed. Thus only its inner dimension can possibly be concerned, since external self-determination is mostly recognized only for colonized peoples.<sup>74</sup> The internal right to self-determination, according to numerous scholarly voices, provides parameters for two issues. One is the democratic organization of state powers. Secondly there are attempts – and this alone is the focus of interest here<sup>75</sup> – to infer from the right to self-determination requirements for the protection of groups exceeding the individual guarantees of the Human Rights Covenants; the root of the matter is the right to autonomy of groups. This could mean that the EU Member States, in shaping the Union, have to safeguard the autonomy of national cultures, which could translate into limits to transferring relevant competences to the Union. However, the current status of development is such that the right to self-determination comprises a right to autonomy only for

<sup>71</sup> On the right to self-determination in this perspective, see Riedel, 'Gruppenrechte und kollektive Aspekte individueller Menschenrechte', 33 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1994) 49, at 55 ff.

<sup>72</sup> The development can be seen clearly in D. Thürer, *Das Selbstbestimmungsrecht der Völker* (1976), with an excursus to the legal question still entirely focused on decolonization; in comparison to Thürer, 'Addendum 1998 on Self-Determination', in Bernhardt (ed.), *supra* note 69, (2000), iv, at 370 ff; N. Wenzel, *Das Spannungsverhältnis zwischen Gruppenschutz und Individualschutz im Völkerrecht* (2007) is concise on the state of affairs.

<sup>73</sup> See, in detail, Koskeniemi, 'National Self-determination Today: Problems of Legal Theory and Practice', 43 *Int'l and Comp LQ* (1994) 241.

<sup>74</sup> Canadian Supreme Court, *Secession of Quebec*, 20 Aug. 1998, para. 111 ff, in particular 138 available at: <http://scc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html> (20 Mar. 2007); on the distinction between internal and external self-determination see Committee Against Racial Discrimination, General Recommendation 21 on the Right to Self-determination (23 Aug. 1996), para. 4; on possible exceptions because of grave repression, see Doehring, 'Self-determination', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2nd edn., 2002), i, Introductory Remark to Art. 2, para. 40; Murswiek, 'The Issue of a Right to Secession – Reconsidered', in C. Tomuschat (ed.), *Modern Law of Self-determination* (1993), at 21, 27, and 37; Pentassuglia, 'State Sovereignty, Minorities and Self-determination', 9 *Int'l J Minority and Group Rights* (2002) 303, at 311 is sceptical.

<sup>75</sup> Certainly minority protection can also be seen as an aspect of the democratic principle: see in detail Section 3.

indigenous peoples at the most,<sup>76</sup> a category to which the European peoples do not belong. So far there is no scientific voice deducing, for the purpose of protection of national cultures, from the right to self-determination parameters for the design of the European Union.

However, the European Union could prompt the further development of the principle of self-determination to a general ‘defence of distinctiveness’ and a firm barrier against supranational integration.<sup>77</sup> Such a step would encounter the basic methodical and political problems of deductively developing international law obligations from vague principles, problems which will not be traced here. The possible role of the ‘cultural diversity’ topos in such reasoning alone will be discussed. Should it prove to be a general principle of international law, in the sense of either Article 38(1)(b) or (c) of the ICJ Statute, the concept of cultural diversity could support the further development of the right to self-determination into a limit on transmitting culture-related competences. The reasons speaking against this have already been named: cultural diversity as a concern of international law is too recent, not supported by enough state practice, and stipulated in too few legal instruments. Summing up, the right to self-determination of the member peoples offers no barrier against supranational unification.

### C Article 27 ICCPR

Nonetheless, the Member States are not entirely free under international law in designing the European Union. As has been repeatedly emphasized by the ECtHR, they are subject to human rights obligations which include guarantees protecting cultural pluralism.<sup>78</sup> The protection of culture is ensured in particular by Article 27 ICCPR.

The EU Member States, all parties to the Covenant, are bound by Article 27 ICCPR when shaping the Union through primary law; it is furthermore generally recognized that the Union constitutes a legal entity to which the Covenant applies.<sup>79</sup> However, Article 27 ICCPR contains the portentous notion of ‘state’. The Union would have to be a state to fall within the scope of the norm. The state quality of the Union is mostly rejected.<sup>80</sup> Yet every legal term has to be interpreted in its specific context and in view of the specific issue it is meant to address. Article 27 ICCPR is not about the Union as

<sup>76</sup> Wenzel, *supra* note 72, 178, n. 336 and accompanying text.

<sup>77</sup> On this, see Franck, ‘Individuals and Groups as Subjects of International Law’, in R. Hofmann (ed.), *Non-State Actors as New Subjects of International Law* (1999), at 97, 110 ff.

<sup>78</sup> For a summary of the case law, see Gilbert, ‘The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights’, 24 *Human Rights Q* (2002) 736; Benoît-Rohmer, ‘La Cour Européenne des Droits de l’Homme et la défense des droits des minorités nationales’, 13 *Revue Trimestrielle des Droits de l’Homme* (2002) 563.

<sup>79</sup> See Case C–540/03, *Parliament v. Council*, *supra* note 51.

<sup>80</sup> European statehood is argued for by J. Sack, ‘Die Staatswerdung Europas – kaum eine Spur von Stern und Stunde’, 44 *Der Staat* (2005) 67; D.C. Dicke, *Das Verhältnis der Schweiz zum real existierenden Westeuropäischen Bundesstaat* (1991), at 51 ff; Majone, ‘The European Community as a Regulatory State’, in Academy of European Law (ed.), *Collected Courses of the Academy of European Law* (1994), v, bk I, at 321; for the argument against statehood, see von Bogdandy, ‘The Prospect of a European Republic: What European Citizens Are Voting On’, 42 *CMLRev* (2005) 913, at 921 ff.

an original subject of international law, but, abstractly put, about the protection of groups against a political entity into which they are integrated. In the light of the far-reaching competences of the Union and its structure as a polity, a purposive interpretation suggests its qualification as a *state* in the sense of Article 27 ICCPR.

Far more critical is the question whether the peoples of the Member States as mentioned in the first recital of the EC Treaty, the nations, due to their integration in the Union, have become minorities in the sense of Article 27 ICCPR. This is not the case if the traditional minority definition is applied,<sup>81</sup> according to which a minority is exclusively a group opposed to a compact majority whose culture is exerting pressure on the culture of the minority.<sup>82</sup> In this understanding the nations in the Union do not constitute minorities in the sense of the provision, since in the Union there is no compact majority, no majority culture, and above all no supporting nation. The typical danger, emanating from a culturally homogeneous majority constituting a group capable of acting, is missing.

Nonetheless, Article 27 ICCPR could be applied in the case of a political community not based on a compact majority, but where its citizens assign themselves to diverse ethnic or linguistic groups, in the sense of a multinational state, such as the Hapsburg Empire or Yugoslavia.<sup>83</sup> Romano Prodi, as President of the Commission, sometimes called the Union a 'Union of minorities'.<sup>84</sup> Although the term 'minority' suggests that the group is opposed to a majority, it is not absurd that this majority should be composed of other minorities.<sup>85</sup> However, not every group inferior by number – another feature of the definition of minorities – actually is a minority. The norm only applies with regard to a specific danger, implying a weak position of the group constraining its economic, social, and cultural development.<sup>86</sup> This focuses attention on the institutional and procedural set-up of the European Union, the polycentric and dialogical logic of which can be summarized, in that it is framed in order to prevent any nation from finding itself in a position of structural weakness.

This can be demonstrated by means of the functional logic of its two most powerful institutions, the European Council and the Council of Ministers. They are institutions representing the Member States, and thus the nations. In addition, they are not endowed with the central mechanism of unification: a hierarchy. The European Council and the Council of Ministers rather seem to be institutions where consensus among 28 different political-administrative systems (27 national ones and the

<sup>81</sup> On the definition, see the authors at *supra* note 31.

<sup>82</sup> In the *Ballantyne* case there is consent that the notion of minority of Art. 27 ICCPR requires opposition to a majority society: see Human Rights Committee, UN Doc CCPR/C/47/D/359/1989, *Ballantyne*, Decision of 5 May 1993, para. 11.2. See also the individual opinions of Committee members Evatt, Ando, Bruni Celli and Dimitrijevic, *ibid.*, at App E.

<sup>83</sup> Lepsius, 'Die Europäische Union als Herrschaftsverband eigener Prägung', in C. Joerges, Y. Mény and J.H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity?* (2000), at 203, 210 ff.

<sup>84</sup> There is a reference in Toggenburg, 'Minorities ... the European Union: Is the Missing Link an "of" or a "within"?', 25 *European Integration* (2003) 273, at 275.

<sup>85</sup> M. Nowak, *CCPR Commentary* (2nd edn., 2005), Art. 27, marginal number 16.

<sup>86</sup> Dahm, Delbrück and Wolfrum, *supra* note 31, i/2, at 277.

Commission's) is sought. The voting rules, especially those set out in Article 205(2) TEC, are designed in such a way that, hitherto, even with regard to majority decisions, a permanent controlling position of individual states or groups of states has not come about.<sup>87</sup> Dialogical and polycentric logic also underlies the procedures by which decisions are made. Basically all important decisions are made by the participation of several institutions: even the European Council lacks the legal instruments, as well as the actual power potential, to 'orchestrate' the co-operation of the different agents. This allows for only a small degree of political unification, resulting in the Union being constituted, far more than federal states, in a diversity-preserving way, a defining feature of European composite federalism.<sup>88</sup>

Thus no nation finds itself in a position with regard to the European institutions that could be called structurally weak. This speaks against the application of Article 27 ICCPR,<sup>89</sup> just like the fact that increasing importance is attached to the subjective element, i.e., that a minority exists only if the group perceives itself as a minority.<sup>90</sup> There are no indications of such a self-perception of the European nations.<sup>91</sup>

Against this background an application of Article 27 would seem justified only if the notion of minority were, for the purpose of promoting diversity, interpreted broadly in such a way as to include every group that is the bearer of a specific culture. However, cultural diversity as a concern of international law does not yet have such a transforming capacity. It is – as has been said – too recent, not supported by enough state practice, and stipulated in too few legal instruments. For this reason also the Framework Convention for the Protection of National Minorities<sup>92</sup> cannot be applied with regard to nations, the peoples of the EU Member States.

With respect to this article's general thesis, it can be concluded that the international law of cultural diversity does not provide obstacles to European unity: it does not prompt any legal caveat and does not legitimize any doubt. At the same time it is confirmed that important issues concerning diversity within the Union, such as the language question, are not embedded in an international law framework. International law as developed above remains silent on these issues.

<sup>87</sup> On the procedural practice, see Mattila, 'Contested Decisions: Empirical Analysis of Voting in the EU Council of Ministers', 43 *European J Political Research* (2004) 29; Tsebelis and Yataganas, 'Veto-players and Decision-making in the EU After Nice', 40 *JCMS* (2002) 283.

<sup>88</sup> In detail, see P. Dann, *Parlamente im Exekutivföderalismus* (2004).

<sup>89</sup> Tomuschat, *supra* note 32, at 958.

<sup>90</sup> Heintze, 'On the Legal Understanding of Autonomy', in M. Suksi (ed.), *Autonomy: Applications and Implications* (1998), at 7, 23.

<sup>91</sup> Hitherto, the treaty practice regarding Art. 27 ICCPR has been light years away from the fate of national cultures in the integration process: see Human Rights Committee, UN Doc CCPR/C/13/D/24/1977, *Lovelace*, Dec of 30 July 1981; UN Doc CCPR/C/22/D/78/1980, *Mikmaq Tribal Society*, Dec of 29 July 1984; UN Doc CCPR/C/33/D/197/1985, *Kitok*, Dec of 10 Aug. 1988; UN Doc. CCPR/C/52/D/511/1992, *Länsman*, Dec of 8 Nov. 1994; UN Doc CCPR/C/60/D/612/1995, *Jose Vicente et al.*, Dec of 29 July 1997.

<sup>92</sup> [1997] II BGBl 1408.

### 3 The Union as Regional Executive of the International Law of Cultural Pluralism

#### A *International Law as an Instrument of Governance in Multi-level Systems*

So far international law has been portrayed, from the constitutional perspective, as a framework for the Union. In a change of perspective it will now be analysed as an instrument used by the Union to urge the states to protect cultural diversity and to strengthen the cultures of minorities or immigrants. More precisely, the parameters and institutions of international law will be examined from the perspective of *governance in multi-level systems*. This term aims at grasping an *interrelation* in which supranational politics successfully influence national politics, even in the absence of competences, i.e., without the power to enact binding decisions.<sup>93</sup> This section specifically deals with the interrelation between national and supranational institutions, non-state actors, procedures and instruments for the achievement of the public good of 'cultural diversity', in which the Union, even without competences, builds up considerable pressure on states to achieve this public goal and to implement the relevant international law.<sup>94</sup>

The pertinent law is presented as being part of political strategies used by the Union to enter into two delicate fields of politics: national unification and the general protection of human rights. The further considerations distinguish between the actions of the Union concerning candidate countries and the actions of the Union as regards Member States. In a first step the Union is examined as an institution through which the governments of the Western European states pursue a common European policy of cultural pluralism with regard to the transformation countries. In a second step the beginnings of the Union's policy of diversity with regard to the Member States will be demonstrated.

#### B *Diversity Governance in the Accession Process*

The Union entered the field of minority politics because of the fall of the Berlin Wall. The main features of the development are well-known: the breakdown of the socialist dictatorships resurrected ethnic conflicts in Central, Eastern, and South-Eastern Europe; some of them even acquired relevance for the security of the West, like the wars in former Yugoslavia, the treatment by the Baltic states of their Russian-speaking populations, and the tensions concerning Hungarian minorities.<sup>95</sup>

<sup>93</sup> Benz, 'Governance in Mehrebenensystemen', in G.F. Schuppert (ed.), *Governance-Forschung* (2nd edn, 2006), at 95; Trute, Denkhaus, and Kühlers, 'Governance in der Verwaltungsrechtswissenschaft', 37 *Die Verwaltung* (2004) 451. This notion of *governance* is of an analytical nature, not to be confused with the normative term 'Good Governance'. On the latter see European Commission, 'European Governance – A White Paper', COM(2001)428 final, 25 July 2001.

<sup>94</sup> On the pertinent agreements see Nolte, 'Das Völkerrecht vor der Herausforderung der kulturellen Vielfalt', in von Bogdandy *et al* (eds) *Berichte der Deutschen Gesellschaft für Völkerrecht* (forthcoming, 2008).

<sup>95</sup> Furthermore, the sometimes dramatic situation of the Romany people has attracted continuous attention: on this see Wolfrum, 'The Legal Status of Sinti and Roma in Europe: a Case Study Concerning the Shortcomings of the Protection of Minorities', 33 *Annuaire européen* (1985) 75; Guglielmo, 'Human Rights in the Accession Process: Roma and Muslims in an Enlarging EU', in Toggenburg (ed.), *supra* note 47, at 37.

Initially the Conference on Security and Co-operation in Europe<sup>96</sup> was the central institution for the settlement of conflicts between majorities and minorities in these countries.<sup>97</sup> However, in 1991 at the latest it became clear that the CSCE alone, for lack of sufficient standards<sup>98</sup> and effective enforcement mechanisms, could not provide for a satisfactory situation.<sup>99</sup> In 1993 the relevant Western European forces agreed upon a form of governance which would merge the legal, organizational, and legitimizing resources of diverse European organizations into a comprehensive diversity policy with regard to the East. This consensus became manifest, on the one hand, in the decision by the European Council of 21 and 22 June 1993 to open up a perspective of accession for the transformation countries under the so-called Copenhagen criteria, comprising minority protection,<sup>100</sup> and on the other hand in the Vienna Declaration of the heads of states and governments of the Council of Europe of 9 June 1993 charging the Committee of Ministers of the Council of Europe with the development of a proper legal regime of minority protection.<sup>101</sup> On this basis, a system of governance was developed in the 1990s, the institutional pillars of which are the European Union, the Council of Europe, and the CSCE or, since 1994, the OSCE. Notwithstanding some frictional losses and reciprocal tensions, the functioning of these organizations can be understood in the sense that they co-operatively formulate and implement Western European ideas regarding the treatment of minority cultures by the transformation countries.<sup>102</sup>

### *1 Tenets, Institutions, Functions, and Instruments*

This *diversity governance* can be comprehended on the basis of its tenets, institutions, and functions.<sup>103</sup> The (non-legal) tenets of supranationality, multilateralism, inclusion,

<sup>96</sup> Helsinki Final Act, 1 Aug. 1975, available at: [www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf) (2 Apr. 2007).

<sup>97</sup> The commencement is marked by the Concluding Document of 15 Jan. 1989 of the Vienna follow-up Meeting of 1986 (paras 18 and 19 of the Principles), the approaches of which have been developed mainly in the Document of the Copenhagen Meeting of 29 June 1990 (paras 30–40), but also in the Charter of Paris of 21 Nov. 1990 of the Conference on Security and Cooperation in Europe, 30 *ILM* 190 (1991), at 5 ff.

<sup>98</sup> No CSCE/OSCE decision can be qualified as an international legal commitment: see C. Höhn, *Zwischen Menschenrechten und Konfliktprävention: Der Minderheitenschutz im Rahmen der Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE)* (2005), at 211 ff; Buergenthal, 'The CSCE Rights System', 25 *George Washington J Int'l L and Economics* (1991) 333, at 378; against the predominant opinion, however, are Breitmoser and Richter, 'Die Verwirklichung der KSZE-Grundsätze zum Schutze nationaler Minderheiten durch Organleihe beim EGMR', 18 *Europäische Grundrechtszeitschrift* (1991) 141, qualifying part of the CSCE/OSCE decisions relevant to minority protection as non-universal general principles of law.

<sup>99</sup> See [www.uni-koeln.de/jur-fak/ostrecht/minderheitenschutz/Vortraege/internationaler\\_minderheitenschutz\\_brunner.htm](http://www.uni-koeln.de/jur-fak/ostrecht/minderheitenschutz/Vortraege/internationaler_minderheitenschutz_brunner.htm) (24 Apr. 2007).

<sup>100</sup> Conclusions of the Presidency of 21–22 June 1993 (SN 180/1/93), at 13.

<sup>101</sup> 2nd bullet point of the Vienna Declaration of 9 Oct. 1993, available at: [www.coe.am/en/docs/summits/vienna\\_summit.pdf](http://www.coe.am/en/docs/summits/vienna_summit.pdf) (30 Mar. 2007).

<sup>102</sup> On the interaction of the organizations see Toggenburg, 'The Union's Role vis-à-vis Minorities. After the Enlargement Decade', EUI Working Papers, Law No. 2006/15, available at: <http://www.iue.it/PUB/LawWPs/law2006-15.pdf> (27 Mar. 2007), at 24 ff.

<sup>103</sup> Certainly, this reconstruction cannot treat all aspects of a sometimes tangled practice. The objective of the following considerations simply is to reveal the basic logic of this form of *governance*.

voluntariness, differentiation, and collective hegemony allow for a first comprehension of this governance. *Diversity governance* has a supranational and multilateral character since its operational institutions are the three supranational and multilateral organizations, the OSCE, the Council of Europe, and the European Union. This prevents it from being perceived as an expression of the hegemonic interests of a state, different maybe from the *governance* exerted by the World Bank which is often associated with the interests of the United States.<sup>104</sup> According to the tenet of inclusion, the operative standards of minority protection are determined in instruments that have been developed by the Council of Europe and the OSCE, and thus by organizations in which the transformation countries were already equal members; here there may also be a difference with regard to the World Bank. The tenet of inclusion also explains the implementation mechanism of the High Commissioner on National Minorities, established as an institution of the OSCE, and thus of an inclusive organization.<sup>105</sup> The tenet of voluntariness sustains the entire system of *governance*, shown especially by the fact that the fundament of its functioning is a self-set political goal of the transformation countries: accession to the European Union. Another tenet which led to much criticism is that of differentiation: the Western European states, but also Greece and Turkey, are not subjected to *diversity governance* in the same way as are the transformation countries.<sup>106</sup> And yet another tenet is apparent in this differentiation: the collective Western European hegemony. At least until the accession of the transformation countries to the European Union, the Western European states collectively have at their disposal a political, economic, and cultural hegemony *vis-à-vis* the transformation countries, on the basis of which they have shaped the exercise of *governance*.<sup>107</sup>

Institutionally this *diversity governance* rests on the three supranational organizations, the European Union, the Council of Europe, and the OSCE.<sup>108</sup> It becomes operative through a series of institutions possessing greatly varying degrees of autonomy with respect to the national governments: the spectrum stretches from bodies occupied by the Member States as fora for national positions to the EU Commission and the High Commissioner on National Minorities, whose operative autonomy *vis-à-vis* the states is a precondition for a functioning system of *governance*. This confirms a general insight: that states have to make international policy partly independent for it to work.

For the further understanding of this form of *governance* it is helpful to take the conventional doctrine of the separation of powers (or state functions) as a reference,<sup>109</sup>

<sup>104</sup> Bartram S. Brown, *The United States and the Politicization of the World Bank* (Kegan Paul, London, 1992).

<sup>105</sup> Para. 2 of the Mandate of the High Commissioner on National Minorities, Helsinki Document, available at: [www.osce.org/documents/mcs/1992/07/4046\\_en.pdf](http://www.osce.org/documents/mcs/1992/07/4046_en.pdf) (01 June 2007), at 22 ff.

<sup>106</sup> An early suggestion to put down the standards in a protocol to the ECHR and to submit them to the ECtHR was unsuccessful: see on this Section 3B below.

<sup>107</sup> R. Cooper, *The Breaking of Nations* (2003), at 71 ff.

<sup>108</sup> This is not to say that there were no tensions between these organizations. In particular the Council of Europe has observed the expansion of the EU with obvious concern.

<sup>109</sup> On this approach, see Möllers, *supra* note 8, at 253 ff; von Bogdandy, 'Law and Politics in the WTO', 5 *Max Planck Yrbk of UN L* (2001) 609.

but with the modification that these conventional functions be exercised unconventionally in a context that is not institutionalized. Accordingly, the legislative function is allocated to diverse institutions. The normative foundational legislative act of this *governance* is the EU Treaty, more precisely the criteria for accession to the European Union of Article O TEU, with its initially unwritten substantive criteria that, since Amsterdam, have been set out in Article 6(1) TEU.<sup>110</sup> This displays the hegemonic tenet. A first stage of concretion takes place, now inclusively,<sup>111</sup> through the Framework Convention for the Protection of National Minorities, elaborated by the Council of Europe in 1993–1995.<sup>112</sup> Its ratification and implementation are considered as the essential requirements for the fulfilment of the Copenhagen criteria (Article 49 TEU) with regard to the protection of minorities.<sup>113</sup> Further legislative concretion takes place through the soft law instruments of diverse institutions. Of specific importance is the OSCE soft law instrument of General Recommendations;<sup>114</sup> the preponderance of the OSCE can be explained by the fact that the transformation countries have participated from the beginning in this organization. This participation fosters the legitimacy of the recommendations. Moreover, there are Recommendations by the Committee of Ministers of the Council of Europe<sup>115</sup> as well as by its Parliamentary Assembly.<sup>116</sup>

<sup>110</sup> However, the criteria of Art. O in conjunction with Art. F TEU are already laid down in the CSCE document of 29 June 1990, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, para 1, available at: [www.osce.org/documents/odhr/1990/06/13992\\_en.pdf](http://www.osce.org/documents/odhr/1990/06/13992_en.pdf)

<sup>111</sup> There are ways to include third countries, as the European Economic Area and the European Convention show. But the Union could not have assumed this task because of a lack of competence; it needs competence also for the formulation of international legal agreements: see Arts 24 and 38 TEU. On the reasons for the lack of a relevant competence see Section 3A. below.

<sup>112</sup> Framework Convention of 1 Feb. 1995, which entered into force on 1 Feb. 1998; in detail on the negotiations see R. Hofmann, *Minderheitenschutz in Europa. Völker- und staatsrechtliche Lage im Überblick* (1995), at 200 ff; on the added value of the Framework Convention see S.S. Åkermark, *The Added Value of the FCNM. The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?* (forthcoming).

<sup>113</sup> Sasse, 'Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?', in Toggenburg (ed.), *supra* note 47, at 59, 68, and 72. The European Charter for Regional or Minority Languages, which had only 21 parties by the end of Feb. 2007, plays only a subordinate role in this *governance*.

<sup>114</sup> See especially OSCE 1996, The Hague Recommendations on the Education Rights of National Minorities; OSCE 1998, The Oslo Recommendations on the Linguistic Rights of National Minorities; OSCE 1999, The Lund Recommendations on the Effective Participation of National Minorities in Public Life, all available at: [www.osce.org/hcnm/documents/](http://www.osce.org/hcnm/documents/)

<sup>115</sup> See, especially, Rec (2001)17E on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe; Rec (2006)10E of the Committee of Ministers to Member states on better access to health care for Roma and Travellers in Europe; Rec (2005)4E on improving the housing conditions of Roma and Travellers in Europe; Rec (2004)14E on the movement and encampment of Travellers in Europe; Rec (2000)4E on the education of Roma/Gypsy children in Europe; Rec (92)10E on the implementation of rights of persons belonging to national minorities, all available at: [www.coe.int/T/CM/WCD/advSearch\\_en.asp](http://www.coe.int/T/CM/WCD/advSearch_en.asp) (24 Apr. 2007).

<sup>116</sup> See, especially, Rec. 1623 (2003) on the rights of national minorities; Rec 1557 (2002) on the legal situation of Roma in Europe; Rec 1492 (2001) on the rights of national minorities; Rec 1345 (1997) on the protection of national minorities; Rec 1285 (1996) on the protection of national minorities; Rec 1255 (1995) on the protection of the rights of national minorities, all available at: [www.coe.int/T/CM/WCD/advSearch\\_en.asp](http://www.coe.int/T/CM/WCD/advSearch_en.asp) (24 Apr. 2007).

Following up the legislative function in the multi-level system, another important institution of *governance* emerges: the European Commission for Democracy through Law of the Council of Europe, better known as the Venice Commission. It advises legislators of the transformation countries and sometimes even takes them by the hand.<sup>117</sup> It is a remarkably hybrid body: formally an institution of the Council of Europe, but demonstrably acting independently, and its personnel made up in such a way as to represent the hegemony of the Western legal culture in the legislative process of the transformation countries. In the Baltic states, the High Commissioner of the OSCE has sometimes played a similar role.<sup>118</sup>

The executive or implementing function of European *diversity governance* is distributed between just as many institutions. In the centre is again the European Union, with the central mechanism being – seemingly typically for many forms of *governance* – a positive incentive, and not the threat of sanction: the effectiveness of the law, the so-called *compliance pull*, is first and foremost due to the perspective of accession to the Union, promising the transformation countries full inclusion and recognition as equals.<sup>119</sup> But this only works if the execution by the transformation countries of the supranational parameters is controlled from the outside. A series of institutions has assumed this task. First, the European Commission provides periodic progress reports, based on its own findings, those of other international institutions, and input from civil society. They are of importance not only for the accession process and public opinion, but also for financial allowances under the PHARE programme. Furthermore, the Council of Europe is involved in this control, especially via the Advisory Committee to the Framework Convention for the Protection of National Minorities.<sup>120</sup> Because of his autonomy, the High Commissioner on National Minorities is of special interest for the executive aspects of the *governance*.<sup>121</sup> He can act on his own initiative in a crisis,<sup>122</sup> something he is particularly suited to do, being a monocratic institution. This compensates for the cumbersomeness of the European Union with regard to foreign affairs, but also the operative weakness of the Council of Europe.

European *diversity governance* is thus relatively well positioned regarding the legislature and the executive. In accordance with the traditional doctrine on functions,

<sup>117</sup> In detail, see S. Rülke, *Venedig-Kommission und Verfassungsgerichtsbarkeit* (2003); Jowell, 'The Venice Commission: Disseminating Democracy through Law' [2001] *Public L* 675.

<sup>118</sup> Galbreath, *supra* note 5, at 44 ff; Sarv, 'Integration by Reframing Legislation: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Estonia, 1993–2001', in W. Zellner, R. Oberschmidt and C. Neukirch (eds), *Comparative Case Studies on Effectiveness of the OSCE High Commissioner on National Minorities* (Core-Working Paper 7, 2002), at 29 ff, 41 ff, and 47 ff.

<sup>119</sup> Smith, 'Western Actors and the Promotion of Democracy', in J. Zielonka and A. Pravda (eds), *Democratic Consolidation in Eastern Europe: Volume 2: International and Transnational Factors* (2001), at 31; Zielonka, 'Conclusions. Foreign Made Democracy', in *ibid.*, at 511.

<sup>120</sup> Art. 26 of the Framework Convention; see in detail Hofmann, 'Das Überwachungssystem der Rahmenkonvention des Europarates zum Schutz nationaler Minderheiten', 2 *Zeitschrift für Europarechtliche Studien* (1999) 379.

<sup>121</sup> For an extensive analysis of the role of the OSCE and of its High Commissioner, see Galbreath, *supra* note 5, at 36, 40 ff.

<sup>122</sup> Para. 3 of the Mandate of the High Commissioner on National Minorities, Helsinki Document, *supra* note 105, at 22 ff.

the analysis needs to be concluded with the judiciary. Here there is a striking gap. No transformation state has the ability to obtain judicial protection against encumbering decisions taken within the framework of European *diversity governance*: there is a judge neither for the general allegation of discrimination, nor for specific discrimination due to the domestic policy opportunism of influential Western European states.<sup>123</sup> Regarding individuals and groups, i.e., those allegedly affected by cultural diversity, there is no supranational judge in this system of *governance*; they are in fact completely mediated: the legal instruments of this system of *governance* do not contain any individual rights; neither the Framework Convention nor the soft law instruments of the OSCE are applicable by national courts.<sup>124</sup> Besides, no functional equivalent, like an ombudsman or an arbitration board, is provided for. This is also typical of *governance*; nevertheless the doubts burgeon about whether the driving forces of this *diversity governance* really seek the full realization of the professed motto ‘democracy through law’.

To conclude, the central instrument of this system of *governance*, the perspective of accession, will be analysed from the ‘form of action’ perspective. The perspective of accession falls into the category of conditionality,<sup>125</sup> an established instrument in the framework of *governance*. Certainly, so far there has been no comprehensive doctrinal reconstruction of this subject;<sup>126</sup> but there are remarkable approaches with respect to conditionality being an instrument of the World Bank.<sup>127</sup> This instrument has systematically been used by the EU for the safeguarding of international human rights since 1991.<sup>128</sup> Contrary to the conditionality of the International Monetary Fund, this conditionality has a basis in international law, since it derives from treaties concluded with candidate countries.<sup>129</sup> Since the transformation countries ratify these treaties on the basis of a parliamentary act of assent, the legitimacy of this conditionality is

<sup>123</sup> An example of this is the accession process of Croatia as a result of the Gotovina affair. For a detailed analysis see M. Rötting, *Das verfassungsrechtliche Beitrittsverfahren zur Europäischen Union* (2008) (unpublished PhD dissertation; on file with author). This question was also the focus of the Jessup Moot Court Competition 2007; see [www.jessupmootcourt.de/2007/fall.html](http://www.jessupmootcourt.de/2007/fall.html) (24 Apr. 2007). Art. 230 TEC does not allow for a review by the ECJ, at the request of a candidate for accession, of infringements of Art. 49 TEU or of a provision of the association agreement.

<sup>124</sup> Hofmann, ‘The Framework Convention for the Protection of National Minorities: An Introduction’, in M. Weller (ed.), *The Rights of Minorities in Europe* (2005), at 1, 5.

<sup>125</sup> In detail see Smith, ‘The Use of Political Conditionality in the EU Relations with Third Countries’, 3 *European Foreign Affairs Review* (1998) 253; H. Grabbe, *The EU’s Transformative Power: Europeanization through Conditionality in Central and Eastern Europe* (2006); Hughes, Sasse and Gordon, ‘Conditionality and Compliance in the EU’s Eastward Enlargement: Regional Policy and the Reform for Sub-national Governance’, 42 *JCMS* (2004) 523 is more nuanced.

<sup>126</sup> In detail, see E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee. Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung* (2nd edn., 2004), at 235 ff.

<sup>127</sup> Dann, ‘Grundfragen eines Entwicklungsverwaltungsrechts’, in C. Möllers, A. Voßkuhle and C. Walter (eds), *Internationales Verwaltungsrecht* (2007).

<sup>128</sup> Declaration on Human Rights (Luxembourg European Council, 28–29 June 1991), Annex V, EC Bull (1991) 6, I, 45; on this see F. Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (1998), at 103.

<sup>129</sup> E.g., Art. 2 of the Stabilization and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part, OJ (2005) L 26/3.

higher than that of the Monetary Fund, where usually the conditions are not subject to parliamentary control.<sup>130</sup>

## 2 Assessment

An assessment of this *governance* directed at the implementation of norms of international law serving cultural diversity can be legal or political. A legal assessment has to confront the regular problem that legal categories, because of the consent of the state concerned and the avoidance of formal instruments, can hardly grasp the subject. As demonstrated, European *diversity governance* can be traced back to (non-legal) tenets, which do not allow for a legal assessment. Thus only vague precepts like non-interference and sovereign equality remain, which give little guidance. The considerable restrictions placed upon the transformation countries by the system of *governance* do not infringe the principle of non-interference simply because of the contractual nature of the standards. State practice and doctrine regarding Article 52 of the Vienna Convention on the Law of Treaties show that the exploitation of the Western European hegemony also does not infringe the principle of sovereign equality.<sup>131</sup> Similarly, the selective application of international minority instruments on the transformation countries does not violate the principle of the sovereign equality of states, as the United Nations Charter with its Security Council vividly demonstrates.

Politically, European *diversity governance* has to be assessed primarily under the aspect of legitimacy. It has been called illegitimate, since it is supposedly asymmetric and discriminatory against the transformation countries.<sup>132</sup> But this allegation misconceives the fact that the necessity for effective implementation of international minority protection was, at least in the 1990s, of a different nature in the transformation countries from in Western Europe. In contrast to the West, there was the well-founded danger of severe conflicts which might even have led to international crises. After the recovery of their sovereignty, the transformation countries structurally had to face the task of establishing functioning states, i.e., political unity. In this process, which can be conceived as nation building, the minority problem posed itself in a different way from in the West, as the 1990s proved in many cases.

The assessment is more critical under the aspect of output legitimacy, i.e., the success of this *governance*.<sup>133</sup> Certainly it succeeded in establishing the protection of

<sup>130</sup> P. Lucke, *Internationaler Währungsfonds* (1997), at 97.

<sup>131</sup> On the threshold of legal relevance, see *Yearbook of the International Law Commission* (1966), ii, at 245 ff; R.G. Wetzel and D. Rauschnig (eds), *The Vienna Convention on the Law of the Treaties: Travaux Préparatoires* (1978), at 357 ff.

<sup>132</sup> Krygier, 'Introduction', in W. Sadurski, A. Czarnota and M. Krygier (eds), *Spreading Democracy and the Rule of Law?: The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (2005), at 3, 12; this accusation has already been raised against the minority protection system established between the two World Wars; on this see Meijknecht, 'The Minority Protection System between World War I and World War II', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law, Volume C 1* (forthcoming 2008).

<sup>133</sup> In the light of the notorious difficulties of judging the real effects of norms, this contribution will confine itself to making 'well-founded assumptions'; see on the problem G. Lübbe-Wolff, *Rechtsfolgen und Realfolgen* (1981); particularly with regard to diversity protection see Sasse, *supra* note 113, at 61, 71.

minorities as an issue in the transformation countries and in establishing a pertinent multi-level system comprehending domestic, supranational, and international institutions. However, a full realization of the international standards generally took place only if the government of a transformation state became dependent upon the political party of a minority, or if a transformation state wanted to set a good example in order for its ethnic group to receive the same rights abroad:<sup>134</sup> the effectiveness of international law and *governance* depends on the internal situation of the addressed state. The implementation of the international law of cultural diversity is regarded as being more deficient than the implementation of the other accession criteria. Gwendolyn Sasse convincingly ascribes this to a series of specifics in European minority policy.<sup>135</sup> According to her, co-ordination between the diverse *governance* institutions is insufficient. For lack of an EU internal minority policy, the relevant standards are not part of the *acquis communautaire*, which is the main focus of the Commission. The plurality of the diversity arrangements in the EU Member States impedes a consistent and coherent approach.<sup>136</sup> The willingness of the transformation countries is often low, since they see themselves as being subject to discriminating requirements not applied to the old Member States. Moreover, she argues, Western Europe did not want the major project of the ‘Reunification of Europe’ to depend on the full realization of minority protection. Political considerations like these have a bigger effect in such a system of *governance*, where international law basically remains a political instrument, than in a political order placed under the rule of law.

The limited success of the implementation of international standards of cultural diversity in some Central and Eastern European states<sup>137</sup> before their accession to the European Union leads to the monumental question whether and, if necessary, how the Union should assert and, where necessary, implement the relevant standards with regard to its Member States.

## C The Promotion of Cultural Diversity in the Member States

### 1 What is at Stake?

A diversity policy aimed at the Member States leads the Union into an area that has so far been largely prohibited. The Union does not have the competence to harmonize the diversity management law of the Member States: the interest of the Member States in their independence from the Union, not least for the purpose of preserving

<sup>134</sup> In detail with regard to Croatia, see Rötting, *supra* note 123, at B IV 4 b; with regard to Hungary, see Sasse, *supra* note 113, at 74.

<sup>135</sup> *Ibid.*, at 64 ff; more positively, see Küpper, ‘Minority Rights’, in F.J.M. Feldbrugge (ed.), *Law in Transition* (2002), at 81, 88.

<sup>136</sup> This has been traced in detail by the EU Network of Independent Experts on Fundamental Rights, Thematic Comment No. 3: The Protection of Minorities in the European Union, 25 Apr., CFR-CDF.ThemComm2005.en, available at: [http://ec.europa.eu/justice\\_home/cfr\\_cdf/doc/thematic\\_comments\\_2006\\_en.pdf](http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2006_en.pdf) (2 Apr. 2007).

<sup>137</sup> On the situation of Romania and Bulgaria see Communication from the Commission, Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania, COM(2006)549, 26 Sept. 2006, at 8, 25 ff, 47 ff, and 57.

constitutional diversity and national identity, is too profound.<sup>138</sup> It is one of the premises of European integration to date that the Member States remain autonomous *vis-à-vis* the Union with regard to both the main mechanisms of national unification and the arrangement of the national protection of fundamental rights.<sup>139</sup>

This may be clarified by means of the following considerations. Regarding national unification it needs to be recalled that the Union still does not play a role in internal conflicts concerning the self-determination of minorities, be it in Northern Ireland, Catalonia, the Basque region, or – in former times – South Tyrol.<sup>140</sup> It remains in the discretion of every Member State to decide which person it wants to incorporate into its collective; the citizenship of the Union is based on an unchallenged national citizenship.<sup>141</sup> Cultural and educational policy as a key instrument of national unification eludes harmonization by the Union (Articles 149(4) and 151(5) TEC). Certainly the instruments of political unification are not completely free from the Union law's influence: thus citizens of the Union and citizens of third countries in possession of a residence permit have to be included in the systems of national solidarity, e.g., the health care system, without discrimination.<sup>142</sup> But this hardly constrains the Member States' freedom in the core fields of national unification.<sup>143</sup> Similar degrees of autonomy *vis-à-vis* the Union exist regarding national protection of fundamental rights. The European Charter of Fundamental Rights explicitly states that the fundamental rights of the European Union first and foremost engage the Union; the Member States are only addressed when implementing Union law (Article 51(1) of the Charter);<sup>144</sup> the Treaty establishing a Constitution for Europe does not change anything in this regard (Article II-111(1) TCE).

<sup>138</sup> In detail, see von Bogdandy, 'Zweierlei Verfassungsrecht. Europäisierung als Gefährdung des gesellschaftlichen Grundkonsenses?', 39 *Der Staat* (2000) 163.

<sup>139</sup> Weiler, 'Fundamental Rights and Fundamental Boundaries', in J.H.H. Weiler, *The Constitution of Europe* (1999), at 102. This does not preclude some Member States from aligning their fundamental rights with European parameters; on this see Huber, 'Offene Staatlichkeit: Vergleich', in von Bogdandy, Cruz Villalón and Huber (eds), *supra* note 64, ii, at 98 ff, para. 26.

<sup>140</sup> The ECJ is accordingly very cautious: see Case C-432/1992, *Anastasiou I* [1994] ECR I-3116, at para. 47. Even in the Treaty establishing a Constitution for Europe there is only a feeble reference to minorities and diversity within the states (Art. I-2 TCE); it does not provide for competences.

<sup>141</sup> Kadelbach, 'Union Citizenship', in von Bogdandy and Bast (eds), *supra* note 14, at 453, 462; Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-0925, paras 37–39. The Network, however, wants to apply the Discrimination Dir 2000/43/EC here and prevent a discriminatory naturalization policy; see EU Network of Independent Experts on Fundamental Rights, *supra* note 136, at 20 ff.

<sup>142</sup> Examples of the abundant case law are Case C-184/99, *Rudy Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, at para. 46; Case C-209/03, *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-2119, at para. 56.

<sup>143</sup> See the seminal contribution by Toggenburg, 'Who is Managing Ethnic and Cultural Diversity in the European Condominium?', 43 *JCMS* (2005) 717.

<sup>144</sup> This is even more restrictive than the case law: see Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas* [1991] ECR I-02925, at paras 41–45; Case C-479/04, *Laserdisken ApS v Kulturministeriet* [2006] ECR I-8089, at para. 61. On the case law, see Kühling, 'Fundamental Rights', in von Bogdandy and Bast (eds), *supra* note 14, at 501, 527 ff.

National reservations with regard to international parameters for national diversity management are not specific to the Union but can often be found in the pertinent international law. Here the openness of the notion of minority,<sup>145</sup> the decision not to stipulate European minority protection in a protocol to the ECHR, and the design of the Framework Convention as not self-executing can be recalled.<sup>146</sup> Certainly minority protection belongs to the older layers of international law, but just as certainly the nations do not want to give away the instruments needed to answer the question ‘Who are we?’.

## 2 Approaches to an EU Internal Diversity Governance

Against this background, two fundamental and far-reaching alternatives arise for the European Union and its Member States. National unity and national protection of fundamental rights can either principally remain outside the Union’s field of activity, or become part of the Union’s competences. The most important disadvantage of the first alternative is that an essential premise of the European Union’s success might be endangered. The Union operates on the premise that its Member States are consolidated, not segmentarily divided, political communities enjoying in principle recognition by all their subjects, minorities included. Given the not yet fully accomplished nation building in some transformation countries, the argument can be made that the Union must guarantee these prerequisites. A legal indication can be found in Article 7 TEU and Article 13 TEC.

If for these reasons the second alternative is chosen and the preservation of cultural diversity in the Member States thus made a task of the Union, there is the disadvantage of noticeably restricting a Member State’s national autonomy in designing its political union and in protecting fundamental rights by extending the power of the Union in two areas central to national identity. As the weakness of the Union’s policy with regard to the accession states teaches, European harmonization of national diversity management, i.e., the build-up of a pertinent Union *acquis*, would probably be necessary. It is certain that such a policy cannot be aimed solely at the transformation countries, but must include all Member States. This second alternative thus has the potential substantially to modify the federal relationship between the Union and its Member States and considerably to curtail national diversity.

The Union and its Member States face a difficult choice. To maintain the legal *status quo* would point to the first alternative. Also the mandate of the recently founded European Fundamental Rights Agency is limited – after a considerable tug of war – to the thematic areas within the scope of Union law.<sup>147</sup> However, there are initiatives by

<sup>145</sup> Grote, ‘The Struggle for Minority Rights and Human Rights: Current Trends and Challenges’, in D. König, P.T. Stoll, V. Röben and N. Matz-Lück (eds), *International Law Today: New Challenges and the Need for Reform?* (2008), at 221.

<sup>146</sup> This was the approach, however, of the Austrian draft of an additional protocol to the ECHR of 26 Nov. 1991 and the Bolzano draft by the Federal Union of European Nationalities of an additional protocol to the ECHR: see Hofmann, *supra* note 120, at 43.

<sup>147</sup> See the 3rd and 8th recitals to and Art. 2 of Council Reg 168/2007 of 15 Feb. 2007 establishing a European Union Agency for Fundamental Rights, OJ (2007) L 53/1; see on an extensive interpretation of these provisions Toggenburg, ‘Die Grundrechteagentur der Europäischen Union: Perspektiven, Aufgaben, Strukturen und Umfeld einer neuen Einrichtung im Europäischen Menschenrechtsraum’, 12 *MenschenRechtsMagazin* (2007) 86, at 98 ff.

the Commission and the Parliament on the basis of the existing law which are understandable only in the light of the second alternative; they will be outlined in what follows.<sup>148</sup>

There are some competences of the Union allowing for approaches to develop a harmonized diversity policy, especially Articles 7(1) and (2), 29, and 34(2) TEU, and Article 13(1) and (2) as well as Article 63 TEC. In view of the hesitation by the Member States, the diversity policy of the Union rather appears as *diversity governance*. There are some indications as to its design, although in general this *governance* is far more rudimentary than the one concerning transformation countries.

The goals of this *governance* are devised by Philip Alston and Joseph H.H. Weiler in a path-finding work for the European Parliament looking for a fundamental rights policy.<sup>149</sup> The European Union is to become an international model for a coherent, energetic, and future-oriented fundamental rights policy, especially in view of racism and xenophobia as well as the economic, social, and cultural rights of disadvantaged groups and minorities.<sup>150</sup> Minority policy, migration policy, and the policy of non-discrimination in general are to converge in one progressive fundamental rights policy to be implemented not so much by the courts but rather by specialized bureaucracies with the integration of non-governmental organizations.<sup>151</sup>

Institutionally, the emerging EU internal *diversity governance* mainly rests on EU institutions, particularly the EU Commission, the European Parliament, the EU Network of Independent Experts on Fundamental Rights, as well as – until 2007 – on the European Monitoring Centre on Racism and Xenophobia.<sup>152</sup> It is still open to what degree supranational organizations outside the EU, in particular the Council of Europe and the OSCE, are included in this *governance*. The lessons learned from the *governance* regarding the transformation countries indicate that the Union will hardly be able to construct efficient internal *governance* without the legal, institutional, and legitimizing resources of the Council of Europe and the OSCE. In this sense Articles 8–10 of the Council Regulation establishing a European Union Agency for Fundamental Rights arrange for co-operation between the Agency and relevant governmental and non-governmental organizations, albeit only within the range of application of Union law.

<sup>148</sup> The suggestions of the EU Network of Independent Experts on Fundamental Rights, *supra* note 136, show which possibilities exist, based on the current legal situation, for developing this.

<sup>149</sup> Alston and Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy', in P. Alston (ed.), *The European Union and Human Rights* (1999), at 3. Their approach has decisively influenced the *Comité des Sages* and its 'Human Rights Agenda for the European Union for the Year 2000. Leading by Example', printed in *ibid.*, Annex (after 917). On this, see von Bogdandy, 'The European Union as a Human Rights Organization?', 37 *CMLRev* (2000) 1307, at 1310 ff. I now correct my critique in the light of the following considerations.

<sup>150</sup> Alston and Weiler, *supra* note 149, at 14 ff.

<sup>151</sup> Entirely in this sense then is the EU Network of Independent Experts on Fundamental Rights, *supra* note 136, in particular at 20 and 92 ff. The influence also shows in that the author, Olivier de Schutter, is closely connected with Philip Alston: P. Alston and O. de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (2005).

<sup>152</sup> Council Reg 1035/97, OJ (1997) L 151/1.

The traditional doctrine on functions (separation of powers) can again serve as a guideline for a functional outline of *governance*. From a legislative aspect, the fundamental act is the EU Treaty, in particular Article 6(1) TEU; in so far as reference can be made to the considerations above. Its vague parameters are again partly being operationalized by norms of international law.<sup>153</sup> Recourse to international law thus compensates in this *governance* for the largely lacking legislative competence of the EU, and international law becomes an instrument of the Union's extension of power *vis-à-vis* the Member States. The fact that the Union does not have to develop its own standards but finds them in international law, and also in the Charter of Fundamental Rights, also unburdens the Union's organs of *diversity governance* from the point of view of legitimacy. However, there are possible EU internal standards as well, in particular those laid down in Directive 2000/43/EC.<sup>154</sup>

While the legislative component of this *governance* has rather clear features, that is not the case for the executive component. Its possible cornerstone, i.e., the analogue to the accession perspective of the *diversity governance* aimed at the East, might be the sanctions of Article 7(1) TEU.<sup>155</sup> For that reason, this *governance* would probably be weaker than that aimed at the East, since on the supranational and international levels incentives usually work better than disincentives.<sup>156</sup> Reports and other 'soft' implementation instruments, known from the method of open co-ordination, are available as EU internal implementation instruments, e.g., the identification of 'best practices'.<sup>157</sup> For many years the European Parliament has been commenting on the situation of minorities in the Member States.<sup>158</sup> Also the Commission has now

<sup>153</sup> The EU Network of Independent Experts on Fundamental Rights, *supra* note 136, derives its standards from the universal human rights treaties, the conventions of the Council of Europe, international *soft law* instruments, and legal instruments of the Union, without further addressing their differing legal nature. It seems to be decisive that they suit a progressive policy. The Expert Network is even of the opinion that the Member States are bound to the Charter when implementing Union law: *ibid.*, at 7.

<sup>154</sup> Council Dir 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. OJ (2000) L 180/22. Similarly, EU Network of Independent Experts on Fundamental Rights, *supra* note 136, at 7 and 62; Art. 3(2) of Council Reg 168/2007, *supra* note 147, reads: 'The Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union.'

<sup>155</sup> On the possibilities of instituting, on the basis of Art. 7 TEU, a control mechanism with regard to the Member States see Communication from the Commission to the Council and the European Parliament of 15 Oct. 2003 on Art. 7 TEU: Respect for and promotion of values on which the Union is based, COM(2003)606, at 8; Schorkopf, in E. Grabitz and M. Hilf (eds), *Das Recht der Europäischen Union. Kommentar I* (looseleaf, 2004), Art. 7 TEU, marginal number 53 ff.

<sup>156</sup> Wolftrum, 'Means of Ensuring Compliance with and Enforcement of International Environmental Law', 272 *Recueil des Cours* (1998) 9.

<sup>157</sup> Toggenburg, *supra* note 143, at 730 and 732.

<sup>158</sup> Resolution of the European Parliament of 16 Oct. 1981 on a Community charter of regional languages and cultures and a Charter of rights of ethnic minorities, OJ (1981) C 287/106; Resolution of the European Parliament of 11 Feb. 1983 on measures in favour of minority languages and cultures, OJ (1983) C 68/103; Resolution of the European Parliament of 30 Oct. 1987 on the languages and cultures of regional and ethnic minorities in the European Community, OJ (1987) C 318/160; Resolution of the European Parliament of 9 Feb. 1994 on the linguistic and cultural minorities in the European Community, OJ (1994) C 61/110; Resolution of the European Parliament of 13 Dec. 2001 on regional and lesser-used European languages, OJ (2002) C 177 E/334; Resolution of the European Parliament on the protection of minorities and anti-discrimination policies in the enlarged EU, OJ (2006) C 222/57.

started to act in this field.<sup>159</sup> Among the agencies, the European Monitoring Centre on Racism and Xenophobia in particular belonged to this *governance* until 2007.<sup>160</sup> The independent EU Network of Experts on Fundamental Rights can be named as a hybrid instrument of this *governance*.<sup>161</sup> It monitors the general fundamental rights situation also in the Member States, minority rights included; its critical reports enjoy considerable public attention. However, the future of this panel is uncertain.<sup>162</sup>

As further institutions with executive functions, the already mentioned institutions, the Council of Europe and the OSCE, come into consideration; in particular the committee of the Framework Convention has always also examined the situation of minorities in the old EU Member States and detected many shortcomings.<sup>163</sup> As regards their integration into the EU internal *governance* there is no clarity so far. The work of the Network of Experts on Fundamental Rights is based to a considerable extent on the work of these implementation institutions.

Lastly the question regarding the judicial function arises; in this respect EU internal *governance* looks slightly better than that aimed at the East. According to the current case law regarding Article 230 TEC, there is arguably no chance for the Member States or the Council to take action against measures in the form of *reports* by the Parliament or the Commission. However, decisions like the establishment of the Network of Experts are assailable.<sup>164</sup> The protection of individual rights has a very feeble position in this *governance* as well. As is generally known, no direct legal action before the ECJ is possible for individuals against measures taken by the Member States. It is, however, conceivable that the ECJ, considerably extending its current competences, could use the preliminary ruling procedure in order to review national measures for their compatibility with principles of law protecting diversity national measures, building on the EC fundamental freedoms and the directives on discrimination.<sup>165</sup>

From a 'form of action' perspective, some instruments applied in this *governance* might be subsumed under the notion of 'open method of coordination'. It has by now a well defined shape, not least because it has been laid down in Articles 128–130

<sup>159</sup> Communication from the Commission on Immigration, Integration, and Employment of 3 June 2003, COM(2003)336; Communication from the Commission of 16 July 2004, First Annual Report on Migration and Integration, COM(2004)508.

<sup>160</sup> Council Reg 1035/97, *supra* note 152.

<sup>161</sup> The accessible documents do not contain information about a possible legal basis. According to Olivier de Schutter, the basis is Parliament Resolution 2000/2231 of 5 June 2001: see de Schutter and van Goethem, 'The Fundamental Rights Agency: Towards an Active Rights Policy of the Union', 4 *ERA-Forum* (2006) 587, at 587 and 589.

<sup>162</sup> Toggenburg, 'Menschenrechtspolitik', in W. Weidenfeld and W. Wessels (eds), *Jahrbuch der Europäischen Integration* (2006), at 187. See Art. 10 of Council Reg 168/2007, *supra* note 147.

<sup>163</sup> In detail, see Oeter and Walker, 'The Case of the Federal Republic of Germany', in S.S. Åkermark, L. Huss, S. Oeter and A. Walker (eds), *International Obligations and National Debates: Minorities around the Baltic Sea* (2006), at 227.

<sup>164</sup> In detail, see J. Bast, *Grundbegriffe der Handlungsformen der EU* (2006), at 389 ff.

<sup>165</sup> What this might look like has been demonstrated by the ECJ in Case C–60/00, *Carpenter v Secretary of State for the Home Department* [2002] ECR I–06279; for a critique see Mager, 'Dienstleistungsfreiheit und Schutz des Familienlebens, Anmerkung zu der Entscheidung EuGH, Rs. 60/00 – Mary Carpenter', 58 *JuristenZeitung* (2003) 204, at 204.

TEC concerning employment policy.<sup>166</sup> However, the fact that this *diversity governance* has not succeeded so far in establishing duties of the Member States comparable to those under Article 128 TEC speaks against such a qualification. More important still: according to the prevalent understanding, the open method is an instrument of the European Council,<sup>167</sup> which does not play a leading role in this *diversity governance*. Rather, *policy assessment* by the public appears to be the central instrument of this *governance*. Experience with the *governance* aimed at the East shows that regular and systematic reports are of great importance<sup>168</sup> and that positive data on the situation of minorities and immigrated groups are necessary<sup>169</sup> if this instrument is to have any effect at all.

### 3 Assessment

Other than the *diversity governance* directed at the transformation countries, the internal *governance* of cultural diversity can resort to expedient legal criteria. With respect to the competences, it has to be noted that there is no explicit norm allowing for a human rights, minority, or diversity policy for the Union.<sup>170</sup> However, in accordance with prevailing opinion, competence in this sense is required only for legally binding measures. It has not yet been clarified which legal basis is required for other measures executed by the Union's institutions. However, in the end it seems hardly disputable that the competence of the Commission, deriving from Article 7(1) TEU, to initiate proceedings before the Council when there is a clear risk of a serious breach by a Member State of principles referred to in Article 6(1) TEU, confers upon the Commission monitoring competence with regard to the Member States. This is confirmed by the fact that a reasoned proposal is required.<sup>171</sup> This monitoring competence with respect to national diversity management is being reinforced by a series of further competences, namely Articles 29 and 34 TEU and Articles 13 and 63 TEC. Also in these policy areas the Commission can make proposals only if it is informed about the situation in the Member States. Also the decision by the European Parliament to set up a temporary

<sup>166</sup> The abatement of social exclusion including the integration of immigrants is a policy that is pursued within the framework of the 'open method of coordination': see Presidency Conclusions of the Lisbon European Council of 24 Mar. 2000, available at: [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressdata/en/ec/00100-r1.en0.htm](http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/00100-r1.en0.htm) (13 June 2007); Presidency Conclusions of the Barcelona European Council of 16 Mar. 2002, available at: [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/71025.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/71025.pdf) (13 June 2007); K. Höchstetter, *Die offene Koordinierung in der EU* (2007), at 120. The migration policy was initially also pursued in the mode of open co-ordination: Communication from the Commission on an open method of co-ordination for the Community immigration policy of 11 June 2001, COM(2001)387 final.

<sup>167</sup> On its first application see Presidency Conclusions of the Lisbon European Council of 24 Mar. 2000, *supra* note 166, no 7.

<sup>168</sup> Sasse, *supra* note 113, at 80.

<sup>169</sup> See in this sense EU Network of Independent Experts on Fundamental Rights, *supra* note 136, at 12 ff and 61 ff.

<sup>170</sup> In detail see von Bogdandy and Bast, in Grabitz and Hilf (eds), *supra* note 155, Art. 5 TEC, marginal nos 3 and 7 ff.

<sup>171</sup> Schorkopf, *supra* note 155, Art. 7 TEU, marginal number 13; Hoffmeister, 'Monitoring Minority Rights in the Enlarged European Union', in Toggenburg (ed.), *supra* note 47, at 85, 87, and 103. For an interpretation of Art. 7 TEU entirely from the perspective of 'federal coercion' see Mangiameli, 'La clausola di omogeneità', in S. Mangiameli (ed.), *L'ordinamento europeo. I principi dell'Unione* (2006), at 1 and 33.

committee examining whether the Member States have infringed Article 6 TEU by taking anti-terrorism measures points in this direction.<sup>172</sup> The establishment of an advisory panel like the Network of Experts on Fundamental Rights is covered by the unwritten competence of self-organization held by any organ, thus also by the Commission.<sup>173</sup>

This competence to monitor and even control the Member States is due to a fundamental constitutional innovation of the Amsterdam Treaty. Putting down explicit prerequisites for structural compatibility, or *homogeneity*, as many put it, in Article 6(1) TEU, the contracting parties formulate *uniform* standards of the democratic rule of law for *all* bearers of public authority in the European constitutional area and confer upon the Union the task of guaranteeing a liberal-democratic constitutional system. It is to ensure the preservation of the normative essentials of the European constitutional area, and thus of the Member States' legal order; it becomes an *organization of collective order*.<sup>174</sup> This step has been taken not least in view of the accession of the transformation countries.

In the present context, monitoring is admissible only if protection and promotion of cultural diversity in the sense of minority rights belong to the principles of Article 6(1) TEU. The wording remains silent. However, the legitimacy, maybe even the legality, of the *diversity governance* regarding the transformation countries depends on Article 6(1) TEU requiring the protection of minority rights; the majority of the commentators thus sees it as rooted in the notion of democracy.<sup>175</sup> This understanding of democracy clearly conflicts with that prevalent in many old Member States, where the protection of minorities does not enjoy similar status, not least for reasons of republican equality.<sup>176</sup> However, the Western European states have advocated such an understanding of

<sup>172</sup> European Parliament dec of 18 Jan. 2006 setting up a temporary committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, OJ (2006) C 287 E/159.

<sup>173</sup> Bast, *supra* note 164, at 362 ff; de Witte, 'The Constitutional Resources for an EU Minority Policy', in Toggenburg (ed.), *supra* note 47, at 107, 109, and 155 ff is critical of the mandate for minority protection of the Network.

<sup>174</sup> In detail, see von Bogdandy, 'The European Union as a Supranational Federation', *supra* note 14.

<sup>175</sup> This is the Commission's opinion: see n. 3 of the Commission's Regular Report of 9 Oct. 2002, available at: [http://www.fifoost.org/EU/strategy\\_en\\_2002/index.php](http://www.fifoost.org/EU/strategy_en_2002/index.php) (14 June 2007), see also the answer to question E-2538/01 (Vitorino), OJ (2002) C 147 E/27, available at: <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/ce147/ce14720020620en00270028.pdf> (14 June 2007), as well as the answer to question P-0395/02 (Reding), OJ (2002) C 160/214, available at: <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/ce160/ce16020020704en02140215.pdf> (14 June 2007). Also the case law of the ECtHR indicates that the democracy principle comprises minority rights: see App No 44158/98, *Gorzelik v Poland*, 40 EHRR (2004) 4, at para. 57; App Nos 7601/76 and 7806/77, *Young, James and Webster v. UK*, 3 EHRR (1981) 20, at para. 63; App Nos 25088/94, 28331/95 and 28443/95, *Chassagnou et al. v. France*, 29 EHRR (2000) 615, at para. 112.

<sup>176</sup> Biaggini, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Schweiz', in von Bogdandy, Cruz Villalón and Huber (eds), *supra* note 64, i, para. 10, marginal number 100; Dreier, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Deutschland', in *ibid.*, para. 1, marginal number 110; Guerrero, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Spanien', in *ibid.*, para. 11, marginal number 77; Tuleja, *supra* note 64, in *ibid.*, para. 8 marginal number 62; also Cruz Villalón, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Vergleich', in *ibid.*, para. 13, marginal number 107; Beselink, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Niederlande', in *ibid.*, para. 6 marginal number 125; Halmay, 'Grundlagen und Grundzüge staatlichen Verfassungsrechts: Ungarn', in *ibid.*, para. 12 marginal number 39; Huber, 'Offene Staatlichkeit: Vergleich', in *ibid.*, ii, para. 26, marginal number 19, 42, and 48; Haguenu-Moizard, 'Offene Staatlichkeit: Frankreich', in *ibid.*, para. 15, marginal number 31.

democracy *vis-à-vis* the transformation countries; this now backfires on them. There is the prospect that EU internal monitoring might change the understanding of democracy in the EU Member States along the lines of the international law of cultural diversity.

Another criterion for judging this diversity governance is offered by the principle of subsidiarity (Article 5(2) TEC, Article 2 TEU last sentence). It is first necessary that an objective cannot be sufficiently achieved by the Member States. The report by the EU Network of Independent Experts on Fundamental Rights concerning the protection of minorities shows that the situation of minorities and immigrant groups in the Member States of the Union does not always meet international standards. Moreover, the treatment of some groups, especially the Sinti and Romanies, is sometimes so bad that the threshold of Article 7(1) TEU may be reached. It is not to be expected that other supranational or international institutions, first and foremost the ECHR, can correct these grievances on their own.

Secondly, the principle of subsidiarity demands that the Union contribute to furthering the objective. In this respect there are few indications of a well-founded judgment. The *diversity governance* with respect to the transformation countries and findings as to its limited success raises some doubts.<sup>177</sup> Still, to me a systematic and public monitoring of the Member States with regard to their observance of the international law of cultural diversity seems well justifiable, as long as it adequately preserves the independence of the Member States. For that reason, the Fundamental Rights Agency should use the pertinent EU law, such as the anti-discrimination Directive 2000/43/EC, to monitor the human rights situation in the Member States. Granted, such monitoring requires a Council decision (Article 5 of Regulation 168/2007). However, since such a decision has to be taken in accordance with Article 205(1) TEC, only 14 insightful governments are needed in order to move the Union in this direction.

## 4 The Union as a Global Promoter of Cultural Diversity

### A *The Union as Actor: the Example of the Diversity Convention*

The human rights conditionality often incorporated by the Union in its international agreements can be interpreted as an instrument for the global promotion of cultural diversity.<sup>178</sup> The same holds true for its criteria catalogue concerning the recognition of new states, which comprises minority protection.<sup>179</sup> However, the spearhead of the

<sup>177</sup> In detail, see Höchstetter, *supra* note 166, at 231 ff.

<sup>178</sup> Since the Luxembourg European Council of 1991, the human rights conditionality has been an integral component of EC foreign policy: see in detail F. Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (1998); on its limits see de Witte and Toggenburg, 'Human Rights and Membership in the European Union', in S. Peers and A. Ward (eds), *The European Union Charter of Fundamental Rights: Law, Context and Policy* (2004), at 59, 61 ff.

<sup>179</sup> The foreign ministers of the EC Member States laid down guidelines on 16 Dec. 1991 according to which the recognition of new states depends upon minority protection; on this see Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-determination of Peoples', 3 *EJIL* (1992) 178.

current international diversity policy of the Union can be found in its contribution to the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. By means of this contribution it can be demonstrated how the Union has by now become a political actor, using the international law of cultural diversity to strengthen European unity.

According to its general status with UNESCO, the Union was initially only able to send the Commission as observer with a rather passive role; that also served to preserve the national competences in the cultural field.<sup>180</sup> But in 2004 the EU Member States decided to combine the national positions in a statement by the Union, and the Commission obtained a negotiating mandate from the Council of Ministers under Article 300(1) TEC so as to 'enable the Union to carry all the weight it should in the UNESCO negotiations'; since then, only the Presidency and the Commission have spoken.<sup>181</sup> According to the general opinion, this unified representation has considerably facilitated the conclusion of the convention with a content desired by the European states against the opposition of the USA.<sup>182</sup>

This Diversity Convention benefits European unity in many respects. It confirms that the European states can only collectively assert themselves against the USA.<sup>183</sup> This supports the quest for the uniform representation of the Union in the field of foreign affairs and for other cases against reluctant Member States that see in their international presence an essential instrument of national unification. It promotes European unification, since the Union can, under the legal personality of the EC, ratify the convention itself;<sup>184</sup> this strengthens not only its international role but also its influence in the cultural field. Furthermore, the Diversity Convention serves the acceptance under international law of an important EU internal policy in the area of diversity management and the development of a European cultural area, namely media politics with its quotas which are

<sup>180</sup> In detail, see Canicchioli, 'The European Community at the UNESCO: An Exceptionally Active Observer?', in J. Wouters, F. Hoffmeister and T. Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (2006), at 135; Ferri, 'EU Participation in the UNESCO Convention on the Protection and Promotion of Cultural Expressions', 3 *European Diversity and Autonomy Papers – EDAP* (2005), available at: [www.eurac.edu/documents/edap/2005\\_edap03.pdf](http://www.eurac.edu/documents/edap/2005_edap03.pdf) (18 June 2007), at 21 ff; von Schorlemer, 'Kulturpolitik im Völkerrecht verankert', 53 *Vereinte Nationen* (2005) 217, at 220.

<sup>181</sup> EU Press release IP/04/1377 of 17 Nov. 2004; on the internal procedure see the Code of conduct between the Council, the Member States, and the Commission on the UNESCO negotiations on the draft Convention on the protection of the diversity of cultural contents and artistic expressions, 5768/05 CULT 4 of 31 Jan. 2005, Council of the European Union, available at: <http://register.consilium.europa.eu/pdf/en/05/st05/st05768.en05.pdf> (18 June 2007); on the EU competence and the distribution of competences between Commission and Presidency see Ferri, *supra* note 180, at 11 ff.

<sup>182</sup> See Letter from US Secretary of State (Condoleezza Rice) of 4 Oct. 2005, available at: [www.iti-germany.de/kultvielfalt/pdf/4\\_e\\_2%20RiceLetter.pdf](http://www.iti-germany.de/kultvielfalt/pdf/4_e_2%20RiceLetter.pdf) (18 June 2007); Explanation of the Vote of the US on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, available at: [www.iti-germany.de/kultvielfalt/pdf/4\\_e\\_3Oliver.pdf](http://www.iti-germany.de/kultvielfalt/pdf/4_e_3Oliver.pdf) (18 June 2007).

<sup>183</sup> Loth, 'Der Weg nach Rom – Entstehung und Bedeutung der Römischen Verträge', 30 *Integration* (2007) 36, at 37 ff.

<sup>184</sup> Art. 27(3)(a) of the Diversity Convention, *supra* note 16.

problematic under WTO law.<sup>185</sup> Certainly the convention has the potential to prejudice the single media market<sup>186</sup> by affirming national cultural policy, and thus of course Member State cultural policy;<sup>187</sup> this, however, does not change the general impact of the convention on the unity of the Union. Altogether the Diversity Convention proves to be an expedient instrument of the Union's policy in many respects.

## B Promotion by Example

The activities of the Union within the framework of the UNESCO convention show that it strives to play a role in global diversity politics. An important trump in the global diversity discourse is its own diversity-oriented constitution, a source of inspiration for a diversity-preserving design of political organizations, be it for supranational institutions with public authority, or be it for federal state constitutions.

The constitution of the Union aims first and foremost for the preservation of the diversity of national cultures, even if this is not required by international law. Herein the will for self-assertion of the European states and peoples reveals itself. Many characteristics of the Union's constitutional law can be explained from this perspective: the lack of will to found a state, the lack of a comprehensive defence and solidarity community, the lack of formation of a proper nation. The European enterprise is constituted on the premise of distinct, state-organized peoples that are supposed to maintain distinct identities. Reference to the diversity-preserving design of the organization's constitution has already been made;<sup>188</sup> among the further pertinent legal complexes the organization of competences, the language regime, and the institutions of differentiated integration can be recalled. How powerful the innovative force of the Union in this respect really is becomes obvious if one recalls the helplessness of Georg Jellinek when searching for a viable constitution for the multi-ethnic structure of the Hapsburg monarchy over 100 years ago,<sup>189</sup> or John Stuart Mill's scepticism regarding the possibility of a free pluralistic society.<sup>190</sup>

<sup>185</sup> Mückl, 'Paradigmenwechsel im europäischen Medienrecht: Von der Fernseh-Richtlinie zur Richtlinie über audiovisuelle Mediendienste', 121 *Deutsches Verwaltungsblatt* (2006) 1201; Kleist and Scheuer, 'Audiovisuelle Mediendienste ohne Grenzen', 9 *MultiMedia und Recht* (2006) 127 (Pt 1), and 206 (Pt 2); on the problem of the admissibility under international law of the quotas, see von Bogdandy, 'Die Informations- und Unterhaltungsindustrie', in E. Grabitz, A. von Bogdandy and M. Nettesheim, *Europäisches Außenwirtschaftsrecht* (1994), at 571 and 589; in 2003, the 'Cancun Declaration on Cultural Diversity' appealed to the members of the WTO to respect cultural diversity: see [www.ebu.ch/en/union/news/archives/2003/tcm\\_6-8195.php](http://www.ebu.ch/en/union/news/archives/2003/tcm_6-8195.php) (18 June 2007). It is disputed whether the Diversity Convention influences the admissibility under WTO law of TV quotas: see Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law', 9 *J Int'l Economic L* (2006) 515; Graber, *supra* note 16.

<sup>186</sup> This may explain the failed attempt by the Commission to insert a 'disconnection-clause' that would have shielded Union law from the Diversity Convention: see von Schorlemer, *supra* note 180, at 221.

<sup>187</sup> Thus, Art. 6(2)(d), (e), and (h) allow for state measures supporting public institutions, notably with regard to public service broadcasting. On the problems under Union law of radio licence fees, see G. Schwendinger, *Gemeinschaftsrechtliche Grenzen öffentlicher Rundfunkfinanzierung* (2007), at 187 ff and 596 ff; see also Evangelischer Pressedienst, 23 *epd medien* (2007) 13.

<sup>188</sup> *Supra*, Section 2C.

<sup>189</sup> Jellinek, *supra* note 15, pp. 34 et seq., 40 et seq.

<sup>190</sup> J.S. Mill, *On Liberty and Considerations on Representative Government* (1948), at 292.

## 5 A Principle of Cultural Diversity?

Returning to the first sentence of this article, the concluding question arises whether diversity is only a topos or rather a legal principle. Jörg Ennuschat, for example, conceives diversity as being a structural principle of European law,<sup>191</sup> and Joseph Weiler grasps the pluralistic, non-hierarchic, dialogical, post-national character of the Union's law with a principle of tolerance<sup>192</sup> that can be interpreted as a principle of diversity. Those considerations are helpful on a political-ethical level. Nonetheless, as a legal principle diversity appears as doubtful as an abstract legal principle of unity or integration. So far it has not been demonstrated what a principle of diversity could accomplish that the doctrines on competences, the protection of national interests through the institutional set-up of the Union, the principles protecting citizens, and minority rights cannot. It would be accorded a positive role only if abstract principles like integration or homogeneity had to be confronted; however, those principles are known neither by the European nor by the international legal order.<sup>193</sup> Furthermore, the term covers divergent, often even antagonistic, interests, namely the alleged interests of a state and nation to be distinct and homogeneous on one hand and the alleged interests of minorities and migrants on the other hand in a pluralistic society acknowledging their specificities. From a conceptual point of view, a juridical conceptualization that embraces opposing interests<sup>194</sup> is problematic, since legal rationality requires that opposing poles be conceptualized by different notions. These considerations argue against the stipulation of an international legal principle of cultural diversity, not to mention its weak foundation in positive law.

Returning to the starting point of this article, it can be stated that, first, the *cultural diversity* topos should remain exactly this, a mere topos; that, secondly, from an international law perspective, the motto of the Union grasps an important aspect of its constitutional and political project; but that, thirdly, the international law perspective does not exhaust the issue. Conformity with international law alone cannot dissipate concern for the future of cultural diversity within the Union.

<sup>191</sup> Ennuschat, 'Der Leitspruch für Europa: "In Vielfalt geeint"', in K. Stern and P.J. Tettinger (eds), *Europäische Verfassung im Werden* (2006), at 111, 121 ff; A. Leisner-Engensperger, *Vielfalt – ein Begriff des öffentlichen Rechts* (2004), at 78 and 137 ff.

<sup>192</sup> Weiler, 'Federalism without Constitutionalism: Europe's *Sonderweg*', in K. Nicolaidis and R. Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (2001), at 54 and 65 ff; furthermore see de Búrca and Scott, 'Introduction', in de Búrca and Scott (eds), *supra* note 70, at 1.

<sup>193</sup> Toggenburg, 'The Debate on European Values and the Case of Cultural Diversity', 1 *European Diversity and Autonomy Papers – EDAP* (2004), at 10 ff, available at: [www.eurac.edu/documents/edap/2004\\_edap01.pdf](http://www.eurac.edu/documents/edap/2004_edap01.pdf) (18 June 2007) is far-seeing but undecided.

<sup>194</sup> Inspired by O. Lepsius, *Die gegensatzaufhebende Begriffsbildung* (1993), at 146 ff, who however treats a different topic.