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

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

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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 analyzed firstly as a situation of application of the international law of cultural diversity, secondly as 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 the European unity since it only protects 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 the concern for the future of cultural diversity in the Union.

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I. Introduction and Basics

1. Problem and General Thesis

Cultural Diversity is an important topos in the European Union. It is part of the Union's self-portrayal,[1] can be found in diverse legal instruments,[2] and is the rationale behind numerous legal provisions.[3] Moreover, the topic of diversity, and not economic growth, freedom, or equality characterises the nature of European unity, at least according to the European motto: "United in diversity".[4] To some, this may however appear to be window dressing, since the concern for cultural diversity gives reason for grave reservations towards the Union.[5] Its celebration of cultural diversity might 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;[6] the latter will be the topic of this paper. The pertinent principles, rules, and institutions of international law – such as self-determination, Article 27 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 – are in the following summarised using the notion of "international law of cultural diversity", without however implying the existence of a proper field of law with specific characteristics. Placing international law of cultural diversity in the spotlight, the Union shall first of all be analysed as a problematic

[1] For example: http://europa.eu/languages/en/chapter/5 (30 March 2007).
[2] For example Decision No. 1983/2006/EC of the European Parliament and the Council of 18 December 2006 on the European Year of Intercultural Dialogue, OJ 2006 L 412/44.
[3] See Article 6(3) TEU, Article 87(3)(d) TEC, Article 151 TEC, Article 22 Charter of Fundamental Rights.
[4] Article I-8 TCE; on the motto Gabriel N. Toggenburg, "Unity in Diversity: Searching for the Regional Dimension in the Context of a Someway Foggy Constitutional Credo", in Roberto Toniatti, Marco Dani, and Francesco Palermo (eds), *An Ever More Complex Union* (Nomos, Baden-Baden, 2004), pp. 27-56; Matthias Ruffert, in Christian Calliess and Matthias Ruffert (eds), *Verfassung der Europäischen Union* (Beck, Munich, 2006), Article I-8, marginal number 12; this motto is already being used: http://europa.eu/abc/symbols/motto/index_en.htm (19 June 2007).
[5] For details see Ulrich Haltern, "Europäischer Kulturkampf", in 37 *Der Staat* (1998), pp. 591-623; Peter A. Kraus, "Cultural Pluralism and European Polity-Building", in 41 *Journal of Common Market Studies* (2003), pp. 665-686; David Galbreath, "The Politics of European Integration and Minority Rights in Estonia and Latvia", in *Perspectives on European Politics & Society* (2003), pp. 35-53, 36, 49.
[6] Institutionally, the pertinent research is located especially with the Institute for Minority Rights of the European Academy Bozen and with the European University Institute, cf. esp. the references to the works of Gabriel Toggenburg and Bruno de Witte in this paper.

situation of this international law:[7] the main interest here is to develop this international law as a framework for the law of the Union and to detect possible conflicts (Part II). Secondly, the Union will be examined as 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 (Part III). Thirdly, the focus is on the contribution the Union makes to the global promotion of cultural diversity (Part IV). Finally it will be discussed whether the law of the Union provides lessons for an international law principle of cultural diversity (Part V).

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.[8] Multi-level systems can be understood constitutionally or instrumentally.[9] 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.[10] 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 Part II 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.[11] Here the focus of interest is on the question of how political agents use norms of international law strategically.

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[7] This notion of *situation* corresponds to the one found in Article 13 of the Rome Statute of the International Criminal Court; see q.v. Sharon A. Williams, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (Nomos, Baden-Baden, 1999), Article 13, marginal numbers 14 et seqq.

[8] Rainer Wahl, "Der einzelne in der Welt jenseits des Staates", in *idem* (ed), *Verfassungsstaat, Europäisierung, Internationalisierung* (Suhrkamp, Frankfurt am Main, 2003), pp. 53-95; Christoph Möllers, *Gewaltengliederung* (Mohr Siebeck, Tübingen, 2005), p. 210.

[9] 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.

[10] On international constitutionalism cf. Jochen A. Frowein, "Konstitutionalisierung des Völkerrechts", in 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (Müller, Heidelberg, 2000), pp. 427-447; Robert Uerpmann, "Internationales Verfassungsrecht", in 56 (11) *Juristenzeitung* (2001), pp. 565-573; Christian Walter, "Constitutionalizing (inter)national governance", in 44 *German Yearbook of International Law* (2001), pp. 170-201; Brun-Otto Bryde, "Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts", in 42 (1) *Der Staat* (2003), pp. 61-75; Stefan Kadelbach and Thomas Kleinlein, "Überstaatliches Verfassungsrecht", in 44 (3) *Archiv des Völkerrechts* (2006), pp. 235-266; Matthias Kumm, "The Legitimacy of International Law: A Constitutionalist Framework Analysis", in 15 (5) *European Journal of International Law* (2004), pp. 907-931.

[11] Nico Krisch, "Imperial International Law", *Global Law Working Paper* 01/04, http://www.nyulawglobal.org/workingpapers/detail/GLWP_0104.htm (19 June 2007); *idem*, "International law in

This perspective dominates Part III regarding the Union as executive of the international law of cultural diversity, as well as Part IV, 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.[12] 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 Part III 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, Part II will show that international law does not create obstacles for European unity since it only protects cultural pluralism but not state-supporting homogeneity, identity, *distinctiveness*.[13] 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.[14] For international law theory it rests on international law's feature of remaining mute about important questions on social and political organisation.

2. 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.[15] Thus, the concern for

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times of hegemony: unequal power and the shaping of the international legal order", in 16 (3) *European Journal of International Law* (2005), pp. 369-408; Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press, New York, 2005).

[12] The notion *Union* comprises the EC; see for details Armin von Bogdandy, "The legal case for unity", in 36 (5) *Common Market Law Review* (1999), pp. 887-910.

[13] For a critical inventory see Felix Hanschmann, *Der Begriff der Homogenität in der Verfassungslehre und Europarechtswissenschaft* (Springer, Heidelberg, 2007). On the paired notions of multiculturalism and distinctiveness see Bruno de Witte, "The Value of Cultural Diversity", in Susan Millns and Miriam Aziz (eds), *Values in the Constitution of Europe* (Dartmouth, forthcoming 2007).

[14] On this premise see Armin von Bogdandy, "The European Union as a Supranational Federation", in 6 (1) *Columbia Journal of European Law* (2000), pp. 27-54; *idem*, "Europäische und nationale Identität: Integration durch Verfassungsrecht?", in 62 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2003), pp. 156-193, 184 et seqq.; Armin von Bogdandy, "Constitutional Principles", in *idem* and Jürgen Bast (eds), *Principles of European ConstitutionalLaw* (Hart, Oxford et al., 2006), pp. 3-52, 42 et seqq.

[15] Georg Wilhelm Friedrich Hegel, *Wissenschaft der Logik I* (Meiner, Hamburg, 1923) (Orig. 1812), p. 59; Georg Jellinek, *Das Recht der Minoritäten* (Hölder, Vienna, 1898) pp. 27, 28, 30.

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.[16] 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,[17] Canada,[18] Indonesia,[19] and South Africa,[20] in which the protection of groups has a high significance. In a series of constitutions, the culturally pluralistic composition of society is nowadays protected.[21] The respective Canadian constitutional discourse 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 to the international success of the concept.[22] In the centre of this somewhat greying debate is the question of the recognition of the cultural lifestyles and traditions of groups which feel marginalised in a national majority culture.[23] "Cultural diversity" emerges as an argument of the weak.[24]

[16] See in particular the vague definition in Article 4(1) of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 20 October 2005; Council Decision of 18 May 2006 on the Conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2006/515/EC, OJ 2006 L 201/15; critical with regard to the notion Max Fuchs, "Kulturelle Vielfalt im kulturpolitischen Alltag", in *UNESCO heute online*, March/April 2006, http://www.unesco-heute.de/0306/themen.htm (23 April 2007); more positive Christoph Beat Graber, "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?", in 9 (2) *Journal of International Economic Law* (2006), pp. 553-574, 558.

[17] Third recital, Articles 2 and 69(3) Federal Constitution of Switzerland.

[18] Article 27 Constitutional Act 1982: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

[19] Article 36A (motto: "United in diversity"); Article 18A ("Diversity of Regions").

[20] Fourth recital ("United in Diversity"); Articles 30 et seq.

[21] Especially in Latin America; cf. esp. Article 7 of the Colombian Constitution, Article 2 of the Mexican Constitution, Article 1 of the Ecuadorian Constitution, Article 1 of the Bolivian Constitution.

[22] Cf. esp. Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, Oxford, 1995); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, Cambridge, 1995); Charles Taylor, *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, Princeton, 1994).

[23] Jürgen Habermas, "Kampf um Anerkennung im demokratischen Rechtsstaat", in *idem* (ed), *Die Einbeziehung des Anderen* (Suhrkamp, Frankfurt am Main, 1996), pp. 237-276, 239.

[24] Christoph Beat Graber, *Handel und Kultur im Audiovisionsrecht der WTO – Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung* (Stämpfli, Bern, 2003), p. 74.

On the international level the notion is established in the nineties with two diverging, even contrasting intentions.[25] On the one hand, cultural diversity is introduced by UNESCO as a principle of organisation of the international community of states. In this respect the term aims at corrections in the process of globalisation; it serves as antonym to a culturally uniform global society shaped by the United States of America.[26] 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,[27] to "diversité culturelle".[28] 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 globalisation shaped by the United States of America.

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.[29] The notion of cultural diversity confronts in particular two problems of international minority protection: first of all the concern for cultural diversity is, in contrast to the protection of minorities, already at first view a concern of everyone, also of the majority, which opens up new potentials for consensus.[30] Secondly, the notion of cultural diversity allows for the presentation of new and

[25] Already in the seventies, the developing countries had tried to establish the related concept of cultural development internationally, but they were unsuccessful; cf. Article 7 of the Charter of Economic Rights and Duties of States of 12 December 1974, A/RES/29/3281.

[26] The World Commission on Culture and Development that had been called for by the UNESCO General Conference in 1991 and authorised by the UN General Assembly presented in 1995 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.

[27] In particular for a nation with global cultural aspirations; Serge Regourd, *L'exception culturelle* (Puf, Paris, 2002).

[28] 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 Ivan Bernier, "A UNESCO International Convention on Cultural Diversity", in Christoph Beat Graber, Michael Girsberger, and Mira Nenova (eds), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services* (Schulthess, Zürich, 2004), p. 65.

[29] On the notion of "diversity management" see Daniel Thürer, "Minorities and majorities: managing diversity", in 15 (5) *Schweizerische Zeitschrift für Internationales und Europäisches Recht* (2005), pp. 659-663; Janina W. Dacyl and Charles Westin, *Governance of Cultural Diversity* (CEIFO Publications, Edsbruk, 2000).

[30] Karl-Otto Apel, "Anderssein, ein Menschenrecht?", in Hilmar Hofmann and Dieter Kramer (eds), *Anderssein, ein Menschenrecht. Über die Vereinbarkeit universaler Normen und ethnischer Vielfalt* (Weinheim, Beltz-Athenäum,

immigrated groups as worthy of protection better than the predefined term of minority and thus enables expansion of the scope of international law.[31]

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. The 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 respective 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.[32] 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 eighties,[33] leading into a broad debate ranging from "identity politics" to the right to cultural identity.[34]

1995), pp. 9-19; exactly in this sense ECHR (Grand Chamber), Appl. No. 27238/95, Chapman v. the United Kingdom, marginal number 93.

[31] The prevailing opinion requires for the qualification as minority that the group members possess the nationality of the state of residence; see Francesco 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), § 57; Felix Ermacora, "The Protection of Minorities before the United Nations", in 182 (4) *Recueil des Cours* (1983), pp. 247-370, 305 et seq. If not nationality, then at least the stability of the residence; see Manfred Nowak, *CCPR Commentary* (Engel, Kehl et al., 2005), Article 27, marginal number 19 et seqq. The Human Rights Committee on the other hand includes, in its *General Comment* 23, migrants in the scope of application of Article 27 ICCPR; General Comment No. 23, Article 27, §§ 5.1, 5.2 (UN Doc. CCPR/C/21/Rev.1/Add.5 of 08 April 1994); in detail Rüdiger Wolfrum, "The Emergence of "New Minorities" as a Result of Migration", in Catherine Brölmann, René Lefeber, and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff, Den Haag, 1993), pp. 153-166; Georg Dahm, Jost Delbrück, and Rüdiger Wolfrum, *Völkerrecht*, (de Gruyter, Berlin, 2nd edition, Vol. I/1 1989, Vol. I/2-I/3 2002), Vol. I/2, pp. 278 et seq.; Venice Commission, "Report on Non-Citizens and Minority Rights", Strasbourg, 18 January 2007, CDL-AD (2007) 001.

[32] Cf. the sixth recital and Article 1 of the Universal Declaration on Cultural Diversity, http://www.unesco.org/confgen/press_rel/021101_clt_diversity.shtml (21 May 2007); seventh recital of the Diversity Convention, *supra* note 16; sixth and seventh recitals of the Framework Convention; long-sighted Christian Tomuschat, "Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights", in Rudolf Bernhardt, Wilhelm Karl Geck, Günther Jaenicke, and Helmut Steinberger (eds), *Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte* (Springer, Heidelberg, 1983), pp. 952-979, 956, 958, 961; cf. Max Fuchs, Drittes Fachgespräch zur UNESCO-Konvention zum Schutz kultureller Vielfalt vom 17.01.2005, http://www.iti-germany.de/kultvielfalt/pdf/2_b_8Fuchs.pdf (23 April 2007), p. 2.

[33] In detail von Bogdandy, "Europäische und nationale Identität: Integration durch Verfassungsrecht?", *supra* note 14, pp. 160 et seqq.

[34] Yvonne M. Donders, *Towards a Right to Cultural Identity* (Intersentia, Antwerpen, 2002); Thomas Franck, "Clan and Superclan", in 90 (3) *American Journal of International Law* (1996), pp. 359-383, 382 et seq.

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,[35] 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 have, in general, 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 proponents of national distinctiveness (*diversity-as-distinctiveness*) to voices advocating an interactive cultural pluralism (*diversity-as-pluralism*)[36] to voices wanting to bring a national political culture to a higher level of universality.[37] The notion "cultural diversity" is used in different, even diametrically opposed senses, which seriously affects its usefulness as a legal term.[38]

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.[39] Others argue that the denial of social recognition of cultural means of expression damages the individual identity built upon this recognition.[40] For those more concerned 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.[41] 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

[35] Most illuminating Lutz Niethammer, *Kollektive Identität. Heimliche Quellen einer unheimlichen Konjunktur* (Rowohlt, Reinbeck, 2000).
[36] On these two notions de Witte, *supra* note 13, p. 5.
[37] Jürgen Habermas, "Inklusion – Einbeziehen oder Einschließen? Zum Verhältnis von Nation, Rechtsstaat und Demokratie", in *idem* (ed), *supra* note 23, pp. 154-184, 164; Walter Reese-Schäfer, *Jürgen Habermas* (Campus, Frankfurt am Main, 3rd edition, 2001), p. 129.
[38] On the problem of "cultural diversity" as a notion that effaces important distinctions see below, V.
[39] Franck, *supra* note 34.
[40] Charles Taylor, "Politik der Anerkennung", in *idem* (ed), *Multikulturalismus und die Politik der Anerkennung* (Fischer, Frankfurt am Main, 1997), pp. 13-78, 21, 24 et seq., 27 et seq.; Jürgen Habermas, "Religiöse Toleranz als Schrittmacher kultureller Rechte", in Jan Joerden and Roland Wittmann (eds), *Recht und Politik* (Steiner, Stuttgart, 2004), pp. 23-35, 34.
[41] Sixth recital of the Universal Declaration on Cultural Diversity, *supra* note 32; third and fourth recitals of the Diversity Convention, *supra* note 16.

Diversity even declares the protection of diversity as "ethical imperative". Thus, diversity and identity place established rights like freedom of speech, freedom of religion, and freedom of assembly in a new context[42] 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.

3. The Most Important Debates within the EU

The notion "cultural diversity" appears in a series of debates concerning the European Union. In the following paragraphs these debates shall be briefly presented and discussed in order to isolate the most fruitful, which shall be elaborated on in Parts II and III.

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 diversity, then every application of the EC freedoms and every EC harmonisation 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.[43]

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[42] See Ryszard Cholewinski, "Migrants as Minorities: Integration and Inclusion in the Enlarged Union", in 43 *Journal of Common Market Studies* (2005), pp. 695-716, 701.

[43] On the cultural implications Bruno de Witte, "The Cultural Dimension of Community Law", in 4 *Collected Courses of the Academy of European Law* (1995), pp. 229- 299. In the jurisprudence there are no allusions as to the Single Market endangering national cultures, cf. ECJ, Joined Cases 60 and 61/84, *Cinéthèque*, Judgment of 11 July 1985, ECR p. 2605; Case C-148/91, *Omroep*, Judgment of 3 February 1993, ECR p. I-487, para. 9; Case C-379/87, *Groener*, Judgment of 28 November 1989, ECR p. I-3967, para. 18; Case C-338/04, *Placanica et al.*, Judgment of 6 March 2007, para. 47, not yet published.

The core business of the Union is integration (Article 2 TEU, Article 2 TEC); this means convergence and often standardisation. This is why the Union is mostly seen as a threat to cultural diversity. The focus of the oldest and most important debate is on the diversity of national cultures which convey, in the eyes of many, national homogeneity and identity. Especially the success of the programme of the single European market in the early nineties 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.[44] Before that, questions had already been raised as to under which conditions the concern for the protection of national cultures could justify national restrictions on the EC freedoms.[45] From the perspective of international constitutionalism it will be analysed below in Part II 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 the concern is expressed that the law of the Union might 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 case *Angonese* concerning the language regime in South Tyrol has been perceived as such a threat – wrongly so, as an exact analysis of the decision shows.[46] 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

[44] German Federal Constitutional Court, Collection of Cases 89, p. 155.
[45] Cf. esp. ECJ, Case C-154/89, *Commission v. France (Tourist guides)*, Judgment of 26 February 1991, ECR I-659; in detail Rachel Craufurd Smith, European Community Intervention in the Cultural Field: Continuity or Change?, in *idem* (ed), *Culture and European Union Law* (Oxford University Press, Oxford, 2004), pp. 19-78, 28 et seqq.
[46] Bruno de Witte, "Language Law of the European Union: Protecting or Eroding Linguistic Diversity?", in Rachel Craufurd Smith (ed), *Culture and European Union Law*, *supra* note 45, pp. 205-241, 227; Gabriel N. Toggenburg, "Die Sprache und der Binnenmarkt im Europa der EU", in 1 *European Diversity and Autonomy Papers – EDAP* (2005), at www.eurac.edu/edap, pp. 17 et seqq.; Francesco Palermo, "The Use of Minority Languages: Recent Developments in EC Law and Judgments of the ECJ", in 3 *Maastricht Journal of European and Comparative Law* (2001), pp. 299-318, 305 et seqq.; Vanessa Bansch, *Sprachvorgaben im Binnenmarkt: Sprachenvielfalt und Grundfreiheiten* (Nomos, Baden-Baden, 2005), pp. 149 et seqq.; Niamh Nic Shuibhne, *EC Law and Minority Language Policy: Culture, Citizenship and Fundamental Rights* (Kluwer Law International, The Hague et al., 2002), pp. 284 et seqq.

detrimental to the cultural diversity brought by immigrants.[47] In this area exists 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.[48] The approach is summarised by the sentence: "There should logically come a point where the integration of the migrants ends and minority protection begins".[49] Yet, this threat does not appear as imminent: the requirement of unanimity under Article 63(3)(a) TEC and the diversity of the respective 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 emphasised regularly that the integration of citizens of third countries must respect their language and culture[50] and that the ECJ has made it clear that it protects all the relevant rights, including those contained in universal human rights treaties.[51] At present, the law of the Union does not constitute a specific threat for the cultures of autochthonous (native) or allochthonous (immigrated) minorities.[52]

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

[47] With a view to Article 27 ICCPR, Cholewinski, *supra* note 42, pp. 709 et seqq.; Steve Peers, "'New Minorities': What Status for Third-Country Nationals in the EU System?", in Gabriel N. Toggenburg (ed), *Minority Protection and the Enlarged European Union: The Way Forward* (Open Society Institute, Budapest, 2004), pp. 149-162, 160.
[48] On this, see Special Issue 43 *Journal of Common Market Studies* (2005), Migrants and Minorities in Europe.
[49] Cholewinski, *supra* note 42, p. 697. It is debatable whether this view is fully convincing; cf. for Canada Kymlicka, *supra* note 22, p. 15.
[50] Council conclusions of 19 November 2004 on the "Immigrant integration policy in the European Union", Council Doc. No. 14615/04, pp. 19 et seqq., numerals 4 and 8. The Council establishes eleven 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, cf. Cholewinski, *supra* note 42, pp. 705 et seq. The integration perspective becomes apparent in positive law in the so-called "Long-term residence Directive", Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44, in particular in the fourth and twelfth recitals as well as in Articles 5(2) and 15(3). Also the fourth recital in Council Directive 2003/86/EC of 22 September 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 Kees Groenendijk, Legal Concepts of Integration in EU Migration Law, in 6 *European Journal of Migration and Law* (2004), pp. 111-126.
[51] ECJ, Case C-540/03, *European Parliament v. Council of the European Union (Family reunification)*, Judgment of 27 June 2006, not yet published.
[52] However, the integration policy of the EU remains in need of being observed closely, in spite of the general recognition of cultural diversity, since the respect for the basic values of the European Union called for in numeral 2 of the Council conclusions of 19 November 2004 on the "Immigrant integration policy in the European Union", Council Doc. No. 14615/04, pp. 19 et seqq., 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 Christian Joppke, "Civic Integration Policies for Immigrants in Western Europe", in 30 (1) *West European Politics* (2007), pp. 1-22, 3 et seq.; Cholewinski, *supra* note 42, pp.708 et seq.

variety of goods in the supermarket and the facilitated residence of immigrated 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 migration law. The legal instruments on protection from discrimination enacted under Article 13 TEC also serve the purpose of cultural diversity.[53] The prohibition of discrimination unfolds its protection especially in areas relevant to diversity and sensitive for identity like the law of names.[54] 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.[55]

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 of to what extent the pertinent jurisprudence is inspired by the law of the Council of Europe.[56] 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

[53] Olivier De Schutter and Annelies Verstichel, "The Role of the Union in Integrating the Roma: Present and Possible Future", in 2 *European Diversity and Autonomy Papers – EDAP* (2005), at www.eurac.edu/edap.
[54] ECJ, Case C-148/02, *Garcia Avello*, Judgment of 2 October 2002, ECR I-11613, para. 40. On this, see Ulrich Haltern, *Europarecht und das Politische* (Mohr Siebeck, Tübingen, 2005), pp. 372 et seqq.; this conforms to the logic of Article 11(1) of the Framework Convention for the Protection of National Minorities.
[55] General Comment No. 23, *supra* note 31, para. 6.2.; Sina van den Bogaert, "State Duty Towards Minorities: Positive or Negative? How Policies Based on Neutrality and Non-discrimination Fail", in 64 (1) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), pp. 37-64, 42.
[56] On the interaction of the courts see Laurent Scheeck, "The relationship between the European courts and integration through human rights", 65 (4) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 65 (2005), pp. 837-886.

of power towards the Member States: the general protection of fundamental rights against national measures (Part III).

Another debate concerns a global diversity policy by the Union, especially within UNESCO and the WTO. Here the focus is on the position of the Union in the process of globalisation and the formulation of a counter-position to the United States of America. From an instrumental perspective it shall 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 (Part IV).

II. The EU as Situation: No Protection of National Cultures by International Law

The concern for the diversity of national cultures nurtures reservations towards European integration. It seems particularly relevant for cultures only represented by few people like the Maltese, Slovenian, or Cypriot. This concern could endanger the current level of integration if strong national forces came to conceive the Europeanisation and thus the convergence of national cultures as threatening the state's unity.[57] Of course it can be doubted whether this connection of a nation state with a national culture is convincing; not only a few authors regard it as anachronistic, even dangerous.[58] This philosophical question is however not the topic of this paper. 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?[59] Can a scientist whose grant application is not being processed by the European Research Council because it is not composed in English,

[57] In this sense, Georg Jellinek focuses his analysis of the minority problem on their potential to disrupt the political collective; see Jellinek, *supra* note 15.
[58] Habermas, *supra* note 23.
[59] Such an attack is under way; see the legal action before the Federal Constitutional Court of Germany by Peter Gauweiler, at http://www.petergauweiler.de/pdf/PresseerklaerungEUVerfassung31.10.06.pdf (24 April 2007). Apart from the German Federal Constitutional Court, the European Court of Human Rights or the Human Rights Committee could be further instances of legal protection.

but in German, Polish, or Slovenian, defend himself or herself with the help of international law, or can at least the Member State concerned do this?[60]

1. The Sovereignty of the Member States

The most important institution of international law protecting national cultures against uniformisation from the outside is national sovereignty. In the classical understanding the sovereign nation state constitutes – similar to a cheese cover – an overarching unity[61] in and through which a national culture reaches its highest development.[62] Sovereignty in international law protects the state against interference from the outside and allows for cultural individualism.[63] Accordingly, the aspiration for affirmation of the cultural peculiarity of a group often implies the claim for statehood. 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 voluntary association of sovereign states rather constitutes an expression of their sovereignty.[64] Sovereignty in international law even allows for the fusion of one state with another to form a unitary state.[65] Sovereignty only maintains

[60] Decision No. 1982/2006/EC of the European Parliament and of the Council of 18 December 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 January 2007, http://erc.europa.eu/pdf/ ideas-wp-final.pdf (24 April 2007); on the language question Álvaro de Elera, "The European Research Area", in 12 (5) *European Law Journal* (2006), pp. 559-574; on this problem, see also Rainer J. Schweizer and Wolfgang Kahl, "Sprache als Kultur- und Rechtsgut", 65 *VVDStRL* (2006), pp. 346-465, 386; on the (meager) possibilities for legal protection cf. ECJ, Case C-361/01 P, *Kik v. Office for Harmonisation in the Internal Market*, Judgment of 9 September 2003, I-08283.

[61] In detail Friedrich Meinecke, *Weltbürgertum und Nationalstaat* (Oldenbourg, Munich, 2nd edition, 1911), p. 7; Karl Doehring, *Völkerrecht* (Müller, Heidelberg, 2nd edition, 2004), marginal number 779.

[62] The idea of the key role of the state underlies the UNESCO Diversity Convention, cf. esp. Articles 1, 2, 5, and 6.

[63] For a classic formulation, see Permanent Court of International Justice, Judgment of 7 September 1927, S.S. Lotus, Series A, No. 10. On the discussion Dahm, Delbrück, and Wolfrum, *supra* note 31, Vol. I/1, pp. 218 et seqq.; Ulrich Haltern, *Was bedeutet Souveränität?* (Mohr Siebeck, Tübingen, 2007), pp. 75 et seqq.

[64] See for example Piotr Tuleja, "Grundlagen und Grundzüge staatlichen Verfassungsrechts: Polen", in Armin von Bogdandy, Pedro Cruz Villalón, and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum*, Vols. I-II (Müller, Heidelberg, Vol. I 2007, Vol. II forthcoming 2008), Vol. I, § 8 marginal number 62; Stanislaw Biernat, "Offene Staatlichkeit: Polen", ibid., Vol. II, § 21 marginal number 40.

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

relevance in view of a possible withdrawal from the EU which may, in an extreme case, serve the protection of cultural diversity.[66]

At the most it may be considered whether cultural diversity as a general principle of international law restricts sovereign freedom.[67] The understanding, propagated by UNESCO, of cultural diversity as common heritage of mankind,[68] i.e. as universal collective value,[69] 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 was concluded. Yet cultural diversity as a concern of international law appears as 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.[70] 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.

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[66] In detail Albrecht Randelzhofer, "Staatsgewalt und Souveränität", in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts*, Vol. II (Müller, Heidelberg, 3rd edition, 2004), § 17, pp. 143-161, 158; Jean-Victor Louis, "Le droit de retrait de l'Union européenne", 42 (3-4) *Cahiers de Droit Européen* (2006), pp. 293-314; Armin von Bogdandy, "Constitutional Principles", in *idem* and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart, Oxford et al., 2006), pp. 3-52, 30.

[67] On the axiomatic question as to the limitation of freedom of action under international law Stefan Kadelbach and Wladyslaw Czapliński, in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Martinus Nijhoff, Leiden et al., 2006), pp. 21-40, 83-97.

[68] Article 1 of the Universal Declaration on Cultural Diversity, *supra* note 32; Second recital of the Diversity Convention, *supra* note 16; the Preamble of the ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, UNTS 1650 (1991), pp. 383 et seqq.; the Preamble of the UN Draft Declaration on the Rights of Indigenous Peoples, UN Doc. A/HRC/1/L.3 (23 June 2006).

[69] On the notion of "common heritage of mankind" Rüdiger Wolfrum, *Internationalisierung staatsfreier Räume* (Springer, Berlin et al., 1984), pp. 336 et seqq.; *idem*, "Common Heritage of Mankind", in Rudolf Bernhardt (ed), *EPIL*, Vol. I/2 (North-Holland, Amsterdam et al., 1992), pp. 692-695; Kemal Baslar, *The Concept of the Common Heritage of Mankind in International Law* (Nijhof, The Hague et al.; 1998), pp. 38 et seqq.; Christopher C. Joyner, "The Legal Implications of the Concept of Common Heritage of Mankind", 35 (1) *International and Comparative Law Quarterly* (1986), pp. 190-199.

[70] Remarkable: the adversary proceedings *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, Panel Report WT/DS90/R of 6 April 1999 and Appellate Body Report WT/DS90/AB/R of 23 August1999 concerning the limits of regional integration in the light of the WTO; in detail Armin von Bogdandy and Tilman Makatsch, "Collision, Co-existence or Co-operation? Prospects for the Relationship between WTO Law and European Union Law", in Gráinne de Búrca and Joanne Scott (eds), *The EU and the WTO* (Hart, Oxford et al., 2001), pp. 131-150.

2. The Right to Self-Determination of the Member Peoples

The right to self-determination of all peoples stipulated in the common Article 1(1) of both Human Rights Covenants explicitly includes the right to cultural development.[71] 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, not rarely is the Union considered an elitist 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 decolonisation. But there are remarkable approaches to giving it additional contents, especially with regard to the protection of groups in larger political entities;[72] 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,[73] many aspects relevant for our topic are undisputed. Thus only its inner dimension can possibly be concerned, since external self-determination is mostly recognised only for colonised peoples.[74] The internal right to self-determination provides, according to numerous scholarly voices, parameters for two issues. First of all the democratic organisation of state powers is concerned. Secondly there are attempts, and this alone is the focus of interest here,[75] to infer from the right

[71] On the right to self-determination in this perspective Eibe Riedel, Gruppenrechte und kollektive Aspekte individueller Menschenrechte, *Berichte der Deutschen Gesellschaft für Völkerrecht* 33 (1994), pp. 49-82, 55 et seqq.
[72] The development can be seen clearly in Daniel Thürer, *Das Selbstbestimmungsrecht der Völker* (Staempfli, Zürich, 1976), with an excursus to the legal question still entirely focused on decolonisation; in comparison to Daniel Thürer, Addendum 1998 on Self-Determination, in Bernhardt (ed), *supra* note 69, Vol. IV, 2000, pp. 370 et seqq.; concise on the state of affairs Nicola Wenzel, *Das Spannungsverhältnis zwischen Gruppenschutz und Individualschutz im Völkerrecht*, (Springer, Berlin, forthcoming 2007).
[73] In detail Martti Koskenniemi, National Self-Determination Today: Problems of Legal Theory and Practice, 43 (2) *International and Comparative Law Quarterly* (1994), pp. 241-269.
[74] Canadian Supreme Court, Secession of Quebec, 20 August 1998, para. 111 et seqq., 138, http://scc.lexum.umontreal.ca/en/1998/1998rcs2-217/1998rcs2-217.html (20 March 2007); on the distinction between internal and external self-determination cf. Committee Against Racial Discrimination, General Recommendation 21 on the Right to Self-Determination (23 August 1996), § 4; on possible exceptions because of grave repression Karl Doehring, Self-Determination, in Bruno Simma (ed), *The Charter of the United Nations: A Commentary*, Vol. I (Oxford University Press, Oxford, 2nd edition, 2002), Introductory Remark to Article 2, marginal number 40; Dietrich Murswiek, The Issue of a Right to Secession – Reconsidered, in Christian Tomuschat (ed), *Modern Law of Self-Determination* (Martinus Nijhoff, Dordrecht et al., 1993), pp. 21, 27, 37; skeptical Gaetano Pentassuglia, "State Sovereignty, Minorities and Self-Determination", in 9 (4) *International Journal on Minority and Group Rights* (2002), pp. 303-324, 311.
[75] Certainly minority protection can also be seen as being an aspect of the democratic principle; see in detail Part III.

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 respective 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 indigenous peoples at the most,[76] 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.[77] 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. Solely the possible role of the topos "cultural diversity" in such reasoning shall 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.

3. Article 27 ICCPR

Nonetheless, the Member States are not entirely free under international law in designing the European Union. As has been repeatedly emphasised by the ECHR, they are subject to human

[76] Wenzel, *supra* note 72, end of Chapter 2, footnote 336 and accompanying text.
[77] On this Thomas M. Franck, Individuals and Groups as Subjects of International Law, in Rainer Hofmann (ed), *Non-State Actors as New Subjects of International Law* (Duncker & Humblot, Berlin, 1999), pp. 97-113, 110 et seqq.

rights obligations; this includes guarantees protecting cultural pluralism.[78] The protection of culture is ensured in particular by Article 27 ICCPR.

The EU Member States, all parties to the Covenant, are bound to Article 27 ICCPR when shaping the Union through primary law; it is furthermore generally recognised that the Union constitutes a legal entity to which the Covenant applies.[79] However, Article 27 ICCPR contains the portentous notion of "state". The Union would have to be a state to fall within the scope of application of the norm. The state quality of the Union is mostly rejected.[80] Yet every legal term has to be interpreted in its specific context and in view of the specific legal question. Article 27 ICCPR is not about the Union as 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 *state* in the sense of Article 27 ICCPR.

Far more critical is the question of 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,[81] 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.[82] In this understanding the nations in the Union do not constitute minorities in the sense of the provision, since in the Union there does not exist a compact majority, no majority culture and above all no

[78] For a summary of jurisprudence see Geoff Gilbert, "The burgeoning minority rights jurisprudence of the European Court of Human Rights", 24 (3) *Human Rights Quarterly* (2002), pp. 736-780; *Florence Benoît-Rohmer*, La Cour Européenne des Droits de l'Homme et la défense des droits des minorités nationales, 13 (51) *Revue Trimestrielle des Droits de l'Homme* (2002), pp. 563-586.
[79] ECJ, Case C-540/03, *European Parliament v. Council of the European Union*, *supra* note 51.
[80] Differing: Jörn Sack, "Die Staatswerdung Europas - kaum eine Spur von Stern und Stunde", 44 (1) *Der Staat* (2005), pp. 67-98; Detlev Christian Dicke, *Das Verhältnis der Schweiz zum real existierenden Westeuropäischen Bundesstaat* (Schulthess Polygraph. Verlag, Zürich, 1991), pp. 51 et seqq.; Giandomenico Majone, The European Community as a Regulatory State, in Academy of European Law (ed), *Collected Courses of the Academy of European Law, Vol. V Book 1* (Kluwer Law International, Den Haag, 1994), pp. 321-419; on the counterposition Armin von Bogdandy, "The Prospect of a European Republic: What European Citizens Are Voting On", 42 (4) *CMLRev*. (2005), pp. 913-941, 921 et seqq.
[81] On the positions cf. footnote 31 above.
[82] In the case *Ballantyne* there is consent that the notion of minority of Article 27 ICCPR requires the opposition to a majority society; see Human Rights Committee, UN Doc. CCPR/C/47/D/359/1989, *Ballantyne*, Decision of 5 May 1993, § 11.2 – cf. also the individual opinions of the Committee members *Evatt*, *Ando*, *Bruni Celli*, and *Dimitrijevic*, ibid. Appendix E.

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.[83] Romano Prodi, as President of the Commission, sometimes called the Union a "Union of minorities".[84] Although the term of minority suggests that the group is opposed to a majority, it is not absurd that this majority should be composed of other minorities.[85] 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.[86] This focuses the attention on the institutional and procedural set-up of the European Union, whose polycentric and dialogical logic can be summarised 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 Commission's) is sought. The voting rules, especially in Article 205(2) TEC, are designed in such a way that so far, even with regard to majority decisions, a permanent controlling position of individual states or groups of states has not come about.[87] The dialogical and polycentric logic also underlies the procedures in which the decisions

[83] Rainer M. Lepsius, Die Europäische Union als Herrschaftsverband eigener Prägung, in Christian Joerges, Yves Mény, and Joseph H.H. Weiler (eds), *What Kind of Constitution for What Kind of Polity?* (European University Institute & Harvard Law School, Florence, Cambridge, MA, 2000), pp. 203-221, 210 et seqq.
[84] Reference in Gabriel N. Toggenburg, "Minorities (…) the European Union: Is the Missing Link an 'of' or a 'within'?", in 25 (3) *European Integration* (2003), pp. 273-284, 275.
[85] Manfred Nowak, *CCPR Commentary* (Engel, Kehl et al., 2nd edition, 2005), Article 27, marginal number 16.
[86] Dahm, Delbrück, and Wolfrum, *supra* note 31, Vol. I/2, p. 277.
[87] On the procedural practice see Mikko Mattila, "Contested Decisions: Empirical Analysis of Voting in the EU Council of Ministers", in 43 (1) *European Journal of Political Research* (2004), pp. 29-50; George Tsebelis and

are made. Basically all important decisions are made under the participation of several institutions: even the European Council lacks the legal instruments as well as the actual power potential to "orchestrate" the cooperation of the different agents. This only allows for a humble degree of political unification, resulting in the Union being constituted, far more than federal states, in a diversity-preserving way, a defining feature of the European composite federalism.[88]

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,[89] just like the fact that increasing importance is attached to the subjective element, i.e. that a minority only exists if the group perceives itself as minority.[90] There are no indications for such a self-perception of the European nations.[91]

Against this background an application of Article 27 would only seem justified if the notion of minority was, for the purpose of promoting diversity, interpreted broadly in a way 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[92] cannot be applied with regard to nations, the peoples of the EU Member States.

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

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Xenophon A. Yataganas, "Veto-Players and Decision-Making in the EU After Nice", in 40 (2) *Journal of Common Market Studies* (2002), pp. 283-307.

[88] In detail Philipp Dann, *Parlamente im Exekutivföderalismus* (Springer, Berlin, 2004).

[89] Tomuschat, *supra* note 32, p. 958.

[90] Hans Joachim Heintze, "On the Legal Understanding of Autonomy", in Markku Suksi (ed), *Autonomy: Applications and Implications* (Kluwer Law International, Den Haag, 1998), pp. 7-32, 23.

[91] Up to now, the treaty practice regarding Article 27 ICCPR is still light-years away from the fate of national cultures in the integration process; cf. Human Rights Committee, UN Doc. CCPR/C/13/D/24/1977, *Lovelace*, Decision of 30 July 1981; UN Doc. CCPR/C/22/D/78/1980, *Mikmaq Tribal Society*, Decision of 29 July 1984; UN Doc. CCPR/C/33/D/197/1985, *Kitok*, Decision of 10 August 1988; UN Doc. CCPR/C/52/D/511/1992, *Länsman*, Decision of 8 November 1994; UN Doc. CCPR/C/60/D/612/1995, *Jose Vicente et al.*, Decision of 29 July 1997.

[92] Bundesgesetzblatt II 1997 p. 1408.

international law framework. International law as developed above remains silent on these issues.

III. The Union as Regional Executive of the International Law of Cultural Pluralism

1. 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.[93] This section specifically deals with the interrelation between national and supranational institutions, non-state actors, procedures and instruments for the realisation of the public good of "cultural diversity", in which the Union, even without competences, builds up considerable pressure on states to realise this public goal and to implement the respective international law.[94]

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 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.

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[93] Arthur Benz, "Governance in Mehrebenensystemen", in Gunnar Folke Schuppert (ed), *Governance-Forschung* (Nomos, Baden-Baden, 2nd edition, 2006), pp. 95-120; Hans-Heinrich Trute, Wolfgang Denkhaus, and Doris Kühlers, "Governance in der Verwaltungsrechtswissenschaft", in 37 (4) *Die Verwaltung* (2004), pp. 451-473. 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.

[94] On the pertinent agreements cf. Georg Nolte, "Das Völkerrecht vor der Herausforderung der kulturellen Vielfalt", in *Berichte der Deutschen Gesellschaft für Völkerrecht* (forthcoming 2007).

2. 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 population, and the tensions concerning Hungarian minorities.[95]

Initially the Conference on Security and Cooperation in Europe[96] was the central institution for the settlement of conflicts between majorities and minorities in these countries.[97] However, in 1991 at the latest it became clear that the CSCE alone, for lack of sufficient standards[98] and effective enforcement mechanisms, could not provide for a satisfactory situation.[99] In 1993 the relevant Western European forces agreed upon a form of governance which would merge the legal, organisational, and legitimising resources of diverse European organisations 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,[100] 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

[95] Furthermore, the sometimes dramatic situation of the Romanies has attracted continuous attention; on this Rüdiger Wolfrum, "The legal status of Sinti and Roma in Europe; a case study concerning the shortcomings of the protection of minorities", in 33 (3) *Annuaire européen* (1985), pp. 75-91; Rachel Guglielmo, "Human Rights in the Accession Process: Roma and Muslims in an Enlarging EU", in Toggenburg (ed), *supra* note 47, pp. 37-58.

[96] Helsinki Final Act, 01 August 1975, http://www.osce.org/documents/mcs/1975/08/4044_en.pdf (02 April 2007).

[97] The commencement is marked by the Concluding Document of 15 January 1989 of the Vienna follow-up Meeting of 1986 (numerals 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 (numerals 30-40), but also in the Charter of Paris of 21 November 1990 (p. 5 et seq.).

[98] No CSCE/OSCE decision can be qualified as international legal commitment; see Christiane Höhn, *Zwischen Menschenrechten und Konfliktprävention: Der Minderheitenschutz im Rahmen der Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE)* (Springer, Heidelberg, 2005), pp. 211 et seqq.; Thomas Buergenthal, "The CSCE Rights System", in 25 (2) *George Washington Journal of International Law and Economics* (1991), pp. 333-386, 378; against the predominant opinion however are Stephan Breitmoser and Dagmar Richter, "Die Verwirklichung der KSZE-Grundsätze zum Schutze nationaler Minderheiten durch Organleihe beim EGMR", 18 (8/9) *EuGRZ* 1991, pp. 141-158, qualifying part of the CSCE/OSCE decisions relevant to minority protection as non-universal general principles of law.

[99] See http://www.uni-koeln.de/jur-fak/ostrecht/minderheitenschutz/Vortraege/internationaler_minderheitenschutz_brunner.htm (24 April 2007).

[100] Conclusions of the Presidency of 21-22 June 1993 (SN 180/1/93), p. 13.

Ministers of the Council of Europe with the development of a proper legal regime of minority protection.[101] On this basis, a system of governance has been developed in the following years whose institutional pillars 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 organisations can be understood in the sense that they cooperatively formulate and implement Western European ideas regarding the treatment of minority cultures by the transformation countries.[102]

a. Tenets, Institutions, Functions, and Instruments

This *diversity governance* can be comprehended on the basis of its tenets, institutions, and functions.[103] The (non-legal) tenets of supranationality, multilateralism, inclusion, voluntariness, differentiation, and collective hegemony allow for a first comprehension. The *diversity governance* has a supranational and multilateral character since its operational institutions are the three supranational and multilateral organisations 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.[104] 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 organisations in which the transformation countries were already equal members; here also may exist 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 organisation.[105] 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

[101] 2nd bullet point of theVienna Declaration of 09 October 1993, http://www.coe.am/en/docs/summits/vienna_summit.pdf (30 March 2007).
[102] On the interaction of the organisations Gabriel N. Toggenburg, "The Union's Role vis-à-vis Minorities. After the Enlargement Decade", EUI Working Papers, Law No. 2006/15, pp. 24 et seqq., cadmus.iue.it/dspace/bitstream/1814/4428/1/LAW+2006.15.pdf (27 March 2007).
[103] 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.*
[104] Bartram S. Brown, *The United States and the Politicization of the World Bank* (Kegan Paul, London, 1992).
[105] Para. 2 of the Mandate of the High Commissioner on National Minorities, Helsinki Document, http://www.osce.org/documents/mcs/1992/07/4046_en.pdf (01 June 2007), pp. 22 et seqq.

political goal of the transformation countries: the accession to the European Union. Another tenet having led to much criticism is that of differentiation: the Western European states, but also Greece and Turkey, are not subjected to the *diversity governance* in the same way as are the transformation countries.[106] 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*.[107]

Institutionally this *diversity governance* rests on the three supranational organisations the European Union, the Council of Europe, and the OSCE.[108] It becomes operative through a series of institutions disposing of greatly varying degrees of autonomy with respect to the national governments: the spectrum reaches 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,[109] but with the modification that these conventional functions be exercised unconventionally in a context that is not institutionalised. Accordingly, the legislative function is allocated to diverse institutions. The normative foundational legislative act of this *governance* is the EU Treaty, more precisely the accession criteria to the European Union of Article O TEU with its initially unwritten substantive criteria that, since Amsterdam, are laid down in Article 6(1) TEU.[110] This displays the

[106] An early suggestion to put down the standards in a protocol to the European Convention of Human Rights and to submit them to the European Court of Human Rights was unsuccessful; see on this 3.b. below.
[107] Robert Cooper, *The breaking of nations* (Atlantic Books, London, 2003), pp. 71 et seq.
[108] This is not to say that there existed no tensions between these organisations. In particular the Council of Europe has observed the expansion of the EU with obvious concern.
[109] On this approach Möllers, *supra* note 8, pp. 253 et seqq.; Armin von Bogdandy, "Law and Politics in the WTO", in 5 *Max Planck Yearbook of UN Law* (2001), pp. 609-674.
[110] However, the criteria of Article O in conjunction with Article 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, numeral 1.

hegemonic tenet. A first stage of concretion takes place, now inclusively,[111] through the Framework Convention for the Protection of National Minorities, elaborated by the Council of Europe in the years 1993 until 1995.[112] 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.[113] The further legislative concretion takes place through soft law instruments of diverse institutions. Of specific importance is the OSCE soft law instrument of General Recommendations;[114] the preponderance of the OSCE can be explained by the fact that the transformation countries have participated from the beginning in this organisation. This participation fosters the legitimacy of the recommendations. Moreover, there are Recommendations by the Committee of Ministers of the Council of Europe[115] as well as by its Parliamentary Assembly.[116]

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 the legislators of the transformation

[111] 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, also because of a lack of competence; it needs a competence also for the formulation of international legal agreements: cf. Articles 24, 38 TEU. On the reasons for the lack of a respective competence see 3.a. below.

[112] Framework Convention of 1 February 1995, entered into force on 1 February 1998; in detail on the negotiations Rainer Hofmann, *Minderheitenschutz in Europa. Völker- und staatsrechtliche Lage im Überblick* (Gebr. Mann, Berlin, 1995), pp. 200 et seqq.; on the added value of the Framework Convention Sia Spiliopoulou Åkermark, *The added value of the FCNM. The Framework Convention for the Protection of National Minorities: a useful Pan-European instrument?* (forthcoming).

[113] Gwendolyn Sasse, "Minority Rights and EU Enlargement: Normative Overstretch or Effective Conditionality?", in Toggenburg (ed), *supra* note 47, pp. 59-83, 68, 72. The European Charter for Regional or Minority Languages, which only had 21 parties by the end of February 2007, only plays a subordinate role in this *governance*.

[114] Cf. esp. 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 at www.osce.org/hcnm/documents/.

[115] Cf. esp. 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; documents at www.coe.int/T/CM/WCD/advSearch_en.asp (24 April 2007).

[116] Cf. esp. 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; documents at www.coe.int/T/CM/WCD/advSearch_en.asp (24 April 2007).

countries and sometimes even takes them by the hands.[117] It is a remarkably hybrid body: formally an institution of the Council of Europe, but demonstratively acting independently, and its personnel made up in a way 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.[118]

The executive or implementing function of the European *diversity governance* is distributed between just as many institutions. In the centre is again the European Union, with the central mechanism being – seemingly typical 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.[119] 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 of all, 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.[120] Because of his autonomy, the High Commissioner on National Minorities is of special interest for the executive aspects of the *governance*.[121] He can act on his own initiative in a crisis,[122] something he is particularly suited

[117] In detail Steffen Rülke, *Venedig-Kommission und Verfassungsgerichtsbarkeit* (Heymanns, Cologne et al., 2003); Jeffrey L. Jowell, "The Venice Commission: Disseminating democracy through law", in *Public law* (2001), pp. 675-683.
[118] Galbreath, *supra* note 5, pp. 44 et seq.; Margit Sarv, "Integration by Reframing Legislation: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Estonia, 1993-2001", in Wolfgang Zellner, Randolf Oberschmidt, and Claus Neukirch (eds), *Comparative Case Studies on Effectiveness of the OSCE High Commissioner on National Minorities* (Core-Working Paper 7, Hamburg, 2002), pp. 29 et seqq., 41 et seqq., 47 et seqq.
[119] Karen E. Smith, "Western Actors and the Promotion of Democracy", in Jan Zielonka and Alex Pravda (eds), *Democratic Consolidation in Eastern Europe: Volume 2: International and Transnational Factors* (Oxford University Press, New York, 2001), pp. 31-57; Jan Zielonka, "Conclusions. Foreign Made Democracy", in ibid., pp. 511-532.
[120] Article 26 Framework Convention; in detail Rainer Hofmann, "Das Überwachungssystem der Rahmenkonvention des Europarates zum Schutz nationaler Minderheiten", in 2 (3) *ZEuS* 1999, pp. 379-392.
[121] For an extensive analysis of the role of the OSCE and of its High Commissioner, see Galbreath, *supra* note 5, pp. 36, 40 et seqq.
[122] Para. 3 of the Mandate of the High Commissioner on National Minorities, Helsinki Document, pp. 22 et seqq.

to do, being a monocratic institution. This compensates the cumbersomeness of the European Union with regard to foreign affairs, but also the operative weakness of the Council of Europe.

The European *diversity governance* is thus relatively well positioned regarding the legislature and the executive. In accordance with the traditional doctrine on functions, the analysis needs to be concluded with the judiciary. Here appears a striking gap. No transformation state has the possibility to obtain judicial protection against encumbering decisions taken within the framework of the European *diversity governance*: there is neither a judge for the general allegation of discrimination, nor for specific discriminations due to domestic policy opportunism of influential Western European states.[123] Regarding individuals and groups, i.e. those allegedly affected by cultural diversity, there is not only 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.[124] Besides, no functional equivalent, like an ombudsman or an arbitration board, is provided for. This as well is typical of *governance*; nevertheless the doubts burgeon as to whether the driving forces of this *diversity governance* really seek the full realisation 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 under the category of conditionality,[125] an established instrument in the framework of *governance*.

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

[124] Rainer Hofmann, "The Framework Convention for the Protection of National Minorities: An Introduction", in Marc Weller (ed), *The Rights of Minorities in Europe* (Oxford University Press, Oxford, 2005), pp. 1-24, 5.

[125] In detail Karen E. Smith, "The use of political conditionality in the EU relations with third countries", in 3 (2) *EFA Rev.* (1998), pp. 253-274; Heather Grabbe, *The EU's transformative power: Europeanization through conditionality in Central and Eastern Europe* (Palgrave Macmillan, Basingstoke, 2006); more nuanced: James Hughes, Gwendolyn Sasse, and Claire Gordon, "Conditionality and Compliance in the EU's Eastward Enlargement: Regional Policy and the Reform for Sub-national Governance", in 42 (3) *Journal of Common Market Studies* (2004), pp. 523-551.

Certainly, so far there has been no comprehensive doctrinal reconstruction of this subject;[126] but there are remarkable approaches with respect to conditionality being an instrument of the World Bank.[127] This instrument has systematically been used by the EU for the safeguarding of international human rights since 1991.[128] Contrary to the conditionality of the International Monetary Fund, this conditionality has a base in international law, since it derives from treaties concluded with candidate countries.[129] Since the transformation countries ratify these treaties on the basis of a parliamentary act of assent, the legitimacy of this conditionality is higher than that of the Monetary Fund, where usually the conditions are not subject to parliamentary control.[130]

b. 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, the 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 upon 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 does not infringe upon the principle of sovereign equality either.[131] Similarly, the selective application of international minority instruments on the transformation countries does

[126] In detail Eberhard Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungsidee. Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung* (Springer, Berlin, Heidelberg, 2nd edition, 2004), pp. 235 et seqq.
[127] Philipp Dann, "Grundfragen eines Entwicklungsverwaltungsrechts", in Christoph Möllers, Andreas Voßkuhle, and Christian Walter (eds), *Internationales Verwaltungsrecht* (forthcoming 2007).
[128] Declaration on Human Rights (Luxembourg European Council, 28/29 June 1991), Annex V, EC Bull 6.1991, I. 45; on this Frank Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (Springer, Berlin, Heidelberg, 1998), p. 103.
[129] For example Article 2 of the Stabilisation 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 No. L 26/3.
[130] Peter Lucke, *Internationaler Währungsfonds* (Lit, Münster, 1997), p. 97.
[131] On the threshold of legal relevance cf. *Yearbook of the International Law Commission*, 1966, Vol. II, pp. 245 et seqq.; Ralf Günter Wetzel and Dietrich Rauschning (eds), *The Vienna Convention on the Law of the Treaties: Travaux Préparatoires* (Metzner, Frankfurt am Main, 1978), pp. 357 et seqq.

not violate the principle of the sovereign equality of states, as the United Nations Charter with its Security Council vividly demonstrates.

Politically, the 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.[132] But this allegation misconceives the fact that the necessity for an effective implementation of international minority protection was, at least in the nineties, of a different nature in the transformation countries than it was in Western Europe. In contrast to the West, there was the well-founded danger of severe conflicts which might have even 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 than in the West, as the nineties prove in many cases.

The assessment is more critical under the aspect of output legitimacy, i.e. the success of this *governance*.[133] Certainly it succeeded in establishing the protection of 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 realisation of the international standards generally only took place 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:[134] 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

[132] Martin Krygier, "Introduction", in Wojciech Sadurski, Adam Czarnota, and Martin Krygier (eds), *Spreading Democracy and the Rule of Law?: The Impact of EU Enlargement on the Rule of Law, Democracy and Consitutionalism in Post-Communist Legal Orders* (Springer, Dordrecht, 2005), pp. 3-24, 12; this accusation has already been raised against the minority protection system established between the two World Wars; on this Anna Meijknecht, "The Minority Protection System between World War I and World War II", in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law, C 1* (forthcoming 2008).

[133] 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 Gertrude Lübbe-Wolff, *Rechtsfolgen und Realfolgen* (Alber, Freiburg, 1981); particularly with regard to diversity protection, see Sasse, *supra* note 113, pp. 61, 71.

[134] In detail with regard to Croatia, see Rötting, *supra* note 123, B IV 4 b; with regard to Hungary, see Sasse, *supra* note 113, p. 74.

convincingly ascribes this to a series of specifics in the European minority policy.[135] According to her, the coordination 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.[136] The willingness of the transformation countries is often low, since they see themselves as being subjected 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 realisation 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[137] before their accession to the European Union leads to the monumental question as to whether and, if necessary, how the Union should assert and, where necessary, implement the relevant standards with regard to its Member States.

3. The Promotion of Cultural Diversity in the Member States

a. 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 harmonise the diversity management law of the Member States: too profound is the interest of the Member States in their independence from the Union, not least for the purpose of preserving constitutional diversity and

[135] Sasse, *supra* note 113, pp. 64 et seqq.; more positively Herbert Küpper, "Minority Rights", in Ferdinand J. M. Feldbrugge (ed), *Law in Transition* (Nijhoff, Den Haag, 2002), pp. 81-98, 88.
[136] This has been traced in detail by the E.U. Network of Independent Experts on Fundamental Rights, Thematic Comment No. 3: The Protection of Minorities in the European Union, 25 April, CFR-CDF.ThemComm2005.en. http://ec.europa.eu/justice_home/cfr_cdf/doc/thematic_comments_2006_en.pdf (02 April 2007).
[137] 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 September 2006, pp. 8, 25 et seq., 47 et seq., 57.

national identity.[138] It is one of the premises of the 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.[139]

This may be clarified by means of the following considerations. Regarding the 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 – in South Tyrol.[140] It remains in the discretion of every Member State to decide upon which person it wants to incorporate in its collective; the citizenship of the Union is based on an unchallenged national citizenship.[141] The cultural and educational policy as a key instrument of national unification eludes harmonisation 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 the 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.[142] But this hardly constrains the Member States' freedom in the core fields of national unification.[143] Similar degrees of autonomy vis-à-vis the Union exist regarding the 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

[138] In detail Armin von Bogdandy, "Zweierlei Verfassungsrecht. Europäisierung als Gefährdung des gesellschaftlichen Grundkonsenses?", in 39 (2) *Der Staat* (2000), pp. 163-184.
[139] Joseph H. H. Weiler, "Fundamental rights and fundamental boundaries", in *idem*, *The Constitution of Europe* (Cambridge University Press, Cambridge, 1999), pp. 102-129. This does not preclude some Member States from aligning their fundamental rights with European parameters; on this Peter M. Huber, "Offene Staatlichkeit: Vergleich", in von Bogdandy, Cruz Villalón, and Huber (eds), *supra* note 64, Vol. II, § 26 pp. 98 et seqq.
[140] The ECJ is accordingly very cautious; cf. Case C-432/1992, *Anastasiou I*, Judgment of 5 July 1994, ECR 1994 I-3116, para. 47. Even in the Treaty establishing a Constitution for Europe there is only a feeble reference to minorities and diversity within the states (Article I-2 TCE); it does not provide for competences.
[141] Stefan Kadelbach, "Union Citizenship", in von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law*, supra note 14, pp. 453-499, 462; ECJ, Case C-200/02, *Chen*, Judgment of 19 October 2004, ECR 2004, p. I-09925, paras. 37-39. The Network however wants to apply the Discrimination Directive 2000/43/EC here and prevent a discriminatory naturalisation policy; see E.U. Network of Independent Experts on Fundamental Rights, *supra* note 136, pp. 20 et seqq.
[142] Examples of the abundant jurisprudence are ECJ, Case C-184/99, *Grzelczyk*, Judgment of 20 September 2001, ECR 2001, p. I-6193, para. 46; Case C-209/03, *Bidar*, Judgment of 15 March 2005, ECR 2005, p. I-2119, para. 56.
[143] See the seminal contribution by Gabriel N. Toggenburg, "Who is Managing Ethnic and Cultural Diversity in the European Condominium?", in 43 (4) *Journal of Common Market Studies* (2005), pp. 717-738.

51(1) of the Charter);[144] the Treaty establishing a Constitution for Europe does not change anything in this regard (Article II-111(1) TCE).

National reservations with regard to international parameters for the national diversity management are nothing specific to the Union but can often be found in the pertinent international law. Here the openness of the notion of minority,[145] 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.[146] 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?".

b. 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. Either national unity and national protection of fundamental rights can principally remain outside the Union's field of activity, or they 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

[144] This is even more restrictive than the jurisprudence; cf. ECJ, Case C-260/89, *ERT*, Judgment of 18 June 1991, ECR 1991, p. I-02925, paras. 41-45; Case C-479/04, *Laserdisken ApS*, Judgment of 12 September 2006, not yet published, para. 61. On the jurisprudence see Jürgen Kühling, "Fundamental Rights", in von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law*, supra note 14, pp. 501-547, 527 et seqq.

[145] Rainer Grote, "The Struggle for Minority Rights and Human Rights: Current Trends and Challenges", in *International Law Today: New Challenges and the Need for Reform?*, pp. 221-246 (forthcoming 2008).

[146] This was the approach however of the Austrian draft of an additional protocol to the ECHR of 26 November 1991 and the Bolzano draft by the Federal Union of European Nationalities of an additional protocol to the ECHR; see Hofmann, *supra* note 120, p. 43.

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 for the national identity. As the weakness of the Union's policy with regard to the accession states teaches, a European harmonisation 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 comprise all Member States. This second alternative thus has the potential to substantially modify the federal relationship between the Union and its Member States and to considerably 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.[147] However, there are initiatives by the Commission and the Parliament on the basis of the existing law which are only understandable in the light of the second alternative; they will be outlined in the following.[148]

There are some competences of the Union allowing for approaches to develop a harmonised diversity policy, especially Articles 7(1) and (2), 29, 34(2) TEU, 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. Weiler in a path-breaking work for the European Parliament looking for a fundamental rights policy.[149] The

[147] See third and eighth recitals and Article 2 of the Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53/1; cf. on an extensive interpretation of these provisions Gabriel N. Toggenburg, "Die Grundrechteagentur der Europäischen Union: Perspektiven, Aufgaben, Strukturen und Umfeld einer neuen Einrichtung im Europäischen Menschenrechtsraum", in 12 (1) *MenschenRechtsMagazin* (2007), pp. 86-104, 98 et seqq.

[148] The suggestions of the E.U. Network of Independent Experts on Fundamental Rights, *supra* note 136, show which possibilities exist, based on the current legal situation, for developing this.

[149] Philip Alston and Joseph H. H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy", in Philip Alston (ed), *The European Union and Human Rights* (Oxford University Press, Oxford, 1999), pp. 3-66. Their approach has decisively influenced the *Comité des Sages* and its "Human Rights Agenda for the European Union for

European Union shall 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.[150] Minority policy, migration policy and the policy of non-discrimination in general shall converge in one progressive fundamental rights policy to be implemented not so much by the courts but rather by specialised bureaucracies with the integration of non-governmental organisations.[151]

Institutionally, the emerging EU-internal *diversity governance* mainly rests on EU institutions, particularly the EU Commission, the European Parliament, the E.U. Network of Independent Experts on Fundamental Rights, as well as – until 2007 – on the European Monitoring Centre on Racism and Xenophobia.[152] Still open is to what degree supranational organisations 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 their legal, institutional, and legitimising resources. In this sense Articles 8-10 of the Council Regulation establishing a European Union Agency for Fundamental Rights arrange for a co-operation between the Agency and respective governmental and non-governmental organisations, albeit only within the range of application of Union law.

For a functional outline of the *governance*, the traditional doctrine on functions (separation of powers) can again serve as a guideline. From a legislative aspect, the fundamental act is the EU Treaty, in particular Article 6(1) TEU; insofar reference can be made to the considerations above. Its vague parameters are again partly being operationalised by norms of international law.[153] The recourse to international law thus compensates in this *governance* for the mostly

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the Year 2000. Leading by Example", printed in Philip Alston, ibid., Annex (after p. 917). On this see Armin von Bogdandy, "The European Union as a Human Rights Organization?", in 37 (6) *Common Market Law Review* (2000), pp. 1307-1338, 1310 et seqq. I now correct my critique in the light of the following considerations.

[150] Alston and Weiler, *supra* note 149, pp. 14 et seqq.

[151] Entirely in this sense then is the E.U. Network of Independent Experts on Fundamental Rights, *supra* note 136, in particular pp. 20, 92 et seq. The influence also shows in that the author, Olivier de Schutter, is closely connected with Philip Alston. Philip Alston and Olivier de Schutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart, Oxford, 2005).

[152] Council Regulation (EC) 1035/97, OJ 1997 L 151/1.

[153] The E.U. 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

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 disburdens 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 the Directive 2000/43/EC.[154]

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.[155] For that reason, this *governance* would probably be weaker than the one aimed at the East, since on the supranational and international levels incentives usually work better than disincentives.[156] Reports and other "soft" implementation instruments, known from the method of open coordination, are available as EU-internal implementation instruments, e.g. the identification of "best practices".[157] For many years the European Parliament has been commenting on the situation of minorities in the Member States.[158] Also the Commission has

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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., p. 7.

[154] Council Directive 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, E.U. Network of Independent Experts on Fundamental Rights, *supra* note 136, pp. 7, 62; Article 3(2) of the Council Regulation (EC) No. 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."

[155] On the possibilities of instituting, on the basis of Article 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 October 2003 on Article 7 of the Treaty on European Union: Respect for and promotion of values on which the Union is based, COM (2003) 606, p. 8; Frank Schorkopf, in Eberhard Grabitz and Meinhard Hilf (eds), *Das Recht der Europäischen Union. Kommentar I* (Beck, Munich, 2004; looseleaf: January 2004), Article 7 TEU, marginal number 53 et seqq.

[156] Rüdiger Wolfrum, "Means of Ensuring Compliance with and Enforcement of International Environmental Law", in 272 *Recueil des Cours* (1998), pp. 9-154.

[157] Toggenburg, *supra* note 143, pp. 730, 732.

[158] Resolution of the European Parliament of 16 October 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 February 1983 on measures in favour of minority languages and cultures, OJ 1983 C 68/103; Resolution of the European Parliament of 30 October 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 February 1994 on the linguistic and cultural minorities in the European Community, OJ 1994 C 61/110; Resolution of the European Parliament of 13 December 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 polices in the enlarged EU, OJ 2006 C 222/57-66.

attended to the topic by now.[159] Among the agencies, the European Monitoring Centre on Racism and Xenophobia in particular belonged to this *governance* until 2007.[160] The independent E.U. Network of Experts on Fundamental Rights can be named as a hybrid instrument of this *governance*.[161] 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.[162]

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.[163] As to their integration in 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 the EU-internal *governance* looks slightly better than the one aimed at the East. According to the current jurisprudence regarding Article 230 TEC, there is arguably no possibility 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.[164] 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 by the Member States. It is however conceivable that the ECJ, considerably

[159] Communication from the Commission on Immigration, Integration and Employment of 03 June 2003, COM (2003) 336; Communication from the Commission of 16 July 2004, First Annual Report on Migration and Integration, COM (2004) 508.
[160] Council Regulation (EC) 1035/97, *supra* note 152.
[161] 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 05 June 2001; see Olivier de Schutter and Valérie van Goethem, "The Fundamental Rights Agency: Towards an Active Rights Policy of the Union", in (4) *ERA-Forum* (2006), pp. 587-607, 587, 589.
[162] Gabriel N. Toggenburg, "Menschenrechtspolitik", in Werner Weidenfeld and Wolfgang Wessels (eds), *Jahrbuch der Europäischen Integration* (Nomos, Baden-Baden, 2006), pp. 187-190, 187. Cf. Article 10 of the Council Regulation (EC) No. 168/2007, *supra* note 147.
[163] In detail Stefan Oeter and Alastair Walker, "The Case of the Federal Republic of Germany", in Sia Spiliopoulou Åkermark, Leena Huss, Stefan Oeter, and Alastair Walker (eds), *International Obligations and National Debates: Minorities around the Baltic Sea* (Ålands Islands Peace Institute, 2006), pp. 227-299.
[164] In detail Jürgen Bast, *Grundbegriffe der Handlungsformen der EU* (Springer, Berlin, 2006), pp. 389 et seqq.

extending its current competences, could use the preliminary ruling procedure in order to review, building on the EC fundamental freedoms and the directives on discrimination, national measures for their compatibility with principles of law protecting diversity.[165]

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 TEC concerning employment policy.[166] However, the fact that this *diversity governance* so far has not succeeded 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,[167] 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*. The experience with the *governance* aimed at the East shows that regular and systematic reports are of great importance[168] and that positive data on the situation of minorities and immigrated groups are necessary[169] if this instrument is to have any effect at all.

c. 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,

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[165] What this might look like has been demonstrated by the ECJ in *Carpenter*, Case C 60/00 ECR 2002 p. I-06279; for a critique see Ute Mager, "Dienstleistungsfreiheit und Schutz des Familienlebens, Anmerkung zu der Entscheidung EuGH, Rs. 60/00 - Mary Carpenter", in 58 (4) *JuristenZeitung* (2003), pp. 204-207, 204.

[166] 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 March 2000, 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 March 2002, http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/71025.pdf (13 June 2007); Klaus Höchstetter, *Die offene Koordinierung in der EU* (Nomos, Baden-Baden, 2007), p. 120. The migration policy has initially also been pursued in the mode of open coordination; Communication from the Commission on an open method of coordination for the Community immigration policy of 11 June 2001, COM (2001) 387 final.

[167] On its first application see Presidency Conclusions of the Lisbon European Council of 24 March 2000, *supra* note 166, number 7.

[168] Sasse, *supra* note 113, p. 80.

[169] See in this sense E.U. Network of Independent Experts on Fundamental Rights, *supra* note 136, pp. 12 et seqq., 61 et seq.

minority, or diversity policy by the Union.[170] However, in accordance with the prevailing opinion, a competence in this sense is only required 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 a proceeding before the Council when there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1) TEU, confers upon the Commission a monitoring competence with regard to the Member States. This is confirmed by the fact that a reasoned proposal is required.[171] This monitoring competence with respect to the 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 only make proposals if it is informed about the respective situation in the Member States. Also the decision by the European Parliament to set up a temporary committee examining whether the Member States have infringed upon Article 6 TEU by taking anti-terrorism measures points in this direction.[172] The establishment of an advisory panel like the Network of Experts on Fundamental Rights is covered by the unwritten competence of self-organisation held by any organ, thus also by the Commission.[173]

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 shall ensure the preservation of the normative essentials of the European constitutional area and thus of the Member States' legal order: it

[170] In detail Armin von Bogdandy and Jürgen Bast, in Eberhard Grabitz and Meinhard Hilf (eds), *supra* note 155, (looseleaf: June 2005) Article 5 TEC, marginal number 3, 7 et seq.
[171] Schorkopf, *supra* note 155, Article 7 TEU, marginal number 13; Frank Hoffmeister, "Monitoring Minority Rights in the Enlarged European Union", in Toggenburg (ed), *supra* note 47, pp. 85-106, 87, 103. For an interpretation of Article 7 TEU entirely from the perspective of "federal coercion" see Stelio Mangiameli, La clausola di omogeneità, in *idem* (ed), *L'ordinamento europeo. I principi dell'Unione* (Dott. A. Giuffrè Editore, Milan, 2006), pp. 1-41, 33.
[172] European Parliament decision of 18 January 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.
[173] Bast, *supra* note 164, pp. 362 et seqq.; critical on the mandate for minority protection of the Network Bruno de Witte, "The Constitutional resources for an EU Minority Policy", in Toggenburg (ed), *supra* note 47, pp. 107-124, 109, 155 et seqq.

becomes an *organisation of collective order*.[174] This step has been taken not least in view of the accession of the transformation countries.

In the present context, monitoring is only admissible 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 rooted in the notion of democracy.[175] This understanding of democracy clearly conflicts with that prevalent in many old Member States, where the protection of minorities does not enjoy a similar status, not least for reasons of republican equality.[176] However, the Western European states have advocated such an understanding of democracy vis-à-vis the transformation countries; this now backfires on them. There is the prospect that the 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 firstly requires that an objective cannot be sufficiently achieved by the Member States. The report by the E.U. Network of Independent

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[174] In detail von Bogdandy, "The European Union as a Supranational Federation", *supra* note 14.

[175] This is the Commission's opinion; see footnote 3 of the Commission's Regular Report of 09 October 2002, http://www.fifoost.org/EU/strategy_en_2002/index.php (14 June 2007), cf. also the answer to the question E-2538/01 (Vitorino) OJ 2002 C 147 E/27, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/ce147/ce14720020620en00270028.pdf (14 June 2007), as well as the answer to the question P-0395/02 (Reding), OJ 2002 C 160/214, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/ce160/ce16020020704en02140215.pdf (14 June 2007). Also the jurisprudence of the ECHR indicates that the democracy principle comprises minority rights; ECHR, No. 44158/98, *Gorzelik et al./Poland*, Judgment of 17 February 2004, marginal number 57; ECHR, Nos. 7601/76 and 7806/77, *Young, James and Webster/United Kingdom*, Judgment of 13 August 1981, marginal number 63; ECHR (Grand Chamber), Nos. 25088/94, 28331/95 and 28443/95, *Chassagnou et al./France*, Judgment of 29 April 1999, marginal number 112.

[176] Cf. Giovanni Biaggini, "Grundlagen und Grundzüge staatlichen Verfassungsrechts: Schweiz", in von Bogdandy, Cruz Villalón, and Huber (eds), *supra* note 64, Vol. I, § 10 marginal number 100; Horst Dreier, "Grundlagen und Grundzüge staatlichen Verfassungsrechts: Deutschland", ibid., Vol. I, § 1 marginal number 110; Manuel Medina Guerrero, "Grundlagen und Grundzüge staatlichen Verfassungsrechts: Spanien", ibid., Vol. I, § 11 marginal number 77; Piotr Tuleja, ibid., Vol. I, § 8 marginal number 62; also Pedro Cruz Villalón, "Grundlagen und Grundzüge staatlichen Verfassungsrechts: Vergleich", ibid., Vol. I, § 13 marginal number 107; Leonard F. M. Besselink, "Grundlagen und Grundzüge staatlichen Verfassungsrechts: Niederlande", ibid., Vol. I, § 6 marginal number 125; Gabor Halmai, "Grundlagen und Grundzüge staatlichen Verfassungsrechts: Ungarn", ibid., Vol. I, § 12 marginal number 39; Peter M. Huber, "Offene Staatlichkeit: Vergleich", ibid., Vol. II, § 26 marginal number 19, 42, 48; Catherine Haguenau-Moizard, "Offene Staatlichkeit: Frankreich", ibid, Vol. II, § 15 marginal number 31.

Experts on Fundamental Rights concerning the protection of minorities shows that the situation of minorities and immigrated groups in the Member States of the Union does not always meet the international standards. Moreover, the treatment of some groups, especially the Sinti and Romanies, is sometimes so critical that the threshold of Article 7(1) TEU might 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 can contribute to further the objective. In this respect there are few indications for a well-founded judgment. The *diversity governance* with respect to the transformation countries and findings as to its limited success raise some doubts.[177] 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 according to Article 205(1) TEC, only 14 insightful governments are needed in order to move the Union in this direction.

IV. The Union as a Global Promoter of Cultural Diversity

1. 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.[178] The same holds true for its criteria catalogue concerning the recognition of new states, which comprises

[177] In detail Höchstetter, *supra* note 166, pp. 231 et seqq.

[178] Since the Luxembourg European Council of 1991, the human rights conditionality has been an integral component of the EC foreign policy; see in detail Frank Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (Springer, Heidelberg, 1998); on its limits Bruno de Witte and Gabriel N. Toggenburg, "Human Rights and Membership in the European Union", in Steve Peers and Angela Ward (eds), *The European Union Charter of Fundamental Rights: Law, Context and Policy* (Hart, Oxford, 2004), pp. 59-82, 61 et seqq.

minority protection.[179] However, the spearhead of the 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 the 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.[180] 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"; ever since then, only the Presidency and the Commission have spoken.[181] 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 United States of America.[182]

[179] The foreign ministers of the EC Member States laid down guidelines on 16 December 1991 according to which the recognition of new states depends upon minority protection; on this Alain Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples", in 3 (1) *European Journal of International Law* (1992), pp. 178-186.

[180] In detail Lucia Canicchioli, "The European Community at the UNESCO: An Exceptionally Active Observer?", in Jan Wouters, Frank Hoffmeister, and Tom Ruys (eds), *The United Nations and the European Union: An Ever Stronger Partnership* (T. M. C. Asser Press, The Hague, 2006), pp. 135-154; Delia Ferri, "EU Participation in the UNESCO Convention on the Protection and Promotion of Cultural Expressions", in 3 *European Diversity and Autonomy Papers – EDAP* (2005), http://www.eurac.edu/documents/edap/2005_edap03.pdf (18 June 2007), pp. 21 et seqq.; Sabine von Schorlemer, "Kulturpolitik im Völkerrecht verankert", in 53 (6) *Vereinte Nationen* (2005), pp. 217-223, 220.

[181] Press release IP/04/1377 of 17 November 2004, European Union; 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 January 2005, Council of the European Union, 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, pp. 11 et seqq.

[182] Cf. Letter from US Secretary of State (Condoleezza Rice) of 04 October 2005, http://www.iti-germany.de/kultvielfalt/pdf/4_e_2%20RiceLetter.pdf (18 June 2007); Explanation of Vote of the United States on the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, http://www.iti-germany.de/kultvielfalt/pdf/4_e_3Oliver.pdf (18 June 2007).

This diversity convention benefits the European unity in many respects. It confirms that the European states can only collectively assert themselves against the United States of America.[183] This supports the quest for a uniform representation of the Union in the field of foreign affairs also for other cases against reluctant Member States that see in their international presence an essential instrument of national unification. It promotes the European unification, since the Union can, under the legal personality of the EC, ratify the convention itself;[184] 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 problematic under WTO law.[185] Certainly the convention has the potential to prejudice the single media market[186] by affirming national cultural policy, and thus of course Member State cultural policy;[187] 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.

2. 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

[183] Wilfried Loth, "Der Weg nach Rom – Entstehung und Bedeutung der Römischen Verträge", in 30 *Integration* 2007, pp. 36-43, 37 et seq.
[184] Article 27(3)(a) of the Diversity Convention, *supra* note 16.
[185] Stefan Mückl, "Paradigmenwechsel im europäischen Medienrecht: Von der Fernseh-Richtlinie zur Richtlinie über audiovisuelle Mediendienste", in 121 (19) *Deutsches Verwaltungsblatt* (2006), pp. 1201-1210; Thomas Kleist and Alexander Scheuer, "Audiovisuelle Mediendienste ohne Grenzen", in 9(3) and 9(4) *MultiMedia und Recht* (2006), Part 1, pp. 127-132, Part 2, pp. 206-212; on the problem of the admissibility under international law of the quotas see Armin von Bogdandy, "Die Informations- und Unterhaltungsindustrie", in Eberhard Grabitz, Armin von Bogdandy, and Martin Nettesheim, *Europäisches Außenwirtschaftsrecht* (Beck, Munich, 1994), pp. 571-596, 589; in 2003, the "Cancun Declaration on Cultural Diversity" appealed to the members of the WTO to respect cultural diversity, 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 Michael Hahn, "A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law", in 9 (3) *Journal of International Economic Law* (2006), pp. 515-552; Graber, *supra* note 16.
[186] 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, p. 221.
[187] Thus, Article 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 cf. Gerd Schwendinger, *Gemeinschaftsrechtliche Grenzen öffentlicher Rundfunkfinanzierung* (Nomos, Baden-Baden, 2007), pp. 187 et seqq., 596 et seqq.; also Evangelischer Pressedienst, *epd medien* 2007 No. 23, p. 13.

of political organisations, be it for supranational institutions with public authority, 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 lacking will to found a state, the lack of a comprehensive defence and solidarity community, the missing formation of a proper nation. The European enterprise is constituted on the premise of distinct, state-organised peoples that are supposed to maintain distinct identities. Reference to the diversity-preserving design of the organisation's constitution has already been made;[188] among the further pertinent legal complexes the organisation 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 multiethnic structure of the Hapsburg monarchy over a hundred years ago,[189] or John Stuart Mill's scepticism regarding the possibility of a free pluralistic society.[190]

V. A Principle of Cultural Diversity?

Returning to the first sentence of this paper, 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,[191] and Joseph Weiler grasps the pluralistic, non-hierarchic, dialogical, postnational character of the Union's law with a principle of tolerance[192]

[188] Above, II.3.
[189] Jellinek, *supra* note 15, pp. 34 et seqq., 40 et seqq.
[190] John Stuart Mill, *On Liberty and Considerations on Representative Government* (Blackwill, Oxford, 1948), p. 292.
[191] Jörg Ennuschat, "Der Leitspruch für Europa: 'In Vielfalt geeint'", in Klaus Stern and Peter J. Tettinger (eds), *Europäische Verfassung im Werden* (BWV, Berlin, 2006), pp. 111-122, 121 et seq.; Anna Leisner-Engensperger, *Vielfalt – ein Begriff des öffentlichen Rechts* (Duncker-Humbolt, Berlin, 2004), pp. 78, 137 et seqq.
[192] Joseph H. H. Weiler, "Federalism without Constitutionalism: Europe's *Sonderweg*", in Kalypso Nicolaidis and Robert Howse (eds), *The federal vision: Legitimacy and levels of governance in the United States and the European Union* (Oxford University Press, Oxford, 2001), pp. 54-70, 65 et seqq.; furthermore Gráinne de Búrca and Joanne

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 the citizens, and the minority rights cannot. It would only be accorded a positive role 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.[193] 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 conceptualisation that embraces opposing interests[194] is problematic, since legal rationality requires that opposing poles be conceptualised 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 paper, it can be stated that firstly, the topos *cultural diversity* 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. The conformity with international law alone cannot dissipate the concern for the future of cultural diversity within the Union.

Scott, "Introduction", in *idem* (eds), *Constitutional Change in the EU. From Uniformity to Flexibility?* (Hart, Oxford, 2000), pp. 1-7.

[193] Far-seeing, but undecided Gabriel N. Toggenburg, "The Debate on European Values and the Case of Cultural Diversity", in 1 *European Diversity and Autonomy Papers – EDAP* (2004), pp. 10 et seqq., http://www.eurac.edu/documents/edap/2004_edap01.pdf (18 June 2007).

[194] Inspired by Oliver Lepsius, *Die gegensatzaufhebende Begriffsbildung* (Beck, Munich, 1993), pp. 146 et seqq., who however treats a different topic.