



Merja Pentikäinen

Creating an Integrated Society and Recognising Differences

The Role and Limits of Human Rights,
with Special Reference to Europe

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Merja Pentikäinen

ABBREVIATIONS

AC	Advisory Committee
ADU	Anti-Discrimination Unit of the Office of the UNHCHR
AMID	Akademiet för Migrationsstudier in Danmark; Academy for Migration Studies in Denmark
CBPs	Common Basic Principles
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CoE	Council of Europe
CPRSI	Contact Point for Roma and Sinti Issues
CSCE	Conference on Security and Co-operation in Europe
EBLUL	European Bureau for Lesser-Used Languages
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECJ	European Court of Justice
ECR	European Court Reports
ECRI	European Commission against Racism and Intolerance
EESC	European Economic and Social Committee
EHRR	European Human Rights Reports
ETS	European Treaty Series
EU	European Union
EUMC	European Monitoring Centre on Racism and Xenophobia
FRA	Fundamental Rights Agency
FYROM	Former Yugoslav Republic of Macedonia
GPR	General Policy Recommendation
HCNM	High Commissioner on National Minorities
HDIM	Human Dimension Implementation Meeting
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
IOM	International Organization for Migration
IWGIA	International Work Group for Indigenous Affairs
NGO	Non-governmental organisation

OECD	Organisation for Economic Co-operation and Development
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the UN High Commissioner for Human Rights
OJ	Official Journal of the European Union
OSCE	Organization for Security and Co-operation in Europe
RFoM	Representative on Freedom of the Media
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	UN Educational, Scientific and Cultural Organization
UNGA	UN General Assembly
UNHCHR	UN High Commissioner for Human Rights
UNHCR	UN High Commissioner for Refugees
UNTS	United Nations Treaty Series
US	United States
USA	United States of America
WCAR	World Conference against Racism
WGM	Working Group on Minorities
WHO	World Health Organization
WTO	World Trade Organization

1 INTRODUCTION: THE COMPLEX

1.1 Integration – A Topical Issue

Diversity and difference are an inherent part of human life. Each person is unique, having his or her individual characteristics, and when individuals come together they in turn form groups with distinctive characteristics and dynamics where diversity and differences are concerned. Societies have always been essentially diverse in the sense that they have been composed of various groups characterised, for instance, by ethnic, cultural, linguistic or religious differences. Some of these groups have long historical roots in their respective societies, while others have emerged from more recent migratory flows.

People have always migrated, and for a variety of reasons. In addition to migrating voluntarily, people have been forced to leave their homes due to wars, persecutions, natural disasters, and similar events. People's international mobility has increased tremendously over the last few decades, particularly since the mid-twentieth century; in the present era of globalisation, individuals are on the move more than ever before, with migratory flows becoming increasingly multifaceted.¹ Migration has also become one of the most important transformative forces of contemporary societies. Historically, particularly from the nineteenth century to the Second World War, Europe was the place people left, emigrating to North America, for instance, in the hope of better living conditions or in order to flee political or religious persecutions. A clear change took place in the second half of the twentieth century, when large parts of Europe experienced a historical shift from emigration to immigration.² The aftermath of the Second World War created a demand for foreign labour, and many European states viewed immigration as the ideal solution to acute post-war labour shortages when the rebuilding of shattered societies created an economic boom. Western European employers imported workers from abroad and countries like Switzerland, France, and Belgium first turned to Italy and the Iberian Peninsula, then to the former Yugoslavia and Greece. France, Britain, and the Netherlands recruited labour from their disintegrating empires in North Africa, South Asia, and the Caribbean.³

1. Migrations of various kinds were also key factors in colonialism, industrialisation and nation-building. Castles (2005), p. 278.

2. IOM (2005), p. 141.

3. Ireland (2004), p. 2.

The direction of labour recruitment was also influenced by the beginning of the Cold War, which in practice halted the movement of people and contacts among them across the Iron Curtain, i.e. between the Soviet-led Eastern bloc and the US-led Western bloc. For instance, when the Berlin Wall – the symbol of Cold War Europe – prevented West Germany from tapping labour reserves in East Germany, the country recruited workers from elsewhere, Turkey in particular, resulting in the creation of the German “guest worker” model of labour recruitment.

The drastic deterioration of the world economy in the early 1970s resulted everywhere in the imposition of bans on new immigration. It also became clear that most of the immigrant workers who had earlier come to Western Europe to fill the labour shortage did not intend to leave. This was contrary to what was expected in the receiving countries; that is, instead of workers of foreign background staying temporarily, their residence resulted in more permanent settlement.⁴ In fact, the influx to Western Europe continued when the family members of immigrant workers joined them.⁵ In addition, Europe received an increasing number of refugees and asylum-seekers.⁶ These various inflows of immigrants involved a more diverse collection of national groups than had been experienced earlier in Europe.⁷ The international mobility of people received a “boost” in Europe in the late 1990s, when the end of the Cold War enabled freer movement of people from Eastern Europe to the West. The breakdown of the bi-polar power constellation of the Cold War seemed to open the floodgates for vast new population flows in other parts of the world as well.⁸ Consequently, at the beginning of the 1990s, international migration emerged as one of the key issues in international politics.⁹

With the arrival of the new millennium, and the realisation that Europe is greying, European states have regained their interest in receiving new immigrants to fulfil the needs of their labour market. As a result, in recent years European states have reassumed their active policies of (even mass) recruitment of immigrant labour. The enlargement of the European Union (EU) in May 2004 by ten new members and beyond the Cold War borders into Eastern Europe marked a historical move

4. Castles (2005), p. 278.

5. For some time, and up until the end of the 1990s, family reunification was the major pattern of immigration in Europe, including the EU area. See e.g. the Commission Communication on a Community Immigration Policy (2000), p. 11. Castles has pointed out that in the last half century, the following three types of primary migration have been the most common: permanent settlement migration, temporary labour migration, and refugee movements. Each of these frequently led to family reunion, which then often became the largest flow as a movement matured. Castles (2005), p. 284.

6. Ireland (2004), p. 2.

7. Ibid.

8. The final decade of the 20th century also witnessed more newcomers arriving in the US than at any other point in its history. Kivisto (2005b), p. 3.

9. Castles (2005), p. 277.

towards freer movement of people across borders in Europe. Since this enlargement, hundreds of thousands of nationals of the new EU member states have moved to the older member states, particularly for employment purposes.¹⁰ Where the direction of immigration was once largely from the East towards the West, Central Europe has increasingly become the recipient of new immigration.¹¹ A general labour shortage in the EU area has meant that third-country nationals, particularly high-skilled persons, have become objects of more active recruitment efforts by the EU states.

Even as the promotion of labour-based immigration has reappeared on the agendas of European governments in recent years and become one of the stated policies of the EU, the 1990s saw the very same states (including the EU states) begin to restrict their asylum policies and laws.¹² Combating undocumented migration has also become a prominent issue on both the national and international agendas of many states, as a great number of migrants, for example those entering the EU, come via irregular routes.¹³

Nowadays European societies include a variety of groups of immigrant background such as former migrant and colonial labourers and their family members, (im)migrant workers, modern job-seekers, cosmopolitans working for transnational corporations and international organisations, students, refugees and asylum-seekers and undocumented immigrants. The last include unauthorised migrants and victims of trafficking, who usually end up in the unregulated (black) labour market. All these people have become de facto members of their “host” societies. The trend is also estimated to continue; that is, permanent migration, temporary labour migration, student flows and irregular migration will all grow.¹⁴ The patterns of migration are also changing rapidly. Today more people are moving temporarily, often staying longer, but then returning to their countries of origin. With increased temporary migration, particularly of highly skilled persons, voluntary return has become a major feature of migration in recent years.¹⁵ Characteristic of modern migration is

10. IOM (2005), pp. 146–147. EU membership also signified the extension of the rights linked to EU citizenship to the nationals of the new EU states. These rights primarily include freer movement and residence rights within the EU as workers, students and family members. For more, see *infra* chapter 3.2. Many older member states nevertheless imposed some restrictions (e.g. in the form of transitional periods) on the free movement of workers, as they feared an influx of workers from the new member states into their labour markets. Similarly, when Bulgaria and Romania became EU members at the beginning of 2007, a number of the EU states restricted the free movement of workers from these countries.

11. IOM (2005), pp. 146 and 152. See also the remarks *infra* in this section.

12. EESC (2002), p. 18.

13. Estimates of this kind of immigration into the EU vary from 500,000 people per year upwards. See e.g. the Commission Communication on a Community Immigration Policy (2000), p. 13.

14. IOM (2005), p. 301.

15. *Ibid.*, p. 14. Seasonal workers and transfrontier workers are among those considered temporary workers.

that the mobility of low-skilled workers is more restricted than that of high-skilled workers.¹⁶ In general, the contemporary flows of migration are characterised by the diversification, proliferation, and intermingling of types of flows. Various forms of migration have become closely linked and interdependent. Officially encouraged flows tend to stimulate irregular movements; permanent and temporary migration cannot be clearly distinguished and tend to stimulate each other.¹⁷ Migration in the era of globalisation is also characterised by new forms of attachments that undermine the traditional nation-state-based assumptions of belonging. As a consequence, issues such as transnationalism and hybrid identities of individuals have appeared in contemporary discussions on migration.

Women are estimated to comprise approximately half of the migrant population, particularly in the advanced industrialised countries.¹⁸ Women and men also circulate differently in the global economy, with women predominantly entering the service and welfare sectors. Women feature in skilled migration streams, particularly when admission policies are specifically developed for the occupations often held by women, and consequently have been recruited particularly as nurses and carers. In the area of forced (involuntary) migration, women make up the majority of victims of trafficking in human beings in the world and of persons internally displaced by conflicts.¹⁹ Women also comprise a significant proportion of the world's refugees.²⁰

The post-1945 developments in migration have resulted in the creation of increasingly multicultural and multiethnic societies in Europe. This demographic change has not, however, taken place without problems. Immigration, especially on a large scale, almost unavoidably creates tensions or “shocks” in societies due to its transformative force, which produces profound and also unanticipated changes in the receiving societies and in inter-group relations within them.²¹ An increasing multicultural and multiethnic reality has also triggered high levels of discomfort among Europeans. The economic recession of the 1970s fuelled the rise of racist and xenophobic tendencies and the spread of anti-immigrant sentiment across Europe,

16. Ibid., p. 210. See also the remarks on the EU *infra* in chapter 3.

17. Castles (2005), pp. 284–286. Regarding newer types of migration flows, Castles refers to return migration as moving increasingly towards temporary or circulatory migration and retirement migration.

18. IOM (2005), p. 13.

19. Ibid., p. 15. IOM has also noted that, despite the heavy impacts of conflicts on women, women are still generally not invited to the peace negotiation tables. Ibid.

20. Often there are no data available by sex, but roughly half of the refugee population is female. The proportions vary greatly depending on the refugee situations; e.g. in mass influx situations, the proportion of female refugees tends to be around 50 per cent. The proportion of females among asylum-seekers, however, is significantly lower in both developing and developed countries. UNHCR (2007), p. 9.

21. Immigration also produces social changes in sending societies and among immigrants themselves and their descendants. Rumbaut (2005), p. 157. Migration is viewed as one of the key forces of social transformation in the contemporary world. Castles (2005), pp. 277–278.

and the beginning of the new millennium has been characterised by the persistence and even intensification of racist and xenophobic incidents and views. European societies are facing an increasing number of tensions and even conflicts along ethnic lines. These modern-day conflicts are also characteristically of an intra-state nature, one recent concrete example being the violent conflicts in a number of French cities in autumn 2005 involving youth of immigrant background in particular.

In today's globalised world, economic structures are changing rapidly, with a variety of simultaneous trends heightening the challenge of building and maintaining stable societies. In Europe, for instance, there is an increase in demand for new labour in many sectors of the economy, but in a number of sectors employees are being laid off. Many jobs, particularly in Western European states, tend to flee from Western Europe to Eastern Europe and beyond to Asia, which creates economic insecurity among Western Europeans. Their insecurity may also be fuelled by the increasing recruitment of non-Western Europeans to Western Europe, a trend often prompted by the de facto labour cost differential. This situation, which reflects structural problems in the labour markets in Europe, seems to be fertile ground for the development of even fierce anti-immigrant and anti-foreigner signals and reactions. The situation may be, and in practice is, exploited by nationalist political movements, and populist politicians are tempted to exploit the uncertainty and their constituents' fear for their own political benefits, fuelling tensions along ethnic lines. The need for immigrant labour and the simultaneous rise of xenophobic and racist attitudes is a real and acute challenge in contemporary European societies, one requiring prompt and determined actions.

In addition to new challenges relating to the increase in populations of immigrant origin, the past fifteen years have witnessed spirited discussions on the situation of persons belonging to older (traditional) minorities. After the fall of the Iron Curtain, demands came to the fore – and acquired political force – calling for the recognition of the specific characteristics of many minorities that had come to existence when state borders were redrawn following the two world wars and the Cold War. This also came to be reflected in international norms, when at the end of the 1980s – and particularly in the course of the 1990s – states accepted a number of international norms specifically pertaining to minorities within the auspices of the Conference on Security and Co-operation in Europe (CSCE; subsequently the OSCE),²² the United Nations (UN) and the Council of Europe (CoE). On-going, acute minority-related challenges in the Balkans and numerous other minority tensions throughout Europe remind us that minority questions not linked to recent migration are also constantly relevant. Many older minorities have presented in-

22. See the remarks on the change of the name of the CSCE into the OSCE *infra* in chapter 2.1.1.2.1.

creasingly vocal demands for the recognition of their particular characteristics,²³ a development has, for example, contributed to paying increasing – and highly needed – attention to the vulnerable situation of the Roma.²⁴ More active debates in the area of minority protection have resulted in the creation of international standards on minorities. In the course of the last two decades, international regulation concerning indigenous peoples has taken steps forward as well.

The increased cross-border mobility of individuals is rendering societies more diverse, resulting in the emergence of “new” minorities. This trend, coupled with intensified demands for recognition by historical minorities and indigenous peoples, means that accommodating various groups – in practice accommodating differences and managing diversity – is among the important contemporary challenges to be addressed by governments. Due to an estimated increasingly positive migration balance in the European states,²⁵ migration remains a key topic and plays a heightened role in public and political debates across Europe; accommodating immigrant-origin populations in particular is destined to remain at the top of the list of political priorities in Europe. The European continent’s still increasing multiethnic reality means that the issues of tolerance, inclusion, equality, and effective inter-group relations are not just interesting theoretical issues but crucial components of European societies that will determine how democratic and resilient these societies will be over the long term.²⁶ The presence of large and diverse immigrant-origin communities has shifted debates towards the issues of identity, social order, crime, and the use of public resources. Debates and disputes have also frequently revolved around the issue of ethnicity.²⁷ In addition, the awakening of the interests of “older” minorities has intensified the debates on accommodation, or incorporation into society, of persons belonging to various groups as well as on identity and social cohesion. The

23. Ireland (2004), p. 3.

24. Regarding the term “Roma”, it can be observed that the Roma are referred to in various ways in different contexts. For example, the OSCE uses the term “Roma and Sinti”; CoE documents often refer to “Roma/Gypsies”. One may also find the term “Travellers”. The Durban Document of the third World Conference against Racism refers to “Roma/Gypsies/Sinti/Travellers”. In this research, the term “Roma” is used as a general term to refer to all possible categories of Romani people.

25. Today most European states have a positive migration balance. Europe, like most other regions of the world, faces demographic ageing due to increasing life expectancies. However, unlike other regions, almost all countries in Europe are experiencing below-replacement fertility rates. Consequently, the pace of demographic ageing is greatly accelerated, and migration is viewed as playing a more prominent role for population growth in Europe than in any other region in the world. The IOM has estimated that during the 21st century, for demographic and economic reasons, all present and future EU member states will either remain or become immigration countries. IOM (2005), pp. 146 and 152.

26. Ireland (2004), pp. 3–4.

27. *Ibid.*, p. 2. Ireland notes that ethnicity belongs to the set of concepts widely used but seldom defined in the field of migration.

issues of security, stability and the unity of states also figure in these various discussions.

As a result of these developments, the integration of individuals belonging to various groups, particularly those of immigrant background, has recently emerged as a high-level political issue in Europe, including within the EU. In addition to the integration of newcomers, the focus in the area of migration has clearly shifted from a preoccupation with asylum issues to economic migration and irregular migrants. Increasing cross-border population mobility in the era of globalisation and its corollary – processes of community formation leading to social and cultural changes – are crucial considerations for states in assessing future perspectives.²⁸

The relationship and approach to Islam in Europe has created a challenge of its own.²⁹ The terrorist attacks on the United States (US) in September 2001 not only propelled anti-terrorist actions to the centre of inter-state agendas but also resulted in unprecedented attention to the situation of Muslims in the Western World, including Europe. Muslim immigration and integration has triggered vivid exchanges of views, which have intensified after a number of violent incidents in Europe, such as the assassination of documentary director Theo van Gogh in the Netherlands in November 2004 and the suicide bombings in London in July 2005: the perpetrators of both incidents were found to be of Muslim background, but also persons who had been born in Europe. Policymakers across Europe appear to be alarmed over Islamic fundamentalism and dangerous Islamic “parallel” societies.³⁰ Terrorist attacks have also resulted in a tightening of national immigration laws and in the promotion of national security to a major concern in the immigration policies in many countries.³¹ Another result has been increasing calls for stringent restrictions on Muslim immigration in particular.³²

The question of how to address issues relating to religion and questions having religious underpinnings seems have given rise to many particular challenges. The outcry triggered by the caricatures of the Prophet Muhammad published in a Danish newspaper (*Jyllands-Posten*) in autumn 2005 bears witness to the delicate, even explosive, nature of issues having religious dimensions. Contemporary religiously motivated tensions have also come to the fore in debates on the use of headscarves by Muslim women in a number of European states, in particular France, Germany and Turkey. The incident in Denmark brought to the fore issues related in particu-

28. Castles (2005), pp. 277–278.

29. Ireland (2004), p. 3.

30. *Ibid.*, pp. 3, 95 and 110. Ireland describes debates in Germany, in the cities of Bremen and Berlin, among others. See pp. 60–115.

31. IOM (2005), pp. 14, 16 and 205. For example, many EU states have recently tightened the integration requirements for migrants. See also *ibid.*, pp. 148–149 and the remarks *infra* in chapter 3.3.

32. Ireland (2004), p. 1.

lar to freedom of expression and its corollary, the freedom of the media, while the question of headscarves revolves around the complex questions of freedom of religion, human rights of women and the limits states are allowed to set on individuals' behaviour and actions in the public sphere.

While the issues of recognising and accommodating differences, as well as managing diversity, have been closely linked to migrants, old minorities and indigenous peoples, it must not be forgotten that the question of differences – including the issue of recognising different needs and concerns of individuals or groups of individuals – applies to other groups as well. The adoption of international norms on such groups as women, children, persons with disabilities and the elderly recognises the need to pay specific attention to persons belonging to these groups.

1.2 The Concept of Integration

The term “integration” has become an extremely common one in contemporary discussions, a fashionable expression that is used in various contexts. One finds references to such expressions as European integration, African integration, market integration, economic integration, political integration, integration of various groups such as immigrants, minorities, women, children, persons with disabilities, refugees and victims of trafficking. The present research draws attention to integration at the societal level and particularly to how the issue is considered when the incorporation in(to) society of individuals belonging to various groups is concerned. More specifically, as will be discussed in more detail below, the focus of this research is on human rights, an area in which integration has also become a slogan in recent years.

An English dictionary of general usage states that “to integrate” means “to combine or form (a part or parts) into a whole”, “to bring or come into equal membership of a community”.³³ According to a British dictionary focussing on the terms relating to race and ethnic relations, “integration”

describes a condition in which different ethnic groups are able to maintain group boundaries and uniqueness, while participating equally in the essential processes of production, distribution and government. Cultural diversity is sustained without the implication that some groups will have greater access to scarce resources than others. For a society to be fully integrated, it must remove ethnic hierarchies, which permit differential access and it must encourage all groups' contributions to the social whole. ...The contrast with assimilation is important: far from facilitating

33. Oxford Paperback Dictionary (1988). See also the references to the definitions of “integration” and “assimilation” in American English dictionaries *infra* in this section.

an absorption of one culture by another, integration entails the retention or even strengthening of differences of ethnic groups.³⁴

Although some states have expressly addressed the issue of integration in their national legislation, particularly the integration of immigrants,³⁵ and the concept also appears in some international human rights conventions, integration is not a legal concept. In fact, many contexts in which the term “integration” is employed, as well as the terminology itself, suggest that integration is not a static concept, but a process having cultural and structural aspects with very complex interrelationships.³⁶

The term “integration” has been intensively considered within the social sciences and in the context of (im)migration, where it has been seen as describing primarily the process of how immigrants and the host community grow or should grow closer to one another or how newcomers become members of an existing socio-political community (such as a nation-state).³⁷ Whilst the differentiation of these processes has become standard, there is nevertheless no uniform terminology to describe them.³⁸ In these discussions, in addition to the concept of integration, one comes across such concepts as assimilation, exclusion, separation, segregation, marginalisation, incorporation, inclusion, acculturation, and accommodation. Furthermore, these concepts have links to multiculturalism, (cultural) diversity, pluralism/plurality, belonging, nationality, citizenship, identity, social cohesion and stability.³⁹ The essential question of recognising and accommodating differences appears to underlie many of these concepts and their analyses.

34. Dictionary of Race and Ethnic Relations (1996), pp. 172–173. The dictionary notes that in Britain integration has been a policy ideal since 1966, and it is viewed as “not a flattening process of assimilation, but as equal opportunity accompanied by cultural diversity in an atmosphere of mutual tolerance”. The popular metaphor for assimilation has been the melting pot; for integration it is the salad bowl, with each ingredient, separable and distinguishable, but no less valuable than the others. The dictionary also points out that Canada has favoured the concept of an ethnic mosaic, with the different pieces of society joined together in one arrangement. In some societies, such as Belgium, Canada, and Switzerland, institutional provisions are made to ensure an ethnically proportionate distribution of resources, thus protecting cultural differences while keeping groups integrated into the whole. Consequently, integration means more than coexistence: it implies an active participation of all groups and an agreement on the appropriate methods of organising the allocation of power, privileges, rights, goods, and services without compromising cultural differences. *Ibid.*

35. See also Kälin (2003), p. 271.

36. *Ibid.*, pp. 271–272. Ireland has pointed out that the “slippery” concept of integration is tricky to define, analyse and explain. Ireland (2004), p. 17.

37. See also e.g. Martikainen (2005), p. 2.

38. *Ibid.*, and Kälin (2003), pp. 271–272.

39. IOM has asserted that integration touches on the issues of culture and belonging, nationality, identity and citizenship that are critical for any society seeking to ensure social stability in an increasingly pluralistic world. IOM (2005), p. 322.

In various attempts to describe the concept of integration, integration is often linked particularly to the concept of assimilation.⁴⁰ Sometimes the two are viewed as opposites of sorts.⁴¹ A distinction is drawn between assimilation and integration by linking the former to cultural similarity and the latter to a certain quality of social relations. In this model, assimilation has been described as the process of becoming equal to the natives in the sphere of cultural identity and in patterns of behaviour. Thus, the concept of assimilation refers to the tendentially complete elimination of cultural and behavioural differences between natives and immigrants. Of central importance in achieving this state of affairs is the process of socialisation and the learning of the language, norms and values that are dominant in the new society. Integration, for its part, is viewed as the process of becoming a part of the social life in the host society. Through integration immigrants gain access to a permanent and relatively complex participation in the different spheres of action and interaction in the host society. More concretely, integration is the process of becoming similar to the natives in terms of achieving a variety of socially distributed valuable resources.⁴²

Many models envisage a complex relation between integration and assimilation, and integration has been divided into various subcategories such as structural, economic and social integration.⁴³ In sociological studies, one finds a division into cognitive, social and structural integration, and integration with regard to identification.⁴⁴ Integration has also been described as having structural and political-

40. See e.g. the remarks on integration presented in the Dictionary of Race and Ethnic Relations *supra*. The dictionary notes that assimilation is the process of becoming similar, and that due to their complexity, processes of assimilation need to be studied on the individual and the group levels with a focus on specific forms of behaviour seen in their full political and social context. Dictionary of Race and Ethnic Relations (1996), pp. 43–45.

41. See e.g. the use of terms in Britain and the references to the remarks in the Dictionary of Race and Ethnic Relations *supra*.

42. Diaz (1995), pp. 200–201.

43. Integration is viewed as denoting the incorporation of migrants into, and their participation in the structures of the host society on all levels; this process is termed structural or social integration, which can be further broken down into economic integration, integration into the educational system, and social integration. Economic integration denotes access to economic opportunities, in particular labour, of all kinds and on all levels; integration into the educational system signifies access to non-segregated primary schools and to higher education; and social integration relates to access to the status system of the host society. In this scheme, exclusion, or marginalisation, is viewed as the opposite of structural and social integration. Cultural assimilation describes the process of growing participation in the culture and values of the host society. It leads to the cultural absorption of migrants into the host society, making cultural differences disappear to a large extent. This requires migrants to give up their cultural identity and take on, in the sense of acculturation, the values and behaviours of the host society. The opposite of cultural assimilation is cultural diversity or, as it is often called, multiculturalism. Kälin (2003), p. 272.

44. Davy has pointed out that sociological studies distinguish four areas of integration: skills and knowledge (cognitive integration), personal relationships (social integration), positions

cultural dimensions; the relationship between these two dimensions is not straightforward and policymakers have often stressed one aspect more than the other, with major consequences for ethnic relations.⁴⁵

One also encounters definitions of the term “integration”. For instance, in the area of immigration, integration has been seen as signifying “bringing immigrants’ rights and duties, as well as access to goods, services and means of civic participation, progressively into the line with those of the rest of the population, under conditions of equal opportunities and treatment”. This civic, rather than cultural, vision of social integration is observed to go hand in hand with a positive appreciation of cultural diversity.⁴⁶

The following definition of integration has been put forward with reference to refugees:

A long-term process of change which places demands on both receiving societies and the refugees and/or communities. From a refugee perspective, it requires a preparedness to adapt to the lifestyle of the host society without having to lose one’s own cultural identity. From the point of view of the host society, integration requires a willingness to adapt public institutions to changes in the population profile, accept refugees as part of the national community, and take action to facilitate access to resources and decision-making processes.⁴⁷

One definition presented in the area of religious studies⁴⁸ uses integration as a general concept and defines it as “the processes by which individual and groups of immigrants are incorporated into various social arenas and segments of the new host society. Integration is a two-way process whereby both the immigrants and the host society adapt new features as a result of their interaction. Integration may also have transnational dimensions”.⁴⁹ This definition distinguishes three arenas of integration: cultural, structural and political integration, and differentiates integration from assimilation, acculturation and multiculturalism.⁵⁰

in society (structural integration), and attachment to the country (integration with regard to identification). Davy (2005), p. 128, n. 32.

45. The structural dimension refers to integration in terms of the labour market, education and training, housing, and social services; the political-cultural dimension refers to formal and informal modes of participation, inclusion, and cultural exchange. Ireland (2004), pp. 17–18.

46. EESC (2002), p. 69.

47. The definition is that given by Peer Baneke, the Secretary General of the European Council on Refugees and Exiles (ECRE) and quoted in the Report of the European Conference on the Integration of Refugees (1999), p. 7.

48. See also the remarks on the increased interest of scholars of religion in integration issues *infra* in chapter 5.2.2.

49. Martikainen (2005), p. 3.

50. It has also been asserted that both assimilation and acculturation place more emphasis on “becoming alike”, while multiculturalism pays too much attention to difference. *Ibid.*, pp. 3–4. Whilst Martikainen views his definition of integration as neutral with regard to the outcomes

In addition to discussing the concept of integration (and its neighbouring concepts) in the context of the process through which newcomers become members of an existing socio-political community, integration has also been considered from the viewpoint of both the immigrant and society. When the viewpoint on integration is that of the immigrants, the options available to them have been considered in, among other contexts, social-psychological models of immigrant acculturation. According to one model presented in this regard, immigrants can adopt four different acculturation strategies: assimilation, integration, separation (segregation) and marginalisation. Assimilation means replacing one's previous identity with that of the new host society, and integration refers to the capacity to access aspects of the dominant culture while simultaneously retaining an ethnic identity. By separation a group also retains its own culture, but does not want to have contacts with the dominant one, and segregation refers to a society's policy of exclusion. Marginalisation implies losing one's cultural background but being simultaneously denied access to the dominant culture. This model has been criticised for being based on simplified assumptions, but has been credited with rightly pointing to the agency and capacity of the immigrants to make choices themselves.⁵¹

From society's viewpoint, "integration" (as well as assimilation) appears in connection with policy options for states in the area of immigration settlement. These policy options have been synthesised in theoretical models on the process by which immigrants settle in a new host society created by authors who have studied states receiving considerable numbers of immigrants. There exist a number of such models and different authors also label and group various options somewhat differently. These models show different approaches to the relationship between integration and assimilation. In some, integration is viewed as an umbrella notion for describing various policy options.

It has been pointed out that although no country follows a single model strictly, the policies of various states can often be traced to one of the following models, which shape national policies in a manner that clearly differentiates countries from each other: (1) Assimilation to the dominant culture based on common civic values, in which the ideal is that immigrants become full citizens indistinguishable from the majority population. (2) Creation of a common culture in the sense of a "melting pot", with immigrants having to accept, but also to contribute to, a common culture based on civic virtues. Cultural diversity is relegated to the private sphere, where it may flourish. (3) Multiculturalism, i.e. the protection or even encouragement of cultural diversity in not only the private but also the public sphere. Immigrants

of the process itself, he also points out that various concepts (such as assimilation, acculturation, multiculturalism and even exclusion) are often used to imply normative ideas about the desired outcome of the process of integration. *Ibid.*, pp. 2 and 4.

51. *Ibid.*, p. 5. Martikainen refers to the model created by John Berry.

need not give up their culture but all are obliged to embrace the ideal of tolerance vis-à-vis other ways of life. (4) Separation is a situation in which immigrants do not have to assimilate to the dominant culture because they are not expected to remain for long, but, at the same time, are denied social integration to a large extent. Full social integration is only granted once the immigrants have fully assimilated to the dominant cultural patterns of the country.⁵² The general integration policies implemented by states and set out by the International Organization for Migration (IOM) resemble this characterisation, albeit with some differences in the use of terms. The IOM has listed four general integration approaches aimed at permanent and regular migrants: assimilation, segregation, integration and multiculturalism. In this framework, integration is linked to the “melting pot” model.⁵³

Another way put forward to describe the approaches available to states to incorporate immigrants into society is to group them into three categories: assimilation, differential exclusion, and multiculturalism.⁵⁴ As a mode of incorporation, assimilation means encouraging immigrants to learn the national language and to fully adopt the social and cultural practices of the receiving community. This also involves a transfer of allegiance from the place of birth to the new country and the adoption of a new national identity. In the differential exclusion model, migrants are integrated temporarily into certain societal subsystems, such as the labour market and limited welfare entitlements, but are excluded from others, such as political participation and the national culture. Citizenship is not an option. Both assimilation and differential exclusion share the view that immigration should not bring about significant changes in the receiving society. Such beliefs in the controllability of ethnic difference could be sustained in the past, but began to be questioned in

52. Assimilation to the dominant culture based on common civic values is also referred to as the traditional “French” model, creation of a common culture in the sense of a “melting pot” as the traditional “American” model, multiculturalism as the “Canadian” model, and separation as the traditional “German” or “Swiss” guest-worker model. Kälin (2003), p. 273.

53. Here assimilation is based on the expected outcome of full citizenship and the sharing of common civic values with the native population. This is a one-sided process of adaptation in which migrants adopt the language, norms and behaviour of the receiving society. Segregation does not expect migrants to assimilate into the culture of the host society, and is generally applied to temporary migrants. The temporary nature of the immigration system leads to granting migrants limited social rights. Integration, also known as a “melting pot”, is a two-way process of mutual accommodation between migrants and the receiving society in which these two groups accept and contribute to a common culture. People of different cultures learn from each other’s culture, while each individual or cultural group retains some sense of cultural heritage and diversity. Multiculturalism recognises cultural plurality in modern societies and tries to regulate this through principles of equality. Migrants remain distinguishable from the majority population through their language, culture and social behaviour without jeopardising the national identity. Multiculturalism privileges a culture of tolerance for different ways of life. IOM (2005), p. 322.

54. This model has been put forward in Castles (2005), pp. 286–288.

the 1970s in Western immigration countries. The result was the introduction of official policies of multiculturalism that implied abandonment of the myth of homogeneous and monocultural nation-states and entailed the recognition of immigrants' rights to cultural maintenance and community formation. These policies were also linked to social equality and protection from discrimination. Multicultural models were first developed in Canada and Australia, and subsequently also in other states in the Western world.⁵⁵ Although the use of the term "multiculturalism" declined in popularity in the 1990s, the notion of multicultural and multiethnic societies has become firmly entrenched in Western countries.⁵⁶ Theories of multiculturalism are (still) visible in the contemporary discussions on migrant settlements and integration in the area of immigration and ethnic studies.⁵⁷ It is also important to be aware that, much like various other concepts used in the area, multiculturalism has been given different definitions.⁵⁸ It is noteworthy that multiculturalism has not necessarily been distanced from policies of controlling difference within the nation-state framework, because it does not question the territorial principle and implicitly assumes that migration will lead to permanent settlement and the birth of second and subsequent generations who are both citizens and nationals. Thus, multiculturalism maintains the idea of a person primarily belonging to one society and being loyal to just one nation-state.⁵⁹

While the issue of integration (in its various manifestations) is both a reality of and a challenge for every immigrant-receiving society, it is not limited to the phenomenon of migration. It has been pointed out, that, in general, culturally diverse societies and even societies that are strongly stratified along class lines constantly

55. Castles points out that many sociologists (especially in the US) have viewed assimilation as an inevitable and necessary process for permanent migrants, and that assimilation leads logically to incorporation of immigrants and their descendants as new citizens. "Guest-worker" or temporary labour recruitment systems employed by, for example, Germany in the post-1945 era are labelled as differential exclusion. Multiculturalism as a state policy was introduced in Canada and Australia in the 1970s. *Ibid.*, pp. 286–288.

56. Castles also suggests that multiculturalism is primarily a phenomenon and concept in Western society. *Ibid.*, p. 288.

57. See also Martikainen (2005), pp. 1–2.

58. Charles Taylor and Will Kymlicka from Canada and Bhikhu Parekh from Britain are considered to be among the key theorists associated with multiculturalism. It has been pointed out that the theories developed by these authors also necessarily reflect the realities of their respective societies. Kivisto (2005b), pp. 20–21. See also Kivisto (2005c), pp. 314–315.

For a somewhat different content for multiculturalism, including its being viewed slightly differently in the US context than, for example, in Canada, see Castles (2005), p. 288. For differing definitions of multiculturalism, see also Alexander (2005), pp. 320–322. Alexander suggests that multiculturalism should be considered as a new and more democratic mode of civil integration. *Ibid.*, p. 322. See also the remarks on similarities between multicultural theories and assimilation in the USA *infra*. Some scholars have suggested that multiculturalism is a new term being used to refer to cultural pluralism. Glazer (2005), p. 113.

59. Castles (2005), p. 288. See also the remarks on transnationalism *infra* in chapter 5.2.2.

face issues relating to integration that are not necessarily very different from the problems of societies that have to deal with culturally different or socially marginalised immigrants.⁶⁰ Furthermore, the issue of integration is also relevant in the case of older (traditional) minorities and indigenous peoples. Despite this, the issue has been clearly less intensively discussed in the case of these groups than in that of immigrants. And although express remarks can be found on integration and assimilation in the works on minorities and indigenous peoples, the concept of integration does not usually appear among the key words or concepts in contemporary publications in the area.⁶¹ In recent years in Europe the issue of integration has been brought up particularly in connection with the Roma.

In sum, the concept of integration (as well as its neighbouring concepts) is used in varying contexts and differing meanings have been attached to it. Furthermore, what integration and the concepts often linked to it mean in practice, i.e. what their actual content is, is often not so easy to ascertain. The divergent use of the very same term adds to the confusion.⁶² The area is further complicated by the very different usage on different sides of the Atlantic. For instance, whilst the term “assimilation” has become unpopular in both Europe and many international contexts, in the USA it has been, and still is, widely used in theories relating to immigrant incorporation.⁶³ For historical reasons, that is, the country’s longer history as an immigrant-receiving country, the development of these theories has a much longer history in the US than in Europe.⁶⁴ It has also been pointed out that the contested concept of assimilation does not “travel well” and is in fact often lost in translation.⁶⁵ Additionally, the concept of assimilation has been given a variety of meanings in the US, where there is also considerable confusion as to its content.⁶⁶ The concept of

60. Kälin (2003), p. 271.

61. Regarding writings on minorities, see e.g. the indexes in Thornberry (1991) and Weller (2005).

62. That divergent usage of the same term, in this case “assimilation”, contributes to confusion has been discussed in a number of articles in *Incorporating Diversity. Rethinking Assimilation in a Multicultural Age*, Kivisto (ed.), 2005.

63. Kivisto (2005b), p. 3.

64. Robert E. Park has been one of the key scholars in formulating assimilation theories in the US. *Ibid.*, p. 7. Park has treated assimilation as a process pertaining to all ethnic groups, but has considered particularly the incorporation of Afro-Americans in the US. See Park (2005).

It has also been pointed out that, in the US, assimilation came to be equated with Americanisation back when the influx of immigrants from Eastern Europe and the Mediterranean countries began, who were suspected of being inferior stock and less easily assimilable than immigrants from northwestern Europe. *Dictionary of Race and Ethnic Relations* (1996), p. 43. See also Yinger (2005), p. 174.

65. Kivisto (2005b), p. 4.

66. *Ibid.*, pp. 3 and 4. On the confusing and often contradictory uses of “assimilation” in the USA, see also Morawska (2005), p. 129, and Yinger (2005), p. 175.

integration also appears in the American context, where it has been explicitly connected to the eradication of racially segregated institutions and to equal opportunities policies.⁶⁷ Furthermore, the concepts of integration and assimilation have often been linked such that integration is viewed as part of assimilation or part of the incorporation process ultimately leading to assimilation.⁶⁸ Assimilation has further been associated with the reduction of boundaries between groups, reducing cultural differences and therefore group separation.⁶⁹ This boundary reduction has been considered important, because differences are often used to justify inferior treatment.⁷⁰ Additionally, in the US, assimilation is sometimes seen as the opposite of (cultural)

67. American English dictionaries provide the following definitions: To integrate: “to bring together or incorporate into a unified, harmonious, or interrelated whole or system”; “to combine to produce a whole or a larger unit”; “to make part of a larger unit or a group: to integrate an individual into society”; “to give equal opportunity and consideration to (a racial or other ethnic group)”; “to make (a school, restaurant, neighborhood etc.) accessible or available to all racial and other ethnic groups.” Integration: “an act or instance of incorporating or combining into a whole”; “an act or instance of integrating a racial or other ethnic group”; “an act or instance of integrating a school, organization, etc.”. Random House Webster’s College Dictionary (1999). An American law dictionary defines integration as “The process of making whole or combining into one”; “the incorporation of different races into existing institutions (such as public schools) for the purpose of reversing the historical effects of racial discrimination”. The latter is connected with desegregation, which is defined as “the abrogation of policies that separate people of different races into different institutions and facilities (such as public schools)”; the state of having had such policies abrogated”. Black’s Law Dictionary (1999).

To assimilate has been defined as follows: “to bring into conformity with the customs, attitudes, etc., of a dominant cultural group or national culture”; “to cause to resemble; make similar”; “to be or become absorbed”; “to conform or adjust to the customs, attitudes, etc., of a dominant cultural group”. Assimilation signifies “the act or process of assimilating or the state of being assimilated; the merging of cultural traits from distinct cultural groups”. Random House Webster’s College Dictionary (1999).

68. Rumbaut (2005), pp. 158 and 166. See also Morawska (2005), pp. 129–132, and Barkan (2005), pp. 190–193.

69. As a sociological concept, assimilation has been defined as a “multidimensional process of boundary reduction which blurs or dissolves an ethnic distinction and the social and cultural differences and identities associated with it”. Rumbaut (2005), p. 158. On assimilation as contributing to boundary reduction between group participants, see Morawska (2005), p. 129, and assimilation as a process of boundary reduction that lessens cultural differences and group separation, see Yinger (2005), pp. 174–176. Yinger also refers to political and moral arguments in favour of assimilation that have been based on beliefs that the drastic reduction of the salience of ethnic group membership supports greater equality, weakens the sources of discrimination, increases individual freedom, and helps to create a more flexible society. *Ibid.*, p. 183. On assimilation as the decline and, at its endpoint, the disappearance of an ethnic/racial distinction and the cultural and social differences that express it, see Alba and Nee (2005), pp. 268–269. According to these authors, assimilation is the best way to understand and describe integration into the mainstream. *Ibid.*, p. 236.

70. Warner and Strole (2005), pp. 48–49.

pluralism,⁷¹ and integration used synonymously with (cultural) pluralism.⁷² It may also be observed that some definitions given to the concept of assimilation, or what can be concluded from the elements linked to it, suggest that it is not necessarily always very different from those given by some to the concept of integration as employed in Europe.⁷³ This may be even more true now, as the term “assimilation”, which fell into disrepute in the 1960s,⁷⁴ has been given new definitions in recent years in the USA.⁷⁵ Gradually and more recently in the US, assimilation has been linked to such (sociological) concepts as multiculturalism, transnationalism, and globalisation.⁷⁶

1.3 Focus, Objectives and Methods of the Research

The issues of accommodation of differences, incorporation of individuals belonging to various groups in(to) a society as well as the policy options available to states in the era of increasing ethnic and cultural diversity of societies have been discussed prominently in the areas of sociology, political theory and philosophy.⁷⁷ These questions have also found their way into the sphere of international law, particularly the area of human rights. International human rights norms contain some express references to the concept of integration as well as to a number of its neighbour-

71. See e.g. Shibutani and Kwan (2005), p. 78. The authors also see cultural pluralism as a concept characteristically used in Europe with respect to ethnic minorities and as one favouring the separate development of ethnic groups. *Ibid.*, pp. 63, 67 and 78. See also Gans (2005), p. 138.

72. Dictionary of Race and Ethnic Relations, p. 173.

73. This may be concluded from a number of articles in *Incorporating Diversity. Rethinking Assimilation in a Multicultural Age*, Peter Kivisto (ed.), 2005. See e.g. the article by Milton M. Gordon. Kivisto has also pointed out that many elements identified by multiculturalists such as Will Kymlicka, Bhikhu Parekh and Charles Taylor (who tend either to avoid the word “assimilation” or to be critical of it) do not necessarily differ from those relying on assimilation theories. According to Kivisto, such terms as “incorporation”, “integration”, or “inclusion” are often synonymous with “assimilation”. Kivisto (2005b), p. 21. He also asserts that the republican model advanced in France is different from the assimilationist policies supported in the US, noting that France has defined assimilation as entailing the elimination of ethnicity in the process of becoming French. However, there are signs that multiculturalism is making inroads in France. Kivisto (2005c), p. 315.

74. Kivisto (2005a), p. vii.

75. These new definitions are introduced in a number of articles in *Incorporating Diversity. Rethinking Assimilation in a Multicultural Age*, Peter Kivisto (ed.), 2005. See e.g. the article by Ewa Morawska. Kivisto suggests that assimilation and incorporation may be used interchangeably. Kivisto (2005c), p. 311.

76. Kivisto (2005a), p. vii.

77. See the remarks on the views of the authors representing various disciplines, presented both in this introductory chapter and *infra* in chapter 5.

ing concepts, such as assimilation, inclusion, and marginalisation. Additionally, the norms explicitly address such issues as identity, diversity, pluralism and social cohesion. Furthermore, human rights norms pertain to the issue of incorporation in a more general manner, as the application of these norms is relevant to belonging and inclusion even where this objective has not been expressly put forward.

The core of human rights relates to the recognition of the equal value and inherent dignity of all human beings regardless of their personal characteristics, political opinions, religious attachments, etc. States have adopted a considerable number of international instruments addressing human rights; the body of rights contains norms of general application but the norms also pertain to various groups and issues. The international community has come up with international human rights instruments that pay particular attention to certain groups and issues, often in recognition of the fact that there are certain groups of individuals that face greater difficulties than others as regards their possibility to enjoy human rights and that there are certain particularly great challenges and persistent problems to be overcome in the area of human rights. Consequently, specific human rights instruments and norms have been drafted to consider such groups as minorities, indigenous peoples, migrant workers, refugees, women, children, persons with disabilities, and even the elderly. The issues addressed include combating racial discrimination, racism and other forms of intolerance,⁷⁸ statelessness, nationality/citizenship,⁷⁹ and fighting against trafficking in human beings. The principles of equality and non-discrimination run like a red thread through all human rights, underscoring the non-discriminatory application of human rights.

International human rights norms of general application, as well as norms pertaining to specific groups and issues, are all part of the same “package” of human

78. The expression “racism” is often accompanied by a variety of other terms; one may come across such ‘lists’ as “racism, xenophobia, antisemitism and related intolerance”, “racism and related intolerance”, “racism and intolerance” and “racism and comparable forms of intolerance”. Nowadays Islamophobia is also often explicitly mentioned. In addition, the term “discrimination” appears on various “lists”. For example, the UN world conference of particular relevance for the topic, organised in 2001 in Durban, was entitled the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. In the framework of the OSCE, the term “racism” is often presented together with such concepts as “aggressive nationalism” and “chauvinism”. See also the pertinent texts cited *infra* in this research.

In this research, the expression “racism and other forms of intolerance” is used as a general umbrella expression covering various phenomena such as xenophobia, anti-Semitism, and Islamophobia. The international human rights norms addressing these questions are termed “anti-racism norms”, and action in the area generally “anti-racist action”. Whereas these very general expressions are adopted for practical reasons, it is nevertheless important to keep in mind that various phenomena have their own characteristics from the point of view of both theory and practice.

79. For the terms “nationality” and “citizenship”, see the remarks *infra* in chapter 2.2.2.

rights and merely represent its various facets or dimensions. In this situation it is crucial not to lose sight of the interlinkages and interplay of the various instruments and norms. For instance, in the area of combating racism and other forms of intolerance there are a number of other relevant instruments in addition to those that have been specifically drafted to address the focal issues.⁸⁰ For the protection of minorities, in addition to minority-specific norms, both human rights of general application and the norms enacted to combat racism and other forms of intolerance are of fundamental importance. Despite these links between the protection of minorities (including minority rights) and the fight against racism and other forms of intolerance, these questions have often been kept apart in the texts of international documents, with the result that they have been considered in separate international documents or in different sections within the same document.⁸¹ This state of affairs has, however, changed somewhat in recent years, as will be illustrated in this research. It is also significant, particularly for the research at hand, that the issue of integration has been expressly addressed in both areas, i.e. minority protection and anti-racist action.

The focus and content of the research: The research at hand focuses on international human rights norms, and in particular their role in the incorporation⁸² of individuals (and groups) in(to) society. One of the main aims of the research is to survey the use of the frequent term “integration” in the area of human rights in order to ascertain in what kinds of contexts the concept is explicitly mentioned and what kinds of other concepts are linked to it. The aim is to clarify the concept of integration by investigating whether it has been given any definitions in the framework of human rights and what kinds of elements are linked to it. One of the core questions is how the concept of integration relates to human rights norms, whose general thrust is the values of inclusion and inclusiveness.

As discussed above, the concept of integration seems to be frequently used with respect to the groups whose defining characteristics are linked particularly to ethnicity, and integration is viewed as applying especially to groups of immigrant background. While the integration in(to) society of persons belonging to these groups is among the most acute challenges for governments in Europe, the present research

80. See e.g. the lists of international instruments considered relevant in this area and set out in the Durban Document and by the European Conference against Racism and ECRI, presented *infra* in chapters 2.2.1.1.3, 2.2.1.3.2 and 4.2.1.

81. For example, the Vienna Document of the 1993 World Conference on Human Rights contains separate sections on these questions. See also the remarks on the relative absence of references to racism and other forms of intolerance in international instruments on minorities and indigenous peoples *infra* in chapter 2.1.4.1.

82. In this research, the term “incorporation” is used as a general term for a variety of terms, including “inclusion” and “integration”.

does not confine itself to discussing these situations, but takes a broader view of the issue of integration. This approach is taken, because the human rights norms address the concept of integration with respect to various groups, including more traditional minorities and indigenous peoples as well as women, children, persons with disabilities and the elderly. Thus, the research analyses international human rights norms comprehensively; that is, it examines the relevant norms across the board, both those pertaining to various groups and those addressing various issues. To inform the overall analysis, the work also discusses the principles of equality and non-discrimination underpinning the entire international human rights regime.

In general, the research concerns both the role and limits of the human rights regime in fostering incorporation in(to) and creating an integrated society. One recurrent theme is the attitude towards differences, i.e. how differences – and what kinds of differences – are allowed, recognised or discouraged in various spheres of life. This is also among the spearheads of the analysis of the international human rights norms in this research; i.e. it examines the attitude towards allowing or recognising differences that is incorporated in the contemporary human rights norms.

Whilst the principal approach taken in the research is to describe and assess the international human rights norms, the specific focus of the work is Europe in that the analysis explores the human rights documents applicable to the European states. Consequently, the approaches taken in the regional human rights systems outside of Europe are beyond the scope of the study. Furthermore, the research concentrates on the norms adopted at the international level, and thus does not analyse and compare integration policies and approaches adopted at the national level in various European states. Defining the scope of the work in this manner aims at distilling the approaches to integration taken primarily at the international level and reflected in international documents adopted by states. While the human rights norms of relevance have been adopted within the United Nations (UN) and its specialised agencies, the Council of Europe (CoE) and the Organization for Security and Co-operation in Europe (OSCE), the research also analyses the approaches to integration taken within the EU in order to provide as complete picture as possible of the relevant integration approaches at the international level in Europe.

The normative analysis is complemented by an examination of the approaches to integration by international expert bodies and actors. Since the question of integration has been discussed most actively with respect to various minorities defined by ethnicity, culture, language or religion, the views of international bodies dealing with such groups are chosen for closer scrutiny; these are the Advisory Committee (AC) of the Framework Convention for the Protection of National Minorities of the CoE, the European Commission against Racism and Intolerance (ECRI), and the OSCE High Commissioner on National Minorities (HCNM). All three bod-

ies⁸³ have extensively considered incorporation into society and have also frequently employed the concept of integration. Since these bodies have tried to find ways to develop good means to integrate persons belonging to various minority groups in(to) society, their remarks on integration reveal a concrete set of elements considered important in the process of developing policies of integration at both the European and national levels.

Although some conclusions are drawn in the course of the research,⁸⁴ the main analyses, syntheses and conclusions are presented in the concluding chapter. Additionally, even though the thrust of the research is a consideration of international human rights norms and their application by the three international bodies mentioned, the work includes references to the views on integration put forth outside normative contexts. This is done to avoid “the prison-house of irrelevance” that lawyers are said to be often trapped in without a better grasp of social theory and political principles.⁸⁵ Consequently, the research takes up insights, among other things, from sociology, political theory and philosophy in chapters 1 and 5, which contain the introductory and concluding remarks of the research.

Combining an analysis of the role of international human rights norms in integration, the more practically oriented views on the requirements and needs in the area of integration raised by the three international bodies, and the insights into integration gained outside the human rights framework and in other disciplines enables one to draw conclusions on both the role and limits of the international human rights regime in creating an integrated society. This broader perspective enables a more critical analysis of the international human rights norms and provides information on various multifaceted elements that need to be in place for successful integration.

The research method applied is quite straightforward: it builds squarely on an analysis of international human rights norms, including the approaches to equality and non-discrimination they embody, and examines how those norms address the questions of integration, incorporation and recognising differences. These normative analyses are complemented by the views of scholars and the three international bodies mentioned.

83. Strictly speaking, the HCNM may not be called an expert body comparable to the AC and ECRI, which are both bodies consisting of a number of independent experts. The HCNM is an OSCE institution set up to prevent conflicts linked to situations involving national minorities. In practice, the HCNM is an individual with recognised diplomatic skills in the area of mediation between governments and (national) minorities. For more about these bodies, see *infra*, chapter 4. In this research the AC, ECRI and the HCNM are called “international bodies”.

84. See particularly chapters 2.1.4, 2.2.3, 3.4 and 4.4.3.

85. The “the prison-house of irrelevance” of lawyers has been discussed by Martti Koskenniemi. Koskenniemi (2005a), p. 4.

The impetus for the research derives from a desire to investigate the extent to which the following tentative observations are true and to address the gaps identified:

- Although the incorporation of individuals belonging to various groups, particularly those of immigrant background, in(to) society is presently one of the most important aspects linked to minorities, and although the integration issue is widely considered to be among the key topics in the area, it has not been considered systematically and coherently either in international human rights norms or by international expert bodies and actors.
- Although the concept of integration is widely used, its content is often left unspecified.
- Although there appear to exist concrete indications regarding the elements considered necessary (or important) for successful integration in some situations, analyses of the interplay of these elements, as well as a more general picture of integration, are still lacking in the area of human rights.
- Insufficient linkages between the minority and anti-racism discourses make it difficult to grasp the multifaceted dimensions of integration. Although links between minority rights and anti-racist action have been established in some international documents and in the work of many international expert bodies and actors, there is still a need to elaborate various (also practical) dimensions of these links and their implications. Additionally, certain tensions between the minority and anti-racism discourses – arising, for instance, from the different emphases they place on the significance of differences – complicate the consideration of the issue of integration.
- The present analyses of various dimensions of incorporation (integration), including those relating to gender and age, are highly insufficient.

1.4 Structure of the Thesis

The work has been structured into five major chapters. This introductory chapter is followed by an analysis of international human rights norms with a view to ascertaining how these address the issues of integration – and the concepts associated with it – as well as the question of recognising differences. Chapter 2 begins with a consideration of norms pertaining to specific groups and continues by examining the international norms focussing on certain issues. Despite this division into norms on groups and issues, the documents studied do not always fall neatly into either of these two categories. For instance, some documents produced to tackle racial discrimination, racism and other forms of intolerance contain elements familiar from the norms on minorities and indigenous peoples. In addition, some instruments addressing the situation of migrant workers do not confine themselves to the situation

and/or rights of such workers, but include provisions addressing the phenomenon of migration more generally, including references to trafficking in human beings. Consequently, the grouping of norms could have been done also somewhat differently than it has been. Chapter 2 ends with a consideration of the role of international human rights norms of general application for incorporation. Chapter 3 discusses the role and significance of the approaches taken within the area by the EU, and chapter 4 sheds light on practice by examining the views of three international bodies chosen for closer scrutiny. The concluding chapter, including the references to the views on integration put forward in various disciplines, presents and consolidates the main conclusions of the research and provides a broader consideration of the integration problematic.

2 INTERNATIONAL HUMAN RIGHTS NORMS RELEVANT IN EUROPE AND THE ISSUE OF INTEGRATION

This chapter considers various international human rights norms relevant in Europe from the viewpoint of incorporation and particularly how integration and allowing or recognising differences are addressed or reflected in these norms. The norms are assessed in three sections. The first sheds light on the international norms pertaining to various groups, such as minorities, indigenous peoples, refugees and migrants. This is then followed by an assessment of the norms adopted to address such questions as racial discrimination, racism and other forms of intolerance (anti-racism norms).¹ The third section discusses the significance of human rights norms and principles of general application for incorporation and for allowing and recognising differences.

2.1 Norms Pertaining to Various Groups

2.1.1 Norms on Minorities

The protection of minorities has had a prominent place in the development of the contemporary international human rights regime, for atrocities committed during the Second World War² – particularly the systematic destruction of minorities – prompted the incorporation of references to human rights into the charter establishing the UN.³ The first human rights convention adopted within the auspices of the UN also reflected the concern and outrage triggered by these incidents; the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948, addresses the destruction of national, ethnical, racial or religious groups. Despite such expressions of concern for the situation of minorities, the general position adopted by states in the beginning of the UN era, and for a long time thereafter, was nevertheless that no specific norms providing for minority rights were necessary. Among other things, reservations towards minority-specific rights de-

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1. See the remarks on the use of terms in this research *supra* in chapter 1.3.
 2. Groups such as the Roma and homosexuals were targeted in addition to the Jews.
 3. See also e.g. Boyle and Baldaccini (2001), p. 141.

rived from the League of Nations' minority protection regime, whose features were viewed as contributing to the League's failure, because minority protection was used as a pretext for aggression.⁴ Consequently, the human rights regime developed by the UN was built to enshrine the principles of equality and non-discrimination, and the interests of minority groups were seen as being secured through the firm application of these principles.⁵ Thus, no explicit references to minorities were incorporated in the founding instruments of modern human rights law, that is, in either the UN Charter or the Universal Declaration of Human Rights (UDHR).⁶ This did not mean, however, that no attention was paid to minorities: the Sub-Commission on Prevention of Discrimination and Protection of Minorities was set up already in 1947 as an advisory body to the UN Commission on Human Rights to consider the situations of racial, national, religious and linguistic minorities.⁷ It took some time before the reluctance of states to enact international minority-specific norms was overcome and the first such norms appeared in human rights documents. This happened when the text of the International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly (UNGA) in 1966. The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted within the CoE in 1950, had incorporated a reference to minorities only in its non-discrimination provision.⁸

A clear change in the attitude towards the adoption of minority-specific international norms took place towards the end of the 1980s, coinciding with the end

4. See e.g. Kymlicka (1995), p. 57.

The minority protection regime developed by the League of Nations consisted of special treaties and provisions aimed at the protection of the minorities that came to existence when the borders of Europe were redrawn after the First World War. This regime was not intended for general application but applied only to certain states in Europe, particularly those defeated in the war; i.e. it essentially concerned minorities in Central and Eastern Europe. Thornberry (1991), pp. 40–54, Banton (1996), p. 16, and Nowak (2005), pp. 635–636. In the pre-League of Nations era there had been efforts to protect religious dissenters and to fight against slavery. On the history of international minority protection, see e.g. Thornberry (1991), pp. 25–54.

5. See e.g. *ibid.*, p. 122.

6. The reason for the impossibility of reaching a compromise on incorporating references to minorities in these instruments was the strongly differing views between the representatives of the “New World”, who took the view that indigenous groups of peoples and immigrants must be assimilated, and those of the “Old World”, many of whom strongly advocated the specific protection of minorities. Nowak (2005), p. 636.

7. For the Sub-Commission, see e.g. Thornberry (1991), pp. 124–132, and Eide (1992), pp. 211–214 and 217. In 1999 the Sub-Commission's work was continued in the Sub-Commission on the Promotion and Protection of Human Rights. For the functioning of the Sub-Commission, see Lempinen (2005), pp. 248–259 and 272–281. In 2006 the UN Commission on Human Rights was replaced by the Human Rights Council.

8. See art. 14. The same kind of reference was also incorporated in Protocol 12 in the form of a free-standing non-discrimination provision. See also the remarks *infra* in chapter 2.3.1.1.

of the Cold War era, with states concluding a number of international instruments within the auspices of several international organisations that focus special attention on the situation of minorities.⁹ Whilst the adoption of the ICCPR and the incorporation of article 27 therein constituted an important development in the area of international minority-specific norms by signifying a move forward in the international recognition of minority rights,¹⁰ the groundbreaking normative step in the area of specific positive minority standards at the international level was taken by the OSCE (CSCE at the time),¹¹ which adopted its most important commitments thus far relevant to minorities in 1989 and 1990. The next notable normative development at the international level took place within the UN when the UNGA adopted the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (the UN Minority Declaration) in 1992. The CoE became active in creating minority-relevant standards when it adopted and opened for signature the European Charter for Regional or Minority Languages (the CoE Language Charter) in 1992 and the Framework Convention for the Protection of National Minorities (the CoE Framework Convention) in 1995. The situation of minorities has also been addressed in documents adopted at world conferences and summit meetings.

2.1.1.1 Cautious Steps by the United Nations

2.1.1.1.1 The International Covenant on Civil and Political Rights and the UN Minority Declaration

The first steps taken in the normative protection of minorities within the UN and incorporated in *article 27 of the ICCPR* were very cautious.¹² Article 27 addresses ethnic, religious and linguistic minorities and states that “persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. The negative formulation inserted in the provision, reflecting strong reservations towards the adoption of separate provisions on minorities that still prevailed at the time the ICCPR was drafted, renders article 27 rather

9. The novelty of the international minority regimes of the UN era in comparison to the earlier regimes is that they are intended for general application. See the remarks on the minority regime set up by the League of Nations *supra* (n. 4).

10. The text of the other UN Covenant adopted by the UNGA at the same time, the ICESCR, makes no references to minorities.

11. See the remarks on the change of the name of the CSCE to OSCE *infra* in chapter 2.1.1.2.1.

12. Art. 27 of the ICCPR is still the only provision concerning the protection of minorities to be found in an international treaty of universal application.

weak.¹³ Consequently, the obligations of states pursuant to article 27 are not very strong but concern essentially non-interference in and toleration of the enjoyment of the rights protected.¹⁴

In 1994, two years after the adoption of the UN Minority Declaration by the UNGA, the Human Rights Committee (HRC), which had been entrusted with supervising the implementation of the ICCPR by the states parties to it, adopted a General Comment on article 27 pointing to the distinctiveness of the rights set out in the provision in comparison to the other rights of the Covenant.¹⁵ This echoed the UN Minority Declaration by referring to ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned. In its Comment, the HRC also referred to the positive obligation of states parties to protect minorities against both the acts of the state party itself and those of private actors.¹⁶ It has been pointed out that while state obligations to protect minorities against private threats seem, at least in principle, to be non-disputable, the question of positive state obligations to fulfil minority rights is more controversial.¹⁷ In its practice, the HRC has accepted positive obligations to ensure special rights of indigenous peoples, but has been very cautious in respect of other groups being included within the scope of article 27.¹⁸

13. Art. 27 is the only provision in the ICCPR with a negative formulation, i.e. “shall not be denied”. The negative formulation was intentionally chosen in order to avoid minority consciousness being (artificially) awakened or stimulated. Nowak (2005), pp. 657–658.

14. The negative character of the obligation is seen as signifying that the states must tolerate the various manifestations of the cultural life of minorities and that the measures which threaten the way of life and culture of a minority constitute a violation of art. 27. *Ibid.*, p. 659.

15. HRC’s General Comment No. 23 on art. 27, paras 1, 4 and 6.1.

16. *Ibid.*, paras 6.1, 6.2, 7 and 9.

It has been noted that art. 27 does not by itself impose a legal obligation on states to provide financial assistance in education and in other areas or to support specific activities aimed at minorities, including support for private or public schools using a minority language. Such support may, however, materialise through the application of other rights recognised in international law, in particular those of equality and non-discrimination. de Varennes (1996), pp. 151 and 154.

17. In the background lies (again) a controversial issue between two conflicting schools of thought: the traditional (Central and Northern) European approach of protecting “old” minorities by means of positive state obligations and special rights (such as the right to use the minority language before public authorities) and the non-discrimination approach, which does not distinguish between “old” and “new” minorities and which denies special rights to minorities and corresponding positive state obligations. Nowak (2005), p. 666. On the “New World” wanting to assimilate minorities and racial and national minorities and the “Old World” wanting to protect them, see also Banton (1996), p. 35.

18. Nowak (2005), p. 666. It is also worth noting that most of the individual communications decided so far by the HRC under art. 27 have been submitted by indigenous peoples. *Ibid.*, p. 651. On the submission of communications under art. 27 of the ICCPR by persons of indigenous origin, see also Anaya (2004), pp. 132–137 and 253–258.

The text of article 27 leaves the personal scope of application extremely vague. The HRC has viewed this scope as being wide enough to mean that the persons designated to be protected by this provision need not be citizens nor even permanent residents of the state party. Accordingly, migrant workers and even visitors in a state party who constitute a minority in the sense of the provision are entitled not to be denied the exercise of the rights set out therein.¹⁹ While a fairly restrictive understanding of the nature and scope of the rights envisaged under article 27 enables an extremely liberal interpretation, a certain element of stability is required of a minority group.²⁰ The HRC has taken the view that article 27 also covers members of indigenous communities that constitute a minority.²¹ In general, the types of minorities covered by article 27, i.e. ethnic, religious and linguistic minorities, are not free from interpretative problems.²²

Article 27 does not expressly address the questions of integration, inclusion or the like, but such issues as autonomy, assimilation and integration were discussed in the course of the drafting process.²³ Scholarly views put forward on article 27 include an observation that the provision in fact prohibits all forms of pressure to integrate or assimilate.²⁴

The subsequent normative step of the UN in the area of minority protection, i.e. the adoption of *the UN Minority Declaration* in 1992 by the UNGA, signified the conclusion of the first – and still the only – multilateral global human rights document focussing solely on minority issues. Together with article 27 of the ICCPR, the Declaration presently represents the norms of principal interest to minorities at the universal level.²⁵ Whilst the UN Minority Declaration draws upon and elaborates

19. The HRC has also noted that the existence of an ethnic, religious or linguistic minority in a given state party does not depend upon a decision by that state party but must be established by objective criteria. HRC's General Comment No. 23 on art. 27, para 5.1 and 5.2.

20. This is interpreted as deriving from the insertion of the word "exist" in the provision. Nowak (2005), p. 647.

21. HRC's General Comment No. 23 on art. 27, paras 3.2 and 7. For the difficulties of some states (particularly earlier) to acknowledge that indigenous peoples could also come within the ambit of art. 27, see the remarks *infra* in chapter 2.1.2.2.

22. Nowak (2005), pp. 648–652. See also the remarks *infra* in chapter 2.1.4.1.

23. This discussion related to the debate on whether the provision should protect only old, long-established minorities, or also newer minority groups. Nowak (2005), p. 640.

24. *Ibid.*, p. 662.

Minority rights may be limited on the basis of the protection of other rights of the ICCPR and on the basis of general limitation clauses. *Ibid.*, p. 667. Art. 46 of the ICCPR concerns the interpretation of the instrument and notes that nothing therein may be interpreted as impairing the provisions of the UN Charter. The HRC has also pointed out that the enjoyment of the rights to which art. 27 relates does not prejudice the sovereignty and territorial integrity of a state party. HRC's General Comment No. 23 on art. 27, para. 3.2.

25. The significance of this declaration-type instrument is underlined by the fact that it was adopted by consensus in the UNGA, in addition to which its importance has been reiter-

article 27 of the ICCPR in particular,²⁶ the drafting of the Declaration's provisions was also influenced by the CSCE commitments on minorities.²⁷

The UN Declaration echoes article 27 of the ICCPR in setting out the right of persons belonging to national or ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion and to use their own language; however, it moves to a more positive statement of these rights instead of defining them in a negative way.²⁸ The Declaration also mentions rights of persons belonging to minorities, such as rights to participation,²⁹ the establishment and maintaining of associations of their own, and contacts with others, including contacts across frontiers.³⁰ Whilst the rights are defined in terms of the rights of individuals (persons) belonging to minorities, the communal dimensions of minority rights are also recognised.³¹

The obligations of states set out in the Declaration include the protection of the existence and the national or ethnic, cultural, religious and linguistic identity of minorities (within their territories) as well as the encouragement of conditions for the promotion of that identity.³² States are also committed to take measures to ensure that persons belonging to minorities may exercise fully and effectively, and on the basis of equality and non-discrimination, all their human rights and fundamental freedoms. The Declaration states that measures are to be taken to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, and traditions and customs.³³

ated in other instruments adopted subsequently. For example, the Vienna Document of the 1993 World Conference on Human Rights "reaffirms" the guidelines of the Declaration. See Part II, Section A, para. 6. See also the remarks on the Vienna Document *infra* in chapter 2.1.1.1.2.

26. Preambular para. 4 to the Declaration notes that the Declaration was inspired by art. 27 of the ICCPR. Preambular para. 3 mentions a number of human rights instruments, including the UDHR, the ICERD, the ICCPR, the ICESCR, and the Child Convention.

27. Bloed (1995), p. 19.

28. See art. 2.1, in which the wording "have the right" is employed instead of the negative formulation of art. 27 of the ICCPR ("shall not be denied the right"). Otherwise art. 2.1 to a great extent replicates art. 27 of the ICCPR.

29. Art. 2.2 mentions the right of persons belonging to minorities to participate effectively in cultural, religious, social, economic and public life, and art. 2.3 their right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live (in a manner not incompatible with national legislation). Art. 4.5 refers to the question of the participation of persons belonging to minorities in the economic progress and development in their country. Art. 5, which addresses the planning and implementing of national policies and programmes and inter-state programmes, calls for taking account of the legitimate interests of persons belonging to minorities.

30. Art. 2.4 and 2.5.

31. See particularly art. 3.1.

32. Art. 1.

33. Art. 4.1 and 4.2.

The Declaration expressly deals with the mother tongue of persons belonging to minorities by raising the possibility both to learn it and to have instruction in it.³⁴ Additionally, knowledge of the history, traditions, language and culture of the minorities that exist within the territory of the state should be encouraged in the field of education. It is also underlined that persons belonging to minorities should have adequate opportunities to gain knowledge of the society as a whole.³⁵

Although the UN Minority Declaration represents an advance over the protection afforded by article 27 of the ICCPR,³⁶ it constitutes only a cautious step forward in the area of normative protection of minorities in the UN context. Firstly, it is a declaration-type instrument without an established implementation review mechanism.³⁷ Secondly, whilst the Declaration expresses states' commitment to the existence and identity of minorities in rather strong language, the provisions on measures with respect to minority languages and in the area of education are rendered less committal, in fact even rather weak, by formulations allowing states a wide margin of discretion.³⁸ It is noteworthy that the provision on ensuring non-discriminatory enjoyment of human rights and fundamental freedoms, for its part, contains stronger language.

The UN Minority Declaration sets certain limits on the expression of minority characteristics by requiring compatibility with both national law and international standards³⁹ and underlining the enabling of the enjoyment by all persons of universally recognised human rights and fundamental freedoms.⁴⁰ The promotion and protection of the rights of persons belonging to minorities is also linked to the stability of states. In addition to pointing to intra-state stability, the Declara-

34. According to art. 4.3, states should take appropriate measures so that, whenever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

35. Art. 4.4.

36. The fact that the Declaration is intended for global application and that it contains universal standards must also be borne in mind in the temptation to make unfavourable comparisons with regional standards.

37. In practice, the UN Working Group on Minorities (WGM) has provided for a follow-up framework of sorts for the implementation of the Declaration, since the Declaration is one of the instruments which the WGM has deemed to be relevant in its work. Thomson (2001), pp. 125–126. For the WGM, see the UN website at <http://www.unhchr.ch/minorities/group.htm> (visited on 10 October 2007).

38. These include such formulations as “states should” instead of more the mandatory “states shall”. Furthermore, there are expressions such as “appropriate measures”, “whenever possible”, “adequate opportunities”, and “where appropriate”. See e.g. art. 4.3–5.

39. According to art. 4.2, states are to take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion and traditions and customs, except where specific practices are in violation of national law and contrary to international standards. See also the reference to compatibility with national legislation in art. 2.3 (noted *supra*).

40. Art. 8.2.

tion draws attention to the inter-state character of minority issues.⁴¹ Activities that would compromise the territorial integrity and political independence of states are expressly outlawed.⁴²

The UN Minority Declaration contains no express references to integration or to any of the other concepts often linked to integration, such as assimilation, exclusion and inclusion. However, the instrument does incorporate an idea that the attention paid to minorities contributes to a better relationship, not only between states, but also between various groups within a state, in particular the majority population and minorities. The provisions on participation and measures to be taken in the field of education to enhance public knowledge of the existence of minorities and their cultures and other characteristics as well as to enable persons belonging to minorities to gain knowledge of the society as a whole point to some kind of interaction between minorities and the majority (including authorities). These considerations also relate to enhancing the belonging of minorities to society, and thereby have links to their incorporation in(to) society.

2.1.1.1.2 Other UN Instruments

The question of minorities has also been addressed in *the Vienna Document*, adopted at the World Conference on Human Rights that convened in June 1993 in Vienna. The provisions in the Vienna Document, general in nature and brief, essentially reiterate the obligation of states to ensure that persons belonging to minorities may exercise fully and effectively all human rights and fundamental freedoms without discrimination and in full equality before the law in accordance with the UN Minority Declaration. The Vienna Document makes particular mention of the rights of persons belonging to minorities with respect to their culture, their religion and their language and notes the link between the rights of persons belonging to minorities and the stability of states, as well as the importance of participation.⁴³

The Vienna Document has acquired some additional importance in the area of human rights by reaffirming the universal nature of international human rights, which was challenged prior to the Conference by a number of Asian states in particular. The outcome in Vienna was that while the universality as well as interlink-

41. Preambular para. 5 refers to the link between the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities and the contribution of this promotion and protection to the political and social stability of states in which the minorities live. Art. 6 notes that inter-state co-operation on questions relating to persons belonging to minorities promotes mutual understanding and confidence. Art. 7 refers to inter-state co-operation as a means to promote respect for the rights set forth in the Declaration.

42. Art. 8.4.

43. Part I, para. 19. The importance of the participation of persons belonging to minorities in all aspects of the life of society is emphasised in Part II of the Document, which contains commitments of a more operational nature. See Part II, paras 25–27.

ages of various international human rights was affirmed, the Document also incorporated references to the existence of cultural differences. However, these references sooner address cultural and other differences at the inter-state level: that is, they recognise cultural differences among states.⁴⁴ The emphasis in the Vienna Document on the importance of fully securing human rights also for women renders it important for women.⁴⁵

From the viewpoint of minorities *the Convention on the Rights of the Child* (the Child Convention), adopted within the UN in 1989, also contains noteworthy provisions in that it expressly addresses the situation of children belonging to minorities by making them the beneficiaries of special protection. In fact, article 30 of the Convention incorporates a provision resembling article 27 of the ICCPR.⁴⁶ *The Convention against Discrimination in Education*, adopted within UNESCO in 1960, includes explicit references to members of national minorities by recognising their right to carry out their own educational activities, including the maintenance of their own schools and the use or teaching of their own language.⁴⁷ The pertinent provisions of the Convention also have bearing on incorporation in(to) society in stipulating that the right of members of national minorities to carry out their own educational activities must not be exercised in a manner which prevents the members of these minorities understanding the culture and language of the community as a whole and participating in its activities, or which prejudices national sovereignty.⁴⁸

44. See Part I, paras 1 and 5. Para. 5 refers to the significance of national and regional particularities and various historical, cultural and religious backgrounds.

45. See Part I, para. 18. See also the remarks *infra* in chapter 2.1.3.2.

46. The pertinent provision also addresses the situation of indigenous children. See art. 30. See also art. 17(d). See the remarks *infra* in chapter 2.1.3.2.

47. Art. 5.1(c). As the title of the instrument clearly suggests, the instrument focuses squarely on aspects of non-discrimination in education. Thus, it does not address cultural and language rights of persons belonging to minorities in a manner similar to the UN Minority Declaration, for instance.

48. According to the Convention, institutions other than those maintained by the public authorities should conform to the minimum educational standards laid down or approved by the authorities. See art. 5.1(c)(ii). See also the references to the UNESCO Convention *infra* in chapters 2.2.1.1.4 and 2.3.1.

2.1.1.2 New Ground Broken by the Organization for Security and Co-operation in Europe

2.1.1.2.1 Remarks on the Characteristics of the OSCE and its Commitments

The Organization for Security and Co-operation in Europe (the OSCE) is rather a unique international organisation, one differing from the CoE and the UN in terms of its normative framework and character as well as its working methods. Accordingly, some remarks on the characteristics of the OSCE are in order before turning to an examination of the minority protection developed within the organisation.

In the OSCE⁴⁹ various issues, including those concerning human rights and minorities, are considered primarily from the viewpoint of the peace and security of states. The organisation's focus is also on the incidents and developments occurring, i.e. security threats originating, within the OSCE area. The concept of comprehensive security employed by the OSCE points to three different but intertwined dimensions of security: the politico-military dimension, the human dimension and the economic and environmental dimension.⁵⁰ The OSCE's characteristics, strengths and comparative advantages in general have been seen as deriving from its comprehensive approach to security, which combines various dimensions of security, as well as from its consensual, co-operational, and operational character.⁵¹

The "human dimension" of the OSCE is a broad concept covering commitments on human rights and fundamental freedoms in general, the protection of persons belonging to national minorities, democracy (including democratic elections and democratic governance and institutions), tolerance and non-discrimination, the rule of law, human contacts and humanitarian law.⁵² In recognition of both the intra- and inter-state relevance of human dimension issues, including those relating to mi-

49. The foundation of the OSCE was laid with the adoption of the Helsinki Final Act in 1975 and over the years this forum of inter-state co-operation developed from a conference-like framework into a forum with permanent structures and institutions. The decision to change the initial name of the Conference of Security and Co-operation in Europe (CSCE) to OSCE as of the beginning of 1995 was made at the summit meeting of the CSCE states held in Budapest in 1994 in order to signal this change.

Unless otherwise indicated, when references to the OSCE are made in the text at hand, they are not limited solely to the period since the change of name but encompass the work of both the CSCE and the OSCE and the documents adopted since the Helsinki Conference of 1975. The name CSCE still appears in connection with the historical facts dating to the pre-1995 period, including the names and titles of the meetings held and the documents adopted at that time.

50. For initially labelling the various questions considered by the CSCE as "baskets", and for the interlinkages of various questions considered within the OSCE, see Bloed (1993), pp. 8 and 27–28. For the various dimensions, see also Ghebali (1996), pp. 222–565.

51. Kamp (2004), pp. 322 and 328.

52. ODIHR (2005), p. xiii.

norities, the participating states have expressly declared that the questions belonging to the human dimension of the OSCE are in the interest of all participating states, i.e. are of international concern.⁵³ Whilst the OSCE's focus has clearly been on state-centred security, in recent years some attention has also been paid to the security of individuals by employing the concept of human security. Although this concept has been discussed at the international level – particularly within the UN⁵⁴ – and has been used within the OSCE, for instance, by the Office for Democratic Institutions and Human Rights (ODIHR), and has appeared occasionally in political discussions of the organisation,⁵⁵ it has not yet developed into a concept used regularly and officially by the OSCE.

Among the characteristics of the OSCE is that the commitments adopted since the 1975 Helsinki Final Act build on each other and that this whole “package” of commitments, sometimes also called the OSCE *acquis*, which has been adopted by consensus, binds all participating states equally.⁵⁶ Accordingly, the OSCE has sometimes been called a “community of values” whose values are seen as relating to the human dimension in particular.⁵⁷ The human rights belonging to the human dimension primarily concern what are known as civil and political rights, whilst

53. An express reference to the international nature of human dimension matters was inserted in the Preamble to the 1991 Moscow Document. In fact, this also meant that the CSCE was among the first forums within which the states participating in its work clearly declared the international nature of human rights questions. For this “revolutionary” declaration, see also e.g. Kemp (2001), pp. 7 and 14.

54. These discussions have been prominent particularly within the UNDP. Of the UN member states, particularly Canada, Japan and Switzerland have actively discussed the issue of human security. Alkire (2003), Smith (2006), pp. 41–42, and KATU Report (2007).

55. These political discussions have concerned, among other things, the issues of border control and security, small weapons and trafficking in human beings. Pentikäinen (2005), pp. 72–73. The OSCE Ministerial Council has mentioned that e.g. violence against women constitutes a threat to human security. Ministerial Council Decision No. 15/05 on Violence against Women (2005), preambular para. 9. The ODIHR has linked human security to such issues as gender-based persecution, violence and exploitation, trafficking in human beings, prevention of illicit trafficking in drugs and arms, other forms of international organised crime and the prevention of terrorism. ODIHR (2005), pp. 209–248. The Panel of Eminent Persons that issued its views on the (future) role of the OSCE on the occasion of the 30th anniversary of the Organization in 2005 noted that within the OSCE human security links human rights and security and relates to the individual and collective responsibility of all OSCE states for the security of the individual. OSCE Panel of Eminent Persons (2005), p. 16.

56. ODIHR (2005), p. xvii.

The OSCE commitments on the human dimension have been incorporated in a number of documents adopted over the years, the most essential being the concluding documents of the general OSCE meetings and the documents adopted by certain specific human dimension meetings. The OSCE Ministerial Council meetings have also made pertinent decisions. For a comprehensive compilation of the OSCE commitments in the area of the human dimension, see e.g. ODIHR (2005).

57. *Ibid.*, p. xvii. For example, the 1992 Helsinki Document links respect for human rights and fundamental freedoms, including the rights of persons belonging to national minorities, to

the commitments on economic, social and cultural rights are much more generally worded.⁵⁸ The OSCE commitments also contain references to many international conventions, including the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and to the importance of both adhering to them and their implementation.⁵⁹ Some of these references suggest that the norms of these other international instruments have been rendered part of the standards also relevant in the area of the human dimension of the OSCE and are thus to be taken into account by the OSCE states. Some human dimension commitments of the OSCE, including those addressing democracy and democratic institutions, go beyond the provisions laid down in many other international instruments, including human rights conventions. For instance, the OSCE commitments on democracy and democratic institutions contain references to the prerequisites that the internal structures of states should fulfil in order to meet the criteria of democracy.⁶⁰

Also characteristic of the OSCE standards is their strict political nature; i.e. the OSCE commitments are not laid down in treaty-format documents but rather are politically binding upon the participating states.⁶¹ The OSCE commitments contain express commitments of the OSCE states to implement the organisation's standards at their national level.⁶² As regards the international supervision of this national implementation, unlike the monitoring systems established under many international human rights conventions, the OSCE commitments introduce no regular state reporting system or complaint mechanism for individuals.⁶³ The monitoring

the shared values and common aims of the participating states. Helsinki Document, Declaration, para. 6.

58. On economic, social and cultural rights, see ODIHR (2005), pp. 131–137.

59. For a reference to the ICERD, see e.g. the 1992 Helsinki Document, Decisions, Chapter VI, para. 32. The 1989 Vienna Document refers to the ICESCR. See para. 13.2 under “Questions Relating to Security in Europe”.

60. Some of these commitments are rather detailed and as such unique commitments incorporated in inter-state instruments. For the pertinent commitments, see ODIHR (2005), pp. 75–96.

61. For the remarks on the nature of the CSCE commitments, see e.g. Bloed (1993), pp. 22–25. The nature and significance of the OSCE commitments compared to international legal obligations have been considered by many scholars over the years. See e.g. van Dijk (1980), pp. 97–124, and Bothe (1980), pp. 65–95.

The OSCE states have negotiated some documents in a treaty-format within the framework of the OSCE. These documents do not concern the material human dimension issues but address politico-military issues and settlement of disputes. For example, the Treaty on Open Skies has been negotiated among the OSCE states. See the OSCE website at <http://www.osce.org/item.13516.html> (visited on 10 October 2007).

62. See e.g. the 1992 Helsinki Document, Decisions, Chapter VI, para. 23, and the 1994 Budapest Document, Decisions, Chapter VIII, para. 21.

63. The OSCE states have created a specific mechanism for the purposes of the human dimension, the so-called Human Dimension Mechanism, which may be activated by the OSCE states. The mechanism was resorted to a number of times in the first half of the 1990s, but

of the implementation of the OSCE human dimension commitments takes place essentially within the context of various OSCE meetings. In recent years, the major meeting considering these aspects of implementation has been the Human Dimension Implementation Meeting (HDIM),⁶⁴ which may be viewed as rather a unique forum at the international level for the assessment of states' compliance with their international commitments. This meeting, held annually in recent years, takes up various human dimension issues, including those concerning national minorities, the Roma, migrant workers and tolerance. Additionally, non-governmental organisations (NGOs) have more opportunities to participate in these discussions than in other international frameworks assessing states' compliance with international norms. Of late, the OSCE's implementation review has faced increasing criticism due to its overwhelming and almost exclusive focus on the eastern participating states, i.e. the OSCE states "East of Vienna".⁶⁵

2.1.1.2.2 OSCE Commitments on Persons Belonging to National Minorities

The OSCE has paved the way for the positive regulation of minority protection at the international level. References to national minorities, albeit of a very general nature, were inserted as early as in *the 1975 Helsinki Final Act* and subsequently minority questions have become a prominent part of the human dimension. In the course of the 1990s, prompted by a number of conflicts in the beginning of the decade in the OSCE area – including the war in the former Yugoslavia⁶⁶ – increased attention was focussed on minority issues, as the treatment of minorities was recognised as one of the root-causes of conflicts in the OSCE area. Recognising that even intra-state minority-related tensions and conflicts have destabilising effects on other participating states resulted in the establishment by the 1992 Helsinki Summit of the post of the High Commissioner on National Minorities (HCNM) to address minority-relevant situations in the OSCE states.⁶⁷ The OSCE commitments on minorities have also served as examples for the standards on minorities adopted

since then the interest of states in using it has declined. For this mechanism and its use in the beginning of the 1990s, see Pentikäinen (1997), pp. 95–102.

64. Another framework for implementation review is the General Review Conferences, which are organised in the years when an OSCE summit takes place. The HDIM convenes in those years when the Review Conferences and summits do not convene. Since the latest OSCE summit was held in Istanbul in 1999, the HDIM has been organised annually since 2000. The HDIM is organised by the ODIHR.

65. Zellner (2005), p. 16. For the critical remarks on the effectiveness and significance of the HDIMs, see e.g. Jääskeläinen and Pentikäinen (2005), pp. 123–133.

The remark "East of Vienna" refers to the geographical OSCE area east of the capital of Austria, which hosts the headquarters of the OSCE, including the OSCE secretariat.

66. Kemp (2001), pp. 4–5.

67. For the mandate and activities of the HCNM, see chapter 4.3 *infra*. Minority questions are addressed also by other OSCE institutions and actors, including e.g. the ODIHR, the RFoM and the field missions. See the remarks on the OSCE website at <http://www.osce.org>.

by other international organisations, including the UN and the CoE. For instance, the OSCE minority commitments directly influenced drafting work on the UN Minority Declaration⁶⁸ and the CoE Framework Convention.⁶⁹

The 1989 Vienna Document introduced new elements vis-à-vis the previously adopted OSCE commitments on minorities, which focussed on equality before the law and the opportunity for the actual enjoyment of human rights and fundamental freedoms.⁷⁰ In addition to reiterating the commitment to ensure human rights and fundamental freedoms on a non-discriminatory basis also for persons belonging to national minorities,⁷¹ the Vienna Document undertook to advance minority issues in that the participating states committed themselves to protecting and creating conditions for the promotion of the ethnic, cultural, linguistic and religious identity of national minorities on their territory.⁷²

The subsequent acceptance of *the 1990 Copenhagen Document* signified the adoption of the most important OSCE document incorporating minority-related standards. The instrument reiterates the principles of equality and non-discrimination⁷³ and goes on to define the rights of persons belonging to national minorities to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects. It is expressly noted that there should not be any attempts to assimilate such persons against their will. The document refers to a number of rights of persons belonging to national minorities, including the right to use their mother tongue in private and in public as well as to disseminate, have access to and exchange information in their mother tongue; the right to establish and maintain their own educational, cultural and religious institutions, organisations or associations; the right to profess and practise religion (including the right to conduct religious educational activities in their mother tongue); the right to establish and maintain contacts among themselves both within their country and across frontiers; and the right to participate in international non-

68. See also the remarks *supra* in chapter 2.1.1.1.1.

69. See the explicit reference to the OSCE documents in preambular para. 12 to the CoE Framework Convention. See also the remarks made at the CoE summit of 1993 discussed *infra* in chapter 2.1.1.3.3. See also Bloed (1995), p. 19.

The CoE Language Charter also takes note of the work carried out within the OSCE, and refers particularly to the 1975 Helsinki Final Act and the 1990 Copenhagen Document. See preambular para. 5 to the Charter.

70. See the 1975 Helsinki Final Act, “Declaration on Principles Guiding Relations between Participating States”, Principle VII, para. 4. The 1983 Madrid Document essentially reiterates this commitment. See “Questions relating to Security in Europe”, para. 15.

71. See the 1989 Vienna Document, “Questions relating to Security in Europe”, para. 18.

72. *Ibid.*, para. 19.

73. The relevant provision sets out the right of persons belonging to national minorities to exercise fully and effectively their human rights and fundamental freedoms without any discrimination and in full equality before the law. The 1990 Copenhagen Document, para. 31.

governmental organisations (NGOs). Additionally, both the individual and communal dimensions of minority rights are emphasised.⁷⁴

The 1990 Copenhagen Document echoes the 1989 Vienna Document by referring to the commitment of states to protect the ethnic, cultural, linguistic and religious identity of national minorities on their territory and to create conditions for the promotion of that identity.⁷⁵ The participating states also assumed commitments with respect to the instruction of or in the mother tongue of persons belonging to national minorities, as well as the use of minority languages before public authorities. Furthermore, the need to learn the official language or languages of the state concerned is stressed, and the importance of taking account of the history and culture of national minorities in the context of the teaching of history and culture in educational establishments is mentioned.⁷⁶ The Document recognises the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identities of such minorities. It is of some interest that the instrument also draws attention to establishing local or autonomous administrations as one of the possible means to achieve the aims to protect and create conditions for the promotion of the ethnic, cultural, linguistic and religious identity of certain national minorities.⁷⁷

The links of OSCE minority commitments to security matters are clearly visible in the 1990 Copenhagen Document in that respect for the rights of persons belonging to national minorities is noted as being a factor contributing to peace and stability in the participating states. It is noteworthy that respecting the rights of persons belonging to national minorities is also linked to the issues of justice and democracy. Moreover, inter-state co-operation in questions relating to national minorities is referred to as promoting mutual understanding and confidence, friendly and good-neighbourly relations, international peace, security and justice.⁷⁸ Certain express cross-references between minority issues and questions relating to intolerance and like issues in the 1990 Copenhagen Document also merit mention in this connection.⁷⁹ Additionally, the fact that the Document places the OSCE commitments on various forms of intolerance right after the minority commitments and in the same section of the document signals the close relationship between these two issues.

74. Ibid., para. 32.

75. Ibid., para. 33.

76. Ibid., para. 34.

77. In this connection, the instrument mentions the specific historical and territorial circumstances of minorities and the need to comply with the policies of the state concerned. Ibid., para. 35. See also references to consultation in para. 33, which addresses identity issues.

78. Ibid., paras 30 and 36.

79. The minority commitments contain explicit references to promoting (social) tolerance and cultural diversity. Ibid., para. 30. See the remarks *infra* in chapter 2.2.1.2.

Many subsequent OSCE documents reiterate the issues highlighted in the 1990 Copenhagen Document, such as the commitment of the OSCE states to ensure general human rights also for persons belonging to national minorities,⁸⁰ commitments relating to identity issues⁸¹ and participation,⁸² and the link between the protection of minorities (identity of national minorities) and peace, stability, justice and democracy.⁸³

While the OSCE commitments on minorities clearly set out positive obligations for states, for instance, the commitments concerning instruction of or in a minority language and those addressing the use of minority languages before public authorities, they also contain a number of expressions lessening their committal character, thereby widening the states' margin of discretion.⁸⁴ Furthermore, compatibility clauses in the instruments subject minority rights to international standards in particular⁸⁵ but also to national legislation or policies.⁸⁶ It is also stressed that the minority entitlements may not be exercised in a manner undermining the territorial integrity of states.⁸⁷

As regards the personal scope of the OSCE minority commitments, the concept of "national minority" used in the OSCE minority commitments is not defined in

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80. E.g. the 1999 Istanbul Document refers to the adoption and full implementation of comprehensive anti-discrimination legislation to promote full equality of opportunities for all. See para. 30.
81. See e.g. the 1990 Paris Charter, "Human Rights, Democracy and Rule of Law", para. 6, and "Human Dimension", para. 3, and the 1992 Helsinki Document, Decisions, Chapter VI, para. 25. See also the references to identity e.g. in the 1999 Istanbul Document, para 30.
82. See e.g. the 1992 Helsinki Document, Decisions, Chapter VI, para. 24.
83. See e.g. the 1990 Paris Charter, "Human Dimension", para. 3, and the 1999 Charter for European Security, para. 19.
84. There are such expressions as "will endeavour", "have adequate opportunities" and "whenever possible and necessary". See e.g. the 1990 Copenhagen Document, para. 34.
85. The 1990 Copenhagen Document cites the importance of the purposes and principles of the UN Charter, other obligations under international law and the provisions of the 1975 Helsinki Final Act. It also refers to respecting undertakings under international human rights conventions and other relevant international instruments. See paras 37 and 38. The 1999 Istanbul Document states that laws and policies regarding the educational, linguistic and participatory rights of persons belonging to national minorities should conform to applicable international standards and conventions. See para. 30.
86. References to conformity with national legislation have been inserted in the commitment relating to the right of persons belonging to national minorities to establish and maintain their own educational, cultural and religious institutions, organisations or associations as well as in the commitment concerning instruction of or in the mother tongue of persons belonging to national minorities and the use of their mother tongue before public authorities. 1990 Copenhagen Document, paras 32.2 and 34. The commitment on establishing local or autonomous administrations to protect and create conditions for the promotion of identity of minorities contains a reference to accordance with the policies of the state concerned. *Ibid.*, para. 35.
87. See e.g. *ibid.*, para. 37.

the OSCE documents, not even the 1992 Helsinki Document incorporating the decisions on the establishment of the HCNM, since no agreement could be reached among the participating states on the definition of the concept.⁸⁸ The references to ethnic, cultural, linguistic and religious identities in the OSCE commitments do give some indication as to the personal scope of “national minority” within the OSCE. In fact, the HCNM, whose mandate envisages his acting as a conflict-prevention instrument, has also been rather reluctant to formulate a definition of “national minority”. In the work of the HCNM, in recognition of issues of ethnicity and nationalism being the root-causes of many minority conflicts, attention has been drawn particularly to such minorities.⁸⁹ While the OSCE commitments do contain some express references to citizens,⁹⁰ thus suggesting that the question of citizenship has relevance for the application of the commitments on national minorities, the HCNM has not considered citizenship to be a precondition for his involvement in minority situations.⁹¹ It is also of some interest that within the OSCE the issues confronting the Roma have been addressed expressly in the framework of the OSCE commitments on anti-racism, not those on national minorities. In addition, a separate action plan on the Roma has been adopted by the OSCE Ministerial Council.⁹²

The OSCE commitments on persons belonging to national minorities do not explicitly refer to issues such as integration, inclusion, or combating marginalisation or exclusion. The commitments do, however, give guidance on the question of incorporation, particularly where they explicitly note that there should be no attempts at assimilation against the will of persons belonging to national minorities. Furthermore, the references to the need to learn the official language or languages of the state, and the commitment calling for taking into account of the history and culture of national minorities in the context of the teaching of history and culture in educational establishments may be seen as linked to the issue of incorporation in(to) society.⁹³

While the OSCE commitments on minorities contain no explicit references to integration, the HCNM uses the concept frequently. The practice of the HCNM in this regard is discussed in detail below in chapter 4.3.3. In 2005, when Slovenia chaired the OSCE, the issue of integration figured prominently on the OSCE

88. Bloed (1993), p. 98.

89. Kemp (2001), p. 8.

90. See e.g. the 1990 Copenhagen Document, paras 30, 31 and 33. Para. 30 refers to “all citizens”, para. 31 to “full equality with the other citizens”, and para. 33 to “other citizens”.

91. See the remarks *infra* in chapter 4.3.

92. For the OSCE commitments on the Roma and the remarks on the OSCE Action Plan on Roma, see chapter 2.2.1.2 *infra*.

93. See the 1990 Copenhagen Document, paras 32 and 34.

agenda, and was discussed particularly with respect to migration.⁹⁴ This prompted the HCNM and the ODIHR, for instance, to address the issue of integration from the viewpoint of “new” minorities.⁹⁵ Minority issues and the issue of integration have also been considered to some extent within the economic and environmental dimension of the OSCE.⁹⁶

2.1.1.3 The Council of Europe – Attention to Historical Minority Languages and National Minorities

The two treaty-format instruments of the CoE that have been concluded with a view to addressing minority-related questions are the CoE Language Charter and the CoE Framework Convention.⁹⁷ Some references to minorities are also incorporated in the documents adopted at the summit meetings of the heads of state or government of the CoE member states. As these documents have been adopted at the highest political level of the CoE states and thus reflect political developments and emphases with respect to minorities, for example, some remarks on the points laid down therein are taken up below.

2.1.1.3.1 The European Charter for Regional or Minority Languages

The CoE Language Charter from the year 1992⁹⁸ is the first legally binding international instrument containing provisions on the positive protection of regional or minority languages. Strictly speaking, the Charter is not a human rights treaty, since its overriding purpose is cultural; i.e. it is designed not to protect linguistic minorities, but to protect and promote regional or minority languages as a threatened aspect of Europe’s cultural heritage. The protection and promotion of the historical regional or minority languages of Europe is linked to Europe’s cultural wealth and traditions, the principles of democracy and cultural diversity,⁹⁹ as well as to “a living

94. For more, see the remarks *infra* in chapter 2.1.3.1.2.

95. See also the remarks *infra* in chapters 2.2.1.2 and 4.3.3.2.

96. In this respect e.g. the seminar on integration of national minorities on 10–11 March 2005 in Kiev is worthy of note. OSCE website at <http://www.osce.org/eea> (visited on 5 March 2007).

97. As already mentioned, the ECHR, which is the European regional counterpart of the ICCPR, incorporates references to minorities solely in its non-discrimination provision. The same applies to the protocols added to the ECHR. See art. 14 of the ECHR and Protocol No. 12 to the ECHR. A similar approach is taken in the European Social Charter adopted in 1961 and its revised version of 1996.

98. The Charter is accompanied by an Explanatory Report clarifying its provisions.

99. National sovereignty and territorial integrity are also mentioned. See preambular paras 3 and 7.

facet of Europe's cultural identity".¹⁰⁰ Linguistic diversity is considered one of the most precious elements of the European cultural heritage.¹⁰¹

Being essentially a cultural document, the Charter establishes neither individual nor collective rights for the speakers of regional or minority languages.¹⁰² However, despite this nature, the obligations set out for the states parties with regard to the status of regional or minority languages and the domestic legislation which has to be introduced in compliance with the Charter have an obvious effect on the situation of the communities concerned and their individual members.¹⁰³ The Charter's linkages to human rights are reflected in its references to human rights instruments and in the issues it explicitly addresses. Regarding the former, the ECHR in particular is underlined;¹⁰⁴ with respect to the latter, the Charter considers issues familiar from various human rights documents, such as education, freedom of expression and the use of (non-official) languages in judicial (criminal) proceedings.

The Charter has a non-discrimination provision¹⁰⁵ as well as a number of provisions offering positive protection for the use of regional or minority languages. It expressly states that the prohibition of discrimination on grounds such as language or association with a national minority – as provided by the ECHR – is not sufficient to protect and promote regional or minority languages, but that measures offering active support for them are needed as well.¹⁰⁶ Consequently, the aim of the

100. Explanatory Report to the Charter, para. 10.

101. In this context, reference is again made to the cultural identity of Europe. The protection and strengthening of Europe's traditional regional and minority languages is considered to represent a contribution to building the continent on pluralist principles. *Ibid.*, para. 26.

102. It has been pointed out that the concept of language as used in the Charter focuses primarily on the cultural function of language and is thus not defined subjectively in such a way as to establish an individual right to speak one's own language. Since reliance was not placed on a politico-social or ethnic definition by describing a language as the vehicle of communication of a particular social or ethnic group, the Charter was also able to avoid defining the concept of linguistic minorities. *Ibid.*, para. 17.

The nature of the Charter is also reflected in the implementation supervision mechanism set up by its provisions. There are no complaint mechanisms; the supervision of the implementation of the Charter takes place through the submission of periodical reports by the states parties. These reports are examined by a Committee of Experts, which prepares a report containing, among other things, its proposals for the CoE Committee of Ministers, which adopts recommendations for the state party as regards the implementation of the Charter's provisions. Charter, arts 15–17.

103. Explanatory Report, para. 11.

104. See e.g. the Charter, art. 4.1, calling for compatibility with the ECHR, and the Explanatory Report, paras 3, 54 and 112. The Charter also refers to the ICCPR and the OSCE documents. See preambular paras 4 and 5.

105. Art. 7.2. This provision also refers to the possibility of taking special measures for the benefit of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population.

106. Explanatory Report, paras 3, 10, 27 and 61. See also paras 71–74. The prohibition of discrimination in respect of the use of regional or minority languages constitutes a minimum

Charter is to ensure, as far as is reasonably possible, the use of regional or minority languages in various spheres of life, particularly education, relations with judicial and administrative authorities and public services, the media, cultural activities and facilities, economic and social life, and transfrontier exchanges.¹⁰⁷ It is noteworthy that the Charter also incorporates the idea of compensation; that is, the measures to be taken for the languages referred to in the instrument compensate minorities for unfavourable conditions in the past and preserve and develop their languages as “a living facet of Europe’s cultural identity”.¹⁰⁸

The structure of the Charter, which has three parts, is somewhat complex,¹⁰⁹ and the instrument has been drafted to cater for the very great variety of language situations that exist in various European states and within each country. Accession to the Charter has been made very flexible in that a state may confine itself to ratifying the instrument without selecting any particular language for the purposes of applying more specific provisions of the Charter.¹¹⁰ Additionally, the states parties that have accepted these more far-reaching provisions are also free to name the languages to be covered by them, and for each of these languages the states can determine the provisions to which they subscribe.¹¹¹ These features of the Charter mean that the states parties to the instrument have assumed very different sets of obligations.

Furthermore, the provisions allow the states parties a broad measure of discretion as regards the application and interpretation of their obligations. The provisions containing the general objectives and principles to be followed in the various areas are rather generally worded. The more detailed provisions provide the states the possibility to adhere to the provisions of minimal stringency¹¹² as well as to exercise a

guarantee for the speakers of such languages. For this reason, the parties undertake to eliminate measures discouraging the use or jeopardising the maintenance or development of a regional or minority language. See para. 71.

107. See also the Charter, art. 7.

108. Explanatory Report, para. 10.

109. Part I of the Charter consists of general provisions, including the definition of the languages covered by the Charter. Parts II and III contain the principal undertakings of the states parties to the Charter. Part II consists of one article (art. 7), which sets out a common core of the objectives and principles applicable to all regional or minority languages, and Part III translates the general principles set out in Part II into more precise rules through a series of more concrete provisions. See also the remarks in the Charter, art. 2.1, and the Explanatory Report, paras 22 and 41.

110. I.e. those laid down in Part III.

111. See the Charter, art. 2, and the Explanatory Report, paras 41–43 and 49. Part III consists of a “shopping list” of sorts from which a state party is free, within certain limits, to choose which of the provisions apply to each of the languages. The state party is required to accept a minimum number of provisions incorporated in Part III. See the Charter, art. 2.2.

112. A number of the provisions in Part III comprise several options of varying degrees of stringency, one of which must be applied “according to the situation of each language”, thus pro-

broad margin of discretion, for the Charter contains a number of formulations that lessen the committal character of the provisions.¹¹³ These formulations are the result of an attempt to take into account the major differences in the de facto situations of regional or minority languages (number of speakers, degree of fragmentation etc.), as well as the costs entailed by many of the provisions and the varying administrative and financial capacity of the European states.¹¹⁴ All of these formulations suggest that much is left to the discretion of the contracting states when it comes to the protection granted.

From the viewpoint of this research, the observations in the Charter on its scope of application are of interest. The Charter concerns regional or minority languages historically spoken “over a long period” in European states, not the languages (particularly non-European languages) which may have appeared in the signatory states as a result of recent migration flows.¹¹⁵ Another point worthy of note is that the protection of the Charter is explicitly linked to the nationality of the speakers of the languages concerned, meaning that only regional or minority languages traditionally used by nationals of the state party concerned may enjoy the protection set out in the instrument.¹¹⁶

The Charter includes a number of explicit references to (the use of) official language(s) and underlines, among other things, the need for members of minorities to know the official language.¹¹⁷ It also points out that a state is allowed to make certain distinctions between languages and, in particular, to take measures

viding more flexibility in the application of the Charter. See also the Explanatory Report, paras 22, 23 and 46.

113. Some provisions include references to the “required number” of speakers, and some refer to the “number of residents using the regional or minority languages” as justifying the measures specified in provisions but do not give any additional indication as to what is meant by these numbers. See e.g. the provisions on the use of the regional or minority languages with judicial authorities (art. 9.1) and in relations with administrative authorities and public services (art. 10.1 and 10.2), and on cultural activities and facilities (art. 12.2). Furthermore, the expression “as far as this is reasonably possible” is inserted in the provisions on the use of regional or minority languages in relations with administrative authorities and public services (art. 10.1 and 10.3.) and on economic and social activities (art. 13.2). The expressions “where necessary” and “as far as possible” can be found e.g. in the provision on the training of the officials and other public service employees and the provision on the use of regional or minority languages with administrative authorities and public services (art. 10.4(b)).
114. On taking account of the fact that some of the measures provided for have significant implications in terms of finance, staffing or training, see the Explanatory report, para. 104.
115. Explanatory Report, paras 15 and 31.
116. The definitions of the languages covered by the Charter refer to nationals. See the Charter, art. 1(a) and (c). See also the references to “citizens” in the Explanatory Report, paras 36, 100 and 105.
117. It is recognised that it is necessary in every state to know the official language (or one of the official languages). Charter, preambular para. 6, and Explanatory Report, para. 29. See also the Charter, art. 8.1, which deals with education.

in favour of the use of a national or official language.¹¹⁸ The Charter underlines the values of interculturalism and multilingualism,¹¹⁹ and includes an undertaking by the states parties to promote mutual understanding between all linguistic groups of the country. In particular, this effort is to include respect, understanding and tolerance in relation to regional or minority languages among the objectives of education and training provided within the states. States should encourage the mass media to pursue the same objective.¹²⁰

The text of the Charter contains no explicit references to integration or to inclusion, exclusion or marginalisation, but these issues are raised in the Explanatory Report to the Charter. This is seen most clearly in the part of the Report dealing with the material scope of the instrument, which refers to the exclusion of the new, often non-European languages from the scope of application, and notes that populations speaking such languages encounter specific problems of integration.¹²¹

While the Language Charter points to the significance of the question of integration for recent immigrants in particular, the Explanatory Report includes a number of references to the relevant elements for incorporation in(to) society. A link is made between integration and the enhancement of the possibility to use regional or minority languages in the various spheres of life. This aim is associated with enabling the speakers of these languages to feel at ease in the state (in which history has placed them) and encouraging them to put behind them “the resentments of the past which prevented them from accepting their place in the country in which they live and in Europe as a whole”.¹²² Integration is also expressly mentioned in the context of relations between groups speaking regional or minority languages, including transnational exchanges. The Charter and the Explanatory Report together suggest that a language group will feel more integrated in the state of which it is a part if

118. Art. 7.2 on non-discrimination. See also the Explanatory Report, paras 72 and 73.

119. Preambular para. 6. An intercultural and multilingual approach is noted as corresponding to the values traditionally upheld by the CoE and its efforts to promote closer relations between peoples, increased European co-operation and a better understanding between different population groups within a state. Explanatory Report, para. 14. The principles of interculturalism and multilingualism are discussed in connection with the importance of the speakers of a regional or minority language learning the language(s) spoken by the majority; the teaching of this (these) language(s) (which often is the official language) is considered to prevent a tendency to form linguistic ghettos contrary to these principles. Explanatory Report, para. 80, commenting on art. 8 on education. Additionally, these principles are taken up in connection with the provision calling upon the states parties to provide facilities also for non-speakers of a regional or minority language (living in the area where the language is used) to enable them to learn the language if they so desire. See the Charter, art. 7.1(g), and the Explanatory Report, para. 65.

120. Art. 7.3 and 7.4. See also the Explanatory Report, paras 74 and 75.

121. The Explanatory Report points out that these problems deserve to be addressed separately, if appropriate in a specific legal instrument. See para. 15.

122. *Ibid.*, para. 13.

it is recognised as such and if cultural contacts with its neighbouring communities are not hindered. The provisions even refer to enhancing and promoting links and transnational exchanges.¹²³

The issues of fragmentation, exclusion and marginalisation are addressed in connection with the possibility of groups speaking the same regional or minority languages to engage in cultural exchanges and to develop their relations in order to preserve and enrich their language. Awareness of a shared identity between speakers of a regional or minority language must not be reflected negatively as exclusion or marginalisation in relation to other social groups. Promoting cultural relations with speakers of different regional or minority languages is stated as serving the goal of both cultural enrichment and enhanced understanding between all groups in a state.¹²⁴

From the viewpoint of incorporation in(to) society, interaction and relations between the population using the majority (often the official) language and the groups using regional or minority languages are undoubtedly of particular importance in preventing exclusionary tendencies. Therefore, it is significant that the Charter also mentions, among other things, the firm application of the non-discrimination principle to prevent the exclusion of minorities, and enabling relations between the majority and minorities in the spirit of the values of interculturalism and multilingualism. The Charter stresses the learning of the official language(s) by persons speaking regional or national minority languages, thereby referring to the importance of a common medium of expression and enabling exchanges between the persons belonging to the majority (for whom the official language often is their mother tongue) and those using regional or minority languages.¹²⁵ Non-native speakers of regional or minority languages are encouraged to learn these languages. In fact, a positive attitude towards minority languages signalled by the willingness of the majority to learn them may even be said to have a link to incorporation in(to) society if this causes the speakers of regional or minority languages to feel that their languages are appreciated by the majority. Cultural exchanges or interactions between the majority and persons speaking regional or minority languages have a bearing on minimising cultural barriers. The Explanatory Report to the Charter points out that this should be a two-way process, so that it is also important that works produced

123. Charter, art. 7.1(e) and (i), and Explanatory Report, paras 67–70. For transnational exchanges, see also the Charter, art. 14.

124. The Explanatory Report notes that the Charter seeks to prevent e.g. fragmented patterns of settlement and administrative divisions within a state. See paras 67 and 68.

125. The Charter does not refer explicitly to the role of knowing the official language for integration. The explanation for this may be sought in the instrument's focus on languages, not on the persons using them, and in the fact that the drafters of the Charter envisaged integration challenges particularly with respect to more recent immigrants. It is also often the case that the historical minorities know the official language but have, due to past and sometimes even still continuing assimilationist policies, lost their own language.

in regional or minority languages become known to the wider public.¹²⁶ Moreover, the Explanatory Report draws attention to the contemporary threats facing regional or minority languages from the standardising influence of modern civilisation, in particular the mass media, and from an unfriendly environment or a government policy of assimilation.¹²⁷

The teaching of the history and the culture which is reflected by the regional or minority languages¹²⁸ and the visibility of minority cultures in the mainstream media are important in informing the wider community about linguistic minorities. Additionally, the promotion of mutual understanding between all linguistic groups, the inclusion of respect, understanding and tolerance for regional or minority languages among the objectives of education and training, and the encouragement of the mass media to pursue the same objective¹²⁹ are of relevance for incorporation.

2.1.1.3.2 The Framework Convention for the Protection of National Minorities

The CoE Framework Convention¹³⁰ is the first – and still the only – multilateral international instrument in treaty format devoted to the protection of national minorities in general. It also explicitly incorporates a dimension to tackle racism and other forms of intolerance.¹³¹ The impact of the OSCE commitments on national minorities is evident in the Convention's provisions.¹³²

The aim of the CoE Framework Convention is to specify the legal principles which states are to undertake in order to ensure the protection of national minorities;¹³³ however, being a framework instrument, the Convention limits itself to stating principles and mostly programme-type provisions that set out the objectives which the states parties to it undertake to pursue. The principles incorporated in the Convention are intended to be implemented through national legislation and appropriate governmental policies,¹³⁴ and the choice of ways and concrete means to put the principles into practice is largely left to the states. Due to the nature of the

126. Explanatory Report, para. 116, addressing art. 12 on cultural activities and facilities.

127. *Ibid.*, para. 2.

128. Charter, art. 8.1(g), addressing education.

129. *Ibid.*, art. 7.3.

130. The adoption of the text of the CoE Framework Convention in 1994 was a follow-up step to and a concrete outcome of the decisions made at the first CoE summit, held in 1993 in Vienna. The Convention was opened for signature in February 1995. See also the remarks *infra* in chapter 2.1.1.3.3. The Convention is accompanied by an Explanatory Report providing background information and guidance on the application of the Convention.

131. See also the remarks *infra* in chapter 2.2.1.3.1.

132. See also the remarks *infra* in chapter 2.1.1.3.3.

133. Explanatory Report, para. 10.

134. See preambular para. 13 to the Convention. See also the Explanatory Report, paras 11 and 13.

Convention, the rights set out therein are not individually guaranteed, and thus are not rights that individuals may invoke. As a result, the Convention did not establish an individual complaint procedure.¹³⁵

The substantive articles of the CoE Framework Convention reiterate a number of human rights and fundamental freedoms found in general human rights instruments, thereby underlining their particular relevance for the protection of national minorities. The right to freedom of peaceful assembly, freedom of association, freedom of expression, and freedom of thought, conscience and religion are expressly mentioned.¹³⁶ The right to equality before the law and of equal protection of the law and non-discrimination are also underscored.¹³⁷

The minority-specific component of the Convention is incorporated in the provisions addressing the protection of the existence of national minorities.¹³⁸ The parties to the CoE Framework Convention have undertaken to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture and to preserve the essential elements of their identity, of which the Convention cites religion, language, traditions and cultural heritage.¹³⁹

The CoE Framework Convention mentions the use and learning of minority languages, education, participation, and contacts in separate provisions. Regarding the minority languages, the Convention refers to the undertaking of the state party to recognise that every person belonging to a national minority has the right to the free use of his or her language in private and public. Under certain conditions the states parties are to endeavour to ensure the possibility of such persons to use the mi-

135. For the specific character of the CoE Framework Convention, see also Hofmann (2005), pp. 5–6.

136. See arts 7–9. Art. 8 dealing with freedom of religion or belief refers expressly also to the right to establish religious institutions, organisations and associations. Art. 9 addressing the right to freedom of expression notes that this right includes the freedom to hold opinions and to receive and impart information and ideas in the minority language and that persons belonging to a national minority may not be discriminated against in their access to the media. Furthermore, persons belonging to national minorities should not be hindered from creating and using printed media, and they should have the opportunity to create and use their own media. The parties are to adopt adequate measures in order to facilitate access to the media for persons belonging to national minorities and in order to promote tolerance and permit cultural pluralism.

137. Art. 4. See also the references to non-discrimination in connection with a number of other provisions, e.g. those in art. 9 on freedom of expression and access to the media and that in art. 12.3 on the promotion of equal opportunities in the area of access to education for persons belonging to national minorities.

138. The Preamble to the Convention refers to the protection of the existence of national minorities in the territories of the states parties and to the fact that “a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity”. Preambular paras 5 and 7.

139. Art. 5.1.

nority language in their relations with administrative authorities. Linguistic rights with respect to criminal proceedings are also mentioned, these allowing persons belonging to national minorities to defend themselves in their minority language.¹⁴⁰ The states parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language and are to endeavour to ensure that persons belonging to national minorities have adequate opportunities to be taught the minority language or to receive instruction in it. In this connection, the importance of learning the official language is underscored.¹⁴¹ Additionally, the Convention includes provisions on the right to use surnames (patronyms) and first names in the minority language and the right to official recognition of the names, as well as the right to display in a minority language signs, inscriptions and other information of a private nature visible to the public. Furthermore, there is also a provision on displaying traditional local names, street names and other topographical designations intended for the public in a minority language.¹⁴²

The provisions concerning education both underscore equal opportunities for access to education for persons belonging to national minorities and refer to measures in the fields of education (and research) to foster knowledge about the national minorities in the state concerned. There is also a reference to facilitating contacts among students and teachers of different communities.¹⁴³ The parties to the Convention are also to recognise that persons belonging to national minorities have the right, within the framework of states' education systems, to set up and to manage their own private educational and training establishments.¹⁴⁴

The effective participation of persons belonging to national minorities in various aspects of life and public affairs,¹⁴⁵ as well as their right to establish and maintain free and peaceful contacts,¹⁴⁶ are specifically mentioned. The express references to tolerance, intercultural dialogue and cultural diversity – an issue dealt with particularly in article 6 of the Convention – are especially worthy of note. Article 6, as well

140. Art. 10.

141. Art. 14.

142. Art. 11.

143. Art. 12.

144. Art. 13. The obligation set out in this article in fact resembles the provision laid down in the UNESCO Convention against Discrimination in Education. See the references to the pertinent provision of the UNESCO Convention *supra* in chapter 2.1.1.1.2.

145. Art. 15 refers to creating the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them. Art. 17.2 sets out the right of persons belonging to national minorities to participate in the activities of NGOs.

146. Art. 17.1 refers to the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers “with persons lawfully staying in other states, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage”.

as other provisions of the Convention of relevance for tolerance, is considered in more detail below in chapter 2.2.1.3.1.

Where the personal scope of application of the CoE Framework Convention is concerned, neither the text of the instrument itself nor the Explanatory Report thereto contains any definition of a national minority. In fact, the Explanatory Report expressly states that the Convention contains no definition of the concept of “national minority” due to the fact that when the text of the Convention was adopted, it was not possible “to arrive at a definition capable of mustering general support of all Council of Europe member states”.¹⁴⁷ A number of the states parties to the CoE Framework Convention have made declarations – particularly when ratifying the instrument – as to which minorities they consider to be relevant under the Convention.¹⁴⁸ In their reports concerning the implementation of the Convention, the states parties that have not made such declarations have focussed on reporting on the minority groups they consider to be national minorities, i.e. the groups that in their view are relevant under the minority-specific provisions of the Convention.¹⁴⁹

The lack of an agreed definition of the concept of national minority has compelled the Advisory Committee (AC), whose task is to carry out the substantive review work on the implementation of the CoE Framework Convention by the states parties,¹⁵⁰ to attempt to clarify the personal scope of the Convention in the course of its supervisory work. The AC has not always agreed with the views of the states parties with respect to, among other things, the importance of citizenship.¹⁵¹ In comparison to the other provisions of the Convention, article 6 clearly has a broad personal scope of application in that it also covers groups that are not viewed

147. Explanatory Report, para. 12.

148. These kinds of declarations have been submitted e.g. by Denmark, Estonia, Germany and Latvia. These declarations may be found on the CoE website at http://www.coe.int/T/E/human_rights/minorities (visited on 5 September 2007).

149. Finland is among these states. In its first report, Finland concentrated on reporting on the situation of the so-called traditional minorities; i.e. it provided information particularly on the Saami people, the Roma, the Jews, the Tatars, the “Old Russians”, and the Swedish-speaking Finns in its territory. Initial report submitted by Finland under the CoE Framework Convention (1999), p. 7. The Finnish government has made a distinction between the “Old Russians” and the “New Russians”, and has considered the former to be covered by the CoE Framework Convention. The “Old Russians” belong to a group of Russian speakers who have lived in Finland since the nineteenth century, and the “New Russians” belong to a group of Russian speakers who have come to Finland as part of the new wave of immigration that started in the beginning of the 1990s.

150. For the work of the AC, see chapter 4.1 *infra*.

151. For more, see the remarks *infra* in chapter 4.1.2. For the differing views of governments and the AC on the personal scope of application of the CoE Framework Convention, see also Hofmann (2004), pp. 61–65. Hofmann also discusses the potential application of the Convention’s provisions to persons belonging to “new” minorities. See pp. 64–65.

as national minorities but have ethnic, cultural, linguistic or religious features in general. Consequently, even groups of non-citizens, including immigrants, refugees and asylum-seekers, are relevant under the article.¹⁵² Indigenous peoples constituting a minority have also been considered under the CoE Framework Convention.¹⁵³ From the viewpoint of international human rights norms, and minority rights in particular, the view of the AC that the protection provided by the Convention may cover a “minority-in-a-minority” situation is also noteworthy.¹⁵⁴ This position signals that the protection of a minority in a “minority-in-a-minority” situation is broader under the CoE Framework Convention than under article 27 of the IC-CPR, for instance.¹⁵⁵

The CoE Framework Convention makes an express link between the protection of national minorities and stability, (democratic) security and peace.¹⁵⁶ Although the Convention is concerned with the protection of national minorities, and a collective dimension of minority rights is evident, the instrument is conspicuously cautious when it comes to defining any collective rights of national minorities.¹⁵⁷ In general, the Convention is characterised by somewhat hesitant wordings. Instead of using the rather mandatory expression “the parties shall”, most provisions contain the less mandatory formulation “the parties undertake” to recognise, guarantee, promote, etc. Many provisions also include restrictive clauses weakening the obligatory character of the provisions and thereby broadening the states’ margin of discretion in the implementation of the objectives of the Convention.¹⁵⁸ This is particularly the case

152. For a broad personal scope of art. 6, see also the remarks *infra* in chapters 2.2.1.3.1 and 4.1.2.

153. Some states parties, including e.g. Finland, have defined indigenous groups as being relevant under the Convention. See e.g. the remarks on the Saami in Finland’s first report on the implementation of the Convention *supra* (n. 149). The AC has also considered indigenous peoples in its opinions. See also the remarks *infra* in chapter 4.1.2.

154. See the remarks on the AC’s first opinion on Finland *infra* in chapter 4.1.2.

155. See the restricted view taken by the HRC in *Ballantyne, Davidson and McIntyre v. Canada*. The approach taken by the HRC in this case has been heavily criticised. See e.g. Wheatley (2005), p. 108.

156. Preambular para. 6.

157. The Convention refers to the protection of (the existence) national minorities and of the rights of persons belonging to national minorities. See also the Explanatory Report, paras 13, 31 and 37. Art. 3.2 of the Convention refers to exercising the rights and enjoying the freedoms flowing from the principles enshrined in the Convention “individually as well as in community with others”.

158. The provisions include a number of references such as “as far as possible”. See e.g. the provisions on the possibility to use the minority language in relations with the administrative authorities (art. 10.2), and on the possibility to be taught the minority language or to receive instruction in it (art. 14.2). For the qualification “where appropriate”, see e.g. the provisions on displaying topographical indications also in the minority language (art. 11.3), and on measures in the fields of education and research to foster knowledge about national minorities (art. 12.1). Furthermore, some provisions include a reference to a specific geographical area, in practice to the application of the rights stipulated in the areas inhabited by persons

with the provisions on the use of a minority language in relations with the administrative authorities and on the opportunity to be taught a minority language or to receive instruction in it.¹⁵⁹ It is also notable in this regard that the CoE Framework Convention expressly provides that a state party incurs no financial obligation when persons belonging to national minorities opt to set up and manage their own private educational and training establishments. Furthermore, these educational and training activities should take place within the framework of the education system of the state.¹⁶⁰ The Convention also contains certain compatibility clauses referring to conformity with other international legal instruments and national legislation.¹⁶¹ Regarding the former, conformity with the ECHR is underscored¹⁶² and attention is drawn to the concern of maintaining the fundamental principles of international law, particularly those concerning the sovereign equality, territorial integrity and political independence of states.¹⁶³

The CoE Framework Convention expressly mentions the issue of integration in connection with several provisions. The provision that incorporates the states parties' undertaking to promote the conditions necessary for persons belonging to national minorities to maintain and develop their special characteristics (including the elements of their identity) also contains an express reference to integration. The provision refers to the general integration policy of the states parties and to refraining from policies or practices aimed at assimilation of persons belonging to national minorities against their will. In fact, these persons are to be protected from any action aimed at such assimilation.¹⁶⁴ The Explanatory Report to the Convention notes that while the purpose of this provision is to protect persons belonging to national minorities from assimilation against their will, it does not prohibit voluntary as-

belonging to national minorities traditionally and/or in substantial numbers. See the provisions on the use of the minority language in relations with the administrative authorities (art. 10.2), on displaying topographical indications also in the minority language (art. 11.3), and on the possibility to be taught the minority language or to receive instruction in it (art. 14.2). See also the Explanatory Report, paras 11 and 29.

159. See arts 10.2 and 14.2. See also the remarks in the preceding footnote. Additionally, art. 10.2 refers to the existence of a request and a real need, art. 14.2 to sufficient demand. Particularly the provision concerning displaying topographical indications (also) in a minority language contains a number of conditional elements. See art. 11.3.

160. Art. 13.

161. Arts 19 and 20. For the references to human rights, see also e.g. art. 22 dealing with limitations, restrictions and/or derogations.

A number of provisions include a reference to the "framework of their legal system(s)". See e.g. arts 9.1, 9.4 and 11.3.

162. Arts 19 and 23.

163. Art. 21.

164. Art. 5.2 reads: "Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation."

simulation.¹⁶⁵ It has been asserted that ethnocide, i.e. the destruction of a culture, would clearly amount to a violation of article 5.1 of the Convention, and that voluntary assimilation and a state's obligations to comply with this provision may be questioned if the members of a particular national minority decide to assimilate (voluntarily).¹⁶⁶

Integration is also brought up in the provision addressing language questions, which states that opportunities for being taught a minority language or for receiving instruction in that language are to be implemented without prejudice to the learning of the official language or the teaching in this language.¹⁶⁷ The Explanatory Report goes on to add that "knowledge of the official language is a factor of social cohesion and integration".¹⁶⁸ Furthermore, integration is expressly mentioned in article 6, which deals with tolerance. This article is discussed below in chapter 2.2.1.3.1.

The provisions of the CoE Framework Convention on education that refer to equal opportunities as regards access to education for persons belonging to national minorities, to fostering knowledge of the national minorities existing in the state concerned, and to facilitating contacts among students and teachers of different communities may also be said to be relevant to incorporation.¹⁶⁹ Several references to social cohesion as well as to links created between cohesion and integration in the context of the CoE Framework Convention, merit particular mention. The Explanatory Report to the Convention links the questions of social cohesion, a knowledge of the official language(s), tolerance, intercultural dialogue, the prohibition of forced assimilation, and integration into society.¹⁷⁰

2.1.1.3.3 The CoE Summits

The heads of the CoE states and governments have convened for CoE summits three times so far, the first being in 1993 in Vienna, the second in 1997 in Strasbourg, and the third in 2005 in Warsaw. In these meetings, the CoE states adopted political documents, including both Summit Declarations and Action Plans, in which attention has been drawn also to minorities. In addition to the minority-specific remarks to be found in these instruments, the issues of broader relevance for this research are elucidated below. The remarks in the documents addressing

165. It is further stated that the provision acknowledges the importance of social cohesion and reflects the desire expressed in the Preamble of the Convention that cultural diversity should be a source and a factor not of division, but of enrichment, for each society. Explanatory Report, paras 45 and 46.

166. Gilbert (2005), pp. 173–174.

167. Art. 14.3.

168. Explanatory Report, para. 78.

169. See the provisions in art. 12. These issues relate to interculturalism and enhancing knowledge about diversity.

170. The Explanatory Report makes express references to social cohesion in arts 5, 6 and 14. For social cohesion in the context of art. 6, see also the remarks *infra* in chapter 2.2.1.3.1.

the issue of combating racism and other forms of intolerance are discussed below in chapter 2.2.1.3.1.

The Vienna Declaration, produced by the first summit of 1993,¹⁷¹ deals with the common cultural heritage of the countries of Europe and notes that the heritage has been enriched by its diversity as well as by values that define European identity, with these including pluralist and parliamentary democracy, the indivisibility and universality of human rights, and the rule of law.¹⁷² The Declaration also mentions diversity and cohesion of societies¹⁷³ and the importance of dialogue among states.¹⁷⁴ The management and control of migratory flows, as well as a comprehensive approach to migration challenges, are also called for.¹⁷⁵ The Declaration frequently mentions peace, stability and democratic security¹⁷⁶ and links sharing the same values to peace and democracy.¹⁷⁷

The protection of national minorities¹⁷⁸ is viewed as an essential element of stability and democratic security,¹⁷⁹ and the Vienna Summit resolved to enter into both political and legal commitments relating to the protection of national minorities in Europe. The political commitments adopted¹⁸⁰ are very general, an example being the creation of the conditions necessary for persons belonging to national minorities to develop their culture while preserving their religion, traditions and customs and to use their minority language.¹⁸¹ Ensuring the protection of the rights of per-

171. The Vienna Summit adopted a Declaration with three appendixes. Appendix I addresses the reform of the control mechanism of the ECHR; Appendix II concerns the situation of national minorities; and Appendix III consists of the Declaration and Plan of Action on combating racism, xenophobia, anti-Semitism and intolerance.

172. Paras 2 and 10. A common cultural heritage and values defining European identity are also linked to democratic security. See also the remarks in the context of national minorities *infra*.

173. Paras 18 and 19. Para. 18 refers to cultural co-operation through education, the media, cultural action, the protection and enhancement of the cultural heritage and participation of young people being essential for creating a cohesive yet diverse Europe. Para. 19 refers to the cohesion of societies, and the importance of the CoE Social Charter and European Code of Social Security for providing member countries with an adequate system of social protection.

174. Para. 15 links this inter-state dialogue to strengthening democratic security and stability.

175. Para. 21.

176. Para. 2. For democratic security, see paras 2, 5, 10, 13 and 15.

177. Para. 22 refers to the bonds of friendship with non-European states sharing the same values and to developing with them common efforts to promote peace and democracy.

178. Appendix II to the Declaration, para. 2, discusses national minorities “which the upheavals of history have established in Europe”.

179. Declaration, para. 5. Appendix II, paras 2 and 7, establish the link between the protection of and respect for the national minorities and stability and peace in Europe.

180. These commitments are laid down particularly in Appendix II to the Declaration.

181. Regarding the use of minority languages, it is pointed out that persons belonging to national minorities must be able to use their language both in private and in public and should be able to use it, under certain conditions, in their relations with the public authorities. Appendix II, para. 6.

sons belonging to national minorities should be done within the rule of law, with respect for the territorial integrity and national sovereignty of states¹⁸² as well as for the principles considered to be fundamental to common European tradition, for example, non-discrimination, equal opportunities and active participation in public life.¹⁸³

In Vienna, the CoE member states – all of which are also participating states in the OSCE – confirmed their determination to implement fully the commitments concerning the protection of national minorities contained in the 1990 Copenhagen Document and other documents of the OSCE. The Summit noted that the role of the CoE is to transform, to the greatest possible extent, these political OSCE commitments into legal obligations.¹⁸⁴ In this regard, the CoE Committee of Ministers was instructed to draft a framework convention to assure the protection of national minorities;¹⁸⁵ the subsequent adoption of the text of the CoE Framework Convention was a concrete follow-up action to this decision. It may be noted that while the Vienna Declaration addresses integration with respect to lawfully residing migrants,¹⁸⁶ the issue is not discussed in connection with national minorities. However, such aims as enhancing tolerance, dialogue and participation, paying due regard to equality and non-discrimination, as well as respecting the territorial integrity and national sovereignty of states establish a framework for the incorporation of national minorities as well.

*The documents of the 1997 Strasbourg Summit*¹⁸⁷ reiterate the issues of stability, security and democratic security.¹⁸⁸ Compared to the first CoE summit, the issue of (social) cohesion receives more emphasis¹⁸⁹ and is also linked to stability and secu-

182. Ibid., para. 3.

183. Other principles noted are equality before the law, and freedom of association and assembly. Ibid., para. 5. A link is also established between the issues of national minorities and tolerance through a note on creating a climate of tolerance and dialogue, which is viewed as being necessary for the participation of all in political life. Ibid., para. 4.

184. Close co-operation between the CoE and the OSCE HCNM was also called for. Ibid., paras 8–10.

185. The CoE Committee of Ministers was also instructed e.g. to draw up confidence-building measures aimed at increasing tolerance and understanding among peoples. Ibid., para. 11. See also the remarks *infra* in chapter 2.2.1.3.1.

186. The Declaration takes up the issue of facilitating the social integration of lawfully residing migrants. See para. 8. See also the remarks *infra* in chapter 2.1.3.1.2.

187. The Strasbourg Summit produced a Final Declaration and an Action Plan appended to the Declaration. The Action Plan is an integral part of the Declaration and is implemented by various CoE bodies. See the Action Plan, para. V.2.

188. Declaration, para. 3 and para. 5, subpara. 5. The Preamble to the Action Plan refers to democratic stability. Co-operation with the EU and the OSCE is again underlined. Declaration, para. 5, subpara. 5.

189. Ibid., para. 5, subpara. 5, and para. 7. According to para. 7, social cohesion is one of the foremost needs of the wider Europe and an essential complement to the promotion of human rights and dignity. In this connection, the Declaration discusses the role of the Euro-

190 The promotion of human rights and strengthening of pluralistic democracy is now linked more explicitly to stability in Europe.¹⁹¹ Also worthy of note are the concern expressed for citizens' security¹⁹² and references to education for democratic citizenship based on the rights and responsibilities of citizens.¹⁹³ States' commitment to fundamental principles of the CoE is reiterated,¹⁹⁴ and achieving a greater unity between the CoE states based on common values is underscored. This unity is also associated with a freer, more tolerant and just European society.¹⁹⁵ In comparison to the documents produced at the 1993 Vienna Summit, those from the 1997 Strasbourg Summit contain fewer references to national minorities. The remarks made link (again) national minority questions to stability, and contain essentially an assertion of determination by the CoE states to step up co-operation in the area of the protection of persons belonging to these groups.¹⁹⁶ Again, no express references to integration are made in connection with national minorities; this time integration is expressly mentioned with regard to lawfully residing migrant workers.¹⁹⁷ The Strasbourg documents also refer to the role of sport in promoting social integration,

pean Social Charter and the Social Development Fund, the significance of combating all forms of exclusion, the need to help refugees, asylum-seekers and victims of conflicts, and the importance of integrating lawfully residing migrant workers.

190. Ibid., para. 5, subpara. 5. For social cohesion, see also the Action Plan, Part II.
191. Declaration, para. 6, refers generally to the protection of human rights and also mentions the issues of the abolition of death penalty, prevention of torture and inhuman or degrading treatment or punishment, the intensification of the fight against racism, xenophobia, anti-Semitism and intolerance, a balanced representation of and effective equality of opportunity between men and women, the protection of persons belonging to national minorities, the role of local democracy in the preservation of stability, and promoting an area of common legal standards throughout Europe.
192. Ibid., Para. 8, raises the concern about the new dimension of threats to citizens' security, including terrorism, corruption, organised crime and drug trafficking, and violence against women. For security of citizens, see also the Action Plan, Part III.
193. Declaration, para. 9, addresses strengthening mutual understanding and confidence between peoples and stresses education for democratic citizenship and the participation of young people in civil society. It also refers e.g. to the protection and promotion of European cultural and natural heritage.
194. These principles are pluralist democracy, respect for human rights and the rule of law. Ibid., para. 5, subpara. 1.
195. The common values cited are freedom of expression and information, cultural diversity and the equal dignity of all human beings. Ibid., para. 5, subpara. 3. For democratic values and cultural diversity, see also the Action Plan, Part IV.
196. Declaration, para. 6, particularly subpara. 6. The implementation of the decisions made at the 1993 Vienna Summit concerning national minorities is mentioned. Ibid., para. 4.
The Action Plan takes note of the imminent entry into force of the CoE Framework Convention and refers to complementing the CoE standard-setting with practical initiatives, such as confidence-building measures and enhanced co-operation involving both governments and civil society. Action Plan, Part I, para. 6.
197. Declaration, para. 7, subpara. 6. See also the remarks *infra* in chapter 2.1.3.1.1.

particularly among young people.¹⁹⁸ The remarks on combating all forms of exclusion and ensuring better protection for the weakest members of society in connection with social cohesion also merit mention in this context.¹⁹⁹

*The 2005 Warsaw Summit Declaration*²⁰⁰ reflects the efforts of the CoE to strengthen security, unity and democratic stability, and reiterates the CoE member states' commitment to common values and principles.²⁰¹ Effective democracy and good governance are noted as being essential for preventing conflicts, promoting stability, facilitating economic and social progress, and creating sustainable communities. The active involvement of citizens and civil society is brought up in this connection.²⁰² The summit documents draw particular attention to protecting citizens and ensuring their security.²⁰³ Furthermore, fostering European identity and unity based on shared fundamental values, respect for common heritage and cultural diversity is underscored. Political, intercultural and inter-religious dialogue is viewed

198. Declaration, para. 9. See also the Action Plan, Part III, para. 3.

199. Declaration, para. 7, particularly subparas 3 and 6.

Other express references to integration concern the full integration into the wider European family of the candidate countries for (CoE) membership. The Action Plan also contains a reference to the reintegration of drug addicts into society. See Part III, para. 3 addressing the security of citizens.

200. The Warsaw Summit documents consist of a Declaration (the Warsaw Declaration) and an Action Plan. The states committed themselves to promoting the tasks and objectives reflected in the decisions of the Summit. See the final paragraphs of the Declaration, para. 2. The Action Plan appended to the Declaration lays down the principal tasks of the CoE in the coming years and elaborates the questions addressed in the Declaration. The Action Plan also includes references to the measures to be taken at the national level. See the Preface to the Action Plan.

201. Preamble paras 1 and 3–6 to the Declaration. Common values are again noted to be democracy, human rights and the rule of law. See para. 1. According to para. 5, the common values and principles are rooted in Europe's cultural, religious and humanistic heritage, which is both shared and rich in its diversity. See also Declaration, paras 5, 6 and 8. For promoting fundamental values, see also the Action Plan, Part I.

202. Declaration, para. 3. See also the Action Plan, Part I, para. 3, for the references to democracy, good governance and citizens' participation. Equal participation of women and men is noted to be a crucial element of democracy. In this connection both strengthening gender mainstreaming and enhancing the implementation of the Beijing Platform for Action adopted at the fourth World Conference on Women in 1995 are referred to. Additionally, e.g. nationality laws and the promotion of acquisition of citizenship are mentioned. See Action Plan, Part I, para. 3, subparas 3 and 7. The provisions on education and promoting democratic citizenship refer e.g. to European standards and values, human rights education and intercultural education. See the Action Plan, Part III, para. 3.

203. Declaration, paras 4 and 8. According to para. 8, citizens' security is ensured by respecting human rights and fundamental freedoms, by combating terrorism, corruption, organised crime, trafficking in human beings, cybercrime and the challenges attendant on scientific and technical progress. See also the Action Plan, Part II. See also the references to security of Europeans in the beginning of Part III addressing building a more humane and inclusive Europe.

as ensuring that diversity becomes a source of mutual enrichment.²⁰⁴ In general, encouraging intercultural and inter-faith dialogue is linked to promoting awareness, understanding, reconciliation and tolerance as well as to preventing conflicts and ensuring integration and the cohesion of society. Also emphasised are the active involvement of civil society, participation of both men and women, and the significance of addressing the issues faced by cultural and religious minorities at the local level. The documents highlight not only dialogue between cultures, but also the importance of dialogue between Europe and its neighbouring regions.²⁰⁵

Another point noted is that protecting and promoting cultural diversity is to proceed on the basis of CoE values and by ensuring the cohesion of societies.²⁰⁶ Whilst social cohesion is discussed in connection with cultural diversity and intercultural dialogue, building cohesive societies is also conspicuously linked to social rights, fighting exclusion and protecting vulnerable social groups.²⁰⁷

The Warsaw Declaration expressly addresses the situation of national minorities in a single sentence only, in the paragraph dealing with European identity, unity and cultural diversity and connecting the work on national minorities to contributions to democratic stability.²⁰⁸ The Action Plan notes that a society that considers itself pluralist must allow the preservation and flourishing of the identities of its minorities and encourages the CoE to continue its activities to protect minorities, particularly through the CoE Framework Convention, as well as to protect regional languages through the CoE Language Charter.²⁰⁹ In light of the Action Plan's remark viewing the management of migration as a major challenge for the twenty-first-century Europe, it is interesting that the issue is specifically mentioned only in one short paragraph in the Action Plan.²¹⁰ Whilst there are not many express refer-

204. Human contacts and exchanging good practices regarding free movement of persons is linked to developing understanding and trust among Europeans, with the aim of building a Europe without dividing lines. Declaration, para. 6.

205. Action Plan, Part III, para. 6.

206. Ibid., para. 5. In the context of cultural diversity, the support is put forth for the adoption of UNESCO Convention on cultural diversity. The Warsaw Summit also decided to appoint a coordinator for intercultural dialogue within the CoE to monitor the implementation of the CoE practical programmes and ensure coordination with other institutions.

207. The European Social Charter is cited for its importance in framing national social policies. The CoE states are resolved to strengthen the cohesion of societies in the Council's social, educational, health and cultural dimensions. Declaration, para. 7. Social cohesion is elaborated upon and repeatedly mentioned in the Action Plan, which refers e.g. to fighting poverty and exclusion, challenges posed by ageing, protection of health, exclusion and insecurity of the Roma, and ensuring equal rights for people with disabilities. See the Action Plan, Part III, para. 1 on building a more humane and inclusive Europe. Even the role of sport in furthering social cohesion is noted. See Part III, para. 7.

208. Declaration, para. 6.

209. Action Plan, Part I, para. 2, subpara. 5.

210. This is done at the end of Part III of the Action Plan, which deals with building a more humane and more inclusive Europe.

ences to integration in the Warsaw documents – and again they are not made with reference to national minorities – the links between integration and the cohesion of society in the documents are worthy of note.²¹¹ The documents include a number of references to inclusion and/or combating exclusion and discuss social cohesion in these connections as well.²¹²

2.1.2 Norms on Indigenous Peoples – Going beyond International Minority Norms

2.1.2.1 ILO Instruments

Notable efforts to come up with international norms concerning indigenous peoples have been made within the International Labour Organization (ILO), which was the first international organisation to show an active interest in indigenous peoples and to adopt international norms on them. The ILO took various actions with respect to indigenous peoples as early as the 1920s,²¹³ with these leading to the adoption of a multilateral international convention in 1957, *the ILO Convention (No. 107) concerning the Protection and Integration of Indigenous and Other Semi-Tribal Populations in Independent Countries*. In addition to being mentioned in the title of the instrument, the concept of integration is expressly employed in a number of the Convention's provisions.²¹⁴ However, the content of the instrument reflects the widespread attitude at the time towards indigenous peoples, i.e. a paternalistic attitude compounded with clearly assimilationist aims that together signified a disregard for the protection of the specific characteristics of the cultures of peoples belonging to indigenous groups.²¹⁵ Thus, even the concept of integration employed

211. This is done in connection with encouraging intercultural and inter-faith dialogue. See the Action Plan, Part III, para. 6, subpara. 1. See also the remarks *supra*. A reference to integration may also be found e.g. in connection with the provision calling for integrating a youth perspective to CoE activities. See Part III, para. 4, subpara. 1.

212. Declaration, para. 7, and Action Plan, Part III, para. 1. See also the references *supra*.

213. These included studies on indigenous workers. Knop (2002), pp. 233–234. For the special features of the ILO, including its “tripartism” and highly-developed system for supervising its conventions, which is also the most widely praised aspect of ILO human rights activities, see Leary (1992), pp. 581–585 and 592–612. For ILO's complaint procedures offering some possibilities for securing redress for the violation of indigenous peoples' rights, see Anaya (2004), pp. 226–228 and 248–252. Among the special features of the ILO conventions is that no reservations can be filed to them. See e.g. Lawson (2001), p. 417.

214. See e.g. preambular paras 3, 6 and 8, and arts 2, 4, 5, 22 and 24. These provisions call for integration of the populations concerned into the national community or into the life of their respective countries. See e.g. arts 2, 22 and 24.

215. For the assimilationist and paternalistic elements of this Convention, see also Barsh (1987) and Anaya (2004), pp. 55, 58 and 227.

did not include valuing the cultures of indigenous peoples (populations); in practice, it meant assimilation.

In order to remove the assimilationist orientation of the 1957 Convention and to acknowledge the distinct identities and cultures of indigenous peoples, the ILO adopted *the Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries* in 1989.²¹⁶ Despite a low number of ratifications,²¹⁷ this convention is presently the central international globally applicable instrument in the area of indigenous rights. The relative absence of indigenous peoples from the ILO's discussions and the process of drafting and adopting Convention No. 169 subjected the new instrument to heavy criticism; for some, the ILO became flawed as a forum for the determination of indigenous rights, and the Convention as a result. However, there are also some for whom this unequal access was remedied by the Convention's responsiveness to indigenous needs and concerns.²¹⁸

Unlike international norms on minorities, ILO Convention No. 169 both provides a definition of the groups (peoples) whose situation it addresses²¹⁹ and sets out entitlements having a clearer communal or collective dimension.²²⁰ In general, the issue of the right to self-determination has been among the central themes in discussions on indigenous peoples. Since this right includes the sensitive issue of possible secession, and since the term "peoples" with which this right is usually associated was used in the Convention, the drafters wanted to ensure that the possibility of secession was excluded in the application of the instrument. This was done

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216. The text of Convention No. 169 also expressly notes that the instrument was adopted with a view to removing the assimilationist orientation of the earlier standards and that it revises the 1957 Convention. Preambular paras 5 and 11, and art. 36. When Convention No. 169 came into force in September 1991, a state's ratification resulted automatically in the denunciation of Convention No. 107 on its part in the case the state had ratified the latter. ILO Convention No. 107 also ceased to be open to ratification. However, Convention No. 107 remains in force for those states that have ratified it but not Convention No. 169. See also Knop (2002), p. 224.
217. As of October 2007, only 19 countries had ratified ILO Convention No. 169, among them four European states (Denmark, the Netherlands, Norway and Spain). That is, of the European states with indigenous peoples, i.e. Finland, Russia and Sweden, have not ratified the Convention yet. Of non-European states with a considerable number of indigenous peoples, Canada and the USA have not ratified the Convention either.
218. Knop (2002), pp. 215 and 219. For strongly critical views on ILO Convention No. 169, both on its drafting process and content, see Venne (1990).
219. Art. 1.1. Whilst art. 1.1(a) refers to the national community, the definitions in art. 1 leave the issue of citizenship/nationality, i.e. whether it is a criterion to be taken into account, somewhat unclear. The substantive provisions do include few references to citizens when the rights and duties of all citizens are referred to. See arts 8.3, 11 and 21. Art. 4.3 refers to the enjoyment of the general rights of citizenship without discrimination.
220. There are a number of references such as "the peoples concerned" and "the rights of these peoples". See e.g. art. 2. The provision referring to the relationship of indigenous peoples to the lands and territories they occupy or otherwise use notes explicitly that the governments are to respect the collective aspects of this relationship in particular. See art. 13.

by inserting a specific provision stating that the use of the term “peoples” in the Convention has no implications as regards the rights that may attach to the term under international law.²²¹

In terms of its substantive coverage, ILO Convention No. 169 is a rather comprehensive document; it addresses a range of questions, including general policy, land, employment, vocational training, handicrafts and rural industries, social security and health, education (including language education) and means of communication, contacts and co-operation across borders, and issues relating to administration.²²² Whilst the Convention refers to providing protection for indigenous and tribal peoples (hereinafter indigenous peoples or the peoples concerned), it characteristically also addresses questions of traditional livelihoods as well as the use of land and natural resources. Accordingly, the Convention contains the recognition of the subsistence economy and traditional activities of indigenous peoples, such as hunting, fishing, trapping and gathering, as important factors in the maintenance of their cultures²²³ and acknowledges the significance of land for these peoples.²²⁴

ILO Convention No. 169 articulates the need to recognise the aspirations of indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions (within the states in which they live).²²⁵ Most provisions of the Convention set out responsibilities of governments rather than the rights of indigenous peoples or members of these peoples. The governments of the states parties to the Convention have assumed the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of indigenous peoples and to guarantee respect for their integrity.²²⁶ Such action is to include measures to ensure that members of these peoples benefit on an equal footing from the rights and opportunities that national laws and regulations grant

221. See art. 1.3. The qualified use of the term “peoples” in ILO Convention No. 169 is observed to be a recognition of identity as “peoples” without a corresponding recognition of rights as “peoples”, those rights remaining in the control of the Convention as a whole. Knop (2002), p. 242. For the term “peoples”, including the reservations of some governments about using it in the context of ILO Convention No. 169, see *ibid.*, pp. 51–90, 220–221, 224 and 237–242. See also Anaya (2004), pp. 59–60, and Venne (1990), pp. 54–57. In its contemporary interpretation, the concept of self-determination is viewed as consisting of two dimensions, internal and external self-determination. See e.g. Knop (2002), p. 256, and Thornberry (1991), pp. 214–218. It is notable that since 1999 the HRC of the ICCPR has considered indigenous peoples in relation to art. 1 of the ICCPR addressing self-determination. Scheinin (2000), pp. 189–197.

222. It is notable that also Convention No. 107 addresses many of these questions.

223. Art. 23.

224. See Part II, which consists of arts 13–19.

225. Preambular para. 6. Attention is also drawn to the distinctive contributions of indigenous peoples to cultural diversity. See preambular para. 8.

226. Art. 2.1. For cultural integrity of indigenous peoples, see also Anaya (2004), pp. 131–141.

to other members of the population.²²⁷ Measures are also to be taken to promote the full realisation of the social, economic and cultural rights of these peoples, with respect for their social and cultural identity, their customs and traditions, and their institutions, and to assist the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community (in a manner compatible with their aspirations and ways of life).²²⁸ There is also a commitment to recognise and protect the social, cultural, religious, and spiritual values and practices of indigenous peoples as well as to respect the integrity of their values, practices and institutions.²²⁹ Special measures may be taken “as appropriate” for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.²³⁰

The issue of participation of indigenous peoples in decision-making processes particularly when the issues considered affect or concern them figures prominently in Convention No. 169. Among other things, stipulations relating to participation appear in connection with the provisions referring to paying due regard to and/or taking into account the views, needs and aspirations of indigenous peoples. In general, the provisions refer to the participation or consultation of, or co-operation with, the peoples concerned.²³¹ Additionally, states are also committed to guarantee indigenous peoples a certain autonomy over the conducting of their own issues. This is reflected, for instance, in the provisions addressing the development of indigenous peoples’ own institutions and initiatives, health services, vocational training and education.²³² In some of these areas, commitments also concern providing resources

227. The importance of the principles of equality and non-discrimination has been stated in a number of provisions. See e.g. preambular paras 4 and 7. Art. 3.1 states that indigenous peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The principles of equality and non-discrimination are laid down also in the provisions on employment (art. 20.2), vocational training (art. 21), social security (art. 24), and education (art. 26). Furthermore, there are stipulations requiring non-discriminatory application of the provisions of the Convention to male and female members of the peoples concerned. See art. 3.1. Art. 20.3(d) refers to equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment.

228. Art. 2.

229. Art. 5.

230. Art. 4.1. According to art. 4.2, such special measures may not be contrary to the freely-expressed wishes of the peoples concerned. Para. 3 notes that the enjoyment of the general rights of citizenship, without discrimination, may not be prejudiced in any way by such special measures.

231. See e.g. arts 2, 5(c), 6.1(a) and (b), 7, 15, 20, 22, 25, 27 and 33.

For the critical notes on the approach to participation of indigenous peoples set out in Convention No. 169, including the remarks on the content of consultation and on indigenous peoples themselves preferring references to consent instead of consultation, see Venne (1990), pp. 58–60.

232. See arts 6.1(c), 7.1, 8.1, 22.3, 25 and 27.

for the activities of the peoples concerned.²³³ The states parties to the Convention have also committed themselves to respecting the methods customarily used by indigenous peoples for dealing with offences committed by their members and to taking into consideration (in the authorities and courts) the customs of these peoples in regard to penal matters.²³⁴

Whilst ILO Convention No. 107 contained a number of express references to integration, these were deliberately omitted from Convention No. 169 due to the fact that the term “integration” had taken on very negative connotations from the viewpoint of indigenous peoples. The application of the concept of integration as understood by governments was considered to be destructive to indigenous peoples, since in practice it had become a concept meaning the extinction of ways of life that are different from those of the dominant society.²³⁵ Although Convention No. 169 contains no express references to integration, or to inclusion, it clearly does not aim at creating a situation in which indigenous peoples and the rest of the population live as separately as possible either; rather, it envisages a certain interactive relationship between these population groups and views indigenous peoples as part of the wider society. The latter perspective is reflected in the provisions stating that retaining and developing the special characteristics and identities of indigenous peoples may be done “within the framework of the states in which they live”.²³⁶ While the provisions addressing questions of language set out measures to be taken to preserve and promote the development and use of indigenous languages, they also call for taking adequate measures to ensure that indigenous peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.²³⁷ The provisions on education state that education is to include the

233. See arts 6.1(c), 25.1, 23.2 and 27.3.

234. Art. 9. See also art. 10.

235. This question was discussed in a meeting of experts convened by the ILO in 1986 that considered Convention No. 107 and recommended its revision. The meeting was attended by representatives of the World Council of Indigenous Peoples, a loose confederation of indigenous groups from throughout the world. The inclusion of the idea of the extinction of ways of life that are different from that of the dominant society in the text of ILO Convention No. 107 was pointed out as having impeded indigenous and tribal peoples from taking full advantage of the strong protections offered in some parts of the Convention because of the distrust of its use had created among them. Report of the Meeting of Experts concerning indigenous peoples (1988), para. 46. See also the remarks in Anaya (2004), p. 58.

236. This is explicitly noted in preambular para. 6, and can also be inferred from a number of provisions, including arts 25.4 and 27.3, and the discussions on self-determination of indigenous peoples.

237. Art. 28. This provision states that indigenous children, wherever practicable, are to be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. Furthermore, adequate measures are to be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

imparting of general knowledge and skills that will help indigenous children to participate fully and on an equal footing both in their own community and in the national community.²³⁸ Educational measures are also to be taken in all sectors of the national community, particularly those that are in most direct contact with the peoples concerned, with the object of eliminating prejudices that exist in respect of indigenous peoples. To this end, efforts are to be made to ensure that history textbooks and other educational materials provide a fair, accurate and informative portrayal of the societies and cultures of these peoples.²³⁹

In general, ILO Convention No. 169 sets out more extensive and stronger obligations for states towards indigenous peoples than is done with respect to minorities in the international minority standards. These include more explicit obligations, for instance, to take the views and aspirations of indigenous peoples into account, and to grant them a certain autonomy. On the other hand, the Convention also contains a number of elements that limit its empowering code. For instance, whilst many provisions appear from the outset to convey rather a strong obligation for the states parties by using the expression “governments shall”, a number of provisions also consist of formulations lessening their committal nature.²⁴⁰ Such formulations can be found particularly in the provisions with clear resource implications²⁴¹ and those requiring the states parties to promote the rights or entitlements of indigenous peoples.²⁴² It may also be observed that whereas there are obligations for states to recognise, protect, safeguard or respect the values and practices of indigenous peoples,²⁴³ the responsibilities of governments in promoting these values and practices are less numerous.²⁴⁴ Much as in the case of international minority norms, Convention No. 169 contains compatibility clauses. These state, for instance, that indigenous peoples have the right to retain their customs and institutions as long as they are compatible with fundamental rights defined by the national legal system and with internationally recognised human rights.²⁴⁵ Furthermore, the provisions

238. Art. 29.

239. Art. 31.

240. See e.g. the use of “to the extent possible” (arts 7.1 and 25.2), “in appropriate cases” (art. 6.1(c)), “whenever possible” (arts 15.2 and 16.3), “where feasible” (art. 22.3), “whenever appropriate” (art. 23.1), “wherever possible” (art. 23.2), “as appropriate” (art. 27.2), “wherever practicable” (art. 28.1), and “if necessary” (art. 30.2).

241. See arts 6.1(c), 23.2, 27.3 and 30.2.

242. See arts 23.1 and 28.3.

243. See e.g. arts 2.1, 4.1 and 5.

244. Promotional responsibilities have been inserted in the following provisions: art. 2.2(b) on the realisation of the social, economic and cultural rights of indigenous peoples with respect to their social and cultural identity, their customs, traditions and institutions; art. 23.1 on the subsistence economy and traditional activities; and art. 28.3 on the development and practice of the indigenous languages.

245. Art. 8.2. According to art. 9.1, the methods customarily practised by the peoples concerned for dealing with offences committed by their members are to be respected to the extent they

addressing the possibility of indigenous peoples to conduct their own activities in a number of fields have been qualified to read that the states parties retain decision-making power with respect to allowing this possibility, and where it is allowed, with respect to the content of the activity.²⁴⁶

Although ILO Convention No. 169 has been viewed as a step forward in the protection of indigenous peoples, and clearly an advancement over ILO Convention No. 107, the most vocal critics of Convention No. 169 have viewed the instrument as being negative towards indigenous peoples and both racially biased and assimilationist. It has been asserted that the Convention enshrines no more than the changed language of assimilation.²⁴⁷ Due to this, many groups of indigenous peoples have also called upon states not to ratify the Convention.²⁴⁸ The indigenous world is not, however, united behind this view; there are many indigenous groups that have pushed strongly for the adoption of ILO Convention No. 169 by states.²⁴⁹

2.1.2.2 Other Instruments

Among the other international documents of relevance for indigenous peoples is *the Vienna Document of the 1993 World Conference on Human Rights*. It incorporates some general references to indigenous peoples²⁵⁰ that pertain to recognising the value and diversity of their distinct identities, cultures, and social organisation, unique contribution to the development and plurality of society, and their full and free participation in all aspects of society, in particular in matters of concern to them. The document breaks some new ground in comparison to ILO Convention No. 169 in explicitly linking the promotion and protection of the rights of indigenous peoples

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- are compatible with the national legal system and internationally recognised human rights.
246. This decision-making power retained in the hands of authorities is reflected e.g. in the provisions giving states a wide margin of discretion in the application of the parts of the Convention (see the remarks *supra*). In accordance with art. 27.3 addressing the right of indigenous peoples to establish their own educational institutions and facilities, this right is conditioned by compliance with minimum standards established by the competent authority. When establishing these minimum standards, the provision requires “only” consultation with indigenous peoples. Pursuant to art. 25.4 concerning health services, health services targeted to indigenous peoples shall be co-ordinated with other social, economic and cultural measures in the country.
247. Venne (1990).
248. *Ibid.*, pp. 66–67 reproducing the Resolution of Indigenous Peoples Preparatory Meeting relating to ILO Convention No. 169. This resolution also condemns the ILO as an inappropriate forum to determine the rights of indigenous peoples.
249. E.g. the Saami in Finland have repeatedly called for the ratification of this convention by the Finnish government.
250. The Vienna Document employs the term “indigenous people” instead of “indigenous peoples”. For this “s-question” in general, see e.g. Knop (2002), p. 255. For other UN declarations or resolutions addressing indigenous peoples, see Anaya (2004), pp. 67–68.

and the contribution of such promotion and protection to the political and social stability of the states in which such people live.²⁵¹ Furthermore, *the Child Convention* contains express references to indigenous children.²⁵²

For more than two decades, efforts had been made within the UN to draft a specific declaration dealing with the protection of indigenous peoples worldwide,²⁵³ and finally, in September 2007, the UNGA adopted *the Declaration on the Rights of Indigenous Peoples* (the UN Declaration on Indigenous Peoples).²⁵⁴ Due to concerns expressed by states particularly with regard to the core provisions concerning the right to self-determination of indigenous peoples and the control over natural resources on indigenous peoples' traditional lands, the process of adopting this instrument was slow.²⁵⁵ It is also noteworthy that indigenous peoples had better opportunities to participate in the drafting process of the UN Declaration than they had in the processes leading to the adoption of the pertinent ILO instruments on indigenous peoples cited above.

The UN Declaration on Indigenous Peoples is a comprehensive document that has somewhat different points of emphasis, and on some points goes further than ILO Convention No. 169. The Declaration addresses the collective rights of indigenous peoples more directly, and most provisions are set out in terms of the rights of indigenous peoples or individuals. The instrument emphasises the right of indigenous peoples to control developments affecting themselves and their lands, territories and the resources that enable them to maintain and strengthen their own institutions, cultures and traditions and to promote their development in accordance

251. Ensuring respect for all human rights and fundamental freedoms of indigenous peoples, on the basis of equality and non-discrimination is also underlined. Vienna Document, Part I, para. 20. Part II of the Vienna Document also addresses indigenous people and the provisions primarily call for the intensification of the activities of the UN in indigenous issues. The issue of participation of indigenous peoples is again underlined. See Part II, paras 28–32.

252. Art. 30. See also the remarks *infra* in chapter 2.1.3.2.

253. The preparation of the Declaration was prompted by the study of Special Rapporteur José Martínez-Cobo on indigenous populations in 1981–1984, which described the oppression, marginalisation and exploitation suffered by indigenous peoples. The first draft of the Declaration prepared by the Working Group on Indigenous Populations was approved by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1994. The UN Human Rights Council adopted the UN Draft Declaration on the Rights of Indigenous Peoples in its first session in June 2006. See the UN website at <http://www.un.org/esa/socdev/unpfii> (visited on 10 November 2006).

254. The Declaration in its finalised form contains some modifications of the draft declaration adopted by the Human Rights Council in June 2006. The Declaration was adopted by 143 votes in favour, 4 against (cast by Canada, Australia, New Zealand and the US) and 11 abstentions (including Georgia, the Russian Federation and Ukraine). See e.g. the website of the IWGIA at <http://www.iwgia.org/sw153.asp> (visited on 11 October 2007).

255. The accommodation of these various issues was carried out in the open-ended inter-sessional working group established in 1995. See the UN website at <http://www.un.org/esa/socdev/unpfii> (visited on 10 November 2006).

with their aspirations and needs.²⁵⁶ The provisions deal with the right of indigenous peoples to development, to their traditional medicines and health practices, to their spiritual relationship with the land, to lands, territories and resources, and to the conservation and protection of the environment.²⁵⁷ The importance of the right to self-determination for indigenous peoples is expressly recognised, and in this connection their right to autonomy or self-government in matters relating to their internal and local affairs is mentioned.²⁵⁸ The Declaration mentions indigenous peoples' right to establish and control their educational systems and institutions providing education in their own language²⁵⁹ and to establish their own media in their language.²⁶⁰ The instrument contains some references to identity issues as well as to the integrity of indigenous peoples as distinct peoples.²⁶¹ Additionally, it sets out the right of all peoples to be different.²⁶² Another right specifically put forth is the right of indigenous peoples and individuals to belong to an indigenous community or nation in accordance with the traditions and customs of the community or nation concerned.²⁶³

The UN Declaration on Indigenous Peoples also contains provisions on equality²⁶⁴ and on racial discrimination and racism faced by indigenous peoples.²⁶⁵ In addition, there are provisions calling for state measures in order to reflect the diversity of the cultures, traditions, histories and aspirations of indigenous peoples in education and public information. Among other things, states are to take effective measures, in consultation and co-operation with the indigenous peoples concerned, to combat prejudice, eliminate discrimination, and promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.²⁶⁶ The right of indigenous peoples and individuals not to be subjected to forced as-

256. See e.g. preambular para. 11.

257. Arts 23–29.

258. See e.g. preambular para. 17, and arts 3 and 4.

259. Art. 14.1 refers to the right of indigenous peoples to establish and control their educational systems and institutions providing education in their own language, in a manner appropriate to their cultural methods of teaching and learning.

260. Art. 16.

261. See e.g. arts 8.2(a) and 33. Art. 33 also refers to the right of indigenous peoples to determine their own identity or membership in accordance with their own customs and traditions.

262. Preambular para. 3 refers to the right of all peoples to be different and to consider themselves different, and to be respected as such.

263. Art. 9.

264. See e.g. preambular para. 3 referring to equality of indigenous peoples with other peoples. Art. 14.2 sets out the right of indigenous peoples to non-discriminatory access to all levels and forms of education of the state.

265. Preambular para. 5. Art. 8.2(e) refers to providing effective mechanisms for prevention of, and redress for any form of propaganda designed to promote or incite racial or ethnic discrimination directed against indigenous peoples. The importance of the non-exploitation of indigenous peoples in the area of employment is also explicitly addressed. See art. 17.

266. Art. 15.

similation or destruction of their culture is specifically mentioned and consequently protection against any form of forced assimilation or integration is called for.²⁶⁷ There are a number of references to the questions of participation, consultation and co-operation with indigenous peoples,²⁶⁸ in addition to which the instrument underscores the importance of creating a stronger partnership between indigenous peoples and states.²⁶⁹

The Declaration also urges that particular attention should be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.²⁷⁰ Furthermore, all the rights and freedoms recognised in the Declaration should be equally guaranteed to male and female indigenous individuals.²⁷¹ The compatibility clause inserted in the Declaration states that the right of indigenous peoples to promote, develop and maintain their special structures, practices, customs etc. should be exercised in accordance with international human rights standards.²⁷²

Due to the fact that there are few European countries with indigenous peoples,²⁷³ the regional organisations in Europe have shown little interest in indigenous peoples by adopting specific norms on them. For instance, there are no specific CoE instruments addressing indigenous issues, and the human rights conventions of the CoE and the documents adopted at the CoE summits contain no references to indigenous peoples. However, it is worthy of note that the documents adopted at the European Conference against Racism expressly mention these peoples.²⁷⁴ Additionally, attention has been drawn to indigenous peoples in the more practical oriented

267. Art. 8, subparas 1 and 2(d). Art. 7 addresses the rights to life, physical and mental integrity, liberty and security of person, and prohibits any act of genocide or other act of violence, including forcibly removing children of the group to another group.

268. Art. 5 refers to the right of indigenous peoples to participate fully, if they so choose, in the political, economic, social and cultural life of the state. For participation, see also e.g. arts 18, 20, 31 and 41, and for consultation and co-operation, see e.g. preambular para. 20, and arts 15, 17.2, 19, 32.2 and 38.

269. Preambular para. 16.

270. Arts 22 and 21.2. Specific mention is made of measures to counter violence and discrimination against indigenous women and children. See art. 22.2.

271. Art. 44. There are also several references to nationality and citizenship. Art. 6 sets out the right of indigenous individuals to a nationality, and art. 33 refers to the right of indigenous individuals to obtain citizenship of the states in which they live.

272. Art. 34. It is also stated that in the exercise of the rights enunciated in the Declaration, human rights and fundamental freedoms of all are to be respected. The exercise of the rights set forth in the Declaration is to be subject only to such limitations as are determined by law, in accordance with international human rights obligations. See art. 46.2. See also a reference to international human rights in art. 40.

273. Primarily in the Nordic states and Russia.

274. See the remarks *infra* in chapter 2.2.1.3.2.

work of the CoE.²⁷⁵ The OSCE documents contain a note on indigenous peoples that merely reminds states about the important principle of non-discriminatory application of human rights and fundamental freedoms also with respect to persons belonging to indigenous communities, i.e. that these persons, too, must benefit from the protection of all general human rights norms.²⁷⁶

Similarly to the documents adopted at the European Conference against Racism, other instruments of relevance for anti-racist action, most visibly the Durban Document, draw attention to the situation of indigenous peoples.²⁷⁷ Whilst the text of the ICERD does not make express references, the Committee on the Elimination of Racial Discrimination (CERD), which supervises implementation of the ICERD, has actively addressed the situation of indigenous peoples.²⁷⁸ The establishment of the Permanent Forum on Indigenous Issues within the UN in 2000 was a notable development from the viewpoint of strengthening the participation of indigenous peoples at the international level in the consideration of issues affecting them.²⁷⁹ Also worth noting in this regard is the possibility granted to indigenous peoples to participate in the work of the Arctic Council.²⁸⁰

Indigenous peoples also fulfilling the criteria of a minority may fall within the ambit of the international minority norms. This recognition has been explicitly made, for instance, in the work of the HRC of the ICCPR under article 27²⁸¹ and the AC of the CoE Framework Convention.²⁸² Some states have had difficulties – particularly earlier – in acknowledging that indigenous peoples could be covered by norms designed to protect minorities: for instance, states considered indigenous

275. E.g. some expert bodies of the CoE have actively drawn attention to indigenous issues. These include the AC of the CoE Framework Convention, ECRI, and the CoE Commissioner on Human Rights. For the AC and ECRI, see also the remarks *infra* in chapters 4.1 and 4.2.

276. See the 1992 Helsinki Document, Decisions, Chapter VI, para. 29.

277. See the remarks *infra* in chapter 2.2.1.1.3.

278. CERD has e.g. adopted a general recommendation on indigenous peoples. See also the remarks on CERD's attention to indigenous peoples *infra* in chapter 2.2.1.1.1. For the significance of the ICERD for indigenous peoples, see also Anaya (2004), pp. 228 and 253–255.

279. For the Permanent Forum, see its website at <http://www.un.org/esa/socdev/unpfii> (visited on 10 November 2006). See also the remarks in Anaya (2004), pp. 58 and 219–220.

280. The member states of the Arctic Council are the five Nordic states (Denmark, Finland, Iceland, Norway and Sweden), Russia, Canada and the USA; they have granted indigenous peoples a special role to participate in the work of the Council. See e.g. Koivurova (2002), pp. 69–94, and Koivurova and Heinämäki (2006).

The attempts in Finland, Norway and Sweden to conclude an international treaty on the Saami should also be noted. A draft Nordic Saami Convention was published by an expert group and forwarded to the governments of these three countries in November 2005.

281. See the view of the HRC put forth in its General Comment No. 23 on art. 27 of the ICCPR. See the remarks *supra* in chapter 2.1.1.1.1.

282. For the application of the CoE Framework Convention to indigenous peoples, see the views of the AC *infra* in chapter 4.1.2.

peoples' cultures to be so primitive that they did not need specific protection, the obligation of the state being to "develop" and assimilate these peoples.²⁸³ Then again, indigenous peoples themselves have not always wanted to be considered as minorities, even when they have fulfilled the criteria for minority protection.²⁸⁴ This reluctance often derives from the fact that indigenous peoples want to make a distinction between themselves and minorities, particularly in that the links to traditional livelihoods and land are considered characteristic of indigenous peoples. These differences and distinctions between minorities and indigenous peoples are also reflected in international norms providing indigenous peoples with a somewhat more far-reaching empowering code as compared to minorities.²⁸⁵ Consequently, the view has sometimes been put forward that minority status may even undermine the status of a group as an indigenous one.²⁸⁶ In practice, however, since only a small number of states have ratified ILO Convention No. 169,²⁸⁷ indigenous peoples have been "forced" to rely on other international instruments for their protection. Particularly important in this regard has been article 27 of the ICCPR, on the basis of which a number of individual communications have been filed with the HRC by persons belonging to indigenous peoples.²⁸⁸

2.1.3 Norms Pertaining to Other Groups

2.1.3.1 Various Groups of Migrants

International migration is often considered in terms of voluntary and involuntary migration or documented (regulated or regular) and undocumented (unregulated or irregular) migration. A division into legal and illegal migration, and the phenomenon of forced migration²⁸⁹ are also cited. These classifications encompass issues such

283. These kinds of views meant that the question of whether art. 27 of the ICCPR should cover also indigenous peoples was not undisputed among the states drafting the Covenant. Nowak (2005), pp. 650–652.

284. See e.g. the remarks on the views of the Saami in Norway stating that they did not wish to be covered by the CoE Framework Convention *infra* in chapter 4.1.2.

285. This is the case when ILO Convention No. 169 is compared with the international norms concerning minorities. See also the remarks on this *supra* in chapter 2.1.2.1. See also Anaya (2004), p. 133.

286. See also the remarks in Makkonen (2000), p. 133.

287. See the references to the status of ratification of this convention *supra* in chapter 2.1.2.1.

288. As already pointed out, most individual communications considered by the HRC have been filed by persons belonging to indigenous peoples. See the remarks *supra* in chapter 2.1.1.1.1.

289. For discussion on forced migration, see e.g. Helton and Jacobs (2006).

as migration for employment, family unification, asylum and refuge, smuggling of persons, and trafficking in human beings.²⁹⁰

There exists no single international human rights document (conventions or the like) that considers the rights of various migrants, let alone the issue of migration in general. Instruments and norms have been concluded to address the situation of certain groups of migrants, particularly migrant workers. Some of these documents draw attention to the issue of migration more generally. References to individuals belonging to various groups of migrants, including migrant workers, are also to be found in anti-racism norms.²⁹¹ Although migrant workers have been considered in the context of minority protection, most visibly by the HCR under the ICCPR,²⁹² it is more typical that the issues of migrant workers and minority protection are kept apart.²⁹³

2.1.3.1.1 Norms on Migrant Workers – From Non-integration towards Integration

Migrant workers and migration for employment have been the object of treaty regulation in the ILO, the CoE and the UN. In addition, the issue has been on the agenda of the OSCE since its inception, and was considered, for instance, at the 1993 World Conference on Human Rights and at the CoE summits.²⁹⁴

The central ILO instruments in the area are *Convention No. 97 concerning Migration for Employment (revised)* from the year 1949 and *Convention No. 143 concerning Migrant Workers (Supplementary Provisions)* from the year 1975.²⁹⁵ ILO Convention No. 97 addresses the situation of migrants regularly admitted to a state for employment, that is, labour immigrants lawfully within the territory of a state party to the Convention.²⁹⁶ It obligates the state party to assist them as well to apply

290. The two forms of undocumented migration, i.e. the smuggling of migrants and trafficking in human beings, are usually considered from the viewpoint of crime prevention. Trafficking has also been addressed in human rights norms. See the remarks on trafficking *infra* in chapter 2.2.2.

291. See the remarks *infra* in chapter 2.2.1.

292. See the remarks on the HRC's views on the broad personal scope of application of art. 27 of the ICCPR *supra* in chapter 2.1.1.1.1.

293. This is clearly seen within the OSCE. See also the remarks on the OSCE *infra* in this section.

294. WTO regulation has also been considered significant for migrant workers. See the ILO Action Plan on Migrant Workers (2004), p. 83.

295. The full title of the 1975 Convention is "the Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers". Conventions No. 97 and 143 are open for the ratifications of the ILO member states. See arts 13 and 18, respectively. Convention No. 143 is also noted to supplement ILO Convention No. 111. See preambular para. 17 to Convention No. 143.

296. See art. 6 on non-discrimination, and the definition of "migrant for employment" in art. 11.1, including a reference to a "person regularly admitted". There are also regulations on

– without discrimination in respect of nationality, race, religion or sex – treatment no less favourable than it applies to its own nationals in a number of matters relating to employment.²⁹⁷ ILO Convention No. 143 supplements Convention No. 97 in two respects: it elaborates upon equality of opportunity and treatment of migrant workers and their family members residing lawfully in the territory of the state and introduces standards concerning migration in abusive conditions. The aim is to suppress clandestine movements of migrants for employment and illegal employment of migrants.²⁹⁸ The Convention also addresses the issue of trafficking in labour.²⁹⁹ As regards migrant workers lawfully in the state and their families, the purpose is to enable such workers to adapt to the society of the country of employment with due consideration for the special needs they may have. Among other things, steps should be taken to assist and encourage them to preserve their national and ethnic identity as well as their cultural ties with their country of origin.³⁰⁰

There are other ILO instruments as well that are relevant to migration for employment,³⁰¹ particularly those setting out fundamental principles and rights at work, such as equality of opportunity and treatment with respect to matters relating to employment, protection from forced labour and the protection of children.³⁰² Since migrant workers are confronted with particular difficulties in the field of social security, ILO social security standards define scope of personal coverage irrespective of nationality.³⁰³

To address the developments and new challenges in the area of international labour migration, the International Labour Conference of the ILO adopted an *Action Plan on Migrant Workers* in 2004. The Plan calls for the development of a (non-binding) multilateral framework for a rights-based approach to labour migration and the establishment of ILO dialogue on migration in partnership with international

the members of the families of migrants for employment. For the definition of “migrant worker”, see art. 11.1, and that of the members of the family, see art. 13.2. The latter covers the spouse and dependent children, father and mother.

297. Art. 6.

298. Part I of the Convention considers migrations in abusive conditions, and Part II equality of opportunity and treatment of migrant workers and their family members lawfully in the territory of a state. At the time of ratification, a state may exclude either Part I or Part II from its acceptance of the Convention. See art. 16.

299. Arts 3 and 5.

300. Art. 12(e) and (f). The latter paragraph, which deals with preserving identity and cultural ties with the country of origin, refers to the possibility for children to gain some knowledge of their mother tongue.

301. In fact, it appears that basically all ILO standards are considered relevant for migrant workers. See the references in the ILO Action Plan on Migrant Workers (2004), pp. 78–81.

302. See e.g. ILO Convention No. 111, ILO Conventions No. 29 concerning Forced or Compulsory Labour and No. 105 concerning the Abolition of Forced Labour, and the ILO Declaration on Fundamental Principles and Rights at Work adopted in 1998.

303. ILO Action Plan on Migrant Workers (2004), pp. 77–78.

and multilateral organisations.³⁰⁴ The Plan draws attention to the feminisation of migration for employment, and cites women domestic workers, migrant workers in irregular situations and trafficked persons as being the most vulnerable groups of workers.³⁰⁵ The Action Plan also visibly addresses the integration of migrant workers in host countries, noting that integration is among the most difficult challenges raised by international migration today. Although many migrant workers stay in the receiving country only for a certain period of time (temporarily), a large number of foreign workers stay more or less permanently in the destination country, rendering integration an important issue to be considered.³⁰⁶

The pertinent norms enacted within the CoE regarding the protection of migrant workers can be found in *the European Social Charter* adopted in 1961, which provides migrant workers who are nationals of a contracting party and their families the right to protection and assistance in the territory of any other contracting party. Similar provisions have been laid down in the (revised) European Social Charter of 1996.³⁰⁷ The provisions on migrant workers incorporated in the latter differ from those in the former only in that two provisions on languages have been added. These concern the teaching of the national language(s) of the receiving state to migrant workers and members of their families as well as the teaching of migrant workers' mother tongue to their children.³⁰⁸

A number of issues raised in the 1961 European Social Charter with respect to migrant workers were elaborated upon in *the European Convention on the Legal Status of Migrant Workers* adopted in 1977.³⁰⁹ Similarly to the relevant provisions of the European Social Charter, the Convention concerns migrant workers who are both nationals of the contracting parties, i.e. in practice the CoE member states,³¹⁰ and who are lawfully in the receiving state.³¹¹ The provisions of the Convention concern

304. ILO website at <http://www.ilo.org/public/english/> (visited on 13 November 2006). The Plan considers labour migration in a globalising world, migration and its consequences (both for the countries of origin and destination), conditions of work and treatment of migrant workers, international regulation of migrant workers and migration, ILO activities, and managing migration.

305. ILO Action Plan on Migrant Workers (2004), pp. 58–63.

306. *Ibid.*, pp. 67–68.

307. See Part I, para. 19, and Part II, art. 19 of the both versions of the Charter. The European Social Charter in both its initial and revised forms are open only for the signature by the CoE member states. See art. 35.1 of the 1961 Charter, and Part VI, art. K.1 of the revised Charter. Many provisions refer to the lawfulness of the staying of migrant workers in the territory of the state.

308. (Revised) European Social Charter, art. 19(11) and (12).

309. The Convention is accompanied by an Explanatory Report.

310. The Convention is open to signature by the CoE member states. See art. 34.

311. See the definition of “migrant worker” in art. 1.1, which contains references both to nationals and authorisation. Family members authorised to join the migrant worker in the terri-

various matters considered important in enabling migrant workers to take up paid employment in another state party to the Convention.³¹² The Convention links migrant workers' right to stay in the receiving country intrinsically to employment;³¹³ it addresses the legal status of migrant workers and aims at ensuring, as far as possible, that they are treated no less favourably in all aspects of living and working conditions than workers who are nationals of the receiving state. The Preamble to the Convention also links the aims of the Convention to respect for human rights and fundamental freedoms.³¹⁴ The instrument includes no express references to the integration of migrant workers and their family members in(to) the receiving society. Despite its references to settlement and adaptation, the aim of the Convention is clearly not to enhance the integration of these persons; their stay is perceived as more or less temporary and linked to the duration of employment, and their return to their state of origin is expected.³¹⁵ It is also noteworthy that the provisions of the Convention are not framed in terms of rights of individuals but set out the obligations of the contracting states. Consequently, the Convention provides no individual complaints mechanism either.³¹⁶

A document adopted within the CoE more recently, *the Declaration adopted at the second CoE summit* of 1997, suggests a change in the attitude towards the issue of integration of migrant workers among the CoE states; this takes the form of an ex-

tory of a contracting party are discussed in art. 12, and they may include a migrant worker's spouse and unmarried children who are still minors and dependent on the worker.

312. See e.g. arts 10 and 14.2.

Although the CoE Convention deals with the same kinds of questions with respect to migrant workers lawfully in the receiving states as the ILO Conventions discussed *supra*, the CoE Convention is somewhat more detailed on some points than the ILO norms. Unlike ILO Convention No. 143, however, the CoE Convention does not address migrant workers in unauthorised and/or abusive situations.

313. See particularly arts 4, 8 and 9 addressing the right to admission and work as well as residence permits.

314. Preambular para. 2 refers to human rights and fundamental freedoms only in general terms without referring to any specific international documents. The Explanatory Report states that the Convention seeks directly to serve the CoE's aim of safeguarding and furthering human rights and fundamental freedoms, as embodied in the ECHR. It is also in keeping with the CoE conventions and agreements in the social field, particularly the European Social Charter. Explanatory Report, para. 7.

315. A number of provisions point to this. E.g. there are several references to the return of migrant workers and their family members to their state of origin. See arts 14.5, 15 and 30.

316. Not even a state reporting mechanism such as that typically attached to human rights conventions is foreseen in the Convention. In fact, the Consultative Committee set up in accordance with the Convention's provisions is not even a supervisory body similar to that of many treaty bodies. The members of this Committee are representatives of the contracting parties, and the task of the Committee is to examine proposals submitted to it by the contracting parties "with a view to facilitating or improving the application of the Convention, as well as any proposal to amend it". See art. 33.3.

PLICIT reference both to the protection the rights of lawfully residing migrant workers and to facilitating their integration in the societies in which they live.³¹⁷

The central UN instrument on migrant workers is *the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (the UN Convention on Migrant Workers), adopted in 1990. The Preamble to the Convention notes the insufficient recognition of the rights of migrant workers and members of their families and the need to develop appropriate international protection.³¹⁸ The Convention is a long and comprehensive instrument³¹⁹ and differs from its European “counterpart”, i.e. the European Convention on the Legal Status of Migrant Workers, in a number of particulars; for instance, its human rights component is more prominent and comprehensive.³²⁰ The definition of the term “migrant worker” and the scope of application of the Convention are broader than those in the CoE Convention. The UN Convention’s point of departure is its applicability to all migrant workers and members of their families; the purpose of the Convention is both to promote the recognition of the fundamental human rights of all migrant workers and to grant certain additional rights to documented migrant workers and their family members. The Convention suggests that recourse to the employment of non-documented migrant workers will be discouraged if the fundamental human rights of all migrant workers are more widely recognised.³²¹ A clear difference compared to the CoE norms on migrant workers can be seen here in that the UN Convention considers migrant workers and members of their families both in the situations when they are documented (or in a regular situation) and when they are

317. Declaration, para. 7, subpara. 6. These provisions are laid down in the context of the remarks on social cohesion.

318. Preambular paras 11 and 16.

319. The Convention contains a total of 93 articles.

320. The Preamble to the UN Convention refers to a number of human rights instruments, including the UDHR, the ICESCR, the ICCPR, the ICERD, the CEDAW, the Child Convention, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The work of the ILO in the area is noted, and a number of ILO instruments are also expressly referred to. Additionally, the importance of the UNESCO Convention against Discrimination in Education is mentioned. See preambular paras 2–4. There is also a general reference to regional and bilateral agreements in the field. Preambular para. 7. See also the remarks on the Convention’s substantive provisions on human rights *infra*.

321. It is further stated that granting certain additional rights to migrant workers and members of their families in a regular situation will encourage all migrants and employers to respect and comply with the laws and procedures established by the state concerned. See preambular para. 15.

Part II of the Convention includes art. 7, which addresses non-discrimination with respect to the rights provided in the Convention. Part III containing arts 8–35 concerns human rights of all migrant workers and their family members. The additional rights of documented migrant workers and their family members are set out in Parts IV and V.

non-documented (or in an irregular situation).³²² Moreover, the definition of family members entitled to family reunification differs somewhat from that in the CoE Convention pertaining to migrant workers.³²³

The UN Convention's provisions on human rights contain not only rights familiar from human rights instruments of general application³²⁴ but also rights or elements not necessarily set out therein.³²⁵ The references to cultural identity in a number of articles are particularly worthy of note in this regard.³²⁶ It also merits mention that the provisions on human rights in the UN Convention on Migrant Workers that reiterate human rights of general application include a number of rights – particularly of an economic and social nature – with respect to which the (revised) European Social Charter, for instance, allows distinctions to be made between nationals and non-nationals (under certain conditions).³²⁷ For its part, the UN Convention, as a rule, affords a number of rights of an economic and social nature to all migrant workers.³²⁸ As regards the additional rights to be granted to documented migrant workers and their family members, it may be seen that some go further than the rights set out, for instance, in the CoE documents addressing the situation of migrant workers.³²⁹

322. Arts 1–5.

323. For the purpose of the Convention, the expression “members of the family” refers to persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well their dependent children and other dependent persons who are recognised as members of the family by applicable legislation or agreements between the states concerned. See art. 4. The differing scope of application in comparison to both the pertinent CoE Convention and the ILO instruments discussed *supra* is worthy of note.

324. Part III reiterates a number of human rights set out in the ICCPR and the ICESCR.

325. These include a number of details relating to the following questions: expulsion (art. 22); the right to recourse to the protection and assistance of the consular or diplomatic authorities of their state of origin (or of a state representing the interest of that state) (art. 23); and the right to transfer of earnings and savings upon the termination of employment (art. 32).

326. Respecting the cultural identity of migrant workers and their family members who are deprived of their liberty is mentioned in art. 17.1. Art. 31 consists of the state's obligation to ensure respect for the cultural identity of migrant workers and their family members. Art. 34 refers both to the obligation of migrant workers and their family members to respect the laws and regulations of any state of transit and the state of employment and to the obligation to respect the cultural identity of the inhabitants of such states.

327. See the remarks on the applicability of the European Social Charter to non-nationals *infra* in chapter 2.3.1.2.

328. See e.g. arts 25–28 and 30. According to art. 30, each child of a migrant worker has the basic right to access to education on the basis of equality of treatment with nationals of the state concerned.

329. See Part IV. The states are, among other things, committed to consider the establishment of procedures or institutions through which account may be taken of special needs, aspirations and obligations of migrant workers and their family members. States of employment are also to facilitate, in accordance with their national legislation, the consultation or participation of migrant workers and their family members in decisions concerning the life

The UN Convention on Migrant Workers contains a section addressing the promotion of sound, equitable, humane and lawful conditions with respect to international migration of workers and members of their families.³³⁰ Among other things, the provisions call for consultation and co-operation among states in the area. It is also pointed out that due regard is to be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families. Also to be considered in this regard are the consequences of migration for the communities concerned.³³¹

Although the UN Convention includes express references to integration, these do not concern the integration of migrant workers and their family members within the society of the receiving state but, rather, confine themselves to the integration of migrant workers' children in the school system and migrant workers' reintegration in the state of origin.³³² While the Convention specifically stipulates that nothing in the Convention may be interpreted as implying the regularisation of the situation of migrant workers or their family members who are non-documented, or otherwise in an irregular situation,³³³ its human rights provisions have a bearing on migrant workers' inclusion in society.³³⁴ In general, the UN Convention on Migrant Workers may be characterised as a rather complicated instrument. This, together with the fact that no reservations may be filed with regard to the document,³³⁵ may partly explain why it has attracted hardly any ratifications from the migrant-receiving

and administration of local communities. It may also be said that the provisions of the UN Convention addressing migrant workers' families and the rights of family members provide broader entitlements than those in the CoE instruments. See e.g. the protection of family unity and facilitating the reunification of families of migrant workers in art. 44, and the rights of family members with respect to education, vocational training, social and health services and participation in cultural life in art. 45. The broader definition of "family members" referred to *supra* is also worthy of note.

330. See Part VI.

331. Art. 64.

332. States of employment are committed to pursue a policy aimed at facilitating the integration of children of migrant workers in the local school system, particularly in respect of teaching them the local language. States of employment are also to endeavour to facilitate for the children of migrant workers the teaching of their mother tongue and culture, and they may also provide special schemes of education in the mother tongue of these children. See art. 45.2–4.

Art. 67 refers to co-operation between states with respect to the orderly return of migrant workers and members of their families to the state of origin (when they decide to return or their authorisation of residence or employment expires or when they are in the state of employment in an irregular situation). Regarding migrant workers and members of their families in a regular situation, the states parties concerned are to co-operate as appropriate with a view to promoting adequate economic conditions for their resettlement and to facilitating their durable social and cultural reintegration in the state of origin.

333. Art. 35.

334. See also the remarks on the inclusiveness of human rights system *infra* in chapter 2.3.

335. Art. 88.

Western countries.³³⁶ The individually guaranteed rights may also discourage states from ratifying the Convention.³³⁷

Of the other relevant UN instruments, *the Vienna Document of the 1993 World Conference on Human Rights* touches upon migrant workers in connection with vulnerable groups and, among other things, calls for the more effective implementation of human rights.³³⁸ States are also invited to consider the possibility of signing and ratifying the UN Convention on Migrant Workers.³³⁹

The OSCE documents have contained references to migrant workers since the founding document, the 1975 Helsinki Final Act.³⁴⁰ The concern for migrant workers within the OSCE is focussed on migrant workers in the OSCE area who are also nationals of the OSCE states³⁴¹ and who are lawfully residing in the host countries.³⁴² The discussions on migrant workers within the OSCE have often revolved

336. The Convention entered into force internationally on 1 July 2003, and by October 2007 it had 37 parties to it, among them only three European states, i.e. Albania, Bosnia and Herzegovina, and Turkey. Montenegro and Serbia had signed it.

337. Here too the UN regulation differs from that of the CoE. As it introduces the rights of individuals, the UN Convention also establishes a supervisory mechanism consisting of both a state reporting system and state and individual complaints systems. See arts 73, 76 and 77. The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, which was set up to monitor the implementation of this UN Convention, is the most recent UN treaty body consisting of independent experts. For the Committee, see art. 72.

338. The Vienna Document states that great importance must be given to the promotion and protection of human rights of persons belonging to groups which have been rendered vulnerable, including migrant workers, the elimination of all forms of discrimination against them, and the strengthening and more effective implementation of existing human rights instruments. Part I, para. 24. Migrant workers are also considered in Part II of the document, in which the World Conference urged all states to guarantee the protection of the human rights of all migrant workers and their families. It is also pointed out that the creation of conditions to foster greater harmony and tolerance between migrant workers and the rest of the society of the state in which they reside is of particular importance. Part II, paras 33 and 34.

339. Part II, para. 35.

340. Helsinki Final Act, "Economic and social aspects of migrant labour" under the heading on "Co-operation in other areas". Subsequently – and prominently since the 1992 Helsinki Follow-Up Meeting – the issues relating to migrant workers have been considered within the human dimension. See e.g. the 1992 Helsinki Document, Decisions, Chapter IV, paras 36–38, and the 1994 Budapest Document, Decisions, Chapter VIII, paras 28–31.

341. See e.g. the reference to nationals and the countries of origin in the 1975 Helsinki Final Act, "Economic and social aspects of migrant labour", para. 6. The 1989 Vienna Document refers to migrant workers from other participating states under "Co-operation in other areas", para. 42.

342. See e.g. *ibid.*, para. 40, the 1990 Paris Charter under "migrant workers", the 1991 Moscow Document, para. 38, the 1992 Helsinki Document, Decisions, paras 36–38, and the 1994 Budapest Document, Decisions, para. 31.

around the issue of migrant workers of Turkish origin in Germany. Additionally, within the organisation, the question of migrant workers has been kept apart from national minority questions.³⁴³

It is also noteworthy that the OSCE commitments up until those adopted in the beginning of the 1990s clearly reflect the idea that migrant workers are only visiting the host country and that they will return to their country of origin. The 1989 Vienna Document still contains an express reference to facilitating the reintegration of migrant workers and their families returning to their country of origin.³⁴⁴ A change in this attitude can be seen in the 1991 Moscow Document and the 1992 Helsinki Document. Both refer to the familiarisation of migrant workers with the languages and social life of the participating state in which they lawfully reside and to enabling migrant workers to participate in the life of the society of the host country.³⁴⁵ The 1991 Moscow Document also underlines the right of migrant workers and their families to express freely their ethnic, cultural, religious and linguistic characteristics.³⁴⁶ This instrument was the first OSCE document that linked promoting tolerance and understanding to the issue of migrant workers.³⁴⁷ The 1994 Budapest Document expressly refers to promoting the integration of migrant workers in the societies in which they are lawfully residing. It also points out that a successful process of integration depends on its active pursuit by the migrants themselves.³⁴⁸ More recently, protecting the rights of lawfully residing migrant workers and facilitating their integration into the societies in which they live have been addressed by the OSCE Ministerial Council.³⁴⁹

2.1.3.1.2 Foreign Residents, Participation and Integration

From the viewpoint of foreign residents and the topic of this research, *the Convention on the Participation of Foreigners in Public Life at Local Level*, adopted within the

343. See also the remarks *supra* in chapter 2.1.1.2.2.

344. See the 1975 Helsinki Final Act, paras 13 and 15, the 1983 Madrid Document, para. 2, and the 1989 Vienna Document, para. 40.

345. Moscow Document, para 38, subparas 2 and 4, and the 1992 Helsinki Document, Decisions, paras 37 and 38.

346. It is also stated that the exercise of the rights of migrant workers may be subject to such restrictions as are prescribed by law and are consistent with international standards. 1991 Moscow Document, para. 38. The same commitment was reiterated in the 1994 Budapest Document, para. 28.

347. Moscow Document, para. 38.1. See also the remarks *infra* in chapter 2.2.1.2.

348. Budapest Document, para. 31.

349. In the Ministerial Council meeting of 2003, the OSCE states undertook to combat discrimination against migrant workers and to facilitate their integration into the societies in which they are legally residing. Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination (2003), para. 11. See also the remarks *infra* in chapters 2.1.3.1.2 and 2.2.1.2.

auspices of the CoE in 1992,³⁵⁰ is of particular interest, since it is among the few international human rights conventions that expressly deals with the issue of integration. The Convention addresses the integration of foreign residents³⁵¹ in the life of the local community and links this integration to participation.³⁵²

The Convention aims at guaranteeing to foreign residents the rights necessary for participation³⁵³ and at enhancing their involvement in various processes of consultation on local matters.³⁵⁴ Freedom of association and the right to form local associations of their own are seen as promoting the maintenance and expression of the cultural identity of foreign residents.³⁵⁵ The general integration of foreign residents into the life of the community is mentioned in the provision on consultative bodies or other appropriate institutional arrangements. The provision points out that arrangements providing a forum for the exchanges of views between local authorities and foreign residents foster foreign residents' general integration (into the life of the community). The states parties to the Convention (and those that have accepted Chapter B in Part I)³⁵⁶ have also committed themselves to encouraging and facilitating the establishment of appropriate institutional arrangements.³⁵⁷ The provision

350. The Convention is open for the CoE member states, but after its entry into force, the CoE Committee of Ministers may also invite any other state to accede to the Convention. See arts 11 and 13.

The Convention contains three parts, of which Part I consists of Chapters A, B and C (covering arts 1–7). Chapter A concerns freedoms of expression, assembly and association, Chapter B consultative bodies to represent foreign residents at local level, and Chapter C the right to vote as well as to stand for election in local authority elections. No other reservations may be made to the Convention except that a state may reserve the right not to apply the provisions of either Chapter B or Chapter C or both. See arts 17 and 1.1. Additionally, art. 6.2 enables the state party to grant foreign residents only the right to vote without the right to stand for election. Part II of the Convention includes e.g. the provisions on providing information to foreign residents concerning their rights and obligations in relation to local public life, and on restrictions of the rights of foreign residents. See arts 8 and 9.

351. For the purposes of the Convention, the term “foreign residents” is noted to mean persons who are not nationals of the state and who are lawfully resident on its territory. See art. 2.

352. The Preamble to the Convention points out that the residence of foreigners on the national territory is now a permanent feature of European societies, and that foreign residents generally have the same duties as citizens at local level, and refers to the need to improve their integration into the local community, especially by enhancing the possibilities for them to participate in local public affairs. Preambular paras 5 and 7.

353. Art. 3 addresses the rights to freedom of expression, peaceful assembly and association.

354. Pursuant to art. 4, a state party “shall endeavour to ensure that reasonable efforts are made to involve foreign residents in public inquiries, planning procedures and other processes of consultation on local matters”.

355. The right to freedom of association is noted to imply the right of foreign residents to form local associations of their own e.g. for purposes of mutual assistance, maintenance and expression of their cultural identity. See art. 3(b).

356. See the remarks *supra* (n. 350) on the possibility of a state party to exclude this section from the application of the convention.

357. Art. 5.

on the right of foreign residents to vote and to stand for election in local authority elections makes the right contingent on lawful and habitual residence for a number of years before the elections. The provision does not deal with the role of this kind of participation in the integration of foreign residents.³⁵⁸

In general, the Convention on the Participation of Foreigners in Public Life at Local Level must be seen as representing a welcome advance in enabling foreigners who reside more permanently in a state to participate matters in the host country. However, the Convention contains a number of elements signifying that it represents only a very cautious step forward in the area. Indeed, it includes a number of elements limiting its own significance: its scope of application with regard to relations with authorities is limited to local matters and interaction with local authorities³⁵⁹ and local authority elections, and the states parties have a wide margin of discretion with respect to the application and the interpretation of the Convention. A state may ratify the Convention by accepting only its general provisions and excluding the provisions that entail more far-reaching obligations concerning setting up consultative bodies and affording foreign residents the right to vote and stand for election.³⁶⁰ The provisions of the Convention in general do not use very mandatory language.³⁶¹ Further detracting from its significance is the fact that the CoE states have not shown a great deal of interest in ratifying it.³⁶²

Soon after the adoption of the text of the Convention on the Participation of Foreigners in Public Life at Local Level, the CoE states addressed the issues of the management and control of migratory flows in a summit held in 1993 in Vienna.

358. See art. 6. Art. 6.1 refers to a lawful and habitual resident in the state concerned for the 5 years preceding the elections. Pursuant to art. 7, a state party may stipulate that the residence requirements laid down in art. 6 are satisfied by a shorter period of residence.

359. The provisions of the Convention apply to all categories of local authorities existing within the territory of each party, unless the state party has specified the categories of territorial authorities in its instrument of ratification, acceptance, approval or accession. See art. 15. Art. 16 asserts that the state party may specify the territory or territories to which the Convention applies.

360. For the general provisions in Chapter A and the more far-reaching provisions in Chapters B and C of Part I, and the possibilities to file reservations, see the remarks *supra* (n. 350). As discussed, pursuant to art. 6.2, a state party may also restrict the application of the provision addressing the right to vote and to stand for election in local authority elections only to the former right.

361. There are many provisions whereby a state party “undertakes to guarantee”, “undertakes to grant”, “undertakes to ensure” or “shall endeavour to ensure” the rights mentioned. Furthermore, the provision on setting up consultative bodies or other appropriate institutional arrangements contains a qualification concerning the size of the foreign community in the area of local authorities. A reference to the existence of “a significant number of foreign residents” in the area of local authorities inserted in art. 5.1 leaves in practice the states parties a considerable margin of discretion.

362. By October 2007, only eight CoE states had become parties to the Convention. They are Albania, Denmark, Finland, Iceland, Italy, the Netherlands, Norway and Sweden.

The Declaration of the 1993 Vienna Summit calls for a comprehensive approach to migration challenges and for continuing the efforts by the CoE states to facilitate the social integration of lawfully residing migrants.³⁶³

In recent years the issue of migration has emerged among the increasingly important agenda items within the OSCE, which has also resulted in more frequent references to the concept of integration in OSCE documents, primarily the decisions and statements adopted by the OSCE Ministerial Council. In 2003 the Ministerial Council, in addressing the situations of migrant populations, linked the failure to integrate societies with instability.³⁶⁴ Subsequently, the Ministerial Council has pointed out that the issues of migration and integration are part of the OSCE's comprehensive approach to security in all three of its dimensions and has called for promoting integration with respect for cultural and religious diversity.³⁶⁵ The OSCE Ministerial Council has acknowledged that successful integration policies not only include respect for cultural and religious diversity and promotion and protection of human rights and fundamental freedoms but also promote stability and cohesion within societies.³⁶⁶

2.1.3.1.3 Asylum-seekers and Refugees – Repatriation Preferred

The foundation of the international regime for the protection of asylum-seekers and refugees is laid down in *the Convention relating to the Status of Refugees* (the Refugee Convention), adopted within the UN in 1951, and *the Protocol relating to the Status of Refugees* (the Refugee Protocol), adopted in 1967. These instruments, which have been called “the most far-reaching international instrument on migration”,³⁶⁷ aim at providing protection for the individuals fulfilling the definitions of “refugee” in them.³⁶⁸ They incorporate provisions on non-discrimination³⁶⁹ and refer to a number of human rights to be guaranteed to refugees³⁷⁰ within the territories of a state

363. Declaration, paras 8 and 21. See also the remarks *supra* in chapter 2.1.1.3.3.

364. According to the pertinent decision, “The mobility of migrant populations and the emergence of societies with many coexisting cultures in all parts of the OSCE region present growing opportunities as well as challenges. Failure to integrate societies and failure also by everyone who resides in them to respect the rights of all can undermine stability”. OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century, para. 13.

365. Ministerial Council Statement on Migration (2006), paras 1, 2 and 5.

366. Ministerial Council Decision No. 2/05 on Migration (2005), preambular para. 8.

367. IOM (2005), p. 302.

368. See art. 1 of both documents.

369. Art. 3 of the Refugee Convention refers to non-discrimination on the ground of race, religion or country of origin.

370. Asylum-seekers and refugees are also protected under the human rights of general application. See also the remarks *infra* in chapter 2.3.1.

party, including certain rights relating to religion, elementary education, and matters relating to labour legislation and social security.³⁷¹

The stated goal of all protection efforts under the Refugee Convention and Protocol is the ultimate re-establishment of a normal life for refugees, and a solution orientation is inherent in the Convention's provisions on cessation, assimilation and naturalisation.³⁷² Nowadays, the concept of (local) integration is employed instead of the concept of assimilation, and in general the durable solutions for refugee situations are considered to be voluntary repatriation, local integration and resettlement.³⁷³ Formally, there is no hierarchy among these solutions, but in fact voluntary repatriation has come to be the preferred option where it is viable.³⁷⁴

The principal substantive remedy provided by the Refugee Convention and Protocol is the right to *non-refoulement*, i.e. the right not to be returned to a territory where the asylum-seeker may experience persecution.³⁷⁵ This right is the foundation of international refugee protection and as a fundamental principle of customary international law it is seen as binding even on states not party to the Refugee Convention and Protocol.³⁷⁶ The implications of the right to *non-refoulement* are far-reaching, since non-return necessarily implies a right to a temporary stay in the place of asylum, including the right to a reliable determination of refugee status and humane treatment during the period of stay. It may also imply a right to a durable solution to the refugee's need for a new permanent home. State practice, however, appears mixed in terms of the unquestioned establishment of these rights.³⁷⁷

371. The Refugee Convention refers to rights with respect to which the refugees within the territory of a state party should be accorded treatment at least as favourable or protection equal to that which the state party accords to its nationals. The questions mentioned include freedom to practise one's religion, and freedom as regards the religious education of children and elementary education (arts 4 and 22.1), and matters relating to labour legislation and social security (art. 24). See also arts 14, 16, 23 and 29. Additionally, refugees should be accorded not less favourable treatment than is accorded to aliens generally or nationals of a foreign country with respect to acquisition of property, the right of association with respect to non-political and non-profit associations and trade unions, the rights to engage in wage-earning employment, to self-employment, and to practise liberal professions, housing, and education other than elementary education. See arts 13, 15, 17–19, 21 and 22. The Refugee Convention also addresses the issues of expulsion, including the prohibition of expulsion or return ("refoulement"). See arts 32 and 33.

372. Refugee Convention, arts 1(c) and 34. According to art. 1(c), cessation concerns the situations where the Convention ceases to apply to a person falling within the term "refugee" under the Convention. Also the Statute of the UNHCR requires the organisation to seek permanent solutions to the problems of refugees by assisting governments to facilitate the voluntary repatriation of refugees or their assimilation within new national communities. UNHCR Statute, Chapter I, para. 1.

373. Executive Committee (2001), paras 96–106.

374. *Ibid.*, para. 96.

375. Refugee Convention, art. 33.

376. Guy S. Goodwin-Gill (1996), p. 157.

377. Helton and Jacobs (2006), p. 7.

The international refugee protection regime set up by the Refugee Convention and Protocol is still strongly adhered to by states,³⁷⁸ although in the light of the present-day refugee situations, which are characterised by forced displacement and multifaceted reasons for flight, it is rather outdated and the arrangements for protection for those in need of protection are in many respects inadequate. The refugees fulfilling the definition of these instruments constitute only a small number of today's international migrants in need of some kind of protection after being forced to move by a variety of disasters, including armed conflict, persecution, severe economic insecurity, environmental degradation, or failures of governance.³⁷⁹ The central reasons for states' reluctance to adopt strong international protection systems for refugees boil down to their jealous guard over sovereignty through immigration controls and to the resource implications of a more robust international protection system.³⁸⁰ Among the evident problems of the current international refugee protection system has been its failure to recognise gender-specific challenges – particularly the concerns of women – and problems in refugee-like situations. Attempts have been made to address this issue by, for instance, adopting guidelines to render the interpretation of the refugee definitions of the Refugee Convention and Protocol more responsive to gender-related persecution.³⁸¹

Refugees and asylum-seekers are briefly mentioned in *the Vienna Document of the 1993 World Conference on Human Rights*, which merely notes the importance of the Refugee Convention and Protocol as well as of the need to achieve durable solu-

378. Although the UNHCR has issued guidelines on various provisions of the Refugee Convention and its Protocol, states interpret the terms differently in their national decision-making. *Ibid.*, p. 8.

379. *Ibid.*, pp. 3–4. The number of internally displaced persons, who get no protection under the UN refugee documents, has increased particularly. See *ibid.*, and Zard (2006), pp. 16–17. Due to the outdatedness of the UN refugee protection system, including its failure in many instances to ensure respect for the basic human rights of those forced to move, the international community has been called upon to formulate new policy responses. The limited utility of the UN protection system has been acknowledged by, among others, the member states of the OAU (presently the AU) and some Latin American governments, which have concluded separate instruments addressing refugee question. Helton and Jacobs (2006), pp. 4 and 7–10.

380. The primary concern of states, both at the time of the adoption of the Refugee Convention and now, is that state authority not be undermined by a refugee definition so broad as to entail excessive obligations to masses of people who might seek special consideration from the international community, including admission to receiving states. *Ibid.*, pp. 4–5. See also Gorlick (2006), pp. 65–72 and 77–82, and Nagy (2006), pp. 92–98.

381. See the Guidelines on International Protection on Gender-Related Persecution adopted by the UNHCR in 2002.

tions, primarily through the preferred solution of dignified and safe voluntary repatriation to the country of origin.³⁸²

The OSCE documents also draw attention to the situation of refugees and displaced persons;³⁸³ this concern was prompted especially by the conflicts in the Balkan area the 1990s.³⁸⁴ Within the OSCE, involuntary (or forced) migration has also been clearly linked to endangering stability in the OSCE region.³⁸⁵ The OSCE commitments refer to the application of the Refugee Convention and Protocol³⁸⁶ as well as to facilitating the (voluntary) return of refugees and (internally) displaced persons and their reintegration in their places of origin.³⁸⁷ The OSCE states have also addressed the situation of asylum-seekers and refugees in connection with the issues of tolerance and non-discrimination.³⁸⁸

The Declaration of the Second CoE Summit, adopted in 1997, echoes the idea of repatriation of refugees by underlining the obligation of the state of origin to readmit such persons to their territory (in accordance with international law).³⁸⁹ Refugee children have received some specific attention in *the Child Convention*.³⁹⁰

2.1.3.2 Women, Children, Persons with Disabilities, and the Elderly

Among the great challenges of international human rights has been the de facto extension of the application of internationally recognised human rights norms to cover women. Despite the fact that the fundamental human rights norms laid down in the UN Charter and the subsequent human rights documents explicitly refer to securing these rights also for women on the basis of equality and non-discrimina-

382. The Vienna Document also refers to the right to seek and enjoy in other countries asylum from persecution, to the right to return one's own country, and to the special needs of women and children. Part I, para. 23.

383. A brief paragraph on the issue was inserted in the 1989 Vienna Document under the heading "Questions relating to security in Europe", para. 22.

384. See e.g. the 1992 Helsinki Document, Decisions, Chapter VI, paras 30–45, the 1994 Budapest Document, Decisions, Chapter VIII, para. 32, and the 1996 Lisbon Document, paras 9 and 10.

385. See e.g. the 1996 Lisbon Document, para. 9.

386. See e.g. the 1999 Charter for European Security, para. 22.

387. See the 1996 Lisbon Document, para. 10, and the 1999 Charter for European Security, para. 22.

388. See the remarks *infra* in chapter 2.2.1.2.

The OSCE Action Plan for the Promotion of Gender Equality adopted in 2004 raises the need to pay due regard to gender dimensions of international protection. It refers to the UNHCR Guidelines on International Protection on Gender-Related Persecution. See para. 42. See also the remarks on the OSCE Action Plan *supra* in chapter 2.1.3.2.

389. Refugees and asylum-seekers are discussed in connection with social cohesion. Declaration, para. 7, subpara 4.

390. See art. 22. See also the remarks *infra* in chapter 2.1.3.2.

tion,³⁹¹ the actual record shows tremendous gaps in this area. Due to the persistent obstacles to ensuring human rights also for women, states have concluded separate international human rights instruments to specifically address the situation of women in this regard.

The most important international human rights instruments³⁹² that apply specifically to women have been adopted within the framework of the UN;³⁹³ they include *the Convention on the Elimination of All Forms of Discrimination against Women* (the CEDAW), adopted in 1979,³⁹⁴ and *the Beijing Declaration and Platform for Action* (the Beijing Document), adopted at the fourth World Conference on the Status of Women in 1995.³⁹⁵ In general, these two instruments underline the importance of guaranteeing women the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men.³⁹⁶ They also reflect a shift in focus from the protection of women underscored in earlier international instruments towards stressing equality and equal opportunities.³⁹⁷ While both documents underline the importance of the full and equal participation of women with men in various aspect of life, including general decision-making processes,³⁹⁸ the Beijing Document, which has numerous provisions emphasising the importance of women's

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391. In addition to race, sex has been placed on the lists of forbidden grounds of discrimination in essentially all human rights instrument of general application. Equality between men and women and non-discrimination on the basis of sex (or gender) has also been underlined in specific provisions of human rights instruments. See the remarks *infra* in chapter 2.3.
392. The attention drawn to women in various human rights contexts, including the areas of anti-racist action and combating trafficking in human beings, should also be noted. Equality of the sexes has been addressed e.g. in the norms concerning indigenous peoples. See the remarks *supra* in chapter 2.1.2. It is of some interest that international minority norms do not explicitly deal with the question.
393. For international standard-setting specifically concerning women, see Reanda (1992), pp. 268–300.
394. For the CEDAW, including its special features, see Pentikäinen (1999), pp. 27–41. See also the remarks on the Convention *infra* in chapter 2.3.
395. The four UN World Conferences on Women organised so far have been important contexts within which various issues of concern for women, including human rights, have been considered. The Beijing Document is the most substantial of the conference documents.
396. CEDAW, art. 3. The Beijing Document emphasises equal rights and opportunities. See e.g. the Declaration, paras 15 and 16.
397. The international norms adopted earlier had a strong focus on the protection of women more generally so that they visibly aimed at protecting and maintaining the role of a woman as wife and mother. These kinds of norms have been viewed as problematic from women's viewpoint in that they allow discriminatory and even damaging practices against them. Pentikäinen (1999), pp. 21–22. For categorising international norms addressing women as protective, corrective and non-discriminatory, see Hevener (1983), pp. 3–4. For the remarks on these norms, see also Pentikäinen (1999), pp. 21–27.
398. The CEDAW underlines the equal participation and non-discrimination of women in the political and public life of the country, including in the formulation of governmental policy. See art. 7.

participation, has been called the agenda for women's empowerment.³⁹⁹ The Beijing Document also associates equality with development, peace, democracy,⁴⁰⁰ as well as justice.⁴⁰¹ Women's equal participation in decision-making is mentioned as being not only a requirement of simple justice or democracy but also a necessary condition for women's interests to be taken into account. Democracy is seen as being both strengthened and promoted when decision-making provides a balance reflecting the composition of society.⁴⁰² Additionally, the Beijing Document calls for gender-sensitive policies and programmes⁴⁰³ and cites multiple barriers to the empowerment and advancement of women and girls due to such factors as their race, age, language, ethnicity, culture, religion, disability, or their indigenous background.⁴⁰⁴ The Beijing Document also draws some attention to the additional barriers to the enjoyment of the human rights encountered by women of migrant background, including women migrant workers (including domestic workers),⁴⁰⁵ displaced women and women refugees.⁴⁰⁶ Additionally, the instrument contains some remarks on religion worthy of note, pointing out, for instance, the significance of and full respect for various religious and ethical values of individuals⁴⁰⁷ and the inalienability and universality of the right to freedom of thought, conscience and religion.⁴⁰⁸ All forms of extremism are noted as having a negative impact on women, potentially leading to violence and discrimination.⁴⁰⁹ The Beijing Document also calls for the prohibition and elimination of any harmful aspect of certain traditional, customary or modern practices that violates the rights of women.⁴¹⁰

The international norms that apply specifically to women do not, as a rule, deal with issues of identity. The Beijing Document makes an exception to this by mentioning the identity of indigenous women.⁴¹¹ In general, norms specific to women recognise certain differences between men and women, essentially with respect to

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399. Platform for Action, para. 1. For the remarks on the empowerment of women, see also the Declaration, paras 7, 13 and 32.
400. Declaration, paras 10, 13 and 15.
401. Platform for Action, para. 5. Para. 43 mentions the achievement of equality between women and men as a condition for social justice.
402. *Ibid.*, para. 183.
403. Declaration, paras 19 and 38. For the need to integrate gender perspectives and for promoting an active and visible policy of mainstreaming a gender perspective in all policies and programmes, see also the Platform for Action, paras 157 and 191.
404. Declaration, para. 32. See also the Platform for Action, paras 48 and 226.
405. Platform for Action, paras 156 and 226.
406. *Ibid.*, para. 226.
407. *Ibid.*, para. 9.
408. *Ibid.*, para. 25.
409. *Ibid.* See also para. 225.
410. *Ibid.*, para. 225.
411. *Ibid.*, para. 34.

women's role in reproduction.⁴¹² Sexual and reproductive rights, which are often of fundamental importance for women in that they concern the possibilities of women to make decisions regarding their own lives, have been among the issues that have triggered the most spirited exchanges of views.⁴¹³ While women-specific international instruments openly address the marginalisation, exclusion and even isolation of women,⁴¹⁴ they are not particularly forthcoming when it comes to the integration of women. The term "integration" does appear in the texts, however, for instance, when the integration of the gender dimension in policy-making is called for.⁴¹⁵

The Vienna Document of the 1993 World Conference on Human Rights, which incorporates some provisions of a general nature on women, is an exception to the above-mentioned main rule of avoiding express references to integration in connection with women in that it states an explicit link between the issues of full participation and integration of women.⁴¹⁶ The Vienna Document also reflects the rocky road towards the enjoyment of human rights faced by women (and girls), since almost fifty years after laying the foundation for the UN human rights regime there was still a need to declare that the human rights of women and girls are an inalienable, integral and indivisible part of universal human rights.⁴¹⁷ In fact, the same statement was reiterated in 1995 in the Beijing Document.⁴¹⁸ The provisions of the Vienna Document addressing the human rights of women also refer to the harmful effects on women of certain traditional or customary practices, cultural prejudices and religious extremism.⁴¹⁹

Of the international organisations relevant in Europe, the CoE has adopted no separate human rights instruments specifically addressing the situation of women; rather, it operates essentially on the basis of the provisions on equality and non-discrimination incorporated into various human rights instruments, including the ECHR and the European Social Charter, stressing that the rights and freedoms set out in those instruments are to be safeguarded without discrimination on the

412. This has been viewed as necessitating the protection of women e.g. during pregnancy. E.g. the CEDAW contains a note on the protection of women's health, including the safeguarding the function of reproduction. See art. 11(f). It is also stressed that maternity is a social function and both women and men have responsibilities in the upbringing and development of their children. See art. 5(b).

413. This also came to the fore in the Beijing Conference. Despite disputes and controversies over the subject, the Beijing Document incorporated some provisions on it. See the Platform for Action, paras 96, 97 and 223.

414. *Ibid.*, para. 33.

415. *Ibid.*, para. 183.

416. Part II, para. 36.

417. Part I, para. 18. See also the remarks on this paragraph *supra* in chapter 2.1.1.1.2.

418. Platform for Action, paras 2 and 11. The provisions on national and regional particularities incorporated in the Vienna Document are also reflected in the Beijing Document. See *ibid.*, paras 9 and 213.

419. Part II, para. 38.

basis of sex.⁴²⁰ The CoE actions taken with respect to women are also based on the central UN documents, in particular the CEDAW.⁴²¹ The documents adopted at the CoE summits address to some extent the special concerns of women, including discrimination, violence, and participation.⁴²² Equal participation of both women and men is also linked to both democracy and real equality.⁴²³

The OSCE commitments on women underline the non-discriminatory application of human rights and fundamental freedoms with respect to women,⁴²⁴ equal rights and opportunities of men and women, and the equal and effective participation of both men and women in political, economic, social and cultural life. Full and true equality between men and women is linked to a just and democratic society (one based on the rule of law).⁴²⁵ In 2004 the OSCE states adopted *an OSCE Action Plan for the Promotion of Gender Equality*, which underlines such issues as (full and equal) participation of women and men, equality of rights and equal opportunities, and the importance of gender mainstreaming.⁴²⁶

From children's viewpoint *the Child Convention*, adopted within the UN in 1989, is the cornerstone in the area of human rights,⁴²⁷ its aim being to address and elaborate special needs that children have due to their vulnerable situation as minors.⁴²⁸ The

420. The European Social Charter in both of its original and revised forms also refers to the protection of women. See e.g. art. 8.

421. In the Action Plan of the third CoE summit the CoE member states also committed themselves to enhancing the implementation of the Beijing Document. See Part I, para. 3, subpara. 3.

422. See the Declaration of the second summit, para. 6, subpara. 5, and para. 8, subpara. 4; and the Declaration of the third summit, para. 9, and the Action Plan of the third summit, Part II, para. 4, and Part III, para. 6, subpara. 1.

423. The CoE member states committed themselves to strengthening their national actions to achieve real equality between women and men e.g. by applying gender mainstreaming in national policies. See the Action Plan of the third summit, Part I, para. 3, subpara. 3. The Action Plan also underscores the importance of the active involvement of both men and women in the context of fostering intercultural and inter-faith dialogue. See Part III, para. 6, subpara. 1. See also the remarks on women *supra* in chapter 2.1.1.3.3.

424. The OSCE states have also referred to the importance of the implementation of e.g. the CEDAW. See e.g. the 1991 Moscow Document, para. 40.2.

425. See e.g. the 1989 Vienna Document, "Questions relating to Security in Europe", para. 15, the 1991 Moscow Document, para. 40, and the 1999 Charter for European Security, paras 23 and 24.

426. The Action Plan also refers to the importance of the CEDAW. See para. 42.

427. The Child Convention has also become the most widely ratified human rights convention. In 2000, two Optional Protocols were added to the framework of the Convention: the Optional Protocol on the Involvement of Children in Armed Conflict, and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

428. For the purposes of the UN Child Convention, a child means every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier. See art. 1. The Convention addresses a number of human rights found also in other human

Convention also takes up issues such as the development of the child's personality⁴²⁹ and respect for the child's parents as well as his or her cultural identity, language and values.⁴³⁰ Also noted in the Convention are the importance of the traditions and cultural values of each people for the protection and harmonious development of the child⁴³¹ and the possibility to establish and manage educational institutions.⁴³² The instrument includes explicit references to children belonging to an ethnic, religious or linguistic minority or who are of indigenous origin by incorporating a provision resembling that laid down in article 27 of the ICCPR.⁴³³ Additionally, the Convention states that when solutions for alternative care for a child are considered, due regard is to be given to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.⁴³⁴

rights instruments by adding a child-specific aspect to them. The specific features of the Convention are its provisions on the principle of the best interest of the child, and responsibilities, rights and duties of parents (or other persons responsible for the child). See arts 3.1, 5 and 18. The protection of children is addressed in a number of provisions. See e.g. arts 19, 35 and 36. Children seeking refugee status or who are refugees and disabled children are dealt with specifically. See arts 22 and 23.

429. Preambular para. 7, and art. 29.1(a) concerning education.

430. Identity is dealt with in arts 8 and 29. Art. 8 refers e.g. to the states parties' undertaking to respect the right of the child to preserve his or her identity, including nationality, name and family relations. Respect for the child's parents, his or her own cultural identity, language and values is mentioned in the context of education. According to art. 29.1(c), the education of the child is to be directed to "the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own".

Art. 29.1(b) refers to the development of respect for human rights and fundamental freedoms and for the principles enshrined in the UN Charter, and art. 29.1(d) to the preparation of the child for responsible life "in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin".

431. Preambular para. 13.

432. Art. 29.2 refers to the liberty of individuals and bodies to establish and direct educational institutions, but notes that this is subject to the observance of the principle set forth in art. 29.1 (see the remarks *supra* (n. 430)) and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.

433. Art. 30. This provision is similar to art. 27 of the ICCPR with the exception that the former also includes an explicit reference to a child of indigenous origin. See also the remarks *supra* in chapter 2.1.1.1.2.

References to minority and indigenous children are made also in the provision on the mass media, which encourages "the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous". See art. 17(d). References to ethnic, national and religious groups and persons of indigenous origin are also made in art. 29.1(d) addressing education. See the remarks *supra* (n. 430).

434. Art. 20.3.

With regard to integration, the Child Convention includes some express references to, for example, the social integration of disabled children⁴³⁵ and the social reintegration of child victims of various forms of exploitation or abuse.⁴³⁶ The provisions on education call for respecting the identity, language and values of children and teaching the national values of the country in which the child is living. Whilst there are no express remarks on integration in this connection, the latter requirement may be said to have some bearing on the issue of incorporation in(to) society.

In addition to the Child Convention, the situation of children has been addressed in a number of other international instruments, some of which also raise issues similar to those found in the UN Convention.⁴³⁷ In general, the other instruments underline the significance of the Child Convention.⁴³⁸ The CoE has also addressed the situation of children in some of its own human rights instruments.⁴³⁹ Both the ILO and the OSCE have conspicuously raised concern over the protection of children from exploitation.⁴⁴⁰ Where the right to education is concerned, the OSCE commitments also touch upon the question of the cultural identity of children belonging to national minorities or regional cultures.⁴⁴¹

435. Art. 23.1 refers to the possibility of a disabled child to enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. Art. 23.3 refers to ensuring that a disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

436. Art. 39. Reintegration into society is also mentioned in the provision addressing the special treatment of the child alleged to have, accused of having, or recognised as having infringed the penal law. See art. 40.

437. See e.g. art. 24 of the ICCPR. The situation of children has also been addressed in the norms on migrant workers, indigenous peoples, and trafficking in human beings. See also the remarks in the pertinent texts cited in this research.

438. See e.g. the Vienna Document of the 1993 Conference on Human Rights, Part I, para. 21, and the Action Plan adopted at the third CoE summit, Part III, para. 2, subpara. 1.

439. See e.g. the references to the protection of children in the (revised) European Social Charter, art. 7. The CoE summit documents also contain some express references to children and young people.

440. The ILO has drawn attention to economic exploitation and to performing any work that is likely to be hazardous to children. The OSCE's attention to children has been drawn to such issues as sexual exploitation and trafficking in human beings, and promoting children's rights and interests, especially in conflict and post-conflict situations. See e.g. the 1990 Copenhagen Document, para. 13, the 1999 Istanbul Document, para. 28, and the 1999 Charter for European Security, para. 24.

441. See e.g. the 1989 Vienna Document, "Co-operation and exchanges in the field of education", para. 68.

Some attention has been paid to persons with disabilities in international documents, most often ones not in treaty form.⁴⁴² Among these are *the Vienna Document of the 1993 World Conference on Human Rights*, which calls for special attention to be paid to ensuring non-discrimination and the equal enjoyment of all human rights and fundamental freedoms by persons with disabilities, including active participation in all aspects of society.⁴⁴³ Active participation and equal opportunity are to be guaranteed through the elimination of all socially determined barriers excluding or restricting their full participation in society.⁴⁴⁴ Persons with disabilities have also been mentioned in the documents adopted within the OSCE⁴⁴⁵ and, as already noted, the situation of children with disabilities has been addressed in the Child Convention.⁴⁴⁶

The CoE has raised questions of relevance for persons with disabilities in the European Social Charter, for instance.⁴⁴⁷ *The (revised) European Social Charter* also expressly deals with the issue of social integration in addressing the barriers and the need to adjust structures and patterns of behaviour in order to enhance the social integration and participation of the persons concerned in the life of the community.⁴⁴⁸ In general, the (revised) European Social Charter is viewed as reflecting somewhat new thinking as regards the attitude towards persons with disabilities when compared, for instance, to the earlier version of the Charter; whilst the origi-

442. See e.g. the Declaration on the Rights of Mentally Retarded Persons from the year 1971, the Declaration on the Rights of Disabled Persons from the year 1975, the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care from the year 1991, and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities from the year 1993.

443. Part I, para. 22.

444. Part II, paras 63–64.

445. The OSCE commitments underline the protection of the human rights of persons with disabilities, and the equal opportunity of such persons to participate fully in the life of their society, including in decision-making in fields concerning them. They also refer to encouraging favourable conditions for the access of persons with disabilities to public buildings and services, housing, transport, and cultural and recreational activities. See the 1991 Moscow Document, para. 41.1–5.

446. See also the remarks *supra* in this section.

447. See art. 15 in both the original and revised versions of the European Social Charter. See also e.g. the Action Plan of the third CoE summit, which refers to ensuring equal rights for people with disabilities. See Part III, para. 5.

448. Art. 15. The provision also refers to the effective exercise of the right to independence. The parties to the Charter are to take positive measures e.g. in order to provide these persons with guidance, education and vocational training, and to promote their access to employment e.g. by encouraging employers to hire them and to adjust the working conditions to the needs of the disabled. Measures should be taken to overcome barriers to communication and mobility and to enable access to transport, housing, cultural activities and leisure. For these positive measures, see also De Schutter (2005), p. 143.

nal European Social Charter emphasised rehabilitation, welfare and segregation, the revised Charter leans towards inclusion and choice.⁴⁴⁹

The Convention on the Rights of Persons with Disabilities, adopted within the UN in 2006, aims at promoting, protecting and ensuring the full and equal enjoyment of all human rights and fundamental freedoms for all persons with disabilities and at promoting respect for their inherent dignity.⁴⁵⁰ The instrument focuses on non-discrimination, ensuring equality of opportunity for, and full and effective participation and inclusion of, persons with disabilities in society. It also calls for respect for difference and acceptance of persons with disabilities as part of human diversity and humanity. It is particularly noteworthy that the Convention touches upon the question of identity by calling for respect for the right of children with disabilities to preserve their identities.⁴⁵¹

When elderly persons have been the focus of attention in international norms,⁴⁵² the pertinent norms contain references even to integration.⁴⁵³ In general, the norms underline such issues as the independence, participation, care, self-fulfilment, and dignity of elderly persons,⁴⁵⁴ as well as their social protection.⁴⁵⁵

449. Quinn (2005), pp. 285–293. According to Quinn, the 1961 European Social Charter advances the philosophy of “separate but equal” and “rehabilitation with a nod towards equality”, and the (revised) European Social Charter advances the idea of “equality with a nod to rehabilitation”.

450. Art. 1.

451. See art. 3(h).

452. See e.g. the UN Principles for Older Persons from the year 1991. This document also refers to the International Plan of Action on Ageing and the instruments of the ILO, the WHO and other UN entities. Preambular para. 11. See also the references to elderly persons e.g. in art. 23 of the (revised) European Social Charter.

453. The provision on participation incorporated in the UN Principles for Older Persons notes that “Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations”. See para. 7.

454. See e.g. the UN Principles for Older Persons.

455. See e.g. the provisions of the European Social Charter framework.

It is also worth of noting that the UN Declaration on Indigenous Peoples includes references to taking into account the special needs of the elderly, women, children and the disabled belonging to indigenous peoples. See the remarks *supra* in chapter 2.1.2.2.

2.1.4 Summary and Conclusions on the Norms Pertaining to Various Groups

2.1.4.1 Questions Addressed

While minorities and indigenous peoples have been subject to the most far-reaching international norms pertaining to various groups, acknowledgement in international documents of the need to protect the special features of these groups as an enriching factor in societies is nevertheless a rather recent development. Whilst the adoption of the ICCPR in 1966 and the incorporation of article 27 thereof constituted an important development in the area of international minority-specific norms, and although the ILO had addressed the situation of indigenous peoples in concluding Convention No. 107 already in 1957, prior to 1989 there were no positive pronouncements incorporated in international instruments on the need to protect, let alone take any promotional actions to support, minority and indigenous cultures. This situation changed when the CSCE states adopted commitments on national minorities in 1989 and 1990 and the ILO adopted the text of Convention No. 169 on Indigenous Peoples in 1989. Subsequently, the UN and the CoE became active in adopting standards for the treatment of minorities, and the pertinent norms enacted by these organisations came to echo the OSCE norms adopted earlier. This change of policy in the direction of adopting specific norms on minorities and indigenous peoples – essentially a departure from the earlier attitude of states that did not favour singling out minorities in the texts of international documents – coincided with the end of the Cold War.

The international norms on minorities and indigenous peoples combine two elements, or pillars, of protection: they underline ensuring general human rights to persons belonging to minorities and indigenous groups without discrimination and refer to the measures to be taken to protect and even promote the specific characteristics of these groups. The first pillar ensures that persons belonging to minorities and indigenous peoples receive all of the other protection without regard to their status as a minority or indigenous peoples and the second constitutes recognition of the insufficiency of the first pillar for the protection of minority and indigenous cultures.⁴⁵⁶ The latter is considered necessary, because a pure non-discrimination norm could have the effect of forcing persons belonging to minorities and to indigenous peoples to adhere to the majority culture, effectively denying them their rights to identity by treating them just like members of the majority or the dominant group.

456. The insufficiency of the prohibition of discrimination is most pointedly noted in the CoE Language Charter.

The second pillar also represents real “added value” and a benefit to minority and indigenous rights (going beyond the mere prohibition of discrimination).⁴⁵⁷

The substantive questions raised in the international *minority-specific norms* focus on culture, language, education, religion, contacts, identity, and participation. The question of tolerance has also been addressed.⁴⁵⁸ Of these issues, language, education, participation, and identity seem to be particular concerns.

The possibility to use minority languages both in private and public has been underlined in most minority-related norms,⁴⁵⁹ and the adoption of the CoE Language Charter may be viewed as a signal of the importance attached to the maintenance of languages. The norms concern the possibility of persons belonging to minorities to learn their mother tongue and receive education in it as well as to use their language with authorities.⁴⁶⁰ The minority norms also contain some differing elements or emphases. For instance, the OSCE commitments set out the right of persons belonging to national minorities to conduct religious educational activities in their mother tongue, and the CoE Framework Convention addresses the use of one’s name, as well as the display in a minority language of signs, inscriptions, other information of a private nature, traditional local names, street names and other topographical indications.⁴⁶¹ The CoE Language Charter enables the states parties to adopt far-reaching obligations with respect to (traditional) regional or minority languages in a number of fields. It is also noteworthy that the OSCE and CoE norms place a considerable emphasis on the need for persons belonging to minorities to learn the state’s official language (or languages).⁴⁶²

457. For the two elements, or pillars, in minority norms, see also the remarks in the HCNM Report on Linguistic Rights (1999), Part III, Section E, paras 1–3.

The nature of the relationship between the two pillars has been an issue debated and characterised in various ways by scholars. There are views according to which minority rights are separate from and additional to the rights stipulated in general human rights norms and those that do not view specific minority norms as signifying any separate or additional category of human rights. For this debate, including a view that specific minority norms entail recognition of and a legal basis for specific forms and measures of protection to universal human rights, see Scheinin (2003).

458. The issues pertaining to tolerance have been brought to the fore particularly in the OSCE commitments and art. 6 of the CoE Framework Convention. For more, see the remarks *infra* in chapters 2.2.1.2 and 2.2.1.3.1.

459. See the OSCE commitments, the UN Minority Declaration, and the CoE Framework Convention.

460. The OSCE commitments mention the possibility to the use of a minority language before public authorities and the CoE Framework Convention with administrative authorities. The CoE Language Charter specifies the use of minority languages in relations with judicial and administrative authorities and public services.

461. The CoE Framework Convention’s provision on linguistic rights in criminal proceedings also goes beyond the human rights norms of general application.

462. The UN norms on minorities do not contain similar provisions.

The minority-related provisions on education address issues of both the non-discriminatory access of persons belonging to minorities to general educational structures and the right of these persons to set up and manage their own private educational or training establishments.⁴⁶³ States have also committed themselves to taking measures in the field of general education that take account of minorities, including disseminating information on them.⁴⁶⁴ In this context, the CoE Framework Convention refers to teacher training and facilitating contacts among teachers and students of different communities, thus pointing to the importance of interculturalism in this endeavour.

All the documents of relevance for minorities place a considerable emphasis on participation, underscoring the importance of opportunities for persons belonging to minorities to participate in decision-making in general, and particularly when the decisions affect them. The pertinent provisions include references to effective participation, consultation, co-operation and involvement.

The norms on minorities often mention the issue of identity in conjunction with states' commitments to protect the existence of minorities.⁴⁶⁵ In general, the right to existence is asserted as the core element of minority protection, a necessary prerequisite for other rights.⁴⁶⁶ It may be observed that while the minority-related norms adopted within the OSCE and the UN contain provisions on the protection of the identity of minorities, the CoE Framework Convention takes a more individualistic approach to the issue by referring to respect for the identity of persons belonging to national minorities.⁴⁶⁷ The identities that receive protection are national, ethnic, cultural, religious and linguistic identities⁴⁶⁸ and thus also reflect the minority groups protected under the international norms. The CoE Framework Convention links re-

463. See the OSCE commitments, the CoE Framework Convention, and the UNESCO Convention against Discrimination in Education.

464. See the OSCE commitments, the UN Minority Declaration, and the CoE Framework Convention. The CoE Framework Convention also refers to taking measures in the field of research to foster knowledge of the culture, history, language and religion of national minorities.

465. See the UN Minority Declaration and the CoE Framework Convention.

466. Thornberry (1991), pp. 57–58.

467. The OSCE commitments also contain references to the right of persons belonging to national minorities freely to express, preserve and develop their (ethnic, cultural, linguistic or religious) identity.

468. The UN Minority Declaration refers to protection of the national or ethnic, cultural, religious and linguistic identity of minorities. While art. 27 of the ICCPR is silent on the issue of identity, the HRC has discussed the cultural, religious, and social identity of minorities in its General Comment on art. 27. The OSCE commitments refer to ethnic, cultural, linguistic or religious identity of national minorities. The CoE Framework Convention refers to the ethnic, cultural, linguistic and religious identity of persons belonging to national minorities and notes that the elements of identity are linked to religion, language, traditions and cultural heritage.

spect for and promotion of the identity of persons belonging to national minorities to a pluralist and genuinely democratic society. Within the CoE, states have also established a connection between the identity of Europe and the protection of (historical) regional or minority languages and of national minorities.⁴⁶⁹ The pertinent OSCE commitments connect a number of elements to the question of identity: the mother tongue; the establishment and maintaining of educational, cultural and religious institutions, organisations or associations; contacts among persons belonging to national minorities; religion; and participation. In general, the OSCE provisions may be viewed as standing out in the protection of the identity of minorities.⁴⁷⁰

While the protection of persons belonging to (national) minorities has been seen as furthering both justice and democracy,⁴⁷¹ a further salient characteristic of the international norms on minorities is the explicit connection established between minority protection and peace, security and stability between as well as within states. This comes particularly clearly to the fore in the OSCE commitments but can be also seen in the minority norms adopted within the UN and the CoE. Undoubtedly the fact that the OSCE norms were used as models for the UN and CoE minority norms has played a role in the evolvement of this emphasis. This linkage suggests that paying positive attention to minorities, including protecting their identities, enhances and consolidates peace, security and stability. Thus far the protection of minorities has been viewed essentially from the viewpoint of the security of states; the more recent discussions on the security of individuals revolving around, for instance, the concept of human security have not yet taken up the issue of (national) minorities in any substantial way.⁴⁷²

The fact that states have not managed to reach agreement on the definition of “minority” creates additional challenges in the area of minority protection. Whilst the relevant international norms do provide indications on the kinds of minority groups protected under them when they refer to national, or ethnic, cultural, linguistic or religious groups or identities, the norms are nevertheless extremely general thereby allowing various interpretations of their scope of application. The divergent views on this scope are apparent when one examines the views of states and international expert bodies or other actors established to deal with minority questions: they vary, sometimes even drastically.⁴⁷³ Over the years, a number of scholars

469. See the CoE Language Charter and the documents adopted at the CoE summits.

470. See also Martín Estébanez (1999), p. 34. One of the unique aspects of the OSCE commitments on national minorities is that they raise the question of various concepts of local or autonomous administrations as constituting ways to protect and promote the (ethnic, cultural, linguistic and religious) identity of certain national minorities.

471. This link is evident in both the OSCE commitments and the CoE Framework Convention.

472. See the remarks on the concept of human security *supra* in chapter 2.1.1.2.1. The CoE has voiced concern for citizens’ security. See e.g. the documents adopted at the CoE summits.

473. See the remarks *infra* in chapter 4, in particular the views of the AC and the states parties to the CoE Framework Convention in chapter 4.1.2.

have also made suggestions on a definition of “minority” with somewhat differing emphases.⁴⁷⁴

One of the clearest disagreements in the area of minority protection revolves around the question of nationality/citizenship,⁴⁷⁵ i.e. whether nationality/citizenship can be viewed as a criterion for entitlement to minority protection. The only minority-related instrument that is explicit and somewhat clear about this issue is the CoE Language Charter, which contains express references to the languages spoken by nationals of the contracting state, i.e. the CoE member states parties to the instrument. The other minority-related norms leave the issue essentially open. In general, governments have been keen to draw a line between nationals/citizens and non-nationals/non-citizens, whereas some international expert bodies or actors, including the AC of the CoE Framework Convention and the HCNM have clearly stated that nationality/citizenship is not a necessary criterion for the enjoyment of protection under international norms relevant to minorities.⁴⁷⁶ It is also noteworthy that while article 27 of the ICCPR is silent on the issue of nationality/citizenship, the HRC has put forth a view advocating a broad personal scope of application for this provision that would cover the non-permanent residents of a country, including migrant workers and even visitors, thus non-nationals/non-citizens.

In light of the divergent views on the extension of minority protection under the international norms, the situation as it stands regarding both which groups qualify as minorities and what the ensuing concrete minority rights are in various situations may be described as rather confusing at best. It is simply rather unclear what kinds of groups may be entitled to the protection envisaged.⁴⁷⁷ The main definitional chal-

474. Among the most notable attempts is that made by Special Rapporteur Francesco Capotorti in his study on minorities published in 1977. See Capotorti (1979). Subsequently, Jules Deschênes presented a comprehensive analysis on minorities in 1985 including a proposal for the definition of a minority. For these studies and definitions, see Eide (1992), pp. 221–222, and Gayim (2001), pp. 13–16. Lauri Hannikainen has made an attempt to consolidate various elements linked to minorities, and according to him there exists a certain consensus on some criteria which need to be in place in order for a group to be considered a minority at the international level. In Hannikainen’s view, “minorities” are such national, ethnic, religious and linguistic groups which (1) differ from the rest of the population, (2) are numerically inferior to the leading nationality or nationalities, (3) are in a non-dominant position, (4) have a mutual sense of solidarity, and (5) are well-established, including having deep roots in their country of residence, and according to the leading view, whose members are citizens of their country of residence. Hannikainen (1996), p. 3. See also remarks in Pentassuglia (2002), pp. 55–72.

475. See also the remarks on the concepts of nationality and citizenship *infra* in chapter 2.2.2.

476. See the remarks *infra* in chapter 4.

477. E.g. John Packer has pointed out that the issues involving minorities are characterised by persistent conceptual and terminological confusion in the social sciences, humanities and law, which hampers the elaboration and implementation of mutual understanding, sustainable policy and effective law in the area. His view is that the need to specify the potential beneficiaries of the protection provided by established minority standards calls for a response to the definitional problem. Packer (1999), pp. 269–273.

lenges boil down to the general vagueness of many concepts – for instance, ethnicity – that are employed in the pertinent norms.⁴⁷⁸ Whilst a linguistic or religious minority may often be defined without major difficulties, pinpointing an ethnic or national minority is a much more complex task.⁴⁷⁹ What can be concluded without difficulty is that the groups not characterised by the features cited in the international minority norms, i.e. minority groups with no national, ethnic, religious or linguistic features, receive no protection with respect to the preservation – to say nothing of the promotion of their identities and self-realisation under these norms.

As regards international standard setting with regard to *indigenous peoples*, ILO Convention No. 169 and the recently adopted UN Declaration on Indigenous Peoples lay down the basis for the international protection of these groups in the European context.⁴⁸⁰ In general, these norms articulate concerns for a much broader set of issues – for example, those relating to land and the traditional activities and livelihoods of indigenous peoples – than do the international minority norms. The norms also address the issues of the identity and integrity of the peoples, acknowledge the communal nature of indigenous rights, and advocate autonomy for indigenous peoples with respect to certain activities. The question of participation by indigenous peoples, elaborated, for example, through references to consultation and co-operation, receives considerable attention in the norms, far more than in the norms dealing with minorities.⁴⁸¹ In the area of education, and as in the case of the international norms on minorities, the norms pertaining to indigenous peoples deal with the issue of non-discriminatory access of the peoples concerned to general educational structures, their right to set up and manage educational or training establishments of their own, and the need to take measures to disseminate information on them. Unlike the minority norms, however, the indigenous norms aim at the

478. Patrick Ireland has commented on the use of the term “ethnicity” in the field of migration by pointing out that it belongs to the set of concepts widely used but seldom defined. Ireland (2004), p. 2.

479. Manfred Nowak has discussed particular difficulties to define an ethnic minority. He has stated that “ethnic” is broader than “racial”; the latter mainly relates to biological, physically recognisable or genetic features, whilst the former also covers cultural and historical elements. “Ethnic minority” is also broader than the term “national minority”. Manfred Nowak (2005), pp. 648–652. For the complexities relating to various characteristics linked to groups entitled to protection under the international minority-specific human rights norms, see also Gayim (2006), pp. 85–108 and 131–133.

480. The Vienna Document of the 1993 World Conference on Human Rights contains only some very general remarks on indigenous people(s).

481. In recent years, enabling the participation of indigenous peoples also at the international level has been given an increasing amount of attention, concretised e.g. in the establishment of the Permanent Forum on Indigenous Issues within the UN and in the possibility of indigenous peoples to participate in the work of the Arctic Council. See the remarks *supra* in chapter 2.1.2.2.

establishment of educational institutions run by indigenous peoples themselves, and the states parties to ILO Convention No. 169 have committed themselves to providing resources to this end. It is of some interest that while ILO Convention No. 169 underlines the need for indigenous peoples to learn the national/official language, its provisions on language are less broad than those in the minority norms.⁴⁸² One of the stated aims of ILO Convention No. 169 is the elimination of socio-economic gaps between indigenous and other members of a national community.

The UN Declaration on Indigenous Peoples represents an effort to rectify some of the deficiencies in ILO Convention No. 169, for example, by better incorporating the views of indigenous peoples. The Declaration also introduces a number of elements that add to and strengthen of the provisions of the ILO Convention. Concern for racism or other forms of intolerance faced by indigenous peoples raised in the UN Declaration is of utmost importance given that that the treatment of indigenous peoples has often been utterly racist and, in addition, marked by views regarded such peoples as “backward” and needing “civilizing”, and that indigenous peoples have been objects of “scientific racism”, exercised openly in the 19th and 20th centuries.⁴⁸³

While the area of international minority protection lacks agreement on the concept of “minority”, the drafters of the international norms on indigenous peoples have been more successful in coming up with definitions of the peoples concerned.⁴⁸⁴ The adoption of these definitions has not, however, prevented disagreements on whom the pertinent norms may be applied to: the term “indigenous” is far from unambiguous and has given rise to a broad range of interpretations.⁴⁸⁵ It is also worthy of note that the links that have been established between the treatment of (minority) groups and peace, security and stability in the international minority norms are not similarly visible in the international norms on indigenous peoples.⁴⁸⁶ The Vienna Document of the 1993 World Conference on Human Rights makes an exception to this by explicitly connecting the promotion and protection of the rights of indigenous peoples to the political and social stability of states.

Regarding other groups considered in the international human rights norms, the rights and status of *migrant workers*, including their family members, have been dealt

482. E.g. ILO Convention No. 169 contains no references to the use of indigenous languages with authorities or in various topographical signs etc., matters that are addressed in the CoE Framework Convention. It is noteworthy, however, that the language-related provisions of the minority instruments contain formulations lessening the degree of commitment of the provisions. See also the remarks *infra* in chapter 2.1.4.2.

483. Anaya (2004), p. 31.

484. Definitions are set out e.g. in ILO Convention No. 169.

485. For various interpretations of the concept “indigenous”, see e.g. Gayim (2006), pp. 134–184. See also Anaya (2004), pp. 3–6.

486. ILO Convention No. 169 asserts states’ concern for territorial integrity and secession.

with in a number of instruments adopted by the ILO, the UN, the CoE and the OSCE.⁴⁸⁷ Whilst the recurrent element of the norms is the regulation of the rights of migrant workers relevant to their engagement in employment, the pertinent ILO and UN norms also contain some express references even to such issues as the (national, ethnic or cultural) identity of migrant workers and their family members.⁴⁸⁸ The OSCE commitments on migrant workers in fact echo to some extent the international provisions on minorities by referring to the right of (lawfully residing) migrant workers and their families to express freely their ethnic, cultural, religious and linguistic characteristics. Characteristic of the CoE and the OSCE norms on migrant workers is their focus on the lawfully residing nationals of the member/participating states to these organisations. For their part, the UN and ILO norms in the area also deal in substantial measure with undocumented migrant workers; the UN Convention on Migrant Workers considers these persons, including their human rights, extensively.

The CoE Convention on the Participation of Foreigners in Public Life at Local Level aims at compensating *non-nationals/non-citizens* who are relatively permanent residents in a country for their exclusion from political decision-making by enhancing their participation at local level. The instrument also links freedom of association and the formation of local associations by foreign residents to the maintenance and expression of such residents' cultural identity. Within the OSCE, the issues pertaining to migration and migrants now figure among the questions increasingly considered as part of the OSCE's comprehensive approach to security. When discussing these issues, the OSCE states have recently highlighted the importance of paying attention to cultural and religious diversity as well as of promoting and protecting human rights and fundamental freedoms in order to promote stability and cohesion within societies.⁴⁸⁹

The international system of protection for *asylum-seekers and refugees* established and set out in the Refugee Convention and Protocol provides persons recognised as refugees under these instruments with a number of (human) rights – for example with regard to religion and elementary education – and entitlements in such areas as employment and social security.

The international norms specifically focussing on *women* underline the equal and non-discriminatory enjoyment of human rights by and the participation and em-

487. The somewhat different definitions of “migrant worker” and “family members” in various instruments are worthy of note.

488. ILO Convention No. 143 refers to preserving the national and ethnic identity of migrant workers and their families and links identity and mother tongue. The UN Convention on Migrant Workers contains a number of references to the cultural identity of migrant workers and their family members.

489. These statements have been made by the OSCE Ministerial Council.

powerment of women. The norms link the status of women to development, peace, democracy and justice, or to a just and democratic society. The women-specific norms are not detailed when it comes to the questions of identity,⁴⁹⁰ neither in discussing women belonging to minority or indigenous groups. In the same vein, it is worthy of note that the international norms on minorities and indigenous peoples are even more hesitant to draw attention to women with a minority or indigenous background. While the international norms on indigenous peoples include some remarks on women and show some sensitivity to gender issues, the international norms on minorities contain references neither to women belonging to minorities nor to the multiple forms of discrimination they may face.⁴⁹¹

The norms laid down in the Child Convention focus primarily on protecting *children* from various forms of abuse and draw attention to such questions as the development of the child's personality and the protection of the child's cultural identity. The norms specifically mention minority and indigenous children.⁴⁹² The international norms on *the elderly* address such issues as independence, participation, care, self-fulfilment, dignity and social protection. The international norms on *persons with disabilities* underline the questions of equality and non-discrimination as well as participation and inclusion. A recent UN instrument – the UN Convention on the Rights of Persons with Disabilities adopted in 2006 – breaks new ground in the area by calling for promoting respect for the inherent dignity of persons with disabilities and by broaching the question of identity by calling for respect for the right of children with disabilities to preserve their identities.

2.1.4.2 Scope of Group-specific Norms and Recognising Differences

Specific international norms adopted by states in the area of minorities and indigenous peoples aim at recognising and protecting the difference of these groups vis-à-vis the general population and even promoting those differences. This acknowledgement of differences in these norms has been described as a move away from emphasising “the right to be the same” towards “the right to be different”.⁴⁹³ Characteristic of this recognition is that the differences of minority and indigenous

490. The Beijing Document does touch upon the identity of indigenous women.

491. For the remarks on the question of double or multiple forms of discrimination, see chapter 2.3.1 *infra*.

492. The OSCE commitments addressing education contain references to the cultural identity of children belonging to national minorities or regional cultures.

493. For the “right to be different”, see e.g. Makkonen (2000), p. 5. The HCNM has also stated that, in essence, minority rights can be described as the right to be different without being discriminated against because of those differences. HCNM's address at the HDIM (2006), para. 7. “The right to be different” has been expressly mentioned in the case of indigenous peoples in the UN Declaration on Indigenous Peoples.

groups are acknowledged outside the private sphere, i.e. in the public sphere, particularly in the area of education. Specific attention is drawn to these groups also in such areas as participation and relations with public authorities.

Despite the recognition of “the right to be different” for minorities and indigenous peoples, a closer examination of the norms reveals that states have nevertheless been eager to limit this possibility. The limits are set out, for instance, in the compatibility clauses inserted in the international instruments. It may also be seen that the pertinent clauses in different documents set somewhat different limits: while the compatibility clauses inserted in the norms on both minorities and indigenous peoples refer to compliance with international standards as well as national legislation, those clauses pertaining to minorities set somewhat stricter standards.⁴⁹⁴

Furthermore, and if one examines the international norms on *minorities*, many provisions, particularly those of more far-reaching substance, contain numerous formulations lessening the committal nature of the obligations for states, thus broadening their margin of discretion as to the implementation of the standards at their national levels.⁴⁹⁵ This discretion is often linked to recognition of the possible financial, administrative and technical difficulties associated with the implementation of many entitlements.⁴⁹⁶ For instance, since organising education to accommodate the interests and specific needs of minorities (particularly their linguistic interests) requires resources, formulations granting states a wider margin of discretion are often inserted in the provisions concerning language questions. These are most conspicuous in the provisions dealing with the possibility to learn minority languages, to have teaching in them and to use the minority language with authorities. Furthermore, while the international minority norms allow persons belonging to minorities to establish and maintain their own educational institutions, these educational activities are to be carried out within the framework of the education system of the states and are required to conform to the limits set by the authorities.⁴⁹⁷

Whereas the provisions on promoting minority languages contain wordings that lessen the level of commitment they entail, the adoption of a separate instrument on minority and regional languages, i.e. the CoE Language Charter, may be taken to signal greater willingness on the part of states to allow linguistic differences than

494. The international norms dealing with minorities call for conformity with national legislation and international standards, including universally recognised human rights and fundamental freedoms. ILO Convention No. 169 refers to compatibility with the fundamental rights defined by the national legal system and with internationally recognised human rights. It is noteworthy that the UN Declaration on Indigenous Peoples refers solely to compatibility with international human rights standards.

495. Compared with other international norms on minorities, the OSCE documents appear to include fewer formulations of this kind, and thus use somewhat stronger language.

496. This has been specifically stated in the CoE Language Charter.

497. See the CoE Framework Convention and the UNESCO Convention against Discrimination in Education.

other differences; that is, it suggests that protecting and even promoting linguistic differences is considered to be “safer” than promoting other characteristics. However, the cautiousness of states with respect to linguistic diversity can be seen even in the CoE Language Charter, since it confines protection to older (historical) “European based” languages that are considered part of a “European identity”. The protection of these languages is also linked to the idea of compensation to those who speak them. In any event, the provisions of the Charter are drafted so as to allow the states parties a broad measure of discretion in interpretation and application.

The cautiousness of states in recognising differences where minorities are concerned may also be inferred from the fact that the minority-specific provisions contain only very few obligations requiring states to promote the interests of minorities, and when these do exist, the provisions include somewhat weak language. It may also be observed that promoting general human rights is expressed in stronger terms than promoting minority-specific entitlements. Additionally, the more far-reaching the minority entitlements are, the more limitations states place on the potential number of beneficiaries.⁴⁹⁸ Furthermore, although minority rights have collective dimensions – the existence of a minority group is necessary for the enjoyment of minority rights – the political sensitiveness of minority questions has discouraged states from setting out collective rights for minorities.⁴⁹⁹

An additional signal of cautiousness on the part of states with regard to minorities is the form of the international instruments chosen for addressing minority issues. The fact that more far-reaching minority-related norms have been laid down in a declaration (the UN Minority Declaration), a framework convention (the CoE Framework Convention), and in politically binding OSCE documents may be read as reflecting the reluctance of states to adopt stronger legal obligations in the area. What is more, the entitlements laid down in treaties, i.e. the CoE Framework Convention and the CoE Language Charter, are not even individually guaranteed rights: they are not rights which individuals can invoke. In general, most minority provisions are drafted essentially to set out obligations for states, not as subjective rights of individuals. As a result, there are no individual complaint mechanisms in either the CoE Framework Convention or the CoE Language Charter; the international supervision of the implementation of these instruments is carried out solely in

498. This is evident in the area of language rights. The CoE Language Charter, which addresses the most far-reaching language-related entitlements of persons belonging to minorities, concerns only historical minorities whose members are also nationals of the contracting state. In general, the Charter’s provisions leave the states parties a considerable margin of discretion in deciding which groups are relevant under the Charter, and particularly which languages are object of more extensive protection.

499. For the remarks on the historical, structural, and political reasons behind the cautiousness of states as regards declaring any collective rights of national minorities, see Capotorti (1979), p. 35. For the individual and collective aspects of minority rights, see e.g. Martín Estébanez (1996), pp. 5 and 29–41.

the form of state reporting. It is also noteworthy that the CoE states could not even agree to entrust truly independent bodies with the task of monitoring the implementation of these instruments, but gave the task to the central political body of the CoE, the CoE Committee of Ministers.⁵⁰⁰ In fact, the only treaty-based provision which has been formulated as a subjective right of persons belonging to minorities and whose application can be challenged by individuals before an international body is article 27 of the ICCPR. However, the fact that this provision is very tentatively worded renders it weak protection for minorities.⁵⁰¹

In sum, although states have concluded numerous international norms on minorities, they have not been willing to assume very strong obligations in the area. The international minority norms are in fact rather “minimalistic” and lack effectiveness when it comes to preserving minority cultures and identities. Setting up and maintaining private educational institutions or thriving cultural societies or organising festivals to support minority cultures requires financial resources or other assistance, but states have not assumed strong obligations to this end. For instance, the CoE Framework Convention has been characterised as consisting of “weak obligations and weak monitoring” to an extent that renders it “almost worthless as a means of guaranteeing minority rights within the Council of Europe”.⁵⁰² The work carried out so far by the AC set up by the Convention has shown, however, that consistent, well-reasoned and high-quality supervisory work that includes sound views and recommendations may compensate for some of the weaknesses of this Convention. The work of the AC is discussed in detail below in chapter 4.1.

The very same observation that may be made in connection with minority norms – that the entitlements containing more far-reaching substance are expressed in language leaving a greater margin of discretion to states – applies to many of the international norms on *indigenous peoples* as well.⁵⁰³ However, generally speaking, while international minority norms seem to employ stronger language in their non-discrimination and equality provisions than in their provisions containing the

500. The Committee of Ministers is assisted in this work by the AC with respect to the CoE Framework Convention, and by the Committee of Experts with respect to the Language Charter. For the role of the CoE Committee of Ministers and the AC in the supervision of the implementation of the CoE Framework Convention, see also the remarks *infra* in chapter 4.1.1.

501. While the Child Convention sets out subjective rights of children, including some rights specifically pertaining to minority (and indigenous) children, it does not provide for a complaints procedure for individuals, but only a state reporting mechanism. As regards other minority-relevant international documents, the UN Minority Declaration does not create any kind of a supervisory mechanism, and the OSCE documents set up neither supervisory mechanisms to which individuals could resort nor any kind of a regular state reporting system.

502. Gilbert (1999) p. 63.

503. See particularly the provisions in ILO Convention No. 169.

“added value” elements,⁵⁰⁴ the norms on indigenous peoples use somewhat stronger language in many articles containing this “added value” component as well. For example, the provisions of ILO Convention No. 169 include weightier obligations on states to promote indigenous peoples’ interests and to provide resources to support indigenous cultures than do international minority norms.⁵⁰⁵ Although the international norms suggest a willingness to grant indigenous peoples a more far-reaching empowering code than has been given to minorities – meaning that indigenous peoples have a more extensive possibility to “be different” than any other groups specifically considered in international norms – the significance of ILO Convention No. 169 has been vitiated by the low number of ratifications among the states in which indigenous peoples live.⁵⁰⁶ The long and often difficult drafting process of the UN Declaration on Indigenous Peoples also reflects difficulties on the part of a great number of states to adopt more far-reaching group-specific norms.

The differences of *other groups* whose situations are addressed in the international human rights norms have not received the same level of acknowledgement as those of minorities and indigenous peoples. The international norms on children, especially when the Child Convention draws attention to the issues such as the child’s personality, identity and cultural values, do touch upon the question of differences. So do, to some extent, the international norms on migrant workers and refugees when they call for measures in the public sphere.⁵⁰⁷ It is noteworthy that in its recent decisions pertaining to migrants, the OSCE Ministerial Council has drawn attention to respecting cultural and religious diversity. The recently adopted Convention on the Rights of Persons with Disabilities deserves particular mention for dealing with the issue of respect for difference and thereby the acceptance of persons with disabilities (as part of human diversity and humanity). It may be observed that the international norms on the elderly and women are most hesitant to make any references to specific features or differences of these persons. For instance, the norms on women do not discuss any differences generally pertaining to womanhood

504. See the remarks on the two elements or pillars *supra* in chapter 2.1.4.1.

505. In general, requirements imposed on the rest of national community to accept customs and traditions of indigenous peoples, and particularly to adjust their own practices to take into account those of indigenous peoples, are not very strong, but are nevertheless more far-reaching than those imposed by the norms on minorities.

506. See the remarks on the ratification status of this convention *supra* in chapter 2.1.2.1. The fact that even indigenous groups have opposed its ratification signals difficulties relating to this instrument.

507. The norms on migrant workers address e.g. the linguistic needs of migrant workers (and their children) with respect to their mother tongue and call for measures in the area of public education, and the norms on refugees call for e.g. taking the religion of refugees into account in the area of education.

or the like, but rather confine themselves to considering women's child-bearing role, which is often viewed as requiring protective measures.

2.1.4.3 On Incorporation: From Forced Assimilation to Integration or Inclusion

The issue of incorporation in(to) or within a society or community in terms of expressly emphasising integration is not often addressed in the international human rights norms dealing with various groups. In the area of *minority norms*, the CoE Framework Convention is in fact the only international minority-related document explicitly referring to the issue of integration in its text. A policy orientation towards incorporation may be read in its article 5, which obligates the states parties to refrain from policies or practices aimed at the assimilation of persons belonging to national minorities. Assimilation has been “qualified” such that these persons are protected against assimilation against their will but their voluntary assimilation should be allowed. The CoE Framework Convention considers the issue of integration also in connection with the provisions on languages;⁵⁰⁸ these stress a knowledge of the official language of the state and link it to both integration and social cohesion.⁵⁰⁹ While other international norms pertaining to minorities do not make any express references to integration, the pertinent OSCE commitments ban attempts at non-voluntary assimilation of persons belonging to national minorities. Additionally, scholarly views put forward on article 27 of the ICCPR refer to the prohibition of all forms of integration and assimilation pressure.

Although the text of the CoE Language Charter is silent on such issues as integration, inclusion, exclusion, marginalisation and fragmentation and specific problems of integration are associated with the populations that have appeared in the states parties as a result of recent migration flows (and that speak new, often non-European languages), the Explanatory Report attached to the Charter discusses a number of points relevant to integration. For instance, the integration of language groups speaking the languages addressed in the Charter is seen as being advanced by the states parties when they recognise these groups and their languages and allow their cultural contacts (with their neighbouring communities). Concern is voiced over fragmented patterns of settlement and administrative divisions within a state and exclusion or marginalisation of speakers of a regional or minority language having a shared identity. Cultural barriers are seen as being eliminated by promot-

508. The CoE Framework Convention raises the issue of integration also in its broad provision addressing tolerance, i.e. in art. 6. For this provision, see the remarks *infra* in chapter 2.2.1.3.

509. Whilst the importance of knowing the official language has been cited also in the OSCE commitments and the CoE Language Charter, the CoE Framework Convention differs in linking this issue expressly to the issue of integration (and social cohesion).

ing (cultural) relations and interactions between different language groups. In general, the values of interculturalism and multilingualism are underlined. Whereas the CoE Language Charter puts a clear emphasis on the need of the speakers of regional or minority languages to learn the official language(s), non-native speakers of regional or minority languages are also encouraged (but not obligated) to learn these languages in order to facilitate understanding between language groups. The promotion of mutual understanding and the inclusion of respect, understanding and tolerance for regional or minority languages in the areas of education and training as well as in the mass media are also underlined.

It should be noted that even if the provisions on minorities lack explicit references to integration (or inclusion), many of them in practice contribute to incorporation in(to) society. The provisions of relevance from this viewpoint include non-discriminatory provisions referring to ensuring human rights and fundamental freedoms of general application also to persons belonging to minorities,⁵¹⁰ provisions on enhancing the participation of these persons in the society at large, and provisions on enabling persons belonging to minorities to gain knowledge of the society as a whole. The provisions on the dissemination of information about minorities in the context of general education may also be seen as furthering incorporation.⁵¹¹

Whilst ILO Convention No. 107 reflected both paternalistic and assimilationist attitudes towards *indigenous peoples*, the instrument also stands as a prime example of the fact that, when the text was adopted, the concept of integration as used therein was equated with assimilation. Consequently, and due to these terminological burdens, ILO Convention No. 169 refers to neither the concept of assimilation nor that of integration. However, Convention No. 169 requires the flourishing of indigenous cultures within the framework of existing states, and envisages certain interaction between indigenous peoples and the rest of the population. Among other things, the provisions on education mention the importance of a knowledge of the state's official language and imparting information to indigenous peoples to enable them to participate in the national community. Additionally, the Convention contains a provision on educating the rest of national community about indigenous peoples. It is noteworthy that although ILO Convention No. 169 incorporates the aim of abandoning an assimilationist orientation in indigenous norms, there are also views claiming that the instrument does not in fact signify a departure from an assimilationist mentality. Unlike ILO Convention No. 169, the UN Declaration on Indigenous Peoples expressly incorporates the issues of both assimilation and integration when it asserts that indigenous peoples and individuals may not be subjected

510. Inclusive effects of general human rights are discussed *infra* in chapter 2.3.

511. The facilitation of contacts among students and teachers of different communities that is taken up in the CoE Framework Convention should be noted.

to forced assimilation or destruction of their culture and that states are to provide effective mechanisms for the prevention of, and redress for, any form of forced assimilation or integration.

The attitude towards *migrant workers* laid down in the international instruments adopted prior to the 1990s did not envisage the integration of these persons in the receiving country; the basic view at the time was that migrant workers were there only temporarily and only as long as they contributed to the labour force. A look at more recent international norms shows a slight change in this attitude. This change is reflected particularly in the OSCE documents adopted since 1994, in addition to which the CoE summit of 1997 called for facilitating the integration of lawfully residing migrant workers and the members of their families in the societies in which they live.⁵¹² The OSCE standards also point to the role of migrants themselves in the process of integration.⁵¹³ While in recent years the ILO has strongly advocated the importance of integration of more or less permanently residing migrant workers, the fact that the UN Convention on Migrant Workers has attracted hardly any ratifications from migrant-receiving Western states⁵¹⁴ sends a signal of the reluctance of states to come up with stronger norms in the area. The explanation for the low number of ratifications may be sought – in addition to the reasons discussed above in the text on this instrument – in the fact that the Convention, to which no reservations may be filed, concerns extensively undocumented migrant workers. The strong human rights component of the instrument, i.e. the requirement to grant a number of human rights also to undocumented migrant workers, may discourage states' from adhering to the Convention, since they may see this as leading to what for them would be a clearly undesirable stay (inclusion) of these persons in the host country.⁵¹⁵

Regarding *foreign residents* more generally, the CoE Convention on the Participation of Foreigners in Public Life at Local Level establishes an explicit link between participation in society (involving interaction with authorities) and integration into society. The connection is made particularly between consultative bodies or other appropriate institutional arrangements and fostering lawfully residing foreign nationals' general integration into the life of the community.⁵¹⁶ The significance of

512. It is important to note, however, that the OSCE and CoE norms in the area focus on lawfully residing migrant workers who are also the nationals of the participating/member states of these organisations.

513. It is worthy of note that the discussions on migrant workers within the OSCE have also often had a certain context, i.e. the issue of migrant workers of Turkish origin in Germany.

514. For the remarks on the ratification status of this convention, see chapter 2.1.3.1.1 *supra*.

515. See also the remarks on the inclusive effects of general human rights *infra* in chapter 2.3.

516. The Convention also deals with the right to vote, but it does not link this to the issue of integration.

this CoE instrument is vitiated by its somewhat limited and weak provisions as well as the low number of ratifications to it.⁵¹⁷ In the first CoE summit of 1993 the CoE states committed themselves to continuing their efforts to facilitate the social integration of lawfully residing migrants. The recent attention by the OSCE states to migrants has resulted in the decisions adopted by the OSCE Ministerial Council calling for promoting integration of these persons. In connection with migrant populations, the Council has expressly linked the failure to integrate societies to instability and, in the same vein, has pointed to the relation between integration and cohesion within societies. It has also stated that successful integration policies give due regard to cultural and religious diversity as well as to the promotion and protection of human rights and fundamental freedoms.

The policy orientation towards *asylum-seekers and refugees* set out in the pertinent international norms does not favour the integration of these persons in the receiving state; rather, states prefer voluntary repatriation when viable and the reintegration of asylum-seekers and refugees in their places of origin.

The international human rights instruments and norms on *women* are concerned with the inclusion of women in various spheres of societal and private activities, including decision-making processes. While the international women-specific documents do not discuss the integration of women, the Vienna Document of the 1993 World Conference on Human Rights does take up the issue by explicitly referring to the importance of both the integration and full participation of women. The document does not, however, provide for any further information to enable to conclude whether this integration is in fact different from inclusion. The same difficulty of drawing a distinction between the concepts of inclusion and integration, is reflected when the Child Convention addresses the social integration of *children* in special need of assistance, and when the concept of integration is raised with respect to *the elderly*. Among the international norms calling for the social integration of *persons with disabilities* in the life of the community, the provisions on the need to adjust structures and patterns of behaviour in order to enhance the integration and participation of the persons concerned merit particular mention.⁵¹⁸

517. For the remarks on the ratification status of this convention, see chapter 2.1.3.1.2 *supra*.

518. See the (revised) European Social Charter.

2.2 Norms Addressing Certain Issues

2.2.1 Norms on Racial Discrimination, Racism and Other Forms of Intolerance

Racial discrimination, racism and other forms of intolerance undoubtedly have a history as long as that of the human race.⁵¹⁹ Racism reached a culmination of sorts in the 19th century, when racial science was developed in conjunction with the legitimization of indigenous dispossession and colonial rule. It also lent support to the idea of a European “civilising mission” and helped in its day to justify slavery.⁵²⁰ Issues of racism and racial discrimination were among the primary concerns when the UN human rights regime was set up.⁵²¹ From the beginning of the UN era, international action against racial discrimination has had links to measures to protect minorities,⁵²² reflected for instance in the first UN convention addressing human rights, the Convention on the Prevention and Punishment of the Crime of Genocide adopted in 1948, in the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1965, and in the documents addressing apartheid.⁵²³ In view of the intensiveness of various international efforts in the area of human rights, anti-racist action has received a considerable amount of attention at the international level, perhaps more than any other single issue.⁵²⁴ Prohibition of racial discrimination is also considered to be part of *ius cogens*.⁵²⁵

519. Banton (1996), p. 76.

520. Marks and Clapham (2005), p. 288.

521. A proposal to include a provision on racial equality in the Covenant of the League of Nations in 1919 did not succeed due to the fact that official racism was at that time the norm for many of the states involved. Ibid. See also Boyle and Baldaccini (2001), p. 141.

522. Banton (1996), p. 34.

523. The UN Convention on the Suppression and Punishment of the Crime of Apartheid was adopted in 1973 and the Convention against Apartheid in Sports in 1985.

It has been asserted that anti-racism as an integral part of international human rights law comprises three different components: the specification of international crimes, in the context of which the 1948 Genocide Convention, the 1973 Convention on Apartheid, and the crimes against humanity and war crimes specified, e.g. in the Rome Statute of the International Criminal Court are of relevance; racial discrimination as an obstacle to the enjoyment of human rights, which is reflected in the bans against racial discrimination in international human rights documents; and the charge that in particular circumstances anti-racist initiatives themselves breach human rights, i.e. when the freedoms of expression, assembly, association, information and the like are restricted in order to combat racism. Marks and Clapham (2005), pp. 295–307.

524. For the centrality of racial discrimination in the development of international human rights law, see Boyle and Baldaccini (2001), pp. 141–149.

525. Ibid., p. 144. See also Hannikainen (1988), pp. 471–476.

Putting an end to colonialism and dismantling institutionalised white racism in South Africa and the USA in the course of the second half of the 20th century may be viewed as among the “victories” of the anti-racism efforts of the UN era, although these developments cannot be attributed solely to international action.⁵²⁶ International anti-racist action has also become multifaceted over the years, with a broad range of international actors contributing to it. In addition to adopting the cornerstone instrument in the area, the ICERD, the actions of the UN⁵²⁷ have included organising world conferences to address these issues, the most recent being the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in 2001 in Durban. The outcome of this conference was the adoption of the Declaration and Programme of Action, known as the Durban Document, which is one of the more noteworthy contemporary UN instruments in the field. The Vienna Document of the 1993 World Conference on Human Rights includes separate sections on the elimination of racism and other forms of intolerance. In addition, many UN specialised agencies, particularly UNESCO and the ILO, have taken normative actions relevant in the area. As regards regional developments in Europe, the pertinent international standards and documents have been adopted within the OSCE and at the European Conference against Racism held in 2000.⁵²⁸ The CoE summits have also touched upon the issue.⁵²⁹

2.2.1.1 The United Nations and Its Specialised Agencies

2.2.1.1.1 The International Convention on the Elimination of All Forms of Racial Discrimination

The ICERD is to date the only international instrument focussing on the issues of racial discrimination and racism that has been made in treaty format.⁵³⁰ The

526. International action played a more visible role with respect to the situation in South Africa than in the USA. References to apartheid were inserted in the text of the ICERD, among other documents. See the remarks *infra* in chapter 2.2.1.1.1.

527. The UNGA has paid attention to the need to counter racism and racial discrimination, for example, by proclaiming three Decades to combat these phenomena. The Third Decade ran from 1993 to 2003. UN website at <http://www.unhchr.ch/html/menu2/issracis.htm> (visited on 10 October 2007). For these UN Decades, see e.g. Boyle and Baldaccini (2001), pp. 166–168 and 184–188.

528. This Conference was one of the preparatory meetings for the World Conference held in Durban. See also the remarks on the regional conferences *infra* in chapter 2.2.1.1.3.

529. A number of international instruments are viewed as relevant for anti-racist action, which is reflected e.g. in the lists of documents inserted in the Durban Document and elaborated at the European Conference against Racism. ECRI also deems several documents to be relevant for its work. See the lists of these documents *infra* in chapters 2.2.1.1.3, 2.2.1.3.2 and 4.2.1.

530. The UNGA adopted the Declaration on the Elimination of Racial Discrimination in 1963, two years prior to the adoption of the text of the ICERD.

cornerstone role of the ICERD in the area has also been mentioned in a number of contexts.⁵³¹ The origins of the instrument are linked to the particular concerns of the early 1960s, especially those of de-colonialisation,⁵³² and discrimination on the grounds described in the ICERD was linked to friendly and peaceful relations among nations as well as to peace and security.⁵³³ For a long time, the application of the Convention was heavily influenced by considerations of international politics, and it was only after the end of the Cold War that its application was “de-politicised” gradually, allowing a more genuine functioning of the instrument that addressed the issues dealt with in it.⁵³⁴ This also created opportunities for new aspects of the issues to be taken into account in the framework of the instrument. The ICERD has also been viewed as a good example of a living instrument that has taken into account the new dimensions or aspects of racism and racial discrimination. Playing a key role in this development has been the Committee on the Elimination of Racial Discrimination (CERD), a body established pursuant to the provisions of the ICERD to carry out the international supervision of the implementation of the Convention.⁵³⁵ Among other things, CERD has published a number of General Recommendations clarifying its views on the content and scope of the provisions of the Convention.⁵³⁶

The ICERD is characteristically an instrument addressing discrimination, and its basic objective is to address the problem that individuals may not be able to enjoy their human rights and fundamental freedoms because of their race, colour, descent, or national or ethnic origin.⁵³⁷ The ICERD does not create or address any new

531. See e.g. the references in the Durban Document and in the OSCE documents. See the remarks *infra* in chapters 2.2.1.1.3 and 2.2.1.2. See also Boyle and Baldaccini (2001), p. 149.

532. This is also reflected in the ICERD. See preambular para. 4. On the background of the ICERD, see e.g. Banton (1996), pp. 51–62.

533. Preambular para. 7. Preambular para. 10 and art. 2.1 refer to promoting understanding between races.

534. Banton (1996), pp. 142–143. See also van Boven (2001), pp. 111–113.

535. For the Committee, see art. 8 of the ICERD. For the factors influencing the performance of CERD and new concerns and issues considered by it in the 1990s, see Banton (2000), pp. 56–60 and 75–78.

536. By October 2007 CERD had adopted altogether 31 General Recommendations addressing a number of aspects relevant to the application of the ICERD. Other functions of CERD include examining the situations in the states parties to the ICERD on the basis of state reports and consideration of communications submitted to it.

537. Art. 1.1. See also Boyle and Baldaccini (2001), p. 152.

The use of the term “race” is nowadays often considered problematic due to the view that human beings cannot in fact be divided into different races; rather, all human beings belong to the same “human race”. This position was also incorporated in the Durban Document. See the remarks *infra* in chapter 2.2.1.1.3. Since the concept of “race” is nevertheless still used, and it appears in a number of human rights documents presently applied, including the ICERD, it is also employed in the text of the research at hand. Nowadays many tend to prefer the concept of “ethnic origin” to that of “race”. However, the former is also viewed as

human rights standards but only underlines the importance and necessity of implementing the already existing human rights on the basis of non-discrimination.⁵³⁸ The Convention obligates the states parties to it to take steps at their national level to prohibit and eliminate racial discrimination and racism,⁵³⁹ including obligations to address these phenomena also in the private sphere.⁵⁴⁰ The ICERD even includes references to positive obligations of states.⁵⁴¹ Teaching, education, culture and information are noted as being central fields in addressing prejudices leading to racial discrimination and in promoting understanding and tolerance.⁵⁴²

The ICERD is among the few international human rights documents that provide a definition of discrimination in its provisions.⁵⁴³ The issue of racism is addressed both in the Preamble⁵⁴⁴ and in article 4.⁵⁴⁵

The ICERD concerns various groups that can be characterised on the basis of criteria mentioned in article 1: i.e. race, colour, descent, or national or ethnic origin. Whilst initially attention was drawn to objective physical characteristics, e.g. colour

being broader than the latter. See e.g. Nowak (2005), p. 649. See also the remarks *supra* in chapter 2.1.4.1.

538. See also CERD's General Recommendation No. 20 on art. 5, para. 1.
539. Arts 2–4. For special and concrete measures, see art. 2.2; and for immediate and positive measures, see art. 4.
540. Art. 2.1(d) obligates the states parties to prohibit and bring to an end racial discrimination by any persons, group or organisation. Art. 4 condemns all propaganda and all organisations based on racist ideas or theories or which attempt to justify or promote racial hatred and discrimination. The insertion of a reference to “public life” in the definition of discrimination set out in art. 1.1 has caused some uncertainties as regards the application of the ICERD in private relationships. Due to these uncertainties, CERD addressed the question in its General Recommendation No. 20. According to para. 4 of this Recommendation: “To the extent that private institutions influence the exercise of rights or the availability of opportunities, the state party must ensure that the result has neither the purpose nor effect of creating or perpetuating racial discrimination.” For the public and private reach of the ICERD, see also Marks and Clapham (2005), p. 301, and Boyle and Baldaccini (2001) pp. 159–160.
541. Art. 2.1 refers to states parties' undertakings to eliminate racial discrimination in all its forms and to promote understanding among all races. Art. 4 refers to taking positive measures designed to eradicate all incitement to, or acts of, racial discrimination. It is worthy of note that art. 1.4 on special measures does not contain positive obligations, and art. 2.2 on special and concrete measures leaves their application to the states' discretion.
542. Art. 7. The issue of education has been pointed out as a neglected dimension of the application of the ICERD. Boyle and Baldaccini (2001), p. 190.
543. See art. 1.1. CERD has clarified the concept of “racial discrimination” in its General Recommendations No. 8, 14 and 24. Such General Recommendations as No. 29 on descent-based discrimination and No. 30 on discrimination against non-citizens have also clarified the concept. For the ICERD addressing both direct and indirect discrimination, see Banton (1996), p. 66. See also the remarks on various definitions of discrimination *infra* in chapter 2.3.1.1.
544. Preambular paras 6 and 10.
545. See also CERD's General Recommendations on art. 4, i.e. Recommendations No. 1, 7 and 15.

and colour racism, and whilst this focus on colour has persisted, it has been pointed out that the more recent application of the ICERD captures both subjective and socio-economic variables of racial discrimination and racism. This focus is reflected in the monitoring work of CERD, which has expanded over the years beyond discrimination on grounds of colour to include the full range of victims of discrimination, including ethnic minorities, immigrants and indigenous peoples.⁵⁴⁶ Although the ICERD is not a minority-specific instrument, it is of particular significance for minorities as well as other groups that fall within the Convention's scope of application. In its practice, CERD has paid attention to a variety of groups, including national or ethnic groups, the Roma, indigenous peoples, refugees, asylum-seekers, (im)migrants, displaced persons, and non-citizens (including non-citizen workers and their family members).⁵⁴⁷

The application of the ICERD with respect to non-citizens used to cause a considerable amount of confusion and even disagreement due to the stipulation in the Convention stating that the ICERD did not apply to distinctions, exclusions, restrictions or preferences between citizens and non-citizens.⁵⁴⁸ Pursuant to this provision, many states parties – especially earlier – submitted no information on the situation of non-citizens in the country, which prompted CERD to address the question in its General Recommendations. In its General Recommendation No. 30 pertaining to non-citizens,⁵⁴⁹ CERD notes that non-nationals – particularly migrants, refugees and asylum-seekers – are often victims of contemporary racism. CERD also refers to undocumented non-citizens and persons who cannot establish the nationality of the state in whose territory they live.⁵⁵⁰ Additionally, CERD points out that although such rights as the right to participate in elections, to vote and to stand for election, may be confined to citizens, the starting point of human rights is that they belong to all persons.⁵⁵¹ CERD draws attention to access to citizenship and naturalisation, and calls for the states parties to ensure that particular groups of non-citizens are not discriminated against with regard to human rights and to pay due attention to possible barriers to naturalisation that may exist for long-term or permanent residents.⁵⁵² CERD also raises the importance of removing

546. Boyle and Baldaccini (2001), pp. 152, 158 and 191.

547. See CERD's General Recommendation No. 24 on art. 1, paras 1–3, and the General Recommendations specifically addressing the situations of various groups. See also Banton (2000), pp. 56, 58–60 and 75–76, and van Boven (2001), pp. 115–122.

548. Art. 1.2. For controversies caused by this provision, see e.g. Boyle and Baldaccini (2001), pp. 154–156.

549. General Recommendation No. 30 on discrimination against non-citizens also replaces the earlier General Recommendation on non-citizens from the year 1993. See para. 39.

550. *Ibid.*, preambular paras 3 and 4.

551. *Ibid.*, para. 3.

552. *Ibid.*, paras 13–17. Art. 2.3 of the ICERD notes that nothing in the Convention may be interpreted as affecting in any way the legal provisions of the states parties concerning nation-

obstacles that prevent the enjoyment of economic, social and cultural rights by non-citizens particularly in the areas of education, housing, employment and health.⁵⁵³

Regarding the scope of application of the ICERD, particular attention should be paid to the absence of religion and belief in the list of grounds of discrimination set out in article 1.⁵⁵⁴ In fact, religion and belief were discussed during the drafting process of the ICERD, but were separated from the process⁵⁵⁵ and subsequently considered in a declaration adopted by the UNGA in 1981.⁵⁵⁶ Following the elimination of the grounds of religion and belief from the ICERD, these aspects are considered within the context of the Convention only when linked to the grounds enumerated in article 1.⁵⁵⁷ CERD's General Recommendation No. 25 on gender-related dimensions of racial discrimination merits specific mention as it is an important step forward in acknowledging that racism and racial discrimination do sometimes affect men and women differently.⁵⁵⁸

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- ality, citizenship or naturalization, but that such provisions should not discriminate against any particular nationality.
553. According to CERD, public educational institutions should be open to non-citizens and children of undocumented immigrants residing in the territory of a state party. CERD calls for the avoidance of segregated schooling and segregation in housing and for effectively tackling problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers. It also highlights the entitlement of all individuals, including those without a work permit, to the enjoyment of labour and employment rights. Furthermore, CERD refers to cultural identity and the preservation and development of the culture of non-citizens. General Recommendation No. 30, paras 29–38.
554. Compare particularly to the practice of ECRI. See the remarks *infra* in chapter 4.2.1. Although language has not been specifically stipulated among the grounds of discrimination in the ICERD, CERD has considered it. See e.g. the references to the right to the preservation and practice of indigenous languages in CERD's General Recommendation No. 23 on the rights of indigenous peoples, para. 4(e). In its General Recommendation No. 21 on the right to self-determination CERD refers to persons belonging to ethnic *or* linguistic groups. See para. 5.
555. The opposition to an instrument on racial discrimination including the issues of religion and belief came e.g. from the Arab delegations, and the Soviet and Eastern European states. Arab countries were concerned about the inclusion of anti-Semitism which might be read as a recognition of the state of Israel. The Soviet Union for its own reasons was not prepared to have religious discrimination included but did want to focus on race. Acrimonious controversy over the question of anti-Semitism as constituting racial as well as religious prejudice resurfaced in the Third Committee of the UNGA during the drafting of the ICERD. Boyle and Baldaccini (2001), p. 148. See also Lerner (1991), p. 46.
556. See the remarks on the declaration adopted *infra* in chapter 2.2.1.1.2. See also Banton (1996), pp. 54–55.
557. This is also clearly seen in the practice of CERD. See e.g. CERD's concluding observations with respect to Iran (2003), para. 14, and with respect to the United Kingdom of Great Britain and Northern Ireland (2003), para. 20.
558. CERD has also paid express attention to the issue of multiple discrimination faced e.g. by non-citizens. See e.g. General Recommendation No. 30 on discrimination against non-citizens, para. 8.

The ICERD may be said to advance human inclusiveness, which is a characteristic of the international human rights approach in general.⁵⁵⁹ From the viewpoint of the issue of incorporation in(to) society, the explicit aims of the ICERD – to eliminate the practices of segregation, separation (including the phenomenon of apartheid) and discrimination – are of particular importance. The text of the ICERD even includes an explicit reference to integration in connection with states’ undertaking to encourage various means, including integrationist multiracial organisations and movements to eliminate barriers between races,⁵⁶⁰ and to discourage anything that might strengthen racial divisions.⁵⁶¹ CERD has also highlighted aspects of relevance for integration, inclusion and the like in the course of its work. Recently, it has affirmed the importance of recognition by governments of the concrete rights of ethnic or linguistic groups to preserve their identity.⁵⁶²

2.2.1.1.2 The UN Declaration on Religion and Belief and the Vienna Document

As noted, separating discrimination on the basis of religion or belief from the drafting process of the ICERD resulted in measures to address these issues separately; the outcome was the adoption of *the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the UN Declaration on Religion and Belief) by the UNGA in 1981. The Declaration emphasises the connection between (international) peace and infringement of the rights and freedoms addressed in the instrument,⁵⁶³ and calls for understanding, tolerance and respect in matters relating to freedom of religion and belief.⁵⁶⁴ It sets out the right of everyone to freedom of thought, conscience and religion⁵⁶⁵ and the prohibition of discrimination on the grounds of religion or other belief.⁵⁶⁶ The instrument also deals with the right of the parents (or other legal guardians) of a child to organise life within the family in accordance with their religion or belief, and the right of every child to have access to education in the matter of religion or belief in accordance with the

559. See also Boyle and Baldaccini (2001), p. 138. See also the remarks *infra* in chapter 2.3.1.

560. See the remarks on the concept of “race” *supra* (n. 537).

561. Art. 2.1(e).

562. It has been pointed out that these remarks by CERD are linked to the development of ethnic identity questions e.g. in the context of minority norms. Boyle and Baldaccini (2001), p. 158.

563. Preambular paras 3 and 6.

564. Preambular para. 5.

565. Art. 1. Art. 6 specifies the freedoms covered by the right to freedom of thought, conscience, religion or belief.

566. Art. 2.1. Art. 2.2 provides a definition of the expression “intolerance and discrimination based on religion or belief”.

wishes of the child's parents (or other legal guardians).⁵⁶⁷ The Declaration calls for consistency with the UDHR and the International Covenants of Human Rights.⁵⁶⁸

The Vienna Document of the 1993 World Conference on Human Rights states that the speedy and comprehensive elimination of all forms of racial discrimination, racism and other forms of intolerance⁵⁶⁹ is a priority task for the international community and consequently calls for effective governmental measures to prevent and combat these phenomena.⁵⁷⁰ The importance of human rights education and the role of education in general in promoting understanding, tolerance, peace and friendly relations between nations and all racial or religious groups are also noted.⁵⁷¹ The Vienna Document addresses separately tolerance between migrant workers and the rest of the society,⁵⁷² and highlights the significance of the ICERD and its individual communication procedure.⁵⁷³ Governments are also called upon to take measures to counter intolerance and related violence based on religion or belief, and reference is made to the importance of the UN Declaration on Religion and Belief in recognition of the right of every individual to freedom of thought, conscience, expression and religion.⁵⁷⁴ Genocide and ethnic cleansing are also mentioned.⁵⁷⁵ While the Vienna Document does not expressly refer to the issue of integration in the provisions addressing racial discrimination, racism and other forms of intolerance, it draws attention to the forms of exclusion resulting from these phenomena.⁵⁷⁶

567. Art. 5. This provision also highlights the bringing up of children in a spirit of understanding, tolerance and friendship among peoples.

568. Art. 8.

569. The Document employs the expression "all forms of racism and racial discrimination, xenophobia and related intolerance". See the remarks on the use of terms in this research *supra* in chapter 1.3.

570. Part I, para. 15. Racial discrimination, racism, apartheid, xenophobia, religious intolerance, etc. are mentioned as serious obstacles to the full enjoyment of all human rights in different parts of the world. Part I, para. 30. See also Part II, section B.1. UN organs and agencies were urged to strengthen their efforts in the area, and all governments were urged to take immediate measures and to develop strong policies including the enactment of appropriate legislation – together with penal measures – as well as the establishment of national institutions to combat the phenomena of racial discrimination, racism and other forms of intolerance. Part II, paras 19 and 20.

571. Part I, para. 33. See also Part II, paras 78–82 for the role of human rights education.

572. Part II, para. 34.

573. States parties to the ICERD were asked to consider making the declaration under art. 14 of the Convention, i.e. to open the possibility for individual communications to be filed with CERD. Part II, para. 21.

574. Part II, para. 22. For the Vienna Document's remarks on practices of discrimination against women, as well as the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism on women, see the remarks *supra* in chapter 2.1.3.2.

575. Part I, para. 28, and Part II, paras 23 and 24.

576. Part II, para. 19. Social exclusion is also mentioned e.g. in the context of extreme poverty. See Part I, para. 25. The issue of participation and the connection between human rights

2.2.1.1.3 The Durban Document

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (World Conference against Racism, WCAR) held in the autumn of 2001 in Durban was the third UN global conference focussing on the fight against such problems as racism and racial discrimination.⁵⁷⁷ Controversies over the issues and priorities of relevance for the conference theme and the somewhat difficult international political climate at the time – particularly the Middle East question – were clearly visible in the conference.⁵⁷⁸ Historical slavery and the slave trade (particularly the transatlantic slave trade) and the issue of compensation for past wrongs were among the major questions to cause disagreements among the participants of the WCAR. There were a number of difficulties and controversies, including persistent differences in views or perceptions of some formulations and the placing of the paragraphs of the conference document, which delayed its publication such that it did not appear until several months after the closing of the WCAR. The Declaration and Programme of Action of the WCAR (the Durban Document) was finally approved and published in January 2002.⁵⁷⁹

Despite all the obstacles and challenges during the drafting process, the document that finally came out – although rather long, including a bit of everything and thus not being the best example of a coherent piece of work – is very rich in that it contains some new elements and even steps forward vis-à-vis the texts of previous international documents in this area. Again, combating racial discrimination, racism and other forms of intolerance⁵⁸⁰ was declared to be a matter of priority for the

protection and stability, peace and security are underlined in a number of paragraphs of the document.

577. The earlier World Conferences addressing the same kinds of questions were organised in 1978 and 1983, both in Geneva. For some remarks on them, see e.g. Banton (1996), pp. 29–31, and Boyle and Baldaccini (2001), pp. 184–188. The regional preparatory conferences prior to the WCAR were organised in Strasbourg, Santiago, Dakar and Tehran. See the Declaration of the Durban Document, preambular para. 17.

578. Due to these controversies the US and Israeli delegations left the meeting before the closing of the WCAR. It is noteworthy that the Middle East question was also predominantly on the agendas of the earlier UN conferences in the area. The Israel-Arab conflict has been viewed as central to the failure of both the 1978 and 1983 conferences and also of the UN Decades. Boyle and Baldaccini (2001), p. 186.

579. UNHCHR press release (2002). The document was endorsed by the UNGA resolution in March 2002.

The Durban Document consists of the Declaration and the Programme of Action, the former setting out the concerns and objectives as well as the commitments adopted, and the latter containing a number of recommendations translating the objectives of the Declaration into a practical and workable form. See para. 122 of the Declaration and the introduction to the Programme of Action.

580. The Document employs the expression “racism, racial discrimination, xenophobia and related intolerance”. See the remarks on the use of terms in this research *supra* in chapter 1.3.

international community.⁵⁸¹ Xenophobia in its different manifestations is viewed as one of the main contemporary sources and forms of discrimination and conflict,⁵⁸² and apartheid and genocide as major sources and manifestations of racism.⁵⁸³ The Document also notes that theories concerning the superiority of certain races and cultures over others, promoted and practiced during the colonial era, continue to be applied in one form or another even today in more subtle and contemporary forms and manifestations.⁵⁸⁴

The Durban Document rejects the existence of distinct or separate human races.⁵⁸⁵ According to the Document, the victims of racial discrimination, racism and other forms of intolerance are individuals or groups of individuals who are or have been negatively affected by, subjected to, or targets of these scourges. The Document echoes the ICERD when it states that racial discrimination, racism and other forms of intolerance occur on the basis of race, colour, descent or national or ethnic origin. The Document also asserts that victims can suffer multiple or aggravated forms of discrimination based on other related grounds, such as sex, language, religion, political or other opinion, social origin, property, birth or other status.⁵⁸⁶

The Durban Document considers a number of groups of persons who are often viewed as victims of racial discrimination, racism or other forms of intolerance.⁵⁸⁷ Of these groups, indigenous peoples receive a considerable amount of attention,⁵⁸⁸ and the Roma⁵⁸⁹ receive more than they have ever before in a UN document of this

581. Durban Declaration, para. 3.

582. Ibid., preambular para. 27. See also paras 16 and 17.

583. Ibid., para. 15.

584. Ibid., preambular paras 29 and 30.

585. Ibid., preambular para. 31, and paras 6 and 7.

586. Ibid., paras 1 and 2.

587. The groups specifically mentioned include indigenous peoples, national or ethnic, religious and linguistic minorities, racial, ethnic, cultural, linguistic and/or religious groups, Roma/Gypsies/Sinti/Travellers, migrants with various status (e.g. migrant workers, documented long-term migrants, undocumented migrants or migrants in an irregular situation, victims of trafficking, smuggled migrants), non-nationals, refugees and asylum-seekers, (internally) displaced persons, Africans and people of African descent, Asians and people of Asian descent, the Mestizo population, Jewish, Muslim and Arab communities, and the Palestinian People.

588. See e.g. the Declaration, preambular para. 10, and paras 13, 14, 22–24 and 39–47. Indigenous peoples are considered in a number of provisions of the Programme of Action. See also the remarks *infra* in this section.

589. The Document uses the expression “Roma/Gypsies/Sinti/Travellers”. See the remarks on the use of terms with respect to this group in this research *supra* in chapter 1.3.

kind.⁵⁹⁰ The extensive consideration given to Africans and people of African descent is also noteworthy,⁵⁹¹ as is the insertion of a number of references to migrants.⁵⁹²

The Durban Document affirms the importance of the principles of equality and non-discrimination, including equal enjoyment of human rights and fundamental freedoms.⁵⁹³ Although the non-discriminatory application of human rights is a kind of a starting point and the core aspect incorporated in the Document, the idea of group-specific rights or entitlements is also raised in connection with some groups. This is done with respect to indigenous peoples, through such references as recognising their distinct identity and the value and diversity of their cultures and heritage, and fully respecting their distinctive characteristics and initiatives.⁵⁹⁴ National, ethnic, cultural, linguistic and religious minorities are specifically mentioned in a number of paragraphs. Although the Durban Document contains no explicit references to the UN Minority Declaration,⁵⁹⁵ the remarks on minorities echo the elements presented in it, including the question of identity.⁵⁹⁶ The provisions also incorporate the idea that guaranteeing the rights of persons belonging to national or ethnic, religious and linguistic minorities protects them from any form of racial discrimination, racism and other forms of intolerance.⁵⁹⁷ It is of some interest that the issues noted in connection with people of African descent resemble to some ex-

590. See e.g. the Declaration, para. 68. Most references are incorporated in the Programme of Action, and they concern e.g. ensuring that Romani children and youth, especially girls, are given equal access to education and that educational curricula include opportunities for them to learn the official language and their mother tongue. The provisions also call for sensitivity and responsiveness to the needs of the Roma as well as intercultural education, and refer to CERD's General Recommendation No. 27 on discrimination against Roma. See the Programme of Action, paras 39 and 40.

591. See e.g. the Declaration, paras 13 and 32–35. These provisions are considered in length in the Programme of Action. See also some remarks *infra* in this section.

592. See e.g. the Declaration, paras 12, 16, 38 and 46–51. For refugees, asylum-seekers as well as (internally) displaced persons, see the Declaration, paras 52–55 and 111. Migrants are discussed extensively also in the Programme of Action. See also the remarks *infra* in this section. The Document highlights the need to pay special attention to protecting people engaged in domestic work and trafficked persons. Programme of Action, para. 67. There are also numerous references to undocumented migrants.

593. See e.g. the Declaration, preambular para. 14, and paras 78 and 79. Para. 76 refers to genuine equality of opportunity for all.

594. See e.g. *ibid.*, paras 39–43, and the Programme of Action, paras 15–23, 117 and 203–209. The Durban Document notes both the Draft Declaration on the rights of indigenous peoples and ILO Convention No. 169. See e.g. the Declaration, para. 42, and Programme of Action, paras 78(j) and 206.

595. The UN Minority Declaration is not listed either among the international documents deemed to be relevant in the area. See the list *infra* (n. 638). The Durban Declaration incorporates a provision similar to art. 30 of the Child Convention on minority and indigenous children. See para. 73.

596. Declaration, para. 66, and Programme of Action, paras 47, 49, 124 and 172.

597. Programme of Action, paras 47, 124 and 172.

tent those usually mentioned in the context of indigenous peoples and that are dealt with, for instance, in ILO Convention No. 169 on Indigenous Peoples.⁵⁹⁸

The Durban Document considers the issue of identity in a number of paragraphs, most prominently with respect to indigenous peoples and minorities,⁵⁹⁹ but also in connection with migrants.⁶⁰⁰ Among other things, the Document recognises that “members of certain groups with a distinct cultural identity face barriers arising from a complex interplay of ethnic, religious and other factors as well as their traditions and customs”. Therefore, the measures, policies and programmes aimed at eradicating racial discrimination, racism and other forms of intolerance should address the barriers that this interplay of factors creates.⁶⁰¹

The manner in which the question of religion is considered in the Durban Document also merits some attention here. As already pointed out, the Document takes as its starting point the grounds of discrimination set out in the ICERD, which exclude religion and belief as independent grounds (but including them as aggravating circumstances). In the Durban Document the issue of religion is raised for instance in connection with minorities, in addition to which the Document states that religion, spirituality and belief play a central role in the lives of individuals and in the way they live and treat other persons.⁶⁰² Concern for religious intolerance against religious communities and their members is also noted. While this concern is expressed in general terms,⁶⁰³ a deep concern is voiced over the increase of anti-Semitism and Islamophobia in various parts of the world.⁶⁰⁴ The Durban Document also deplors attempts to oblige women belonging to certain faiths and religious minorities to forego their cultural and religious identity, to restrict the women’s legitimate expression or to discriminate against them with regard to opportunities for education and employment.⁶⁰⁵

598. Declaration, para. 34, and the Programme of Action, paras 4 and 13.

599. For the identity of indigenous peoples, see e.g. the Declaration, paras 39 and 42; for the identity of minorities, see para. 66.

600. For respect for the cultural identity of migrants, see the Programme of Action, para. 30(g). Other groups with respect to which identity is mentioned include people of African descent and women belonging to certain faiths and religious minorities. See the Declaration, paras 34 and 71, respectively. For the latter, see also the remarks *infra* in this section.

601. Declaration, para. 67.

602. It is further noted that religion, spirituality and belief can contribute to the promotion of the inherent dignity and worth of the human person and to the eradication of racial discrimination, racism and other forms of intolerance. *Ibid.*, para. 8.

603. *Ibid.*, paras 59 and 60.

604. *Ibid.*, para. 61, and Programme of Action, para. 150. The Declaration also contains a reference to the Holocaust. See para. 58. The Programme of Action notes anti-Arabism and the religious prejudice and intolerance experienced by people of African descent. See paras 150 and 14, respectively.

605. Declaration, para. 71.

The clear acknowledgement of the gender-related dimension of racial discrimination and racism is among the pronounced and important issues taken up by the Durban Document. The need to integrate or apply a gender perspective is stipulated in a number of provisions. In these connections, reference is often made to the need to draw specific attention to the situation of women (or girls),⁶⁰⁶ but there are also more general references to the need to take a gender perspective into account.⁶⁰⁷ Whilst the Document contains numerous references to the need to address multiple forms of discrimination faced by women (or girls) in particular,⁶⁰⁸ multiple discrimination is raised in connection with other groups as well, including minorities.⁶⁰⁹ There is also an indirect reference to institutional or structural discrimination and its contribution to the victimisation and exclusion of migrants.⁶¹⁰ The references to violence against women, sexual violence and other gender-based violence against women and girls are also noteworthy.⁶¹¹ Furthermore, linking trafficking in human beings and racism is an important aspect of the Durban Document. The issue of trafficking, particularly trafficking in women and children, is addressed in several provisions.⁶¹²

The Durban Document contains a number of references to the importance of inclusion⁶¹³ and the need to combat marginalisation and social exclusion.⁶¹⁴ The very

606. Ibid., preambular para. 33, and para. 69, and the Programme of Action, paras 31 (addressing multiple barriers faced by migrant women), 50, 51, 53 and 54(a).

607. See e.g. the Programme of Action, paras 52, 59, 66, 94 (addressing data collection) and 133 (addressing gender-sensitive human rights training).

608. See e.g. the Declaration, preambular para. 33, and para. 69, and the Programme of Action, paras 18 (indigenous women and girls), 31 (women migrants) and 212.

609. Programme of Action, para. 172. The issue of multiple discrimination is also raised with respect to people of African descent. There are also references to religious discrimination combined with certain other forms of discrimination, and to persons subject to multiple discrimination (mentioned in general terms). See the Programme of Action, paras 14, 49, 79 and 104(c).

610. Remarks concern the possibility of racial discrimination and racism and other forms of intolerance being reflected in laws, policies, institutions and practices and how this may contribute to the victimisation and exclusion of migrants, especially women and children. See the Programme of Action, para. 97.

611. See e.g. *ibid.*, paras 18 (indigenous women and girls), 30(h) (migrant women and children who are victims of spousal or domestic violence), 36 (refugee and internally displaced women and girls), 54(a) and (b), and 62 (racially motivated violence against women).

612. See e.g. the Declaration, para. 30, and the Programme of Action, paras 37–38, 63, 64, 67, 69, 88, 105, 139, 158, 174, 186 and 201. See also some references to smuggled migrants and the smuggling of migrants in the Programme of Action, e.g. in paras 69, 105 and 186.

613. See e.g. the Declaration, preambular para. 8. For references to inclusive societies, see *ibid.*, preambular para. 22, and paras 6 and 96; for references to democratic, inclusive and participatory governance, see *ibid.*, para. 21; and for references to promoting respect for inclusiveness, see the Programme of Action, para. 126.

614. See the Declaration, paras 9, 11, 18 and 22, and the Programme of Action, paras 9, 48, 60, 61, 97, 102, 126, 148, 157 and 207.

term “integration” appears in numerous paragraphs and in different contexts. Family reunification is noted as having a positive effect on integration in the case of migrants.⁶¹⁵ The Document refers to implementing specific measures involving the host community and migrants in order to encourage respect for cultural diversity, to promote the fair treatment of migrants and to develop programmes, where appropriate, that facilitate their integration into social, cultural, political and economic life.⁶¹⁶ There is a reference to the full integration into society of victims of racial discrimination, racism and other forms of intolerance, and the necessity for special measures or positive actions in this context.⁶¹⁷ The Document mentions the integration of Africans and people of African descent into social, economic and political life,⁶¹⁸ and refers to the resettlement in third countries and local integration of refugees and displaced persons,⁶¹⁹ and to the reintegration of trafficked persons into society.⁶²⁰ It even addresses the issue of facilitating the full integration of persons with disabilities into all fields of life.⁶²¹ The Durban Document establishes a connection between integration and participation by noting that full integration into social, economic and political life goes hand in hand with full participation at all levels of the decision-making process.⁶²² In general, the numerous references in the Document to the importance of participation are worthy of note.⁶²³ The equal participation of all individuals and peoples is linked to the formation of just, equitable, democratic and inclusive societies.⁶²⁴

In sum, the recurring theme of the Durban Document is promoting tolerance and the preservation and even promotion of pluralism and diversity, as well as linking these questions to producing more inclusive societies.⁶²⁵ These issues are also associated with globalisation, the negative effects of which could aggravate poverty, marginalisation, social exclusion, cultural homogenisation and economic disparities,

615. Declaration, para. 49, and Programme of Action, para. 28.

616. Programme of Action, para. 30(c).

617. Declaration, para. 108.

618. Ibid., para. 32.

619. The policy orientation written in the Durban Declaration clearly favors the voluntary return of refugees. Ibid., paras 54 and 65.

620. Programme of Action, para. 64.

621. Ibid., para. 57.

622. This link is made in general terms in the Declaration, para. 108. The same link is referred to in connection with recognising the value and diversity of the cultural heritage of Africans and people of African descent. Ibid., para. 32.

623. Declaration, preambular paras 21–23, and paras 21, 34, 42, 81 and 108, and Programme of Action, paras 4, 15(a), 23(d), 29, 43, 45, 47, 50–53 (promoting women’s participation), 61, 91(b), 93, 98, 99, 112–114, 190(c), 208, 211, 214 and 216.

624. Declaration, preambular para. 22.

625. Ibid., para. 6. For cultural diversity of societies, see also *ibid.*, preambular para. 19. The references to diversity and pluralism concern both the international and national levels. See also the remarks *infra* in this section.

which may occur along racial lines within and between states. The Document notes that benefits of globalisation are to be gained, for instance, through increased cultural exchanges and through the preservation and promotion of cultural diversity.⁶²⁶ The Document proclaims the values of solidarity, respect, tolerance and multiculturalism,⁶²⁷ and calls for respect for diversity in societies and for cultures.⁶²⁸ The importance of interculturalism is also stressed.⁶²⁹ The Document notes the challenges that people of different socially constructed races, colours, descent, national or ethnic origins, religions and languages experience in seeking to live together and develop harmonious multiracial and multicultural societies.⁶³⁰ Education, particularly human rights education, is viewed as an important means to advance the promotion of tolerance and respect for diversity in societies.⁶³¹ Human rights education is also specifically cited in connection with promoting integration.⁶³² The Durban Document notes both the intra- and inter-state dimensions of the issues of racial discrimination, racism and other forms of intolerance,⁶³³ and the links of these issues to international peace and security.⁶³⁴ The Document discusses an array of measures to be taken to combat racial discrimination, racism and other form of intolerance; it underlines national measures, including anti-discrimination legislation, national policies and actions plans.⁶³⁵

The states participating in the Durban Conference pointed out that the ICERD is the principal international instrument intended to eliminate racial discrimination,

626. It is asserted that the preservation and promotion of cultural diversity can contribute to the eradication of racism, etc. There is also a reference to inclusive globalisation. See the Declaration, para. 11. The Durban Document also contains a note on the integration of developing countries into the global economy. See the Programme of Action, para. 105.

627. Declaration, para. 5.

628. For a call to respect diversity in societies, see e.g. *ibid.*, para. 95. Respect for cultures is mentioned in the provisions dealing with various groups. See e.g. the remarks on respect for indigenous cultures and heritage and promoting respect for the culture and history of the Roma in the Programme of Action, paras 15 and 42, respectively.

629. Declaration, paras 11 and 120, and Programme of Action, paras 39, 42, 58 and 117–120.

630. Programme of Action, para. 171. See also the Declaration, para. 67.

631. Declaration, paras 95 and 97, and Programme of Action, paras 117–132.

There are also some remarks on educating the public at large about various groups existing in society. For example, for educating about the culture and history of the Roma, see the Programme of Action, para. 42.

632. *Ibid.*, para. 126. Emphasis is placed on integrating human rights principles and standards into the policies and programmes of states. *Ibid.*, para. 190(d).

633. For the references to racial discrimination, racism and other forms of intolerance as an obstacle to friendly and peaceful relations among peoples and nations, as well as being among the root causes of many internal and international conflicts, see the Declaration, preambular para. 24. See also paras 20, 21 and 96.

634. *Ibid.*, paras 85 and 103. The provision on indigenous peoples also links the situation of these peoples to political and social stability and the development of the states in which they live. *Ibid.*, para. 40. There are also references to dialogue among civilisations. *Ibid.*, para. 82.

635. See *ibid.*, paras 76–122, and the Programme of Action, para 58–166.

racism and other forms of intolerance, and consequently called for universal adherence to it and its full implementation.⁶³⁶ The Durban Document makes specific mention of promoting and protecting the exercise of the rights set out in the UN Declaration on Religion and Belief.⁶³⁷ It also lists a number of other international documents of relevance in the area of anti-racism.⁶³⁸ Additionally, the Document calls for strengthening international co-operation and enhancing the UN and other international mechanisms in the area.⁶³⁹ To follow up the WCAR and implement the Durban Document, the Conference called on states to elaborate action plans at the national level and inform the UN High Commissioner for Human Rights (UNHCHR) about these plans and other relevant steps taken to implement the Document.⁶⁴⁰

As regards the follow-up to the WCAR and overseeing the implementation of the Durban Document, the measures taken by various human rights bodies and actors should also be noted. Amongst the notable steps are those taken by CERD,

636. Declaration, preambular para. 15. See also references to the ICERD in paras 77 and 104, and in the Programme of Action, paras 68, 75 and 134. States are urged to make the declaration envisaged under art. 14 of the ICERD to allow individual communications.

637. Programme of Action, para. 79.

638. The list contains the following instruments: the ICESCR, the ICCPR and its Optional Protocols, the Convention on the Prevention and Punishment of the Crime of Genocide, ILO Convention No. 97 on Migration for Employment (revised), the Convention for the Suppression of the Traffic in Persons and for the Exploitation of the Prostitution of Others, the Refugee Convention and its Protocol, ILO Convention No. 111 concerning Discrimination in Employment and Occupation, the UNESCO Convention against Discrimination in Education, the CEDAW and its Optional Protocol, the Child Convention and its two Optional Protocols, ILO Convention No. 138 on Minimum Age, ILO Convention No. 182 on the Worst Forms of Child Labour, ILO Convention No. 143 on Migrant Workers (Supplementary Provisions), ILO Convention No. 169 on Indigenous and Peoples, the Convention on Biological Diversity, the UN Convention on Migrant Workers, the Rome Statute of the International Criminal Court, the UN Convention against Transnational Organized Crime with its two supplementary protocols (addressing trafficking in persons and smuggling of migrants), the UN Declaration on Religion and Belief, the Vienna Convention on Consular Relations, and the ILO Declaration on Fundamental Principles and Rights at Work. See the Programme of Action, paras 75–83. The Durban Document contains references also to the UDHR and the Millennium Declaration, as well as the Geneva Conventions and their Additional Protocols. See the Declaration, paras 104 and 105, and the Programme of Action, para. 168, respectively.

639. Programme of Action, paras 167–219.

640. *Ibid.*, para. 191. Monitoring and encouraging the implementation of the WCAR recommendations by all actors has also become one of the principal tasks of the Anti-Discrimination Unit (ADU) of the office of the UNHCHR. Other follow-up actions with respect to the Durban Document have included the appointment of independent eminent experts by the UN Secretary-General to follow the implementation of the Durban Document (with the co-operation of the UNHCHR) and setting up working groups. See OHCHR/ADU (2004), pp. 1–3, and the UNHCHR website at <http://www.unhchr.ch/html/racism> (visited on 10 October 2007).

which has made frequent and systematic references to the follow-up to the WCAR and the Durban Document. In its General Recommendation adopted in 2002,⁶⁴¹ CERD both welcomes the outcome of the WCAR and refers to the responsibilities of CERD in its follow-up. Of broader significance is the decision of CERD to recommend to the states parties to the ICERD that they include in their periodic reports information on action plans or other measures they have taken to implement the Durban Document at the national level.⁶⁴² By these actions CERD has created a review of sorts of the implementation of the Durban Document on its own agenda. Other actors as well have placed the Durban Document on their agendas, thereby contributing to the reinforcement of its significance.⁶⁴³

2.2.1.1.4 UNESCO and ILO Documents

UNESCO has noted the fight against racism, discrimination, xenophobia and intolerance as being at the heart of its mandate.⁶⁴⁴ For instance, the organisation has directed efforts towards drafting relevant international instruments in this area.⁶⁴⁵ One of the instruments of particular significance for non-discrimination is *the UNESCO Convention against Discrimination in Education* concluded in 1960. In addition to addressing non-discriminatory treatment in education, the Conven-

641. General Recommendation No. 29 on the follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance.

642. The concluding observations adopted by CERD on state reports also include (systematically) references to the Durban Document. CERD has referred to the Durban Document even within the framework of its individual communication procedure. See e.g. *POEM and FASM v. Denmark*. The communication concerned the limits on the freedom of expression of parliamentarians and views put forth on Muslims. The communication was declared inadmissible due to the non-exhaustion of domestic remedies, but in its opinion CERD referred to the Programme of Action of the WCAR and particularly to its para. 115, which refers to the key role of politicians and political parties in combating racial discrimination, racism and other forms of intolerance. See para. 7.

643. E.g. UNESCO and some UN Special Rapporteurs, including the Special Rapporteurs on racism and on migrant workers, have made explicit references to the implementation or importance of the Durban Document.

Regarding the regional actors in Europe in the area of anti-racism, e.g. ECRI has referred to the Durban Document rather sparingly. Some general references have been made to ECRI's role in the implementation of the conclusions of both the European and World Conferences against Racism, and ECRI has highlighted the significance of making national plans to implement the Durban Document in the context of integration. See the remarks *infra* in chapter 4.2.3.

644. UNESCO website at <http://www.unesco.org/shs/againstdiscrimination> (visited on 14 November 2006). See also the remarks in Banton (1996), pp. 24–25, and in Boyle and Baldacini (2001), p. 152.

645. In addition to conventions, UNESCO adopts e.g. recommendations and declarations. UNESCO website at <http://portal.unesco.org> (visited on 17 October 2007). UNESCO has also launched various operational programs and projects. UNESCO website at <http://www.unesco.org/shs/againstdiscrimination> (visited on 14 November 2006).

tion also deals with such issues as the possibility to establish and maintain separate educational systems or institutions for religious or linguistic reasons and the role of education in developing the human personality, strengthening respect for human rights and fundamental freedoms and promoting understanding and tolerance.⁶⁴⁶

In 1978 a meeting of representatives of UNESCO member states adopted *the Declaration on Race and Racial Prejudice* expressing concern about racism, racial discrimination, colonialism and apartheid, as well as the exclusion and forced assimilation of the members of disadvantaged groups.⁶⁴⁷ The Declaration underlines the unity of the human race and the fact that human beings belong to “a single species”,⁶⁴⁸ and sets forth the right of all individuals and groups to be different.⁶⁴⁹ It also underscores the right of all groups to their own cultural identity and the development of their distinctive cultural life.⁶⁵⁰ The instrument makes a link between racism, racial segregation and discrimination and political tensions and international peace and security.⁶⁵¹ While states’ responsibility for ensuring human rights and fundamental freedoms on equal footing for all individuals and groups is stressed, the duties of individuals towards others and the society in which they live are also cited.⁶⁵² The Declaration addresses separately the situation of population groups of foreign origin, particularly migrant workers and their families.⁶⁵³

In response to the rise in acts of intolerance, aggressive nationalism, racism and anti-Semitism, the UNGA proclaimed the year 1995 as the International Year for Tolerance and designated UNESCO as the lead agency for this event.⁶⁵⁴ In that year, UNESCO’s General Conference adopted *the Declaration of Principles on Tolerance*. This Declaration reiterates many issues dealt with in the 1978 Declaration discussed above, including individuals’ and groups’ “right to be different”.⁶⁵⁵ It ex-

646. Arts 2 and 5. The Convention requires that when separate educational systems or institutions are established, they must conform to the standards laid down or approved by the competent authorities. Art. 5.1(c) addresses separately the right of members of national minorities to carry on their own educational activities. See also the remarks on this Convention *supra* in chapter 2.1.1.1.2 and *infra* in chapter 2.3.1.

647. Preamble para. 13. See also the references to racism and racial prejudice in art. 2. Art. 2.2 puts forth a definition of racism.

648. Preamble para. 5, and art. 1. UNESCO had issued statements declaring non-existence of the biological differentiation of races also earlier. See e.g. A Statement of Race from the year 1950 and A Statement on the Nature of Race and Race Differences from the year 1951. See also the remarks in UNESCO (2001), pp. 8–9.

649. Art. 1.2.

650. Art. 5.1.

651. Arts 2.2 and 4.3. See also art. 4.2.

652. Arts 6.1 and 8.1.

653. Art. 9.3.

654. UNESCO (2001), p. 11.

655. Art. 2.4. The 1978 Declaration is also expressly mentioned in this article, as well as in art. 3.3. The Preamble to the 1995 Declaration refers to a number of international instruments which are viewed as relevant in the area. The list includes the ICCPR, the ICESCR, the

presses concern for the rise in acts of intolerance, including exclusion, marginalisation and discrimination directed against national, ethnic, religious and linguistic minorities, refugees, migrant workers, immigrants and vulnerable groups within societies, as well as acts of violence and intimidation committed against individuals exercising their freedom of opinion and expression.⁶⁵⁶ The Declaration links the questions of tolerance, multiculturalism, peace, development and democracy,⁶⁵⁷ and calls for positive measures to promote tolerance.⁶⁵⁸ It also provides some guidance concerning the meaning of tolerance by describing it as “harmony in difference” and connecting it with the recognition of universal human rights and fundamental freedoms, democracy and the rule of law.⁶⁵⁹ The Declaration addresses tolerance, exclusion and marginalisation at the societal level and raises the need to ensure equality of treatment and opportunity for all groups and individuals in society.⁶⁶⁰ Globalisation, rapidly increasing mobility, and large-scale migrations increase the necessity of tolerance, and particular attention should be paid to vulnerable groups, including their integration, especially through education.⁶⁶¹ The role of education in preventing intolerance and countering exclusion is underlined, and in this connection references are also made to respect for human dignity and differences.⁶⁶²

During the first half of the on-going decade, UNESCO has taken noteworthy normative steps with respect to the question of cultural diversity.⁶⁶³ In the aftermath of the terrorist attacks in the US in 2001, the General Conference of UNESCO adopted *the Universal Declaration on Cultural Diversity* in November 2001. The Declaration was born of the wish of the member states to define a standard-setting instrument, in the context of globalisation, for the elaboration of their national cultural policies.⁶⁶⁴ The Declaration establishes links between culture, identity, social cohesion, development, tolerance, dialogue, co-operation, international peace and security, as well as cultural diversity and the unity of humankind.⁶⁶⁵ Globalisation is viewed both as representing a challenge for cultural diversity and as creating the

ICERD, the Refugee Convention and Protocol, the CEDAW, the UN Declaration on Religion and Belief, and the UN Minority Declaration.

656. Preambular para. 7.

657. Ibid., and art. 2.3. For the value of multiculturalism, see also art. 2.

658. Preambular para. 10 and art. 1.1. See also the remarks in preambular para. 7.

659. Art. 1.1–3. Art. 2.2 asserts the need to ratify existing international human rights conventions.

660. Art. 2.

661. Art. 3, particularly subparas 1–3.

662. Art. 4.

663. Cultural diversity is pointed out as having been at the core of UNESCO’s concerns since its inception. UNESCO website at <http://portal.unesco.org> (visited on 22 December 2005).

664. Introduction to the Declaration at UNESCO website, *ibid.*

665. Preambular paras 6–8. According to art. 2, policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace.

conditions for renewed dialogue among cultures and civilizations.⁶⁶⁶ The instrument characterises cultural diversity as “the common heritage of humanity”⁶⁶⁷ and notes that the defence of cultural diversity “is inseparable from respect for human dignity and implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples”.⁶⁶⁸ Cultural rights are viewed as an enabling environment for cultural diversity,⁶⁶⁹ and the importance of contacts with other cultures and genuine dialogue among cultures is stressed.⁶⁷⁰

The notions enshrined in the Universal Declaration on Cultural Diversity were reinforced in *the Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, approved by the UNESCO General Conference in October 2005,⁶⁷¹ whose preamble reiterates the status of cultural diversity as a “common heritage of humanity”.⁶⁷² The Convention addresses the challenge of globalisation for cultural diversity⁶⁷³ and aims at protecting and promoting the diversity of cultural expressions.⁶⁷⁴ It links cultural diversity to peace and security, and makes a note of the importance of culture for social cohesion.⁶⁷⁵ The full realisation of human rights and fundamental freedoms proclaimed in the universally recognised instruments are underscored,⁶⁷⁶ and references are made to tolerance, social justice and mutual respect between peoples and cultures, as well as to the plurality of the identities and cultural expressions of peoples and societies.⁶⁷⁷ The Convention addresses the link between culture and identity, views linguistic diversity as a fundamental element of cultural diversity, and notes the role of education in the protection and promotion of

666. Preambular para. 9.

667. Art. 1. This provision notes that culture takes diverse forms across time and space, and that this diversity is embodied in the uniqueness and plurality of the identities of the groups and societies making up humankind.

668. Art. 4. The Action Plan attached to the Declaration refers to respecting and protecting traditional knowledge, in particular that of indigenous peoples. See para. 14.

669. In this connection art. 27 of the UDHR and arts 13 and 15 of the ICESCR are expressly mentioned. See art. 5. Art. 6 refers to freedom of expression, media pluralism, multilingualism, etc. as guarantees of cultural diversity.

670. Art. 7.

671. UNESCO website at <http://portal.unesco.org> (visited on 22 December 2005).

672. Preambular para. 3.

673. Preambular para. 20.

674. Art. 1(a). Art. 4 sets out the definitions of “cultural diversity” and “cultural expressions”. See particularly subparas 1 and 3.

675. Preambular paras 5 and 11, respectively.

676. Preambular para. 6. Art. 2.1 asserts that cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. See also art. 5.1.

677. Preambular paras 5 and 8.

cultural expressions.⁶⁷⁸ It also sets out the principles of equal dignity of and respect for all cultures,⁶⁷⁹ and mentions interculturalism and dialogue among cultures in a number of provisions.⁶⁸⁰ As regards the obligations of the states parties to the Convention, states are to endeavour to create in their territory an environment which encourages individuals and social groups to create, produce, disseminate, distribute and have access to their own cultural expressions. In this connection, the Convention mentions the importance of paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples.⁶⁸¹ The instrument also underlines the sovereign right of states to adopt measures and policies to protect and promote the diversity of cultural expressions within their territory.⁶⁸²

To respond to the new challenges emerging in modern societies – including new forms of discrimination – in connection with scientific developments and the process of globalisation that may result in new threats to inter-ethnic relations (including violent conflicts), UNESCO adopted a new *Integrated Strategy to Combat Racism, Discrimination, Xenophobia and Intolerance* in 2003. This document identifies a number of priority themes for the organisation, including revision and/or revitalisation of its instruments dealing with racism and discrimination.⁶⁸³

A number of ILO documents are of significance for anti-racism action, including *ILO Convention No. 111 concerning Discrimination in Employment and Occupation*.⁶⁸⁴

678. Preamble paras 15, 19 and 20. For education, see also art. 10(a).

679. Art. 2.3. According to this provision, the protection and promotion of the diversity of cultural expressions presuppose the recognition of the equal dignity of and respect for all cultures, including those of persons belonging to minorities and indigenous peoples.

680. Preamble paras 13, 17 and 20, and art. 1(c) and (d).

681. Art. 7.1(a). For references to minorities and indigenous peoples, see also art. 2.3 and preamble para. 16. Indigenous peoples are mentioned also in preamble para. 9. Preamble para. 11 refers to the importance of culture and its potential for the enhancement of the status and role of women in society.

682. Arts 1(h), 2.2 and 5.1.

683. The following themes were also identified as priorities: developing scientific research and reflection on the phenomena of racism, discrimination and xenophobia, developing new educational approaches and elaborating teaching materials and indicators, mobilising opinion leaders and political decision-makers against racism and discrimination, preserving diversity in multi-ethnic and multicultural societies, and combating racist propaganda in the media, especially in cyberspace. UNESCO website at <http://www.unesco.org/shs/againstdiscrimination> (visited on 14 November 2006).

684. The definition of racial discrimination put forth in the ICERD is based on that stipulated in ILO Convention No. 111. Banton (2000), p. 76. See also the remarks on various definitions of discrimination *infra* in chapter 2.3.1.

See also the international documents viewed as relevant in the area and referred to in the Durban Document, at the European Conference against Racism, and by ECRI. See the remarks *supra* in chapter 2.2.1.1.3 and *infra* in chapters 2.2.1.3.2 and 4.2.1.

Although *ILO Convention No. 169 on Indigenous Peoples* does not refer expressly to racial or ethnic discrimination or to combating racism,⁶⁸⁵ it is viewed as a relevant instrument in the area of combating these phenomena.⁶⁸⁶ In general, the ILO's focus on the area of labour and employment and its aims related to eradicating discrimination and promoting equality of opportunity and treatment in these contexts are of significance for anti-racism action.⁶⁸⁷ In recent years, the ILO has visibly addressed reducing discrimination, combating racism and xenophobia faced by migrant workers and promoting their social integration and inclusion.⁶⁸⁸

2.2.1.2 The Organization for Security and Co-operation in Europe

Concerns about racism and other forms of intolerance were incorporated in OSCE documents later than concerns for national minorities. The first explicit remarks on the former are found in the 1990 Copenhagen Document, i.e. the document which, not coincidentally, is also the OSCE instrument containing the most important and far-reaching OSCE commitments on minorities. These two sets of commitments were laid down in successive paragraphs of the Document.⁶⁸⁹

Pursuant to *the 1990 Copenhagen Document*, the participating states condemn totalitarianism, racial and ethnic hatred, anti-Semitism, xenophobia and discrimination against anyone as well as persecution on religious and ideological grounds. Among other things, the participating states commit themselves to taking measures to protect persons or groups who may become subject to threats or acts of discrimination, hostility or violence as a result of their racial, ethnic, cultural, linguistic or religious identity as well as to promoting understanding and tolerance. The Document underlines the role of education in addressing the problem of racial prejudice

For the activities and documents of the ILO, see the ILO website at <http://www.ilo.org>. See also the remarks in McCrudden (2001), pp. 261–266, and in Boyle and Baldaccini (2001), p. 147.

685. The Convention refers to ensuring that members of indigenous peoples benefit on an equal footing from rights and opportunities and to non-discrimination in general terms. See e.g. arts 2.2 and 3.1. It also refers to possible prejudices harboured against indigenous peoples in the provisions on education. See also the remarks *supra* in chapter 2.1.2.1.

686. See the inclusion of this instrument among the international documents mentioned in the Durban Document, at the European Conference against Racism, and by ECRI. See the references *supra* (n. 684).

687. See also the remarks *infra* in chapter 2.3.1.

688. See particularly the ILO Action Plan on Migrant Workers adopted in 2004. See the remarks on this document *supra* in chapter 2.1.3.1.1.

689. National minorities are considered in paras 30–39 and discrimination, racism and other forms of intolerance in para. 40.

and hatred and in the development of respect for different civilizations and cultures.⁶⁹⁰

The OSCE states reiterated their determination to combat all forms of racial and ethnic hatred, anti-Semitism, xenophobia and discrimination at the highest political level at *the 1990 Paris Summit*.⁶⁹¹ In *the 1991 Moscow Document* the participating states voiced (for the first time) their concern over discrimination, intolerance and xenophobia against migrant workers.⁶⁹²

The OSCE commitments adopted in the course of the 1990s reflect the participating states' preoccupation with war and post-war situations, particularly in the former Yugoslavia. In this vein, *the 1992 Helsinki Document* draws attention to gross violations of CSCE commitments in the field of human rights and fundamental freedoms, including those related to national minorities, and to the special threat posed by such violations to the peaceful development of society. The full protection of and respect for diversity is proclaimed to characterise democratic and pluralistic societies.⁶⁹³ The Document links tolerance, understanding and co-operation to stable democratic societies and stresses the importance of adhering to the ICERD and taking appropriate measures at the national level, including legal ones, to assure protection against discrimination on racial, ethnic and religious grounds. The role of human rights education is highlighted.⁶⁹⁴

The participating states' concern about and condemnation of manifestations of intolerance, including aggressive nationalism, racism, chauvinism, xenophobia and anti-Semitism, have been reiterated in the documents adopted at a number of subsequent OSCE meetings.⁶⁹⁵ The documents link these phenomena to ethnic, political and social tensions within and between states and endangering peace, security, stability and democracy in the OSCE area.⁶⁹⁶

In the course of the 2000s the OSCE has continued to address questions relating to anti-racism, and the OSCE states have reaffirmed their commitment to promote tolerance and non-discrimination. It is also noteworthy that the more recent OSCE documents pay increasing attention to various groups of migrants, including

690. Para. 40.1–4. Subparas 5–7 of para. 40 concern effective remedies and complaints against acts of discrimination, including racist and xenophobic acts, adhering to the international instruments addressing the problem of discrimination, and accepting international mechanisms allowing states and individuals to bring communications relating to discrimination before international bodies.

691. Paris Document, under “Human Dimension”, para. 4.

692. Para. 38.1.

693. Helsinki Document, Declaration, para. 12.

694. *Ibid.*, Decisions, Chapter VI, paras 30–35.

695. See e.g. the 1994 Budapest Document, Decisions, Chapter VIII, paras 1, 25 and 26; the 1996 Lisbon Document, paras 9 and 10; and the 1999 Charter for European Security, para. 19.

696. See e.g. the 1996 Lisbon Document, para. 9, and the 1999 Charter for European Security, para. 19.

migrant workers, (im)migrants, asylum-seekers and refugees in these connections.⁶⁹⁷ Among the means of combating discrimination, racism and other forms of intolerance the role of legislative actions and education, including human rights education, are underscored, and the role of the media and the Internet is also mentioned.⁶⁹⁸ In recent years, increasing attention has also been drawn to inter-religious/faith and intercultural dialogue.⁶⁹⁹ The OSCE actions in the area of anti-racism have also become increasingly practically oriented, with the OSCE institutions being given concrete tasks.⁷⁰⁰ While the Office for Democratic Institutions and Human Rights (ODIHR) in particular has been called upon in this regard, the HCNM and the Representative on Freedom of the Media (RFoM) have also been given various roles.⁷⁰¹ The increased attention of the OSCE to the issues of racism and other forms of intolerance can also be seen in numerous OSCE conferences and meetings organised in recent years,⁷⁰² and in the special emphasis given to these phenomena in the recent Human Dimension Implementation Meetings (HDIMs).⁷⁰³ The issue of religious intolerance has also attracted special attention within the OSCE, one result of this being the appointment of three representatives to promote tolerance in this area.⁷⁰⁴

697. See particularly the decisions taken by the OSCE Ministerial Council since 2002.

698. For the pertinent commitments, see e.g. ODIHR (2005), pp. 200–208.

699. The importance of dialogue was pointed out already in the 1990 Copenhagen Document, para. 36. Of the more recent documents, see e.g. Ministerial Council Decision No. 6 on Tolerance and Non-discrimination (2002), para. 1, and Ministerial Council Decision No. 12/04 on Tolerance and Non-discrimination (2004), para. 1.

700. Pertinent decisions have been made particularly by the OSCE Ministerial Council meetings organised since 2001. In the Ministerial Council meeting of 2001 the OSCE states also adopted, less than three months after the terrorist attacks on the USA in September 2001, the Plan of Action for Combating Terrorism, which includes a paragraph on promoting human rights, tolerance and multiculturalism. See para. 11.

701. For the remarks on the roles of various OSCE institutions and actors in the area of anti-racism, see Pentikäinen (2004b), pp. 81–91. For the HCNM's activities in this area, see also the remarks *infra* in chapter 4.3.2.

702. These events include the conferences on anti-Semitism and on tolerance, racism, xenophobia and discrimination. Essentially at the insistence of the USA the issue of anti-Semitism has often been considered separately from other forms of intolerance.

703. See particularly the agendas of these meetings since 2002. For the HDIMs, see also the remarks *supra* in chapter 2.1.1.2.1.

704. These Personal Representatives of the OSCE Chairman-in-Office are: the Personal Representative to Promote Greater Tolerance and Combat Racism, Xenophobia and Discrimination; the Personal Representative on Combating Racism, Xenophobia and Discrimination, also focussing on Intolerance and Discrimination against Christians and Members of Other Religion; and the Personal Representative on Combating Intolerance and Discrimination against Muslims. OSCE website at <http://www.osce.org/activities/13539.html> (visited on 10 October 2007).

Within the OSCE the problems of the Roma⁷⁰⁵ have been openly discussed in the framework of anti-racism action rather than national minorities, an approach also reflected in the OSCE commitments.⁷⁰⁶ It is also noteworthy that whilst the OSCE documents indicate that the personal scope of application of the OSCE commitments on anti-racism is wide, extending to all individuals and thus also to foreigners,⁷⁰⁷ the commitments concerning the Roma suggest that nationality has some significance.⁷⁰⁸ The situation of the Roma has also been addressed in a separate action plan adopted by the OSCE states in 2003, *the OSCE Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area* (the OSCE Action Plan on Roma). The Action Plan recommends actions to be taken by both the participating states and OSCE institutions and structures⁷⁰⁹ and is intended to reinforce their efforts aimed at ensuring that the Roma are able to play a full and equal part in the societies of the OSCE states and at eradicating discrimination against them.⁷¹⁰

The OSCE commitments on anti-racism have been rather hesitant to refer to integration, inclusion or similar processes. Integration is expressly mentioned for the first time in *the 1994 Budapest Document*, which links in very general terms integration policy and combating the phenomena stemming from intolerance, in particular aggressive nationalism, racism, chauvinism, xenophobia and anti-Semitism.⁷¹¹ So

705. Within the OSCE the expressions “Roma and Sinti” is used for the Romani people. For the use of term “Roma” in this research, see the remarks *supra* in chapter 1.3.

706. See e.g. the 1990 Copenhagen Document, para. 40; the 1991 Moscow Document, para. 42.2; the 1992 Helsinki Document, Decisions, Chapter VI, para. 35; the 1999 Istanbul Document, para. 31; and the 1999 Charter for European Security, para. 20.

707. See e.g. a reference in the 1992 Helsinki Document, Decisions, Chapter VI, para. 33.

708. See *ibid.*, para. 35. This provision refers to the participating states’ commitment to address “problems of their respective nationals belonging to Roma and other groups traditionally identified as Gypsies”. The OSCE Action Plan on Roma contains a reference to citizens in connection with participation. See the remarks *infra* in this section (n. 716).

709. Of the OSCE institutions, particularly the ODIHR and its Contact Point for Roma and Sinti Issues (CPRSI) have been given tasks, but also the role of the HCNM and the RFoM is cited. The implementation of the Action Plan is reviewed at the pertinent OSCE meetings, including the HDIMs. See the Action Plan, para. 133.

710. The Action Plan addresses racial and ethnic discrimination faced by the Roma. See e.g. para. 1. Section III of the document addresses racism and discrimination and raises the issues of prejudices, negative stereotypes and racial violence against Roma, dialogue and relations between Roma communities and authorities (including the police) as well as between Roma and non-Roma communities, and the role of the media. Section IV addresses socio-economic issues such as housing and living conditions, unemployment and economic problems, and health care. Section V concerns education, Section VI deals with enhancing participation, and Section VII focuses on Roma in crisis and post-crisis situations. The Action Plan recognises the special problems faced by Romani women (and girls), including multiple discrimination, in a number of paragraphs. See e.g. paras 6, 19, 51, 62, 79–80, 94, 98, 106 and 112.

711. Para. 25 of the Document states that “action to combat these phenomena should be seen as an integral part of integration policy and education”.

far the OSCE documents have been most elaborate on the questions of integration and exclusion with respect to the Roma. While OSCE commitments addressing the situation of the Roma mention the problem of their social exclusion and the need to combat the racism and discrimination they face,⁷¹² *the OSCE Action Plan on Roma* makes several observations on integration. It calls for promoting the integration of the Roma into social and economic life and combating their isolation and poverty,⁷¹³ and stresses the importance of not allowing housing projects to foster ethnic and/or racial segregation.⁷¹⁴ The Action Plan bans school segregation; while urging that the Roma be integrated into mainstream education, it states that mainstream education should be sensitive to cultural differences and take the history, culture and languages of the Roma into account.⁷¹⁵ Both integration and inclusion are also mentioned with respect to participation.⁷¹⁶ Furthermore, attention is drawn to the specific needs of the Roma in the areas of health care and access to justice. The provisions on health care refer to promoting awareness about the specific needs of the Roma amongst health care personnel, as well as training health care workers to understand relevant aspects of Romani culture.⁷¹⁷ The provision dealing with access to justice raises the question of providing information in the Romani language.⁷¹⁸

While the issue of migration has emerged among increasingly important agenda items within the OSCE, the concept of integration has appeared more frequently in the pertinent OSCE documents, including the decisions adopted by the OSCE Ministerial Council.⁷¹⁹ The same kinds of provisions as were incorporated into the decisions concerning migration and migrants have also been inserted in the recent decisions on tolerance and non-discrimination taken by the OSCE Ministerial

712. See the 1999 Istanbul Document, para. 31. The 1999 Charter for European Security refers to the need to take effective measures to achieve full equality of opportunity for the Roma. See para. 20.

713. Section IV, para. 44.

714. *Ibid.*

715. Preambular para. to Section V and paras 67 and 73. The Preamble addresses the issue of integration into mainstream education through full and equal access at all levels. The provisions also address equal opportunities and the possibility to take special measures to enhance the equality and effectiveness of education for Roma children, the inclusion of Roma history and culture in educational texts, measures to ensure respect, protection and promotion of the Romani language and its teaching, and of Roma culture, and developing anti-racist curricula for schools and anti-racism campaigns for the media. See paras 69–72, 76.

716. Section VI, paras 88, 97. The latter refers to empowering and integrating Romani individuals into the decision-making processes of states and localities as elected representatives of their communities and as citizens of their respective countries. Equal participation of Romani women and men is also underlined. See e.g. para. 98.

717. Paras 59 and 61(b).

718. Para. 18.

719. See the remarks on the pertinent OSCE decisions/statements on migration *supra* in chapter 2.1.3.1.2.

Council. It may be observed that the decisions in the area of anti-racism include an increasing number of references to persons of migrant background. The pertinent decisions point to addressing the issue of migration and integration with respect for cultural and religious diversity as part of the overall efforts by the OSCE to promote tolerance, mutual respect and understanding and to combat discrimination, as well as to promote respect for human rights and fundamental freedoms.⁷²⁰ The Ministerial Council has referred to the value of cultural and religious diversity as a source of mutual enrichment of societies, to recognising the importance of integration with respect for cultural and religious diversity, and to recognising the positive contributions that all individuals can make to a harmonious pluralistic society.⁷²¹

2.2.1.3 The Council of Europe

Although the Council of Europe (CoE) has adopted a considerable number of conventions relevant to human rights, it has not concluded one specifically addressing racial discrimination and racism similar to that adopted by the UN. The CoE's actions in the area have been based on the various CoE standards, such as those set out in its core human rights convention, the ECHR,⁷²² as well as on UN standards, such as the ICERD.⁷²³ The CoE has considered racism and other forms of intolerance in a number of political documents adopted within its framework, the most noteworthy of these being the documents adopted at the three CoE summits and at the European Conference against Racism organised in 2000. The very fact that the CoE Framework Convention incorporates elements of direct relevance for anti-racism action is noteworthy.

720. Ministerial Council Decision No. 10/05 on Tolerance and Non-discrimination (2005), para. 5.6.

721. Ministerial Council Decision No. 13/06 on Combating Intolerance and Discrimination (2006), paras 4 and 8. See also Ministerial Council Decision No. 10/07 on Tolerance and Non-discrimination (2007), preambular para. 8. The latter decision calls for fostering inclusive societies based on respect for cultural and religious diversity, human rights and democratic principles. It also refers to protecting legally residing migrants and to strengthening national strategies and programmes for the integration of regular migrants. See paras 7 and 8.

722. Accordingly, the European Court of Human Rights has also considered cases of relevance for racial discrimination. In recent years the Strasbourg Court has given new attention to the institutional or systemic character of racism in its case law. This is done e.g. in *Nachova and Others v. Bulgaria*, which concerned racist violence against Roma at the hands of Bulgarian state agents. According to the Strasbourg Court the authorities had failed in their duty under art. 14 of the ECHR, taken together with art. 2, to take "all possible steps to establish whether or not discriminatory attitudes may have played a role in events". Para. 163 of the judgment. See also the remarks in Marks and Clapham (2005), pp. 299–301.

723. See also the list of international documents ECRI deems to be relevant in its work *infra* in chapter 4.2.1.

2.2.1.3.1 The CoE Summit Documents and the CoE Framework Convention

Of *the documents adopted at the CoE summits*,⁷²⁴ the first that emerged from the 1993 Vienna Summit addresses rather extensively the question of racism and other forms of intolerance⁷²⁵ in that it considers the issues both in the text of the Declaration⁷²⁶ and in Appendix III to the Declaration.⁷²⁷ Appendix III refers to respect for the cultural diversity and the equal dignity of all human beings as well as tolerance as features of a democratic and pluralist society. Democracy, tolerance and solidarity are noted as common European values, and importance is attached to combating actions that are likely to strengthen fears and tensions between groups from different racial, ethnic, national, religious or social backgrounds.⁷²⁸ Concern is voiced over the increase of racism and other forms of intolerance against migrants and people of immigrant origin,⁷²⁹ and the deterioration of the economic situation is viewed as threatening the social cohesion of European societies by generating forms of exclusion that are likely to foster social tensions and manifestations of xenophobia.⁷³⁰ The importance of reducing marginalisation and social exclusion of all members of society is also brought to the fore.⁷³¹ While anti-Semitism is specifically noted, all forms of religious discrimination are condemned.⁷³² The documents of the Vienna Summit touch upon the issue of tolerance also vis-à-vis national minorities in not-

724. For a more elaborate consideration of the summit documents, see chapter 2.1.1.3.3 *supra*.

725. The documents refer to racism, xenophobia, anti-Semitism and intolerance. See also the remarks on the use of terms in this research *supra* in chapter 1.3.

726. See paras 3, 4 and 17.

727. Appendix III consists of both the Declaration and the Plan of Action on Combating Racism, Xenophobia, Anti-Semitism and Intolerance. See also the remarks *supra* in chapter 2.1.1.3.3.

728. Appendix III, para. 7 of the Declaration notes these manifestations of intolerance threatening democratic societies and their fundamental values and undermining the foundation of European construction.

729. *Ibid.*, paras 2–4.

730. *Ibid.*, para. 6.

731. *Ibid.*, para. 9.

732. *Ibid.*, para. 10.

The Plan of Action incorporated in Appendix III mentions more concrete actions to be taken in the area, including establishing a committee to review the CoE member states' measures in this area. See para. 3. This decision resulted in the establishment of ECRI. See also the remarks *infra* in chapter 4.2.1. Other provisions concern launching a broad European Youth Campaign, reinforcing guarantees against all forms of discrimination based on race, national or ethnic origin, or religion, and reinforcing mutual understanding and confidence between people. Measures are to be taken to promote education in the fields of human rights and respect for cultural diversity, to strengthen programmes aimed at eliminating prejudice in the teaching of history by emphasising positive mutual influence between different countries, religions and ideas, and to combat social exclusion and extreme poverty. See paras 1–2 and 4.

ing that creating a climate of tolerance and dialogue is necessary for the participation of all people in political life.⁷³³

While the documents adopted at both the second and third CoE summits (organised in 1997 and 2005, respectively) do not consider racism and other forms of intolerance as extensively as the first summit documents, they call for both the implementation of the pertinent decisions made at the 1993 Vienna Summit⁷³⁴ and the intensification of action against these phenomena.⁷³⁵ The fight against these phenomena is linked both to the promotion of human rights and to the strengthening of pluralistic democracy and stability in Europe.⁷³⁶ The third summit condemned all forms of intolerance and discrimination, in particular those based on sex, race and religion, and drew attention specifically to anti-Semitism and Islamophobia.⁷³⁷ While the importance of promoting understanding and tolerance was highlighted, the CoE states also expressed their increasing concern for managing and promoting cultural diversity while ensuring the cohesion of societies. It was noted that protecting and promoting cultural diversity on the basis of CoE values are essential conditions for the development of societies.⁷³⁸ Intercultural and interfaith dialogue based on universal human rights was viewed as a means of promoting awareness, understanding, reconciliation and tolerance as well as preventing conflicts and ensuring integration and the cohesion of society.⁷³⁹ The third summit also drew attention to the use of information and communication technologies in furthering criminal activities, including those of a racist and xenophobic nature.⁷⁴⁰

733. See Appendix II on national minorities, para. 4. The summit also instructed the CoE Committee of Ministers to draw up confidence-building measures aimed at increasing tolerance and understanding among peoples. *Ibid.*, para. 11.

734. Declaration of the second summit, para. 4.

735. *Ibid.*, para. 6. The intensification of the CoE actions in this area concern e.g. consolidating the role of ECRI. See the Action Plan of the second summit, Part I, para. 5, and the Action Plan of the third summit, Part I, para. 2, subpara. 4. See also the remarks *infra* in chapter 4.2.1.

736. Declaration of the second summit, para. 6, including subpara. 4. For common values, including cultural diversity, see the remarks *supra* in chapter 2.1.1.3.3. Respect for cultural diversity is also linked to the European heritage. See the Action Plan of the second summit, Part IV, para. 2.

737. The CoE states expressed their determination to further develop, within the CoE, rules and effective machinery to prevent and eradicate all forms of intolerance and discrimination, as well as to further implement equal opportunities policies in the member states. Declaration of the third summit, para. 9.

738. Action Plan of the third summit, Part III, para. 5, subpara. 1.

739. *Ibid.*, Part III, para. 6, subpara. 1. See also the remarks on the dialogue envisaged *supra* in chapter 2.1.1.3.3.

740. All CoE states were urged to sign and ratify the Convention on Cybercrime and to consider accepting its Additional Protocol Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems. *Ibid.*, Part II, para. 5, subpara. 4. Attention to new information technologies was already drawn by the second summit, which stressed the need to ensure that its applications respect human rights (including respect for private life) and cultural diversity as well as foster freedom of expression

The CoE summit documents contain no express references to either the gender dimensions of racial discrimination, racism and other forms of intolerance or the concept of multiple discrimination.⁷⁴¹ The CoE states have considered it important to mobilise particularly the youth in the work of advancing tolerance. Consequently, as envisaged in the first CoE summit,⁷⁴² the CoE carried out a European youth campaign against racism, xenophobia, anti-Semitism and intolerance in 1995, and the third CoE summit launched a new Europe-wide youth campaign in the spirit of the 1995 campaign.⁷⁴³

The CoE Framework Convention makes express references to tolerance, (intercultural) dialogue and cultural diversity in its Preamble,⁷⁴⁴ and elaborates these issues particularly in article 6. Article 6 is noted as an expression of the concerns stated in the Declaration and the Plan of Action on Combating Racism, Xenophobia, Anti-Semitism and Intolerance adopted at the first CoE summit.⁷⁴⁵ The text of article 6 does not explicitly mention racism, xenophobia, anti-Semitism, etc., but paragraph 1 of the provision stresses a spirit of tolerance and intercultural dialogue and points out the importance of promoting mutual respect, understanding and co-operation among all persons living in the territory of a state party.⁷⁴⁶ The article has a broad personal scope of application that also covers groups that are not viewed as national minorities; i.e. its application is extended to all persons living in the area of a state party and whose identity is linked to ethnic, cultural, linguistic or religious features.⁷⁴⁷ Thus, individuals belonging to groups with a migrant background also come within its ambit.⁷⁴⁸ The fields of education, culture and the media are speci-

and information. Declaration of the second summit, para. 9, subpara. 3, and Action Plan, Part IV, para. 3.

741. The Declaration of the third summit does refer to condemning intolerance (and discrimination) based on sex. See para. 9. See also the remarks *supra* in chapter 2.1.3.2 in the text on women.
742. See the Action Plan of Appendix III to the Declaration of the first summit, para. 1. See also the remarks on this *supra* in chapter 2.1.1.3.3.
743. Action Plan of the third summit, Part III, para 4, subpara. 1. For the participation of young people in advancing understanding, see also the Declaration of the second summit, para. 9, subparas 1 and 5.
744. See preambular para. 8.
745. Explanatory Report to the Convention, para. 47. The Declaration and the Plan of Action referred to are incorporated in Appendix III to the Declaration of the first summit. See the remarks *supra* (n. 727).
746. See also the Explanatory Report, para. 48.
747. Pursuant to art. 6.1, the states parties must e.g. take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, “irrespective of those persons’ ethnic, cultural, linguistic or religious identity”. For the references to ethnic, cultural, linguistic or religious identity, see also art. 6.2.
748. See also the remarks on the wide personal scope of application of art. 6 *supra* in chapter 2.1.1.3.2 and on the application of this provision by the AC *infra* in chapter 4.1.2.

cally mentioned in the provision, because they are considered particularly relevant to the achievement of the aims it sets out.⁷⁴⁹

The Explanatory Report accompanying the CoE Framework Convention mentions the issues of strengthening social cohesion and eliminating barriers between persons belonging to ethnic, cultural, linguistic and religious groups as well as the matter of integrating persons belonging to these groups into society. The integration of such persons is also linked to preserving their identity.⁷⁵⁰ Article 6 also refers to the possibility of persons being subjected to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity, and calls for protection against these incidents.⁷⁵¹

2.2.1.3.2 The European Conference against Racism

The European Conference against Racism “All different, all equal: from principle to practice” was held in 2000; it preceded the UN World Conference Against Racism held in 2001 in Durban and served as the preparatory meeting for the WCAR at the European level.⁷⁵² The Conference produced two documents: the ministers of the CoE member states adopted a political declaration at the concluding session, and the Conference adopted a set of General Conclusions.⁷⁵³

The Political Declaration reaffirms that Europe is a community of shared values characterised by tolerance and cultural diversity.⁷⁵⁴ The CoE is viewed as having a key role in the fight against the phenomena of racial discrimination, racism and other forms of intolerance,⁷⁵⁵ which, it is noted, threaten democratic societies and their fundamental values.⁷⁵⁶ The Declaration links tolerance and respect for diver-

749. Explanatory Report, para. 48. Promoting tolerance and permitting cultural pluralism is also addressed in the provision on access to the media. See art. 9.4.

750. The Explanatory Report asserts that in order to strengthen social cohesion, the aim of art. 6.1 is, *inter alia*, to promote tolerance and intercultural dialogue by eliminating barriers between persons belonging to different ethnic, cultural, linguistic and religious groups through the encouragement of intercultural organisations and movements that seek to promote mutual respect and understanding and to integrate these persons into society whilst preserving their identity. See para. 49.

751. Art. 6.2. This paragraph is noted as being inspired by para. 40.2 of the 1990 Copenhagen Document of the OSCE. See the Explanatory Report, para. 50.

752. The European Conference convened in October 2000 in Strasbourg. For the conference, see CoE (2004), pp. 16–18.

753. Both documents were forwarded to the Preparatory Committee of the WCAR as Europe’s contribution. European Conference against Racism (2000), p. 7. The two documents may also be found in this publication.

754. A note is also made concerning the multicultural nature of Europe. See para. 1.

755. The document refers to fighting racism, racial discrimination, xenophobia and related intolerance. See the use of terms in this research *supra* in chapter 1.3.

756. Para. 6. The Declaration also refers to the role of the UN (ICERD, UNHCHR), the EU (the EUMC, the Amsterdam Treaty and EC legislation), and the OSCE (HCNM, ODIHR,

sity to stability and peace⁷⁵⁷ and underlines equal dignity for all human beings, the promotion of equality of opportunity, the fight against marginalisation and social exclusion, and the enhancement of participation of individuals (especially those belonging to vulnerable groups).⁷⁵⁸ While anti-Semitism gets some specific attention, concern is voiced over the continued occurrence of intolerance on the grounds of religion and belief in its many forms.⁷⁵⁹ Contemporary forms of slavery and the persistence and development of aggressive nationalism and ethnocentrism are also noted.⁷⁶⁰ Migrants, asylum-seekers, refugees, displaced persons, non-nationals, indigenous peoples, minorities, and the Roma are specifically mentioned as groups targeted by various events in the area of racial discrimination, racism and other forms of intolerance.⁷⁶¹ Furthermore, the existence of multiple discrimination is noted⁷⁶² and mention is made of the role of the media, politicians, political parties and organisations as well as new technologies in dissemination of racist messages.⁷⁶³

The Declaration calls for the strengthening of the European bodies active in the area of anti-racism, in particular the action of ECRI, and enhancing co-operation among relevant international actors.⁷⁶⁴ The ministers of the CoE states also committed their states to take further steps, including legal measures, policy measures and educational and training measures, to prevent and eliminate racial discrimination, racism and other forms of intolerance, and to monitor and evaluate such action on a regular basis. The importance of human rights and intercultural education is stressed among preventive measures.⁷⁶⁵ The remarks on political measures also

RFoM) in this field. See paras 26–28 and 30. The role of NGOs is also mentioned. See paras 31 and 35.

757. Para. 7.

758. Paras 8–10. For participation, see also para. 33, point no. 8 under policy measures which refers to access to the decision-making processes in society, in particular at the local level.

759. Paras 15 and 21. The Holocaust is referred to in para. 14. Ethnic and religious cleansing, as well as genocide are also specifically mentioned and rejected. See paras 13 and 20. See also para. 34.

760. Paras 15 and 19.

761. The Declaration notes that these various groups are targeted on grounds related to language, religion or national or ethnic origin. See para. 16. For the Roma, see also para. 33, point no. 9 under policy measures. The document refers to “Roma/Gypsies and Travellers”.

762. Para. 18. See also para. 33, point no. 2 under policy measures.

763. Paras 23–25.

764. Paras 36 and 37.

765. Paras 32 and 33. Educational and training measures underline the role of education and awareness-raising to promote tolerance, respect for human rights and cultural diversity. It is specifically mentioned that these measures should be introduced and strengthened among young people. Additionally, training and awareness-raising targeting public officials is also mentioned. See para. 33, points no. 1 and 2 under educational and training measures. Para. 33 notes that legal measures contain the full and effective implementation at the national level of the relevant universal and European human rights instruments, adopting national legisla-

contain aspects of special interest for the research at hand in that they refer to integrating a gender perspective into policies and action, to creating conditions for the promotion and protection of the ethnic, cultural, linguistic and religious identity of persons belonging to national minorities, and to countering social exclusion and marginalisation, particularly by providing equal access to education, employment and housing. Furthermore, the Declaration proposes that special measures should be developed to actively involve the host society and encourage respect for cultural diversity, to promote fair treatment of non-nationals and to facilitate their integration into social, cultural, political and economic life.⁷⁶⁶

The General Conclusions echo a number of issues brought up in the Political Declaration,⁷⁶⁷ but, partly because they comprise a longer document, they typically contain a more extensive treatment.⁷⁶⁸ The document also addresses some issues not raised in the Political Declaration, including remarks on the existence of certain forms of racism and prejudice in state institutions, the need to collect and publish data broken down also by sex and age, and the interaction between racist and sexist prejudice and stereotypes.⁷⁶⁹ While the need to increase understanding and acceptance of differences is stressed,⁷⁷⁰ concern is also voiced over the existence of theories of supposedly insurmountable cultural differences between groups.⁷⁷¹ It is also noted that equal treatment by itself may not be enough if it does not overcome the weight of cumulative disadvantage suffered by persons who are victims of racial discrimination, racism and other forms of intolerance; accordingly it urges that a positive duty be imposed on public authorities to promote equality and to assess the impact of policies, as well as to prevent and punish violations.⁷⁷² The General Conclusions also address the integration of non-nationals into the host society and

tion and administrative measures, guaranteeing equality without discrimination (by ensuring equality of opportunity), providing support for victims, bringing to justice those responsible for racist acts and violence, and combating all forms of expression inciting racial hatred.

766. Para. 33, points no. 3–6 under policy measures. Policy measures refer also to the need to establish national policies and action plans to combat racial discrimination, racism and other forms of intolerance, including discrimination on multiple grounds, and to ensure non-discriminatory treatment of non-nationals detained by public authorities, the effective access of all members of the community to the decision-making processes, and full equality for the Roma. See points no. 1–2 and 7–9.

767. These include e.g. the concern over the rise of religious intolerance, including anti-Semitism, and persisting prejudice and discrimination against the Roma. See Part B, para. 5, points no.10–12, and Part C, paras 29 and 30.

768. This concerns e.g. the question of multiple discrimination. See Part B, para. 4, and Part C, paras 24 and 25. The various measures to be taken at the national level are more elaborate. See Part C. Gender dimensions are also acknowledged more clearly than in the Political Declaration. See Part C, para. 11, point no. 7, and para. 17.

769. See Part B, para. 5, point no. 8, and Part C, paras 8, 12, 25, 34 and 39.

770. Part C, para. 22.

771. Part B, para. 5, point no. 9.

772. Part B, para. 14.

call for the possibility of non-nationals to whom residency has been granted – taking account of length of residence – to enjoy the rights necessary for full integration into the host society. The document is not more specific about what these rights entail in concrete terms, but merely refers to applying human rights and fundamental freedoms to all persons on the territories of states, irrespective of their nationality or legal status.⁷⁷³

The General Conclusions underline the importance of participation in decision-making processes⁷⁷⁴ and reiterate the link between participation and integration.⁷⁷⁵ The CoE states are called upon to promote the positive aspects of immigration among the general public, one means for which would be to stress the value of diversity and the contribution made by migrants to society. Promoting the social inclusion of migrants is viewed as a key means of combating racism and other forms of intolerance. It is also pointed out that undue stress on restrictive admission/immigration policies may produce negative stereotyping and thus adversely affect persons belonging to targeted groups and the integration of non-nationals. Family reunion is viewed as having a positive effect on integration.⁷⁷⁶

773. It is also noted that integration policies should not be subordinate to other policies such as immigration controls. When granting nationality, states should not discriminate on grounds of racial, ethnic or cultural origin. See Part C, para. 15.

774. See particularly Part C, paras 18–20, which address the participation of various groups, including national minorities and migrants.

775. This is done in connection with the remarks on the setting up of integration programmes encouraging the establishment of partnerships between local authorities, associations working in this field and the communities of foreign origin. Enabling participation in community life is particularly emphasised. See Part C, para. 18.

776. Part C, paras 26 and 27.

The General Conclusions note the roles of the CoE Commissioner for Human Rights, ECRI and the EUMC. The CoE states are also called on to support the pertinent action of the OSCE in this area. See Part D.

Appendix I to the General Conclusions includes a list of international legal instruments which are relevant to combating racial discrimination, racism and other forms of intolerance. Of the instruments of universal application the list mentions e.g. the Geneva Conventions pertaining to humanitarian law and their protocols, the CEDAW, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Child Convention and its Optional Protocols, the UN Convention on Migrant Workers, and the Statute of the International Criminal Court. Of the European documents, in addition to the central instruments of the ECHR and its protocols and the European Social Charter (in both its original and revised forms), the list includes the European Convention on Establishment, the European Agreement on Regulations governing the Movement of Persons between Member States of the CoE, the European Convention on the Legal Status of Migrant Workers, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Convention on the Participation of Foreigners in Public Life at Local Level, the European Language Charter, the CoE Framework Convention, and the European Convention on Nationality. For this list, see European Conference against Racism (2000), pp. 39–40.

To follow up the decisions and recommendations made at the European Conference against Racism (as well as at the WCAR), the various sectors of the CoE have been encouraged to incorporate the results of the European Conference (and the WCAR) into their activities.⁷⁷⁷

2.2.2 Nationality and Trafficking in Human Beings

The importance attached by states to nationality, i.e. the legal bond between an individual and a state,⁷⁷⁸ has already been discussed above, particularly in the sections on minority rights.⁷⁷⁹ This importance is also reflected in the norms laid down in human rights instruments, with *the UDHR*, for instance, setting out everyone's right to a nationality⁷⁸⁰ and the human rights norms on children and women also specifically addressing the issue.⁷⁸¹ Among other things, nationality has significance in protecting a person against expulsion and ensuring his or her right to enter a country,⁷⁸² and it has played a prominent role in the diplomatic protection provided for in international law.⁷⁸³ Although the important starting point for international human rights is that human rights belong to all individuals irrespective of their nationality, there are also many rights whose enjoyment is linked to nationality. This is discussed below in chapter 2.3.1.2.

The significance attached to nationality is visible also in the attempts to reduce statelessness, for instance, by adopting international conventions to this end.⁷⁸⁴

777. The CoE organised an *ad hoc* meeting of experts to exchange views on the implementation of the conclusions in February 2002. Additionally, ECRI has provided encouragement and guidance to the CoE member states concerning the elaboration of national action plans to combat racism, which was one of the key recommendations of the European Conference (as well as of the WCAR). CoE (2004), p. 18. See also the remarks *infra* in chapter 4.2.3.

778. For nationality as a legal bond, see the European Convention on Nationality, art. 2(a).

779. See the remarks *supra* in chapter 2.1.4.1. See also the remarks *infra* in chapters 2.3.1 and 5.2.

780. Art. 15.

781. The child's right to acquire a nationality has been brought up e.g. in art. 24.3 of the ICCPR and in art. 7 of the Child Convention. The issue of the nationality of women has been addressed in a separate UN instrument, the Convention on the Nationality of Married Women, adopted in 1957, and also in art. 9 of the CEDAW.

It is also worth noting that the UN Declaration on Indigenous Peoples refers to the right of indigenous individuals to a nationality. See art. 6. Art. 33.1 refers to the right of indigenous individuals to obtain citizenship of the states in which they live.

782. See e.g. Protocol 4 to the ECHR, art. 3, which prohibits the expulsion of nationals and sets out the right to enter the territory of the state of which one is a national.

783. See e.g. Brownlie (1990), pp. 402–403. For the significance of nationality, see also Hakapää (2003), pp. 198–204, and Hailbronner (2003).

784. The two important UN instruments are the Convention relating to the Status of Stateless Persons from the year 1954 and the Convention on the Reduction of Statelessness from the year 1961.

States have also been concerned about double or multiple nationality, which has been considered problematic particularly from the viewpoint of compulsory military service.⁷⁸⁵ However, states' reservations towards multiple nationality have decreased in the course of time, and this somewhat more relaxed attitude is reflected in the text of *the European Convention on Nationality* adopted within the CoE in 1997.⁷⁸⁶ This Convention refers to the desirability of finding appropriate solutions to the consequences of multiple nationality, in particular as regards the rights and duties of multiple nationals (including military obligations).⁷⁸⁷ The Explanatory Report to the Convention also makes an explicit link between integration and nationality, and refers to the need for the integration of permanent residents.⁷⁸⁸ It also points out how multiple nationality is seen as both hindering and furthering the integration of individuals.⁷⁸⁹ It is worthy of note that while the document adopted at the CoE third summit draws attention to the laws governing the issue of nationality and to the promotion of acquisition of citizenship, it does not explicitly link these issues to integration.⁷⁹⁰

The terms "nationality" and "citizenship" are sometimes considered synonymous and sometimes not. The former approach applies, for example, in the case of the European Convention on Nationality.⁷⁹¹ When the two concepts are not seen to be synonymous, a distinction is drawn whereby "nationality" denotes the legal status of recognised membership in the state, or formal citizenship, whilst "citizenship" in a more general sense relates to members' rights and duties in the civic, political,

785. This concern of states is reflected in the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality concluded in the CoE in 1963.

786. According to art. 27.1, this Convention is open for signature by the CoE member states and the non-member states which have participated in its elaboration.

787. Preamble paras 9 and 10. The prevention of statelessness is among the express aims of the Convention. See preamble para. 5, and arts 4(b) and 8. The Convention also refers to avoiding discrimination in matters relating to nationality. Preamble para. 6, and art. 5.

788. The Explanatory Report mentions the developments in Europe since 1963, including labour migrations between European states leading to substantial immigrant populations, the need for the integration of permanent residents, the growing number of marriages between spouses of different nationalities, and freedom of movement between EU member states. See p. 2.

789. It is pointed out that in some states, especially when a large proportion of persons wish to acquire or have acquired nationality, the retention of another nationality may be seen as hindering the full integration of such persons. However, other states may consider it preferable to facilitate the acquisition of nationality by allowing persons to retain their nationality of origin and thus further their integration in the receiving state (e.g. to enable such persons to retain the same nationality as other members of the family or to facilitate their return to their country of origin if they so wish). See the Explanatory Report, p. 3.

790. Action Plan of the third summit, Part I, para. 3, subpara. 7.

791. The Explanatory Report attached to it notes that with regard to the effects of the Convention, the terms "nationality" and "citizenship" are synonymous. See p. 5.

economic, and social realms.⁷⁹² Various documents of relevance in the area of human rights, as well as the views and opinions of international expert bodies and actors, use both terms and refer to both “nationals/non-nationals” and “citizens/non-citizens”;⁷⁹³ often it is impossible to see if any difference between the concepts of nationality and citizenship is envisaged.⁷⁹⁴

Trafficking in human beings is part of the phenomenon of migration, and also has links both to (transnational) crimes and human rights.⁷⁹⁵ Trafficking in human beings, which takes place both within countries and across borders and in which particularly women and children are victimised,⁷⁹⁶ has become one of the gravest human rights problems that needs to be addressed in contemporary Europe. The problem of trafficking in human beings is by no means a new phenomenon, and attempts to tackle it through international documents have been made since the beginning of the 20th century. Over the years, and in the era of globalisation, trafficking has nevertheless acquired new dimensions, providing most profitable sources of income for traffickers. Since the 1990s, increasing attention has been attached to this issue by various international organisations and actors.

Two central and often mentioned international documents in the area of trafficking in human beings are *the Convention against Transnational Organized Crime* and its *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (the so-called Palermo Protocol on Trafficking), both of which were adopted within the UN in 2000.⁷⁹⁷ These instruments are not human rights treaties per se, since they were primarily concluded to combat transnational organised crime. However, the Palermo Protocol on Trafficking also includes important provisions on the protection of trafficking victims. In addition, it is the first international instrument to define trafficking in human beings.⁷⁹⁸ While the need to fight traffick-

792. Ireland (2004), p. 2, n. 1.

793. See e.g. the use of these concepts by the international bodies discussed *infra* in chapter 4.

794. For the tendency to associate closely the concepts of citizenship and nationality, as well as frequently not seeing them as distinct, see EESC (2002), p. 65.

795. While trafficking has been addressed in the framework of human rights, the two forms of undocumented migration – i.e. smuggling of migrants and trafficking in human beings – are predominantly considered from the viewpoint of crime prevention. See also the remarks *supra* in chapter 2.1.3.1, and on the two Protocols attached to the UN Convention *infra*. Due to their connections to organised crime, which is nowadays often transnational in nature, both smuggling and trafficking are linked closely to the security of states. See also the remarks *supra* in chapter 1.1.

796. International instruments also contain express references to the victimization of women and children.

797. Another protocol was adopted to supplement the main convention on the issue of smuggling.

798. See the definition in art. 3. The scope of application of the instrument has two significant limitations: it concerns offences which are transnational in nature and involve an organised

ing has also been incorporated into such human rights documents as *the CEDAW*⁷⁹⁹ and *the Child Convention*,⁸⁰⁰ *the Convention on Action against Trafficking in Human Beings*, adopted within the CoE in 2005, deserves particular mention for being the first international convention to address the issue of trafficking in human beings broadly from the viewpoint of human rights.⁸⁰¹

The OSCE has paid attention to the problem of trafficking in human beings in its commitments since 1991.⁸⁰² In recent years the OSCE has intensified its focus on the phenomenon,⁸⁰³ and, while it previously treated it primarily in the context of organised crime, it has increasingly linked it to human rights.⁸⁰⁴ In 2003, the OSCE adopted *the OSCE Action Plan to Combat Trafficking in Human Beings*,⁸⁰⁵ and subsequently it has drawn particular attention to trafficking in children.⁸⁰⁶

The issue of trafficking in human beings is also dealt with to some extent in the documents on migrant workers discussed above in this research,⁸⁰⁷ and it is prominently addressed in the area of anti-racism by *the Durban Document*.⁸⁰⁸

The norms addressing trafficking contain some express references to the issue of integration. The primary aim that can be seen in international documents is to repatriate victims of trafficking or return them to the country they entered from and to assist them in reintegration.⁸⁰⁹ However, the possibility of the victims remaining in

criminal group. See art. 4.

799. The CEDAW obligates the states parties to it to take measures to suppress all forms of traffic in women and exploitation of prostitution of women. See art. 6.
800. Arts 35 and 36. In 2000 an Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography was added to the Convention aiming at enhancing efforts to address trafficking in children.
801. The definition of trafficking set out in art. 4 of the CoE Convention follows that of the Palermo Protocol on Trafficking. However, the CoE Convention differs from the Palermo Protocol in that it concerns also intra-state trafficking and trafficking having no links to organised crime. See art. 2.
802. The 1991 Moscow Document draws attention to traffic in women and exploitation of prostitution of women. See para. 40.7. The 1999 Charter for European Security addresses the elimination of sexual exploitation and all forms of trafficking in human beings. See para. 24.
803. This is apparent in several decisions adopted by the OSCE Ministerial Council in the course of the 2000s.
804. See the pertinent commitments and decisions in ODIHR (2005), pp. 210–230.
805. The Action Plan is a detailed document consisting of recommended actions at the national level as well as tasks for OSCE institutions and bodies. The definition of trafficking stipulated therein follows that of the Palermo Protocol on Trafficking.
806. See e.g. Ministerial Council Decision No. 13/04 on Child Victims of Trafficking (2004), and the Permanent Council Decision on Child Victims of Trafficking (2005). The OSCE has also had a Special Representative on Combating Trafficking in Human Beings since 2004. See the OSCE website at <http://www.osce.org>.
807. See the remarks *supra* in chapter 2.1.3.1.1.
808. See the remarks *supra* in chapter 2.2.1.1.3.
809. See e.g. the Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography, art. 10.2; the Palermo Protocol on Trafficking, art. 8;

the territory of the receiving state has also been envisaged. This possibility, as well as measures of inclusion and (re)integration, have been mentioned particularly with respect to child victims of trafficking.⁸¹⁰

2.2.3 Summary and Conclusions on the Norms Addressing Certain Issues

2.2.3.1 Questions Addressed

The problems of racial discrimination, racism and other forms of intolerance have attracted considerable attention in international human rights norms, and fighting these phenomena has been often mentioned as a priority for the international community, with the ICERD seen as the cornerstone instrument in the area.⁸¹¹

The international anti-racism norms underscore the principles of *equality and non-discrimination*. As regards various forms of intolerance, the norms focus on racism, but also address xenophobia. While the grounds of religion and belief were excluded from the scope of application of the ICERD, the more recent documents in the area, as a rule, also expressly concern religious discrimination and intolerance. For instance, although the Durban Document echoes the definition of racial discrimination set out in the ICERD, it tackles directly the concerns of discrimination and intolerance based on religion or belief.⁸¹² The documents adopted within the CoE and the OSCE place considerable emphasis on the fight against anti-Semitism,⁸¹³ and Islamophobia appeared among the pronounced concerns in international instruments after the terrorist attacks in the US in 2001.⁸¹⁴ In recent years states have paid an increasing amount of attention to religious intolerance, a trend that is reflected in the international norms in the area and, more concretely, in the appointment of three representatives of the OSCE Chairman-in-Office to

the Convention on Action against Trafficking in Human Beings, art. 16.5; and the OSCE Action Plan to Combat Trafficking in Human Beings, para. 7.

810. The Palermo Protocol on Trafficking refers to humanitarian and compassionate factors. See art. 7. See also the Convention on Action against Trafficking in Human Beings, art. 16.7 and the Explanatory Report thereto, paras 202, 203 and 207; the OSCE Action Plan to Combat Trafficking in Human Beings, Part V, para. 8.2; and the Permanent Council Decision on Child Victims of Trafficking (2005), paras 6, 9 and 11.

811. See e.g. the remarks in the Vienna Document of the 1993 World Conference on Human Rights and the Durban Document. For the cornerstone role of the ICERD, see also the OSCE commitments.

812. In general, the Durban Document suffers from certain inconsistencies, for instance, as regards the use of terms and concepts. While it has adopted the ICERD's definition of discrimination as its starting point, the grounds of religion and belief have been considered independently in the document, not just as an aggravating factor to other grounds.

813. The Durban Document also refers to anti-Semitism.

814. See e.g. the Durban Document and the Declaration of the third CoE summit.

address various manifestations of religious intolerance. Characteristic of the OSCE commitments in the area of anti-racism is that they contain references to concepts usually not expressly mentioned in other frameworks, including totalitarianism, aggressive nationalism,⁸¹⁵ and chauvinism.⁸¹⁶

A common denominator underscoring the international anti-racism norms is a call for *understanding and tolerance*, which is to be found in practically all documents of relevance for anti-racist action. The increasing need for tolerance has been clearly linked to the expansion of migration flows. The international anti-racism norms also call for respect of various kinds with somewhat varying emphases. For instance, the UN Declaration on Religion and Belief underscores the need for understanding, tolerance and respect in matters relating to freedom of religion or belief. The Durban Document advocates the promotion of tolerance and the preservation and even promotion of pluralism and diversity, and specifically calls for respect for cultural diversity as well as for cultures of various groups. UNESCO documents highlight the need for respect for the right of all groups to their own cultural identity, respect for human dignity and differences, mutual respect between peoples and cultures, the equal dignity of all cultures, and respect for all cultures. The OSCE commitments and decisions refer to the protection of and respect for diversity – cultural and religious diversity in particular – as well as respect for different civilizations and cultures. Additionally, they address the importance of promoting mutual respect, understanding and co-operation among all persons living in the territory of a state, and of respecting the equal dignity of all human beings, and human rights.

Whilst the recent OSCE decisions highlight religious diversity,⁸¹⁷ otherwise the provisions on *diversity* in the area of anti-racism primarily concern cultural diversity. UNESCO has prominently designated cultural diversity as “the common heritage of humanity”, linked cultural diversity and respect for human dignity, and viewed linguistic diversity as a fundamental element of cultural diversity. When calls are made to respect cultures within the framework of the CoE, a certain focus or emphasis is placed on European cultures.⁸¹⁸ Undoubtedly this should be read, at least partly, as a consequence of the CoE’s role as a regional organisation focussing on

815. Aggressive nationalism is also noted in the Political Declaration of the European Conference against Racism, which also raises concern for ethnocentrism.

816. The attention drawn by the General Conclusions of the European Conference against Racism to both sexism and racism and their interaction is worthy of note. These remarks were not reflected in the Political Declaration of the Conference.

817. See the decisions by the OSCE Ministerial Council on tolerance and non-discrimination.

818. This kind of focus may be seen in the Declaration of the second CoE summit, which refers to the protection and promotion of “our European cultural and natural heritage”. The Action Plan adopted at the same summit links cultural diversity and the European heritage. The third CoE summit noted that European identity and unity are based on shared fundamental values and respect for “our common heritage and cultural diversity”.

regional questions. Both the OSCE and the CoE have deemed respect for diversity to be one of the characteristics of democratic and pluralistic societies.

Some documents discuss tolerance, respect and cultural diversity in relation to *values and/or principles*. The Durban Document refers to the values of solidarity, respect, tolerance, multiculturalism and interculturalism. The political CoE documents state that the common and/or shared values and fundamental principles are the basis of a free, tolerant and just European society and note that these values and principles include democracy, human rights, the rule of law, tolerance, solidarity, freedom of expression and information, cultural diversity, and the equal dignity of all human beings.⁸¹⁹ The CoE states have also asserted that protecting and promoting cultural diversity is to be done on the basis of CoE values.⁸²⁰ It is of some interest that the value of multiculturalism is pronounced in the instruments adopted in the UN and UNESCO, whereas the concept is strikingly less prominent in the OSCE and CoE documents.

Similarly to many international group-specific norms discussed above in chapter 2.1, the anti-racism norms contain provisions addressing questions of *identity*. Many of these concern the identities of groups, although the identity of individuals has also been dealt with. These more individual-oriented references may be found particularly in the OSCE and CoE norms.⁸²¹ While UNESCO has generally proclaimed “the right of all individuals and groups to be different”, UNESCO documents establish links between culture and identity and thus often speak about cultural identity. The documents also address the question of the identities and cultural expressions of peoples and societies. The Durban Document discusses identity issues with respect to indigenous peoples, national, ethnic, cultural, linguistic and religious minorities, and people of African descent. It also notes the importance of respect for the cultural identity of migrants and contains a noteworthy provision on the cultural and religious identity of women.⁸²²

Some international anti-racism norms contain the idea that recognising differences protects individuals against racial discrimination, racism and other forms of intolerance. The Durban Document makes this assertion when it speaks about guaranteeing the rights of persons belonging to national or ethnic, religious and

819. See the documents adopted at the CoE summits and the Political Declaration of the European Conference against Racism.

820. This was noted by the third CoE summit.

821. The pertinent OSCE commitments speak about the protection of persons or groups with a racial, ethnic, cultural, linguistic or religious identity. Art. 6 of the CoE Framework Convention refers to the identity of persons belonging to various ethnic, cultural, linguistic and religious groups. The Political Declaration of the European Conference against Racism notes the ethnic, cultural, linguistic and religious identity of persons belonging to national minorities.

822. See also the remarks *infra* in chapter 2.2.3.2.

linguistic minorities. The CoE states have put forward a similar claim with respect to national minorities.⁸²³

In addition to the references they make to identity questions, the anti-racism norms have a number of other resemblances to the international norms on minorities. These include an emphasis on the issue of *participation* and establishing an explicit connection with the issues of *peace, security and stability*.⁸²⁴ Regarding the latter, the anti-racism norms refer to the intra- and inter-state dimensions of the issues of racial discrimination, racism and other forms of intolerance, as well as links to peace, security and stability both between and within states. The drafting process and the initial application of the ICERD serve as a prime example of how racial discrimination and racism were first considered relevant particularly in inter-nation and inter-state relations.⁸²⁵ The inter-state dimensions of the anti-racism norms are also apparent in the more recent documents adopted in this area,⁸²⁶ although they draw increasing attention to these phenomena within states. This shift in focus towards intra-state issues and relations between various (ethnic, cultural etc.) groups within states can be clearly seen in the OSCE and the CoE documents. As mentioned, in these organisations tolerance and diversity are also discussed as being fundamental features of a democratic society. The Durban Document asserts a connection between the equal participation of all individuals and peoples and the formation of just, equitable, democratic and inclusive societies. It also refers to democratic, inclusive and participatory governance.

Another similarity with the international discourse on minorities may be discerned if one looks at the groups that have been the focus of attention in the anti-racism norms; to a great extent, both frameworks are concerned with the same kinds of groups, i.e. those whose defining features relate essentially to ethnicity, religion, language, or culture. The Durban Document also incorporates a prominent group-specific component in its extensive references concerning national, ethnic, cultural, linguistic and religious minorities, on the one hand, and indigenous peoples, on the other.⁸²⁷ The Roma have received particular attention in the anti-racism norms, and among the international organisations the OSCE has been in the forefront in actively considering their situation and concretely acting upon the problems they face in Europe; the concern for the situation of the Roma has been both indicated in the OSCE commitments and decisions in the area of anti-racism and reflected

823. See the Political Declaration of the European Conference against Racism.

824. Participation and links to peace, security and stability have been highlighted in most pertinent norms. Participation is a particularly prominent issue in the Durban Document.

825. Inter-state implications come to the fore also in the UN Declaration on Religion and Belief, and in UNESCO documents.

826. See particularly the Durban Document.

827. The manner in which the Durban Document addresses the issue of people African descent resembles the way in which it considers indigenous peoples.

in its concrete activities.⁸²⁸ Subsequently, the CoE and the UN have also attached increasing importance to questions pertaining to the Roma, resulting in express provisions on them in their documents.⁸²⁹ This increased attention to the Roma has recently resulted in the establishment of the European Forum for Roma and Travellers, which co-operates closely with the CoE in particular; this is a noteworthy step at the international level in enhancing the participation of this minority in the issues affecting it. The establishment of this forum highlights the importance of participation.⁸³⁰

The anti-racism discourse is not obstructed by the same kind of dispute over the question of nationality/citizenship⁸³¹ as has been seen in the area of international minority protection; nowadays non-nationals/non-citizens are clearly covered by the norms.⁸³² Consequently, persons belonging to various groups with an immigrant background – including migrants, migrant workers, asylum-seekers, refugees, etc. – come within the ambit of the anti-racism norms. Concern for discrimination and intolerance against migrant workers is often separately voiced.⁸³³ It is also noteworthy that the anti-racism norms contain provisions calling for the fair treatment of migrants and non-nationals.⁸³⁴

Regarding the *means* of addressing discrimination, racism and other forms of intolerance, the relevant international norms contain some references to strengthening international co-operation and enhancing international mechanisms in this area,⁸³⁵ but the importance of taking various measures, including legal measures, at the national level is given particular emphasis.⁸³⁶ The norms, especially those of

828. CPRSI of the ODIHR has been the focal point of Roma activities within the OSCE. See also the remarks on the attention paid by the HCNM to the Roma *infra* in chapter 4.3.2.

829. See the Durban Document and the documents adopted at the CoE summits and at the European Conference against Racism.

830. For the forum, see the forum's website at <http://ertf.org/en/index.html> (visited on 10 October 2007).

831. See the remarks on the use of the concepts of nationality and citizenship *supra* in chapter 2.2.2.

832. The (earlier) confusion caused by the distinction between citizens and non-citizens in the ICERD is discussed *supra* in chapter 2.2.1.1.1. It is noteworthy that the OSCE commitments in the area specifically targeting the Roma contain a note on nationals.

833. See e.g. the Vienna Document of the 1993 World Conference on Human Rights and the UNESCO, ILO and OSCE documents.

834. The Durban Document refers to promoting the fair treatment of migrants, and the Political Declaration of the European Conference against Racism to promoting the fair treatment of non-nationals. See also the remarks *infra* in chapter 2.2.3.3.

835. See the Durban Document and the remarks in the CoE documents e.g. on strengthening the role of ECRI.

836. The Durban Document also calls for elaborating action plans at the national level. For various domestic measures, including notes on national action plans, see also the Political Declaration of the European Conference against Racism.

global application, also contain some references to positive obligations of states in the area.⁸³⁷ Education, and specifically human rights education, has been strongly stressed throughout the documents. In recent years, particularly the OSCE and the CoE have stressed the importance of intercultural and inter-religious/faith dialogue. UNESCO has drawn attention to the important role of both contacts and dialogue,⁸³⁸ but whereas the OSCE and the CoE seem to stress dialogue more at the level of individuals, UNESCO places more emphasis on contacts and dialogue among cultures. The role of the media and the Internet, as well as that of politicians, have also been highlighted. The CoE seems to give children and the youth a special role in advancing understanding and tolerance.⁸³⁹ Furthermore, while implementing human rights is considered important in the fight against racial discrimination, racism and other forms of intolerance, it is noteworthy that UNESCO has also raised the issue of the duties of individuals both towards other people and the society in which they live.⁸⁴⁰

The Durban Document can hardly be seen as an exemplary piece of work among international documents negotiated by states due to certain inconsistencies it contains,⁸⁴¹ but it nevertheless incorporates points that set it apart from the norms adopted by the CoE and the OSCE. Among these points is the focus placed on the gender dimensions of racial discrimination, racism and other forms of intolerance, with a number of provisions not only recognising the need to consider the specific situations of women and girls but also referring to the need to pay due attention to the gender dimension in the area of anti-racist action more generally. Whilst the General Recommendation adopted by CERD in 2000, which addresses the gender-related dimensions of racial discrimination, deserves particular mention as paving the way for the recognition of the importance of gender sensitivity in this area, the provisions of the Durban Document in this regard signify a broader recognition of the significance of gender dimensions. In general, the Durban Document is clearly better elaborated in this respect than the documents adopted in the CoE and the OSCE.⁸⁴²

837. See the ICERD, the Durban Document, and UNESCO documents. The importance of the positive duties of public authorities to promote equality has also been highlighted in the General Conclusions of the European Conference against Racism. The Political Declaration of the Conference did not incorporate this point.

838. UNESCO has also referred to interculturalism.

839. See particularly the youth campaigns proclaimed by the first and third CoE summits.

840. See the Declaration on Race and Racial Prejudice. The responsibilities of individuals have also been touched upon in the Action Plan of the second CoE summit, which discusses promoting citizens' awareness of their rights and responsibilities in a democratic society in connection with education for democratic citizenship.

841. See also the remarks on the use of terms and concepts *supra* in this section (n. 812).

842. The Political Declaration of the European Conference against Racism does contain a note on the need to integrate a gender perspective into policies and action.

Also worthy of note in the Durban Document is the attention to the racist dimensions of the phenomenon of trafficking in human beings, a feature which sets the Document in the forefront of addressing such concerns. Interestingly, the Convention on Action against Trafficking in Human Beings, which is the first human rights convention drawing attention to the human rights aspects of trafficking more broadly, does not similarly recognise the link between racism or racist attitudes and trafficking in human beings. Furthermore, while both the CoE and the OSCE documents in the area of anti-racism are rather hesitant to voice concerns over multiple forms of discrimination, the Durban Document makes numerous references to the issue. The Durban Document even notes institutional or structural discrimination in the case of migrants.⁸⁴³ Its references to violence against women, sexual violence and other gender-based violence against women and girls also merit mention.⁸⁴⁴

Concerning the issue of *nationality/citizenship* and the regulation of the elements relating to it, including the conditions of granting nationality/citizenship, states have clearly been reluctant to conclude international norms which would limit their national decision-making power in this area. The question of trafficking in human beings, for its part, has been increasingly considered in international norms and decisions, both in the anti-racism norms⁸⁴⁵ and in separate international documents. The latter have placed considerable emphasis on combating the crime of trafficking, whilst the protection of victims of trafficking has only recently been given more attention.⁸⁴⁶

2.2.3.2 Concerns, Challenges and Tensions

While the international anti-racism norms call for respect for diversity and differences, they also put forward challenges linked to differences. The pertinent OSCE commitments note that the racial, ethnic, cultural and linguistic or religious iden-

843. The Political Declaration of the European Conference against Racism does contain a brief note on the existence of multiple discrimination. While the General Conclusions of the Conference are more elaborate on this issue, they also contain remarks pointing to institutionalised racism in state institutions. These remarks did not find their way into the Political Declaration of the Conference. The attention recently drawn to the issue of institutional or systemic nature of racism by the European Court of Human Rights is worthy of note. See the remarks on this *supra* in the beginning of chapter 2.2.1.3 (n. 722). The OSCE has prominently addressed the issue of multiple discrimination with respect to Romani women.

844. These issues have been raised e.g. with respect to indigenous women and girls, migrant women and children (who are often victims of spousal or domestic violence), and refugee and internally displaced women and girls. Racially motivated violence against women is also noted in general terms.

845. See particularly the Durban Document.

846. See particularly the Convention on Action against Trafficking in Human Beings. Also the Child Convention, with its additional protocols, focuses on the victims.

tivity of persons or groups may subject these individuals or groups to threats or acts of discrimination, hostility or violence. This aspect of the issue is echoed in the CoE Framework Convention, article 6.2 of which refers to protecting persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity. The Durban Document points out that members of certain groups with a distinct cultural identity face barriers associated with ethnic and religious factors as well as traditions and customs. The Durban Document also expressly recognises the challenges that people of different socially constructed races, colours, descent, national or ethnic origins, religions and languages experience in seeking to live together and to develop harmonious multi-racial and multicultural societies. It is also worthy of note that in connection with addressing the situation of the Roma, CERD has asserted that their cultural differences may contribute to their marginalisation.⁸⁴⁷ Statements of this sort suggest that differences, and particularly differences and identities connected with ethnic, cultural and linguistic or religious characteristics, are prone to fuel tensions, challenges and problems.

In recognition of the way various identities or group characteristics create barriers between groups and individuals belonging to these groups, the international anti-racism norms include express provisions on the need to combat and eradicate these barriers.⁸⁴⁸ Solutions offered by the international norms to this challenge, to tackling these barriers and advancing tolerance include enhancing contacts among groups and individuals belonging to different groups and encouraging dialogue.

Concern for differences is also reflected in states' concern for social cohesion, which comes to the fore in the anti-racism norms. It may be observed that the concern for social cohesion has been highlighted particularly in the CoE documents. When the CoE Framework Convention discusses social cohesion in the context of article 6, the question is linked to tolerance, the elimination of barriers between persons belonging to ethnic, cultural, linguistic and religious groups, intercultural dialogue, and the integration of these persons into society.⁸⁴⁹ The documents adopted at the CoE summits refer to the need to develop strategies to manage and promote cultural diversity while ensuring the cohesion of societies.⁸⁵⁰ In general, the CoE has stressed the value of (social) cohesion in combating all forms of exclusion and

847. CERD has put forth this idea in its General Recommendation No. 27 on discrimination against Roma. See para. 34.

848. See e.g. the ICERD, the OSCE commitments, and art. 6 of the CoE Framework Convention.

849. These remarks have been made in the Explanatory Report.

850. The first CoE summit pointed out that the deterioration of the economic situation is a threat to the social cohesion of European societies by generating forms of exclusion likely to foster social tensions and manifestations of xenophobia. The third CoE summit stressed the importance of understanding and tolerance and expressed increasing concern for the management and promotion of cultural diversity while ensuring the cohesion of societies.

ensuring better protection of the weakest members of society.⁸⁵¹ UNESCO documents also contain some provisions on the issue of social cohesion and articulate links between, among other things, culture, identity, social cohesion, tolerance, dialogue, co-operation, international peace and security, and cultural diversity. Policies for the inclusion and participation of all citizens are noted as guarantees of social cohesion.⁸⁵²

While international norms incorporate states' concern for differences, there are also remarks on record showing an apprehension regarding the homogenisation pressure on cultures. This has been expressed most vocally within UNESCO, and the pressure has been linked to the challenges which globalisation poses to cultural diversity. Although the cultures of persons belonging to minorities and indigenous peoples are also mentioned in these contexts, the protection of the cultures of these groups is clearly not the main concern; rather, the instruments articulate a general concern about the pressure to homogenise that globalisation imposes on cultures.⁸⁵³

Characteristic of the anti-racism discourse is that it is pregnant with tensions, including – especially from states' point of view – a tension between diversity (and pluralism) and the cohesion of society, and between promoting diversity (pluralism) and building an inclusive (or integrated) society. Another tension arises from the demands for equality and non-discrimination built into the anti-racism discourse and the demands for respect for diversity and differences and for the promotion of pluralism or diversity. Furthermore, the message put forth in the UN era has been that there are no distinct human races, but all human beings belong to the same “human race” or “a single species”;⁸⁵⁴ i.e. there has been a shift from emphasising physical differences among individuals to stressing the similarities between all human beings. Against this background of stressing blindness to differences, the calls to respect cultural and other differences pose a challenge in that they have prompted new forms of racism, including theories of supposedly insurmountable cultural differences between groups.⁸⁵⁵ A further challenge of the anti-racism discourse, which has elevated the importance of tolerance and respect,⁸⁵⁶ concerns the limits of those values; i.e. what should and what should not be accepted in the name of tolerance and respect. Although the international anti-racism norms do not incorporate the

851. See e.g. the Declaration of the second CoE summit.

852. See the Universal Declaration on Cultural Diversity. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions makes a note on the importance of culture for social cohesion.

853. Also the Durban Document incorporates some stipulations on the effects of globalisation, including remarks on its negative outcomes.

854. See the Durban Document and UNESCO documents.

855. The General Conclusions of the European Conference against Racism refer to the existence of these theories, and the Durban Document notes the existence of contemporary forms and manifestations of theories of superiority of certain races and cultures over others.

856. See the remarks on values (and principles) *supra*.

compatibility clauses seen in the international norms on minorities and indigenous peoples,⁸⁵⁷ the requirement to comply with human rights does come to the fore.⁸⁵⁸ However, although extreme manifestations of intolerance, such as genocide, apartheid and ethnic cleansing have been specifically addressed as well as criminalised in international norms,⁸⁵⁹ the general references to human rights are often not enough to solve the challenges relating to the limits of tolerance and respect.

Additionally, certain remarks relating to religion put forth in the Durban Document in particular deserve some attention. This is when the Document discusses a central role of religion, spirituality and belief in the lives of individuals, the role of religion, spirituality and belief in contributing to the eradication of racial discrimination, racism and other forms of intolerance, and the cultural and religious identity of women belonging to certain faiths and religious minorities. The Document also contains remarks on certain communal aspects of religion when it considers religious communities and their religious beliefs. Also UNESCO has made an interesting observation in expressly mentioning the importance of culture and its potential for the enhancement of the status and role of women in society. It has also highlighted the need to pay due attention to the special circumstances and needs of women in the context of cultural expressions.⁸⁶⁰

The challenges and tensions in the area of the anti-racism discourse, including aspects pertaining to religions and culture, are discussed further in the concluding chapter of this research.

857. See the remarks *supra* in chapter 2.1.4.2. The OSCE commitments in the area of anti-racism set out in the 1991 Moscow Document contain a reference to compliance with national law and international obligations of states in the context of migrant workers.

858. Tolerance has been linked most clearly to the recognition of (universal) human rights and fundamental freedoms in UNESCO documents. The Political Declaration of the European Conference against Racism refers to respect for human rights, and the intercultural and inter-faith dialogue proposed at the third CoE summit is to be based on universal human rights. The UN Declaration on Religion and Belief demands consistency with the UDHR and the UN Covenants.

859. See the Convention on the Prevention and Punishment of the Crime of Genocide. Apartheid is tackled e.g. in the ICERD and in some conventions specifically addressing it. Ethnic cleansing emerged among international law concepts particularly during the Yugoslav war in the course of the 1990s, and consequently it also appears in more recent documents. See e.g. the Vienna Document of the 1993 World Conference on Human Rights and the documents of the European Conference against Racism. The latter also refer to religious cleansing. See also the remarks *supra* in chapter 2.2.1.

860. See the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

2.2.3.3 Incorporation: Inclusion and Integration

The international anti-racism norms frequently mention such concepts as inclusion, inclusive societies, integration, combating marginalisation and social exclusion. The central thrust of the norms is that discrimination and intolerance lead to exclusion and marginalisation and, consequently, racial discrimination, racism and other forms of intolerance must be combated in order to build an inclusive society.⁸⁶¹ The ICERD openly promotes inclusiveness and expressly calls for the elimination of the practices of segregation and separation (including apartheid). The instrument also touches upon the concept of integration, albeit only in passing, when it discusses “integrationist multiracial organizations”. The Vienna Document of the 1993 World Conference on Human Rights raises concern over the exclusion resulting from racial discrimination, racism and other forms of intolerance.

As regards integration, the part of the Explanatory Report dealing with article 6 of the CoE Framework Convention gives somewhat more substance to the concept by establishing a connection between integrating persons belonging to ethnic, cultural, linguistic and religious groups into society and preserving their identity. The remarks made in this connection link integration not only to identity but also to the issues of social cohesion, tolerance, dialogue, and eliminating barriers. Numerous statements on the need to counter social exclusion and marginalisation (of all members of society) are voiced in the political CoE documents, and they link the question of integration to non-nationals by calling for facilitation of their integration into social, cultural, political and economic life. These documents reiterate the connection between integration and the cohesion of society and emphasise the role of intercultural and inter-faith dialogue for integration.⁸⁶² It is also in the context of integration that the CoE states have spoken of promoting the fair treatment of non-nationals.⁸⁶³

While the General Conclusions adopted at the European Conference against Racism do not represent commitments of CoE states, the numerous aspects of relevance for integration raised therein deserve to be noted here. The Conclusions reiterate the need to integrate non-nationals into the host society and emphasise the role of human rights and participation for integration. They also cite the positive role of family reunion and note that the integration of non-nationals may be adversely affected by unduly restrictive admission/immigration policies which produce negative stereotyping. The importance of promoting the positive aspects of immi-

861. As already discussed *supra*, extreme forms of exclusion, such as apartheid, as well as acts undermining diversity in the most brutal manner – i.e. genocide and ethnic cleansing – have been banned (and criminalised) in international norms.

862. See particularly the documents adopted at the CoE summits.

863. See the Political Declaration of the European Conference against Racism.

gration among the general public, including highlighting the value of diversity and the contribution made by migrants to society, is also stressed.⁸⁶⁴

Of the international documents of relevance in the area of anti-racism, the Durban Document contains most frequent references to inclusion, marginalisation, social exclusion, and integration. It calls for facilitating the integration of migrants into social, cultural, political and economic life, and views family reunification having the positive effect for integration. The Document establishes a general link between integration and participation (at all levels of the decision-making process). Integration of migrants is also associated with respect for cultural diversity and with promoting the fair treatment of these persons.⁸⁶⁵ While the Durban Document openly addresses the integration of Africans and people of African descent, it makes a general call to fully integrate into society victims of racial discrimination, racism and other forms of intolerance. Additionally, when clearly favouring repatriation, the Document stresses the integration of refugees, displaced persons and trafficked persons in general terms.⁸⁶⁶ It is of some interest that the Durban Document also mentions the facilitation of the full integration of persons with disabilities into all fields of life. The Document does not discuss indigenous peoples in the context of integration, but voices concern for their exclusion.

UNESCO earlier put forward concerns about the exclusion and forced assimilation of the members of disadvantaged groups,⁸⁶⁷ and more recently has discussed the importance of combating the exclusion and marginalisation of vulnerable groups.⁸⁶⁸ The organisation has also highlighted the importance of integration with respect to these (vulnerable) groups, and in this connection it has stressed the role of education.⁸⁶⁹ ILO's activities have focussed on eradicating discrimination and promoting equality of treatment and opportunity in the area of labour and employment. In recent years, efforts to combat the discrimination, racism and xenophobia faced by migrant workers and to promote their social integration and inclusion have figured prominently on the ILO agenda.

Although the OSCE commitments in the area of anti-racism note the connections between integration policy and combating discrimination and various phenomena of intolerance, they highlight the general links between inclusion, integration and furthering non-discrimination and tolerance comparatively less than the

864. The General Conclusions note that promoting the social inclusion of immigrants is essential to combating racism and other forms of intolerance.

865. It is noted that the specific measures taken in the area of integration should also involve both the host community and migrants.

866. The Document refers to the local integration of refugees and displaced persons and the re-integration of trafficked persons into society.

867. See the Declaration on Race and Prejudice from the year 1978.

868. See the Declaration of Principles on Tolerance from the year 1995.

869. Ibid.

corresponding provisions in the CoE documents and in the Durban Document. This situation has begun to change in recent years, as the OSCE – in the form of the decisions of the OSCE Ministerial Council – has drawn increasing attention to the question of integration of the Roma and migrants in particular. This focus has resulted in the adoption of the OSCE Action Plan on Roma, which addresses the integration of the Roma and the problem of social exclusion they face. The Action Plan calls for the integration of the Roma into social and economic life, voices concern for their isolation, including their residential segregation, calls for the integration of the Roma into mainstream education,⁸⁷⁰ and mentions the need to pay attention to the specific needs as well as the language and culture of the Roma in such areas as health care and access to justice. The Action Plan highlights the general links between integration, inclusion and participation. The recent decisions of the OSCE Ministerial Council pertaining to combating intolerance and discrimination note the importance of integration that includes respect for cultural and religious diversity and call for recognising the positive contributions of all individuals to a pluralistic society.

While the question of integration receives some attention in the instruments specifically addressing trafficking in human beings,⁸⁷¹ the return and reintegration of the victims of trafficking in their countries of origin is clearly the option preferred by states. The possibility to remain in the receiving state has also been envisaged, particularly in the case of child victims of trafficking. Where the prospect of remaining in the receiving state is concerned, states have committed themselves to taking some measures to support the inclusion and (re)integration of victims.

International documents are hesitant to address the role of nationality/citizenship in integration (or inclusion). The European Convention on Nationality is a rare document in expressly dealing with this issue, with the Explanatory Report to it making an explicit link between nationality and the integration of permanent residents and thereby asserting the “integrative” function of nationality. The Report also raises the question of multiple nationalities in this connection, although it merely notes the divergent views of states on its role for the integration of individuals. The “closed” nature of the CoE system is also reflected in the Convention in that the need for the integration of permanent residents is discussed by drawing explicit attention to migration between European states.⁸⁷²

870. Mainstream education should also be sensitive to cultural differences and take the history, culture and languages of the Roma into account.

871. As discussed, e.g. the Durban Document also contains remarks on trafficking, including references to the integration of trafficking victims.

872. The Explanatory Report also mentions freedom of movement between EU member states.

Finally, as regards the various frameworks or levels of integration that are mentioned in the norms pertaining to the issues dealt with in this chapter, it is primarily integration into society⁸⁷³ or into social, cultural, political and economic life that is envisaged.⁸⁷⁴ Social integration and local integration have also been called for,⁸⁷⁵ and UNESCO and the OSCE have specifically highlighted the importance of the area of education for integration.⁸⁷⁶

873. See art. 6 of the CoE Framework Convention (concerning persons belonging to ethnic, cultural, linguistic and religious groups). The Durban Document calls for the full integration into society of victims of racial discrimination, racism and other forms of intolerance, as well as the reintegration of trafficked persons into society.

874. See the Political Declaration of the European Conference against Racism (when discussing non-nationals) and the Durban Document (when discussing migrants). The OSCE Action Plan on Roma calls for the integration of Roma into social and economic life. The Durban Document refers to the full integration of persons with disabilities into all fields of life.

875. ILO has spoken about social integration (and inclusion) of migrant workers, and the Durban Document discusses the local integration of refugees and displaced persons.

876. The UNESCO Declaration of Principles on Tolerance stresses the integration of vulnerable groups through education, and the OSCE Action Plan on Roma calls for the integration of the Roma into mainstream education.

2.3 Human Rights Norms: Principles of General Application and the Issue of Incorporation

The international human rights norms of general application do not contain provisions expressly addressing the issues of integration or inclusion of individuals and/or groups in(to) society. Above all, there exist no such human rights as the “right to integration” or the “right to inclusion”, nor is there a corresponding duty of states to integrate or to include. The general human rights norms and principles do, however, give a certain direction to state policies and have a role to play in incorporation. The international human rights paradigm is characterised by the aim of advancing human inclusiveness;⁸⁷⁷ the principles of equality and non-discrimination set out in the human rights norms also expressly address the issue of exclusion, more specifically exclusion from the enjoyment of rights and freedoms on an equal footing.⁸⁷⁸

2.3.1 Equality and Non-discrimination – the Underpinnings of Human Rights Law

2.3.1.1 Various Models of Equality and Forms of Discrimination

The principles of equality and non-discrimination are a recurrent theme in the international human rights norms – in those of universal as well as regional application. References to these principles have been incorporated into the human rights documents of general application⁸⁷⁹ as well as those pertaining to various groups and particular issues.⁸⁸⁰ To underline the significance of the principles of equality and non-discrimination, states have also concluded a number of international instruments specifically addressing the issue of discrimination. As already discussed in the preceding sections, the ICERD tackles racial discrimination, and the UN Declaration on Religion and Belief concerns the grounds of religion and belief.⁸⁸¹ Several instruments deal with discrimination on the basis of sex – the CEDAW

877. Boyle and Baldaccini (2001), p. 138.

878. Express references to exclusion have been made in the definitions of discrimination incorporated in human rights documents. See also the remarks on these definitions *infra* in this section.

879. See e.g. the UDHR, arts 1, 2 and 7; the ICCPR, preambular para. 1 and arts 2.1, 3 and 26; the ICESCR, preambular para. 1 and arts 2.2 and 3; the ECHR, art. 14; Protocol 12 to the ECHR; and the (revised) European Social Charter, art. E. The principles of equality and non-discrimination are also firmly incorporated in the documents adopted by the OSCE. See the remarks *supra* in chapters 2.1.1.2 and 2.2.1.2.

880. See the remarks in the preceding sections.

881. See the remarks on these two instruments *supra* in chapters 2.2.1.1.1 and 2.2.1.1.2, respectively.

specifically with discrimination against women,⁸⁸² and the UNESCO Convention against Discrimination in Education addresses non-discriminatory treatment in the area of education.⁸⁸³ A number of ILO documents draw attention to the issue of eradicating discrimination in the ILO's focus areas, i.e. labour and employment.⁸⁸⁴ The importance of non-discrimination is also reflected in the *ius cogens* norms of international law.⁸⁸⁵

While equality and non-discrimination have an intrinsic relationship⁸⁸⁶ in that ascertaining discrimination presupposes clarification of the concept of equality, and while the ideal of equality is deeply rooted in contemporary thinking⁸⁸⁷ and incorporated into both national and international norms, the content given to equality is not necessarily always very clear.⁸⁸⁸ In general, the principle of equality is not monolithic or one-dimensional, but can be based on several different conceptual foundations, the choice of which boils down to values and policy. The fact that “equality” is used in a great many different ways is a perpetual source of confusion.⁸⁸⁹

The most traditional way to view equality is formal equality, in which fairness is linked to consistent treatment and an individual's characteristics, such as sex, race,⁸⁹⁰ colour, or ethnic origin, should not in themselves constitute relevant differences justifying different – usually inferior – treatment. The most basic principle underlying the legal definitions of equality is that of equality before the law, which is associated with formal equality and which requires the removal of specific legal impediments and a state's neutrality towards individuals.⁸⁹¹ Due to a number of inherent limitations on, and problems relating to, its scope and features, the concept of formal equality has been criticised, for, among other things, its treatment of differences (ignoring them), ignorance of the significance of group memberships for an

882. See also the remarks *supra* in chapter 2.1.3.2.

883. See also the remarks on this Convention *supra* in chapters 2.1.1.1.2 and 2.2.1.1.4.

884. One of the central ILO instrument is ILO Convention No. 111 concerning Discrimination in Employment and Occupation. See also the remarks on the Convention *infra* in this section and *supra* in chapter 2.2.1.1.4.

885. In his extensive study on *ius cogens*, Lauri Hannikainen concluded that according to contemporary international law “severe discrimination on any grounds is prohibited by a peremptory norm”. Hannikainen (1988), p. 482. See also the remarks on the *ius cogens* character of racial discrimination *supra* in chapter 2.2.1.

886. Bayefsky (1990), p. 1, and McKean (1983), p. 8.

887. McKean (1983), pp. 2 and 285.

888. It has been pointed out how striking it is that despite the widespread adherence to the ideal of equality, there is so little agreement on its meaning and aims. Fredman (2002), p. 2.

889. McKean (1983), pp. 2–3. For various uses – both narrow and broad – of the concept of equality, see pp. 6–7.

890. See the remarks on the use of the term “race” *supra* in chapter 2.2.1.1.1.

891. Fredman (2002), p. 127.

individual's identity, and lack of positive obligations of accommodation.⁸⁹² To overcome these kinds of problems, more substantive approaches going beyond a demand for consistent treatment of likes have been developed. These would consist of the recognition that apparently identical treatment can in practice reinforce inequality, for instance, because of past or on-going discrimination. Therefore, different treatment may be necessary for achieving equality. This acknowledgement has resulted in developing various substantive equality models,⁸⁹³ including those of equality of results and equality of opportunity, and in a linking of equality to specific substantive rights.⁸⁹⁴

Whilst formal equality is based on a notion of procedural fairness stemming from consistent treatment and on an abstract, universal notion of justice, substantive equality is primarily concerned with achieving a fairer distribution of benefits, including the idea of compensatory treatment, or distributive justice.⁸⁹⁵ Equality in its broad sense⁸⁹⁶ envisages a standard to be achieved and allows for "special measures" or differences in treatment designed to bring persons up to a certain level.⁸⁹⁷ Equality of results concerns the outcome and requires it to be equal. This notion of equality is at its most controversial when it goes beyond the removal of exclusionary criteria and requires the achievement of an equal outcome by preferential treatment of an under-represented group. The concept of equality of opportunity steers a middle course between formal equality and equality of results. This model recognises

892. In the formal equality model, the right to equal treatment is reserved to those who are "like" the comparator. Thus, formal equality has also been considered equality as consistency, a form of equality reflecting the Aristotelian idea of treating likes alike and requiring that two similarly situated individuals should be treated alike. In this model, equality is treated as the opposite of difference. Since differences are viewed to legitimate detrimental treatment of those who are different, they should be ignored. For the characteristics of formal equality, see *ibid.*, pp. 7–11 and 92, and Fredman (2001b), pp. 16–18.

893. Formal and substantive forms of equality are also often referred to as formal and real forms of equality, or *de jure* and *de facto* equality. McKean (1983), pp. 141 and 145. For *de jure* and *de facto* equality, see also Smith (2005), p. 185.

894. Fredman (2001b), pp. 19–22.

895. Whereas formal equality presupposes that justice is an abstract, universal notion and cannot vary to reflect different patterns of benefit and disadvantage in a particular society, the substantive approach to equality rejects an abstract view of justice and instead insists that justice is only meaningful in its interaction with society. The substantive approach to equality also rejects as misleading the aspirations of individualism; e.g. in the context of sex or race, the uncritical use of merit as a criterion for employment or promotion could perpetuate disadvantage. Fredman (2002), pp. 11, 126 and 128. Whilst the concept of formal equality essentially focuses on the right to equal treatment as between individuals belonging to different groups, substantive equality tries to achieve equal treatment as between groups. Ellis (2005), pp. 87–88 and 301. For the idea of distributive justice, and for the remarks on views on the essence of equality as a component of justice, see also McKean (1983), pp. 2 and 6–7.

896. For equality in its broad sense meaning "true", "effective", "real", "genuine", or "normative" equality, see *ibid.*, p. 6.

897. *Ibid.*

that equal treatment against a background of past and structural discrimination can perpetuate disadvantage but also that focusing solely on equality of results is going too far in subordinating the right to individual treatment to a utilitarian emphasis on outcomes. The analogy of competitors in a race is often used to describe this model; i.e. an equal opportunity approach aims to equalise the starting point and allows the competitors to be judged on individual merit once the “race” has begun. The model of equality of opportunity rejects policies that aim to correct imbalances by quotas or targets whose aim is equality of outcome. A substantive sense of equality of opportunity requires measures to be taken to ensure that persons from all sectors of society have a genuinely equal chance of satisfying the criteria for access to a particular social good. This is pursued by implementing positive measures in the areas of education and training, for example, and taking family-friendly measures. In general, it is worthy of note that whilst equality of opportunity requires the removal of obstacles to the advancement of disadvantaged groups, it does not guarantee that this will lead to greater substantive fairness.⁸⁹⁸

The international human rights norms prominently associate equality with substantive rights, in particular the application of human rights.⁸⁹⁹ International human rights instruments include equality and non-discrimination provisions of both an accessory and independent nature. Accessory provisions typically call for the equal and non-discriminatory enjoyment of the rights and freedoms enunciated in the document at hand, thereby linking the principles of equality and non-discrimination to the substantive norms set out in the instrument.⁹⁰⁰ The most prominent independent provisions are article 26 of the ICCPR and Protocol 12 to the ECHR. Article 26 sets out a distinct right of equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed upon states.⁹⁰¹ Protocol 12 to the ECHR provides for a general prohibition of discrimination in respect of the enjoyment of “any right set forth by law”.⁹⁰² The

898. Fredman (2002), pp. 13–15.

899. See also Fredman (2001b), p. 22.

900. See e.g. the ICCPR, arts 2.1 and 3; the ICESCR, arts 2.2 and 3; and the ECHR, art. 14. According to these provisions, only the rights and freedoms set forth in the respective instrument must be secured without discrimination.

901. Art. 26 prohibits discrimination in law or in fact in any field regulated and protected by public authorities. HRC’s General Comment No. 18 on non-discrimination, para. 12. See also Nowak (2005), pp. 600 and 628. In the late 1980s, the HRC made decisions concerning individual communications against the Netherlands emphasising the meaning of substantive equality for women in social law and thereby extending the obligations of states under art. 26 to social benefits. See e.g. *Broeks v. the Netherlands* and *Zwaan-de Vries v. the Netherlands*. For the evolution of the HRC’s attitude towards the broad obligations of states under art. 26 as reflected e.g. in these cases, see Ando (2004), pp. 207–211. For critical remarks on this interpretation by the HRC, see Tomuschat (2004).

902. Protocol, art. 1.1. For a narrower scope of application of Protocol 12 compared to art. 26 of the ICCPR, see Nowak (2005), pp. 600, 604 and 627–628, and Schokkenbroek (2004), p. 78.

ICERD and the CEDAW call for the non-discriminatory application of all human rights and fundamental freedoms.⁹⁰³

The fact that there is no uniform approach to the definition of discrimination, either at the national or the international level – including international human rights law – poses additional challenges to the area of equality and non-discrimination. Despite the considerable number of international human rights documents, only few of them include definitions of discrimination. The complexity of the matter is hardly lessened by the fact that these few definitions are not identical, but differ to some extent.⁹⁰⁴ It is noteworthy that, for instance, the ECHR, the European Social Charter (in both its original and revised forms) and the UN Covenants contain no definitions.⁹⁰⁵ In general, as may also be seen in the definitions of discrimination put forth, equality guarantees in international human rights documents are built on the formal equality model;⁹⁰⁶ i.e. they require equal treatment of individuals in similar situations without regard to their personal characteristics.⁹⁰⁷ More substantive forms of equality may also be found in the norms, for instance, in ILO documents.⁹⁰⁸ While the international anti-racism norms have a basis in equality of treatment, they also contain express remarks on equality of opportunity.⁹⁰⁹ Fur-

903. See the ICERD, art. 1.1, and the CEDAW, art. 1, containing the definitions of discrimination addressed by these documents.

904. See the definitions found e.g. in ILO Convention No. 111, art. 1.1(a); the UNESCO Convention against Discrimination in Education, Art. 1.1; the ICERD, art. 1.1; and the CEDAW, art. 1 (specifically addressing discrimination against women). For the definition in the ICERD, see also the remarks *supra* in chapter 2.2.1.1.1.

905. The uncertainty about the nature of the concepts of equality and discrimination incorporated in the ICCPR was clarified to some extent when the HRC put forth its view on discrimination, including its definition of the concept, in its General Comment No. 18 on non-discrimination adopted in 1989.

906. According to Fredman, most equality guarantees in international human rights documents have been interpreted as extending no further than formal equality, creating essentially only negative obligations to refrain from discriminating on prohibited grounds. Fredman (2001b), pp. 18 and 35–36. For equal treatment equality provisions in the area of human rights, see also Makkonen (2004), p. 158.

907. Within the framework of the ICCPR, cases of alleged discrimination are examined by drawing attention to whether the parties are in a comparable situation, whether unequal treatment is based on reasonable and objective criteria and whether the distinction is proportional in a given case. HRC's General Comment No. 18 on non-discrimination, para. 13.

908. See e.g. ILO Convention No. 111, which refers to “equality of opportunity or treatment in employment or occupation” in the definition of discrimination in its art. 1.1. ILO Convention No. 111 was also among the first important international legal instruments to refer to “equality of opportunity” and its promotion. Banton (1994), p. 7.

909. See e.g. the provisions of the UNESCO Declaration of Principles on Tolerance, the Political Declaration of the European Conference against Racism, the Declaration of the third CoE summit, and the Durban Document. See the pertinent remarks *supra* in chapter 2.2.1. It has been pointed out that the equality principle incorporated in the ICERD addresses indirect discrimination and advocates a notion of equality of outcome. Boyle and Baldaccini (2001), pp. 156–157.

thermore, although the provisions of the CEDAW essentially espouse the formal form of equality, which requires the same or equal treatment, the Convention also makes references to more substantive approaches, including equal opportunities.⁹¹⁰ The ICERD and the CEDAW incorporate specific provisions on the mandate to take temporary special measures to advance de facto equality with respect to the enjoyment or exercise of rights.⁹¹¹ The committee supervising the implementation of the CEDAW, i.e. the Committee on the Elimination of Discrimination against Women (the CEDAW Committee), has even raised the possibility of setting quotas as the means to achieve de facto equality between men and women.⁹¹²

In recent years direct and indirect discrimination have emerged among the concepts often employed in the area of non-discrimination law with the aim of addressing the inadequacy of formal equality in achieving the redistributive and restructuring goals of equality.⁹¹³ However, the fact that the aims of the concept of indirect discrimination are often ambiguous, and that the concept cannot remove obstacles or change customarily stereotyped roles, limits its role in pursuing redistributive goals.⁹¹⁴

The equality jurisdiction within the framework of the ECHR is distinctively based on a proportionality approach rather than on considerations of direct or indirect discrimination. In general, the approach of the ECHR has its own characteristics, including the weighing of interests.⁹¹⁵ In practice, the proportionality approach

910. See e.g. art. 8 on representing governments and participating in the work of international organisations. See also the remarks on the provisions of the CEDAW addressing structural forms of discrimination *infra* in this section.

911. See ICERD, art. 1.4, and the CEDAW, art. 4. The possibility of special measures is also expressly set out in ILO Convention No. 111. See art. 5. Although the provisions on special measures are lacking in the texts of both the ICCPR and the ICESCR, the committees set up to supervise the implementation of these instruments have put forward the possibility of taking these kinds of measures. See HRC's General Comment No. 18 on non-discrimination, para. 10, and General Comment No. 13 on the right to education adopted by the Committee on Economic, Social and Cultural Rights, paras 32 and 33. For special measures in international human rights norms, see also McCrudden (2001), pp. 277–278.

912. CEDAW Committee's General Recommendation No. 25 on art. 4, para. 22.

913. The prohibition of direct discrimination seeks to protect the principle of formal equality, whilst the prohibition of indirect discrimination represents an attempt to provide a greater degree of substantive equality (in particular, equality of opportunity). Broadly speaking, indirect discrimination occurs where an unjustified adverse impact is produced for a protected class of persons by an apparently class-neutral action. Ellis (2005), pp. 87–88 and 91. The concepts of direct and indirect discrimination have been extensively elaborated in EC law. See also the remarks *infra* in chapter 3.2.

914. Fredman (2002), pp. 94, 109, 112 and 115, and Ellis (2005), p. 115.

915. For the application of art. 14 of the ECHR, see Gerards (2004). See also Ovey and White (2006), p. 413. The proportionality approach of the ECHR has been observed to prescribe a notion of equality as rationality based on a weighing of interests. This approach goes beyond the notion of a comparator and instead of requiring that likes be treated alike permits treatment to differ according to the degree of difference in the subjects. Weighing (two) interests

and the margin of appreciation doctrine⁹¹⁶ incorporated in the ECHR provide the states parties with a wide margin of discretion in many areas,⁹¹⁷ which has prompted commentators to characterise the approach of the ECHR as yielding a very weak equality doctrine.⁹¹⁸ The European Court of Human Rights has endorsed states' broad margin of discretion, for instance, in the area of immigration, and has viewed protecting the labour market from immigration at a time of high unemployment as a legitimate state aim.⁹¹⁹ Although the Court has not been favourably disposed to importing a concept of indirect discrimination into the open-ended equality guarantee of the ECHR,⁹²⁰ it has recently recognised a more indirect form of discrimination as being valid: the Court has held that the right not to be discriminated against in the enjoyment of the rights guaranteed under the ECHR is also violated when states – without an objective and reasonable justification – fail to treat differently persons whose situations are significantly different.⁹²¹

In recent years, resulting from the recognition of the fact that in reality many individuals often belong to several overlapping groupings, increasing attention has been paid to the cumulating of various grounds of discrimination, i.e. to situations in which a person is a victim of discrimination on the basis of more than one ground. Consequently, such concepts as double discrimination, multiple discrimination or multiple forms of discrimination, and intersectional discrimination have emerged in the area of non-discrimination. These situations have also been expressly acknowledged in some international human rights documents and in the

against each other also creates a tension between competing interests. Fredman (2002), pp. 118–119.

916. For the margin of appreciation doctrine of the ECHR, see Gerards (2004), pp. 38–57.
917. The margin of appreciation left to a state is related e.g. to the existence of a “common ground”, i.e. a consensus among the CoE member states. *Ibid.*, p. 39.
918. Fredman (2002), p. 119. Janneke Gerards has noted that the strict use of the common ground argument (note *supra*) risks degrading the ECHR to a lowest common denominator of human rights protection. Gerards (2004), p. 41.
919. The European Court of Human Rights has held the exclusion of particular groups on grounds of nationality to be a legitimate means of achieving the legitimate aims of immigration policy, even where such exclusion had a disparate impact on black and Asian people. See *Abdulaziz, Cabales and Balkandali v. United Kingdom*, paras 72 and 78. See also Fredman (2001b), pp. 31–32, and (2002), pp. 108 and 117. For the broad margin of appreciation afforded to states in the area of immigration policy, see also Gerards (2004), pp. 25 and 55. On the other hand, it should be noted that the Strasbourg case law has also acknowledged that the inherent racism of immigration provisions may amount to inhuman or degrading treatment under art. 3 of the ECHR. This was acknowledged by the European Commission of Human Rights in *East African Asians v. United Kingdom*, para. 196. See also Fredman (2002), pp. 41 and 121.
920. *Ibid.*, p. 108, and Gerards (2004), p. 12.
921. This recognition has been made e.g. in *Thlimmenos v. Greece*. See para. 44. See also Ellis (2005), p. 322. For recognising the concept of indirect discrimination, see also Gerards (2004), pp. 11–14.

work of some international expert bodies.⁹²² Double or multiple discrimination has often been mentioned particularly with respect to women, since they tend to be affected by a cumulation of grounds of discrimination. However, when the functioning of non-discrimination law requires bright line distinctions to be made between different categories of groups facing discrimination (as it often does), the existing legal framework is rather impotent in practice in addressing the cases in which various grounds of discrimination cumulate; that is, it is somewhat toothless when it comes to tackling the situations of the most vulnerable groups of individuals.⁹²³ Further challenges enter the scene when there is a possibility of conflict between differing grounds: for instance gender equality may conflict with religious or ethnic equality.⁹²⁴

Furthermore, concepts such as institutional (and institutionalised) discrimination,⁹²⁵ and structural or systemic discrimination have also appeared in the non-discrimination vocabulary.⁹²⁶ These kinds of concepts acknowledge that sexism, racism, or other forms of intolerance, as well as various forms of discrimination, extend far beyond individual acts of prejudice. Such prejudices are frequently embedded in the structure of society and thus cannot be clearly attributed to any one person. Accordingly, true barriers to equality cannot be captured by drawing attention to individual acts of discrimination – as is predominantly done in the framework of non-discrimination law. Tackling these barriers requires taking concrete steps with respect to the structures of society, including its decision-making processes and labour market.⁹²⁷ It may be seen that the international human rights norms are rather hesitant to deal with structural forms of discrimination: this can be partly explained by the fact that the discussion on these broader questions of discrimination is rather recent whereas most of the pertinent international documents were concluded some time ago. However, one of the more recent documents, the Durban Document,

922. See e.g. the remarks in some anti-racism norms, particularly those set out in the Durban Document. Also the Political Declaration of the European Conference against Racism makes a brief note on the existence of multiple discrimination. Of the international expert bodies, CERD has addressed this issue. See the remarks *supra* in chapters 2.2.1.1.3, 2.2.1.3.2 and 2.2.1.1.1.

923. Sandra Fredman has pointed out that the existing legal framework contains no mechanism for dealing with these crosscurrents. Fredman (2002), pp. 74–75. She has also stated that one of the problems of direct discrimination is that it assumes that groups have fixed boundaries and operate in opposition to one another. Fredman (2001a), p. 3.

924. See also Fredman (2002), p. 75.

925. The apartheid system set up in South Africa is an example of an institutionalised form of racial discrimination and racism.

926. For various concepts of discrimination, including institutional and institutionalised discrimination, see e.g. Makkonen (2004), pp. 157–159.

927. See also Fredman (2002), pp. 7–11, and (2001b), pp. 16–18.

makes a note on institutional or structural discrimination in the case of migrants.⁹²⁸ The attention recently paid by the Strasbourg Court to the institutional or systemic character of racism also merits particular note.⁹²⁹ Furthermore, the CEDAW contains interesting and important elements in that it addresses practices and patterns of behaviour. For example, the Convention calls for taking measures to modify the social and cultural patterns of conduct of both men and women. It does so with a view to eliminating prejudices and customary and other practices that are based on the idea of the inferiority or the superiority of either of the sexes or based on stereotyped roles of men and women. Another aim of the instrument here is to recognise the common responsibility of men and women in the upbringing and development of their children.⁹³⁰

While states have assumed both negative duties to refrain from restricting the exercise of the rights and freedoms and positive duties to take proactive measures to give effect to the rights set out in the international human rights norms,⁹³¹ the norms are rather hesitant to impose positive duties on states to take active measures to promote equality. This relates to the prevalence of the concept of formal equality in the norms, which primarily creates only negative obligations to refrain from discriminating on prohibited grounds and imposes no positive obligations of accommodation. In general, schemes for positive action are considered to conflict with the liberal, individual notion of equality.⁹³² For instance, the ECHR does not contain positive duties in the area, and Protocol 12 to the ECHR extending article 14 to a freestanding equality right does not require positive action either.⁹³³ By contrast,

928. See the remarks *supra* in chapter 2.2.1.1.3. It is also worthy of note that while the General Conclusions of the European Conference against Racism cite the problem of the existence of racism and prejudice in state institutions, this concern was not reflected in the Political Declaration of the Conference. See the remarks *supra* in chapter 2.2.1.3.2.

929. See the remarks *supra* in the beginning of chapter 2.2.1.3 (note 722).

930. Art. 5(a). See also McKean (1983), pp. 186–193, and Pentikäinen (1999), pp. 33–34.

931. The concrete substance of the negative and positive duties depends on the formulation of the given right, but both types of duties are inherent in economic, social and cultural rights as well as in civil and political rights. The HRC has addressed both negative and positive obligations under the ICCPR in its General Comment No. 31 on the nature of the general legal obligation. See particularly paras 6–8. See also Nowak (2005), pp. 37–38. While the scope of positive obligations required by the provisions of the ECHR is regarded as not being very clear, the European Court of Human Rights has introduced the concept of (implied) positive obligations, leaving a broad margin of appreciation to the states parties. van Dijk (1998), pp. 22–24, 28 and 32–33. For positive duties in the area of economic, social and cultural rights, see e.g. General Comment No. 12 on the right to adequate food, adopted by the Committee on Economic, Social and Cultural Rights, para. 15. See also Eide (1995), pp. 35–40. For the trichotomy of obligations to respect, protect and fulfil human rights and for the obligations to fulfil the rights set out in the ICESCR, see Dowell-Jones (2004), pp. 28–34.

932. Ellis (2005), p. 297.

933. The Explanatory Report to the Protocol states that the protocol does not impose any obligation to adopt positive measures since “such a programmatic obligation would sit ill with the

positive state actions are viewed as being envisaged by article 26 of the ICCPR and are also mentioned in connection with other equality provisions of the ICCPR.⁹³⁴ The specific meaning of positive duties in these equality provisions is nevertheless fraught with ambiguity and controversy.⁹³⁵ The ICERD and the CEDAW contain elements representing somewhat more detailed provisions on positive duties with respect to equality than do human rights norms in general.⁹³⁶ As already pointed out, these two documents also specifically mention the possibility of introducing special measures to guarantee de facto equality. It is noteworthy, however, that the states parties are allowed, but not required, to take such measures.⁹³⁷

Characteristic of the protection provided in the international human rights norms – and thus also of the application of their equality guarantees – is that it primarily and directly concerns the relationship between the state and individuals under its jurisdiction and applies less directly to the relationship between private actors.⁹³⁸ As a result, the protection against discrimination set out in the human

whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justifiable". See para. 16. Para. 24 of the Explanatory Report notes that positive obligations to prevent discrimination cannot be excluded altogether, but that the primary objective of art. 1 of the Protocol is to set out a negative obligation for the states parties not to discriminate. See also Schokkenbroek (2004), pp. 72–77. Schokkenbroek also points out that the question of positive obligations was the most controversial issue during the negotiations of the Protocol. See p. 75.

934. HRC's General Comment No. 18 on non-discrimination, para. 10. Positive duties pursuant to art. 3 on gender equality have been addressed in HRC's General Comment No. 28 on art. 3, para. 3. For positive duties in the area of equality, see also Nowak (2005), pp. 38, 40, 599 and 630–632.

935. *Ibid.*, pp. 630–634.

936. See e.g. the ICERD, arts 2 and 4. Art. 4 expressly sets out positive measures. See also Boyle and Baldaccini (2001), pp. 156–158. For the CEDAW, see e.g. arts 2–5. See also Pentikäinen (1999), pp. 32–37.

937. Where these measures are taken, they are not considered discriminatory. See e.g. the ICERD, art. 1.4.

938. For the extension of the ECHR provisions primarily to the public sphere and the indirect reach of some provisions of the ECHR regarding private relations creating some responsibilities for states with respect to private relationships – often labelled *Drittwirkung* – see van Dijk (1998), p. 19. For the so-called horizontal effects of human rights under the ICCPR, see Nowak (2005), pp. 39–41 and 632–634. Art. 20.2 of the ICCPR explicitly obligates the states parties to prohibit by law any advocacy of national, racial or religious hatred inciting discrimination, hostility or violence. The HRC has addressed the reach of the ICCPR e.g. in its General Comment No. 28 on art. 3 by referring to putting an end to discriminatory actions, both in the public and the private sector, which impair the equal enjoyment of rights. See para. 4. In its General Comment No. 27 on art. 12, the HRC points out that a state party must ensure that the rights guaranteed in art. 12 (freedom of movement) are protected not only from public but also from private interferences. In the HRC's view, this obligation to protect is particularly pertinent in the case of women. See para. 6. For positive state obligations to ensure that the Covenant's rights are also fully applied against acts com-

rights norms has limitations with respect to private relations. For example, in the case of Protocol 12 to the ECHR, it has been asserted that any positive obligations in the area of relations between private persons would concern, at the most, relations normally regulated by law in the public sphere and for which the state has a certain responsibility, such as arbitrary denial of access to work, restaurants or other services.⁹³⁹ It has been pointed out that the non-discrimination provisions of the ICCPR cover the “quasi-public sectors” such as employment, providing goods and services, places intended for use by the general public, private educational facilities and the health and housing sectors.⁹⁴⁰ Although the focus of the CEDAW is also clearly on public life, it contains elements that clearly cut across the public-private divide and address certain private relations rather directly.⁹⁴¹

The recognition of the inability of the principle of formal equality to produce real equality and the limits of the concept of indirect discrimination in removing the obstacles to realising equality of opportunity or in changing customarily stereotyped roles⁹⁴² has resulted in measures to complement non-discrimination and equality laws. These measures, often couched in the language of “mainstreaming”, are designed to offset historical and other types of structural disadvantage and to promote social inclusion. Mainstreaming includes the idea that equality is not just an add-on or afterthought to policy, but is one of the factors to be taken into account in every policy and executive decision.⁹⁴³ Mainstreaming policies that entail active, positive measures to advance equality have given a powerful boost to the effectiveness of equality in some contexts.⁹⁴⁴ By definition, for mainstreaming equality to be truly effective there must also be mechanisms to ensure that the equality con-

mitted by private persons or entities, see also General Comment No. 31 on the nature of the general legal obligation, para. 8. For the applicability of human rights between private parties, see also Curtis (2007). The UN Declaration on the Right and Responsibility to Promote and Protect Human Rights, adopted in 1998, underscores the primary responsibility and duty of states to promote and protect human rights and fundamental freedoms, but it also refers to the right and responsibility of individuals, groups and associations to promote respect for and knowledge of these rights and freedoms. Preambular paras 8 and 9.

939. A general limit on state responsibility is set in art. 1 of the ECHR that is noted as being particularly relevant in cases of discrimination between private persons. Protocol 12 to the ECHR contains further elements seeking to limit possible horizontal effects, one such element being an explicit reference to discrimination by “any public authority”. See the Explanatory Report to Protocol 12, paras 27–28. See also Schokkenbroek (2004), pp. 77–78.

940. Nowak (2005), p. 634.

941. See particularly art. 16 on marriage and family relations. See also Pentikäinen (1999), pp. 36–37. See also the remarks on the application of the ICERD to private relationships *supra* in chapter 2.2.1.1.1.

942. Ellis (2005), pp. 114–115.

943. Fredman (2002), p. 176.

944. Gender mainstreaming has emerged as one of the concepts employed in the area of equality in a number of international organisations, including the UN and the CoE. The EU has also developed policies in the area of mainstreaming, from the viewpoint of both gender

siderations are systematically taken into account in the formulation, administration and evaluation of all policies.⁹⁴⁵ Additionally, even when policies of mainstreaming are implemented, the choice of the principle of equality is still of great relevance, i.e. choosing whether the principle of equality utilised is that of formal equality or some of the equality models of more substantive value. For instance, positive duties may be formulated in terms of improving the representation of various groups, including various minorities and/or women in a given sector. However, if there is a real desire to accommodate diversity, changing the colour and/or gender make-up of the structures is not enough; rather, the measures must genuinely address and change also the underlying distributive structures and reshape them to reflect diversity. It has been pointed out that to be truly effective positive duties should amalgamate the notions of both equality of opportunity and equality of results and require substantive requirements not just in the availability of opportunities but also in the ability to use them.⁹⁴⁶

2.3.1.2 Prohibited Grounds of Discrimination and the Human Rights of Non-nationals

As a rule, the international human rights norms addressing equality and non-discrimination, set forth the prohibited grounds of discrimination. The lists of these grounds differ from one another to some extent, but the grounds of race, sex, language and religion are repeatedly mentioned.⁹⁴⁷ When states legislate against discrimination and enumerate the prohibited grounds of discrimination, this also signifies the creation of protected classes of individuals.⁹⁴⁸ Some of the grounds, particularly those pertaining to sex and race, have been addressed in a range of instruments, reflecting the fact that these grounds have also been considered ones

and ethnicity (to tackle racism). For mainstreaming within the EU, see also the remarks *infra* in chapter 3.2.

945. Bell (2002), p. 209.

946. Fredman (2001b), pp. 26–27, and (2002), pp. 121–124.

947. The UN Charter refers to race, sex, language or religion. See art. 1.3. The UDHR refers to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See art. 2. The ICCPR and the ICESCR repeat the grounds stipulated in the UDHR. See the ICCPR, arts 2.1 and 26, and the ICESCR, art. 2.2. The ECHR mentions all these grounds and adds association with a national minority. See the ECHR, art 14, and Protocol 12, art. 1.1. The (revised) European Social Charter refers to race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status. See Part V, art. E. The UNESCO Convention against Discrimination in Education cites the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth. See art.1.1.

948. Banton (1996), p. 64.

on which discrimination frequently occurs.⁹⁴⁹ The cornerstone international human rights convention in the area of racial discrimination and racism, the ICERD, refers to the grounds of race, colour, descent, and national or ethnic origin and thus covers a variety of groups that can be characterised on the basis of these criteria.⁹⁵⁰

The wording of many lists of prohibited grounds of discrimination also suggests that the lists are not exhaustive; the admission of new grounds reflecting changing social mores is made possible through the incorporation of the words “such as”, “or other status”, or the like. For instance, although sexual orientation does not appear in the list of grounds stipulated in the ECHR (including its Protocol 12), the Convention’s case law has acknowledged to some extent the relevance of sexual orientation within the framework of the ECHR.⁹⁵¹ In fact, the European Court of Human Rights has created a certain hierarchy of different grounds; it has attached varying weight to the grounds of different forms of discrimination, as a result of which states’ discretion with respect to distinctions on the basis of sex, for example, often appears to be narrower than with respect to many other grounds.⁹⁵² The HRC has also referred to the importance of the principle of equality between men and women and to the fact that the argument of there being a long-standing tradition cannot be maintained as a general justification for the differing treatment of men and women.⁹⁵³

Among the most conspicuous distinctions allowed by human rights law are those relating to non-nationals/non-citizens.⁹⁵⁴ Whilst the starting point in human rights law is that the human rights enumerated in international documents belong to every individual – irrespective of whether a person is a national/citizen, a non-national/non-citizen residing more or less permanently in the country or just visiting

949. See particularly the ICERD and the CEDAW. See also Boyle and Baldaccini (2001), p. 138.

950. As already discussed, the ICERD is of significance e.g. for indigenous peoples and many groups of non-nationals, including refugees, asylum-seekers, and (im)migrants. See the remarks *supra* in chapter 2.2.1.1.1.

951. The European Court of Human Rights has given some protection to homosexual relations under art. 8 of the ECHR on private and family life. See e.g. *Dudgeon v. United Kingdom* and *Norris v. Ireland*. For the remarks on the recognition of sexual orientation (homosexuality) as well as transsexuality by the Court, see also Ovey and White (2006), pp. 270–278.

952. It has been observed that the European Court of Human Rights requires “very weighty reasons” before a difference of treatment on grounds of sex could be regarded as compatible with the ECHR due to the fact that the advancement of equality between men and women is a major goal in the member states of the CoE. Fredman (2002), pp. 116–117. For the application of the “very weighty reasons” test to discrimination based on illegitimate birth, religion, nationality and sexual orientation, see Gerards (2004), pp. 48–57.

953. Nowak (2005), p. 610.

954. See also the remarks on the concepts of nationality and citizenship and, accordingly, the concepts of nationals/non-nationals and citizens/non-citizens, *supra* in chapter 2.2.2.

(e.g. as tourist)⁹⁵⁵ – human rights instruments include provisions expressly allowing certain distinctions on the basis of nationality/citizenship. In practice, these permit the exclusion of non-nationals/non-citizens from the enjoyment of certain rights, in particular political rights. For instance, both the ICCPR and the ECHR make it possible to restrict the political activity of aliens.⁹⁵⁶ Certain distinctions between nationals/citizens and non-nationals/non-citizens are also admissible in the area of economic and social rights. The ICESCR includes a provision leaving the states parties a large margin of discretion in guaranteeing the economic rights recognised in the Covenant to non-nationals. This provision, however, contains an important qualification: this margin of discretion is available only for developing countries that are party to the Covenant;⁹⁵⁷ in other words, this option is not available to the European states parties. The (revised) European Social Charter also permits certain distinctions between nationals and non-nationals; essentially, to be covered by the substantive articles of the Charter, foreigners need to be nationals of other states parties to the Charter – thus in practice nationals of the CoE member states.⁹⁵⁸ The states parties to the Charter have the possibility to extend the application of the instrument to other persons as well if they so wish.⁹⁵⁹ While the Charter considers migrant workers in a separate provision,⁹⁶⁰ refugees and stateless persons also receive some specific attention in that the Charter refers to the protection afforded to these persons by other international instruments.⁹⁶¹ The central reason for the

955. See e.g. art. 2.1 of the ICCPR, which refers to ensuring the rights recognised “to all individuals” within the territory of the party to the Covenant. Art. 1 of the ECHR sets out the duty of the contracting parties to “secure to everyone within their jurisdiction the rights and freedoms” defined in the Convention. For extending the rights of the ICCPR also to non-citizens, see also HRC’s General Comment No. 15 on the position of aliens, and General Comment No. 31 on the nature of the general legal obligation, para. 10.

956. See the ECHR, art. 16, and the ICCPR, art. 25.

957. See art. 2.3.

958. This requirement stems from the fact that the European Social Charter is open for signature by the CoE member states. See the (revised) European Social Charter, Part VI, art. K.1. The same applied to the 1961 Charter. See art. 35.1. Other requirements are those of lawful residence or regular working within the territory of the party concerned. See the Appendix to the (revised) European Social Charter addressing the scope of the Charter in terms of persons protected, para. 1. The states parties have also undertaken to conclude bilateral and multilateral agreements or other arrangements to ensure equal treatment with their nationals of the nationals of other parties in respect of social security rights. See art. 12.4.

959. Appendix to the (revised) European Social Charter addressing the scope of the Charter in terms of persons protected, para. 1.

960. See art. 19. See also the remarks on migrant workers *supra* in chapter 2.1.3.1.1.

961. See the Appendix to the (revised) European Social Charter addressing the scope of the Charter in terms of persons protected, paras 2 and 3. The Charter notes that while lawfully staying in the territory of the state party these persons are entitled to treatment that is as favourable as possible and in any case not less favourable than that specified under the obligations applicable to those persons. References are made to the Refugee Convention and Protocol, the Convention on the Status of Stateless Persons, and other existing interna-

interest of states in excluding non-nationals/non-citizens particularly from the enjoyment of many economic and social rights boils down to states' concerns over the financial implications involved.⁹⁶²

As mentioned above, the question of the application of the ICERD with respect to non-citizens used to be actively debated due to the particular provision in the Convention allowing certain distinctions to be made between citizens and non-citizens. The confusion created by this provision also prompted CERD to address the question in its General Recommendations and, among other things, CERD has pointed out that the point of departure in human rights is that they belong to all persons.⁹⁶³ However, distinctions between nationals/citizens and non-nationals/non-citizens with respect to the norms applicable in principle to all persons may be possible if they do not amount to prohibited discrimination on the basis of the general rules on justification.⁹⁶⁴

2.3.2 Autonomy, Identity, Difference, and Incorporation in(to) Society

The human rights norms of general application do not expressly mention such issues as autonomy or identity, but a number of human rights – such as freedom of religion or belief, freedom of opinion and expression, freedom of association, and respect for privacy and family life – in fact contribute to guaranteeing individuals a certain sphere of freedom or autonomy.⁹⁶⁵ Guaranteeing human rights has also been seen as tantamount to a certain recognition of the identity of individuals.⁹⁶⁶ In fact, setting

tional instruments applicable to such persons. See also the remarks on refugees and stateless persons *supra* in chapters 2.1.3.1.3 and 2.2.2.

962. This concern is clearly noted in the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, adopted by the UNGA in 1985, which addresses e.g. economic, social and cultural rights and cites the aim of avoiding undue strain on the resources of the state. See art. 8.1(c). See also Eide (1995), pp. 34–35.

963. See CERD's General Recommendation No. 30 on discrimination against non-citizens, para. 3. See also the remarks *supra* in chapter 2.2.1.1.1.

964. See CERD's General Recommendation No. 30 on discrimination against non-citizens, para. 4. See also Kälin (2003), pp. 276–278, and Nowak (2005), pp. 54–55, 618–619 and 626–627. For the complex relationship between citizenship and human rights, see e.g. Butenschon (2003). For the protection of non-citizens in international human rights law, including observations on problems in the area, see Weissbrodt (2007). See also the remarks on the significance of nationality *supra* in chapter 2.2.2.

965. For the remarks on human rights as commitment to human autonomy and freedom, see Quinn (2005), p. 281. For the remarks on advancing the autonomy of individuals by equality provisions, see Fredman (2002), pp. 15–16. For private autonomy and human rights, see also Habermas (1996), pp. 84–103.

966. According to Walter Kälin, human rights protect the cultural identity of everyone, including migrants, thus giving legal force to the idea that respect for human beings requires recognition of their identity. Kälin (2003), p. 282.

out the prohibited grounds of discrimination in the human rights norms constitutes a certain recognition of the identities linked to the grounds enumerated; this is more of a negative recognition, however, i.e. one viewing the identities as disadvantages to be ignored or corrected.⁹⁶⁷

A space of personal autonomy creates an area within which individuals are most clearly allowed (without state interventions) to maintain and develop their cultural traditions as well as various manifestations of their identity. The human rights norms creating this sphere of freedom for individuals reflect the public-private divide incorporated in international human rights law, which also relates to the reach of human rights protection primarily and directly to the relationship between the state and individuals discussed above. While the public-private divide allows diversity and difference to flourish particularly in the private sphere, the private sphere is not excluded from state interventions. International human rights norms permit states to intervene in this sphere, for instance, in the interest of the protecting human rights; in fact, the pertinent norms leave states a wide margin of discretion in this regard.⁹⁶⁸ Some practices, such as female genital mutilation, despite being central to a culture, are viewed as warranting restriction or prohibition, i.e. state intervention.⁹⁶⁹

The complex relationship between equality and difference was discussed above and, among other things, it was observed that the choice of the concept of equality followed has a bearing on the role or significance given to difference within the equality paradigm. Formal equality aims at disregarding individuals' characteristics (such as race, sex, religion, colour, or ethnic origin), with this blindness justified by the fact that difference is the negative partner that legitimates detrimental treatment of those who are different. Since the right to equal treatment is in practice reserved to those who conform, this approach also values sameness and endorses assimilation and conformity. Being intensively individualistic, the concept of formal equality disregards membership in cultural, religious, and ethnic groups, for instance; it aims at abstracting the individual from these contexts and refuses to recognise the different needs and desires arising from these frameworks. However, the result is not the creation of a universal individual, but rather the vesting of a person with the attributes of the dominant culture, religion, or ethnicity. Despite these problems, the notion of formal equality has its positive elements, for it has played an enormously valuable role in tackling formal, exclusionary rules (including

967. See also the remarks *infra* in this section.

968. See particularly art. 8.2 of the ECHR, which allows restrictions on the right to private and family life. The ICCPR denies arbitrary or unlawful interferences with privacy. See art. 17.1.

969. Fredman (2001b), p. 36. See also the remarks in HRC's General Comment No. 28 on art. 3, para. 11.

laws) and in prohibiting blatant prejudice.⁹⁷⁰ In the area of racism, formal equality has been able to address racial prejudice and stereotyping.⁹⁷¹

More substantive forms of equality have given some room for the acknowledgement of difference. For instance, the application of the concept of indirect discrimination has brought some progress towards fashioning a notion of equality which can accommodate diversity. In practice, applications of the concept of equality have helped reveal the extent to which the dominant culture or religion is favoured in various situations. However, the measures taken to advance substantive equality entail challenges and problems of their own: pursued through the endorsement of equality of results, a change in the colour and/or gender composition of a workplace, might, while to some extent positive, reflect only an increasingly successful assimilationist policy. Women in male-dominated sectors of work may have succeeded in entering them by conforming to “male” working patterns, and members of minorities who have entered the sectors may be those who have conformed with the prevailing patterns of behaviour (e.g. the way of dressing, religious observance, language, etc.); that is, in practice, they have assimilated, whether voluntarily or because of the lack of available options. Furthermore, it is not uncommon that when the numbers of women and/or (certain) minorities increase in certain types of jobs, the pay for or status of the job in question decreases. In general, the danger in the concept of substantive equality is that it pays too little attention to the equally important duty to accommodate diversity by adapting existing structures. The group dimension is taken into account, but not positively, to acknowledge the characteristics of other cultures or groups to modify structures.⁹⁷²

It has been observed that the case law in various jurisdictions reveals that surprisingly little progress has been made in creating a concept of equality which can penetrate rules that are apparently neutral but in fact entrench the dominant norm. Among other things, the proportionality approach of the ECHR is viewed as a sophisticated form of consistency signifying that difference is treated according to the degree of difference.⁹⁷³ The approach of the ECHR requiring the weighing of competing interests means that much depends on which factors are acceptable as potentially outweighing the equality interest. Formally neutral rules carry a particularly high risk of disguising an endorsement of the dominant norm especially where the state asserts that the rule furthers the “public interest”. It has been demonstrated that in cases concerning Roma and religious discrimination, the European Court of Human Rights has failed to recognise the extent to which apparently neutral rules

970. Fredman (2002), pp. 7, 9, 11 and 16. Efforts to prohibit overtly prejudicial behaviour take up the issue of e.g. paying differential rates for like work. See p. 7. For the powerful conformist pressure of formal equality, see p. 9. See also the remarks *supra* in chapter 2.3.1.1.

971. Fredman (2001b), p. 23.

972. *Ibid.*, pp. 23–26. See also Fredman (2002), pp. 13–14, 109 and 123.

973. *Ibid.*, p. 118. See also the remarks *supra* in chapter 2.3.1.1.

reinforce the values of the dominant groups in society. In general, cases concerning claims of minorities and claims relating to health and safety (such as the use of safety helmets by Sikhs and the use of drugs such as peyote and hashish) have brought complex questions to the fore, but in practice accommodation and respect for minority cultures and values have not received much support in the framework of human rights of general application, including the ECHR.⁹⁷⁴ The conflict between gender equality and the rights of minorities – whether older or newer minorities – appears to be a particularly acute issue. Relating to this, the wearing of headscarves by Muslim women and girls has emerged as one of the key contested sites, having raised particularly heated debates in many European states, for example, France and Germany, as well as in Turkey, where the issue has additional dimensions of its own. Prohibitions against the use of headscarves in the public sphere, for instance, in the area of education have been justified on the basis of the principle of secularity, which itself is not a neutral value.⁹⁷⁵ The Strasbourg Court has been hesitant to offer protection to the users of Muslim headscarves.⁹⁷⁶

Human rights of general application and the principles of equality and non-discrimination incorporated therein have links to the question of incorporation in(to) society, since the norms and principles play a role in preventing the exclusion and marginalisation of individuals in society. While the requirement of non-discriminatory application of human rights has a bearing on enhancing inclusion, the role of non-discrimination provisions in this process has limitations, which have been discussed above. These limitations stem from the fact that international human rights norms rarely contain positive duties for states to promote equality and that the assertion of a right to equality is essentially left to the individuals who are the victims of discrimination. In practice, this also means that only those in a position to invoke the mechanisms available may benefit from them, and that persons in the most vulnerable situations may be barred from doing so. On the other hand, those who wish to enjoy equal rights (including the protection of human rights) are also subject to pressure to conform to the dominant norms and practices, as the prevalent concept of formal equality entails disregarding differences; the concepts containing a more substantive idea of equality are not free from this conformist pressure either.

974. Fredman (2001b), pp. 32–34 and 38, and (2002), pp. 38–39 and 119. Fredman comments on the practice of the European Court of Human Rights in particular. For the limited support for the different lifestyles of the Roma under the ECHR, see e.g. *Buckley v. United Kingdom*.

975. E.g. in France the principle of *laïcité* (secularity) has been used to argue for a concept of equality which stresses identity and overrides ethnic, religious, or cultural differences except in the domain of private life. Fredman (2001b), pp. 36 and 39–42.

976. See e.g. *Dablab v. Switzerland* and *Leyla Şahin v. Turkey*.

3 THE EUROPEAN UNION, HUMAN RIGHTS AND INTEGRATION INTO SOCIETY

3.1 Human Rights and Fundamental Freedoms in the European Union

In the course of the 1990s, human rights emerged as one of the prominent items on the agenda of the European Union (EU) in both its external and internal relations, including EU law. In the area of external relations, since the early 1990s human rights have appeared in agreements on trade and co-operation with third countries as well as in the EU association agreements and the accession process.¹ The EU is presently one of the main actors on the international plane in the area of human rights. As regards internal developments within the EU, references to human rights and fundamental freedoms are incorporated in the founding treaties, including the Treaty on European Union (TEU) and the Treaty of Amsterdam, concluded in 1992 and 1997, respectively.² The adoption of the Charter of Fundamental Rights of the European Union in 2000 is also among the prominent efforts to reinforce fundamental rights and non-discrimination in the EU.³ Many provisions of the Charter reiterate provisions set out in the ECHR, although not always in identical terms. The EU Charter also contains provisions not found in the ECHR, such as provisions on freedom to conduct a business, the rights of the elderly, the integration of persons with disabilities, economic and social rights, and the environment. The integration of persons with disabilities and the rights of the elderly are addressed in the provisions of the EU Charter on equality, which also consider equality before the law, non-discrimination, cultural, religious and linguistic diversity, equality be-

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1. EU website at http://europa.eu.int/pol/rights/index_en.htm (visited on 15 May 2006). See also Bartels (2005), pp. 22–23. The accession criteria for new member states have been set out in the Copenhagen criteria for EU membership developed in 1993. EU website at http://europa.eu.int/comm/enlargement/index_en.html (visited on 15 May 2006). For the Copenhagen Criteria, see also e.g. Malloy (2005), pp. 266–268.
 2. See particularly art. 6.1 and 6.2 of the TEU. The Amsterdam Treaty introduced new and wide-ranging provisions on fundamental rights and a wholly new and broader anti-discrimination provision in its art. 13. See also the remarks *infra* in chapter 3.2. See also Bell (2002), pp. 126–128, and Ellis (2005), p. vii.
 3. The Charter was adopted in the form of a declaration at the summit of the heads of state or government of the EU states in Nice in December 2000.

tween men and women, and the rights of the child.⁴ The extremely general terms of the Charter's provisions nevertheless leave it rather unclear exactly what is protected and what is not.⁵

Despite various developments within the EU pertinent to human rights, the EU has a relatively modest normative record in the area of human rights if compared to international actors such as the CoE, the UN, and the OSCE. On the other hand, the EU does not even aim at being or becoming a standard-setter comparable to these organisations. The EU actions in the area of human rights are explicitly described as being based on the existing main international and regional instruments for the protection of human rights.⁶ A number of internationally agreed instruments seeking to protect fundamental human rights exert at least an indirect influence on the content of EU law; of prime importance in this respect is the ECHR, which is expressly referred to in the pertinent EU treaties.⁷

The consideration of minority issues in the EU has been heavily influenced by the very divergent views of the EU member states concerning proper policies on minorities,⁸ which has prevented the creation of a common ground on these questions. As a result, the Community legislation provides no specific framework for the protection of minorities.⁹ The EU Charter of Fundamental Rights contains refer-

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4. See Chapter III, "Equality", incorporating arts 20–26. The provision on non-discrimination in art. 21 refers to a number of grounds which are prohibited as bases of discrimination. Art. 21.1 prohibits any discrimination based on "any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation". Art. 21.2 addresses the prohibition of any discrimination on grounds of nationality within the scope of the founding treaties of the EU. In general, the rights set out in the Charter are not linked to nationality but the rights of individuals that are put forward as belonging to everyone. The rights of EU citizens are considered separately in Chapter V of the Charter.
 5. See also the references to the remarks by J.J. Weiler on the adoption of the Charter as a symbol to counterbalance the market orientation of the EU *infra* in chapter 3.4 (n. 145).
 6. EU website at http://europa.eu.int/comm/external_relations/human_rights/intro/index.htm (visited on 15 May 2006). It is pointed out that the EU member states' obligations based on the relevant UN and CoE instruments form a key framework for their action e.g. in the field of racism (particularly where EU standards do not exist). Prior to the adoption of the Council directives on equality and racial discrimination in 2000, all EU member states were expected to have ratified the ICERD. Information from the EUMC in June 2004.
 7. In addition to the ECHR, the European Social Charter (both in its original form of 1961 and revised form of 1996) and the Community Charter of Fundamental Social Rights of Workers adopted in 1989 are noted to be of particular significance for human rights and fundamental freedoms within the EU. Ellis (2005), p. 19. See also the remarks on the Community Charter *infra* in chapter 3.2 (n. 57)
 8. Two somewhat extreme positions in the area of minority protection are those adopted by France and Finland, the former rejecting the idea of minority rights and the latter strongly favouring them. Among other things, France's policy towards minorities prompted it to file a reservation to art. 27 of the ICCPR.
 9. See also Thornberry and Martín Estébanez (2004), p. 19.

ences to minorities only in its provisions on non-discrimination.¹⁰ As pointed out, the Charter refers to respect for cultural and linguistic diversity, but does so in very general terms – without any references to minorities.¹¹ The EU has given some consideration to linguistic diversity and in this framework also to minority languages spoken in the EU area by, for instance, providing resources for their maintenance and development.¹² While a comprehensive internal Community policy on minorities has been lacking, the EU has developed a somewhat more solid minority policy in the area of external relations, including the accession of new member states. The accession criteria refer to the need for the candidate country to show that it has established respect for and protection of minorities.¹³ In the accession processes, the EU has paid particular attention to the situation of the Roma, for example.¹⁴

Whilst the EU has not managed to develop a concrete policy on minorities within the Union, the fight against racism and other forms of intolerance has become one of the most relevant human rights questions addressed. The year 1997 marked a watershed as regards the attention paid to the issues of racism and other forms of intolerance as well as to discrimination and exclusion within the EU.¹⁵ In addition to having declared 1997 the European Year Against Racism, the EU states established the European Monitoring Centre on Racism and Xenophobia (EUMC).¹⁶ The Treaty of Amsterdam, concluded in the same year, introduced new provisions on non-discrimination that extended the mandate of the Community to the new areas of discrimination – including discrimination on the basis of racial or ethnic

10. See art. 21.1 (also referred to *supra* (n. 4)).

11. According to art. 22, “The Union shall respect cultural, religious and linguistic diversity.” Preamble para. 3 recites that the EU contributes to the preservation of common values “while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the member states”.

12. Thornberry and Martín Estébanez (2004), pp. 19–20. In practice the EU has provided financial support for the European Bureau for Lesser Used Languages (EBLUL), which aims at promoting languages and linguistic diversity. See the EBLUL’s website at <http://www.eblul.org> (visited on 10 October 2007).

13. See the Copenhagen Criteria for EU Membership (also referred to *supra* (n. 1)).

14. For the EU’s attention to minorities, including the Roma, see e.g. Biscoe (1999), pp. 89–103, and Thornberry and Martín Estébanez (2004), pp. 19–20. For attention to minorities in the EU accession process, see Open Society Institute (2001).

15. For the interest of the European Community in these problems in the 1980s and increasingly towards the 1990s and onwards, see Gras (2000), pp. 14–15, and Bell (2002), pp. 54–63 and 80–87.

16. The EUMC was set up to provide the Community and the member states with data on the phenomena of racism, xenophobia and anti-Semitism and to make recommendations to policymakers to help them tackle these problems. For the EUMC and its activities, see e.g. Pentikäinen (2004b), pp. 47–57. At the beginning of 2007, the EUMC was replaced by the Fundamental Rights Agency (FRA), which has a broader mandate covering human rights more generally. The FRA commenced its work in the beginning of March 2007. See the FRA’s website at <http://www.fra.europa.eu/fra/index.php> (visited on 13 March 2008).

origin – and marked a turning point in EU anti-discrimination law.¹⁷ In 1998, the Action Plan against Racism was adopted by the EU Commission to develop the EU contribution to the fight against racism by, for instance, calling for the application of the principle of “mainstreaming”.¹⁸ In addition to specific anti-racist policies and actions, other EU policies and programmes have links to the fight against racism and other forms of intolerance.¹⁹ Among other things, the European Employment Strategy is viewed as an important instrument in this area.²⁰

3.2 Focus on Non-Discrimination

The principle of equality is among the general principles of EU law,²¹ and the prevention of discrimination has a prominent place in EU actions. Initially, EU law in the area of discrimination concentrated on sex discrimination and discrimination against nationals of a member state,²² and the adoption of the Treaty of Amsterdam extended the Community’s competence to cover the grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation.²³ The implementation of non-discrimination provisions has taken place essentially through the adoption of directives:²⁴ the secondary legislation includes a number of directives supporting sex equality²⁵ and in 2000, two directives, the Racial Equality Directive and the Em-

17. Bell (2002), p. 143.

18. See also the remarks *infra* in chapter 3.2.

19. This occurs e.g. when education, training and youth programmes aim to promote intercultural learning and tolerance by bringing together young people from different backgrounds. Pentikäinen (2004b), p. 46.

20. EUMC Annual Report 2000, pp. 98–99. Instruments such as the Commission Communication on Immigration, Integration and Employment, adopted in June 2003, also emphasise the need to prevent racism and discrimination. See also the remarks on this Communication *infra* in chapter 3.3.

21. Ellis (2005), pp. 315–344.

22. Fredman (2002), p. 90, and Bell (2002), pp. 32–53.

The promotion of equality between men and women as one of the tasks of the Community was taken up already in the Treaty of Rome (TEC), and the principle of equal pay for equal work irrespective of sex was the first question addressed. The provisions concerning the measures to be taken by the EU institutions in the area of sex equality have subsequently been broadened. The Amsterdam Treaty elevated equality between men and women one of the central tasks of the Community. See arts 2 and 3 of the Treaty. See also Fredman (2002), pp. 31–32 and 90.

23. Pursuant to art. 13 of the Amsterdam Treaty, the Council “may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

24. Ellis (2005), p. 18.

25. These include e.g. the Equal Pay Directive and the Equal Treatment Directive.

ployment Equality Directive, were adopted to implement article 13 of the Treaty of Amsterdam. The former implements the principle of equal treatment irrespective of racial or ethnic origin and prohibits racial and ethnic discrimination in the fields of employment, education, social security and healthcare, access to goods and services, and housing. The latter implements the principle of equal treatment in the areas of employment and training irrespective of religion or belief, disability, age and sexual orientation.²⁶ The legislative framework of the EU has been supported and supplemented by anti-discrimination programmes adopted within the Union to encourage measures to prevent and combat discrimination.²⁷ The Community Action Programme to Combat Discrimination is also noted as playing a role in preventing and combating racism, xenophobia and anti-Semitism.²⁸

Currently there is only a limited list of grounds for discrimination that EU law prohibits outright. These include the above-mentioned EU nationality, sex, racial or ethnic origin, religion or belief, disability, age, and sexual orientation.²⁹ The more noticeable differences compared to the lists of grounds laid down in the international human rights instruments of general application adopted by the CoE and the UN are that the list of grounds in EU law contains grounds not explicitly mentioned in human rights norms and that the EU list is not open-ended.³⁰ Although EU law has been expanded by the addition of new grounds of discrimination, the coverage of the law remains far from complete. It has been observed that since EU law only prohibits discrimination based on specified grounds, differences (in treatment) between persons in otherwise comparable circumstances that are not based on the specified grounds are lawful.³¹ Furthermore, as discussed in the preceding chapter, the need to establish sufficiently distinct boundaries vis-à-vis other groups, as well

26. The directives do not provide the definitions of the grounds they address, which has contributed to some uncertainties as to their scope. Consequently, much discretion has been left to the ECJ as regards the definitions. The omission of “colour” in the Racial Equality Directive has been criticised due to the fact that much racial discrimination is in reality based upon the colour of the victim’s skin. See Ellis (2005), p. 31.

27. The programmes adopted have addressed various forms of discrimination prohibited under EU law. See e.g. the Programme relating to the Community Framework Strategy on Gender Equality (2001–2005) and the Community Action Programme to Combat Discrimination (2001–2006).

28. EU Annual Report on Human Rights (2003), p. 19.

29. Part-time and temporary employment has also been listed among the prohibited grounds. Ellis (2005), p. 20. For different grounds, see pp. 20–36.

30. See the remarks on the open-endedness of the lists of prohibited grounds of discrimination in human rights norms *supra* in chapter 2.3.1.1. Art. 13 of the Amsterdam Treaty and the relevant directives provide closed lists of grounds. It is worthy of note that the EU Charter of Fundamental Rights includes a number of grounds not expressly covered by the provisions of the Amsterdam Treaty and the EC anti-discrimination directives and that the Charter’s list of grounds is also open-ended. See the remarks on the art. 21.1 of the Charter *supra* (n. 4).

31. Ellis (2005), p. 108.

as bright line distinctions, is problematic in respect of multiple or cumulative (or “intersecting”) discrimination.³²

Unlike the international human rights norms, EU anti-discrimination law does not contain non-discrimination provisions of general application, but is clearly limited to certain areas, employment being the most prominent. Additionally, EU anti-discrimination law creates somewhat different scopes of application for the different grounds it covers, producing a hierarchy of equality in which different groups enjoy a different standard of legal protection. At present, racial or ethnic discrimination is at the top and age discrimination at the bottom of this hierarchy.³³ In general, the Community competences set limits whereby the application of EC directives cannot extend to the areas that are outside the Community’s regulatory competence. For example, although the material scope of the Racial Equality Directive extends to the area of education, the Community has no competence over matters of educational curriculum and organisation; yet, these are important areas in which racial discrimination may occur, for instance through the inclusion in the curriculum of material with a racial bias, or through the refusal to admit children of a particular (ethnic) origin (e.g. Roma) to a school.³⁴

Within EU law, the scope of the law prohibiting discrimination on the ground of nationality is also somewhat different from the law dealing with other categories of discrimination. It is rooted in the importance of the free movement of persons in a single economic market, and the whole area of discrimination based on nationality is being subsumed into the wider notion of citizenship of the Union.³⁵ A number provisions in EU law prohibit discrimination against persons on the ground of their possessing the nationality of an EU member state. EU law characteristically affords different rights to different groups of individuals depending on their nationality and status. The rights of citizens of EU member states residing in other EU states have been liberalised to a considerable extent such that EU citizens enjoy a strong legal

32. See the remarks *supra* in chapter 2.3.1.1. See also Fredman (2002), pp. 68–70 and 74–75. For the problematic of multiple discrimination in the light of EC directives, see also Bell (2002), pp. 112–115.

33. The Racial Equality Directive has the broadest scope of application extending beyond employment to include education, housing, and other social protection. The EC directives on sex equality cover employment and social security. The Employment Equality Directive is limited to discrimination in the areas of employment, vocational training, and membership in workers’ or employers’ organisations; social security is specifically excluded. The Employment Equality Directive also contains some very wide-ranging exceptions, especially in relation to age. For the remarks on the hierarchy of these provisions, see Ellis (2005), p. 214, Fredman (2002), p. 70, and Bell (2002), pp. 32 and 52. For the wide material scope of the Racial Equality Directive, including prohibiting discrimination in both the public and private sectors in relation to the activities it refers to, see Chalmers (2001), p. 214.

34. For this reason the ECJ’s decisions acquire particular importance. Ellis (2005), p. 256. For the limits set by the Community’s competence, see also Bell (2002), pp. 76 and 134.

35. Union citizenship was created by the TEU. See Part II, arts 17–21.

status in other EU states, including extensive rights to move and reside within the territory of the member states. The strongest status has been granted to workers and those exercising the right of establishment or freedom to provide services, but economically inactive (retired persons, persons with independent means and students) and the family members of all the above-mentioned EU citizens have also been granted certain rights.³⁶ Union citizenship also confers political rights on EU citizens residing in other EU states, most prominently the right to vote in local elections and in the elections of the EU Parliament.³⁷ In general, EU citizens enjoy stronger protection in other EU states on the basis of EU law than under general international law.³⁸

Third-country nationals lawfully in the EU area are divided into a number of categories, each of which has a somewhat differing legal status and the regulation of which differs in accordance with the temporary or permanent purpose of a person's presence in the EU member state. The EU has created a system of graded rights in which a rather stable status has been granted to recognised refugees³⁹ as well as to long-term residents from third countries, with the latter potentially enjoying almost the same rights as EU citizens.⁴⁰ The status of the other groups already covered by the EC directives is either limited by the purpose of residence (temporary or subsidiary protection, students) or is related to their status as joining family members.⁴¹ The nationals of a number of third countries, including the association countries,

36. In addition to treaty provisions, there is also a substantial body of secondary law to support the rights of the EU citizens. There exist provisions prohibiting discrimination on the basis of nationality in general terms and providing for the freedom of movement of EU nationals and their family members. The right to move and reside within the territory of the EU member states is subject to some limitations and conditions laid down in EU legislation. Gross (2005), pp. 146–148. For a comprehensive consideration of the various rights conferred on the EU citizens of various statuses, see Rogers and Scannell (2005).

37. See the TEU, art. 19. The rights of EU citizens have also been incorporated in Chapter V of the EU Charter of Fundamental Rights.

38. Rogers and Scannell (2005), pp. 233–244.

39. For the right of free movement and social security benefits of recognised refugees and stateless persons, see *ibid.*, pp. 76 and 224.

40. Bell (2002), pp. 194–195. Residency is viewed to be long-term after five years of legal residence and economic independence. See the Directive on Long-term Third-country Residents, arts 4 and 5. The same mechanism is laid down in the Directive on Family Reunification. Most of the restrictions in the directives regulating the legal status of third-country nationals are optional, with EU regulation setting the minimum standard and the member states free in most areas to grant equal treatment. Gross (2005), pp. 160–161. For a wide margin of discretion of states with respect to the Directive on Long-term Third-country Residents, see Halleskov (2005), pp. 181–201.

41. For the various legal statuses created in EU law and their contents, see Gross (2005), pp. 152–160.

are given rights with respect to the EU and vice versa on the basis of agreements between the EU and the relevant countries.⁴²

The distinction upheld between EU citizens and third-country nationals in the EU resulted in the insertion of a separate provision on nationality both in the Racial Equality Directive and the Employment Equality Directive.⁴³ These insertions were due to the ever-sensitive matter of immigration and the need to signal that it did not fall within the terms of the directives. The member states wanted to preserve the right to deal with asylum and migration policies and, especially, the scope of their social security systems.⁴⁴ Incorporation of the nationality provision in the directives signifies that the core problem of legal discrimination in the area of immigration is not covered by EC law.⁴⁵ The insertion of references to nationality in EU legislation has also resulted in a considerable number of uncertainties, reflected in debates on the reach of the directives with respect to third-country nationals.⁴⁶ Among other things, it has been pointed out that the most serious forms of racial violence are excluded from the remit of the Racial Equality Directive, as it does not include policing or questions of criminal justice.⁴⁷ The legal distinction between citizens of the Union and third-country nationals has been criticised from a human rights perspective, since it has not been considered compatible with the EU mission to combat racism;⁴⁸ it has been stated that the nationality exception in the EC directives may even foster rather than diminish xenophobia.⁴⁹ It is also worthy of note that the areas of freedom, security and justice developed by common actions

42. The EU has concluded these kinds of agreements with numerous countries in Europe and outside Europe. See Rogers and Scannell (2005), pp. 247–265.

43. According to art. 3.2 of the Racial Equality Directive, “This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of member states, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.” Art. 3.2 of the Employment Equality Directive incorporates the similar kind of provision.

44. See also the remarks on the development of Community competences in the area of immigration and asylum *infra* in chapter 3.3.

45. Gross (2005), p. 158. See also Ellis (2005), p. 290. The formulation of art. 21.2 of the EU Charter of Fundamental Rights also reflects the distinction between the rights of EU citizens and those of third-country nationals. See the remarks *supra* in chapter 3.1 (n. 4). See also Ellis (2005), p. 330.

46. Bell (2002), pp. 37–38 and 195. Evelyn Ellis has stated that in situations other than those specified, the Racial Equality Directive and its partner Employment Equality Directive are intended to apply to all persons within the EU, irrespective of their nationality. Ellis (2005) pp. 289–290.

47. Chalmers (2001), pp. 214–215.

48. Groenendijk and Guild (2001), p. 44.

49. Brown (2002), p. 212.

of the EU member states are also specifically mentioned as being provided for EU citizens.⁵⁰

Although the unique characteristics of the supremacy and direct effect of EC law and the now highly sophisticated case law of the European Court of Justice (ECJ) are noted as being of the utmost potential significance for individuals claiming equality, the numerous sources of equality and non-discrimination law make this area an extremely complex one within the EU.⁵¹ Adding to the complexity of EC law in the area of anti-discrimination are a number of ambiguities as regards the scope of application of the relevant provisions.⁵² Furthermore, the fact that anti-discrimination law advances a perception that “some are more equal than others” may undermine the potential of anti-discrimination law to create an enhanced commitment to the Union on the part of individuals.⁵³ The anti-discrimination action of the EU has strong links to the labour market and consequently also to economic and market interests; the treatment and status of third-country nationals is plainly associated with economic imperatives. Although the adoption of the Racial Equality Directive in particular signifies a departure from the traditional labour market focus in going outside the sphere of employment, economic concerns remain the recurrent orientation within the EU, as can be clearly seen in the directives.⁵⁴ The symbiotic relationship between equality and economic concerns has also resulted in seeing sex/gender equality through an “economic prism”: i.e. the disadvantaged position of women in the labour market has been characterised as a source of economic inefficiency, and sex equality is seen as a strategy to achieve economic competitiveness. It has been pointed out that recognition of the fact that equality could not remain indefinitely subservient to market-based aims also led the ECJ to acknowledge that the sex equality provisions also have their basis in the fundamental human right to equality.⁵⁵

EU social policy is closely linked to the economic dimensions of the Union, and the “European social model” has been created to balance economic interests

50. TEU, art. 29.

51. Ellis (2005), pp. 85–86.

52. At the heart of the difficulty is, among other things, the ambiguities of such central terms as “treatment” and “employment”. Ibid., pp. 214, 218–219 and 254–255. See also the remarks on the vagueness linked to the prohibited grounds of discrimination *supra* (n. 26).

53. Bell (2002), p. 213.

54. See Recital 9 to the Racial Equality Directive, and Recital 11 to the Employment Equality Directive. The breadth of the provision on justification on grounds of age in art. 6 of the Employment Equality Directive has been pointed out as being an indication of how the principle of non-discrimination is sacrificed to commercial interests. Ellis (2005), p. 296. For the remarks on the economic and political forces prompting EU anti-discrimination legislation and on the economic basis of the Racial Equality Directive and the Employment Equality Directive, see pp. 29 and 296.

55. Fredman (2002), pp. 24–26 and 90.

“market-making”) with social protection (“market-correcting”).⁵⁶ Social policy in the EU is not rights-based but characterised by a comparative absence of the language of rights.⁵⁷ Although the initial market-making focus of the EU was strong, the adoption of article 13 of the Amsterdam Treaty and the directives pursuant to it have reconfigured European social policy such that more attention is now paid to fundamental social rights. However, despite this shift, the market-making focus of earlier periods is still visible in EU policies.⁵⁸ In general, the economic and social objectives (including social protection and equality) of the EU are constantly in tension, even conflict,⁵⁹ and there are pressures to prioritise economic liberalisation over economic justice and cohesion.⁶⁰ The EU has justified its agenda on equality and non-discrimination both with reference to economic rationality – thus viewing equality as a productive factor in a market-driven economy – and to securing human rights, but it has been pointed out that it is sometimes difficult to identify which one of these two rationales has the upper hand in the EU policy.⁶¹ It has also been observed that advancing economic rationality with respect to equality within the EU has also had its positive outcomes, especially in the context of disability, a development that has propelled the EU into the “vanguard of the disability debate in Europe”.⁶²

56. Scharpf (2003), pp. 112–113.

57. de Witte (2005), p. 155, Hervey (2005), p. 333, and Gatto (2005), p. 361. It is also pointed out that whilst the language of rights is avoided in the area of EU social policy e.g. due to economic interests, such language is not necessary for good results. de Búrca (2005), pp. 10 and 13–14.

Rather than incorporating the European Social Charter of the CoE into EU law, the EU has adopted its own Community Charter of Fundamental Social Rights of Workers. In fact, the European Social Charter and the EU have established two very different regional systems engaged in different ways in the protection and promotion of social rights. de Búrca, p. 11. See also Hervey (2005), and Ashiagbor (2005). The protection provided by the EU is observed to be less strong than that given by the European Social Charter. de Witte (2005), p. 155.

58. Mark Bell has identified and contrasted two models of European social policy: the market integration model and the social citizenship model. The former emphasises the primary goal of the Union to achieve economic integration and EU intervention in the social sphere is allowed only when this is required to support and sustain the smooth functioning of the common market. The latter model is centred around a role for the Union as a guarantor of fundamental social rights with social policy as an independent policy objective. According to Bell, the current state of European social policy does not fit neatly into either of these models. Bell (2002), pp. 6–31 and 196.

59. Scharpf (2003), p. 129. For the tension, even conflict, between economic and social objective, see also Atkinson (2003), p. 151.

60. Alston (2005), p. 46.

61. Quinn (2005), p. 280.

62. *Ibid.* For the EU actions with respect to the disabled, see pp. 300–303. The (revised) European Social Charter’s provisions on the disabled are broader than provisions in EU law, particularly the Employment Equality Directive. See also De Schutter (2005), pp. 142–143.

Much as legal systems in general follow their own individual views on the various models of equality, current EU law also espouses differing approaches to the concept of equality.⁶³ Within the EU, equality has been established as an express goal, and both the principle of equal treatment and somewhat more substantive forms of equality are found in EU law. In the case of the latter, the EU often employs the concept of equal opportunities.⁶⁴ The secondary instruments of EU law also use the concepts of direct and indirect discrimination and in practice – as indicated by, for example, the case law of the ECJ – discrimination signifies the application of different rules to comparable situations or the application of the same rule to different situations.⁶⁵ EC law allows justifications of different degrees of different treatment, with direct discrimination permitting the fewest justifications and indirect discrimination being structured in such a way as to permit a *prima facie* case of discrimination to be rebutted by a justification.⁶⁶ Although the ECHR operates as a source of EU law, the differences between the concepts of discrimination employed within these two frameworks are worth noting.⁶⁷

While EC law reflects the general experience of the EU states in the area of anti-discrimination law, which is mainly based on enforcement by individuals,⁶⁸ the

63. The EU approaches are said to reflect much of the spectrum of concepts from the simple prescription of formal equality to the positive pursuit of equality of opportunity, or even equality of results. Ellis (2005), pp. 4–5 and 87.

64. For the remarks on EU law being couched in terms of equal opportunities, see Fredman (2002), pp. 136–143. For the references to the principle of equal treatment, see e.g. art. 1.1 of the Equal Treatment Directive, art. 1 of the Racial Equality Directive, and art. 1 of the Employment Equality Directive. Art. 141.4 of the TEC and art. 2.8 of the Equal Treatment Directive, which address equality between men and women, refer to ensuring full equality between men and women (in working life) and allowing maintaining or adopting particular measures to ensure full equality in practice. Both the Racial Equality Directive and the Employment Equality Directive also refer to the objectives of “ensuring full equality in practice”. See arts 5 and 7.1, respectively.

65. The decisions of the ECJ have played important role in shaping EU law in the area of equality and non-discrimination, including in developing the concepts of direct and indirect discrimination. The definitions of these concepts were subsequently inserted in EU legislation. Ellis (2005), pp. 18–19 and 87–98, and Fredman (2002), p. 94, 107 and 111. The statutory definitions may be found e.g. in art. 2.2 of the Burden of Proof Directive concerning sex discrimination and in art. 2 of both the Racial Equality Directive and the Employment Equality Directive. See also the remarks on the concepts of direct and indirect discrimination *supra* in chapter 2.3.1.1.

66. Fredman (2002), pp. 102–103 and 112–114. Fredman points out the significance of the fact that the definition of direct discrimination in the Racial Equality Directive includes no justification defence. For various exceptions to the principle of discrimination, see also Ellis (2005), pp. 271–313.

67. Under the ECHR (in principle) even direct discrimination can in general be excused or “justified” in any case where it pursues an acceptable aim and is not disproportionate to that aim. *Ibid.*, pp. 321–322. See also the remarks on the non-discrimination provisions of the ECHR *supra* in chapter 2.3.1.1.

68. Bell (2002), p. 184.

EU has also created positive action schemes to promote equality in order to mitigate the limits of individual litigation. The possibility for proactive measures (positive action) to promote equality is set out prominently in EC directives, but it can be seen (again) that there is no requirement to take such measures.⁶⁹ This situation derives from the competence of the Community in the area: for instance, pursuant to article 13 of the Amsterdam Treaty all types of legislative or other instruments are authorised, but their ambit is restricted to the prohibition of discrimination and does not extend to measures to promote equality of opportunity on a wider scale.⁷⁰ It has been pointed out that despite the provisions in EU law on a more substantive concept of equality, i.e. that of equal opportunities, in practice the concept comes closer to an individualistic than a substantive notion.⁷¹ Characteristic of the EU approaches is the rejection of the equality-of-results model, which allows quotas for instance.⁷² In general, the term “positive action” used within the EU is seen as requiring clarification.⁷³

Within the EU, non-discrimination and equality laws are complemented by mainstreaming measures⁷⁴ to relieve structural disadvantage and to promote social inclusion.⁷⁵ Mainstreaming is a well-established discourse within EU gender equal-

69. See e.g. art. 5 of the Racial Equality Directive and art. 7 of the Employment Equality Directive. Positive measures are also mentioned in the area of sex equality. See also the remarks *supra* (n. 64). For positive actions in EU legislation, see Ellis (2005), p. 297–313, and Fredman (2002), pp. 136–137. For equal opportunities and positive action in the EU, see Bell (2002), pp. 47, 77, 148 and 184. For the specific features of positive duties, see also Fredman (2002), pp. 176–188. Bruno de Witte has observed that the ECJ’s doctrine does not include a “positive obligations” dimension. de Witte (2005), p. 155.

70. Ellis (2005), p. 14.

71. This observation is made by Sandra Fredman in discussing the practice of the ECJ challenging an affirmative action policy. Fredman refers e.g. to *Kalanke v. Freie Hansestadt Bremen*, a well-known case in which the ECJ accepted the legitimacy of measures giving an advantage to women with a view to improving their ability to compete equally with men in the labour market, but in which the Court coupled this recognition of the limits of formal equality with a strong emphasis on the primacy of the individual and individual merit. In the case, the ECJ did not accept the idea of equality of results. According to Fredman, although the ECJ has softened its views in the subsequent cases, most notably in *Marschall v. Land Nordrhein-Westfalen*, the Court’s approach is to support the subordination of substantive equality to the primacy of the individual. Fredman (2002), pp. 136–143.

72. The rejection of the general application of quotas was reflected in the two cases referred to in the preceding note. See *Kalanke v. Freie Hansestadt Bremen*, para. 22, and *Marschall v. Land Nordrhein-Westfalen*, para. 35.

73. For instance, it has not as yet been comprehensively defined by the ECJ. Ellis (2005), p. 297.

74. For mainstreaming, see also the remarks *supra* in chapter 2.3.1.1.

75. The EU is seen as wielding enormous power in this area, particularly with respect to social policy and through its Employment Strategy and the deployment of its Structural Funds. Ellis (2005), p. 115.

ity policy,⁷⁶ and it has subsequently been introduced in connection with policies on combating other forms of discrimination (or intolerance).⁷⁷ However, it has also been pointed out that the EU appears to lack clear procedures in the areas, thus resulting in a risk that mainstreaming will become haphazard and variable, depending on the issue and/or the individuals involved.⁷⁸

3.3 EU Approaches to Integration in(to) Society

In the EU context, the question of integration is often linked to the political development of the Union, i.e. the broader process of the increasing and closer cooperation of European states in various areas, particularly the economic and political fields.⁷⁹ Characteristic of this process of state-level integration has also been an emphasis on diversity among and at the level of European states and peoples as well as a respect for the identities of member states.⁸⁰ Within the EU, “the right to be different” has been prominently endorsed at the inter-state level.⁸¹

As regards integration at the intra-state level, particularly the integration of individuals at the societal level, the EU states have been primarily concerned about the integration of legally resident third-country nationals. Some, though clearly less intense, attention has been focussed on the integration of EU citizens. The Direc-

76. See e.g. the Commission of the European Communities, Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities. For gender mainstreaming in the EU, see e.g. Carlson (2007), pp. 75–77.

77. For references to mainstreaming, see e.g. the Community Action Programme to Combat Discrimination (2000–2006) (also referred to *supra* (n. 27)), Annex, Part I, subpara. (g). The Action Plan Against Racism also refers to “mainstreaming” aiming at integrating the fight against racism as an objective into all Community actions and policies at all levels. See the EU website at <http://europa.eu/scadplus/leg/en/cha/c10417.htm> (visited on 10 October 2007). For mainstreaming within the EU, see also Ellis (2005), pp. 115–117, Bell (2002), pp. 47 and 209, and Fredman (2002), p. 176.

78. Bell (2002), p. 209.

79. Ulrike Davy speaks of integration as the broader process of the growing together of European (nation) states. Davy (2005), pp. 126–127. See also Weiler, Begg and Peterson (2003), which deals with various dimensions of “European integration”, including market integration, political integration, social dimensions of integration, and even integration at the level of security and defence.

80. E.g. art. 6.3 of the TEU notes that “the Union shall respect the national identities of its member states”. The Preamble to the EU Charter of Fundamental Rights refers to respecting the diversity of cultures and traditions of the peoples of Europe as well as the national identities of the member states. See preambular para. 3 (referred to *supra* in chapter 3.1 (n. 11)).

81. Nicolaïdis and Howse (2003), p. 358. The authors also discuss the tension between unity and diversity. For social inclusion and integration at both the inter-state and national levels, see also Atkinson (2003), pp. 143–160.

tive on the Rights of EU Citizens and Their Family Members expressly notes that the right of permanent residence subject to no conditions is “a genuine vehicle for integration into the society of the host member state in which the Union citizen resides”.⁸² It is also set out in the Directive that a genuine integration of Union citizens and their family members in the host member state gives protection against expulsion: i.e. the greater the degree of integration, the greater the degree of protection against expulsion.⁸³ Unlike the directives pertaining to third-country nationals,⁸⁴ the Directive includes no references to compliance with integration conditions that may be required from EU citizens. The issue of integration of Community workers and their family members into the life of the host member state has also been considered by the ECJ.⁸⁵ There are also EU norms expressly addressing the integration of persons with disabilities.⁸⁶

Within the EU, the exchanges of views on integration have clearly developed in parallel with the recent interest by the member states in migration of third-country nationals. This interest has been prompted particularly by demographic change, i.e. a rapidly greying Europe and ensuing concerns relating to the availability of (skilled) labour to ensure economic competitiveness and growth in the EU area.⁸⁷ The EU has explicitly linked immigration and the contribution of legally admitted migrants to attaining the aims of the Lisbon Strategy, launched in March 2000, which set the goals of the EU becoming the most competitive and dynamic knowledge-based economy in the world and being capable of sustainable economic growth with more and better jobs and greater social cohesion.⁸⁸ In a Communication issued in 2000 the EU Commission noted that insufficient attention had been given to both the role of third-country nationals in the EU labour market and to the integration of

82. Recital 18 to the Directive on the Rights of EU Citizens and Their Family Members.

83. *Ibid.*, Recitals 23 and 24. According to art. 28.1 of the Directive, e.g. social and cultural integration into the host member states should be taken into account in expulsion considerations.

84. See the remarks *infra* in this section.

85. See e.g. *Di Leo v. Land Berlin*, in which the ECJ asserted that free movement for workers requires “the best possible conditions for the integration of the Community worker’s family in the society of the host Member State”. See para. 13. See also the remarks on children of workers, family life, and children and education in Rogers and Scannell (2005), pp. 144–145, 149 and 371.

86. Improving the social and professional integration of disabled persons has been taken up e.g. in the Community Charter of Fundamental Social Rights of Workers. See art. 26. The Employment Equality Directive refers to reasonable accommodation for the disabled and to the integration of the disabled into the working environment. See arts 5 and 7. Furthermore, the EU Charter of Fundamental Rights refers to the integration of the disabled. See art. 26. See also the remarks on the disabled *supra* in chapters 3.1 and 3.2.

87. The issue of meeting the new demographic and economic challenges is repeatedly raised e.g. in the documents produced by the Commission. See e.g. the Commission’s Communications referred to *infra* (n. 121)

88. Commission Communication on Immigration, Integration and Employment (2003), p. 3.

existing and prospective migrants.⁸⁹ This relatively recent EU-level discussion on integration also reflects the fact that integration debates are also rather recent in many EU countries, in which national legislation and policies on integration have been developed actively only since the end of the 1990s.⁹⁰

Community competences in the area of immigration and asylum were established for the first time in the Treaty of Amsterdam,⁹¹ and the European Council meeting held in Tampere in October 1999 agreed on the development of a common EU policy in the area.⁹² Ensuring fair treatment of third-country nationals residing legally in the territories of member states through an integration policy aimed at granting them rights and obligations comparable to those of EU citizens was viewed as a key element of the development of the EU as an area of freedom, security and justice.⁹³ This initial aim of equalising the legal statuses of EU citizens and legally resident third-country nationals with a view to contributing to the integration of the latter was nevertheless lost in the process, where the main efforts focussed on the establishment of an immigration *acquis*.⁹⁴ At the same time as the EU states have directed their interest towards legal immigration, unregulated forms of immigration, particularly smuggling of migrants and trafficking in human beings have acquired an increasingly prominent place on the EU agenda.

The issue of integration has also found its way into the directives pertaining to long-term third-country residents, refugees and the issue of family reunification that have been adopted with a view to establishing a level playing field between member states and progressing towards a common immigration policy.⁹⁵ The integration of third-country nationals who are long-term residents in the member states is noted to be a key element in promoting economic and social cohesion. A similar link to economic and social cohesion is also made in connection with family reunification, which is viewed as making family life possible and thereby also creating socio-cultural stability that facilitates the integration of third-country nationals in

89. Commission Communication on a Community Immigration Policy (2000), p. 13.

90. For national steps, see e.g. the Commission Communication on Immigration, Integration and Employment (2003), Annex 1, pp. 38–39. The integration measures taken by the EU states have been dealt with in the Commission's annual reports on migration and integration published since 2004.

91. The Amsterdam Treaty granted new competences to the Community in the field of migration and asylum with a view to harmonising national laws in the area, and since then the EU has been a productive legislator in the field of migration. Gross (2005), p. 145.

92. The Tampere meeting agreed to define the elements, which should include partnership with countries of origin, a common European asylum system, fair treatment of third-country nationals and management of migration flows. Commission Communication on a Community Immigration Policy (2000), p. 3.

93. *Ibid.*, p. 9.

94. Ziegler (2005), p. 121.

95. Commission's First Annual Report on Migration and Integration (2004), p. 6.

the member state in question.⁹⁶ The integration of third-country nationals into the society in which they live is viewed as requiring that they be able to enjoy equality of treatment with citizens of the member states in a wide range of economic and social matters.⁹⁷ Consequently, focus is placed on equal treatment with nationals in a number of areas, including access to employment and self-employment activity, education and vocational training, recognition of qualifications, social security, and tax benefits.⁹⁸ The integration of family members is also envisaged;⁹⁹ it is of some interest that in this context for instance the children's capacity for integration at an early age has been highlighted.¹⁰⁰ The EU member states are allowed to require of third-country nationals compliance with integration conditions (in accordance with national law) both for acquiring long-term resident status and for the exercise of the right to family reunification.¹⁰¹

Integration has also been dealt with in the provisions addressing refugees and persons granted subsidiary protection as well as family members of refugees. The EU member states are expressly required to provide programmes to facilitate the integration of refugees into society.¹⁰² Regarding trafficking victims, the emphasis is put on their reintegration in their countries of origin. Their possibility to stay in the receiving country is also acknowledged, but the possibility to receive a residence

96. See Recitals 4 to the Directive on Long-term Third-country Residents and the Directive on Family Reunification. The latter also concerns family reunification of refugees. See Chapter V.

97. Recital 12 to the Directive on Long-term Third-country Residents.

98. *Ibid.*, art. 11. The Directive also concerns protection against expulsion, and in this context e.g. a person's links with the country of residence should be taken into account in making decisions on expulsions. See art. 12.

99. The Directive on Family Reunification refers to the promotion of the integration of family members and to granting them independent status. See Recital 15 to the Directive. According to art. 14, in the member state family members are entitled to access to education, employment or self-employment activity and vocational guidance and training.

100. Consequently, the possibility has been put forward of limiting the right to family reunification of children over the age of 12. *Ibid.*, Recital 12 and art. 4. Integration is also addressed in connection with the requirement of age limits for spousal family reunification, and the Directive sets minimum age requirement with a view to preventing forced marriages. See art. 4.5.

101. See art. 5.2 of the Directive on Long-term Third-country Residents and art. 7.2 of the Directive on Family Reunification.

102. See art. 33.1 of the Directive on Refugees and Persons Otherwise Needing International Protection. For the requirement to provide programmes tailored to the needs of refugees in order to facilitate their integration into society, see also the Commission Communication on Immigration, Integration and Employment (2003), p. 6. The integration of family members of refugees is addressed in the Directive on Family Reunification; in accordance with the general rule set out in art. 7.2, a member state may require the family members to comply with integration measures (in accordance with national law) after they have been granted family reunification.

permit is conditioned on the victim assisting the authorities in solving trafficking crimes.¹⁰³

The pertinent directives reflect the insistence of the EU states on retaining national decision-making power with respect to integration issues; i.e. these issues are essentially left to the discretion of each member state. While the provisions require integration measures for refugees, there are no requirements with respect to other groups or the content of integration measures.¹⁰⁴ Thus, the reluctance of the member states to surrender their national decision-making in matters of immigration and integration has meant that (at least presently) there exists no harmonised EU policy in the area. It has also been pointed out that due to differences between member states in legal and cultural traditions and in their respective groups of immigrants, harmonisation on a concrete level in the area of integration may not even be desirable.¹⁰⁵ In keeping with their unwillingness to give away their sovereign rights in the area of immigration, the EU states have retained the power of decision over nationality issues, keeping the criteria and procedures on the acquisition of the nationality of a member state exclusively within the competence of the national legislator.¹⁰⁶

As a result of the above-mentioned orientation, the development of concrete integration policies and measures has taken place at the national level of the member states. In practice, the national approaches in the EU states in the area of integration and the integration-specific measures diverge, sometimes drastically, and views differ, for instance, as regards compulsory elements of national integration programmes and the integrative value of nationality.¹⁰⁷ One trend that can be seen is that despite the growing need for immigrant labour in the EU area, many member states have recently introduced increasingly stringent conditions for immigration, including stricter national requirements for integration, for instance, by introducing compulsory integration programmes and a system of integration agreements. The more stringent approach taken by many EU states towards integration requirements

103. See the Directive on Trafficking Victims. Art. 8 concerns conditioning the stay of the victim on providing assistance to authorities.

104. References such as “in accordance with national law” have been inserted in the Directives on Long-term Third-country Residents and on Family Reunification. See arts 5.2 and 7.2, respectively.

105. Ziegler (2005), p. 121.

106. Gross (2005), p. 159, and Groenendijk and Guild (2001), pp. 47–49.

107. For a synthesis report on national integration policies, see the Commission Communication on Immigration, Integration and Employment (2003), pp. 37–46. See also the remarks on national integration policies in the Commission’s annual reports on immigration and integration. See also Ziegler (2005), pp. 120–122.

is linked to growing concerns over security, particularly those triggered by recent terrorist attacks and other violent incidents in Europe.¹⁰⁸

Although integration has not (so far) become a central topic of EU law, this body of law may nevertheless be viewed as having a certain role with respect to the incorporation of individuals into society, as the rights and duties conferred on individuals by EU law create legal statuses for individuals that also have a bearing on the issue of incorporation. As discussed, one characteristic of EU law is that it affords divergent rights to individuals belonging to different groups, with EU citizens enjoying the strongest status in other EU states, and various groups of third-country nationals having different statuses. In general, provisions concerning various rights in the economic, social and legal areas have significance for the incorporation of the persons concerned.¹⁰⁹ Despite the legislative developments in these areas, it has been observed that not much progress has been made in improving the legal situation of third-country immigrants, a situation which stems primarily from the controversies surrounding the main issues of economic migration. The applicable directives are not based on a comprehensive and consistent strategy but mainly uphold the existing differences in the treatment of the several groups of third-country nationals. In this context, it is noted, mechanisms of inclusion and exclusion are mixed in a variable configuration.¹¹⁰ Once a person seeking international protection has been granted refugee status within the EU, this status is rather strong. National integration measures for refugees are also supported by a EU fund established for the purpose.¹¹¹ Although long-term third-country residents enjoy a number of the same rights as EU citizens, they have to first “gain” their stronger status by at least five years of legal residence and economic independence.¹¹² In fact, acquiring this stronger status requires a certain proof of integration, which is then “rewarded” with a better legal

108. Some of these incidents are mentioned in the introductory chapter to this research, i.e. chapter 1.1. For linking the issue of integration to security considerations, see also Ziegler (2005), p. 119.

109. According to Thomas Gross, the relevant areas are the labour market, social rights and the legal integration. Gross (2005), pp. 146–147.

110. *Ibid.*, pp. 147 and 160.

111. The integration of refugees is the main goal of the actions of the European Refugee Fund established for the years 2005–2010 by Council Decision 2004/904/EC. See also *ibid.*, p. 160. In general, several EU financial instruments contribute to the integration efforts of the member states that target immigrants. See the Commission’s First Annual Report on Migration and Integration (2004), p. 8.

112. The Directive on Long-term Third-country Residents refers to five years of legal and continuous residence in the territory of the member state immediately prior to the submission of the relevant application. See art. 4.1. Long-term third-country residents are also required to provide evidence of the existence of stable and regular sources and sickness insurance. See art. 5.1.

status by EC law.¹¹³ The same elements can be found in the provisions concerning family reunification.¹¹⁴ Individuals granted temporary or subsidiary protection and students have been granted fewer rights: their integration into the host society is not even envisaged, because their return to their home country is considered desirable or at least possible. The treatment of asylum-seekers during the reception phase is clearly intended not to enhance their integration into the host society.¹¹⁵

Discussions on integration have highlighted the role of EU anti-discrimination law for integration, particularly the Racial Equality Directive and the Employment Equality Directive.¹¹⁶ In general, within the EU, anti-discrimination legislation has been viewed as a positive step towards a more balanced approach to the problems of migration.¹¹⁷ It has also been rightly pointed out that although a strong legal status is relevant for adequate integration, it does not automatically result in integration. This has been seen in the EU, where even EU citizens have difficulties becoming integrated into the society in which they reside.¹¹⁸

In spite of the fact that the practical issues relating to integration have generally rested firmly in the national competence of member states, the integration of third-country nationals has recently gained increasing attention at the EU level, including meetings of the Council. The Thessaloniki European Council of June 2003 is viewed as a watershed of sorts in confirming that integration has finally reached the EU agenda.¹¹⁹ Subsequently, National Contact Points on Integration have been established in the EU member states; the points form a network that serves as a forum for the exchange of information and best practices between member states at the EU level with a view to finding successful solutions for the integration of immigrants.¹²⁰ Despite the lack of Community competences in the area of integra-

113. Recital 6 to the Directive on Long-term Third-country Residents notes that the duration of residence is the main criterion for acquiring the status of long-term resident, and that the residence should be both legal and continuous in order to show that the person has put down roots in the country.

114. See arts 7 and 15 of the Directive on Family Reunification. See also Gross (2005), p. 160.

115. Asylum-seekers have only limited social rights and their freedom of movement and free choice of residence are restricted. The possibility of access to the labour market has been envisaged, but may be subjected to limitations. See arts 7–15 of the Directive on Asylum-Seekers. See also Gross (2005), p. 161.

116. See e.g. the Commission Communication on Immigration, Integration and Employment (2003), pp. 6 and 32–33, and the Commission Communication on A Common Agenda for Integration (2005), pp. 3–4.

117. Waddington and Bell (2001), p. 607. See also Gross (2005), pp. 157 and 161.

118. E.g. it has been observed that high proportions of young Italians in Germany are dropping out of the school system. *Ibid.*, p. 146.

119. Urth (2005), pp. 169–172.

120. Among other things, this network has developed a Handbook on Integration for policy-makers and practitioners. It was first published in 2004 and a second edition appeared in 2007. See http://ec.europa.eu/justice_home/fsj/immigration/integration/fsj_immigration_integration_en.htm (visited on 10 October 2007). The national contact points have been

tion, in recent years the EU Commission has issued several documents addressing immigration and integration.¹²¹ Of these, the Communication on Immigration, Integration and Employment issued in 2003 contains the Commission's proposals for the implementation of a common European policy on asylum and migration. It calls for a holistic approach to integration that takes into account not only economic and social aspects of integration, but also issues related to cultural and religious diversity, citizenship, participation and political rights. It stresses integration into the labour market, education and language skills (particularly the ability to speak the language of the host country), the urgency of draw attention to the specific needs of certain groups of migrants (including refugees, persons enjoying international protection, women and young second- or third-generation immigrants), economic and social cohesion, social inclusion, and combating discrimination.¹²² In its proposals the Commission also provides a definition of integration, suggesting that it means "a two-way process based on mutual rights and corresponding obligations of legally resident third-country nationals and the host society which provides for full participation of the immigrant". This is seen as implying, on the one hand, that it is the responsibility of the host society to ensure that the formal rights of immigrants are in place so that the individual has the possibility of participating in economic, social, cultural and civic life and, on the other, that immigrants respect the fundamental norms and values of the host society and participate actively in the integration process, although without having to relinquish their own identity.¹²³ Pertaining to participation, the Commission's proposal to develop a concept of civic citizenship

engaged in exchanging information on more politically sensitive issues, such as integration of religions in Europe, arranged marriages and their influence on admission policy and compulsory integration measures. Urth (2005), pp. 172–174.

121. See e.g. the Commission Communication on a Community Immigration Policy, published in 2000; the Communication on Immigration, Integration and Employment, published in 2003; the First Annual Report on Migration and Integration, published in 2004; the Second Annual Report, published in 2006; the Third Annual Report, published in 2007; A Common Agenda for Integration – Framework for the Integration of Third-Country National in the European Union, published in 2005; the Green Paper on an EU Approach to Managing Economic Migration, published in 2005; and the Policy Plan on Legal Migration, published in 2005.
122. Other issues raised include housing, health and social services, social and cultural environment, nationality and civic citizenship, dealing with illegal migrants, consolidating the legal framework, reinforcing policy coordination, the European Employment Strategy, co-operation in the field of education, closer dialogue with third countries, reinforcing EU financial support for integration, and improving information on the phenomenon of migration. It is pointed out that many parts of this comprehensive programme in the Communication do not fall within the Community's legislative competence. Gross (2005), p. 152.
123. Commission Communication on Immigration, Integration and Employment (2003), pp. 17–18.

at the national level – a category short of national citizenship – as a means of promoting the integration of immigrants is worthy of particular mention.¹²⁴

The meeting of the Council of the EU held in November 2004 established a set of Common Basic Principles (CBPs) to underpin a coherent European framework on integration of third-country nationals. The CBPs view integration as “a dynamic, two-way process of mutual accommodation by all immigrants and residents of member states”, and note integration to imply respect for the basic values of the EU. Employment is considered as a key part of the integration process and central to the participation of immigrants, to the contributions immigrants make to the host society, and to making such contributions visible. A basic knowledge of the host society’s language, history and institutions, and enabling immigrants to acquire this knowledge are underscored. Efforts in education are noted to be critical to prepare immigrants to be successful and active participants in society. Immigrants’ access to institutions and public and private goods and services, on a basis of equality and non-discrimination, is a foundation for better integration. Frequent interaction between immigrants and citizens of member states is referred to as a fundamental mechanism for integration. Shared forums, intercultural dialogue and education about immigrants and immigrant cultures, and stimulating living conditions in urban environments are mentioned as being of importance in this context. The practice of diverse cultures and religions is guaranteed under the EU Charter of Fundamental Rights, and must be safeguarded, unless practices conflict with other inviolable European rights or with national law. Additionally, the participation of immigrants in the democratic process and in the formulation of integration policies and measures, particularly at the local level, is highlighted.¹²⁵

The EU Commission responded to the invitation of the Council of the EU to establish a coherent European framework for integration in 2005 by adopting a document, which contains proposals for concrete measures to put the CBPs into practice.¹²⁶ The growing interest at the EU level in integration is reflected in the conclusions the Council of the EU adopted as a follow-up to the informal meeting of EU ministers responsible for integration held in May 2007. Among other things, these conclusions refer to promoting unity in diversity and emphasise the impor-

124. Ibid., pp. 22–23. The Commission introduced the concept of civic citizenship in 2000 and explained that it would comprise a set of core rights and obligations for third-country nationals. Enabling migrants to acquire such a citizenship after a minimum period of years is viewed as possibly a sufficient guarantee for many migrants to settle successfully into society, or as a first step in the process of acquiring the nationality of the member state concerned. Commission Communication on a Community Immigration Policy (2000), pp. 19–20.

125. The CBPs also stress the importance of mainstreaming integration policies and measures in all relevant policy portfolios and levels of governments and public services, and developing clear goals, indicators and evaluation mechanisms in the area of integration. See the CBPs adopted by the Council of the EU (2004).

126. See the Commission Communication on a Common Agenda for Integration (2005).

tance of the CBPs as the basis for the European approach to integration.¹²⁷ The importance attached to integration is also evident in the decision of the Council to establish the European Fund for the integration of third-country nationals for the period 2007–2013.¹²⁸

3.4 Concluding Remarks

To summarise some characteristics of the approaches to integration adopted at the EU level, it may be noted that the importance of integration has been discussed particularly vis-à-vis third-country nationals. Integration is linked to security and economic and social cohesion¹²⁹ as well as to combating social exclusion and advancing inclusion.¹³⁰ An intense focus has been placed on integration through participation in the labour market.¹³¹ The EU approaches place a considerable emphasis on both European and national values as well as draw attention to both the rights and responsibilities of individuals. Integration is viewed as a kind of two-way process in which education, participation, interaction and dialogue play a significant role. A basic knowledge of the host society's language, history and institutions is considered indispensable in the process.

127. Council Conclusions on the Strengthening of Integration Policies in the EU (2007), pre-ambular para. 4 and paras 4 and 6.

128. See http://ec.europa.eu/justice_home/funding/integration/funding/integration_en.htm (visited on 11 October 2007).

129. See e.g. the Commission Communication on Immigration, Integration and Employment (2003), p. 4.

130. See e.g. the Commission Communication on a Community Immigration Policy (2000), p. 19. In addition to the European Employment Strategy, EU immigration policy is linked to the Strategy for Social Inclusion. See the Commission's First Annual Report on Migration and Integration (2004), pp. 7–8. In general, the EU has placed a considerable emphasis on social protection and inclusion policies aimed at the eradication of social exclusion as well as on promoting social cohesion, equal opportunities and solidarity. The actions in the area include developing National Action Plans (NAPs) for inclusion. See the Commission Communication on Social Protection and Inclusion (2005), p. 2. The NAPs for inclusion concern such issues as increasing labour market participation, tackling disadvantages in education and training, improving access to quality services, ensuring decent housing, and relieving homelessness. Furthermore, they address overcoming discrimination and increasing the integration of people with disabilities, ethnic minorities and immigrants (first and second generation). See EU Guidelines for National Reports, p. 6.

131. This emphasis can be seen e.g. in the CBPs developed by the Council. See also e.g. the Commission Communication on Immigration, Integration and Employment (2003), p. 3. Immigration policy is also linked to the European Employment Strategy. See the Commission's First Annual Report on Migration and Integration (2004), pp. 7–8. See also the remarks in Bell (2002), pp. 129–130 and 196–198.

The remarks put forth by the Commission on the need to pay attention to gender dimensions of integration (immigration) deserve particular mention.¹³² The Commission has also pointed out that a systematic mainstreaming of gender considerations – both in terms of policy and data – has been lacking in most member states when dealing with immigration.¹³³ While the situation of second- or third-generation immigrants, and migrant youth and children in general, is noted as requiring particular attention,¹³⁴ the EU has also stressed integration measures at the local level.

Due to the failures of many EU states to integrate third-country nationals,¹³⁵ the integration of such persons already living in EU states necessarily remains one of the top political priorities in the EU states. For example, the EU Commission has pointed out that successful integration of third-country nationals to maintain economic and social cohesion is one of the major challenges which the EU faces in immigration policy.¹³⁶ In the Commission's view, the EU's ability to manage immigration and to ensure the integration of immigrants will greatly influence its overall ability to master economic transformation and to reinforce social cohesion in the short and longer term. The economic and social benefits of immigration can only be realised if a high degree of successful integration of migrants can be achieved.¹³⁷

While the EU states are facing increasing migration pressure due to various pull and push factors, unregulated migration – with which the EU states are already actively wrestling – is likely to increase in the absence of legal avenues for economic migrants.¹³⁸ According to the Commission, illegal third-country nationals residing in the EU present a major challenge for the integration process.¹³⁹

It has been observed that the political approach within the EU regarding integration has in fact made integration a precondition for the granting of (immigration) rights.¹⁴⁰ As the theme of integration is linked with other contexts, most

132. The Commission has discussed the need to pay particular attention to gender issues and the specific needs of immigrant women. See e.g. the Commission Communication on Immigration, Integration and Employment (2003), pp. 7 and 25, and the Commission Communication on a Common Agenda for Integration (2005), pp. 4 and 11.

133. Commission's First Annual Report on Migration and Integration (2004), p. 6.

134. Commission Communication on Immigration, Integration and Employment (2003), p. 25, and the Commission Communication on a Common Agenda for Integration (2005), p. 4.

135. Ziegler (2005), p. 119.

136. The Commission put forth this view already in 2000 in its Communication on a Community Immigration Policy (2000), p. 11.

137. Commission Communication on Immigration, Integration and Employment (2003), pp. 35–36.

138. The EU Commission has also pointed out that due to the lack of legal avenues, many economic migrants have been driven either to seek entry through asylum procedures or to enter illegally. Commission Communication on a Community Immigration Policy (2000), p. 13.

139. Commission Communication on Immigration, Integration and Employment (2003), p. 25.

140. Groenendijk (2004), p. 129.

notably that of (Islamic) fundamentalism, extremism and security – as has been done after the terrorist attacks of recent years – the concept of integration has also become overcharged: it has increasingly become linked to “integratability”, i.e. a measure and part of the access criteria for migrants and a condition for obtaining permission of stay in the first place, with all follow-up issues of a possible obligation to integrate, accompanied by possible sanctions.¹⁴¹ The treatment of third-country nationals is noted to stand in sharp contrast to the evolution of free movement rights of EU citizens as they are not required to prove appropriate language proficiency or other prerequisites for integration.¹⁴²

Furthermore, although human rights have emerged as an issue on the EU agenda in various contexts, and the EU is an active and prominent actor in the field, the EU may at best be considered somewhat of an ambivalent actor in the area of human rights. Indeed, the EU often speaks the language of human rights, but its own actions are not always in line with the international human rights norms.¹⁴³ In light of the controversies and tensions between EU actions and international human rights protection, the EU has faced general criticism for not paying enough attention to human rights in its own area, i.e. in its member states. Adopting the EU Charter of Fundamental Rights in 2000 and replacing the EUMC with the Fundamental Rights Agency as of the beginning of the year 2007¹⁴⁴ may be viewed as some of the efforts to address this kind of criticism.¹⁴⁵ In general, the lack of a solid human rights policy has been considered a genuine problem in the Community.¹⁴⁶

There are, however, prospects for strengthening human rights within the EU if the Treaty of Lisbon negotiated after the rejected Constitutional Treaty of the EU

141. Ziegler (2005), p. 119.

142. Gross (2005), p. 153. See also the reference to the challenges of integrating EU citizens *supra* (n. 118).

143. See e.g. the remarks on the stronger protection of the European Social Charter compared to EU protection in the area of social rights, including the protection of the disabled *supra* in chapter 3.2 (n. 57). Furthermore, the ECJ has had more restricted views on the use of quotas to promote gender equality than e.g. the CEDAW Committee. See the remarks on the ECJ's views *supra* in chapter 3.2 (n. 72) and on the views of the CEDAW Committee on quotas *supra* in chapter 2.3.1.1. For the tensions between the discourses dealing with international human rights and with the fundamental rights of the EU, see also Ziegler (2005), p. 119.

144. See the remarks on this *supra* in chapter 3.1 (n. 16).

145. According to J.J.H. Weiler, the adoption of the EU Charter of Fundamental Rights is an effort relating to the issue of perception and identity. While emphases on economic and monetary union within the EU have contributed to the perception of a Europe concerned more with markets than with people, the adoption of the Charter was an important symbol counterbalancing the market orientation of the EU and forms part of the “iconography of European integration”, contributing both to the identity and identification with Europe. Weiler (2003), pp. 28–29.

146. *Ibid.*, pp. 30–31.

and signed in December 2007 enters into force.¹⁴⁷ The Treaty of Lisbon strengthens the rights of individuals within the EU by introducing new rights by guaranteeing the freedoms and principles set out in the EU Charter of Fundamental Rights and giving its provisions binding legal force.¹⁴⁸ In addition, the Treaty envisages the Union's accession to the ECHR.¹⁴⁹

The purpose of the Treaty of Lisbon is primarily to provide the Union with a more robust legal framework and the tools necessary to meet future challenges and to respond to citizens' needs. In addition to addressing a number of institutional issues, the Treaty details and reinforces the values and objectives on which the Union is built.¹⁵⁰ The values set out are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.¹⁵¹ The aim of the Union is to promote peace, its values and the well-being of its peoples, and its task is to offer its citizens an area of freedom, security and justice.¹⁵² While emphasis is placed on such issues as establishing an internal market and (balanced) economic growth, the Union is noted to have a role also in such areas as in combating social exclusion and discrimination and promoting social justice and protection, equality between women and men, and economic, social and territorial cohesion.¹⁵³ The Union must respect its rich cultural and linguistic diversity and ensure that Europe's cultural heritage is safeguarded and enhanced.¹⁵⁴

147. The Treaty of Lisbon amends the TEU and the TEC (Treaty of Rome), without replacing them. See the Preamble and arts 1 and 2 of the Treaty. If successfully ratified by all EU member states by the end of 2008, the Treaty of Lisbon will enter into force at the beginning of 2009. See the remarks at http://europa.eu/lisbon_treaty/glance/index_en.htm (visited on 19 March 2008).

It is pointed out that the Treaty of Lisbon preserves and reinforces the "four freedoms" of the EU and the political, economic and social freedom of European citizens. On the basis of the Treaty the Union will also acquire an extended capacity to act on freedom, security and justice in order to better fight against crime and terrorism. The new provisions on civil protection, humanitarian aid and public health also aim at boosting the Union's ability to respond to threats to the security of European citizens. See *ibid.*

148. The Treaty gives the Charter the same legal value as the Treaties, e.g. the TEU. See art. 6.1.

149. The Treaty also asserts that fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states constitute general principles of the Union's law. See art. 6.2 and 6.3.

150. See also http://europa.eu/lisbon_treaty/glance/index_en.htm (visited on 19 March 2008).

151. These values are noted to be common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. See art. 1a.

152. Art. 2.1 and 2.2.

153. Promoting solidarity between generations, protecting the rights of the child, and solidarity among member states are also mentioned. See art. 2.3.

154. *Ibid.*

It is worthy of note that the Treaty of Lisbon also contains some express references to integration, of which particular importance for the research at hand is the provision, which underlines the role and national decision-making of member states in the integration of third-country nationals. The Treaty excludes any harmonisation of the laws and regulations of member states in this area.¹⁵⁵

155. Art. 63a.4. reads: “The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of member states with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the member states.”

4 THREE INTERNATIONAL BODIES AND THE ISSUE OF INTEGRATION

Numerous international expert bodies and actors have increasingly taken up the issue of integration of various kinds of groups or individuals in the course of their work. These include many bodies set up within the framework of the international human rights instruments considered in this research. Of these international bodies and actors, three in particular are chosen for closer examination in this chapter: the Advisory Committee (AC) of the CoE Framework Convention, the European Commission against Racism and Intolerance (ECRI) of the CoE, and the High Commissioner on National Minorities (HCNM) of the OSCE. The three international bodies¹ differ in nature and have different mandates: the AC is a body established for the purpose of participating in the monitoring of the implementation of a specific treaty, i.e. the CoE Framework Convention; ECRI is not a treaty-specific body, but an expert body which assesses its agenda items in the light of a number of international human rights instruments; the HCNM is an OSCE institution set up for the purposes of conflict prevention and inter-state security. All of the bodies draw on international human rights standards in their work and all have addressed the issue of integration. However, due to the differing natures and roles of the bodies, their approaches to human rights and integration have varying emphases.

The following description sheds light on the work of the three bodies in general, including their remarks on the groups and substantive issues they generally have addressed. These general observations provide both an introduction to the discussions on integration and a foundation for the analysis to be carried out at the end of this chapter. The main focus of this chapter is on studying the use of the term “integration” by the bodies – including the elements they link to integration – with the aim of identifying the content given to the concept. While the remarks of the bodies are recorded comprehensively in the sections examining integration, the general remarks made prior to these contain summaries. The analysis of the views of the AC and ECRI draws on a comprehensive study, whereas the views of the HCNM are based on a more general study of the pertinent OSCE material; this qualification stems from the fact that, as an actor of quiet diplomacy characterised by certain confidentiality, the HCNM’s reporting responsibilities are circumscribed and consequently his detailed views are not accessible and public to the same extent as those

1. In this work these three are called “international bodies”. See the remark on this *supra* in chapter 1.3 (n. 83).

of the other two bodies.² In each case, the analysis relies on the documents of the three bodies made public and available by October 2007.

4.1 The Advisory Committee of the CoE Framework Convention

4.1.1 Supervisory Function of the Advisory Committee

The assessment of the implementation of the CoE Framework Convention by the states parties to it is carried out on the basis of a review of the reports submitted by the states.³ Pursuant to the provisions of the Convention, the ultimate evaluation of the adequacy of the implementation of the Convention is carried out by the CoE Committee of Ministers, which is assisted in this task by the AC.⁴ The AC prepares its opinions on the measures taken by the state parties in order to meet their obligations under the Convention.⁵ Based on the AC's opinions and possible observations by the respective governments, the Committee of Ministers adopts resolutions addressing the main issues of concern.⁶ While the AC's opinions contain a comprehensive review of the implementation of the CoE Framework Convention, the resolutions adopted by the Committee of Ministers on the implementation of the Convention are very brief.⁷

The CoE Framework Convention entered into force in 1998, and the first state reports were received by the AC in 1999. The second cycle of monitoring under the

2. See also the remarks *infra* in chapter 4.3.1.

3. See art. 25 of the Convention.

4. See arts 24 and 26 of the Convention. The AC is composed of 18 ordinary members, who must have recognised expertise in the field of the protection of national minorities. The members are expected to be independent and impartial and effectively serve in their individual capacity.

5. The AC bases its opinions on various sources, including the information provided by governments (e.g. in their reports) and by non-governmental actors. Country visits carried out to the countries under examination are also a customary element of the monitoring procedure of the AC. These visits are observed to be among the most important aspects of the monitoring procedure leading to the drafting of an opinion of the AC. Hofmann (2004), p. 56.

6. The opinions adopted by the AC are transmitted to the governments concerned and to the CoE Committee of Ministers. Having received the AC's opinion and the comments from the respective state, the Committee of Ministers is called on to adopt conclusions and, where appropriate, recommendations with respect to the state party concerned. Rules on the Monitoring Arrangements of the Framework Convention, Part II.

7. In these resolutions the Committee of Ministers has, as a rule, asked the country concerned "to continue the dialogue in progress" with the AC and to keep the AC regularly informed of the measures taken in response to the conclusions and recommendations of the Committee of Ministers.

Convention commenced in 2004 with the submission of the first of the second-cycle state reports.⁸ The opinions adopted by the Committee during the second monitoring cycle have become longer compared to the first-cycle opinions and consist essentially of follow-up remarks on the measures a state has taken in response to the findings of the first-cycle report.⁹ As in the case of many other monitoring systems established under human rights instruments (treaties), the system for the CoE Framework Convention has faced the problem of delays in states submitting their reports.

The remarks that follow are based on the observations put forward by the AC in its opinions (published by October 2007). The Recommendations of the Committee of Ministers based on the AC's opinions are not examined in this analysis, since, due to their limited length, they provide little substance for the question at hand.¹⁰ One development of note in this context is that the AC published its first thematic commentary in 2006 highlighting the importance of education in the context of the CoE Framework Convention.¹¹

4.1.2 Groups and Questions Addressed

The AC considers minorities specific to each country in its opinions and has paid considerable attention to the situation of the Roma. The Committee has pointed out that the social exclusion of the Roma is linked to their lacking a kin-state and that they are in special need of protection under the CoE Framework Convention.¹² Of the other minorities in several states parties to the Convention, the Jews have also been considered in a number of opinions, particularly during the first monitoring cycle.¹³ Over the years, (im)migrants, foreign residents and non-citizens, including refugees and asylum-seekers have been given an increasing amount of attention. It is also possible to find a few express notes on migrant workers¹⁴ and a number of

8. For the information on the monitoring cycles, including state reports submitted and the AC's opinions adopted, see the CoE website at http://www.coe.int/T/E/human_rights/minorities (visited on 10 October 2007).

9. See e.g. the first opinion adopted during the second monitoring cycle, i.e. the second opinion on Liechtenstein, para. 3.

10. Sometimes these Recommendations address expressly the issue of integration. See e.g. the recommendation based on the AC's second opinion on Italy in which the Committee of Ministers calls on the authorities to consider a comprehensive and coherent strategy of integration vis-à-vis the Roma. CM Resolution on Italy (2006), para. 2.

11. See the AC's Commentary on Education (2006).

12. See e.g. the second opinion on Denmark, para. 52.

13. See e.g. the first opinions on Ireland, para. 24, and on Poland, para. 44, and the second opinions on Croatia, paras 102 and 103, and on the Czech Republic, para. 88.

14. See e.g. the first opinion on Germany, para. 37, and the second opinion on Malta, paras 22 and 36.

references to Muslims.¹⁵ Further, the AC has made general references to religious communities or groups¹⁶ and addressed the situation of indigenous peoples.¹⁷

Although the AC has not assessed the implementation of the CoE Framework Convention from the viewpoint of gender, it has cited – albeit not systematically – the need to take into account sex/gender in the area of data collection.¹⁸ The AC has also made a note on the need to take *the gender dimension* into account in the design and implementation of all minority initiatives.¹⁹ Additionally, the AC has often expressed the need to pay special attention to Romani women and girls, for instance, in the areas of education and participation and as potential victims of trafficking in human beings.²⁰ The Committee’s observation on avoiding gender stereotyping in educational materials is also worthy of note.²¹ The AC has drawn attention to women with an immigrant background with reference to article 6,²² and has welcomed the efforts of the authorities to mobilise women and youth in minority communities in connection with article 15.²³ In addition to *the age dimension* being given some attention in this framework, age has received some specific notice in the area of data collection²⁴ and at times in other connections as well, particularly with respect to Romani youth and children.²⁵ Children in general, and Romani children in particular, have been mentioned when education is discussed in connection with the Convention’s article 12.²⁶ In the area of education, the AC has also

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15. See the remarks on religion *infra* in this section.
 16. See e.g. the first opinion on Bulgaria, para. 55, and the second opinions on Croatia, paras 100–103, on Denmark, Executive summary and paras 20–21 and 27 and 35, and on Finland, para. 92 (under art. 8).
 17. See the opinions on Finland, Denmark, Norway, Sweden, and the Russian Federation. In its second opinion on Norway the AC notes that the Saami in Norway have expressed their willingness not to be covered by the policies on national minorities, thus consequently neither to be protected by the CoE Framework Convention. See paras 8 and 56.
 18. See also the remarks on data collection *infra* in this section.
 19. The AC makes this point in its second report on Ireland with a view to ensuring Traveller women’s full and effective equality. See paras 12 and 33.
 20. See e.g. the first opinions on Spain, paras 33, 38 and 78, and on Finland, para. 48, and the second opinions on Croatia, paras 65, 147 and 149, and on Hungary, paras 11 and 53.
 21. Second opinion on Estonia, para. 111 (under art. 12).
 22. The AC has drawn attention e.g. to domestic violence against women of foreign origin who may have difficulties obtaining or retaining their residence permit upon leaving their spouse. Second opinion on Norway, paras 88 and 92. The AC refers to the vulnerability of persons of immigrant origin, particularly women, in its second opinion on Liechtenstein, para. 13 (under art. 4).
 23. Second opinion on Armenia, para. 122.
 24. See the remarks on data collection *infra* in this section.
 25. See e.g. the first opinion on Spain, paras 33, 56 and 78, and the second opinions on the Czech Republic, para. 57, and on Italy, para. 58. See also the remark on the victimisation of Romani children in trafficking in human beings at the end of this section.
 26. The AC has e.g. called for paying attention to the educational needs of both young people and adults belonging to the Romani community. First opinion on Bulgaria, para. 91.

drawn attention to the high drop-out rates among girls and young women from national minorities²⁷ and to the over-representation of pupils from immigrant and Romani families – particularly girls and young women – in special schools for under-achievers and, correspondingly, their under-representation in intermediate and grammar schools.²⁸

The lack of a definition of “national minority” in the text of the CoE Framework Convention (as well as in the Explanatory Report to it)²⁹ has resulted in frequent remarks on the personal scope of application of the Convention by the AC in connection with article 3. Whilst the Committee has noted a margin of appreciation on the part of the states parties to the Convention in order to take into account the specific circumstances prevailing in their country, it has also pointed out that this appreciation must be exercised in accordance with general principles of international law and the fundamental principles set out in article 3 of the Convention. In particular, the Committee has stressed that the implementation of the Convention should not be a source of arbitrary or unjustified distinctions.³⁰ The AC has often disagreed with the views of states parties that in its opinion impose excessive limitations on the Convention’s personal scope of application. For instance, the AC has reacted to the distinction that the Finnish government upholds between the “Old Russians” and other Russian-speakers (often called “New Russians”) by calling on the Finnish government to examine this distinction and the advisability of maintaining it, since, according to the government itself, the distinction has no practical consequences.³¹ The AC has reacted to the views of Malta and Liechtenstein concerning the non-existence of national minorities in those states by stating that the authorities should consider the possibility of applying the Convention, in view of its objectives, on an article-by-article basis and in consultation with those concerned, to persons who do not share the language, religion or culture of the general population.³²

27. Second opinion on Armenia, paras 13, 94, 98 and 151.

28. Second opinion on Germany, paras 70 and 74.

29. See the remarks *supra* in chapter 2.1.1.3.2.

30. This is a standard formulation in the first opinions. See e.g. the first opinion on Bulgaria, para. 14.

31. See the first opinion on Finland, para. 15. See also the second opinion, paras 26 and 28. See also the remarks on this distinction made by the Finnish government *supra* in chapter 2.1.1.3.2.

Furthermore, the AC has not e.g. agreed with the approach of the Danish government which views only one minority, i.e. the German minority in South Jutland, to be protected under the Convention. First opinion on Denmark, Executive summary and paras 18–23, and the second opinion on Denmark, paras 38–54. For the AC’s views on an inclusive approach to the personal scope of application of the Convention, see also e.g. the second opinions on Slovenia, paras 9 and 13, and on Romania, paras 25 and 31.

32. Second opinion on Malta, para. 15. In its second opinion on Liechtenstein the AC draws particular attention to non-nationals who are not part of the immigration population from neighbouring countries and discrimination against them. See para. 8.

The AC's rather flexible and open approach to the personal scope of application of the CoE Framework Convention is also reflected in its opinions on citizenship: it has clearly been more willing than the states parties to the Convention to apply various provisions of the Convention with respect to non-citizens. According to the AC, based on a case-by-case consideration, each provision of the Convention may be relevant also for non-citizens.³³ The Committee has also welcomed the acceptance of dual citizenship³⁴ and stated that the applicability of the CoE Framework Convention does not necessitate formal domestic recognition of a group as a national minority per se.³⁵ The AC has repeatedly reminded the states parties about the wide personal scope of application of article 6, which covers such groups as asylum-seekers, (im)migrants and persons belonging to other groups that have not traditionally inhabited the country concerned.³⁶ Also worthy of note is that the AC has actively raised the issues pertaining to minorities under article 6, particularly when a state party's government has adopted a non-inclusive view with respect to the personal scope of application of the Convention.³⁷ The AC's view on the extent of the protection provided by the CoE Framework Convention being broad enough to cover a "minority-in-a-minority" situation is notable from the viewpoint of international law. The AC has considered this issue most intensively with respect to the Finnish Province of Åland Islands, where Swedish is the only official language. The Committee has observed that, taking into account the level of autonomy enjoyed and the nature of the powers exercised by the Province of Åland, the Finnish-speaking population there should be given the possibility to rely on the protection provided by the CoE Framework Convention to the extent that the issues concerned fall within the competence of the Province of Åland.³⁸

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33. The AC has systematically pointed out in its first opinions that it would be possible to consider the inclusion of persons belonging to other groups, including non-citizens as appropriate, in the application of the Framework Convention on an article-by-article basis. This is a standard formulation inserted in the first opinions in connection with art. 3. See e.g. the first opinion on Poland, para. 29. For the AC's views on this inclusive aspect with respect to non-citizens, see also e.g. the second opinions on Croatia, paras 29 and 30, on the Slovak Republic, paras 21–24, on Italy, para. 32 (addressing non-citizens who are also non-EU citizens), on Norway, para. 9, and on Germany, paras 9, 10, 26 and 173.
34. In its second report on Armenia the AC views dual citizenship contributing to improving relations of persons belonging to national minorities with their kin-states. See para. 134.
35. See e.g. the second opinion on Ireland, para. 28.
36. See e.g. the first opinions on Ireland, para. 61, and on Austria, para. 32, and the second opinions on Denmark, para. 76, and on Italy, para. 77. In its second opinion on Liechtenstein the AC notes that in addition to art. 6, also the scope of art. 4 cannot be restricted to national minorities alone. See para. 11.
37. See e.g. the opinions on Denmark and Malta.
38. First opinion on Finland, para. 17. In its second opinion on Finland the AC considers that further dialogue should be pursued on Finnish language education in Åland. See para. 142. See also the remarks on minority-in-a-minority aspects in international human rights law *supra* in chapter 2.1.1.3.2.

Since the work of the AC is based on the CoE Framework Convention, the substantive issues raised by the Committee also naturally reflect those addressed in the provisions of the Convention. The AC has made ample reference to the issues of *equality and non-discrimination* (addressed primarily in article 4),³⁹ and has considered ensuring full and effective equality,⁴⁰ equal treatment,⁴¹ and increasingly equal opportunities.⁴² The Committee has also cited the need for a comprehensive anti-discrimination law,⁴³ as well as the importance of positive measures to ensure equality.⁴⁴ Although some express attention has been given to double or multiple forms of discrimination, the AC may not be viewed as particularly active in addressing these forms of discrimination:⁴⁵ in general it does not refer explicitly to double or multiple forms of discrimination but rather tends to refer (at times) to the need to pay attention to the situation of women or youth.⁴⁶ The Committee has also noted the institutional aspects of discrimination.⁴⁷

Identity questions, including the need to support *identities*, are frequently mentioned by the AC in connection with various articles of the Convention. References are made to identities in general, at times to linguistic and cultural identity, and, less frequently, to religious identity.⁴⁸ The Committee has noted that a distinct identity is needed for a group to be eligible for protection under the CoE Framework Convention.⁴⁹ The AC has highlighted several times the importance of the mother tongue for identity⁵⁰ and asserted that religious services, the media and sup-

39. The opinions draw attention visibly to discrimination based on ethnicity. See e.g. the second opinion on Finland, para. 73.

40. See e.g. the first and second opinions on Croatia, para. 26, and para. 59, respectively.

41. See e.g. the second opinions on Ireland, para. 47, and on Germany, paras 22 (equal treatment in education) and 180.

42. See e.g. the second opinions on Norway, para. 22, and on Germany, Executive summary and paras 11, 12, 15, 33–34, 36 and 74.

43. See e.g. the second opinion on Germany, Executive summary and paras 11, 37, 174 and 180.

44. See e.g. the first opinion on Croatia calling for launching additional positive measures in the field of employment with a view to ensuring full and effective equality for persons belonging to national minorities. See para. 26. See also the remarks in the second opinion on Croatia, para. 59. In its second opinion on Germany the AC notes that equal treatment for minorities (in education) presupposes active measures and that equal opportunities (for persons belonging to minorities) often require positive action. See paras 22 and 52.

45. For the double burden of discrimination faced by Traveller women, and for a reference to double discrimination faced by Travellers with a disability, see the first opinion on Ireland, paras 38 and 41.

46. See also the remarks on gender and age dimensions in the AC's opinions *supra* in this section.

47. First opinion on Poland, para. 33.

48. See e.g. the second opinions on Slovenia, Executive summary and paras 104, 106 and 192, and on Germany, paras 61–63 (under art. 5).

49. First opinion on Bulgaria, para. 20. See also the second opinion on Romania, paras 25 and 26.

50. See e.g. the first opinions on Slovenia, para. 45 (under art. 6), and on Spain, para. 21.

port for cultural associations are essential to preserving identity and avoiding assimilation of a minority.⁵¹ While the Committee has usually discussed the question of identity of persons (or groups of persons), it has also touched upon the identity of a state by drawing attention to the links between the language question and the process of building a state (and people's) identity. The policies and measures adopted in this connection should respond to the needs and specific identities of persons belonging to the different national minorities living in the state.⁵² As regards the state language, the AC has observed that protecting the language is a legitimate aim, but that its protection and promotion should not be pursued through an overly regulatory approach and at the expense of the protection of national minorities and their languages.⁵³ The Committee has often referred to cultural, linguistic and/or ethnic diversity,⁵⁴ and it has pointed out, echoing the express stipulations of the CoE Framework Convention, that diversity should not be construed as a potential source of problems, but perceived as an enriching factor.⁵⁵

Over the years, the AC has drawn increasing attention to the issue of immigration,⁵⁶ which has contributed to the increased number of remarks by the AC with respect to the issue of *tolerance* and *intercultural dialogue* addressed in article 6 of the Convention. The Committee has referred to the need for tolerance and for promoting a culture of tolerance,⁵⁷ and has discussed the role of the governmental authorities, policymakers and prominent public figures in the dialogue envisaged in article 6.⁵⁸ The Committee has often addressed the role of the media in the area of tolerance. Among other things, the AC has voiced its concern over the fact that the media, rather than describing the presence of minorities or foreigners in the state as a source of diversity that enriches society, have referred to such groups as a potential danger or threat to the national identity and welfare of citizens.⁵⁹ The lack of pluralism and diversity in the media is also viewed as having negative implications for tolerance.⁶⁰ According to the AC, the media not only have a major role in

51. First opinion on FYROM, para. 45.

52. Second opinion on Moldova, paras 20 and 21.

53. Second opinion on Estonia, paras 90 and 93 (under art. 10).

54. See e.g. the first opinion on Bosnia and Herzegovina, para. 14, and the second opinions on Slovenia, para. 99, and on Germany, para. 20.

55. First opinion on Bulgaria, Executive summary and para. 53.

56. See e.g. the second opinions on Italy and on Denmark. The former draws some attention also to clandestine immigration when the AC makes a note on the rise of this type of immigration in recent years and how it has posed particular challenges, especially as regards the sometimes harsh conditions of detention of immigrants without legal status. See para. 77.

57. See e.g. the first opinions on FYROM, para. 55, and on Serbia and Montenegro, para. 53, and the second opinions on San Marino, Executive summary, and on Romania, Executive summary and para. 206.

58. See e.g. the first opinion on FYROM, para. 48.

59. Second opinion on Slovenia, para. 100.

60. Second opinion on Moldova, para. 66.

encouraging a spirit of tolerance and intercultural dialogue, but hold one of the keys to the preservation and promotion of the culture of persons belonging to different ethnic and religious groups.⁶¹ In this vein, the Committee has also made some remarks on the Internet and racism.⁶² Additionally, the AC has referred to mutual and interethnic understanding and the importance of interethnic communication and contacts,⁶³ and has specifically addressed religious dialogue and tolerance.⁶⁴ In addition to speaking in terms of tolerance, the AC has often referred to *respect*,⁶⁵ for instance, when it has called for respect for and understanding towards people,⁶⁶ respect for diversity,⁶⁷ respect for diversity and multiculturalism,⁶⁸ respect for human rights and diversity,⁶⁹ respect for identity, mutual respect and understanding among all persons (irrespective of their identities),⁷⁰ mutual respect,⁷¹ and respect for traditions peculiar to Romani lifestyles and culture.⁷²

The AC has made a number of remarks on (*social*) *cohesion*,⁷³ for instance in linking internal cohesion and a feeling of belonging to a common society.⁷⁴ The Committee has cited the importance of fostering mutual understanding and intercultural dialogue for social cohesion in the country, and has drawn attention to the elimination of barriers or divisions among persons belonging to different ethnic or linguistic groups in order to strengthen (social) cohesion.⁷⁵ It has drawn attention

61. Second opinion on Denmark, paras 94–103.

62. In its second opinion on Finland the AC notes e.g. racist materials in the Internet concerning certain non-traditional minorities of Finland, such as the Somalis, but also traditional minority groups. As regards the latter the AC refers to Internet discussions on Swedish-speaking Finns reflecting intolerant attitudes and views. See para. 86.

63. See e.g. the second opinion on Norway, Executive summary.

64. See e.g. the second opinion on Armenia, para. 56.

65. This is done most clearly in connection with art. 6, but also in connection with other articles.

66. See e.g. the first opinion on Bulgaria, para. 50.

67. See e.g. the first opinion on Ireland, para. 82, and the second opinions on the Czech Republic, para. 11, on Romania, para. 94, and on Norway, Executive summary and paras 84 and 164.

68. See e.g. the second opinion on Slovenia, para. 20.

69. See e.g. *ibid.*, para. 187.

70. See e.g. the first opinion on Poland, paras 22 and 57.

71. See e.g. the first opinion on Serbia and Montenegro, para. 60, and the second opinion on Finland, para. 85.

72. See e.g. the first opinion on Spain, para. 33 (under art. 4).

73. The Framework Convention refers to cohesion in connection with arts 5, 6 and 14. See also the remarks *supra* in chapters 2.1.1.3.2 and 2.2.1.3.1.

74. First opinion on Bosnia and Herzegovina, para. 62 (under art. 6).

75. See e.g. the first opinion on FYROM which refers to encouraging interaction between the different component of society, particularly in the sphere of education. See the Executive summary. In its opinions on Moldova the AC addresses the language gap between the two population groups in the country, i.e. the speakers of the state language (Moldovan) and Russian-speakers, and expresses its concern for linguistic intolerance stemming from this

to enhancing national cohesion by eliminating elements of segregation in schools⁷⁶ as well as to the importance of (learning) the state language as a factor of (social) cohesion.⁷⁷ The AC has also considered the role of the media in strengthening the cohesion of society and pointed out that they should be encouraged, without prejudice to their editorial independence, to pay more attention to the country's cultural and ethnic richness and diversity and to contribute through their programmes to a more cohesive society.⁷⁸

The AC has discussed the tense relationship between differences and the integrity and unity of states, a situation usually mentioned by governments.⁷⁹ It has reacted to a governmental view regarding Muslims as a security issue,⁸⁰ and has made a noteworthy remark in which it pointed to the need to move from an emphasis on ethnic belonging and group rights towards a more inclusive approach focusing on (individual) human rights.⁸¹

When the AC has expressly addressed the question of *religion*,⁸² among other things, it has made a note of the importance of religion to identity.⁸³ It has also considered the question of state support for a particular church or churches and called for the reconsideration of the prevailing systems that may create situations of inequality. Whilst the AC has not viewed a state church system in itself as conflicting with the CoE Framework Convention, it has put forward the opinion that a system in which one church is supported by the state should be reviewed in the light of the principle of equality before the law and equal protection of the law as guaranteed in

gap. The AC calls for measures that help to safeguard social cohesion and intercultural dialogue. See the first opinion, para. 45 (under art. 6). The AC discusses this language gap also in its second opinion on Moldova when the AC also raises the issue of integration. See the pertinent remarks *infra* in chapter 4.1.3.1 under art. 6 (n. 154).

76. First opinion on Bosnia and Herzegovina, para. 85 (under art. 12). In its second opinion on Moldova, the AC notes that, in preparing new history books and in teaching of history, all sensibilities should be taken into account in order to foster the preservation and strengthening of social cohesion and inter-ethnic dialogue. See para. 112 (under art. 12).

77. See also the remarks *infra* in chapter 4.1.2.1 under arts 5 and 12.

78. Second opinion on Slovenia, para. 103 (under art. 6).

79. For the remarks on territorial integrity, sovereignty and unity and security, see e.g. the first opinion on Bulgaria, para. 1.

80. Second opinion on Moldova, para. 79 (under art. 8). The AC draws attention to the situation when the questions relating to the Muslim communities seem to be dealt with by the authorities from the point of view of public order and national security, and when the police keep a close watch on the religious practices of the members of the Muslim communities.

81. First opinion on Bosnia and Herzegovina, para. 13.

82. Art. 7 of the Convention addresses the right of every person belonging to a national minority to freedom of thought, conscience and religion, and art. 8 the right to manifest one's religion or belief.

83. See e.g. the first opinion on Poland, para. 59, and the second opinion on Slovenia, paras 104 and 192 (religious identity of Muslims).

article 4 of the Convention.⁸⁴ The Committee has drawn attention to the automatic public financing of two state churches in Finland, for example, calling for a review of the system and for due consideration for the needs of smaller religious communities, including non-Christian ones.⁸⁵

The AC has called for a review of religious instruction in state schools to ensure objectivity and neutrality and to ensure that pupils are not obliged to attend lessons focusing on a particular religion or belief.⁸⁶ It has also put forth a call for the authorities to extend schooling options, including non-denominational and multi-denominational schools, in a manner that ensures that the school system reflects the growing cultural and religious diversity of the country.⁸⁷ The role of religious institutions in advancing tolerance (or intolerance) has also been cited.⁸⁸

The AC has often addressed the questions of discrimination and (religious) intolerance against Muslims.⁸⁹ Among other things, it has called for the possibility of the building of mosques⁹⁰ and Muslim cemeteries⁹¹ and for the opening of cultural and religious centres.⁹² The Committee has also expressed its concern for rhetoric conveying messages of intolerance – among politicians for instance – that target Muslim immigrants in particular.⁹³ In the same vein, the AC has also considered manifestations of Islamophobia and taken the view that questionnaires addressed to applicants for citizenship, if directed exclusively to certain groups, such as Muslims, are discriminatory as well as incompatible with the principle of mutual respect and understanding enshrined in the CoE Framework Convention.⁹⁴ The Committee has encouraged – albeit in rather a specific context – the authorities to pay increased attention to the concerns of the Muslim community and, in consultation with those

84. See the first opinion on Denmark in which the AC discusses the role of the Evangelic Lutheran Church. See para. 29 (under Art. 8). See also the second opinion on Denmark, paras 25 and 109–111 (under art. 4). See also the remarks in the first and second opinions on Norway, para. 39 (under art. 8) and para. 93 (under art. 7), respectively.

85. See the opinions on Finland addressing the automatic public financing of the Evangelic Lutheran and the Orthodox Churches. First and second opinions on Finland, para. 29 and paras 91 and 92, respectively (under art. 8).

86. First opinion on Norway, para. 40 (under art. 8), and second opinion on Norway, paras 94–97 (under art. 7).

87. Second opinion on Ireland, para. 100.

88. See e.g. the first opinions on Serbia and Montenegro, para. 53 (under art. 6), and FYROM, para. 56 (under art. 6).

89. See e.g. the first opinions on Bulgaria, para. 33, and on Spain, para. 55, and the second opinions on Croatia, para. 37 (addressing Bosniacs), on Moldova, paras 78–81, 82 and 84, on Denmark, paras 88 and 93, on Slovenia, para. 98, and on Liechtenstein, para. 13.

90. See e.g. the first opinions on Slovenia, para. 46, and on Spain, para. 55, and the second opinion on Denmark, paras 88 and 93 (under art. 6).

91. Second opinion on Moldova, paras 82 and 84 (under art. 8) (addressing Tatars).

92. Second opinion on Slovenia, para. 98.

93. Second opinion on Norway, para. 84 (under art. 6).

94. Second opinion on Germany, paras 69 and 79.

concerned, it has also referred to the search for a solution that would enable Muslims to exercise their right to practise their religion and to express their religious and cultural identity in appropriate conditions.⁹⁵ It is worthy of note that the AC has briefly addressed the circumcision of boys as a traditional religious practice of Jews. The Committee has recognised the possibility of introducing certain restrictions on this practice as part of the Jewish religion in the interest of the health of children.⁹⁶

In the area of *education*,⁹⁷ the AC has stressed equal access to education, the opportunities for persons belonging to national minorities to learn their own language and to learn about their own culture and history, and the taking into account of minority cultures, history and traditions in the area of general education.⁹⁸ Multicultural and intercultural dimensions of education,⁹⁹ as well as awareness-raising and specific training for teachers,¹⁰⁰ have also been underlined. Awareness-raising with respect to the cultures of national minorities, (cultural) diversity in general and human rights has also been discussed with reference to article 6.¹⁰¹ Furthermore, the AC has underscored the importance of providing information dealing with minorities to the authorities, particularly the police and the judiciary.¹⁰²

One element that comes to the fore in the AC's opinions is the importance of *participation*. While participation has been dealt with separately in article 15, where it is considered broadly – covering participation in political frameworks (including elections), public affairs, economic life, employment, and similar contexts – the Committee has strongly emphasised the question of participation under other provisions as well. When discussing participation, the AC has frequently referred to consultation, but has also mentioned involvement, effective participation, and

95. See the second opinion on Slovenia in which the focus is on persons from the former Yugoslavia. See para. 104.

96. See the first opinion on Sweden, para. 40 (under art. 8), and the second opinion on Finland, paras 93 and 94 (under art. 8).

97. The importance of education for the CoE Framework Convention is underlined in the AC's thematic commentary on education.

98. See e.g. the first opinions on Ireland, para. 82, and on Poland, para. 73. For providing information on minorities in the context of general education, see also e.g. the second opinions on Denmark, para. 27, on Finland, paras 113, 115 and 116, and on Germany, paras 115, 116 and 180. These references have been made, as a rule, in connection with art. 12.

99. See e.g. the second opinions on Moldova, Executive summary and paras 19, 102, 103 and 108, and on Norway, paras 124–129. For references to multiculturalism, see e.g. the first opinions on Poland, para. 73 (in school curriculum, under art. 12), and on Spain, para. 57 (under Art. 6), and the second opinions on Estonia, para. 59, and on Slovenia, paras 20 and 97.

100. See e.g. the second opinions on Norway, para. 129, and on Germany, paras 112 and 117.

101. See e.g. the second opinion on Armenia, para. 64, and on San Marino, para. 20. See also the remarks on the role of the media with respect to awareness-raising and providing information on various groups *supra* in this section.

102. See e.g. the second opinion on Moldova, para. 73.

at times genuine or effective partnership and co-operation.¹⁰³ With respect to the Roma, the AC has also raised the question of empowerment.¹⁰⁴ The Committee has touched upon the content of participation, for instance, in noting that adequate weight should be given to the views of minorities,¹⁰⁵ that minorities should be heard broadly,¹⁰⁶ and that participation should also involve critical input to the decision-making processes and the evaluation of policies and practices.¹⁰⁷ It appears that in the context of participation the AC has increasingly referred to dialogue.¹⁰⁸

Finally, in order to be able to assess the situation of the groups relevant from the viewpoint of the CoE Framework Convention and the measures taken, the AC has frequently stressed the importance of *data collection*, and it has increasingly referred to the need for data broken down not only by minority (ethnicity), but also by age, sex/gender and geographical distribution or location.¹⁰⁹ The Committee has also addressed unjustified collection of crime-related data on the ethnic background of persons that amounts to discrimination or stigmatisation of persons belonging to certain groups (including the Roma).¹¹⁰ It has stressed the voluntary nature of data collection on individuals' ethnicity and that such data collection is to be consistently based on self-identification by individuals concerned.¹¹¹

The AC's remark during the first reporting cycle on the issue of *trafficking in human beings* in connection with article 6 deserves particular mention.¹¹² However, the Committee has not been active in pursuing it further; it has since merely noted

103. For the remarks on consultation, see e.g. the second opinions on Norway, paras 10 and 25, and on Germany, para. 156 (concerning the Roma); for involving or involvement, see e.g. the first opinion on Ireland, para. 136; for effective participation, see e.g. the second opinions on Ireland, para. 132 (addressing Travellers), and on Norway, para. 25; for genuine partnership (with national minorities), see e.g. the second opinion on the Czech Republic, para. 20; for effective partnership (with Romani organisations), see e.g. the second opinions on the Czech Republic, para. 180, and on the Slovak Republic, para. 18; for co-operation, see e.g. the second opinions on Norway, para. 165 (with minority representatives), and on the Czech Republic, para. 80 (with Roma).

104. See e.g. the second opinion the Czech Republic, para. 79.

105. See e.g. the second opinion on Finland, paras 19, 55, 155 and 156 (concerning the Saami). The Committee notes that the "negotiation" obligation goes beyond mere consultation so that it is ensured that the views of the Saami Parliament are fully taken into account in decision-making affecting the protection of the Saami. See para. 156. The AC also mentions the inadequacy of the existing consulting mechanisms concerning the Russian-speakers. See para. 149.

106. Second opinion on Armenia, para. 125.

107. Second opinion on Ireland, para. 111 (addressing Travellers' participation).

108. See e.g. the second opinion on Germany, paras 147 (under art. 15) and 164 (under art. 17).

109. See e.g. the second opinions on Denmark, para. 60, on the Slovak Republic, para. 31, and on Germany, para. 33.

110. Second opinion on Germany, paras 17, 18 and 46.

111. Second opinion on Ireland, para. 36.

112. First opinion on Serbia and Montenegro, para. 63 (under art. 6). In this opinion the AC also refers explicitly to the fate of Romani women and children in the context of trafficking.

that the situation of the Roma living in camps renders them (and especially women and children) particularly vulnerable to various kinds of abuses, including human trafficking.¹¹³

4.1.3 The Issue of Integration

While the issue of integration has been taken up in the contexts of articles 5.2, 6 and 14.3 of the CoE Framework Convention,¹¹⁴ the AC has raised it also under other articles of the Convention, most prominently in connection with articles 3–6, 12, 14 and 15.¹¹⁵ In the following section, the express references to integration put forth by the AC are collected under various articles of the Convention, in addition to which the remarks on integration made specifically with respect to the Roma are brought together. Chapter 4.1.3.2 contains a summary of the main points on integration raised by the AC.

4.1.3.1 References to Integration under Various Articles of the CoE Framework Convention

Under *article 3* concerning the personal scope of application of the CoE Framework Convention, the AC has stated that when public efforts are made to improve integration, specific measures are also needed to address the particular needs of persons belonging to national minorities. According to the Committee, there exist some interlinkages between the protection of national minorities and integration but that it is important that the protection of national minorities is not perceived as encompassing only those measures that the authorities pursue in the framework of their integration initiatives.¹¹⁶ The Committee has noted the access of non-citizens to the measures of integration concerning foreigners,¹¹⁷ and has associated integration into society with acquisition of citizenship.¹¹⁸ Connections have been made between integration in society and the legal status of persons as well as improved access to

113. Second opinion on Italy, para. 58 (under art. 4). See also the remarks on Roma *infra* in chapter 4.1.3.

114. See the remarks *supra* in chapters 2.1.1.3.2 and 2.2.1.3.1.

115. For a detailed analysis of the references to integration put forth in the AC's opinions published by 11 November 2003, see Pentikäinen (2004a), pp. 124–130.

116. First opinion on Sweden, para. 17.

117. Second opinion on the Czech Republic, para. 27.

118. First opinion on Slovenia, para. 9. For facilitating the integration of persons of foreign origin (who have lived in the state for a number of years) by improving the possibilities of obtaining citizenship, see the second opinion on Moldova, para. 27. See also the second opinion on Germany, para. 26.

social, economic and other rights.¹¹⁹ The AC also appears to have linked facilitating the integration into society of people who have settled in the country more recently to including broadly persons belonging to ethnic, cultural, linguistic or religious groups (including non-citizens) in the application of the CoE Framework Convention.¹²⁰

In connection with *article 4*, which concerns equality and non-discrimination, the AC has frequently put forth remarks on the integration of the Roma (see below).¹²¹ Under this provision, the Committee has made a remark on an integrated approach to housing and education.¹²² In addition, the Committee has addressed the linkages between the knowledge of the state language, citizenship and the government's integration efforts in noting that improved proficiency in the state language amongst national minorities is a central factor for not only their access to citizenship but also their employment opportunities and the government's integration efforts in general. In the same vein, the AC has stressed the existence of training opportunities to receive training in the state language.¹²³ It has also connected the issue of effective participation and integration into society in the context of article 4.¹²⁴

Article 5 deals with promoting conditions that enable persons belonging to national minorities to maintain and develop their culture and to preserve the essential elements of their identity; in this connection, the AC has observed that efforts aimed at supporting the culture and identity of persons belonging to national minorities are essential for an integrated society. In implementation of the national

119. In its second opinion on Slovenia the AC addresses specifically the integration of non-Slovenes who are from other parts of the former Yugoslavia. The AC urges the authorities to take immediate action to resolve the legal status of these persons, while making provision for assistance measures to facilitate their access to social, economic and other rights, and, more generally, their integration in Slovene society. See para. 11. See also the Executive summary. See also the remarks of similar kind made under arts 4 and 6 cited *infra*.

120. Second opinion on Norway, paras 9 and 27.

121. In its second opinion on Hungary the AC refers to fight against discrimination and the promotion of social integration of disadvantaged persons (particularly Roma). See para. 43.

122. As regards the situation in Northern Ireland, the AC has encouraged the government to explore further with the communities concerned how a more integrated approach to both housing and education could lead to strengthening of relations of the two communities. First opinion on the United Kingdom, para. 36.

123. The AC refers to the introduction of more free-of-charge state language training opportunities for those persons with limited financial means who intend to take the citizenship exam or to seek to improve their proficiency in the state language for other purposes that contribute to integration. Second opinion on Estonia, paras 49 and 51.

124. This is done in the AC's second opinion on Slovenia, and again with respect to non-Slovenes from the former Yugoslavia when the AC refers to facilitating their effective participation and integration in Slovene society by means of targeted measures. See para. 61. In this context the AC raises again the regularisation of the legal status of these persons and their access to citizenship and social and economic rights. See paras 57 and 60. See also the remarks of similar kind *supra* in connection with art. 3 and *infra* in connection with art. 6.

integration programmes, the Committee has urged the authorities to pay attention to the protection of the languages and cultures of national minorities and the social dimension of integration. It has been stressed that national integration programmes should result in the integration, and not assimilation, of persons belonging to national minorities.¹²⁵

The AC has welcomed the view that integration projects are a tool to strengthen more open and tolerant attitudes towards multiculturalism. In the Committee's opinion, these projects should be used to develop the understanding of ethnic differences as a positive phenomenon that enriches society.¹²⁶ The Committee has stressed the importance of avoiding terminology that can be perceived as implying that national minorities and their languages are not an integral part of society.¹²⁷ Links have been put forward between integration in society and the consulting and involving of minorities, particularly with respect to the measures aimed at their support.¹²⁸ Additionally, the AC has discussed promoting and protecting the use of the state language as an integration measure by the government, and it has pointed out that the measures should be implemented without prejudice to the right of persons belonging to national minorities to maintain and develop their identity and their culture, including their languages.¹²⁹

125. First opinion on Estonia, para. 37. For the issue of integration and creating suitable conditions for persons belonging to various minority groups to preserve and develop their cultures and to assert their respective identities, see also the first opinion on Bulgaria, para. 47.

126. Second opinion on Estonia, para. 59. For a remark on integration and seeing minority cultures as the enrichment of the national culture, see also the first opinion on Bulgaria, para. 47.

127. Second opinion on Estonia, paras 62 and 65. The AC notes that the authorities' commitment to Estonia as a multicultural society is not consistently reflected in the terminology used in official documents and statements, when e.g. the use of the term "non-Estonian" is used to describe the country's minority population, while intended to refer only to ethnicity. See para. 62.

128. The AC has pointed out that consulting all minorities directly and actively involving them in the identification and practical implementation of policies aimed at helping national minorities to preserve and develop their culture will help them, particularly the numerically smaller minorities, to strengthen their identity while ensuring their integration in society. First opinion on Moldova, para. 40. See also the second opinions on Estonia, para. 57, and on Germany, paras 61–63 (under art. 5).

129. For the remarks on the promotion of the state language and the government's active policy of increasing the use and reinforcing the status of the state language in view of encouraging social cohesion and facilitating integration within society, see the first opinion on Lithuania. In this opinion, and with reference to art. 5.2, the AC notes that it deems it legitimate, given the specific historical background of the country, that the authorities should wish to develop such a policy and also a range of measures to ensure its implementation, some of which also extend, as regards the public sphere, to persons belonging to national minorities. The AC expresses the hope that the authorities will ensure that the measures adopted to promote, protect and monitor the use of the state language are implemented without prejudice to the right of persons belonging to national minorities to maintain and develop their identity and culture. The authorities are encouraged to ensure the effective implementation

In the framework of *article 6*, which deals with tolerance and intercultural dialogue, the AC has referred to the need to try to remedy any possible integration difficulties certain groups may encounter because of their religious and cultural differences vis-à-vis the majority population.¹³⁰ The Committee has discussed the issue of integration prominently in the context of immigration by drawing attention to the challenges involved in integrating persons from various religious, cultural and linguistic backgrounds; it has pointed out that the integration of these persons has rendered promoting a spirit of tolerance and mutual respect among all persons in the country by the authorities important.¹³¹ The Committee has drawn attention to persisting problems affecting immigrants, asylum-seekers and refugees ranging from the exploitation of racism and xenophobia in politics to the persistence of a negative climate concerning these persons, and has called upon the authorities to pay particular attention to these problems.¹³² Integration has been linked to the prevention of racism and discrimination, and the need to improve the integration of foreign nationals has been stressed. The AC has commented on the lack of a comprehensive integration strategy and has welcomed the adoption of National Action Plans aimed at implementing the conclusions of the Durban World Conference against Racism, which is noted to aim at encouraging the integration of foreign nationals. In connection with the need to combat racism and intolerance, the AC has underlined the need to pay attention to the position of vulnerable groups such as persons (particularly women) of immigrant origin and Muslims.¹³³ In more recent opinions, the Committee has increasingly addressed integration difficulties faced by persons with an immigrant background and the links of these difficulties to discrimination and intolerance.¹³⁴ The AC has cited discriminatory practices in the areas of hous-

of this right e.g. through appropriate support and the promotion of minority languages. See para. 40.

130. First opinion on Liechtenstein, para. 15. See also a remark on this in the second opinion on Liechtenstein in which the AC combines the consideration of arts 4 and 6. See para. 9. For integration problems certain groups might possibly encounter owing to the religious and cultural differences that set them apart from the majority population, see also the first opinion on Italy, para. 40.

131. Ibid. For promoting a spirit of tolerance and intercultural dialogue facilitating integration, see also the remarks in the second opinion on Malta, para. 26.

132. Second opinion on Italy, paras 77 and 78.

133. Second opinion on Liechtenstein, paras 10, 12 and 13. In this opinion the AC considers art. 4 together with art. 6.

For the government's efforts to improve integration and to accommodate the increased diversity of the society, see also the second opinion on Finland, paras 10, 65 and 167. For welcoming the integration efforts envisaged in a National Action Plan against Racism, see the second opinion on Ireland, para. 65.

134. Second opinion on San Marino, para. 24. See also the second opinion on Norway, paras 85 and 91.

ing, education and employment,¹³⁵ and has reiterated the particular difficulties that women with an immigrant background may encounter. These women, in particular single mothers, are observed to be often affected by unemployment and housing problems, in addition to which they are one of the groups of people hardest hit by poverty.¹³⁶ The AC has also commented on criminalising incitement to racial hatred, viewing it as an important measure to facilitate integration.¹³⁷

The AC has separately underlined the integration of immigrants in the area of education, and has highlighted the need to take efforts to develop an integration policy for immigrants particularly in the field of equality of opportunity in education and language promotion. Such measures are viewed as essential in combating racism, xenophobia and discrimination effectively.¹³⁸ The Committee's opinions also contain remarks on integrated education, which means mixed education.¹³⁹ Furthermore, the link between the knowledge of the national (state) language(s) and integration, as well as the importance of the availability of adequate teaching of the national language(s) to recent arrivals, including adults, have been highlighted.¹⁴⁰

Whilst the AC has stated that a government's policy towards integration should include tackling the existing barriers of discrimination faced by persons belonging to different ethnic and religious groups, it has also discussed integration policies that contribute to a climate of intolerance towards these groups. According to the Committee, governments should be ready to revise legislation, policy and practice where these are shown to be discriminatory or where they result in an increase in hostility towards immigrants, asylum-seekers and refugees. There should be readiness on the part of a government to make revisions where the results run counter to the aim of better integration and when they may be shown to lead towards a process of assimilation against the will of the persons concerned. Furthermore, an integration strategy should draw attention to the positive contribution that foreigners' participation

135. For this and stressing the importance of facilitating the integration in the society of persons of immigrant background, see the second opinion on Norway, Executive summary and paras 17, 76, 159, 164 and 165. The AC notes the government's programme aiming to facilitate the rapid and effective integration of immigrants containing e.g. compulsory fast-track learning of the Norwegian language and familiarisation with the culture of the host country and schemes to encourage adequate preparation for access to the labour market. The AC also draws attention to a new social inclusion plan, the role of the media and awareness-raising with respect to various groups. See paras 17, 81–83 and 90.

136. *Ibid.*, para. 85.

137. Second opinion on Malta, para. 25.

138. First opinion on Germany, Executive summary and para. 39.

139. See e.g. the first opinion on FYROM, para. 51.

140. In its second opinion on Finland the AC stresses the importance of availability of adequate free-of-charge teaching of the national languages to persons who have arrived Finland recently, including for adults. In the AC's view the authorities should pursue further integration efforts pertaining to minorities at various levels of administration, including through provision of teaching of national languages. See paras 65 and 67.

could make in society, including the labour market.¹⁴¹ The AC has referred to the important responsibility that governments have to conduct a dialogue in the sensitive area of immigration and integration.¹⁴² Underlining not only tolerance, but also intercultural dialogue is viewed as important in promoting and facilitating integration.¹⁴³ The Committee has pointed out that any measures to promote and facilitate the integration of non-citizens should be adopted and implemented in consultation with the persons concerned.¹⁴⁴

The AC has touched upon the question of citizenship under article 6 when referring to the importance of citizenship to the integration of non-citizens and their participation in political life. In the Committee's view, the lack of citizenship may constitute a real obstacle to fuller integration (including participation in political life), and therefore flexible provisions concerning citizenship can facilitate integration into society.¹⁴⁵ Attention is also drawn to the role of dual citizenship in contributing to integration efforts.¹⁴⁶ The legal status of persons and the issue of integration have been linked in other contexts as well,¹⁴⁷ in addition to which the AC has asserted that uncertainty and insecurity resulting from a temporary authorisation of residence may limit the opportunities of many immigrants for integration.¹⁴⁸ The AC has specifically addressed the situation of asylum-seekers, refugees and persons with humanitarian status, and has stated that measures taken to provide them with assistance in securing employment, accommodation and social services facilitate their economic and social integration.¹⁴⁹

In discussing promoting respect and understanding for people and facilitating their integration into society, the AC has raised the question of safeguarding iden-

141. Second opinion on Denmark, Executive summary and paras 21–22, 85 and 90.

142. It is also noted that the authorities should not exclude from dialogue or funding those most critical. *Ibid.*, para. 91.

143. Second opinion on San Marino, Executive summary and paras 17 and 25.

144. *Ibid.*, para. 21.

145. First opinion on Germany, para. 40. See also the second opinion on Germany, paras 13, 66, 67 and 73. See also the first opinion on Austria in which the AC also points out that the authorities should make sure that the legislation on citizenship is applied fairly and in a non-discriminatory manner to all applicants. See para. 35.

146. Second opinion on Finland, para. 66.

147. In its second opinion on Slovenia the AC states that it is essential to develop a social climate and attitudes that are conducive to the integration, within Slovene society, of non-Slovenes from the former Yugoslavia. Attention should be given e.g. to resolving the legal status of individuals. See para. 21. See also the remarks on the opinion on Slovenia *supra* in connection with arts 3 and 4. See also the remarks on Roma *infra* in this section.

148. Second opinion on Germany, para. 68. The AC observes that many immigrants reside in Germany on a basis of a temporary authorisation.

149. The AC has also noted the transposing the principles enshrined in the Refugee Convention into domestic law and providing recognised refugees with a wide range of social and economic rights. See the second opinion on Malta, paras 23 and 24. For meeting the welfare needs of asylum-seekers and refugees and thereby enabling their integration, see also para. 29.

tity, although in a limited context.¹⁵⁰ With a view to facilitating integration and promoting a spirit of tolerance and intercultural dialogue and avoiding the development of stereotypes and prejudices among the general public, the AC has underlined actions in the fields of education and media. It has highlighted the importance of an awareness of human rights and intercultural issues in the school curriculum and the impact of statements by public figures and reporting in the media on non-citizens.¹⁵¹ The Committee has stressed the efforts to encourage the media to play a positive role in society as vehicles of communication and integration, whatever their position in the media landscape and whatever the language used. It has also underlined the need for training and awareness-raising for journalists with respect to human rights and diversity as well as the desirability of allowing the media to operate independently and pluralistically.¹⁵² The AC has pointed out that the promotion of domestic print and electronic media for national minorities, including bilingual initiatives, is an important element in integration efforts.¹⁵³ Finally, with reference to article 6 the AC has put forth remarks on social cohesion, mutual respect, inter-ethnic understanding and co-operation, eliminating barriers or divisions, and integration.¹⁵⁴

150. In its first opinion on Bulgaria the AC considers persons belonging to certain groups, the Macedonians and Pomaks in particular (under art. 6), and urges the authorities to take effective measures to promote respect and understanding towards these people and facilitate their integration into Bulgarian society, while safeguarding their identity. See para. 50.

151. Second opinion on Malta, Executive summary and paras 26 and 28. For the role of the media in the area of tolerance and furthering integration, see also the first opinion on Bulgaria in which the AC refers to some of the media presenting information in a manner apt to strengthen the existing negative stereotypes regarding vulnerable groups (including Roma, Macedonians or persons belonging to certain religious groups). In this connection the AC also notes the principles contained in the CoE Committee of Ministers' Recommendation No. (97) 21 on the media and the promotion of a culture of tolerance. See para. 55. The similar kind of remark is made in the first opinion on Spain, para. 50.

152. Second opinion on Moldova, para. 67. For the remarks on the role of the media, see also the second opinion on Norway, paras 79, 82, 83 and 90.

153. The AC has raised this aspect with respect to Estonia where many persons belonging to national minorities continue to follow to a large extent the media based in the Russian Federation. Second opinion on Estonia, para. 19. See also the remarks in para. 71.

154. In its second opinion on Moldova the AC points out that in order to preserve and strengthen the country's social cohesion, it is essential that the authorities continue to promote mutual respect, inter-ethnic understanding and co-operation among persons belonging to different ethnic or linguistic groups and make efforts to eliminate any barriers or division between them. The efforts are needed to strengthen the role of the education, the media and culture, and they should be made to improve the dialogue with, and the integration of, persons such as the Roma and non-traditional religious communities. See para. 62.

In connection with *article 12*, which addresses education, the AC has given prominent consideration to the integration of Romani children in schools (see below).¹⁵⁵ The AC has discussed the potential of schools to further integration,¹⁵⁶ and has stated that the successful integration of ethnic and religious groups in the state also depends on fostering knowledge of the groups' culture, history, language and religion within society.¹⁵⁷ The Committee has placed emphasis on the importance of reflecting the country's diversity in school curricula and on an integrated and multicultural approach to education.¹⁵⁸ Attention is also drawn to the role of interculturalism in schools in enhancing dialogue and understanding among children belonging to different communities, which, among other things, contributes to better subsequent vocational and social integration.¹⁵⁹

The AC again cites the linkages between the state language, cohesion and integration in referring to the importance of (learning) the state language as a factor of cohesion and a precondition for the future socio-economic integration of the children of national minorities.¹⁶⁰ The Committee has noted with satisfaction the increasing attention by governments to making people aware of the importance of human rights, tolerance and multicultural dialogue as part of their integration policies.¹⁶¹ Recently, with reference to article 12, the AC has raised the question of the social, linguistic and cultural integration of refugee children and has called for attention to be paid to the specific educational needs of the children of refugees and internationally displaced persons. The Committee has also referred to the need to integrate into regular classes children belonging to certain national minorities having disadvantaged backgrounds.¹⁶²

155. In its first opinion on Bosnia and Herzegovina the AC refers to the introduction of a common core curriculum as instrumental in facilitating the integration of returnee children and student mobility. See para. 85.

156. First opinion on FYROM, para. 75.

157. Second opinion on Denmark, para. 146.

158. According to the AC, the curriculum and syllabi of schools should adequately incorporate aspects which enhance the country's ethnic and cultural diversity and ensure that the majority are more aware of the history and cultural identity of minorities. At the legislative level, the authorities are encouraged to promote an integrated and multicultural approach to education when addressing the right to education of persons belonging to national minorities. Second opinion on Romania, para. 140.

159. The AC raises this point in its second opinion on Slovenia in which it discusses specifically the implementation of interculturalism in schools operating in the "ethnically mixed areas" inhabited by the Hungarian and Italian minorities. See paras 139 and 140. See also the remarks on Roma *infra* in this section.

160. Second opinion on Moldova, para. 122.

161. Second opinion on the Czech Republic, para. 134 (noting a strategy for the teaching human rights and tolerance).

162. Second opinion on the Russian Federation, paras 234, 237, 238 and 240. In the same connection the AC calls for integrating Romani children into regular classes.

With reference to *article 14*, which sets out the right to learn a minority language, the AC has put forth remarks echoed in the points raised in the context of other provisions. For instance, it has underlined that the implementation of the educational reform that stresses the need to learn the state/official language must be carried out in a manner that contributes to the integration of persons belonging to national minorities, but not to their assimilation.¹⁶³ Additionally, the Committee again refers to the importance of a knowledge of the state language as a factor contributing to social cohesion, participation and integration. While acknowledging these links, the AC has also pointed out that it is important that the authorities strive for a balanced response to the specific language needs of all national minorities.¹⁶⁴ Furthermore, the AC has discussed integration programmes for minorities in the area of education,¹⁶⁵ and has made observations concerning school settings that favour inter-ethnic dialogue and thereby facilitate integration.¹⁶⁶ Whilst minority language education has been stated to having a role in facilitating the integration of persons belonging to national minorities in the society, it is important that this kind of language education is designed as a goal per se, essential to the preservation of these persons' identity.¹⁶⁷

In its remarks made with reference to *article 15*, those on the Roma in particular, the AC has linked participation and integration. This is discussed below.

As regards *the Roma*, whom the AC has considered in a number of its opinions, the questions that have come to the fore (under various articles) prominently concern equality and non-discrimination, inclusion and combating exclusion, marginalisation and isolation. The Committee has expressed its particular concern for the exclusion of Roma and discrimination against them in such fields as employment,

163. First opinion on Estonia, para. 50. See also the second opinion on Estonia, paras 137 and 140.

164. The AC has noted the particular situations of the national minorities and the need for existing resources to be shared equitably. See the first opinion on Moldova, para. 83. For a note on the knowledge of the state language likely to facilitate integration and effective participation in public life of persons belonging to national minorities, see also the first opinion on Armenia, para. 74.

165. Second opinion on Hungary, para. 104.

166. In its second opinion on Croatia the AC addresses the debate whether national minorities should be educated in their own institutions or whether they should receive instruction in their minority language in schools using Croatian language. The AC refers to the legitimate concern for inter-ethnic dialogue being essential in the war-affected areas necessitating concerted efforts which could ultimately facilitate integration. See para. 136. In its first opinion on Serbia and Montenegro the AC refers to the importance of teaching of minority language and culture integrated in the regular school curriculum of the pupils concerned. See para. 98.

167. Second opinion on Norway, para. 134.

welfare, public services, education, housing (accommodation), and participation.¹⁶⁸ It has stress the need to narrow the gap between persons belonging to the Romani minority and the rest of the population and to adopt a targeted and a long-term strategy at the national level to improve the situation of Roma.¹⁶⁹ With reference to article 4, which specifically addresses equality and non-discrimination, the AC has discussed the insensitivity of various measures to the Romani lifestyles and traditions and the need to show respect for traditions peculiar to Romani lifestyles and culture.¹⁷⁰ The Committee has specifically referred to the increased efforts to adapt health care services to the linguistic and other needs of the Roma, in particular Romani women.¹⁷¹ It has also critically commented on views that do not perceive the culture of the Roma as a valuable contribution to society.¹⁷²

The AC's remarks expressly addressing the integration of the Roma in(to)/ within society indicate that it has made these in connection with several articles of the CoE Framework Convention, in particular articles 4–6, 12 and 15.¹⁷³ The Committee has stated that fuller integration of the Roma cannot be confined to a strictly social approach, but requires, above all, recognition and elimination of all the forms of discrimination which they face.¹⁷⁴ It notes that an integration policy

168. See e.g. the first opinions on Bulgaria, Executive summary and para. 32, and on Spain, Executive summary, and the second opinions on Hungary, paras 47–54 and 58, on Ireland, Executive summary, on Norway, Executive summary, and on Germany, para. 16. In its first opinion on FYROM the AC notes positive discrimination measures, including quotas, taken in the field of higher education to make it easier for persons belonging to minorities to enter higher education, and states that the system has not brought the expected results as far as the Roma are concerned. See para. 81 (under art. 12).

169. Second opinion on Germany, paras 16 and 39 (under art. 4). The AC also suggests that the Roma could be included in the target groups listed in the National Inclusion Plans prepared in the context of the EU.

170. In its first opinion on Spain, the AC discusses discriminatory attitudes against Roma in the area of employment and calls for specific efforts to encourage and prepare Romani women to enter the labour market and to promote the revaluation of their role in the family and society, while respecting the traditions peculiar to Romani lifestyles and culture. See para. 33. It also points out that measures taken in the areas of education, access to public services and medical care have proved unsuited to the Romani lifestyle and traditions, and consequently ineffective. See paras 36 and 37.

171. Second opinion on the Slovak Republic, para. 57 (under art. 4). This opinion contains remarks on special concern for the alleged sterilisation of Romani women without their prior free and informed consent and discrimination of Roma in access to health care. See paras 51–57.

172. Second opinion on Italy, para. 33 (under art. 3).

173. See e.g. the first opinions on Bulgaria, para. 121 (under art. 4), on the Czech Republic, para. 30 (under art. 4), on Romania, Executive summary and para. 25 (under art. 4), on Moldova, Executive summary, and on Austria, para. 31 (under art. 6). See also e.g. the second opinions on Hungary, paras 13 and 131, on the Czech Republic, para. 43 (under art. 4), and on Spain, Executive summary.

174. First opinions on Romania, para. 37 (under art. 6), and on Italy, para. 36 (under art. 6). See also the second opinions on Italy, para. 33, and on Hungary, paras 13 and 131.

concerning Roma should be linked to reducing the gap between Roma and the rest of population in most fields, improving the public image of the Roma and combating their marginalisation and social exclusion.¹⁷⁵ In the framework of article 5, the AC has underlined the need to seek means of preserving and enhancing the identity, traditional lifestyle and culture of the Roma in integration efforts focussing on them. Thus, the full integration into society of Roma, as well as their participation in society, has been linked to the possibility to maintain Romani culture, language and traditions.¹⁷⁶

The AC has addressed the housing situation of Roma, in particular the placing of Roma in camps, from the viewpoint of integration. The Committee has strongly criticised the practice of placing Roma in camps since it runs counter to integrating Roma into society and aggravates their socio-economic difficulties.¹⁷⁷ Living in camps isolated from society renders access by Roma to employment, education and health care extremely difficult, resulting in a situation that is incompatible with the CoE Framework Convention. The lack of serious prospects of integration, especially for Roma who have often lived in such camps for several years, has also been pointed out as rendering these persons – especially women and children – particularly vulnerable to various kinds of abuses, including human trafficking.¹⁷⁸

175. Second opinion on the Czech Republic, para. 190. See also the remarks in para. 79 (discussed *infra*).

176. First opinions on the Czech Republic, para. 33, on Moldova, para. 42, and on Spain, Executive summary.

In its second opinion on the Czech Republic the AC addresses the integration of the Roma under a separate section under art. 5: “Integration of the Roma and affirmation of their identity” (including paras 75–80). In this section the AC welcomes the measures taken to help the Roma to maintain and affirm their culture and identity. It also urges the authorities to continue their efforts to support preservation and development of the Romani identity, and co-operate with the Roma in selecting the measures best suited to their real needs, while seeking to incorporate those measures into the government’s overall integration strategy. The AC also points out that the preservation and affirmation of Romani cultural identity has success only if the authorities’ efforts to effectively improve the social and economic position of Roma, and limit their marginalisation and social exclusion, are also successful. See paras 76, 79 and 80.

177. The AC has called for a comprehensive and coherent strategy to provide Roma with housing, to end the discrimination and socio-economic inequalities suffered by Roma, and to encourage their participation in the public affairs concerning them. See the first opinion on Italy, Executive summary and paras 25 (under art. 4) and 39 (under art. 6).

178. Second opinion on Italy, para. 58 (under art. 4). See also paras 59 (under art. 4) and 154.

The AC has voiced its concern for the separation and isolation of Roma in the area of housing also in other contexts, including the practice of building walls around the areas where Roma (Travellers) are accommodated, without, however, expressly discussing it in terms of integration. See e.g. the first opinion on Ireland, para. 50 (under art. 5). In the same opinion the AC addresses the nomadic lifestyle of some Roma, and notes nomadism being one of the essential elements of the culture and identity of persons belonging to the Traveller community. It also draws attention to the failure to provide halting sites for the

Numerous remarks of the AC concern the integration of Roma in schools. The Committee has criticised placing Romani children in separate or “special” schools or classes and has called for integrating Romani pupils in regular schools (and classes).¹⁷⁹ Integration in schools has been linked to integration into society, since placing Roma in “special” schools makes it more difficult for Romani children to gain access to other levels of education, thereby also reducing their chances of becoming integrated into the society.¹⁸⁰ The AC has often referred to “integrated” schools (or integrated education), which appears to mean mixed schools instead of separate schools or separate education.¹⁸¹ The Committee has made a note of governmental measures aimed at the integration of Romani children in the school system at the various levels, for example, measures involving direct socio-economic support for families and special initiatives, such as introducing quotas for access to higher education. The Committee has stressed the need for awareness-raising measures for both families and schools with a view to greater integration of Romani children in the education system.¹⁸² Additionally, taking full account of Romani language and culture in the educational system has been stressed as important to integrating Roma in the school system.¹⁸³ Reinforcing the visibility of the culture of the Roma in the school curricula should be viewed as part of a comprehensive strategy for

Traveller community and the allegations that this contributes to a process of assimilation. See paras 52 and 56 (under art. 5).

179. These remarks have been made particularly under art. 12 addressing education when the AC has extensively touched upon the segregation or exclusion of Romani children in the area of education. See e.g. the first opinions on Romania, para. 59, on Lithuania, para. 64, on Bulgaria, para. 87, on Poland, paras 76 and 77, and on Spain, paras 70 and 71, and the second opinions on Hungary, paras 15, 58 and 89, on the Slovak Republic, paras 97 and 100, on Slovenia, paras 23, 146–147, 150 and 157, and on Norway, para. 48 (under art. 4) and paras 122 and 123 (under art. 12). The AC has addressed the education of Irish Traveller children in an integrated environment in its first opinion on the United Kingdom. See paras 83 and 84. See also both the first and second opinions on Ireland, paras 85 and 95, respectively.
180. Second opinion on the Czech Republic, para. 147 (under art. 12). For the need for the active involvement on the side of the parents, see para. 153.
181. See e.g. the first opinions on Bulgaria, paras 87 and 88, on Ireland, para. 86, and on Poland, para. 76. The first opinion on Ireland refers also to integrated early childhood care. See para. 86.
182. Second opinion on Moldova, paras 115 and 120.
183. First opinions on Poland, para. 77, and on Slovenia, paras 64 and 65. For the need to take due account of Romani children’s needs, culture and language, see also the first opinion on FYROM, para. 78. This opinion also specifically notes the situation of Romani girls. All these opinions also refer to the principles laid down in the CoE Committee of Ministers’ Recommendation No. (2000) 4 on the education of Roma/Gypsy children in Europe. In its first opinion on Spain the AC refers to the importance of information about Roma, their history, culture and traditions in school textbooks. See paras 71 and 72.

their integration.¹⁸⁴ As regards other considerations that need to be kept in mind in the area of education, the AC has raised the issue of the recruitment of Romani teaching staff, raising teachers' awareness of the specific problems of Romani children, and involving parents more effectively.¹⁸⁵

The AC has established an explicit link between integration and participation under article 15 in referring to increasing the participation and integration of the Roma within society.¹⁸⁶ It has stated that the creation of a suitable system through which the Roma can be regularly consulted in matters affecting them would be particularly valuable in the development of a strategy of integration.¹⁸⁷

The AC has underscored the importance of a long-term comprehensive strategy for integrating Roma,¹⁸⁸ and has stressed the involvement of Roma in designing these strategies (and/or other action in the matter). The Committee has pointed out that the measures addressing the needs of Roma cannot have the desired effect unless framed and implemented in consultation and collaboration with the Romani community and unless the various parties involved show understanding and respect for Romani culture.¹⁸⁹ Additionally, it has emphasised the importance of paying attention to the specific needs of the various groups concerned in the context of a strategy of integration. More specifically, the AC has asserted that whereas the improvement of the living conditions of the Roma who have recently settled in a state as asylum-seekers or refugees can legitimately be considered extremely important, stronger emphasis could be put on the preservation and development of the identity of the Roma who have been traditionally present in the state.¹⁹⁰ The AC has also drawn attention to the Roma residing in the country who have no citizenship of the

184. The government should also take measures to ensure that Roma pupils attend school on a regular basis. Second opinion on Italy, para. 115.

185. In addition to listing these aspects, the AC reiterates the importance of the prevention of and combating ongoing prejudice towards the Roma among the rest of the population, developing the teaching of the Romani language, taking more sustained efforts to promote the Romani language, culture and traditions, and giving other children a more positive image of Romani identity. Second opinion on Slovenia, paras 150, 151 and 157.

186. Second opinion on the Czech Republic, para. 22. The AC notes the appointment of Roma co-ordinators to advise regional authorities on policies and measures to improve the situation and integration of Roma as a positive development. See para. 179.

187. Second opinion on Italy, para. 144.

188. *Ibid.*, Executive summary and paras 13 and 114.

189. First opinion on Italy, para. 34 (under art. 5). For the consultation of the Roma in designing a comprehensive strategy of integration for Roma, see also the second opinion on Italy, para. 59 (under art. 4). See also the second opinion on the Czech Republic, para. 80 (under art. 5).

190. Second opinion on Italy, para. 60 (under art. 4). In this opinion the AC expresses its particular concern for the lack of attention to the specific needs of those Roma who are not citizens of the EU and for their treatment by the authorities under the immigration perspective only. See para. 32 (under art. 3).

country of residence and to taking measures, for instance, in the field of education to facilitate their integration.¹⁹¹

4.1.3.2 Summary of the Major Points concerning Integration

In sum, the frequent remarks on integration put forth by the AC indicate that as regards the various levels or areas with respect to which integration has been cited, the Committee has usually discussed integration in(to) or within society. It has also spoken in terms of integration in the state, an integrated society, economic and social integration, an integrated approach to housing and education, and integrated education. The AC's specific references to integration suggest that the Committee has highlighted somewhat different elements depending on the group at hand. The three major groups that can be distinguished in this respect are national minorities, the Roma, and persons of immigrant origin. Of these, the AC has discussed integration most prominently in connection with the last two.

When the AC has considered integration initiatives with respect to *national minorities*, it has highlighted the importance of taking specific measures to address the particular needs of persons belonging to these groups. For the persons belonging to the groups characterised as national minorities, integration entails non-assimilation¹⁹² and the possibility to maintain their differences through protection and support for their culture, language and identity. In the context of the CoE Framework Convention, the integration of these persons is realised through the implementation of the various provisions of the instrument which aim at enabling these persons to express, preserve and promote their particular characteristics. In fact, the AC's remarks on non-assimilation in this connection suggest that maintaining differences – including preserving distinct identities – is even expected from national minorities. It is also worthy of note that when discussing the integration of national minorities, the AC has pointed out that ethnic differences should be viewed as a positive phenomenon that enriches society.

The above remarks also concern *the Roma* where they are considered as national minorities and thereby receiving protection under the various articles of the CoE Framework Convention. In the AC's remarks on the integration of the Roma, con-

191. In its second opinion on Germany the AC draws attention to the Roma residing in the country without German citizenship not qualifying for the measures taken for the Roma holding German citizenship due to which their integration is made more difficult. The AC also refers to sometimes tensional relations of this group with the majority population. The AC calls for a more flexible approach with regard to the Roma residing in the country without German citizenship and considering the possibility to allow them to benefit from measures in favour of the Roma holding German citizenship wherever relevant. See paras 71 and 75 (under art. 6).

192. The AC has expressly stressed that national integration programme should result in integration, not assimilation, of persons belonging to national minorities.

siderable emphasis has been put on equality, non-discrimination, inclusion, and reducing the gap between Roma and the rest of population. The need to improve the public image of the Roma has also been highlighted. It is worth special mention that in the framework of article 4, which sets out the principles of equality and non-discrimination, the AC has called for specific efforts to encourage and prepare Romani women in particular to enter the labour market by promoting the re-evaluation of their role in the family and society while respecting the traditions peculiar to Romani lifestyles and culture.¹⁹³

As in the case of the Roma, the AC has closely linked the integration of *persons of immigrant origin* to the prevention of discrimination. In addition, pursuant to article 6 of the CoE Framework Convention – the principal provision pertaining to persons of immigrant origin – the Committee has underlined combating racism and xenophobia and promoting a spirit of tolerance and mutual respect among all persons in the country. The AC has stressed the importance of addressing a negative climate concerning persons of immigrant origin and the significance of intercultural dialogue in promoting and facilitating the integration of such persons. The elimination of barriers or divisions has been viewed as important in facilitating integration. While the AC's remarks on the (economic and social) integration of asylum-seekers, refugees and persons with humanitarian status deserve to be mentioned, the Committee has also stated more generally that integration measures should not lead towards a process of assimilation against the will of immigrants, asylum-seekers and refugees. It has called for integration strategies concerning persons of foreign background to draw attention to the positive contribution of foreigners' participation in society. It is of some interest that the Committee has not been forthcoming in discussing the question of identity in connection with article 6 – despite the fact that the issue of safeguarding identity in the process of integration is expressly addressed in connection with this provision.¹⁹⁴

While the AC seems to suggest that integration is to be realised somewhat differently depending on the focal group, it may also be observed that the Committee has strongly stressed the importance of the knowledge of *the state (national) language* as an element of integration with respect to all groups. In addition, opportunities to learn *the mother tongue* have been cited, most prominently in the case of national minorities, but also with regard to persons belonging to groups with an immigrant background. Furthermore, the AC has underlined the role of *education* for integration.¹⁹⁵ In the case of both the Roma and persons of immigrant background, the

193. This remark is included in the first opinion on Spain. See the reference to this opinion *supra* (n. 170).

194. See the remarks on this provision *supra* in chapter 2.2.1.3.1.

195. The AC's commentary on education contains some general references to integration. See the AC's Commentary on Education, pp. 6 and 11.

AC has stressed the importance of integration in the area of education through integrated, i.e. mixed education. The Committee's recent attention to the need to also integrate children belonging to certain national minorities having disadvantaged backgrounds into regular classes also deserves mention. Additionally, the AC has linked the successful integration of ethnic and religious groups in the state to the fostering of knowledge of their culture, history, language and religion within society, and, consequently, it has called for a country's diversity to be reflected in its school curricula.¹⁹⁶ In general, the Committee has stressed an integrated and multicultural approach to education and the role of interculturalism in schools in enhancing dialogue and understanding among children belonging to different communities.

The AC has established an explicit connection between integration within society and *participation*. This is done clearly in the Committee's remarks on the Roma and when it has discussed the importance of citizenship for persons of immigrant background. A link is also specifically made between the participation of minorities with respect to the measures aimed at them, including integration measures, and the integration of these groups in society. While the AC has addressed the role of citizenship in integration, it has also discussed more generally the links between integration in society and *the legal status* of persons that enable access to social, economic and other rights. The Committee has pointed out that uncertainty and insecurity resulting from a temporary authorisation of residence may limit the opportunities of many immigrants for integration. In connection with article 6 of the Convention, the AC has underlined the role of education, *public figures* and *the media*, as well as the importance of the awareness of human rights and intercultural issues in the processes of integration.

The AC has cited the importance of creating *a comprehensive strategy for integration*, most notably with respect to the Roma. It has also made very earnest remarks on the role of *housing* in integration when criticising the policy of placing Roma in camps, which runs counter to integrating them into society. Furthermore, in its observations concerning the Roma, the AC has most clearly taken up – albeit in passing – the importance of paying attention to the specific needs of the various groups concerned in integration strategy. Moreover, the Committee has deemed it legitimate to put stronger emphasis on the preservation and development of identity of the Roma who have been traditionally present in the state compared to persons belonging to groups that have settled more recently.

The AC's remarks with reference to article 6 have also drawn attention to the challenges involved in integrating persons from various religious, cultural and lin-

196. The AC has strongly stressed the importance of the visibility of Romani culture in the school curricula and of the educational system taking full account of Romani language and culture.

guistic backgrounds. In its earlier opinions on integration difficulties, the Committee referred to the need to remedy any difficulties certain groups may encounter because of their religious and cultural differences from the majority population, whereas in its more recent opinions the Committee has spoken in terms of integration difficulties deriving from discrimination and intolerance. In its integration-related remarks, the AC has cited the need to pay attention to integration challenges faced by Muslims, thereby suggesting that the question of religion is a relevant one in the integration process. In general, however, as regards various dimensions relating to integration, such as gender or age, the AC cannot be considered very forthcoming.¹⁹⁷

The AC's remark concerning the link between *the inclusive application of the CoE Framework Convention* and integration in society is worthy of particular note, since it suggests that the integration into society of people who have settled in the country more recently may be facilitated by including the persons belonging to various ethnic, cultural, linguistic or religious groups (including non-citizens) in the application of the CoE Framework Convention.

4.2 The European Commission Against Racism and Intolerance

4.2.1 ECRI and the Focus of Its Activities

ECRI was established pursuant to the decisions made at the first CoE summit in 1993 as a response by the CoE member states to intensify their efforts to combat the phenomena of racism, xenophobia, anti-Semitism and intolerance.¹⁹⁸ ECRI has operated since March 1994, and has become the principal CoE body in the area of combating racism and other forms of intolerance.¹⁹⁹ According to ECRI's Stat-

197. The sporadic remarks relating to this include the need to draw particular attention to integration challenges faced by women with immigrant background and a note on Romani girls with respect to integration in the area of education.

198. See Appendix III to the Vienna Declaration. See also the remarks on this Appendix *supra* in chapters 2.1.1.3.3 and 2.2.1.3.1.

199. At the second CoE summit of 1997 the CoE member states called for the intensification of ECRI's work. See the Action Plan, Part I, para. 5. The European Conference against Racism also called for the strengthening of the European bodies active in combating racism, discrimination and related intolerance, in particular the action of ECRI. See the Political Declaration of the Conference, the second last paragraph at the end. Also the third CoE summit of 2005 made an explicit note of the importance of the work of ECRI in the area. See the Action Plan, Part I, para 2, subpara. 4.

ute,²⁰⁰ the Commission's task is to combat racism, xenophobia, anti-Semitism and intolerance, as well as racial discrimination, at the level of "Greater Europe" and from the perspective of the protection of human rights.²⁰¹ On the basis of the pertinent documents and decisions concerning its functions and mandate, ECRI has gradually developed its programme of activities, which comprises three major elements: a country-by-country approach, work on general themes, and relations with civil society.²⁰²

The country-by-country approach focuses on the monitoring of racism, racial discrimination, xenophobia, anti-Semitism and intolerance (hereinafter racism and other forms of intolerance)²⁰³ in the CoE member states. A CoE state is subjected to ECRI's review on the basis of its membership in the Council. ECRI's country-by-country reporting procedure concerns all CoE states on an equal footing and consists primarily of preparing country reports that include an examination of the situation in each state.²⁰⁴ The reports also contain ECRI's suggestions and proposals as to how the problems identified might be overcome. ECRI's monitoring work is broad-based in the sense that it is not based on the assessment of states' compliance with one specific international instrument; rather ECRI considers a number of international documents, primarily international conventions, including the CoE Framework Convention, to be relevant to its work.²⁰⁵ In general, it may be observed

200. The CoE Committee of Ministers adopted a new Statute for ECRI in June 2002. This new Statute took effect as of 1 January 2003.

201. Art. 1 of the Statute. ECRI is composed of independent and impartial experts appointed by each CoE member state on the basis of their recognised expertise in dealing with racism, racial discrimination, xenophobia, anti-Semitism and intolerance. See arts 2-4 of the Statute.

202. CoE (2004), pp. 9-13. See also art. 10 of the Statute of ECRI.

203. See the remarks on the use of terms in this research *supra* in chapter 1.3.

204. For the list of the present 47 CoE member states monitored by ECRI, see e.g. the CoE website at <http://www.coe.int>.

205. The following instruments of relevance for the work of ECRI are listed in the Appendix to the first General Policy Recommendation ECRI adopted in 1996: the ECHR and its Protocols, the Refugee Convention, ILO Convention No. 111, the European Social Charter and its additional protocols, the UNESCO Convention against Discrimination in Education, the ICERD, the ICESCR, the ICCPR and its Optional Protocol, the CoE Language Charter, and the CoE Framework Convention. Subsequently ECRI has inserted in its country reports references e.g. to the following instruments: the (revised) European Social Charter, the Convention on the Participation of Foreigners in Public Life at Local Level, the European Convention on the Legal Status of Migrant Workers, the European Convention on Nationality, the European Charter for Local Self-Government, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the Refugee Protocol, ILO Convention No. 169, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Child Convention, the Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems, the CEDAW, and the UN Convention on Migrant Workers.

that ECRI has developed a somewhat distinct method to combat racism and other forms of intolerance, one characterised by the use of a multidisciplinary and practically oriented (empirical) approach.²⁰⁶ ECRI aims at contributing to the translation into practice of international standards relevant to its mandate at the national (including regional and local) level. And whilst ECRI builds its actions on existing international standards relevant to its work, it sometimes also applies a somewhat higher standard in its effort to implement a comprehensive approach.²⁰⁷

To date, ECRI has carried out and completed two rounds of country-by-country reporting, and the third, which was initiated in 2003, was due to be finished during the year 2007.²⁰⁸ Over the years, ECRI's monitoring work has become increasingly detailed, which is reflected also in the content and increased length of the country reports adopted. The method that ECRI has adopted is to follow up the proposals and recommendations it has put forth in its earlier country reports and to update the reports' overall content to reflect the new developments in the state under review.²⁰⁹ ECRI's monitoring procedure is not based on reports submitted to the Commission by the states, which is the usual practice in the monitoring work carried out, for instance, by treaty bodies; rather, ECRI produces country reports itself on the basis of the information it collects from various sources, both governmental and non-governmental.²¹⁰

When comparing the monitoring function of ECRI to that of the AC of the CoE Framework Convention, the former concerns all CoE states and the latter ex-

In its country reports ECRI has also referred to the EU instruments, including art. 13 of the Amsterdam Treaty, the Racial Equality Directive, and the Employment Equality Directive.

206. The broad and multidisciplinary views of ECRI stem from the variety of ECRI members' backgrounds including lawyers specialised in public international law and human rights, political scientists, sociologists, ombudspersons, specialists of anti-discrimination issues, journalists, writers etc. Information from ECRI in July 2004.
207. Hannikainen (2004), p. 41. See also the remarks in Kelly (2004), pp. 138–139.
208. The first country-by-country reporting round took place in 1994–1998 and the second round in 1999–2002.
209. The aim of ECRI set for its third-round reports was to achieve an even greater level of detailed and concrete analysis and proposals. ECRI's Annual Report 2002, p. 16, paras 13 and 14.
210. In accordance with ECRI's Statute, ECRI also conducts contact visits in the countries under its scrutiny. See art. 11.2. For a detailed description of the procedure of ECRI with respect to country reports, including the remarks on various sources used by ECRI, see Pentikäinen (2004b), pp. 22–27.

ECRI has adopted the practice of permitting the annexing of an appendix to the country reports including the observations of the authorities of the state concerned if that is requested by the National Liaison Officer. This appendix submitted by the government does not form part of ECRI's analysis and proposals concerning the situation in the country concerned. It may be observed that over the years an increasing number of governments have used the possibility to attach an appendix to ECRI's country report.

tends only to the states that have ratified the CoE Framework Convention. On the basis of the ratifications of and signatures to the Framework Convention, it may be observed that ECRI's monitoring work covers more states than that of the AC's.²¹¹ In general, ECRI has fewer constraints on its monitoring work than the AC, for instance, since it collects the information itself; that is, it is not dependent on the submission of reports by states. Consequently, ECRI is not faced with the problem of delayed procedures because of the late or non-submission of state reports. The role of the CoE Committee of Ministers with regard to the work of ECRI and the AC is also different. Due to the role of the Committee of Ministers in monitoring the implementation of the CoE Framework Convention, the monitoring procedure under the Convention may be said to have a somewhat stronger political dimension than in the case of ECRI. The role of the Committee of Ministers in the monitoring work of ECRI is only to take note of the reports and publications produced by ECRI; it does not adopt any resolutions or recommendations on the basis of the Commission's documents.

The second dimension of ECRI's programme of activities, *work on general themes*, consists in particular of issuing of General Policy Recommendations (GPRs) addressed to all CoE states and the collection and dissemination of examples of good practice.²¹² To date ECRI has adopted eleven GPRs, including, for example, one on specialised bodies and one on national legislation.²¹³ In its GPR No. 7 on national legislation to combat racism and racial discrimination, adopted in 2002, ECRI put forth broad definitions of racism as well as of direct and indirect racial discrimination. These definitions include explicit references to such independent grounds as religion, language and nationality, which make the content of the concepts of

211. By October 2007 the only CoE member states that had taken no steps to become legally bound by the CoE Framework Convention were Andorra, France, Monaco and Turkey. Belgium, Iceland, Greece and Luxembourg had signed it.

212. In its series of examples of good practice ECRI has produced publications e.g. on combating racism and intolerance against Roma, and on specialised bodies to combat racism and other forms of intolerance at national level. See ECRI website at http://www.coe.int/T/E/human_rights/ecri (visited on 10 October 2007).

213. GPRs adopted by ECRI are: No. 1 on combating racism, xenophobia, anti-Semitism and intolerance (1996); No. 2 on specialised bodies to combat racism, xenophobia, anti-Semitism and intolerance at national level (1997); No. 3 on combating racism and intolerance against Roma/Gypsies (1998); No. 4 on national surveys on the experience and perception of discrimination and racism from the point of view of potential victims (1998); No. 5 on combating intolerance and discrimination against Muslims (2000); No. 6 on combating the dissemination of racist, xenophobic and anti-Semitic material via the Internet (2000); No. 7 on national legislation to combat racism and racial discrimination (2002); No. 8 on combating racism while fighting terrorism (2004); No. 9 on the fight against anti-Semitism (2004); No. 10 on combating racism and racial discrimination in and through school education (2007); and No. 11 on combating racism and racial discrimination in policing (2007).

racism and racial discrimination broader than is the case in the framework of the ICERD, for instance.²¹⁴

The third major strand in ECRI's activities, *relations with civil society*, has been prompted by the realisation that a successful strategy against racism and other forms of intolerance depends to a large extent on raising awareness of the threat posed by these phenomena and ensuring that the anti-racist message filters down to the whole of civil society.²¹⁵ Within this strand, ECRI has, among other things, aimed at reinforcing its relations with civil society actors.²¹⁶

The remarks in the following sections are based primarily on an analysis of the country reports produced and published by ECRI (by October 2007), in addition to which some notes are included on ECRI's GPRs that summarise a number of points raised in the country reports.

4.2.2 Groups and Questions Addressed

ECRI has drawn attention to a variety of groups falling within its remit and characterised by ethnic, cultural, religious or linguistic features. ECRI uses the term "minority" broadly, and frequently refers to minorities, minority groups, minority communities, national minorities, ethnic minorities, religious minorities, visible minorities, and "new" minority groups.²¹⁷ It also often uses the concept of vulnerable groups²¹⁸ and at times the term "disadvantaged groups".²¹⁹ While ECRI has drawn attention to the question of citizenship/nationality²²⁰ – particularly as it regularly scrutinises the content of the citizenship laws of the CoE states – it has not viewed citizenship/nationality as a criterion that would restrict its monitoring work but has

214. For the definition of racism, see para. I.1.a of the Recommendation, and para. I.6. of the Explanatory Memorandum to the Recommendation. For the definitions of direct and indirect discrimination, see paras I.1.b. and I.1.c. of the Recommendation.

215. CoE (2004), p. 12.

216. In view of this ECRI has e.g. adopted a "Programme of Action on Relations with Civil Society". This Programme (adopted in 2002) also constitutes part of ECRI's contribution to the implementation of the conclusions of the European and World Conferences against Racism, which stress the importance of involving civil society in the fight against racism and intolerance. Ibid.

217. For a broad use of the term "minority groups", see e.g. GPR No. 10.

218. In its second- and third-round reports ECRI has frequently drawn attention to vulnerable groups, and the groups referred to depend on the specific situation of the country in question. It may be observed that e.g. the Roma, non-citizens, immigrants, and Muslims have often been raised in this context. At times attention is also drawn to women of immigrant origin.

219. See e.g. the second report on Romania, para. 11.

220. ECRI appears to employ these two concepts somewhat interchangeably. See also the remarks on these concepts *supra* in chapter 2.2.2.

actively looked into the situation of non-citizens.²²¹ ECRI has stressed the link between citizenship/nationality that enables full participation in the life of a country and the feeling of being an integral part of its society.²²² It has also drawn attention to the excessively restrictive conditions for granting citizenship/nationality, and has noted a general trend amongst European states towards a more flexible approach as regards the issue of dual citizenship/nationality.²²³

In a number of its reports, ECRI has raised the particular problems faced by non-EU citizens in the EU states.²²⁴ In general, in the course of its monitoring work, ECRI has paid a great deal of – and increasing – attention to the situations of persons of immigrant origin, including immigrants, refugees and asylum-seekers. The situation of persons belonging to these groups is a regular item in ECRI's second- and third-round reports, and the Commission has frequently commented on the reception and status of non-citizens as well as on the immigration and/or asylum and refugee policies adopted by states. ECRI's attention to migrant workers or foreign (or non-citizen) workers is also worth noting,²²⁵ as is its increased attention to (im)migrants in an illegal or undocumented situation.²²⁶ The Roma have been a particular focus of attention in ECRI's work,²²⁷ in addition to which the Commission has systematically drawn attention to the situation of the Jews.²²⁸ It has increasingly addressed the situation of Muslims.²²⁹ These three groups – the Roma,

221. ECRI has also considered groups of non-citizens as minority groups. See e.g. the second report on Austria, para. 12.

222. See e.g. the second reports on Latvia, para. 13, and on Estonia, paras 11, 63 and 64.

223. See e.g. the third reports on Germany, para. 8, and on Austria, para. 10.

224. See e.g. the second and third reports on Belgium, para. 29, and paras 30 and 39, respectively; the second and third reports on Austria, Executive summary and para. 21, and Executive summary and paras 49–56, respectively; and the second and third reports on France, paras 36 and 41, and para. 137, respectively. See also the third reports on Italy, Executive summary, and on Luxembourg, para. 100. ECRI has also drawn attention to the privileged situation of the citizens of the EU and EFTA states in Switzerland in comparison to other non-Swiss citizens. See the second and third reports on Switzerland, para. 35, and paras 96 and 100, respectively.

225. For the remarks on migrant workers, see e.g. the second and third reports on Germany, para. 5, and para. 61, respectively. For non-citizen workers, see e.g. the second and third reports on Austria, para. 28, and paras 49–56, respectively. For foreign workers, see e.g. the third report on Belgium, paras 77 and 81. In general, ECRI's attention to discrimination in the labour market often concerns workers of immigrant background or non-citizen workers.

226. See e.g. the third reports on Slovakia, para. 78, on Switzerland, paras 103 and 104, on Spain, Executive summary and paras 32–37, and on Portugal, Executive summary and paras 64 and 65. In the report on Portugal ECRI recommends legalising the situation of foreign workers.

227. The situation of Roma has received attention practically in the all country reports of the states having Roma communities.

228. Particularly the second- and third-round reports address anti-Semitism.

229. Muslims received increasing amount of attention during the second reporting round, and they are also frequently considered in the third-round reports. For concern for the mani-

the Jews and Muslims – have received considerable attention in ECRI’s country reports, and have also been specifically addressed in the Commission’s General Policy Recommendations.²³⁰ Furthermore, ECRI has drawn some attention to the situation of indigenous peoples.²³¹

The inclusion in ECRI’s present statute of a reference to the integration of a *gender perspective* into the Commission’s programme signified an important addition to the dimensions of its work.²³² While it had paid some attention to gender perspectives in its agenda items already prior to the adoption of this provision,²³³ it has done so somewhat more often since then. However, the approach to gender perspectives by ECRI may be considered somewhat limited. Namely, the only context within which ECRI has referred systematically to the need to pay attention to the gender dimension is its third-round reports, in which it calls for a number of states to take the gender dimension into consideration in monitoring, specifically in data collection.²³⁴ Otherwise ECRI’s attention to gender perspectives has been sporadic and has varied on a case-by-case basis; most of the gender-specific remarks concern the need to pay attention to the situation of Romani women.²³⁵ ECRI has also drawn some attention to the victimisation of women in the context of trafficking in human beings,²³⁶ and at times has considered the situation of women of immigrant origin more generally. For instance, it has noted that women of immigrant origin are particularly vulnerable to the effects of racism and discrimination as well as to exploitation or disadvantages on the labour market,²³⁷ but that they are at risk oth-

festations of Islamophobia, see e.g. the second and third reports on Sweden, para. 56, and paras 80 and 81, respectively, and the third report on Germany, Executive summary and para. 67. Whilst some of ECRI’s attention has been drawn to older Muslim groups existing in the pertinent states, ECRI has increasingly considered the more recent Muslim immigrants. See also the remarks on Muslims *infra*.

230. See the references to the pertinent recommendations No. 3, 5 and 9 *supra* in this section (n. 213).
231. See particularly the country reports on Finland, Norway and Sweden that consider the Saami communities.
232. Art. 10.2 of the Statute notes that “ECRI shall, as appropriate, integrate a gender perspective into its programme.”
233. See e.g. the references to women of immigrant background *infra* in this section.
234. ECRI has inserted a standard sentence in the texts addressing monitoring systems and data collection in most, but not all, of its third-round reports. For this standard sentence, see e.g. the third report on Belgium, para. 55.
235. The reports include a number of references to Romani women. See also GPR No. 3, point 16 in the set of recommendations.
236. See e.g. the third reports on Germany, para. 70, on Austria, paras 67 and 68, on Poland, paras 67 and 68, and on Lithuania, paras 51–53.
237. See e.g. the third reports on Switzerland, para. 104 (female workers of “sans papiers”), and on Sweden, para. 88.

erwise as well.²³⁸ Some attention has been drawn to Muslim women and girls, often to discriminatory practices linked to the use of Muslim headscarves or other clothing.²³⁹ The Commission has also called for gender sensitivity in asylum processes.²⁴⁰ Furthermore, it is worthy of note that some of ECRI's references to the situation of men or boys also signify specific attention to a gender perspective. Among other things, the Commission has drawn attention to the high rate of unemployment of (young) men with an immigrant background,²⁴¹ the exclusion from schools of boys with an ethnic minority background,²⁴² and the conduct of authorities, including the police, towards men belonging to visible minorities.²⁴³

It may be observed that, in addition to gender, ECRI has sometimes drawn attention to other dimensions, including age, when remarking, for instance, on the situation of children, minors and young people.²⁴⁴ The questions addressed in the area of education often concern children (including Romani children). ECRI has also noted, although not often, the situation of the elderly, and has made an observation on disability.²⁴⁵

As regards the various questions ECRI has addressed in its work,²⁴⁶ it may be seen that it systematically draws attention to *racial discrimination, exclusion and/or marginalisation* in various fields, including employment (the labour market), education, housing, health care, and access to public places,²⁴⁷ to racist or other intolerant (in accordance with its remit) practices and actions, and to the treatment of individuals

238. E.g. in its all reports on Iceland ECRI draws attention to the vulnerable situation of women of immigrant origin who may live in very isolated situation vulnerable to abuses (particularly to domestic violence) and prejudice on the part of society. See the first report, para. 4, the second report, paras 33 and 34, and the third report, Executive summary and paras 71 and 72.

239. See e.g. the third reports on Germany, para. 67, on Switzerland, paras 41 and 42, and on Austria, para. 58. See also GPR No. 5, point 10 in the set of recommendations. See also the remarks on honour-related violence, forced marriages and female genital mutilation often raised in the context of Muslim girls and women *infra* in this section.

240. Second report on Iceland, para. 34, and the third report on Germany, paras 42 and 44.

241. See e.g. the first report on Portugal, para. 21, and the second report on France, para. 43.

242. See e.g. the first and second reports on the United Kingdom, para. 17, and para. 30, respectively (referring particularly to African-Caribbean boys).

243. See e.g. the second report on Belgium, para. 23, and the third report on Switzerland, paras 89–93.

244. See e.g. the second reports on Hungary, para. 45, on Switzerland, para. 26, and on Greece, para. 45. Romani children and Muslim girls have also acquired distinct attention.

245. For the elderly, see the first report on Latvia in which ECRI calls for more lenient requirements in acquiring citizenship for older people, para. 9. ECRI notes disabled Roma (Travellers) in its second report on Ireland, para. 76.

246. For the remarks on these questions, see also Pentikäinen (2004b) pp. 29–30, and Kelly (2004), pp. 19–112.

247. GPR No. 3 addresses discrimination, marginalisation and exclusion of the Roma in various spheres of life.

and groups by the authorities, particularly by law enforcement officials.²⁴⁸ At times ECRI has expressly referred to double or multiple forms of discrimination,²⁴⁹ and on some occasions it has noted in passing structural, systematic (or systemic), or institutional forms of discrimination.²⁵⁰ ECRI has discussed the concept of institutional racism most prominently in its country reports on the United Kingdom.²⁵¹ In its third-round country reports, ECRI frequently refers to both direct and indirect forms of discrimination, echoing its GPR No. 7, and to equal opportunities, including the introduction of positive measures.²⁵² ECRI has also drawn increasing attention to the exploitation of and discrimination against immigrants, for instance, in the area of employment.²⁵³

As regards the *means* to combat the phenomena within its remit, ECRI has underlined the importance of states' adherence to relevant international (legal) instruments, of the existence of sufficient anti-discrimination legislation, of the introduction of racist motivation as an aggravating circumstance, of the firm implementation of legislation at the domestic level, and of monitoring the situation (e.g. by national specialised bodies). In the context of monitoring the situation in a particular country, throughout its reports ECRI has stressed the importance of data collection in order to monitor incidents of a racist nature and situations involving discrimination against persons belonging to the various groups whose situations ECRI monitors.²⁵⁴ ECRI has systematically drawn attention to the importance of education and awareness-raising regarding the questions of racism and discrimination and of the dissemination of information about various minority groups among authorities

248. The conduct of law enforcement officials has been systematically addressed e.g. in the third-round reports and particularly visibly in ECRI's GPR No. 11.

249. Few references have been made e.g. with respect to Romani women. See e.g. the third reports on Bulgaria, para. 92, and on Slovakia, para. 54. See also GPR No. 3, point 16 in the set of recommendations. For a note on dual discrimination of women of immigrant origin, see e.g. the third report on France, paras 142 and 144. The third-round reports incorporating the remarks on monitoring systems and data collection also often expressly refer to double or multiple discrimination.

250. See e.g. the second reports on the Netherlands, para. 9, on Finland, para. 12, and on Romania, para. 34, and the third report on Sweden, para. 106. For a note on structural discrimination, see also GPR No. 10, para. III.4.

251. See particularly the second report on the United Kingdom, Executive summary and paras 6 and 17.

252. See e.g. the third reports on Spain, para. 109, and on France, paras 139 and 146. For the need to promote a genuine equality of opportunity, see also GPR No. 1, Section B, points 5 and 13 in the set of recommendations. GPR No. 7 addresses e.g. the principle of equal treatment, temporary special measures, and a duty of public authorities to promote equality and to prevent discrimination. See paras II.2 and III.4–8 of the Recommendation.

253. See e.g. the third report on Iceland, Executive summary and paras 89–97.

254. See also the remarks on a gender dimension in the context of data collection *supra* in this section.

and the public at large.²⁵⁵ Furthermore, it has underscored the need to reflect the history, culture, language, religion, etc., of minorities in the school curriculum and materials.²⁵⁶

ECRI has also attached specific importance to human rights education and training,²⁵⁷ including providing this training for authorities and officials²⁵⁸ and even for journalists.²⁵⁹ The need to do research to assess the situation of minorities and to study racist crimes, as well as the significance of the role of the media (and the Internet),²⁶⁰ politicians,²⁶¹ other opinion leaders, authorities and civil society have been stressed. ECRI has often drawn attention to the climate of opinion in a country.²⁶² In general, it has stressed the need for a comprehensive approach to combat the phenomena within its remit using both policy and legal measures.²⁶³

ECRI has discussed the questions of *pluralism*,²⁶⁴ the acceptance of a diverse composition of society,²⁶⁵ the acknowledgment of a multicultural society,²⁶⁶ the protection of linguistic and cultural *diversity*,²⁶⁷ and the importance of intercultural-

255. See e.g. the second report on Ireland, Executive summary and paras 77 and 78, and the third report on Croatia, para. 93.

256. See e.g. the third report on Sweden, paras 12 and 87. For multiculturalism in schools and the need to provide information on the history and culture of Roma in schools, see e.g. the third reports on Estonia, para. 145, and on Lithuania, para. 86. For promoting the culture, traditions and language of the Roma, see also GPR No. 3, point 18 in the set of recommendations. For supporting teaching of the language and culture of the countries of children of immigrant origin as part of the school curriculum, see the third report on Switzerland, paras 68 and 71.

257. See e.g. the second report on Finland, Executive summary, and the third reports on Norway, paras 42–45, and on Germany, paras 25–28. See also the remarks in GPR No. 10, para. II.2.a.

258. See e.g. the third reports on Greece, para. 20, and on Spain, Executive summary.

259. See e.g. the third report on Denmark, para. 108.

260. See e.g. the third reports on Germany, paras 110 and 111, on France, para. 106, and on Sweden, Executive summary and para. 103. See also GPR No. 6.

261. ECRI has raised the exploitation of racism in politics among the issues of particular concern. See e.g. the second reports on Austria, paras 35–38, and on Italy, Executive summary and paras 71–75. For concern for racist and xenophobic discourse in politics, see also e.g. the third reports on Belgium, Executive summary and paras 87–95, on France, Executive summary, on Austria, paras 92–97, and on the Russian Federation, paras 133–136.

262. This is a regular item in the reports. See e.g. ECRI's concern for the climate of opinion as regards individuals of non-Danish background prevailing in the country in the second report on Denmark, paras 36–40.

263. See also Pentikäinen (2004b) pp. 29–30.

264. For discussing pluralism and ethnic and cultural identities, see e.g. the second report on Turkey, paras 53–56.

265. See e.g. the second reports on Germany, para. 42, and on Iceland, para. 37.

266. See e.g. the second report on Estonia, para. 58.

267. The third-round reports contain a number references to diversity. See e.g. the third reports on Belgium, para. 84, on Austria, para. 42, and on France, para. 105. See also the references to cultural diversity in GPR No. 1, Section B, points 2 and 4 in the set of recommendations.

ism.²⁶⁸ The Commission has also underlined the importance of a culture of *tolerance* and *respect* for difference²⁶⁹ and called for mutual understanding.²⁷⁰ In addition, it has referred to mutual respect,²⁷¹ the need to respect the rights and the culture of the Roma,²⁷² respect for human dignity,²⁷³ respect for the equal dignity of all human beings,²⁷⁴ respect for equality,²⁷⁵ respect for diversity,²⁷⁶ promoting respect of non-citizens – particularly asylum-seekers and refugees²⁷⁷ – and respect for the human rights of immigrants, including those who have illegally entered a country.²⁷⁸

At times ECRI has raised the issue of *social cohesion*, for instance, when it has urged countries to take measures to raise the awareness of the general public concerning issues relating to racism and intolerance and to develop a culture of tolerance and respect for difference in the country in order to help reinforce and preserve the social cohesion.²⁷⁹ ECRI has stated that immigration and asylum policies that appear to be inspired by a conception of a foreigner as a danger and a threat to public order, economic stability and social peace run counter to efforts to develop a culture of tolerance and respect for difference and constitute a dangerous development for the social cohesion.²⁸⁰

ECRI's remarks on *identity* deserve some specific attention. The Commission has referred to the importance of preserving the linguistic and cultural identity of minority groups²⁸¹ and to the importance for new arrivals in a country to be able to

268. For intercultural education, see e.g. the third report on Iceland, paras 36 and 37. For the importance of contacts and interactions between different communities, see e.g. the third report on FYROM, Executive summary and paras 121–126 and 144.

269. See e.g. the second reports on Belgium, para. 12, on France, para. 20, and on Austria, para. 21. For references to respect for difference(s), see also e.g. the third reports on Sweden, Executive summary, on Lithuania, para. 35, and on Iceland, para. 35.

270. For facilitating mutual understanding of the different communities, see e.g. the second report on Ukraine, para. 53. ECRI has separately addressed understanding towards Muslims and the Islamic faith. See the reference to the second report on Ireland in the text on religion *infra* in this section.

271. See e.g. the third reports on Belgium, para. 74, on Romania, para. 19, and on the Russian Federation, para. 44.

272. See e.g. the third report on Greece, para. 73.

273. See e.g. the third reports on Turkey, para. 39, and on Italy, para. 66.

274. See e.g. GPR No. 3, preambular para. 11.

275. See e.g. GPR No. 5, preambular para. 10.

276. See e.g. the third report on Croatia, para. 63. See also GPR No. 10, Preambular para. 29 and para. II.1.

277. See e.g. the third report on Lithuania, para. 119.

278. See e.g. the third report on Italy, Executive summary.

279. ECRI speaks in terms of the social cohesion of the people living in the country. Second report on Slovenia, Para. 43. For other references to (social) cohesion, see e.g. the second reports on France, para. 21, and on Austria, Executive summary and para. 21.

280. See e.g. the second reports on Belgium, para. 12, and on Austria, para. 21.

281. See e.g. the first report on Armenia, para. 65. For taking the specific identities of different minority groups into account, see the second report on Estonia, para. 61; for promoting

find strength and orientation in their own cultural, religious and linguistic identity while learning and developing a parallel and evolving identity within a new society.²⁸² ECRI has called for increased acknowledgement of a society in which various forms of identity can be associated with the traditional identity.²⁸³ It has underlined the importance that persons feel they are part of society and accepted members of it²⁸⁴ and the need to highlight the positive role and contribution of individuals belonging to different groups.²⁸⁵ ECRI has separately emphasised the need to distribute information about the Roma's contribution to society²⁸⁶ and to provide a more positive image of the Romani community.²⁸⁷ It has also touched upon the problems associated with ethnic affiliations and divisions along ethnic lines.²⁸⁸

ECRI has placed considerable emphasis on the question of *participation* in society, most noticeably in the area of political life and when decision-making pertains to the groups concerned.²⁸⁹ The importance of participation has been stressed in connection with the Roma; the pertinent remarks concern participation of Roma in general²⁹⁰ and participation with respect to measures affecting Roma.²⁹¹ ECRI has noted that policies which tend towards a "paternalistic" approach to solving the problems faced by the Roma are unlikely to result in lasting change or a real improvement in their situation.²⁹² While ECRI has often referred to involvement and

cultural identities of minority groups, see the third report on Slovenia, Executive summary and paras 73, 74 and 82.

282. Second report on Denmark, para. 21.

283. *Ibid.*, para. 40. See also the second reports e.g. on Norway, para. 57, on Germany, Executive summary and paras 43 and 50, on Estonia, para. 60, on Latvia, para. 66, and on Turkey, Executive summary and para. 56. In its third report on France ECRI strongly encourages the national authorities to initiate debate on the possibility to recognise rights connected with the identity of minority groups (without encroaching on the fundamental principles of the French Republic). See para. 13.

284. Second reports on Sweden, Executive summary, and on Finland, para. 55.

285. See e.g. the second and third reports on Germany, Executive summary (in both).

286. See e.g. the third report on Romania, para. 134.

287. See e.g. the third report on Estonia, para. 145.

288. In its third report on FYROM ECRI voices concern for distinct boundaries (based on ethnicity), division along ethnic lines, and the non-acceptance of multiple identities. See paras 138 and 139. See also the remarks on the first report on Bosnia and Herzegovina *infra* in chapter 4.2.3 (n. 349).

289. ECRI has also spoken in terms of the importance of participation in the labour market and education.

290. See e.g. the second report on the Czech Republic, paras 32, 40 and 47, and the third report on Slovakia, para. 72.

291. See e.g. the second report on Spain, paras 44, 46, 49 and 51, and the third report on Slovakia, Executive summary. See also GPR No. 3, point 14 in the set of recommendations, which refers to participation of Roma in decision-making process, with the priority placed on the idea of partnership on an equal footing.

292. Second report on Slovakia, para. 40.

consultation in the context of participation,²⁹³ in the case of Roma it has also called for empowerment.²⁹⁴ ECRI's remark on the often-limited notion of consultation is also worth noting.²⁹⁵ When ECRI has discussed participation of Roma, it has remarked on the need to make structural changes, referring to the need to structure (state) institutions in such a way as to encourage active involvement and participation of Romani communities in the policy-making processes.²⁹⁶ In its third-round reports ECRI seems to favour speaking in terms of dialogue instead of participation, for it has increasingly referred to the importance of dialogue both between authorities and various communities (or minorities)²⁹⁷ and between various communities and groups.²⁹⁸

ECRI has frequently discussed the question of a knowledge of the official *language(s)* as well as the importance of the mother tongue.²⁹⁹ It has commented on promoting the use of the state language by noting that while maintaining and learning one's mother tongue is very important, learning the official language of the state is a key to participating in the society – including its labour market – for members of minorities. In the same vein, it views a knowledge of the state language as crucial in general in combating exclusion and marginalisation of various groups and promoting social cohesion in society.³⁰⁰ ECRI has also made remarks on the need to accompany the requirements concerning a knowledge of the official language by increased efforts to provide high-quality and inexpensive language training courses.³⁰¹ Furthermore, the Commission has called for flexibility as regards language requirements so that they do not constitute a barrier, for instance, to entering the labour market. ECRI has raised this issue with respect to certain countries that have more

293. See e.g. the second reports on Italy, paras 60 and 61, and on Ukraine, para. 15, and the third report on Albania, paras 102–107. The third report on Estonia refers both to co-operation and consultation of national minorities. See paras 23 and 25.

294. See e.g. the second and third reports on Slovakia, para. 40, and paras 70–74, respectively.

295. ECRI has pointed out that in exploring views of Roma consulting dominant (Romani) elites is not enough. Third report on Albania, para. 102.

296. Second report on Portugal, para. 63.

297. See e.g. the third report on Estonia, para. 26 and on Denmark, paras 91 and 93 (dialogue with Muslims).

298. See e.g. the third reports on Belgium, paras 74 and 76 (dialogue among religious communities), on Croatia, para. 92 (dialogue among ethnic groups), and on Poland, para. 102 (dialogue between cultural, ethnic and religious communities).

299. For the importance of both the knowledge of the official language of the country and preserving one's mother tongue, see e.g. the second report on Germany, paras 25 and 26, and the third report on Spain, para. 63.

300. See e.g. the second report on Moldova, para. 54.

301. Second report on Latvia, para. 49. For the importance to offer sufficient language teaching to meet the needs of non-native speakers, see also the second report on the United Kingdom, para. 32.

than one official language³⁰² as well as those having only one.³⁰³ It has also suggested that more weight could be given to the value of fluency in other languages in employment.³⁰⁴ ECRI has addressed language requirements as barriers also in the area of political participation.³⁰⁵

ECRI has increasingly paid attention to *trafficking in human beings*, although it has done so neither systematically nor very broadly.³⁰⁶ Migrants in an illegal situation are noted to be vulnerable to trafficking,³⁰⁷ as are Roma.³⁰⁸ Additionally, whilst ECRI has made remarks on the questions of *religious discrimination or intolerance and the right to freedom of religion*,³⁰⁹ it has addressed the role of churches and religious groups with respect to tolerance,³¹⁰ religious education in schools³¹¹ – including a call for such education to be made optional³¹² – and the formal link between the church and the state.³¹³ Furthermore, ECRI has called for both increasing understanding of the Muslims and the Islamic faith among the majority³¹⁴ and equal

302. E.g. in its second report on Finland ECRI calls for more flexibility as regards the requirement for fluency in the two official languages (i.e. Finnish and Swedish). See para. 26. See also the remarks in the second report on Luxembourg, Executive summary and paras 66–72.

303. See e.g. the second reports on Latvia, para. 49, on Estonia, para. 14, and on Iceland, para. 44.

304. Second report on Sweden, para. 51.

305. See e.g. the second report on Latvia, para. 21.

306. Whilst the second-round reports include some references to trafficking, a number of third-round reports adopted by October 2007 address this question, with the notable exceptions of the reports on Estonia, Finland, Denmark, Ireland, Georgia, Portugal, and Slovenia. See also the remarks on trafficking in the text on gender dimensions *supra*.

307. Third report on the Czech Republic, para. 50. In the same connection ECRI refers to exploitation of other forms, such as in the sex industry or illegal employment market, of migrants in an illegal situation.

308. Third report on Slovakia, paras 79 and 82.

309. See e.g. the second reports on Bulgaria, para. 18, and on the Russian Federation, paras 52–55, and the third reports on Greece, paras 74–79, and on Turkey, Executive summary and paras 68 and 69.

310. See e.g. the second report on Croatia, para. 66. The second report on Poland and the third report on Austria address the role of churches and religious groups with respect to anti-Semitism. See para. 57 of the former (addressing the role the Catholic church) and para. 70 of the latter.

311. See e.g. the third reports on Norway, para. 58 (calling for religious education to reflect the religious diversity), and on Spain, paras 78 and 80 (addressing religious instruction of Muslims). In its third report on Ireland ECRI calls for multi-denominational or non-denominational education. See para. 87. For ensuring that religious instruction in schools respect cultural pluralism, see also GPR No. 5, point 12 in the set of recommendations.

312. See e.g. the third report on Turkey, Executive summary and paras 68 and 69. For religious education and the availability of alternative education, see also the second report on Ireland, para. 46, and the third report on Italy, para. 48. See also GPR No. 10, para. II.2.b) and c).

313. In its second report on Sweden ECRI notes positively the abolishment of the formal link between the church and the state. See para. 13.

314. Second report on Ireland, para. 54.

treatment of the Muslim religion with other religions,³¹⁵ including opportunities for Muslims to have proper places of worship, burial grounds, and meeting places.³¹⁶

ECRI has touched upon the *limits of tolerance* to some extent in addressing the ritual animal slaughter practised openly by the Muslim and the Jewish communities, racist expressions (including hate speech), and practices often embedded in cultural traditions, such as honour killings, forced marriages and female genital mutilations. When discussing ritual animal slaughter, ECRI has called for respect for both the principle of secularity and religious traditions and has warned against taking radical measures to ban the possibility to have animals slaughtered in accordance with Muslim and Jewish traditions lest tensions arise amongst the population that would fuel prejudices towards certain religions.³¹⁷

Whilst, as already noted, ECRI has expressed its special concern for racist and xenophobic discourse in politics, it has also paid particular attention to racist expression, including hate or racist speech, and thus also to the limits of freedom of expression.³¹⁸ ECRI has visibly called for the prohibition of anti-Semitic hate speech³¹⁹ as well as actions to address racist expression also more generally.³²⁰ In its country reports, ECRI has drawn attention to inadequate protection against racist expression in national legislation and practice.³²¹ It has specifically addressed hate speech against Muslims, doing so in a particularly evident fashion in its third report on Denmark.³²² It notes in the report that the police are generally reluctant to investigate complaints made by Muslims concerning hate speech directed against them and regrets that the lack of a strong message that would be sent by consistently prosecuting those who commit hate speech has given some politicians free

315. Third reports on France, para. 124, and on Luxembourg, paras 94 and 95.

316. See e.g. the third reports on Switzerland, Para. 41 (addressing lack of proper places of worship and meeting places), on France, para. 124 (referring to building of mosques and offering burial grounds), and on Iceland, paras 74 and 76 (referring to the building of a mosque and Muslim cultural centre). In its third report on Belgium ECRI calls for public financing of Muslim places of worship. See para. 74. See also the references to Muslim girls and women in the text on gender dimensions *supra* in this section. See also GPR No. 5.

317. Second report on Luxembourg, para. 62. In its third report on Switzerland ECRI notes the public debate on the ritual slaughter of animals having been coloured by anti-Semitic discourse. See para. 39.

318. ECRI has addressed freedom of expression e.g. in its GPR No. 7. This recommendation e.g. refers to the possibility to restrict the exercise of freedom of expression (and assembly and association) with a view to combating racism. See para. II.3. Furthermore, the criminal law should penalise various expressions of racist nature. See particularly para. IV.18.

319. See e.g. GPR No. 9, point 6 in the set of recommendations. See also e.g. the third report on Poland, paras 97–102.

320. See e.g. the third report on Norway, Executive summary and paras 97–102.

321. *Ibid.*, para. 99.

322. See e.g. the third report on Slovenia, paras 76 and 86–78.

reign to create an atmosphere of suspicion and hatred towards Muslims. According to ECRI, the problem is compounded by the fact that the media mostly interview the imams who express the most extreme views, thus reinforcing the image that is being given of Muslims as a threat to society. ECRI also discusses the drawings of the Prophet Muhammad published in a Danish newspaper (*Jyllands-Posten*) in September 2005, which were considered offensive by many Muslims. The Commission notes that the stated intention of the drawings was to ascertain whether freedom of speech is respected in Denmark, and concludes that the goal of opening a democratic debate on freedom of speech should be met without resorting to provocative acts that can only predictably elicit an emotional reaction. In its reports ECRI urges the Danish government to send a strong signal that incitement to racial hatred against Muslims will not be tolerated.³²³

ECRI has made some remarks on honour-related violence, forced marriages and female genital mutilation. It has noted the attention paid by authorities to honour-related violence often targeted against Muslim girls, and while it has welcomed the efforts made to help those persons who are at risk of this type of violence, it has also stated that the manner in which these issues are presented in public debate and in the media should not further contribute to a climate where Muslims are the targets of generalisations and stereotypes.³²⁴ ECRI has made similar comments in addressing the issues of forced marriages and female genital mutilation, noting that the exploitation of these issues in public debate should not contribute to a climate where minority groups, notably Muslims, are the targets of generalisations and stereotypes, which sometimes lead to acts of racism or discrimination. In making these comments, ECRI – for the first and thus far only time – also openly condemns the practices of forced marriage and female genital mutilation.³²⁵

4.2.3 ECRI and the Issue of Integration

ECRI has increasingly referred to the issue of integration in the course of its monitoring work. Whilst numerous references to integration were inserted already in the first-round country reports, the number of these references clearly increases in the subsequent reports, markedly so in the second-round reports. Of the GPRs adopted

323. ECRI also draws attention to its GPR No. 5 and accordingly calls on states to encourage debate within the media on the image which they convey of Islam and Muslim communities and on responsibility in this respect in avoiding the perpetuation of prejudice and biased information. ECRI calls for awareness-raising campaigns throughout the country in order to present a more objective and balanced view of Muslims and Islam and to foster a constructive debate on living in a plural society. ECRI also welcomes a dialogue between the authorities and members of the Muslim communities. Third report on Denmark, paras 89–93.

324. Third report on Sweden, paras 80 and 81.

325. Third report on Norway, para. 59.

by ECRI, No. 5 on combating intolerance and discrimination against Muslims, No. 8 on combating racism while fighting terrorism, and No. 10 on combating racism and racial discrimination in and through school education also contain specific remarks on integration.³²⁶

4.2.3.1 ECRI's Remarks on Integration

As regards the various groups with respect to which ECRI has raised the question of integration, the Commission's first remarks refer to the integration of persons belonging to various minority groups and of people from different ethnic, linguistic, religious and cultural backgrounds in general terms.³²⁷ Subsequently, in its second- and third-round reports, ECRI has conspicuously voiced concern for the integration of persons belonging to various groups with an immigrant background and non-citizens, including refugees and asylum-seekers;³²⁸ the focus of the Commission's remarks on integration in the third-round reports is clearly on persons of immigrant origin.

As will be discussed below, ECRI has paid considerable attention to integration into the labour market and in this context has also specifically addressed the integration of migrants who come to work in a country.³²⁹ ECRI has even mentioned the integration of seasonal workers into society.³³⁰ In the course of its second reporting round, ECRI began to pay particular attention to the integration problems faced by the Roma, in addition to which one also sees the first express references to Muslims in ECRI's remarks on integration.³³¹ ECRI has also generally stated that all minorities in a country should be taken into account in the area of integration.³³²

326. In fact, GPR No. 5 only mentions a seminar on religion and the integration of immigrants organised by the European Committee on Migration in Strasbourg in November 1998. See preambular para. 8. The remarks on integration in GPRs No. 8 and 10 are referred to *infra* in this section in connection with the pertinent issues.

327. See e.g. the first reports on San Marino, Introduction, and on Portugal, para. 13. In its second report on the Netherlands ECRI refers to the integration of ethnic minorities. See para. 19. ECRI has discussed extensively the integration of ethnic minorities with respect to Georgia. See particularly the second report on Georgia, paras 99–145.

328. See e.g. the second reports on Poland, paras 30 and 31, on Germany, paras 17 and 27, on Andorra, Executive summary and paras 18 and 21, on Slovenia, paras 27 and 28, on Switzerland, paras 40 and 41, and on San Marino, Executive summary and paras 30–37.

329. See e.g. the second report on Slovenia, para. 27. The third report on Cyprus addresses promoting integration of and combating discrimination against people at a disadvantage in the labour market. See para. 76.

330. Second report on Andorra, para. 33.

331. See the remarks on the Roma and Muslims *infra* in this section. See also Pentikäinen (2004a), pp. 117–118.

332. Third report on Estonia, para. 137.

Worthy of note are also some of ECRI's remarks signifying increased attention to certain *gender dimensions* of integration. The Commission has cited the additional difficulties that women of immigrant origin – particularly those staying at home – may encounter in integrating into society, including entering employment. It has observed that women of immigrant origin may find themselves particularly excluded from the structures of society since they often lack the confidence and opportunities to make contact with the culture and networks of the majority population.³³³ For instance, the Commission has urged the authorities to support initiatives aimed at promoting the integration and independence of foreign women with a view to developing and providing support for permanent and comprehensive counselling and advice services for migrant women.³³⁴

As regards other dimensions of relevance for integration, ECRI has also taken up the situation of children in discussing children's, including Romani children's, integration into schools (or the educational system). Additionally, when discussing an integrated society, ECRI has expressed its particular concern for the situation in which even children born and raised in a country but of immigrant origin may feel excluded from mainstream society. The Commission has referred to the problem of de facto housing and school segregation, ethnic harassment in schools, and the information that children of immigrant origin receive from their surroundings suggesting that being of immigrant origin makes one a problem rather than an asset for society.³³⁵ While ECRI has not, as a rule, discussed different challenges boys and girls may encounter in the area of integration, a note can be found on Romani girls in the area of integration in schools.³³⁶ Recently it has also cited the importance of taking elderly people into account in the scope of integration programmes.³³⁷

333. Second report on Sweden, para. 79. In this report ECRI discusses the importance of inclusion in the labour market for a fully integrated society and also recommends taking steps to develop language training e.g. for women at home. See para. 51. In its third report on France and in the text addressing an integrated society ECRI states that women of immigrant origin are especially prone to exclusion and to dual discrimination. See para. 144.

334. The second report on Liechtenstein notes promoting the integration and independence of foreign women through the provision of language courses, counselling services and information. See para. 36. ECRI also draws attention to the difficulties of women of immigrant origin who have come to the country to accompany their working husbands in attending suitable language courses, and calls for developing particular strategies in order to ensure that potentially very isolated persons, such as women of immigrant origin who do not go to work, can learn the official (German) language. See paras 43 and 47, respectively. See also the remarks on housewives in the third report on Finland, para. 113.

335. ECRI has also pointed out that the parents of such children are often in a very difficult situation and without employment compounding the problem, and that children of immigrant origin often lack a positive "role model" since they cannot identify with either their parents or with mainstream society. Thus, second-generation persons of immigrant origin may find themselves particularly marginalised within society. Second report on Sweden, para. 79.

336. Third report on Lithuania, paras 83 and 85.

337. Third report on Finland, para. 113.

ECRI has pointed out that whilst similarities in physical appearance and religion are usually viewed as making it easier to integrate into society as a whole, this is not necessarily always the case; indeed, persons sharing these features with the dominant group also have challenges in the area of integration.³³⁸ Furthermore, the Commission has drawn attention to different situations in the area of integration among persons belonging broadly to the same (ethnic) group by noting the different challenges faced by more recent newcomers.³³⁹

ECRI has frequently discussed the importance of integration in(to) society in general,³⁴⁰ in addition to which it has referred to integration in at least the following contexts: integration into the social, economic, political and civic life of the state,³⁴¹ integration into the public life of the state,³⁴² integration into society and culture,³⁴³ integration into a country,³⁴⁴ integration in the local population,³⁴⁵ integration into municipalities,³⁴⁶ societal integration (of persons of immigrant origin),³⁴⁷ social integration of various groups,³⁴⁸ integration of society,³⁴⁹ social and political integration of all segments of society,³⁵⁰ integration between majority and minority com-

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338. Second report on Portugal, paras 58 and 59. For the remarks on language and comparatively more pronounced cultural differences affecting integration and participation, see the second report on San Marino, para. 31.
339. In its third report on Poland ECRI mentions that the Vietnamese arrived a long time ago have no problems of integration into society, whilst the Vietnamese arrived in the 1990s have challenges in the area of integration, including lack of command of the official language and a difficult economic situation. See para. 46.
340. See e.g. the second reports on Poland, paras 30 and 31, on Germany, para. 17, on Andorra, Executive summary, and on Slovenia, paras 25, 27 and 28, and the third report on Liechtenstein, Executive summary and para. 42.
341. See e.g. the second report on Estonia, para. 58.
342. See e.g. the second report on Switzerland, para. 41.
343. In its second report on Spain ECRI addresses the views on alleged impossibility for certain groups, notably Muslims, to integrate into society and culture. Para. 37. See also the remarks on the integration of Muslims *infra*.
344. See e.g. the second report on San Marino, para. 35, and the third report on Liechtenstein, para. 48.
345. See e.g. the second report on Luxembourg, para. 23.
346. For a note on facilitating newly arrived immigrants' and refugees' integration into their municipalities, see the third report on Denmark, para. 46.
347. Second report on Sweden, Executive summary and para. 78.
348. Various groups discussed in this connection include minority groups, immigrants, the Roma and refugees. See e.g. the first report on Portugal, para. 13, the second reports on Luxembourg, para. 72, on Lithuania, para. 53, and on Spain, paras 50, 55 and 59, and the third report on Hungary, para. 54.
349. Third report on Switzerland, para. 80. In its first report on Bosnia and Herzegovina ECRI voices its concern for communities strictly divided along ethnic lines resulting in strict ethnic affiliations and notes it to run counter to integration of the society. See para. 70. ECRI suggests adopting the concept of full democratic citizenship. See para. 71.
350. Third report on Austria, para. 35.

munities as well as between citizen and non-citizen communities.³⁵¹ Furthermore, ECRI has frequently discussed an integrated society, referring, for instance, to the need to move towards a society in which immigrants and persons of immigrant background gain their proper place.³⁵² In line with ECRI's prominent references to equal opportunities, the Commission's reports, particularly its third-round reports,³⁵³ include notes on the need to implement a policy of equal opportunity with a view to integrating persons belonging to various minorities, particularly those of immigrant background, as an essential part of achieving an integrated society.³⁵⁴

As regards more specific arenas of integration, ECRI has frequently discussed integration in the areas of employment (the labour market), education (the school system), and housing.³⁵⁵ The Commission has made statements about the importance of inclusion in the *labour market* for a fully integrated society, and has referred to the importance of focusing attention on the problem of labour market discrimination and its effects.³⁵⁶ It has called for the removal of the additional barriers to the employment of persons of many minority groups, including those of immigrant origin, for instance, through special measures to help immigrants enter the labour market.

351. Third report on Italy, para. 43.

352. Third report on France, Executive summary and para. 145. The whole section including paras 129–147 is entitled “Necessity of moving towards an integrated society”, and in this connection ECRI raises e.g. the need to address racism, social exclusion and ghettoisation, discrimination in employment, education, housing and access to public services, as well as ensuring equal opportunities. See particularly paras 129, 139 and 146. For formulating an immigration policy to enable immigrants to find their proper place in an integrated society, see also the third report on Croatia, para. 53.

For other references to creating an integrated society, see e.g. the second and third reports on Sweden, paras 78–82, and the Executive summary, respectively, the third reports on Slovakia, paras 109–116, on Germany, Executive summary, on Iceland, para. 103, and on Finland, paras 105–116, as well as the second report on Georgia, paras 101 and 142.

353. See the remarks *supra* in chapter 4.2.2.

354. See e.g. the third reports on Greece, paras 124 and 125, and on France, para. 139. For earlier references to equal opportunities in the context of integration, see e.g. the first report on Armenia, para. 43.

355. The third report on Luxembourg refers to integrating communities from an immigrant background in all areas, including the labour market and housing. See the Executive summary. ECRI has also specifically addressed access to public services. See the third report on France, para. 146.

356. Second report on Sweden, para. 51. For attaching priority attention to discrimination in employment (as part of integration), see also the third report on Sweden, Executive summary. For the remarks on discrimination in employment being a serious barrier to the full integration of members of many minority groups into the social and economic life of the country, including the labour market, see also the second reports on Finland, paras 25 and 26, and on Slovenia, para. 31.

ECRI has also viewed the situation so that integration of members of immigrant communities in all areas, especially in the labour market has an impact on eliminating discrimination they suffer. See the third report on Luxembourg, Executive summary and para. 100.

These measures could include language training, “conversion courses” to adapt experience and qualifications, and schemes to encourage non-citizens to set up their own businesses.³⁵⁷ In order to integrate minority groups into the labour market, ECRI has also recommended that governments provide adequate funding for any initiatives aimed at offering better job training and employment skills to minority groups.³⁵⁸

In the area of *education*, ECRI has established a link between the integration of non-citizens and minority groups in society and school education, including language education.³⁵⁹ While the Commission has expressly dealt with facilitating the integration in schools of children from minority groups in its GPR No. 10 on school education,³⁶⁰ its country reports have often dealt with the issue as it pertains to children of immigrant origin and Romani children.³⁶¹ According to ECRI, integration efforts in the field of education (and training) should not exclude the possibility for minority groups to express their own religious, linguistic and cultural characteristics.³⁶² The question of the role of the mother tongue in integration has been separately addressed, with ECRI stating that teaching of the mother tongue to children from minority groups, including children of immigrant origin and non-citizen children, could represent a positive step in assisting the integration of minority pupils in the school system.³⁶³

357. Second report on Poland, para. 41. For the remarks on successful integration measures including language teaching, training and other measures that facilitate integration into the employment market, see also para. 31. For integrating individuals of foreign origin into the labour market by addressing (both indirect and direct) discrimination and providing language training, see the second report on Germany, para. 27. For the removal of additional barriers to employment of persons of immigrant origin such as complications or delays in validating qualifications obtained abroad, and for the importance to develop language training for adults to assist them in entering the labour market, see also the second report on Sweden, para. 51.

358. Third report on Denmark, para. 66. For training and other measures to facilitate integration into the employment market, see also e.g. the third reports on Poland, para. 49, and on the Russian Federation, para. 53. See also the third report on Ireland, Executive summary and paras 83 and 95.

359. First report on Italy, para. 13. The second report on Iceland addresses the integration of pupils from different cultural backgrounds in schools. See para. 29. The third report on Denmark discusses integrating minority groups into the educational sector. See the Executive summary.

360. Para. I.3.j of the Recommendation.

361. For the remarks on Romani children, see the text on Roma *infra* in this section. For the remarks on the children of immigrant background, see e.g. the second reports on Sweden, para. 47, and on Luxembourg, Executive summary and para. 45, and the third reports on Luxembourg, para. 74, and on Switzerland, paras 63–64 and 70.

362. First report on Greece, para. 12.

363. Second report on Ireland, para. 44.

ECRI has made remarks on the potentially positive role for integration of multi-lingual teaching³⁶⁴ and the establishment of bilingual classes in schools.³⁶⁵ Recently it issued a recommendation concerning the provision of education in the mother tongue to children in a non-discriminatory manner. In addition, it mentioned that measures aimed at ensuring the integration of children belonging to ethnic minorities into the school system should not amount to forced assimilation and that any measures taken to better integrate children from minority groups in the area of education should be made on a voluntary basis, with the full consultation of parents and children involved.³⁶⁶ ECRI has also expressly addressed the question of assimilation in its GPR No. 10 on school education, which asserts that measures to ensure the integration of children from minority groups in the school system must not in practice lead to forcible assimilation.³⁶⁷

Regarding integration in the area of *housing*, ECRI has pointed out that *de facto* residential segregation contributes to *de facto* segregation in the area of education, and that segregation in the areas of housing and schooling runs counter to integration.³⁶⁸ ECRI has discussed the issue of areas with a high concentration of immigrants and noted the widely differing views on this subject and the various possible solutions: while some feel that the concentration of immigrant groups in one area prevents their integration and fosters problems, others feel that such groups should be allowed to live together in an environment where they can organise their own associations, cultural and social life. ECRI takes the view that any policy initiatives in this area should allow full possibilities for groups to integrate, yet stresses that such policies should in no way imply an obligation to assimilate.³⁶⁹ More recently, ECRI has spoken out on the avoidance of ghettoisation and favouring mutual integration in settlement policies.³⁷⁰ The Commission has also commented on programmes developed by authorities to integrate socially deprived areas and has stated that any measures taken to ensure more multicultural neighbourhoods should not have an

364. Second report on Andorra, para. 21.

365. Second report on the FYROM, para. 25. For a note on bilingual schools or education, see the second report on Georgia, paras 125 and 130. See also the remarks on ECRI's observations on Georgia *infra* in this section.

366. ECRI has also recommended an adoption of an all-encompassing policy for fighting school segregation by taking into account the employment, housing and social components of this problem. It has recommended the continuation and expansion of programmes for keeping ethnic minority pupils in the educational system, and has noted that sufficient funding should be allocated to such projects which should be part of a long-term policy. See the third report on Denmark, paras 75–77.

367. GPR No. 10, preambular para. 31.

368. Second report on Sweden, paras 45–47 and 79. For *de facto* segregation in residential areas and schools running counter to efforts to promote an integrated society, see also the third report on Sweden, Executive summary.

369. First report on Sweden, para. 12.

370. Second report on Ukraine, para. 49.

adverse effect on minority groups by housing them in areas where they are isolated in practice.³⁷¹

As already mentioned, ECRI has paid a considerable amount of attention in its work to *language issues*.³⁷² Language-related observations have often been put forward with respect to integration and more broadly than merely in the context of school education. ECRI has acknowledged the need to learn the language of the country of residence,³⁷³ and has also stated that an adequate command of the official language is essential for the successful integration of persons belonging to minority groups in(to) society.³⁷⁴ Whilst a knowledge of the official language is stressed, it is pointed out that teaching it is not enough for integration but that other ways of integrating minority communities are needed as well.³⁷⁵ A knowledge of the official language is also linked to ensuring full participation by all people in the society, including successful integration into the employment market.³⁷⁶ In these connections, ECRI has reiterated the call to pay attention to both the availability and content of the language courses offered. It has stressed that the requirements concerning a knowledge of the official language should be accompanied by efforts to provide high-quality and inexpensive language training courses that sufficiently take into account the differing backgrounds, work constraints and competencies of persons.³⁷⁷

371. Furthermore, when members of minority groups are housed in new areas, they should be given adequate financial and social support. Also measures to promote neighbourly contacts are recommended to be taken. See the third report on Denmark, paras 80 and 82.

372. See the remarks on the importance ECRI in general attaches to both the official language and mother tongue *supra* in chapter 4.2.2.

373. For the remarks on the integration of immigrants and providing instruction in the official language for immigrant adults and children, see the third report on Greece, paras 124 and 125. See also the third report on Hungary, paras 54 and 55.

374. For the official language being essential for minority groups to secure their full rights and to allow for successful integration, see the first report on Estonia, para. 18. For the importance of the official language for integration, see also e.g. the second reports on Latvia, para. 76, on Liechtenstein, para. 47, on Finland, paras 37 and 57, on Andorra, paras 21 and 36, on Luxembourg, paras 69 and 70, and on San Marino, para. 33.

375. Third report on Estonia, para. 134.

376. See e.g. the first report on Georgia, para 57, and the second report on Poland, para. 31.

377. In its second report on Sweden ECRI notes that, given the importance placed on fluency in the Swedish language for employment, steps should be taken to develop language training for adults which is more targeted to specific groups, easily available to more isolated groups such as women at home, and specifically designed to assist persons of immigrant origin in entering the labour market. See para. 51. When ECRI has commented on “integration contract” system including training in the official language, it has mentioned that language training must be of good quality and tailored as much as possible on the individual competences and needs of the persons concerned as well as inexpensive. See the third report on Austria, para. 40. In its third report on Estonia ECRI refers to providing good quality, free of charge language courses for non-Estonian speakers to improve their integration into society, paying due regard to different needs of minority groups. See para. 22. See also the remarks in the third reports on Iceland, paras 91 and 95, and on Ireland, para. 83.

ECRI has further suggested that more weight could be given to the value of fluency in other languages in employment³⁷⁸ as well as to the prior qualifications, skills and experience that persons have.³⁷⁹

ECRI has discussed extensively the linguistic situation of ethnic minorities and the issue of integration with respect to one country, Georgia. Although the remarks made concern the particular situation in this country, some are worth mentioning here as being (potentially) of more general relevance.³⁸⁰ For instance, ECRI highlights the importance of an adequate knowledge of the official language by the members of minority communities for integration in society by noting that it is a key aspect of successful integration into society that enables, among other things, genuine equality of opportunities.³⁸¹ Emphasis is put on the avoidance of any assimilation that would deprive ethnic minorities of the possibility or capacity to use their own language.³⁸² ECRI underlines that encouragement to learn the official language should not result in neglect of the minority languages and culture; in fact, their preservation should be linked to the interests of the basic cohesiveness of society.³⁸³ Furthermore, in the area of education adequate room should be left for teaching minority languages and cultures.³⁸⁴ ECRI also voices concern about the isolation of ethnic minorities due to the language barrier and has called for measures to motivate and help these groups integrate into society by both increasing the number of minority-language information sources in the media and providing more opportunities to learn the official language.³⁸⁵

The country reports produced by ECRI contain numerous references to the “participatory dimension” of integration, i.e. linking the questions of *participation* and integration.³⁸⁶ ECRI has remarked that integration policies should take into account the need to ensure that all groups have the opportunity to participate on an equal footing in society while safeguarding their right to preserve their own cultural iden-

378. Second report on Sweden, para. 51.

379. Third report on Ireland, para. 83.

380. ECRI has noted that in Georgia solving the language issue is of key importance to avoid it becoming a cause of inter-ethnic tensions. See the second report on Georgia, para. 105.

381. First and second reports on Georgia, para. 57, and paras 105–120, respectively.

382. Second report on Georgia, para. 105.

383. ECRI has recommended that the authorities take care to preserve and encourage the use of minority languages alongside the official language. *Ibid.*, paras 117 and 120.

384. *Ibid.*, paras 128–132. ECRI recommends e.g. setting up bilingual schools or education, but also calls for the authorities to ensure that the ethnic minorities do not perceive it as a threat to their cultures and languages. See para. 130.

385. *Ibid.* paras 115, 116, 118 and 119. ECRI has pointed out that the opportunities to learn the official language should be available to everyone interested, not just to school children, and the opportunities to learn the official language could include affordable evening classes or vocational language courses. See paras 116 and 119.

386. See e.g. the second reports on Liechtenstein, para. 48, on Denmark, Executive summary, on FYROM, Executive summary, on Latvia, para. 75, and on Switzerland, paras 40 and 41.

tity.³⁸⁷ ECRI has called for improving the integration and participation in society of non-citizens who are long-term residents by according them certain political rights, such as the right to vote or eligibility in local elections.³⁸⁸ ECRI has also observed that according local voting rights to non-citizens would also encourage an engagement on the part of political parties to take the interests of non-citizens fully into account³⁸⁹ and that the right to participation is valued by non-citizen communities as a sign of their acceptance in society.³⁹⁰

ECRI has stressed the importance of the acquisition of *nationality/citizenship* for the integration of immigrants and non-citizens who are long-term permanent residents to enable, for instance, their better participation in the political life of the host country.³⁹¹ The Commission has also put forward a link between facilitating citizenship and the full integration of society.³⁹² Moreover, it has viewed dual citizenship positively from the point of view of integration.³⁹³

Offering persons *information* about the functioning of the host society and the culture of the state of residence has been viewed as important for their integration.³⁹⁴ Additionally, ECRI has called for giving non-citizens information concerning their legal situation, the regulations in force, their rights and how they can seek further

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387. First report on Sweden, para. 11. In its second report on Estonia ECRI discusses particularly stateless persons and Russian-speaking population and establishes links between participation of non-citizens in political life and integration as well as between participation, integration into society, citizenship and identity. See paras 40, 41 and 58–61.
388. See e.g. the first and second reports on Germany, para. 7, and para. 17, respectively, the second reports on Belgium, para. 15, on France, para. 15, on Slovenia, para. 28, on Austria, para. 18, on Liechtenstein, para. 48, and on San Marino, para. 34, and the third report on Portugal, paras 73 and 76. In these connections ECRI has also sometimes raised the significance of the European Convention for the Participation of Foreigners in Public Life at Local Level. See e.g. the pertinent paragraphs in the second reports on France, Slovenia and San Marino, and the third report on Portugal cited *supra*. In the third reports on Germany and on Austria ECRI recommends granting long-term non-EU citizens voting rights and eligibility in local elections. See paras 36 and 38, respectively.
389. See e.g. the first and second reports on Germany, para. 7, and para. 17, respectively, the first report on Italy, para. 7, and the second reports on France, para. 15, and on Andorra, para. 37.
390. Second report on Switzerland, para. 41.
391. See e.g. the first reports on Belgium, para. 9, and on Ukraine, para. 15, and the second reports on Denmark, para. 5, on Ireland, paras 8 and 9, on Italy, para. 9, on Liechtenstein, para. 48, on Andorra, Executive summary, and on San Marino, paras 35–37.
392. For facilitating citizenship for persons of immigrant origin with a view to the full integration of society, and awareness-raising among the general public about this, see the third report on Switzerland, para. 80. ECRI has also remarked that there should be no discrimination in the granting of citizenship. Para. 81.
393. Second report on Luxembourg, para. 3. See also the remarks in the second report on Andorra, para. 41.
394. See e.g. the second reports on Finland, paras 37 and 57, and on Liechtenstein, para. 47. The third report on Greece refers to providing instruction in the culture of the host state for immigrant adults and children. See para. 125. The third report on Hungary refers to access to courses on Hungarian culture. See paras 54 and 55.

assistance and guidance.³⁹⁵ Successful integration of immigrants into society has been mentioned as including advice and assistance in receiving social and welfare benefits.³⁹⁶ ECRI has also referred to the positive role of *family visits and family reunification* for the full integration of new minority groups (or persons of immigrant background) into society,³⁹⁷ and has drawn attention to access to the labour market for family members and the positive role of such access in integration.³⁹⁸

ECRI has noted failures to apply *laws* systematically – and a gap between the law and the reality – and their negative impact on integration into society.³⁹⁹ It has also suggested that attention in a law to the status and rights of national minorities would improve their integration into society.⁴⁰⁰ The issue of integration has been raised with respect to *the media*, with ECRI discussing both the role of the media for integration⁴⁰¹ and the fact that a considerable separation of the official-language and minority-language media runs counter to the aim of mutual integration.⁴⁰²

In its remarks on integration, in addition to raising the issue of *assimilation*, ECRI has touched upon the questions of *identities* and *respect for differences*. As regards assimilation, ECRI has pointed out that developing policy initiatives to allow possibilities for groups to integrate should in no way imply an obligation on their part to assimilate.⁴⁰³ Furthermore, as already mentioned, the Commission has made remarks opposing forced or forcible assimilation in the area of education.⁴⁰⁴ In its first-round reports, ECRI observed that integration based on respect for individual, cultural and ethnic differences may prove to be a more successful and acceptable approach than one that tends to play down differences between different ethnic mi-

395. Second report on Liechtenstein, para. 47.

396. Second report on Poland, para. 31. See also the third reports on Poland, para. 49, and on the Russian Federation, para. 53.

397. See e.g. the first, second and third reports on Germany, para. 6, para. 16, and paras 32 and 35, respectively. See also the second report on Liechtenstein, para. 48, and the third report on Greece, paras 124 and 125. The second report on Andorra addresses family reunification of seasonal workers and facilitating full integration into society. See para. 33.

398. Third report on Austria, para. 37.

399. Second report on Luxembourg, para. 41.

400. Third report on Estonia, paras 30 and 31.

401. See e.g. the second report on Ukraine, paras 53 (addressing prejudice against certain persons surfacing in the media) and 60 (addressing press articles containing false generalisations and stereotypes on the Roma). For the role of the media to promote tolerance and integration, see also the third report on Portugal, para. 86.

402. Second report on Latvia, para. 60. The remarks concern the separation between Latvian-speaking and Russian-speaking media. In its second report on Moldova ECRI notes this kind of linguistic gulf in the media field and observes it to run counter to the efforts made to promote social cohesion. See para. 39.

403. First report on Sweden, para. 12. In its second report on Sweden ECRI makes a remark on the aim of assimilation not being compatible with an integrated society. See paras 80 and 81.

404. See the remarks *supra* in this section.

nority groups.⁴⁰⁵ Subsequently, ECRI has embraced the aim of ensuring that the different cultures, languages and identities of minority groups are not lost or diminished in the process of integration, and has stressed that national/state identity can be enriched by encompassing and protecting such diverse elements. The specific identities, needs and problems of the different minority groups should be taken into account in developing policies and actions to integrate the various components into society.⁴⁰⁶ In the course of its third reporting round, ECRI has referred to integration policies that take into account the specific needs of all minority groups⁴⁰⁷ and to taking measures to promote the culture and language of immigrants in the area of integration.⁴⁰⁸

ECRI has made critical remarks on policies based on “capacity for integration”⁴⁰⁹ as well as on integration policies based on addressing the supposed “short-falls” or disadvantages of persons of immigrant origin.⁴¹⁰ A climate where new arrivals, long-term residents and citizens of foreign background do not feel respected or welcome and where they are perceived as a threat to a country’s economy, way of life and value system has negative consequences for their situation and their ability to integrate into society.⁴¹¹ ECRI made a similar observation in its discussion of integration as this relates to *social cohesion*.⁴¹²

ECRI has linked increased *recognition within a society of its diverse composition* and of the positive contribution made by individuals of foreign origin to the issue

405. First report on Switzerland, para. 10. When addressing participation ECRI has also stressed that integration policies should take into account safeguarding the right of all groups to preserve their own cultural identity. See the first report on Sweden, para. 12.

406. Second report on Estonia, paras 60 and 61. It is notable that although the title of the section under which these remarks have been made refers to Russian-speaking minorities, the remarks on taking account identities in the process of integration do not seem to concern solely Russian-speakers. See para. 60 which refers to integrating both Estonians and minority groups into one society, and para. 61 which refers to over 100 minority groups living in Estonia, including several Muslim communities, more generally.

407. Third report on Estonia, para. 137.

408. Third report on Greece, paras 124 and 125.

409. Second report on Switzerland, para. 35. See also the third report on Switzerland, para. 94.

410. See e.g. the second report on Sweden, para. 80.

411. Second report on Denmark, paras 22 and 37. For a remark on portraying immigration as a threat to employment for nationals, see the third report on Portugal, para. 75.

412. References to the links between integration and social cohesion are made most frequently in ECRI’s second-round reports. In its second report on France ECRI links social cohesion and integration in schools. See para. 21. In its second report on Latvia ECRI notes the concrete implementation of integration strategy being beneficial to the cohesion of the whole population of the country. See the Executive summary. See also the second reports on Slovenia, Executive summary, and on Austria, Executive summary. ECRI has discussed social cohesion in the context of the integration (and participation) also when it has specifically addressed the Roma. See e.g. the second report on Lithuania, para. 57.

of integration.⁴¹³ Shaping immigration and integration policies to reflect the positive role of immigrants and the fact that immigrants constitute an integral part of society have been viewed as important.⁴¹⁴ While ECRI has taken the view that more attention should be drawn to the benefits brought to society by persons of immigrant origin, it has also stressed the duty of and need for mainstream society to adapt to and accept persons of new and different cultures and backgrounds. Society as a whole should be provided with information about the reasons behind integration policies, and it is important to raise awareness among the majority community of the part it too must play in learning to accept persons of immigrant origin as an equal part of society representing a benefit rather than a problem. ECRI has also cited the importance of defining what is meant by “successful integration” as a goal of the policies.⁴¹⁵ ECRI has underscored that non-citizens should not be treated merely as economic entities, and awareness-raising measures within society in general should include information on the contribution made by non-citizens to culture and society.⁴¹⁶ ECRI has noted the frustration expressed by many immigrants at being viewed sooner as economic entities and being employed in unskilled low-paid jobs even though they have much higher qualifications, sometimes of university standard.⁴¹⁷ ECRI has also taken up the importance for achieving an integrated society by building a sense of belonging to society and trust by means of contact and dialogue.⁴¹⁸

ECRI has discussed somewhat critically the “guest worker” approach developed in Germany and Austria, in particular by noting that the status of immigrants belonging to this group of persons is relatively precarious and affects their possibilities for integration and participation in society.⁴¹⁹ In addition, attention has been drawn

413. According to ECRI, this recognition would contribute greatly to solving many of the problems of racism and discrimination and to the richness of society as a whole. Second report on Germany, para. 42.

414. Third report on Germany, Executive summary and para. 31. For a note on the importance to treat foreigners as part of society, see also the third report on Switzerland, para. 85.

415. Second report on Sweden, para. 82.

416. Third report on Poland, para. 50. For awareness-raising measures concerning the contribution made by non-citizens to the culture of the state and society, see also the third report on Hungary, paras 54 and 55. In its third report on Germany ECRI raises the need not to consider immigrant primarily in terms of their utility value. See para. 31.

417. ECRI has called for facilitating recognition of qualifications obtained abroad as one solution to this problem. Third report on Portugal, para. 74.

418. Second report on Georgia, paras 133–145. The third report on Estonia refers to the importance of integrating Russian-speaking minorities in society and the significance of interculturalism between Estonian-speaking and Russian-speaking communities for the integration of minority groups. In addition to interculturalism, ECRI draws attention to languages, employment, education, and the specific needs of minority groups. See the Executive summary and paras 136 and 137.

419. ECRI notes that in this approach guest workers are perceived primarily in terms of their utility value despite the fact that they have made Germany the focus of their lives. In the

to the fact that certain systems of work permits may contribute to discrimination and exploitation of foreign workers and affect negatively their opportunities for integration.⁴²⁰

ECRI has described integration as a two-way strategy in which a *mutual integration* process between majority and minority is foreseen.⁴²¹ Integration is a process demanding mutual recognition of the qualities embodied in both the host and the immigrant communities⁴²² and concerns mutual integration of the different parts of society while maintaining and protecting linguistic and cultural diversity.⁴²³ The Commission has stressed that immigrants' possibilities for integration do not depend solely on their own will but also hinge on the action of public bodies and of society as a whole, and that integration of the country's various groups is a mutual process.⁴²⁴ In a two-way process of integration, successful integration includes measures aimed at the majority population as well, notably in the fields of education and awareness-raising.⁴²⁵ Education and awareness-raising of the general public should aim at combating prejudices and stereotyping as well as at advancing mutual understanding of the different communities.⁴²⁶ Successful integration as a two-way process involves efforts on the part of the population at large, which must be made

“guest worker” approach the duty has been on the non-nationals themselves to fit into the society, and integration measures have not been a priority. This approach has also sometimes resulted in a separation of migrant communities from the rest of the population, in problems learning the official language and in other social difficulties. Second report on Germany, para. 41. See also ECRI's critical remarks on the guest worker model in the third report on Germany, para. 29, and in the second report on Austria, para. 18.

420. In its third report on Iceland ECRI notes the system of temporary work permits granted by employers, and it recommends changing the system so that work permits were granted by the authorities. See paras 90, 91 and 94.

421. Second report on Liechtenstein, para. 46. ECRI has employed visibly the concept of “mutual integration” in its second-round reports in which ECRI has made a number of references to a mutual integration between the majority and various groups, including Roma, the immigrant population, and the minority population. See e.g. the second reports on the United Kingdom, para. 41, on Cyprus, para. 36, on Italy, Executive summary, on Latvia, Executive summary and paras 60, 73 and 76, on Ukraine, paras 49 and 60, and on Sweden, para. 82. For references to mutual integration in the third-round reports, see e.g. the third report on Cyprus, para. 114, on Iceland, Executive summary and paras 43, 102, 104 and 105, on Slovenia, paras 137 and 140. See also the remarks on social cohesion *supra* in this section.

422. First and second reports on the Netherlands, para. 10, and para. 22, respectively.

423. Second report on Latvia, Executive summary.

424. Third report on France, paras 136 and 147.

425. Second report on San Marino, para. 33.

426. See e.g. the second reports on Ukraine, para. 53, and on San Marino, para. 33. For the need to combat intolerant attitudes towards non-citizens, see also the third report on Poland, paras 49 and 50. For awareness-raising among the general public to further an integrated society, see the third report on Slovakia, paras 92 and 116. The third report on Luxembourg raises the need for awareness-raising in order to fight prejudices and stereotypes against Muslims as part of integration policy. See the Executive summary.

aware of the human and enriching aspect of immigration and a multicultural society; accordingly, integration measures should seek to foster mutual respect between immigrants and mainstream society.⁴²⁷

ECRI has clearly viewed the *fight against discrimination* as being at the heart of integration strategies, and has also placed a focus on measures aimed at the majority population.⁴²⁸ In its GPR No. 8, which addresses combating racism and fighting terrorism, ECRI points out that the integration of states' diverse populations is a mutual process that involves ensuring equal rights and opportunities for all individuals.⁴²⁹ The Commission has also stressed the importance of combating racism and xenophobia for advancing integration⁴³⁰ and, among other things, has pointed out that the elaboration of a National Action Plan in the framework of the follow-up to the Durban World Conference against Racism constitutes an ideal opportunity to address the issues of integration of non-citizens into society.⁴³¹

ECRI has highlighted that *schools* have a fundamental role in promoting integration and in shaping attitudes among young people. In this connection, it has highlighted the importance of producing and widely disseminating teaching materials concerning issues of racism and discrimination and the value of providing information about the history and cultures of the various groups living in a country in schools.⁴³² ECRI has also drawn attention to relevant *training* for such groups as officials, civil servants and teachers who come into contact with immigrants and/or non-citizens in their work as part of the efforts for successful integration of these persons.⁴³³

427. Third report on Portugal, paras 75 and 77.

428. Third report on Sweden, Executive summary and paras 106 and 107. ECRI also notes attention paid by authorities to structural or institutional discrimination. See para. 106. According to ECRI, focus should be on discrimination in employment, including introducing special (positive) measures. ECRI also welcomes action plans for ethnic diversity and against discrimination adopted in the country. See paras 112–118. For addressing racial discrimination, see the second report on Georgia, para. 143. For the fight against discrimination in all its forms featuring prominently within policies concerning immigration and integration, see the third report on Iceland, Executive summary and paras 104 and 105.

429. GPR No. 8, preambular para. 22 and point 16 in the set of recommendations.

430. Second report on Liechtenstein, paras 46 and 47. See also the third report on Finland, paras 108–112.

431. Second report on San Marino, para. 33. See also the second report on Liechtenstein, para. 46.

432. Second report on Sweden, para. 37. In its first report on Andorra ECRI refers to the importance of educational projects targeted in particular the youngest generations. See para. 10.

433. Second reports on Poland, para. 31, and on San Marino, para. 33. See also the third reports on Poland, para. 49, and on the Russian Federation, para. 53. The third report on Switzerland addresses integrating children in the area of education and special training for teachers in dealing with diversity. See para. 64.

At times ECRI has addressed the need to develop active measures to promote integration.⁴³⁴ To ensure the successful integration of immigrants into society it is important to see to it that adequate structures and policies are in place at all levels that deal with the migration situation.⁴³⁵ ECRI has frequently made observations on the importance of adopting a *comprehensive immigration and/or integration plan, strategy or policy*,⁴³⁶ and pointed out that such a plan should cover the whole territory of the state.⁴³⁷ It has also noted the importance of establishing a comprehensive legal, policy and institutional framework at the central level for providing coherence and sustainability in local efforts to promote integration between majority and minority communities (and notably citizens and non-citizen communities).⁴³⁸ The Commission has welcomed integration plans that include combating racism and xenophobia as well as references to the advantages of an integrated society, and has called for integration strategies to contain clear policies to improve the integration of persons of immigrant origin in concrete terms.⁴³⁹ Immigration and integration policies should be respectful of the human rights of immigrants, which would play a role in preventing abuses and violations against immigrants, including domestic and other foreign workers.⁴⁴⁰ ECRI has pointed out that the needs of various groups, including immigrants other than just newcomers and economic migrants, should be accommodated.⁴⁴¹ The importance of involving minority groups in designing and

434. First report on Denmark, para. 10. In its second report on Sweden, and in the context of discussing an integrated society, ECRI notes the lack of positive action programmes to address discrimination in employment. See para. 51. In its third report on Finland ECRI both welcomes positive measures in the area of integration and recommends their extension. See para. 116.

435. Second report on Poland, para. 31.

436. ECRI has made these remarks most often when it has discussed integrating non-citizens and persons of immigrant origin, and also sometimes with respect to the Roma. For the latter, see the remarks *infra* in this section. For the former, see e.g. the second reports on Liechtenstein, Executive summary and para. 42, on Denmark, para. 20, on Sweden, para. 8, on San Marino, Executive summary and para. 33, and on Slovenia, Executive summary. See also the third reports on Greece, Executive summary, on Hungary, Executive summary and para. 54, on Croatia, para. 53, on Poland, Executive summary and para. 48, on Denmark, Executive summary, and on Ireland, Executive summary and paras 132–137.

437. See e.g. third reports on the Russian Federation, para. 53, on Hungary, para. 55, and on Poland, para. 49.

438. Third report on Italy, para. 43. For the importance of promoting integration at local level, see also the remarks on Roma *infra* in this section.

439. Second report on Liechtenstein, paras 46 and 47. For the need of concrete and effective measures, see the second report on Georgia, para. 142.

440. Third report on Cyprus, Executive summary and para. 114.

441. For the need for comprehensive and targeted integration policy or strategy on immigration, see the third reports on Greece, Executive summary, and on Hungary, Executive summary and para. 54. In its third report on Hungary ECRI refers to the need to address not only recognised refugees but also other non-citizens such as economic immigrants or “persons authorised to stay”. According to ECRI this is particularly important in the light of the

implementing integration plans has also been cited.⁴⁴² As regards integrating minority groups into the labour market, ECRI has called for involving all relevant partners, such as the business and NGO sectors, national and local authorities, and employment agencies, in devising and implementing policies.⁴⁴³ It has attached importance to raising public understanding of and support for government integration policies both among minority groups and in the population at large.⁴⁴⁴ Additionally, ECRI has recommended that the authorities provide information on their integration policies to the public and that a wide public debate on the issues surrounding integration be initiated.⁴⁴⁵ In order to enable the monitoring of the achievement of integration objectives, ECRI has recently highlighted the importance of collecting *data* broken down by religion, language, nationality and national or ethnic origin.⁴⁴⁶

In its country reports, ECRI has repeatedly addressed states' *integration programmes and courses for newcomers and integration contracts*,⁴⁴⁷ and has generally welcomed these schemes and encouraged their development. The Commission has drawn attention to the content of such training and has noted that it has to be authentic; i.e. it should not be merely symbolic, and should be tailored to the participants' needs.⁴⁴⁸ While ECRI has welcomed individual counselling and extensive language teaching assisting integration, it has also called for careful monitoring of the social effects of the element of compulsion in training schemes. In the course of its first reporting round, ECRI voiced a word of warning concerning the emphasis it perceived on an integrational approach highlighting efforts by the minority groups

state's (at the time forthcoming) joining the EU and the resulting opening up of its labour market to EU citizens. ECRI makes the similar kinds of remarks in its third report on Poland in which it refers to the need for comprehensive and targeted integration strategy and immigration policy including integration programme for newcomers as well as for the immigrants already in the country. A general integration policy should concern not only recognised refugees but also other non-citizens such as economic immigrants or persons "with tolerated status". See paras 48 and 49. For the need to promote the integration of all persons of immigrant background, also of those who have arrived longer ago, and irrespective of their ethnic and national origin, see the third report on Portugal, paras 70 and 71.

442. See e.g. the second reports on Latvia, para. 75, and the second and third reports on Sweden, para. 81, and paras 39 and 110, respectively. For consulting minority groups with respect to integration policy, see also the third report on Estonia, para. 136. See also the third report on Ireland, para. 137. For the involvement of Roma in this context, see the remarks *infra* in this section.

443. Third report on Denmark, para. 66.

444. First report on the Netherlands, Introduction and para. 21.

445. Second report on Liechtenstein, para. 47.

446. Third report on Sweden, Executive summary and paras 108–111.

447. For the remarks on integration programmes for newcomers, see e.g. the third report on Germany, para. 37, and on integration contracts for non-citizens, see e.g. the third reports on Austria, para. 40, and on France, para. 131.

448. Third report on France, para. 135. See also the third report on Germany, para. 38.

themselves to integrate. According to ECRI, such an approach may be interpreted by some groups in society as a tacit criticism of minorities who have failed to integrate and may thus even reinforce prejudices. In ECRI's view, it is important that a policy does not lead to a lack of respect – institutionally or publicly – for a group's cultural background. Furthermore, it is equally important that a policy should not obscure the possibility that differences of culture may have contributed to the social disadvantages peculiar to these groups and to which social policies need to be sensitive.⁴⁴⁹ This line of thinking is also clearly reflected in ECRI's subsequent remarks on the two-way process of integration (including mutual integration). Recently ECRI has also pointed out the desirability of positive incentives instead of the imposition of fines as a means to persuade non-citizens to attend integration classes.⁴⁵⁰

When ECRI has expressly commented on *duties* with respect to integration, it has criticised emphases on the duty of non-citizens or immigrant populations themselves to fit into society.⁴⁵¹ Moreover, it has stressed the importance of focusing on the duty of society or the host state to integrate and promote integration and highlighted the duty of and need for mainstream society to adapt to and accept persons of new and different cultures and backgrounds.⁴⁵² However, ECRI has also cautiously addressed the roles and even duties of various groups in the area of integration in noting that a government programme aimed at integration of various groups into society calls for a commitment to its goals and objectives and to the cohesion and integration of society from all sections of the community, irrespective of their origin.⁴⁵³ ECRI has expressly welcomed an emphasis on the duty of the whole society to integrate.⁴⁵⁴

As regards specific groups in connection with which it has discussed the issue of integration, ECRI has frequently taken up the situation of *the Roma*. Its remarks in

449. First report on the Netherlands, paras 10 and 21. In this report ECRI addresses training schemes for integration, when they include the obligation to learn the official language of the host country and obligatory counselling in orientation in society and trades.

450. Third report on Austria, para. 40.

451. Second report on Switzerland, para. 41. See also ECRI's critical remarks on duties and the guest worker model and the notes on integration measures targeted to children from minority groups in the area of education *supra* in this section.

452. Second report on Sweden, paras 47 and 82. The third report on Germany raises the duty of a country of immigration which includes the promotion of an integrated society, and duty and responsibility of the state to promote integration. See the Executive summary and para. 30.

453. Second report on Latvia, para. 75.

454. Third report on Switzerland, para. 85.

this regard concern their integration in(to) society in general⁴⁵⁵ (or in a state)⁴⁵⁶ – often specifically into employment and education⁴⁵⁷ – and at times also in the areas of housing and health.⁴⁵⁸ Attention has also been drawn to the importance of promoting integration at the local level.⁴⁵⁹ Consideration of the integration of Roma into society, including their integration into education and employment, is mentioned as requiring due attention to the role of discrimination and societal prejudice against them.⁴⁶⁰ Furthermore, the (social) integration of Roma should take into account their identity and participation in political life.⁴⁶¹ In the area of education, ECRI has stressed the role of both training in the official language and opportunities to study the Romani language in integrating Romani children into the educational system.⁴⁶² The importance of awareness-raising measures among the general public and school personnel concerning the importance of integration has been underlined, with the measures for school personnel envisaged to include anti-discrimination training and training in multicultural education.⁴⁶³

ECRI has addressed the adoption of integration programmes for Roma, and it has underlined genuine participation of the Romani communities in designing, implementing and evaluating these programmes.⁴⁶⁴ The programmes aimed at integrating Roma should focus on overcoming their exclusion – a goal that is noted as being in interest of the general public and one of its responsibilities. Furthermore, programmes should be based on a concept of integration as a two-way process in which both majority and minority groups are seen as responsible for building a

455. See e.g. the second reports on Greece, para. 30, on Portugal, para. 65, on Lithuania, Executive summary, on Slovenia, para. 31, and on Spain, para. 45, and the third report on Estonia, para. 142.

456. Second report on Ukraine, para. 6.

457. See e.g. the second reports on Bulgaria, para. 43, on Portugal, paras 38 and 65, and on Slovakia, para. 63, and the third reports on Slovakia, paras 106 and 109, on Lithuania, para. 83, 85 and 90, on Romania, paras 139–141, on Estonia, para. 142, on the Czech Republic, Executive summary and para. 118, on Hungary, paras 101, 105 and 107, on Poland, paras 115 and 116, and on Ireland, paras 92 and 95.

458. See e.g. the third report on the Czech Republic, para. 103. For severe disadvantages of Roma in housing, health and education, and non-segregated settlements being part of an integrated society, see the third report on Slovakia, paras 109 and 113.

459. See e.g. the third report on the Czech Republic, Executive summary and paras 97 and 100.

460. See e.g. the second and third reports on Lithuania, para. 57, and paras 79 and 99, respectively. See also the second report on Portugal, para. 65, and the third reports on the Czech Republic, paras 98–100, and on Estonia, paras 138–145.

461. Second report on Spain, para. 50. For an integrated society entailing providing the Roma with the opportunity to participate on an equal footing, see the third report on Slovakia, para. 110.

462. Second report on Croatia, para. 42.

463. Third report on the Czech Republic, para. 119.

464. See e.g. the second reports on Spain, para. 50, and on Moldova, para. 31, and the third reports on Lithuania, paras 78 and 82, and on Portugal, para. 123.

cohesive society. Measures targeted at the non-Romani population should aim at countering societal prejudice and discrimination against Roma,⁴⁶⁵ and an approach involving a range of special measures in different fields to permit the Roma to enjoy genuinely equal opportunities with the rest of the population should be put into practice. Awareness-raising among persons responsible for implementing policies concerning Roma, and in society at large, should contain information on the philosophy behind the measures taken and the need to include the Romani minority as an equal and integrated part of society.⁴⁶⁶ ECRI has also remarked that citizenship does not necessarily make it easier for Roma to integrate, and that political will, practical and effective measures, as well as a comprehensive approach to positive action, are needed to address the situation of the Roma.⁴⁶⁷ It is notable that, with respect to the integration of the Roma, ECRI has placed considerable emphasis on combating their social exclusion,⁴⁶⁸ and has closely linked mutual integration to their (social) inclusion.⁴⁶⁹

ECRI has given some specific attention to the integration of *refugees*⁴⁷⁰ and *persons granted protection on other grounds*⁴⁷¹ as well as *asylum-seekers*.⁴⁷² According to the Commission, providing information and assistance for asylum-seekers and refugees in order to help them gain an understanding of society and its structures is important for their integration.⁴⁷³ ECRI has also raised the issue of integration into the employment market of refugees and asylum-seekers allowed to stay in the country.⁴⁷⁴ In the Commission's view, an integration strategy for recognised refugees should include assistance in finding work, language training and assistance in finding housing.⁴⁷⁵ ECRI has also referred to the importance of the legal basis of

465. Third report on Lithuania, paras 79 and 99.

466. Third report on Slovakia, para. 116. See also the third report on Poland, para. 122.

467. Third report on Portugal, paras 125–128.

468. See e.g. the third report on Portugal, paras 123–128.

469. See e.g. the third report on Slovenia, paras 137 and 140.

470. See e.g. the second reports on Lithuania, para. 53, and on Slovenia, para. 25, and the third reports on Romania, Executive summary and para. 93, on Slovakia, para. 81, on the Czech Republic, para. 41, on Hungary, para. 55, on Estonia, para. 80, on Denmark, para. 47, on Italy, para. 113, on Iceland, Executive summary and paras 42 and 43, and on Portugal, para. 81.

471. E.g. the second report on Lithuania and the third report on Estonia address integration of persons granted subsidiary protection. See para. 53, and para. 80, respectively. The third report on Hungary refers to temporarily protected persons. See para. 55. The third report on Romania considers persons with “humanitarian status”. See para. 93.

472. See e.g. the second reports on Ireland, paras 40 and 41, on Liechtenstein, para. 23, on Hungary, para. 44, and on Luxembourg, para. 33, and the third reports on Romania, Executive summary, on Belgium, para. 41, on the United Kingdom, para. 116, and on Portugal, para. 81.

473. Second report on Liechtenstein, para. 23.

474. First report on Poland, para. 11.

475. Third report on Slovakia, para. 81. For the availability of free courses on the official language for persons with refugee status or “humanitarian status” and integrating them into the labour market, see the third report on Romania, para. 93. For the recommendation

the reception of “quota” refugees, developing programmes aimed at favouring their active participation in society, and their access to financial support measures for university education.⁴⁷⁶ Furthermore, in promoting the integration of refugees in society, the importance of securing adequate resources and co-ordination among the different actors (various ministries) involved has been cited.⁴⁷⁷ As regards asylum-seekers, ECRI has pointed out that the possibility for asylum-seekers to provide for themselves and their families through the right to work may play an important role as regards both their psychological well-being and their short- and long-term integration and acceptance into society. Permission to work can also have a very positive effect in preventing negative stereotypes and prejudices against asylum-seekers from gaining hold in popular opinion.⁴⁷⁸ Additionally, the Commission has called for the integration of child asylum-seekers in mainstream schools.⁴⁷⁹ ECRI has recommended to the authorities that they ensure that asylum-seekers can participate in society during the examination of their asylum applications, with measures in this regard including adequate opportunities to study and learn the official language. ECRI has also voiced concern for the isolation of reception or accommodation centres and called for their integration into the local communities.⁴⁸⁰

Also worth noting are some of ECRI’s express references to *Muslim communities* in the context of integration. ECRI has warned against the view that the integration of Muslim foreigners is impossible because of the cultural gap between Muslims and the majority of the population, and has called for a positive approach to Islam

on monitoring the policy of housing refugees and providing refugees with an integration course in different municipalities in order to ensure that refugees are not isolated, see the third report on Denmark, para. 47. In this report ECRI also comments the existence of integration councils set up in the country, and recommends the government to make them mandatory in order to facilitate newly arrived immigrants’ and refugees’ integration into their municipalities. See para. 46.

476. Third report on Iceland, para. 43.

477. Third report on Slovenia, paras 49 and 50.

478. Second reports on Ireland, paras 40 and 41, and on Liechtenstein, para. 23. For ECRI’s positive remarks on asylum-seekers’ right to work enhancing their integration, see also the second report on Luxembourg, para. 37.

479. Third report on United Kingdom, para. 116. See also the third report on Iceland, para. 57.

480. Third report on Norway, paras 33 and 38. In this report ECRI notes that the isolation of reception centres from the outside world unduly delays the integration process of refugees in Norway. See also the third reports on Belgium, para. 45, and on Denmark, para. 59.

In its third report on the Czech Republic ECRI highlights the importance of providing asylum-seekers with opportunities to participate in the local society during the examination of their asylum applications, and consequently ECRI recommends the authorities to integrate accommodation centres into the local community, encourage private accommodation, permit employment as rapidly as possible, ensure children are granted access to education, provide language training and consider other measures that would increase contacts with society. See para. 46.

to enhance integration into society.⁴⁸¹ The Commission has expressed its concern for statements by some public figures – supported in some cases by the mass media – concerning the dangers of multiculturalism and of the alleged impossibility for certain groups, notably Muslims, to integrate into society and culture.⁴⁸² It has also drawn attention to reports claiming that efforts by Muslims to integrate into society are often met with reticence, notably by public authorities and the media.⁴⁸³ As part of integration policy concerning members of immigrant communities, ECRI has specifically called for awareness-raising in order to fight prejudices and stereotypes against Muslims.⁴⁸⁴ Additionally, ECRI has made note of the concern raised about a plan to disperse Muslim asylum-seekers throughout a country and that this may endanger the integrating strength of the (Muslim) community.⁴⁸⁵

In the course of its third reporting round ECRI has drawn increasing attention to the marked differentiation in law and in practice between EU citizens and *non-EU citizens*, and the Commission has stated, for instance, that this differentiation negatively affects the social and political integration of all segments of society, posing an obstacle to the creation of an integrated society. Consequently, ECRI has recommended measures aimed at reducing the gaps existing in law and practice between the nationals of the (EU) state concerned and non-EU citizens, particularly in employment, education, and generally in the enjoyment of social, civil and political rights. ECRI has also called for granting eligibility and voting rights in local elections to non-EU citizens in order to enhance their integration.⁴⁸⁶ Moreover, it has requested the authorities to review all occupations inaccessible to non-EU citizens in order to ascertain whether or not these restrictions are justified, and to remove any unwarranted obstacles identified. In ECRI's view this measure would have the effect of aiding the integration of immigrants by affording them easier access to employment.⁴⁸⁷ Furthermore, ECRI has made comments on the discriminatory features of immigration and integration policies affording foreigners different

481. Second report on Luxembourg, paras 61 and 65. In its third report on France ECRI warns against rhetoric conveying the idea that society cannot integrate Muslims because of the alleged cultural divide between the followers of Islam and the majority population. In the same connection ECRI addresses unequal treatment of Muslim religion with other religions and resistance of public authorities in matters of building mosques or obtaining Muslim burial grounds in cemeteries. See para. 124.

482. Second report on Spain, para. 37.

483. Third report on Germany, para. 67.

484. Third report on Luxembourg, Executive summary.

485. Second report on Ireland, para. 53.

486. Third report on Austria, Executive summary and paras 35 and 38.

487. Third report on France, para. 137. See also the second report on France, paras 36 and 41, and the third report on Portugal, para. 73.

statuses⁴⁸⁸ and has cited the fact that the issue of integration is usually not mentioned in connection with EU citizens.⁴⁸⁹

ECRI's country reports contain remarks on the reintegration of trafficked children into society.⁴⁹⁰ ECRI has also drawn attention to an important question by pointing out that strict requirements for low-skilled persons to enter the country increase the numbers of persons working illegally.⁴⁹¹ Additionally, ECRI has stated that if non-citizens have not been integrated into society as fully participating members, relations between non-citizens and the majority community may become tense if economic and social conditions become less favourable for the population as a whole. Under such conditions, the relative lack of integration of non-citizens might leave them especially vulnerable if manifestations of xenophobia, discrimination and intolerance become more acute.⁴⁹² ECRI has pointed out that when the elements for an integrated society, including equal opportunities, do not exist, the result may be identity-based withdrawal tending towards communitarianism and identity-based radicalisation. As a reaction to feelings of exclusion, persons who lack reference points in society apparently establish other ones by expressing their affiliation with an ethnic or religious community and violently rejecting other communities. Therefore, an integration policy should address these kinds of questions.⁴⁹³

4.2.3.2 Summary of ECRI's Remarks on Integration

ECRI has often discussed minority groups in general terms, and while it has made a remark on the need to take all minorities into account in the area of integration, it has focused most of its attention in the area of integration on the Roma and persons of immigrant background. ECRI's remarks on the integration of refugees and persons granted protection on other grounds, as well as asylum-seekers, Muslims and non-EU citizens, deserve particular mention.⁴⁹⁴ In general, ECRI has made important observations by noting that similarities in physical appearance and religion do not necessarily make it easier to integrate into society, and that persons belonging broadly to the same (ethnic) group may face different challenges in the process of

488. In its third report on Switzerland ECRI comments on "capacity for integration" policy followed earlier in Switzerland and the new "binary admission" policy affording foreigners different statuses, and views the latter also having discriminatory features. See para. 94.

489. *Ibid.*, para. 100.

490. Third report on Albania, paras 113 and 115. The second report on Georgia includes a note on the integration of displaced persons. See the Executive summary and para. 97.

491. Third report on Switzerland, para. 103.

492. Second reports on Liechtenstein, para. 45, on San Marino, para. 32, and on Andorra, para. 38.

493. Third report on France, paras 129 and 130.

494. ECRI has also noted the reintegration of the trafficked children into society, and the integration of displaced persons.

integration. The Commission has also observed that the issue of integration is not usually discussed in the case of EU citizens.

ECRI has drawn some attention to *the gender dimension* of integration, for instance, by referring to the additional difficulties that women of immigrant origin may encounter in integrating into society. It has addressed the integration of children most clearly in the area of education, but has not, as a rule, discussed different challenges boys and girls may encounter in integration. The role of age in integration has generally not been taken up by ECRI. As regards the various levels or contexts of relevance for integration, ECRI has frequently spoken of integration in(to) society in general or creating an integrated society. While it has considered the areas of employment and education in particular to be the central ones for integration, it has drawn some attention to housing as well.⁴⁹⁵

ECRI has given *the fight against discrimination* a central place in integration. In the area of *employment*, it has underlined ensuring equal opportunities.⁴⁹⁶ In the area of *education*, it has stressed the integration of children from minority groups in the school system and pointed out that this integration must not in practice lead to forcible assimilation.⁴⁹⁷ The role of mother tongue teaching for children in assisting the integration of minority pupils in the school system has been mentioned.⁴⁹⁸ In the area of *housing*, ECRI has spoken about the avoidance of ghettoisation and the favouring of mutual integration in settlement policies. It has voiced concern about the possible isolation of minorities and de facto residential segregation contributing to de facto segregation in the area of education running counter to integration. ECRI has called for policy initiatives relating to housing that would allow full possibilities for groups to integrate, stressing at the same time that such policies should in no way imply an obligation to assimilate.⁴⁹⁹

ECRI has drawn considerable attention to the role of *languages* in integration by highlighting an adequate command of the official language, thereby enabling participation in society, including in its labour market.⁵⁰⁰ The Commission has un-

495. ECRI has also touched upon the issue of access to public services, most clearly in its remarks on the Roma.

496. ECRI has also welcomed action plans for ethnic diversity and against discrimination.

497. ECRI has pointed out – particularly in its earlier reports – that integration efforts in the field of education and training should not exclude the possibility for minority groups to express their own religious, linguistic and cultural characteristics.

498. ECRI has cited the potentially positive role of a multilingual teaching in schools and the establishment of bilingual classes.

499. ECRI has discussed the issue of areas with a high concentration of immigrants by noting the widely differing views on this subject and the various solutions possible.

500. ECRI has recommended that more weight is given to the value of fluency in other languages in the employment field.

derlined both the availability and content of the language courses offered⁵⁰¹ and the provision of opportunities to learn the official language to everyone interested. It has highlighted the importance of an opportunity to learn one's mother tongue especially in the context of education, and has touched upon preserving and encouraging the use of minority languages alongside the official language also more generally.⁵⁰²

One aspect of integration also strongly stressed by ECRI is the "participatory dimension", i.e. the link between *participation* and integration. Among other things, ECRI has called for improving the integration and participation in society of non-citizens who are long-term residents by according them certain political rights, such as the right to vote and eligibility in local elections.⁵⁰³ The Commission has also observed that according local voting rights to non-citizens would contribute to increased attention by political parties to the interests of non-citizens, and that non-citizens value the right to participation as a sign of their acceptance in society. In order to advance the integration of immigrants – especially non-citizens who are long-term permanent residents – and enable their better participation in the political life of the host country, ECRI has called for the granting of nationality/citizenship to these persons. While the Commission has viewed dual citizenship positively from the point of view of integration, it has also made an important observation in pointing out that citizenship does not necessarily make it easier to integrate.⁵⁰⁴

ECRI has *also* highlighted *the following aspects of integration*: offering persons information about the functioning of the host society and the culture of the state of residence; providing non-citizens information concerning their legal situation, regulations in force, their rights and how they can seek further assistance and guidance; providing immigrants advice and assistance in receiving social and welfare benefits; the positive role of family visits and family reunification;⁵⁰⁵ and access of family members to the labour market. Additionally, ECRI has mentioned such issues as attention in the law to the status and rights of national minorities, the importance of systematic application of laws, the significance of legal statuses,⁵⁰⁶ and the impact of certain systems of work permits on discrimination and exploitation of foreign workers.

501. ECRI has called for high quality and inexpensive language training courses that take sufficiently into account the differing backgrounds, work constraints and competencies of persons.

502. ECRI has made these comments particularly with respect to Georgia.

503. In these connections ECRI has sometimes raised the significance of the European Convention for the Participation of Foreigners in Public Life at Local Level.

504. ECRI has made this observation in the context of Roma.

505. ECRI has spoken about family reunification even in the case of seasonal workers.

506. ECRI has discussed e.g. the relatively precarious status of immigrants known as "guest workers" and somewhat weak legal statuses of many non-EU citizens in EU countries.

ECRI has viewed *contact* and *dialogue* (i.e. interculturalism) as advancing the creation of an integrated society, and has seen integration as a two-way strategy involving minorities and society as a whole. The Commission has often employed the concept of “mutual integration”, by which it refers, for instance, to the roles of various actors, i.e. persons belonging to both minorities and the majority, public bodies etc., in the process of integration. The Commission has attached importance to the role of schools in promoting integration and in shaping attitudes among young people. Furthermore, ECRI has discussed the role of *the media* in integration. It has also viewed a linguistic gulf in the media – more specifically a considerable separation of the official-language and minority-language media – as running counter to integration and to social cohesion.

In its observations on integration, ECRI has at times addressed the issue of assimilation.⁵⁰⁷ Additionally, it has touched upon questions of *identities* and *respect* for (individual, cultural and ethnic) differences, and has spoken in favour of ensuring that the different cultures, languages and identity of minority groups are not lost or diminished in the process of integration. ECRI has stressed the importance of taking a more open approach to national/state identity so that it can be viewed as encompassing elements of different cultures, languages and identities of minority groups.

ECRI has put forward remarks criticising policies based on a “capacity for integration” and integration policy based on addressing the supposed “shortfalls” or disadvantages of persons of immigrant origin. To advance integration, ECRI has highlighted the need to address the problems posed by a climate where new arrivals, long-term residents and citizens of foreign background do not feel respected or welcome and where they are perceived as a threat to the country’s economy, way of life and system of values. In ECRI’s view, it is important that immigration and integration policies reflect increased *recognition* within society of its diverse composition, of the positive contribution made or role played by individuals of foreign origin, and of viewing immigrants as an integral part of society. ECRI has made critical remarks on the “guest worker” approach in which workers are perceived primarily in terms of their utility value. It has emphasised generally that non-citizens should not be treated as mere economic entities and that awareness-raising measures within society at large should include information on the contributions made by non-citizens to culture and society.

507. ECRI has pointed out that developing policy initiatives to allow possibilities for groups to integrate should in no way imply an obligation to assimilate. It has also made express remarks against forcible/forced assimilation in the framework of education.

ECRI has underlined the importance of adopting *a comprehensive immigration and/or integration plan, strategy or policy*.⁵⁰⁸ It has referred to the need for integration strategies that contain clear policies to improve the integration of persons of immigrant origin in concrete terms. Whilst immigration and integration policies should be respectful of the human rights of immigrants, integration policies should also broadly address various groups. The authorities should also ensure that adequate structures and policies are in place at all levels that deal with the migration situation and integration, and a comprehensive legal, policy and institutional framework should exist at the central level for providing coherence and sustainability in local efforts to promote integration.

ECRI has welcomed states' *integration programmes and courses* for newcomers and integration contracts, and has stressed the importance of both authentic content in the training and tailoring it to meet the needs of the participants. While ECRI has called for monitoring of the social effects of the element of compulsion in training schemes, it has also favoured positive incentives instead of fines as a means to persuade non-citizens to attend integration classes. In general, the Commission has taken a critical view on the emphases on the duty of non-citizens or immigrant populations themselves to fit into society,⁵⁰⁹ and has stressed the importance of focusing on *the duties of mainstream society and the state* in the area of integration. More recently ECRI has welcomed an emphasis on the duty of the entire society to integrate. It is worthy of note that when ECRI has discussed the integration of the Roma, it has appeared to set out responsibilities for minority groups somewhat more readily than in other contexts.

ECRI has stressed involving minority groups in designing and implementing integration plans.⁵¹⁰ With a view to integrating minority groups into the labour market, ECRI has called for *the involvement of all relevant partners* – not only various authorities, but also the business and NGO sectors and employment agencies – in devising and implementing policies. To enable the monitoring of the achievement of integration objectives, ECRI has recently cited the importance of collecting *data* broken down by religion, language, nationality and national or ethnic origin. Additionally, ECRI has attached importance to heightening *public understanding of and support for government integration policies* both among minority groups and in the

508. ECRI has made these remarks most frequently when it has discussed integrating non-citizens and persons of immigrant origin and at times with respect to the Roma. It is also possible to find some observations on the need for positive action to promote integration in ECRI's remarks on Roma.

509. ECRI's critical remarks on the guest worker model also relate to the duty of integrating into society resting heavily on the immigrant population.

510. ECRI has strongly stressed a genuine participation of Romani communities in designing, implementing and evaluating the programmes concerning them.

population at large. It has recommended to the authorities that an extensive public debate should be initiated on the issues related to integration.

ECRI has taken up the “dangers” of a non-integrated society by referring to the possibility of tensions between non-citizens and the majority community at a time of deteriorating economic and social conditions and the vulnerability of non-citizens to manifestations of xenophobia, discrimination and intolerance. The Commission has also raised an important question in noting that identity-based withdrawal tends towards communitarianism and identity-based radicalisation when persons feel excluded and lack reference points in society. It has also made an important remark in drawing attention to the fact that strict immigration requirements for low-skilled persons contribute to an increase in the numbers of persons working illegally.

4.3 The OSCE High Commissioner on National Minorities

4.3.1 The Role and Mandate of the HCNM

The HCNM is the most prominent institution for addressing minority issues within the OSCE, described by the HCNM himself as the OSCE’s “focal point” on national minorities.⁵¹¹ As already mentioned, establishment of the post of the HCNM was prompted by the armed conflicts in Europe in the 1990s, particularly the war in the former Yugoslavia, and the decision to create the HCNM was laid down in the 1992 Helsinki Document.⁵¹² The post of the HCNM has been held by a person with recognised competence in international affairs and diplomacy.⁵¹³

The function of the HCNM is to identify and seek early resolution of ethnic tensions that might endanger peace, stability or friendly relations between the OSCE states. The HCNM has pointed out that his⁵¹⁴ mandate requires him to

511. HCNM statement to the OSCE Permanent Council (November 2006), para. 29.

512. See the remarks *supra* in chapter 2.1.1.2. Creating the HCNM was an effort by the CSCE states to come up with a tool within the CSCE to enable the prevention of conflicts such as that erupted in the former Yugoslavia. In fact, the ex-Yugoslav war made the participating states of the CSCE to realise that the CSCE had not been well equipped to address the situations of potential conflicts involving minorities. See also the remarks in Packer (2001), pp. 644–645.

513. The former Dutch minister Max van der Stoep was appointed as the first HCNM; in 2001 he was followed by a Swedish diplomat, Rolf Ekéus, and in July 2007, a former Norwegian foreign minister, Knut Vollebaek became the Commissioner. HCNM website at <http://www.osce.org/hcnm> (visited on 10 October 2007). The office of the HCNM is located in The Hague.

514. As remarked in the preceding footnote, to date all holders of the post of the HCNM have been men.

address tensions involving national minority issues, relations between the majority and minority/-ties, and sometimes also relations between minority and minority.⁵¹⁵ The focus of the HCNM's work, visible in his recommendations to states, is clearly on inter-ethnic tensions, primarily tensions in the relations between majority and minority populations that could create a context for wider conflict.⁵¹⁶

Although the HCNM's work is intrinsically linked to human rights, and thus also to the human dimension of the OSCE and particularly its commitments concerning national minorities,⁵¹⁷ within the OSCE the HCNM has not been designated as a human dimension mechanism or institution; it is considered a security instrument, specifically an instrument of conflict prevention. The HCNM's task is to look into situations involving national minorities from the point of view of conflict prevention, including early action as well as early warning functions. Thus, the Commissioner's mission is basically two-fold: his "early action" function consists of trying to contain and de-escalate tensions before they ignite, and his "early warning" function signifies a role as a "tripwire", meaning that he is responsible for alerting the OSCE whenever such tensions threaten to develop to a level at which he cannot contain them with the means at his disposal.⁵¹⁸

The mandate of the HCNM contains a number of provisions restricting his activities. For instance, he is not a minority ombudsman and consequently does not consider individual cases concerning persons belonging to national minorities. More generally, it is also noteworthy that the HCNM is not a mechanism supervising compliance by states with their international obligations and commitments; rather, his role is to offer assistance to governments with the aim of solving challenges relating to national minority questions. Additionally, the HCNM's mandate does not permit him to consider national minority issues in situations involving organised acts of terrorism or to communicate with or acknowledge communications from any person or organisation that practices or publicly condones terrorism or violence.⁵¹⁹ Despite such restrictions, the mandate of the HCNM remains very broad.⁵²⁰

515. HCNM statement to the Permanent Council (February 2006), para. 4.

516. HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007).

517. See the remarks on the standards relied by the HCNM in his work *infra* in this section.

518. See the provisions on the mandate of the HCNM in the 1992 Helsinki Document, Chapter II, para. 3. See also the remarks on the HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007).

519. These limitations are expressly mentioned in the provisions on the mandate of the HCNM in the 1992 Helsinki Document. See Chapter II, para. 5b and 5c. The exclusion of the terrorism-related questions from the HCNM's mandate derived particularly from the insistence of Turkey and the Great Britain that wished to exclude the possibility of the HCNM to consider such situations as the Kurds in Turkey and the case of Northern Ireland. Kemp (2001), p. 10.

520. Packer (2001), pp. 645–647.

Characteristic of the work of the HCNM is his role as an independent, impartial and co-operative actor. Another salient feature of the post is the condition of confidentiality, which is evident in all of the Commissioner's functions. The successful functioning of the HCNM requires the political support of the OSCE states, but independence allows the HCNM to operate without the approval of either of the OSCE political bodies consisting of the OSCE states and the state concerned. Impartiality signifies the HCNM's role as a third party to the situations he is engaged in. The co-operative aspect of the HCNM's work consists of consultations with and recommendations to governments of the OSCE states. The condition of confidentiality in the HCNM's work means that the Commissioner acts through quiet (or silent) diplomacy and is expected to assess the situation at hand and give his advice to governments and other actors in confidence rather than through public exposure.⁵²¹ Accordingly, the HCNM's detailed recommendations to governments are not public but strictly confidential. The HCNM regularly briefs the OSCE states through the OSCE Permanent Council, both formally and informally, and discusses the recommendations he has submitted to governments of the OSCE states with the Council. However, the HCNM's statements to the Permanent Council are normally general in nature and do not reveal specific details; the Commissioner's reports and communications primarily draw attention to worrying sights and developments that he deems to require the attention of the international community.⁵²²

With a view to assisting the governments of the OSCE states in addressing situations involving national minorities, the HCNM aims at establishing dialogue with the relevant parties, including authorities, national minority representatives and civil society, but also the international community. Dialogues with governments aim at putting forward recommendations – in face-to-face meetings or through written communications – that suggest ways and means to de-escalate tensions.⁵²³ Coun-

521. Confidentiality links to avoiding possible risk of escalation of tension that might be caused by the HCNM's involvement. It also encourages the parties directly involved to be more co-operative and forthcoming and willing to take more moderate positions than what they would take in public. HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007).

522. The HCNM reports directly only to the OSCE Chairman-in-Office on his assessments and visits. These strictly confidential reports outline the HCNM's assessment of the situation at hand, and the Commissioner may draw the Chairman's attention to issues which he considers require further action. *Ibid.* For the remarks on the HCNM's work in confidence, independently and with co-operation with various partners, see also the remarks in the HCNM statement to the Permanent Council (February 2006), paras 4 and 5.

523. The recommendations include proposals for legislation, legislative amendments, institutional reform or a change of practice as well as other measures to establish a political and participatory framework that serves to promote harmonious inter-ethnic relations. The recommendations may also include encouragement of bilateral co-operation between neighbouring states. HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007). For the remarks on dialogue sought by the HCNM and for the content of assistance for governments, see also the HCNM statement to the Permanent Council (February 2006), para. 5.

try visits are a principal aspect of the HCNM's work, one enabling him to keep informed about developments as well as to maintain a dialogue with the relevant parties.⁵²⁴ The HCNM draws information from a variety of sources, both governmental and non-governmental, in order to get as accurate a picture as possible of the situation under consideration and to enable him to discover the root causes of the problems at hand.⁵²⁵

In formulating his advice and recommendations to governments, the HCNM uses international human rights standards as a basis and relies on the international standards to which each state has agreed as his principal framework of analysis and the foundation of his specific recommendations.⁵²⁶ Consequently, in addition to the OSCE commitments, the HCNM uses the standards of the UN and the CoE.⁵²⁷ Recently the HCNM has stated that the CoE Framework Convention is the most important normative document in his work in addition to the 1990 Copenhagen Document of the OSCE.⁵²⁸ The HCNM has also both urged the states to ratify the CoE Framework Convention⁵²⁹ and underlined the importance of ensuring the inclusive implementation of this instrument.⁵³⁰ Whilst the HCNM uses the international human rights standards and norms as a starting point for his work, he is not tied by specific norms or standards in aiming at politically viable solutions. He formulates his advice first and foremost from a political and practical point of view, evaluating which measures might be the most appropriate in a given situation from the perspective of conflict prevention. Thus, the HCNM assesses each situation individually on its own merits and bases his recommendations on minority issues on that assessment.⁵³¹

In the course of his country-specific engagements, the HCNM has repeatedly had to consider certain issues, and these have prompted him to invite groups of

524. Ibid.

525. HCNM's address at Stanford University (2007), paras 28 and 29.

526. For the HCNM's remarks on the importance of human rights standards, including minority rights, among his tools in his efforts in the area of conflict prevention, see the HCNM's address at the HDIM (2006), para. 7.

527. HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007) refers to the importance of the 1990 Copenhagen Document of the OSCE as well as of the ICCPR, the ECHR and the CoE Framework Convention.

528. HCNM's address at Stanford University (2007), para. 40. The HCNM has also urged the authorities to ratify the CoE Language Charter. See e.g. the HCNM statement to the Permanent Council (November 2006), para. 11, addressing Georgia.

529. HCNM's address at Stanford University (2007), para. 41.

530. The HCNM has pointed out that he advises the OSCE states to avoid the exclusion of minority groups by refraining from entering restrictive declarations upon ratification of the Convention in particular with regard to the citizenship criterion. HCNM's address at the Strasbourg Seminar (2006), para. 13.

531. HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007). See also the HCNM's address at the New York Seminar (2006), para. 15.

independent experts to develop a number of *thematic Recommendations and Guidelines* to assist him in formulating his advice to governments. The Recommendations and Guidelines adopted to date on the HCNM's initiative concern the following questions: minority education and the use of minority languages, both of which are viewed as particularly important for the maintenance and development of the identity of persons belonging to national minorities; the effective participation of national minorities in public life (in the governance of states); the use of minority languages as a vehicle of communication in the broadcast media; and the improvement of policing practices in multi-ethnic societies.⁵³² The Recommendations and Guidelines attempt to clarify in relatively straightforward language and build upon the content of minority rights and other international standards generally applicable in the situations in which the HCNM is involved. They also provide practical guidance for states seeking solutions to inter-ethnic problems, thereby also serving the HCNM's ultimate goal of conflict prevention.⁵³³ Due to the non-governmental origin of the thematic Recommendations and Guidelines, and due to the fact that they have not been accepted by the OSCE states through the OSCE decision-making mechanisms, they do not represent formal commitments on the part of the states. However, since the HCNM uses them as a point of reference in his work, i.e. he has included them in his "tool-box", the Recommendations and Guidelines acquire importance through the practical work of the Commissioner. It has been observed that, in fact, the general Recommendations and Guidelines represent a new source of valuable reference points with which policy- and law-makers in all the OSCE states can accommodate diversity in their respective societies.⁵³⁴

As part of his conflict prevention policy, the HCNM also provides support to governments through concrete programmes and projects, often on the questions addressed in the thematic Recommendations and Guidelines.⁵³⁵ In recent years, the

532. See the Hague Recommendations regarding the Education Rights of National Minorities (1996), the Oslo Recommendations Regarding the Linguistic Rights of National Minorities (1998), the Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999), the Guidelines on the Use of Minority Languages in the Broadcast Media (2003), and the Recommendation on Policing in Multi-Ethnic Societies (2006). In addition to these five sets of Recommendations and Guidelines, there also exists a set of Guidelines to Assist National Minority Participation in the Electoral Process from the year 2001, which was developed by the ODIHR in conjunction with the International Institute for Democracy and Electoral Assistance and the Office of the HCNM in view of elaborating the 2001 Lund Recommendations and to give better effect to those Recommendations. These Guidelines address only selected parts of the Lund Recommendations, in practice those that relate to the work of the ODIHR in respect of elections. See the Guidelines on Participation (2001), Introduction, paras 1–3.

533. HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007).

534. Packer (2000), pp. 42 and 44.

535. These programmes and projects concern e.g. education, language training, legal advice, TV and radio broadcasting in minority languages, and the training of civil servants, police and journal-

HCNM has intensified his co-operation with the CoE,⁵³⁶ in addition to which he has developed close links with the European Commission, in particular the Commissioner for Enlargement and the Directorate-General dealing with the enlargement of the EU and membership negotiations with candidate countries.⁵³⁷

4.3.2 Groups and Questions Addressed

As already discussed above, the concept of “national minority” used in the OSCE minority commitments is not defined in the OSCE documents,⁵³⁸ but the references to ethnic, cultural, linguistic and religious identities in the OSCE commitments indicate that the groups that are relevant are those characterised by these features. As any general agreement on what constitutes a (national) minority is lacking both in the OSCE and elsewhere, the HCNM has not been eager to come up with any kind of a definition either. The approach of the HCNM is based on the remarks of the first person to hold the position, Max van der Stoel, who stated in 1993 that the existence of a minority is a question of fact, that to belong to a national minority is a matter of a person’s individual choice, that a minority is a group with linguistic, ethnic or cultural characteristics distinguishing it from the majority, and that a minority usually not only seeks to maintain this identity but also tries to give stronger expression to that identity.⁵³⁹ The subsequent Commissioners have relied on these observations on the characteristics linked to national minorities.⁵⁴⁰ The mandate of

ists on how to operate in a multi-ethnic environment. HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007). For the remarks on the projects initiated by the HCNM, see also the HCNM statement to the Permanent Council (February 2006), para. 5.

536. This is in line with the joint conclusions agreed by the OSCE and the CoE in spring 2005. HCNM statement to the Permanent Council (November 2005), para. 33.

537. Co-operation concerns essentially the 1993 Copenhagen criteria concerning the membership criteria of the EU, including human rights and respect for and protection of minorities. HCNM statement to the Permanent Council (November 2006), para. 31.

538. See the remarks *supra* in chapter 2.1.1.2.2.

539. Max van der Stoel put forth these remarks in a CSCE seminar on minorities held in Warsaw in 1993. He stated the following: “What is a minority? I do not pretend to improve on the work of many experts who over the years have not been able to agree on a definition, so I won’t offer you one of my own. I would note, however, that the existence of a minority is a question of fact not of definition. In this connection I would like to quote the Copenhagen Document of 1990 which is of fundamental importance to minorities’ issues within the CSCE. It states that quote To belong to a national minority is a matter of a person’s individual choice unquote. Even though I may not have a definition of what constitutes a minority, I would dare to say that I know a minority when I see one. First of all, a minority is a group with linguistic, ethnic or cultural characteristics which distinguish it from the majority. Secondly, a minority is a group which usually not only seeks to maintain this identity but also tries to give stronger expression to that identity.” HCNM’s address at the HD Seminar (1993), paras 3 and 4.

540. HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007).

the HCNM covers primarily *minority situations of an inter-ethnic character*, and in practice the focus of his work has been on tensions and frictions defined by differences in ethnicity, language or religion.⁵⁴¹

In his work the HCNM has been involved in numerous minority-related situations in the OSCE area, and his focus has been on situations involving national minorities in the Baltic states, in the OSCE states in Central, Eastern and South-Eastern Europe, and in the Caucasus and Central Asia.⁵⁴² In a number of situations, the HCNM has worked with the states that became independent after the collapse of the Soviet Union, which also resulted in the emergence of a number of new, even substantial, minorities in these new states. In these situations nation- and state-building that has involved building a new national identity has been among the fundamental issues affecting the approaches to minorities in the states.⁵⁴³ It is also characteristic of the situations considered by the HCNM that a national minority is a “kin-minority” having a “kin-state” that has expressed its interest in the minority situation.⁵⁴⁴ Thus, the HCNM’s involvement has focused primarily on those situations that involve persons belonging to national/ethnic groups that constitute the numerical majority in one state but a numerical minority in another, thereby engaging the interest of governmental authorities in each state and constituting a potential source of inter-state tension if not conflict.⁵⁴⁵ Among the situations figuring prominently on the agenda of the HCNM have been the Russian-speaking minorities in the OSCE states, in whose situation the Russian government has shown an active interest,⁵⁴⁶ and the interest of Hungary in assisting Hungarians in its neighbouring countries to preserve and develop their Hungarian culture and language.⁵⁴⁷

541. HCNM’s address at Stanford University (2007), paras 5 and 12. It is also worthy of note that the Recommendations on Policing in Multi-Ethnic Societies mention that in the view of the experts who compiled the Recommendations, the term “national minorities” encompasses a wide range of minority groups, including religious, linguistic and cultural as well as ethnic minorities, and that in principle, the Recommendations are relevant for all of those groups. See the Introduction to these Recommendations, para. 6.

542. In recent years the HCNM has been involved in the minority situations e.g. in Estonia, Latvia, Hungary, the Slovak Republic, Romania, Croatia, FYROM, Serbia and Montenegro, Kosovo, Turkey, Georgia, Moldova, Ukraine, the Russian Federation, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan. See the HCNM statements to the Permanent Council since March 2002.

543. HCNM’s address at Stanford University (2007), para. 5.

544. For the remarks on kin-minorities, see e.g. the HCNM statements to the Permanent Council (July 2003), para. 14, (May 2005), para. 16, and (November 2006), para. 7.

545. Lund Recommendations on Participation (1999), Introduction, para. 2.

546. This is the case e.g. with respect to Estonia, Latvia, Moldova and Ukraine.

547. For the remarks on the HCNM’s engagement in Hungary and the question of the Russian-speaking minority in Latvia and Estonia, see e.g. the HCNM’s address at Stanford University (2007), paras 51–55.

Although the HCNM has often referred to citizens,⁵⁴⁸ in general he has not considered citizenship to be a precondition for his involvement in minority situations.⁵⁴⁹

It may be seen that *the Roma* have received some specific attention from the HCNM.⁵⁵⁰ This attention to the Roma by the HCNM, into whose priority mandate as an inter-state conflict prevention instrument the situations facing the Roma often do not fall, serves to highlight the persistent plight of Roma in the OSCE area. The HCNM has paid attention to the fate of Roma, for instance, by preparing two substantial reports on them, in 1993 and 2000.⁵⁵¹ Subsequently, he has pointed out that he continues to follow developments related to the Roma in general and to highlight the relevant issues within the context of his mandate. The HCNM has also stated his intention to carry out his responsibilities as articulated under the OSCE Action Plan on Roma.⁵⁵² In recent years, the HCNM has also drawn some unprecedented attention to “new” minorities, in particular when he has expressly addressed the issue of integration. This is discussed below in chapter 4.3.3.2.

As regards *the gender perspective* in the work of the HCNM, it may be observed that whilst he has given some specific attention to the situation of Romani women,⁵⁵³ the perspective has otherwise been virtually absent from the statements and recommendations he has issued.⁵⁵⁴ Although the thematic Recommendations and Guidelines prepared for the use of the HCNM do contain a few remarks on the need to pay attention to the situation of women, the documents cannot be regarded as being forthcoming where the gender perspective is concerned.⁵⁵⁵ Against this

548. See e.g. the HCNM statements to the Permanent Council.

549. E.g. in the case of Estonia and Latvia the situation of non-citizens and stateless persons, and in particular those belonging to the Russian-speaking populations, has been the focus of the HCNM's attention. The importance of the naturalisation of these persons has also been among the issues stressed by the HCNM.

550. As discussed, the Roma have been expressly considered in the context of the OSCE anti-racism action, not in that of national minorities. See the remarks *supra* in chapters 2.1.1.2.2 and 2.2.1.2.

551. In these reports the HCNM has paid particular attention to discrimination and racial violence, education, participation, and living conditions, and has strongly underlined the importance of the effective participation of Roma particularly in the elaboration and implementation of public policies concerning Roma. HCNM report on Roma (2000). It is also notable that the HCNM's recommendations in 1993 contributed to the establishment of the CPRSI at the ODIHR. See also the remarks *supra* in chapter 2.2.3.1. For the remarks on the Roma-related activities of the HCNM, see also Pentikäinen (2004b), p. 84.

552. HCNM statement to the Permanent Council (December 2003), para. 24. For the OSCE Action Plan on Roma, see also the remarks *supra* in chapter 2.2.1.2.

553. The HCNM has drawn some specific attention to the situation of Romani women e.g. in his reports on Roma. See also Pentikäinen (2004b), p. 84.

554. This observation is based on the HCNM's statements and (general) recommendations made public and thus available for the research at hand by October 2007.

555. The Explanatory Note to the Lund Recommendations on Participation (1999) makes a note on the need to respect the human rights of women. See Part I, para. 3. The Lund Recommendations are also the only set of thematic Recommendation which mention the CEDAW.

background, the HCNM's recent statement on ensuring that the gender perspective is mainstreamed in HCNM programmes and projects is worth particular note. In this statement the HCNM not only remarks that applying a gender perspective and involving all stakeholders – women as well as men – contributes to the effectiveness of efforts to ease tensions and reconcile differences, but also refers to implementing the provisions of the OSCE Action Plan for the Promotion of Gender Equality.⁵⁵⁶ Regarding other dimensions, at times – but not openly⁵⁵⁷ – the HCNM has paid some attention to dimensions such as age. For instance, he has drawn attention to the need to take the age of persons into account in naturalisation requirements.⁵⁵⁸ The remarks made with respect to education, for their part, often have implications for children and the young.

The *issues* that have frequently been the focus of the HCNM's attention are reflected in the sets of thematic Recommendations and Guidelines discussed above and in the concrete programmes and projects initiated by the HCNM.⁵⁵⁹ The HCNM's advice to governments has often concerned such issues as constitutional law, minority-related legislation, the political and institutional frameworks and practices in areas such as education, language policy, media broadcasting, minority participation in public life, and policing in ethnically, linguistically and culturally diverse societies.⁵⁶⁰ A sense of exclusion and alienation from society at large or a sense of threat to one's (cultural, linguistic, religious or traditional) identity may create tensions warranting the HCNM's attention.⁵⁶¹ Accordingly, the considerations that have come to the fore include ensuring equal opportunities for persons belonging to minorities to participate in the political, social, economic and cultural life of the state in which they live and at the same time respecting their ethnic, cultural, linguistic and religious identities.⁵⁶² Questions of national unity and even national

The Guidelines elaborating the Lund Recommendations contain a note on the importance of the participation of women, and the Explanatory Note to the Recommendations on Policing (2006) makes a couple of notes on women. See the references to these remarks *infra* in chapter 4.3.3.1

556. HCNM statement to the Permanent Council (February 2006), para. 20. For the OSCE Action Plan for the Promotion of Gender Equality, see also the remarks *supra* in chapter 2.1.3.2.

557. This observation is based on the HCNM's statements and recommendations made public by October 2007.

558. The HCNM has cited the issue of age e.g. in the context of naturalisation of non-citizens in Latvia, especially with respect to the naturalisation requirements containing the written language test. See the HCNM statement to the Permanent Council (June 2006), para. 29.

559. See also the remarks *supra* in chapter 4.3.1.

560. HCNM's address at the New York Seminar (2006), para. 13.

561. HCNM's address at Stanford University (2007), para. 5.

562. HCNM's address at the HDIM (2006), para. 7. In this address the HCNM also refers to the question of "the right to be different". See also the remarks on this "right" *supra* in chapter 2.1.4.2.

identity have also been at the centre of the HCNM's work, which focusses primarily on finding a balance between strengthening the national identity and unity of states and protecting the rights and identity of the minorities living in them.⁵⁶³ The HCNM has also often cited the issue of (national) cohesion.⁵⁶⁴

The need to recognise the value of diversity has been among concerns underscored by the HCNM and, as will be discussed below, respect for diversity has become the main thrust in the HCNM's approach to integration. The HCNM has also called for respect for the human dignity and rights of all persons⁵⁶⁵ and for human rights.⁵⁶⁶ He has observed that safeguarding respect for human rights is one of the most fundamental and effective means of preventing conflict.⁵⁶⁷ Furthermore, the importance of dialogue and good governance,⁵⁶⁸ as well as the issue of citizenship,⁵⁶⁹ often come to the fore in the HCNM's statements and recommendations.

Whereas the HCNM has a rather clear role in the area of national minority questions, it is worthy of note that he has also been designated a role with respect to the issues of racism and other forms of intolerance.⁵⁷⁰ Despite this aspect of his mandate, and although the HCNM has addressed the topic of racism and other forms of intolerance generally – for instance, at the OSCE conferences on these is-

563. HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007). For the remarks on state-building and inclusive national communities, see e.g. the HCNM statement to the Permanent Council (July 2004), para. 14.

564. For the remarks on the efforts to build a common national identity and increase the national cohesion of the country, see the HCNM statement to the Permanent Council (December 2003), para. 7, addressing Tajikistan. The question of cohesion has been often raised by the Commissioner since the creation of the post of the HCNM.

565. HCNM's address at the HDIM (2006), para. 6.

566. HCNM statement to the Permanent Council (July 2004), para. 25.

567. HCNM's address at the HDIM (2006), para. 6.

568. For the remarks on good governance, see e.g. the HCNM's address at Stanford University (2007), para. 43.

569. The HCNM has paid attention to the acquisition of citizenship visibly e.g. in his engagement in Estonia and Latvia.

570. The role of the HCNM in the area of anti-racism was raised already at the time of the establishment of the post of the HCNM by inserting the first reference to it in the document adopted by the 1992 Stockholm meeting of the Council of Ministers. At the 1993 Rome meeting of the Council of Ministers the participating states invited the HCNM, in the light of his mandate, to pay particular attention to all aspects of aggressive nationalism, racism, chauvinism, xenophobia and anti-Semitism. See the 1993 Rome Document, Chapter X, para. 6. The Ministerial Council meeting of 2003 referred to the importance of the recommendations of the HCNM on education, public participation and language, and tasked the HCNM with ensuring an effective follow-up to the relevant provisions of the decision of the Council. Ministerial Council Decision No. 4/03 on Tolerance and Non-discrimination (2003), paras 10 and 16. For the tasks given to the HCNM in the area of anti-racism, see also Pentikäinen (2004b), pp. 83–85 and 91.

sues and in his speeches and statements addressing national minorities⁵⁷¹ – it may be observed that so far the HCNM has not been very willing to link the questions of racism and intolerance to his mandate regarding national minorities. Among the situations in which the HCNM has explicitly addressed the issues of racism (including racial violence and racially motivated attacks) is the case of the Roma.⁵⁷² The Commissioner has focussed his attention principally on extreme and/or violent forms of nationalism. Recently he has also mentioned that fostering the values of mutual respect and understanding has become more important as many societies are facing a struggle with xenophobia and racism.⁵⁷³ It appears that religion has not been very conspicuously addressed by the HCNM; however, the Commissioner’s attention to new and radical forms of religion affecting inter-ethnic stability deserves particular mention.⁵⁷⁴

While the HCNM has pointed out that there are no easy answers or simple solutions to how conflicts rooted in and driven by inter-ethnic tension and tensions between majority and minorities can be prevented from emerging and escalating, he has remarked that inter-ethnic conflict is avoidable and that there are a variety of instruments and techniques that can be applied to different situations.⁵⁷⁵

4.3.3 The HCNM and the Issue of Integration

4.3.3.1 Integration and National Minorities

As discussed in this research, the OSCE commitments pertaining to national minorities contain no express provisions on integration.⁵⁷⁶ Neither do they refer to such questions as marginalisation or social exclusion. Despite this “silence” in the OSCE norms, the HCNM has often used the term “integration”. In fact, on the basis of the statements and speeches the HCNM has made in the course of his work, it may be seen that the issue of integration concerning (persons belonging to)

571. For the remarks on the importance of attention to prejudice, intolerance, racism and xenophobia, see the HCNM statement to the Permanent Council (June 2002), para. 22. The HCNM has underlined promoting understanding and breaking down barriers. See the HCNM statement to the Permanent Council (July 2004), para. 30. It is also noteworthy that the thematic Recommendations and Guidelines prepared to support the work of the HCNM make some linkages between national minority issues and the need for tolerance. See e.g. the remarks in the Hague Recommendations on Education (1996) *infra* in chapter 4.3.3.1.

572. This was also pointed out to the author of this research when she interviewed the advisors of the HCNM on the topic of anti-racism in the activities of the HCNM in August 2002 at the HCNM’s office in The Hague.

573. HCNM’s address at Stanford University (2007), para. 48.

574. HCNM statement to the Permanent Council (July 2003), para. 23, addressing Kyrgyzstan.

575. HCNM’s address at Stanford University (2007), paras 61 and 62.

576. See the remarks *supra* in chapter 2.1.1.2.2.

national minorities has been on the HCNM's agenda since the beginning of the Commissioner's functions.⁵⁷⁷ The HCNM has often spoken in terms of "integrating diversity",⁵⁷⁸ and *the concept of "integration with respect for diversity"* (or "integration respecting diversity") has emerged as the main thrust in the HCNM's approach to integration as well as a prominent aspect of his conflict prevention activities in general.⁵⁷⁹ At the heart of this approach lies the idea that states need to encourage minority *participation* in the political, social, economic and cultural life of mainstream society with a view to developing *a sense of belonging* to and having a stake in society at large, while at the same time *protecting the rights of minorities* to maintain an identity of their own that includes their culture, language and religion.⁵⁸⁰ The HCNM has also observed that in the situations under his consideration he tries to find a fair balance between the promotion and protection of minority rights and policies of integration⁵⁸¹ – a task he has noted as being far from easy.⁵⁸² The HCNM has also pointed out that the CoE Framework Convention, which expressly refers to integration, is the most important document for him in this effort.⁵⁸³

The approach of "integration with respect for diversity" emphasises the importance of state policies aimed at supporting the integration of national minorities, as distinct from forced assimilation.⁵⁸⁴ "Integration with respect for diversity" is observed to entail both *the duty of the state* to promote voluntary integration of minorities on the basis of equality and non-discrimination and *the responsibility of persons belonging to minorities* to support and co-operate with the integration policies of the

577. See the HCNM's remarks in the first HDIM of 1993 when the HCNM addressed the questions of communication, participation and integration, and noted integration entailing the maintenance of the separate identity of a minority, but also efforts on the part of the members of the minority to integrate e.g. by learning the language of the majority and by showing loyalty towards the state they are living in. The HCNM also referred to unacceptable policies of forced assimilation, deportation and ethnic cleansing. HCNM's intervention at the HDIM (1993), paras 21–23.

578. See e.g. the HCNM's address at the Locarno Conference (1998) with the title of "The Role and Importance of Integrating Diversity". For the remark that the concept of integrating diversity or integration with respect for diversity has long been central to the HCNM's approach to his mandate, see the Address by the OSCE HCNM Director at the HDIM (2006), para. 11.

579. HCNM statements to the Permanent Council (February 2006), para. 17, and (November 2006), para. 35. See also the remarks on the HCNM website at <http://www.osce.org/hcnm> (visited on 19 April 2007).

580. Cover note by the HCNM on "Integration Policies" (2006), para. 5. See also the HCNM statement to the Permanent Council (November 2006), para. 35.

581. HCNM's address at Stanford University (2007), para. 35.

582. HCNM's address at the Strasbourg Seminar (2006), para. 9.

583. *Ibid.*, para. 11. The HCNM also refers to the AC's Commentary on Education (2006) relating to the CoE Framework Convention and its role when the HCNM is addressing the issues concerning education. See para. 24. See the remarks on this commentary *supra* in chapter 4.1.

584. HCNM's address at Stanford University (2007), para. 36.

state, primarily by learning the state language and obeying the law.⁵⁸⁵ Furthermore, with reference to integration, whilst he has referred to the creation of a multicultural society in which all cultures are valued and appreciated, the Commissioner has also stated that certain *basic values*, such as respect for human rights – including the rights of children and women – tolerance, non-discrimination and the rule of law should be maintained.⁵⁸⁶ The HCNM has pointed out that a carefully designed policy of integration offers a way to ensure human rights.⁵⁸⁷

Whilst “integration with respect for diversity” has become the overarching concept in the work of the HCNM, it may be observed that the HCNM has used the term “integration” in somewhat different connections. For instance, he has referred to the (full) integration of minority communities within/into society,⁵⁸⁸ integration of national minorities into the state/country,⁵⁸⁹ the social and cultural integration of different groups into society,⁵⁹⁰ social or societal integration,⁵⁹¹ the integration of a region (and its population) into the (mainstream) society (or state),⁵⁹² integration of a minority into the state’s political, social and cultural life,⁵⁹³ integrating the rights of persons belonging to national minorities with the needs of the majority,⁵⁹⁴ national integration,⁵⁹⁵ integration into the local community,⁵⁹⁶ civil or civic inte-

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585. Address by the OSCE HCNM Director at the HDIM (2006), para. 11. The HCNM has noted that in exchange for respect by the state for the rights of the minority to maintain their culture, language and religion and for opportunities for them to participate fully in political and economic life, the state can expect their loyalty and responsibility. See the HCNM statement to the Permanent Council (July 2004), para. 25. For integration respecting diversity involving rights and responsibilities for the state, society as a whole (including the majority) and persons belonging to national minorities, see also the HCNM’s address at Stanford University (2007), para. 36.
586. HCNM’s address at the OSCE Economic Forum (2005), para. 16.
587. HCNM’s remarks at the Bishkek Round Table (2006), para. 5.
588. HCNM statements to the Permanent Council (March 2004), para. 31, addressing Estonia and Latvia, and (June 2006), para. 24, addressing Moldova.
589. HCNM statement to the Permanent Council (October 2004), para. 2, addressing Georgia.
590. HCNM statement to the Permanent Council (June 2002), para. 22.
591. For social integration, see the HCNM statement to the Permanent Council (October 2002), paras 19 and 22; for societal integration, see the HCNM statement to the Permanent Council (June 2006), para. 24, addressing Moldova.
592. HCNM statement to the Permanent Council (June 2006), paras 4 and 24, addressing Georgia and Moldova.
593. HCNM statement to the Permanent Council (November 2005), para. 23, addressing Georgia.
594. HCNM statement to the Permanent Council (December 2003), para. 3, addressing Turkmenistan.
595. HCNM statement to the Permanent Council (May 2005), paras 4, 6, 7 and 9, addressing Kyrgyzstan, Turkmenistan, Kazakhstan, and Tajikistan.
596. HCNM statement to the Permanent Council (December 2003), para. 12, addressing the Russian Federation.

gration,⁵⁹⁷ civil and social integration of persons from all the ethnic communities within the state,⁵⁹⁸ and integration of national minorities in areas of administration, judiciary, police and education.⁵⁹⁹ This list of somewhat different perspectives on or areas of integration may be seen in the light of a consideration underlined by the HCNM, namely, that integration in various countries requires paying attention to the specific situation of each country. Accordingly, he has highlighted slightly different aspects of integration depending on the country at hand.

Whilst the issue of integration has been mentioned in the HCNM's individual recommendations to governments, the concept of "integration with respect for diversity" has been elaborated upon in a series of thematic Recommendations and Guidelines prepared for the use of the Commissioner⁶⁰⁰ discussed above. These documents include a number of express remarks on integration.⁶⁰¹

*The Hague Recommendations regarding the Education Rights of National Minorities (1996)*⁶⁰² often address the sensitive issue of minority education,⁶⁰³ and particularly minority language education in various educational contexts, which also highlights the importance attached to the language issue. The Recommendations consider the right of persons belonging to national minorities to maintain their identity and associate this right with a proper knowledge of their mother tongue acquired during the educational process. Additionally, they identify a responsibility to integrate into the wider society of persons belonging to national minorities and link this particularly to the acquisition of a proper knowledge of the state language.⁶⁰⁴ While multi-

597. For civil integration, see the HCNM statement to the Permanent Council (June 2006), para. 3, addressing Georgia; for civic integration, see the HCNM statement to the Permanent Council (November 2006), para. 12, addressing Georgia.

598. HCNM statement to the Permanent Council (July 2004), para. 25, containing remarks on the HCNM's activities in the field of education.

599. HCNM statement to the Permanent Council (June 2006), para. 18, addressing Serbia.

600. Cover note by the HCNM on "Integration Policies" (2006), para. 6. The HCNM has pointed out that the concept of "integration respecting diversity" is the central thread binding all the thematic Recommendations. HCNM's Address at the OSCE Economic Forum (2005), para. 2. See also the HCNM statement to the Permanent Council (February 2006), para. 18.

601. Among other things, they put forward the need to integrate all persons, including those belonging to national minorities in civil society. See the Hague, Oslo and Lund Recommendations and the Guidelines on the Use of Minority Languages in the Broadcast Media, and the Introductions to all these documents, paras 6, 9, 7 and 10, respectively.

602. The HCNM has pointed out that, in addition to the CoE Framework Convention, the Hague Recommendations are the most practical source of guidance for his work. HCNM's address at the Strasbourg Seminar (2006), para. 14.

603. Explanatory Note to the Hague Recommendations, "Final remarks", para. 1.

604. Para. 1. See also the Explanatory Note to the Hague Recommendations, "General introduction", para. 7.

lingualism by the national minorities is connected to their integration,⁶⁰⁵ members of the majority are encouraged to learn the languages of the national minorities living within the state, this being viewed as contributing to the strengthening of tolerance and multiculturalism.⁶⁰⁶

The Hague Recommendations also establish a connection between integration and the acquisition of a sound knowledge of the society, with the promotion of tolerance and pluralism considered an additional, important component of this dynamic.⁶⁰⁷ Moreover, the Recommendations discuss the right of minorities to integrate into and participate in the wider national society.⁶⁰⁸

The Hague Recommendations note that in order to advance understanding and tolerance, as well as integration, the intellectual and cultural development of majorities and minorities should not take place in isolation.⁶⁰⁹ Consequently, the document cites the importance of intercultural education and of ensuring that the general compulsory curriculum includes the teaching of the histories, cultures and traditions of their respective national minorities.⁶¹⁰ Furthermore, the Recommendations underline the fundamental principles of equality and non-discrimination,⁶¹¹ as well as the need on the part of states to approach minority education rights in a proactive manner, including, where required, the adoption of special measures to actively implement minority language education rights.⁶¹² The importance of minority participation in developing and implementing policies and programmes related to minority education is also stressed.⁶¹³

*The Oslo Recommendations regarding the Linguistic Rights of National Minorities (1998)*⁶¹⁴ emphasise the importance of languages, particularly the importance of the mother tongue for the identity of individuals. The Recommendations note the func-

605. Explanatory Note to the Hague Recommendations, "Minority education at primary and secondary levels", para. 2.

606. Para. 19.

607. Explanatory Note to the Hague Recommendations, "General introduction", para. 7.

608. *Ibid.*, "Minority education at primary and secondary levels", para. 1.

609. *Ibid.*, "Minority education at tertiary education", para. 3.

610. Para. 19.

611. Para. 2.

612. Para. 4.

613. Paras 5–7 and 20. See also the Explanatory Note to the Hague Recommendations, "Decentralisation and participation", paras 1–3.

614. It is also pointed out that although the Recommendations refer to the use of language by persons belonging to national minorities, the thrust of the Recommendations and the international instruments from which they derive could potentially apply to other types of minorities. Introduction, para. 12.

Regarding linguistic issues, also the HCNM Report on Linguistic Rights (1999) is worthy of note. This report is based on a survey carried out by the HCNM on the linguistic rights of persons belonging to national minorities in the OSCE states.

tion of language both as a personal matter closely connected with identity⁶¹⁵ and as an essential tool of social organisation that in many situations becomes a matter of public interest. The use of languages is observed to bear on numerous aspects of a state's functioning, and in a democratic state committed to human rights, the accommodation of diversity becomes an important matter of policy and law; failure to achieve the appropriate balance may be a source of inter-ethnic tensions.⁶¹⁶

The Oslo Recommendations address the use of the language of national minorities in a number of contexts, such as names, religious ceremonies, community life and NGOs, the media, economic life, administrative authorities and public services, independent national institutions, judicial authorities and cases of the deprivation of liberty.⁶¹⁷ It is pointed out that the use of minority languages “in public and in private” by persons belonging to national minorities is closely linked to education, and consequently a reference is made to the significance of the Hague Recommendations.⁶¹⁸ The Oslo Recommendations observe that in minority contexts, the practice of religion is often especially closely related to the preservation of cultural and linguistic identity.⁶¹⁹

In the practical work of the HCNM, activities in the field of education have been strongly emphasised, and in this connection the Commissioner has highlighted that education is closely associated with integration, promoting understanding, language teaching, and the promotion of contacts, inclusion and participation. Further, the Commissioner has remarked that activities in the field of education aim at the civil and social integration of persons from all the ethnic communities within a state – from the majority as well as national minorities – with a view to avoiding frictions which might lead to tensions and even conflict. Education is viewed as contributing to integration in a number of ways: by promoting understanding of other cultures and of the value of diversity in a multicultural society, as well as tolerance and respect for human rights; by developing the skills, particularly the linguistic skills, which successful participation in a multi-cultural society requires; and by promoting contacts between different groups.⁶²⁰ Consequently, the HCNM has cited the important role of education in spreading the positive values of societies and in understanding – even in enjoying – different cultures, languages and traditions and its links to responsible citizenship.⁶²¹

615. The Explanatory Note to the Oslo Recommendations states that language is one of the most fundamental components of human identity, and hence, respect for a person's dignity is intimately connected with respect for the person's identity and consequently for the person's language. General introduction, para. 1.

616. Introduction, para. 4.

617. Paras 1–21.

618. Explanatory Note to the Oslo Recommendations, para. 9.

619. *Ibid.*, para. 4.3 addressing the use of minority languages in the context of religion.

620. HCNM statement to the Permanent Council (July 2004), paras 11 and 25–29.

621. HCNM's Address at Stanford University (2007), paras 44 and 47–49.

The Lund Recommendations on the Effective Participation of National Minorities in Public Life (1999) address the important issue of participation. The basic premises of the Recommendations include the objective whereby good democratic government serves the needs and interests of all who live and reside under it and allows, encourages and supports all those subject to its decisions to participate in the making of those decisions.⁶²² The principle of good and democratic governance is often raised in the Recommendations.⁶²³ The document also underlines the importance of effective participation of national minorities in public life, with this viewed as an essential component of a peaceful and democratic society. The Recommendations aim to facilitate the inclusion of minorities within the state and to enable minorities to maintain their own identity and characteristics.⁶²⁴

The Lund Recommendations stress the importance of both the substance and process of participation. Involvement is noted to be the essence of participation – in terms of both the opportunity to make substantive contributions to decision-making processes and the effect of those contributions.⁶²⁵ Governmental authorities and minorities should pursue an inclusive, transparent, and accountable process of consultation in order to maintain a climate of confidence.⁶²⁶ The Recommendations also point out that in order to promote the effective participation of national minorities, governments often need to establish specific arrangements for these minorities.⁶²⁷ When specific institutions are established to ensure the effective participation of minorities in public life, they must respect the human rights of all those affected.⁶²⁸

622. Guidelines on Participation (2001), elaborating the Lund Recommendations, Part II, para. 6.

623. Introduction, para. 7, and Part I, para. 1. See also the Explanatory Note to the Lund Recommendations, Part I, paras 1.2 and 1.4. For the remarks on good governance and democratic governance, see also Part II, paras 6.2 and 13, and Part III, para. 16.

The objective of good and democratic governance is observed to point to serving the needs and interests of the whole population, thus concerning governments seeking to ensure the maximum opportunities for contributions from those affected by public decision-making. Introduction, para. 7.

624. Part I, para. 1.

625. Part II, para. 6, and Explanatory Note, Part II, para. 6.2.

626. Part I, para. 5. According to the Explanatory Note to the Lund Recommendations, since good governance is not only of the people but also for the people, its processes should always be inclusive of those concerned, transparent for all to see and judge, and accountable to those affected. Only such processes will inspire and maintain public confidence. Inclusive processes may comprise consultation, polling, referenda, negotiation and even the specific consent of those directly affected. Decisions resulting from such processes are likely to inspire voluntary compliance. Part I, para. 5.1.

627. Part I, para. 1.

628. Part I, para. 3. The Explanatory Note the Lund Recommendations notes that when specific institutions are established to ensure the effective participation of national minorities in public life, this must not be at the expense of others' rights. All human rights must be respected at all times, including by such institutions which may be delegated authority by the state. The importance to pay attention to the case of "minorities within minorities", especially in the territorial context, as well as respecting the human rights of women, including

Furthermore, the Lund Recommendations take up important questions related to the identity of individuals and self-identification. It is pointed out that individuals identify themselves in numerous ways in addition to their identity as members of national minority.⁶²⁹ Additionally, the Recommendations refer to the role of the media, mentioning that the state should encourage the public media to foster intercultural understanding and address the concerns of minorities.⁶³⁰

The Guidelines on the Use of Minority Languages in the Broadcast Media (2003) consider access to the media and the possibility to impart and receive information by persons belonging to national minorities. The Guidelines mention the values of pluralism and tolerance and underline the principles of good and democratic governance. The purpose of the Guidelines is linked to the inclusion, accommodation, and integration of the range of express demands and existing diversity in the broader society, with these aims noted as maximising and contributing to social cohesion.⁶³¹

The central message of *the Recommendations on Policing in Multi-Ethnic Societies (2006)* is that good policing in multi-ethnic societies is dependent on the establishment of a relationship of trust and confidence, built on regular communication and practical co-operation between the police and minorities. It is pointed out that such a relationship benefits all parties: the minorities benefit from policing which is more sensitive to their concerns and more responsive to their requirements for personal protection and access to justice; the police benefit from greater effectiveness resulting from good communication and co-operation; and the state benefits from both the integration of minorities and the greater effectiveness of its policing. The

freedom from discrimination, is expressly mentioned. The Explanatory Note refers to paras 33 and 38 of the 1990 Copenhagen Document of the OSCE, art. 20 of the CoE Framework Convention, and art. 7 of the CEDAW. Part I, para. 3.

629. Part I, para. 4. The Explanatory Note refers to an individual's freedom to identify oneself as one chooses being necessary to ensure respect for individual autonomy and liberty. Individual may possess several identities, and in open societies with increasing movement of persons and ideas, many individuals have multiple identities which are coinciding, coexisting or layered, reflecting their various associations. Identities are not based solely on ethnicity, nor are they uniform within the same community; they may be held in different members in varying shades and degrees. Part I, para. 4.2.

630. Part I, para. 5. The Explanatory Note remarks that inclusive processes require conditions of tolerance. A social and political climate of mutual respect and equality needs to be assured by law and also taught as a social ethic shared by the whole population. The media is noted to have a special role in this regard. A reference is made to art. 6.1 of the CoE Framework Convention. Part I, para. 5.3.

631. Introduction, para. 11. The operative parts of the Guidelines address e.g. the questions of freedom of expression, cultural and linguistic diversity, protection of identity of all persons (including persons belonging to national minorities), equality and non-discrimination, developing effective policy to address the use of minority language(s) in the broadcast media, regulating the broadcast media, and the promotion of minority languages in the area of broadcasting.

Recommendations provide a practical way forward for states seeking to integrate minorities and at the same time develop professional service-oriented community policing.⁶³²

The General Principles incorporated in the Recommendations call for states to adopt policies that clearly recognise the importance of policing for inter-ethnic relations. These policies should form part of wider policies and programmes to promote the integration of minorities at the national and local levels.⁶³³ Stress is put on the importance of having the composition of the police reflect the diversity of population and on the public image of the police as an ethnically representative body, these two considerations in turn having an impact on promoting integration of minorities through their participation in the public life.⁶³⁴ The Recommendations propose that the police should take a proactive role in communicating and co-operating with minorities and in building confidence. Especially at the local level, police should co-operate closely with other public authorities to ensure that their actions to prevent and manage inter-ethnic conflict are co-ordinated with wider action to promote the integration of minorities and to build a successful multi-ethnic society.⁶³⁵ The role of minorities is to maintain a readiness to communicate and co-operate with the police for the purpose of increasing community safety and access to justice.⁶³⁶ Additionally, the Recommendations underline the importance of human rights,⁶³⁷ make

632. Introduction, para. 9.

633. Part I, para. 1.

634. Part II, para. 4. The Explanatory Note to the Recommendations states that equitable representation of minorities in the police organisation is important for several reasons, including as a way of promoting integration of minorities through their participation in the public life of the state and its institutions (as stipulated in the Lund Recommendations). Part II, under para. 4.

635. Part VI, paras 21 and 23.

636. Part IV, paras 12 and 14. The Explanatory Note states that minorities can themselves contribute to community safety and access to justice by promoting awareness of rights and responsibilities of their members under the law, by providing advice and support for persons who are victims of crime, by encouraging civic participation in activities relating to community safety and policing, and by working to promote the interest of and fair treatment for members of their communities in matters relating to policing and justice. It is also underlined that it is essential that minorities, or particular groups within them, do not take justice into their own hands, and that all members of minorities have unrestricted access to their legal rights and the justice system of the state in general. It is particularly important that those women in minority communities, who may face gender discrimination or domestic violence, are not prevented by internal community structures from having access to their legal rights and the justice system. Part IV, para. 14.

637. Part I, para. 1. The Explanatory Note refers to the importance of cultural and religious awareness, mediation and community relations skills, language training and training in human rights, including rights of persons belonging to national minorities. Part III, para. 8.

a note on community cohesion,⁶³⁸ and put forward critical remarks on the practice of “racial profiling”.⁶³⁹

While a number of the issues taken up in the thematic Recommendation and Guidelines are reflected in the HCNM’s statements, some of the concerns addressed in the latter are not necessarily clearly set out in the former. These include the HCNM’s remarks on the link between citizenship and integration;⁶⁴⁰ links between integration and increasing the rights of non-citizens, especially by granting them voting rights in municipal election;⁶⁴¹ an emphasis on both the right and duty of a state to promote national integration;⁶⁴² a note on encouraging the business community to become more involved in the (social) integration process;⁶⁴³ and observations on the need for an integration strategy that protects and promotes cultural diversity of the country, including a legal framework to protect minority rights, language training, and attention to educational curricula.⁶⁴⁴ Furthermore, the HCNM has pointed out that the successful implementation of integration policies requires support and understanding from those mainly affected by them.⁶⁴⁵ The Commissioner has also given some consideration to the issue of how co-operation amongst neighbouring states in the area of minority education could help to promote national integration and enhance regional stability.⁶⁴⁶

4.3.3.2 Integration and “New” Minorities

Some years ago, the HCNM announced his intention to explore in more detail the situation of the so-called “new” minorities and the issues of identity, belonging and inclusion.⁶⁴⁷ Subsequently, and responding to the specific calls made by the OSCE Parliamentary Assembly in 2004 and 2005, the Commissioner pointed out

638. Explanatory Note, Part VI, para. 23.

639. Part V, paras 16 and 19. The Explanatory Note refers expressly to the Romani groups who tend to be targets of European-wide racial profiling. Part V, under para. 16.

640. HCNM statements to the Permanent Council (December 2003), para. 12, addressing the Russian Federation, and (March 2004), para. 32, addressing Estonia and Latvia. In the latter statement the HCNM also mentions interference from outside and that it can complicate integration policies and weaken the interest in speeding up naturalisation. See para. 35.

641. HCNM statement to the Permanent Council (October 2004), para. 8, addressing Latvia.

642. *Ibid.*, para. 4.

643. HCNM statement to the Permanent Council (July 2003), para. 5, addressing Latvia.

644. HCNM statement to the Permanent Council (June 2002), para. 14, addressing Moldova. For the remarks on the integration programme, see also HCNM statement to the Permanent Council (July 2003), para. 10, addressing Estonia.

645. HCNM statement to the Permanent Council (March 2004), para. 32, addressing Estonia and Latvia.

646. HCNM statement to the Permanent Council (May 2005), para. 9, addressing Tajikistan.

647. Annual Report on OSCE Activities 2003, p. 138.

that he intended to look more closely at the relevance of the concept of “integration with respect for diversity” with respect to “new” minorities and, without prejudice to the mandate of the HCNM, to explore the applicability of the methods that the HCNM has developed over the years in situations involving these newer minority groups.⁶⁴⁸ In this connection, attention to both “new” minorities and the issue of integration was also noted to be the HCNM’s contribution to “the timely and interesting debate” on the issue of integration initiated by the Slovenian OSCE Chairmanship of 2005.⁶⁴⁹ The HCNM reacted to the call from the OSCE Parliamentary Assembly by commissioning a study on “new” minorities. This study, published in 2006,⁶⁵⁰ primarily contains information on different integration policies being applied with respect to “new” minorities in seven OSCE states with the aim of bringing together some useful lessons on the range of policy options available for dealing with challenges facing multi-ethnic societies.⁶⁵¹

The HCNM has stated that it is precisely the area of integration where comparisons between the methods of integration of “traditional” and “new” minorities are likely to be most fruitful. While the HCNM has emphasised that the conflict prevention aspect of his mandate generally points to giving greater priority in his work to “traditional” rather than “new” minorities, he has referred to the potential relevance of his recommendations based on the concept of “integration respecting diversity” in situations concerning “new” minorities.⁶⁵²

648. The OSCE Parliamentary Assembly passed a resolution during its winter session in 2004 calling the HCNM to initiate a study on policies on the integration of “new” minorities, and it repeated this invitation in 2005. HCNM statement to the Permanent Council (February 2006), paras 17 and 18.

649. HCNM statement to the Permanent Council (November 2005), para. 33. The Slovenian Chairmanship initiated a debate on integration and migration within the OSCE in which the HCNM (as well as the ODIHR) participated. See the Address by the OSCE HCNM Director at the HDIM (2006), para. 14. See also the remarks *supra* in chapter 2.1.1.2.2

650. The study, along with the HCNM’s own analysis, was presented to the OSCE Parliamentary Assembly in July 2006.

651. Cover note by the HCNM on “Integration Policies” (2006), para. 1. The study entitled “Policies on Integration and Diversity in Some OSCE Participating States” was carried out by the Migration Policy Group, and it covers seven OSCE states (Canada, Denmark, France, Germany, the Netherlands, Sweden and the United Kingdom). The study addresses the issues of non-discrimination, political participation, labour market integration, and access to education, health care and housing. It also examines policies that deal with the increasing ethnic, cultural and linguistic diversity of the societies concerned. In the states studied, effective equality policies, based on anti-discrimination backed up by active policies to promote inclusiveness are the cornerstone of integration policy. See also the remarks in the Address by the OSCE HCNM Director at the HDIM (2006), para. 17. For the remarks on the concept of “new” minorities, see the Cover note by the HCNM on “Integration Policies” (2006), para. 4.

652. HCNM statement to the Permanent Council (February 2006), para. 18. See also the HCNM’s address at the HDIM (2006), para. 8.

According to the HCNM, the boundaries between the integration of migrants and minorities are not always clear and the fundamental challenge which confronts states and governments is essentially the same with respect to both kinds of groups, namely, what policies should be adopted in order to manage diversity in ways that promote stability and prosperity and reduce the risk of tensions and social unrest.⁶⁵³ Established and “new” minorities have a great deal in common both in the problems they face and in the means of resolving these problems. Both are likely to be concerned about political, economic and social exclusion and about the maintenance of their own culture. In both cases, the solution is seen as lying in the integration of minorities into a multi-ethnic, multicultural society while respecting their right to maintain their own culture. The key issues to be dealt with, such as minority participation in political and economic life and education, are the same for both categories of groups.⁶⁵⁴

The HCNM has considered that the balanced approach he has underlined with respect to national minorities – and when he has discussed the concept of integration respecting diversity and in particular the need to focus on participation and the development of inclusive societies – is relevant for all diverse societies regardless of whether their diversity stems from relatively recent immigration or the historical multi-ethnic character of a state. The Commissioner has also stressed that this is not to suggest that there are simple “one size fits all” solutions, that there are no relevant differences between recent migrants and members of long-established minorities, or that their treatment should in all respects be identical.⁶⁵⁵ Whilst there are similarities in the situations of national minorities and “new” minorities, the HCNM has pointed to the existence of real differences as well, which the Commissioner has linked to his experience that tensions that may lead to conflicts most often arise in situations involving established minorities.⁶⁵⁶ It is also highlighted

653. Address by the OSCE HCNM Director at the HDIM (2006), Para. 13.

654. HCNM’s address at the OSCE Economic Forum (2005), para. 3.

The study on “new” minorities and integration commissioned by the HCNM also shows that immigrants and minorities are often significantly disadvantaged in terms of lower education standards, higher employment, lower political and public participation, poorer housing conditions and more health problems. These difficulties are often compounded by widespread prejudices in society about groups that are perceived as “different” or “foreign”. Therefore, there is the need first and foremost for an effective anti-discrimination policy. It is also noted that the key demand which persons belonging to different minority and migrant groups make, is to be treated in the same way as the majority, to have equal chances of getting jobs, and education, adequate housing and so on. See the Address by the OSCE HCNM Director at the HDIM (2006), para. 17.

655. Cover note by the HCNM on “Integration Policies” (2006), para. 5.

656. HCNM’s address at the OSCE Economic Forum (2005), para. 4. In this address the HCNM reminds about his mandate in the area of conflict prevention and clearly prefers to continue to look into the areas of his priorities where, according to the HCNM, risks of conflict are greatest.

that there are legal and practical differences between the integration of persons belonging to national minorities and the integration of migrants.⁶⁵⁷

The HCNM has observed that the study on “new” minorities and integration commissioned by him indicates parallels between the HCNM’s aim and approach and the aims and approaches followed by the countries examined. At the same time, the study reveals a wide variety of policies for conducting different aspects of integration policies, underlining the scope for exchanging experiences.⁶⁵⁸ The study also draws attention to a number of other trends in the debates on integration which could have implications for minorities as well as for migrants. Specifically, longstanding commitments to multiculturalism in some states are increasingly overshadowed by the need for shared values and means to promote community cohesion. It has been suggested that in formulating a response to these trends, it is worth bearing in mind the fundamental principles of the HCNM’s approach to integration, which are based on encouraging participation and a sense of belonging while respecting the right of all persons to maintain their culture, identity and traditions.⁶⁵⁹

In general, when the HCNM has discussed the policy of “integration respecting diversity” with respect to minority groups consisting of recent immigrants (“new” minorities), he has raised the issues of diversity, participation and the possibility to maintain and develop one’s own culture.⁶⁶⁰ He has remarked that, as in the case of national minorities, integration requires new minorities to share certain basic values with the majority such as tolerance, non-discrimination and respect for the law.⁶⁶¹ According to the Commissioner, a harmonious society does not require the imposition of common values on matters of day-to-day customs and behaviour, as long as fundamental human rights are respected, with these to include the rights of children and women.⁶⁶² Finally, it is also worthy of note that the HCNM has suggested refining the concept of integration, and, if possible, developing a set of principles which could be endorsed by the OSCE as a whole.⁶⁶³ In general, the subject of inte-

657. Address by the OSCE HCNM Director at the HDIM (2006), para. 13.

658. Cover note by the HCNM on “Integration Policies” (2006), Para. 6. The HCNM has reminded, on the basis of his own experience with national minorities, that every situation is different and that different approaches and solutions are possible. According to the HCNM, the study he commissioned on “new” minorities throws more light on the options and choices available for participating states with respect to combining integration and respect for diversity. See the HCNM statement to the Permanent Council (February 2006), para. 19.

659. Address by the OSCE HCNM Director at the HDIM (2006), para. 18.

660. HCNM’s address at the OSCE Economic Forum (2005), paras 19–21.

661. See also the remarks on basic values *supra* in chapter 4.3.3.1.

662. HCNM’s address at the OSCE Economic Forum (2005), para. 21.

663. The HCNM has suggested that the OSCE Economic Forum should endorse a recommendation on these issues. *Ibid.*, para. 22.

gration is viewed as being vitally important to societies and deserving further study and discussion.⁶⁶⁴

4.3.3.3 Summary of the HCNM's Remarks on Integration

One of the major points in the HCNM's remarks on integration is that the HCNM uses integration, and more specifically, "*integration with respect for diversity*" (or "integration respecting diversity") as an overarching concept in his activities pertaining to national minorities.⁶⁶⁵ This concept embodies an approach that emphasises minority participation in the political, social, economic and cultural life of mainstream society with a view to developing a sense of belonging to and having a stake in society at large and that at the same time protects the rights of minorities to maintain their own identity linked to their culture, language and religion. The HCNM has underlined *finding a fair balance* between the promotion and protection of minority rights and policies of integration, and has pointed out that the CoE Framework Convention is the most important document for him in this respect.

The series of thematic Recommendations and Guidelines developed for the use of the HCNM and containing provisions on *minority education, languages, participation* in public life, *use of minority languages* in the broadcasting media, and *policing* in multi-ethnic societies provide details on the central issues linked to the concept of "integration with respect for diversity". In general, the subject of minority education rights – particularly minority language education – and the issue of participation figure prominently in the activities of the HCNM. With reference to participation, the Commissioner has stressed the importance of both the substance and process of participation, discussed the importance of *good and democratic governance*, and linked effective participation of national minorities in public life to a peaceful and democratic society.

The other components considered relevant to the integration dynamic by the HCNM include the acquisition of a proper knowledge of *the state language* and a sound *knowledge of the society* by persons belonging to national minorities, as well as the promotion of *tolerance* and *pluralism*. The Commissioner has placed a great deal of emphasis on activities in *education*, an area that provides the central context for the promotion of understanding and contacts, language teaching, inclusion and participation. The HCNM has underlined the value of education based on multiculturalism and interculturalism.⁶⁶⁶

664. Address by the OSCE HCNM Director at the HDIM (2006), para. 19.

665. It is notable that the HCNM has used the term "integration" with a variety of emphases.

666. The HCNM has recommended to a number of states to assist national minorities in attaining bilingual/multilingual skills. Encouraging members of the majority to learn the languages of the national minorities living within the state is observed to contribute to the strengthening of tolerance and multiculturalism within the state.

Furthermore, the HCNM has discussed the role of *the media* in fostering intercultural understanding and addressing the concerns of minorities, and has linked cultural and linguistic diversity and protection of the identity of persons belonging to national minorities to promoting the use of minority language(s) in the broadcast media. Additionally, good policing in multi-ethnic societies is observed to contribute to avoiding and managing inter-ethnic conflicts and promote the integration of minorities at the national and local levels. The HCNM's integration-related observations also cite links between *citizenship* and integration, the importance of *dialogue* for integration, the role of the business community in the integration process, the need for an integration strategy that protects and promotes cultural diversity of the country, and support and understanding for integration measures from those mainly affected by them. In general, the HCNM has pointed out that integration in various countries requires paying attention to the specific situation of each country.

Characteristic of the HCNM's approach to integration is that it openly advocates *rights and responsibilities for various stakeholders*, i.e. the state, society as a whole (including the majority), and persons belonging to national minorities. And while the HCNM has referred to the creation of a multicultural society in which all cultures are valued and appreciated, he has also stressed the importance of safeguarding certain basic values, such as respect for human rights – including the rights of children and women – tolerance, non-discrimination, and the rule of law. The HCNM has pointed out that policies of integration, ensuring human rights, preventing conflicts, and the cohesion of societies are all interconnected.

Although the HCNM's focus has been on inter-ethnic minority situations involving national minorities, and has stressed that the conflict prevention aspect of his mandate directs his focus to “traditional” rather than “new” minorities, he has recently given some attention also to the latter. To date the most prominent and concrete contribution of the HCNM with respect to “new” minorities is the 2006 study addressing different integration policies being applied with respect to “new” minorities in seven OSCE states. The HCNM has also observed that the area of integration offers very fruitful comparisons indeed between the methods of integration of “traditional” (and established) and “new” minorities: these groups often face similar kinds of problems where exclusion and the maintenance of their distinct identities are concerned, and their host states, for their part, wrestle with the challenges of managing diversity and avoiding ethnic tensions and social unrest.

The HCNM has discussed the potential relevance of his recommendations for “new” minorities. The Commissioner has highlighted the applicability of the balanced approach he has employed in implementing the concept of “integration with respect for diversity” in which the issue of participation and the development of inclusive societies characterised by a sense of belonging are of prime importance. He has also stressed the importance of education. As in the case of national minorities, the HCNM has pointed out that every situation is different and that consequently

different approaches and solutions with respect to integration policies are possible. In this connection, he has also underlined respecting certain basic values such as tolerance and non-discrimination, respect for law, and fundamental human rights, including the rights of children and women.

Despite seeing similarities in the situations of “traditional” and “new” minorities, the HCNM has taken the view that the legal and practical differences between recent migrants and members of long-established minorities signify that the treatment of these groups may not be identical. The HCNM has linked these differences primarily to his experiences with tensions arising in situations involving established minorities, which in the Commissioner’s view are the ones that most often lead to conflicts.

4.4 Summary and Comparisons of the Approaches of the Bodies

4.4.1 Addressing the Same Kinds of Groups and Issues: Frequent References to Integration

All three bodies discussed in this chapter address the same kinds of issues, for example, equality and non-discrimination, identities,⁶⁶⁷ diversity and pluralism, languages, education, participation, tolerance, and the cohesion of society. They all have also frequently employed the term “integration” in the course of their work. When the bodies have looked into the (minority) situation in the same state, they have often considered the same groups.⁶⁶⁸ It is also worth noting that whilst the work of the AC is intrinsically linked to the CoE Framework Convention, this instrument is also among the documents that ECRI and the HCNM view as central to their work.

While a recurrent focus for all three bodies is the situation of various minorities characterised by ethnic, cultural, linguistic or religious features, their respective emphases have been influenced by their somewhat differing mandates. The AC’s focus has been on national minorities, which are the groups essentially addressed by the CoE Framework Convention. In addition, under article 6 of the Convention the AC has drawn attention to the groups not viewed as national minorities but that are groups with ethnic, cultural, linguistic or religious characteristics. In

667. In addition to frequently addressing identity of individuals or groups, the identity of state has also been touched upon by the bodies, by ECRI and the HCNM in particular.

668. All three bodies have considered e.g. the situation of the Russian-speakers in Estonia and Latvia.

the context of this provision, the Committee has increasingly considered persons of immigrant background, including refugees and asylum-seekers. ECRI for its part is a body expressly mandated to combat racism and other forms of intolerance, and it has adopted a very broad approach to minorities that has embraced both the “older”, i.e. more “traditional”, minorities and “new” minority groups that have emerged from recent immigration. ECRI has directed most of its attention to the situation of persons belonging to the latter groups. ECRI has also paid increasing attention to the vulnerable situation of undocumented migrants. Additionally, both the AC and ECRI have considered the situation of Jews, Muslims and indigenous peoples.

While his mandate focuses on the groups designated as national minorities, the HCNM has also been entrusted with tasks in the area of anti-racism action. The Commissioner’s role as an actor specifically looking into (national) minority situations having inter-state security implications necessarily directs his viewpoints to national minorities. Not being a supervisory body but, rather, an actor in conflict prevention, the HCNM provides advice to governments in concrete situations involving national minorities, in practice involving “kin-minorities” having “kin-states” that have expressed their interest in the situation of the focal minority; such situations constitute a potential source of inter-state tension or conflict in the OSCE area. Thus, the minority situations which the HCNM deals with primarily concern not only particular national minorities, but also the relations between the OSCE states.

In view of the differing mandates and roles of the bodies at hand, it is also worthy of note that although the mandates of both the HCNM and the AC concern national minorities, the groups dealt with by the two are not necessarily the same with respect to a particular state. Perhaps the most telling case on this point is the differing attention to Romani groups, whose situation has been frequently addressed by the AC but who have not received active attention from the HCNM, primarily because they lack of a “kin-state” and their situation thus does not bear on the prevention of inter-state tensions or conflict. Nevertheless, the HCNM has not totally neglected the Roma; his attention to their issues stems from concerns linked to the persistent plight of the Roma in the OSCE area. In recent years the HCNM has drawn some unprecedented attention to “new” minorities, an emphasis prompted by the increased attention given to the issue of integration within the OSCE more generally. However, the HCNM has stressed that the focus of his work is on inter-ethnic minority situations involving national minorities, and he has taken the view that the conflict prevention aspect of his mandate in particular directs his attention to “traditional” rather than “new” minorities.

Undoubtedly stemming in part from their different mandates, the three international bodies have placed differing emphases on somewhat varying aspects of the question of integration. As regards the groups that have been specifically considered in the framework of integration, it may be seen that although the AC has dealt with

the question of integration with respect to national minorities, most frequently it has discussed integration of Roma and persons of immigrant origin. While ECRI has taken the view that all minorities in a country should be taken into account in the area of integration, it has, like the AC, directed most of attention to the Roma as well as to persons with immigrant background. The HCNM, for his part, has conspicuously linked integration of national minorities to the concept of “integration with respect for diversity” (or “integration respecting diversity”). In spite of a certain reluctance on the part of the HCNM to consider “new” minorities in his work, the Commissioner has nevertheless pointed out that the concept of integration employed by him provides elements for methods to integrate persons belonging to these newer groups as well.

In general, whilst the HCNM has considered the issue of integration more or less since the establishment of the post, and has developed “integration with respect for diversity” as the overarching concept for his work, ECRI has made numerous specific references to elements which it views as important for the integration process. ECRI’s express remarks on integration are clearly more numerous than those of the AC’s, which can be partly explained by the fact that ECRI has carried out its monitoring work for a longer time than the AC and to date has produced more documentation (including country reports) than the latter.⁶⁶⁹ While both the AC and ECRI have considered the integration of refugees, persons granted protection on other grounds, and asylum-seekers, ECRI’s notes on the integration of Muslims and non-EU citizens deserve particular mention.⁶⁷⁰ Although the AC and ECRI have also considered Jews and indigenous peoples, for instance, these groups have not received attention in the integration-specific observations of the bodies.

Regarding the levels, areas or contexts with respect to which integration has been taken up by the three bodies, they have discussed integration in somewhat varying connections or with different emphases. The AC has generally referred to integration in(to) or within society, in addition to which it has made remarks for instance on integration in the state, an integrated society, economic and social integration, and an integrated approach to housing and education. ECRI has frequently spoken in terms of integration in(to) society in general or the need to create an integrated society,⁶⁷¹ in addition to which it has referred, for instance, to integration into the social, economic, political and civic life of the state, integration into the public life of the state, integration into a country, integration in the local population, integration into municipalities, societal or social integration, integration of society,

669. ECRI initiated its first reporting round in 1994 and concluded the third round in 2007, whereas the AC commenced its first monitoring cycle in 1998 and was in its second cycle in 2007.

670. See also the remarks on these groups *infra* in chapter 4.4.2.

671. ECRI has recently pointed out that rather than using the term “integration”, it prefers to refer to an “integrated society”. ECRI’s Annual Report 2006, para. 9.

social and political integration of all segments of society, and integration between majority and minority communities as well as citizen and non-citizen communities. ECRI has often employed the term “mutual integration” and has also extensively discussed integration in the areas of employment (the labour market) and education (the school system), and at times with respect to housing and public services. While the HCNM uses “integration with respect for diversity” as the overarching concept, he has also referred for instance to the integration within/into society or state, social or societal integration, civil or civic integration, national integration, the integration of a region (and its population) into the (mainstream) society or state, integration into the local community, and integration through education and participation.

4.4.2 Elements of Integration Put Forward

On the basis of the express references to integration made by the three bodies, it can be said that the AC has highlighted somewhat different aspects of the phenomenon depending on the group under consideration. For the groups characterised as national minorities integration entails non-assimilation and the possibility – even an expectation – to maintain their differences and distinct identities⁶⁷² through the support from the implementation of the various provisions of the CoE Framework Convention. While this also applies to the Romani groups belonging to national minorities, the AC’s remarks on the Roma suggest that for them integration entails first and foremost reducing the gap between them and the rest of population especially by the way of anti-discrimination measures. Similarly, the integration of persons of immigrant origin is linked closely to the prevention of discrimination. In general, integration measures under article 6 of the CoE Framework Convention essentially entail the implementation of the principles of equality and non-discrimination, promoting tolerance and mutual respect and introducing anti-racism measures. It is worthy of mention that although the issue of maintaining identity is raised in the context of article 6, to date the AC has not clearly discussed it in this connection; the Committee has merely pointed out that there should be no forcible assimilation.

Consequently, from the viewpoint of the CoE Framework Convention, when the issue of integration is linked to the implementation of this instrument, the groups characterised as national minorities have been granted a more far-reaching possibility to “the right to be different” than other groups. It is also notable that when the AC has discussed integration, it has called for viewing ethnic differences pertaining

672. This is also in line with the requirement of distinctiveness (distinct identity) of the group for receiving protection under the CoE Framework Convention discussed by the AC. See the remarks *supra* in chapter 4.1.2. It is notable that art. 5 of the CoE Framework Convention bans forced assimilation.

to national minorities as a positive phenomenon enriching society. In the case of persons of foreign background, the Committee has cited the need to draw attention to the positive contribution of foreigners' participation in society. The AC's remark on a more inclusive application of the CoE Framework Convention is of particular interest and significance, since it suggests that giving more recognition to the characteristics of various ethnic, cultural, linguistic or religious groups – including those who have settled in the country more recently – would contribute to their integration into society.

Many of the remarks on integration put forth by ECRI and concerning the situation of the Roma in particular resemble those made by the AC in that ECRI has underlined the need to address discrimination, social exclusion and societal prejudice faced by Roma. However, the same rather clear distinction between the minority groups characterised as national minorities and other groups as can be seen in the work of the AC is not visible in the remarks of ECRI. In fact, ECRI has discussed the questions of taking into account and maintaining specific identities of different minority groups as well as respect for differences when it has considered the integration of various groups falling within its remit. ECRI has spoken about integration policies that take into account the specific needs of all minority groups and taking measures to promote the culture and language of immigrants. ECRI has also addressed the issue of national/state identity by calling for its enrichment by diverse elements existing in society. Consequently, ECRI has adopted a broad perspective to the question of identities and protecting and even promoting identities and differences. While ECRI has linked integration to an increased recognition within society of its diverse composition and of viewing persons of immigrant background as an integral part of society, it has also made a remark similar to what the AC has stated in stressing the importance of immigration and integration policies reflecting the positive role and contribution of immigrants. ECRI has also made important observations in pointing out that persons sharing similarities in physical appearance and religion with the dominant group also have challenges in the area of integration, and that the issue of integration is not usually mentioned in connection with EU citizens.

The HCNM's approach to integration, which is built around the concept of "integration with respect for diversity", includes protecting the rights of persons belonging to national minorities to maintain their own identity and finding a fair balance between the promotion and protection of minority rights and policies of integration.⁶⁷³ The HCNM has observed that both "old" and "new" minorities often face similar kinds of problems, and in both cases the fundamental challenge for governmental policies relates to managing diversity and the solution lies in the inte-

673. It is also in this connection that the HCNM has raised the importance of the CoE Framework Convention for his work.

gration of minorities into a multi-ethnic, multicultural society while enabling them to maintain and develop their own culture. However, the Commissioner has taken the view that due to (legal and practical) differences between recent migrants and members of long-established minorities the treatment of these groups may not be identical, including in the area of integration.⁶⁷⁴

On the basis of the remarks and views on integration put forth by the AC, ECRI and the HCNM, it may be seen that all three bodies have underlined the importance of *non-discrimination* as the basis of integration strategies. As regards more specific areas, they all have strongly underlined the questions relating to languages, education, and participation as being particularly important aspects of integration.

All three bodies have paid a considerable amount of attention to *language issues*, and they have put a great deal of emphasis on the importance of the knowledge of the official (state) language for integration in the case of all minority groups. The AC has pointed out that a knowledge of the state language is a factor of social cohesion, participation and integration, and ECRI has stressed the links of the state language to ensuring full participation by all people in society, including successful integration into the employment market. Issues relating to languages have figured prominently in the activities of the HCNM, and he has linked a responsibility of persons belonging to national minorities to integrate into the wider society to the acquisition of a proper knowledge of the state language. The bodies have also underscored the availability of the language courses offered. Furthermore, they have discussed the possibility to learn in the mother tongue. This has been done most clearly in the case of national minorities by both the AC and the HCNM, which have stressed the importance of the mother tongue for the identity of persons belonging to these groups. Both the AC and ECRI have specifically underlined the opportunities of the Roma to study their mother tongue, and have also touched upon the issue of mother tongue learning with respect to persons belonging to groups of immigrant background, although not as strongly as in the case of national minorities and the Roma.

The importance of *education* for integration derives from a number of aspects linked to the role of schools, for instance in the area of awareness-raising. ECRI has remarked the fundamental role of schools in promoting integration and in shaping attitudes among young people. The HCNM has underscored the activities in the field of education for integration since education is the area within which understanding and contacts, language teaching, inclusion, participation, and the positive values of societies may be promoted. All three bodies have highlighted the impor-

674. The HCNM has linked these differences essentially to his experience relating to tensions arising in situations involving established minorities that in the HCNM's view most often lead to conflicts.

tance of reflecting the country's diversity in school curricula. Furthermore, in addition to stressing multiculturalism in the area of education, the importance of interculturalism has been cited.

Both the AC and ECRI have called for integrating Romani children and children of immigrant origin into education, and ECRI has stated that the integration of children from minority groups in the school system should not lead to forcible assimilation. In its activities focusing on national minorities, the HCNM has underlined avoiding separation along ethnic lines in schools by the way of contacts, communications and engagement in joint curricula and extracurricular activities. In light of the remarks put forth it may be seen that while integrated education is underlined in the case of the Roma and persons of immigrant background, separate schools or education is not generally viewed as problematic in the case of national minorities as long as there are contacts etc. However, it is worthy of mention that the AC has recently drawn attention to the issue of integrating into regular classes of children belonging to certain national minorities with a disadvantaged background.

Of the three bodies, ECRI and the HCNM have placed a great deal of emphasis on the "participatory dimension" of integration, i.e. linking the questions of *participation* and integration. Also the AC has established an explicit connection between participation and integration, most clearly in addressing the situation of the Roma.⁶⁷⁵ ECRI has stressed the importance of participation in various areas, particularly in the labour market, education and decision-making. Among other things, it has called for improving the integration and participation in society of non-citizens who are long-term residents by according them political rights pertaining to voting and eligibility in local elections, and by granting nationality/citizenship for persons of immigrant background. The AC has also established links between the question of citizenship, the integration of non-citizens and their participation in political life. The link between citizenship and integration has also been noted by the HCNM. Additionally, both the AC and ECRI have drawn attention to the role of dual citizenship in contributing to integration efforts.

The HCNM's approach to integration, built around the concept of "integration with respect for diversity", puts an emphasis on minority participation in the political, social, economic and cultural life of mainstream society with a view to developing a sense of belonging to and having a stake in society at large. Integration through participation is viewed as an important element in forging links between mutual understanding and loyalty between the majority and minority communities within the state and in giving minorities input to processes that directly affect them.

675. It is also notable that when the AC and ECRI have addressed the issue of participation in general, they both have increasingly spoken in terms of dialogue.

Other aspects or elements of relevance for integration taken up by all three bodies include the importance of combating racism and other forms of intolerance. This is most frequently discussed by ECRI, which is also a body specifically established to combat these phenomena. The AC has increasingly made references to combating racism and other forms of intolerance on the basis of article 6 of the CoE Framework Convention. It is also notable that both ECRI and the AC have referred to the significance of the National Action Plans implementing the outcomes of the Durban World Conference against Racism in advancing the integration of foreign nationals/non-citizens into society. Although the HCNM has also cited the importance of tolerance for his work, he seems to have been somewhat hesitant to elaborate upon the issue. The HCNM's attention has been drawn primarily to the threats of extreme and violent forms of nationalism.

In addition to distributing information on minorities, the bodies have stressed the importance of the training of various officials for integration. Furthermore, all three bodies have cited the role of the media in integration, as well as the importance of contacts and dialogue in general. They all have also linked integration to the cohesion of society. The bodies have pointed out the importance of adopting a comprehensive immigration and/or integration plan, strategy or policy. Both the AC and ECRI have stressed the importance of involving minority groups in designing and implementing integration plans or measures.⁶⁷⁶ ECRI has been most forthcoming in detailing the various elements it views as important in this respect. Whilst ECRI has clearly referred to the importance of raising public understanding of and support for government integration policies both among minority groups and in the population at large,⁶⁷⁷ both it and the AC have also called for initiating a public debate or dialogue on the issues pertaining to integration. Remarks made by both ECRI and the HCNM to involve various actors, including business sectors in the efforts of integration are worth noting. The AC has stressed the role of public figures in the area of integration.⁶⁷⁸ Furthermore, both the AC and ECRI have noted that uncertainty and insecurity resulting from a legal status linked to the authorisation of residence affects integration.

In addition to the aspects discussed above, ECRI in particular has raised a number of other points or elements it deems relevant in the area of integration, including

676. The AC has discussed making a comprehensive strategy of integration, including involving minorities in designing strategies, with respect to the Roma.

677. The HCNM has pointed out that the successful implementation of integration policies requires the support and understanding from those mainly affected by them.

678. The AC has done this under art. 6 of the CoE Framework Convention. It is notable that although ECRI has not expressly linked the issue of integration and the role of public figures, it has raised the role of politicians and other opinion leaders in general as among the important means to combat racism and intolerance.

offering persons information, advice and assistance, the positive role of family visits and family reunification, and access to the labour market of family members. ECRI has also put stress on such aspects as the importance of the existence of adequate structures and policies at all levels that deal with the migration situation, and collecting data to enable the monitoring of the achievements in the area of integration.

It may be observed that compared to the AC and the HCNM, ECRI has also been generally a bit more elaborate on the issue of housing and integration when it has, for instance, voiced concern for de facto residential segregation, ghettoisation, housing policies implying an obligation to assimilate, and has spoken in favour of mutual integration in settlement policies. While the AC has not made many notes on integration in the area of housing, its observation on placing the Roma in camps – which the Committee views as running counter to the integration of the Roma into society at large – is worth particular mention. For example, to date ECRI has not similarly addressed this issue from the viewpoint of integration.

ECRI has often employed the concept of “mutual integration”, which entails a two-way strategy and a process between the majority and minority/-ties demanding mutual recognition of the qualities embodied in various communities. ECRI’s remarks on the integration of refugees, persons granted protection on other grounds, and asylum-seekers are worth noting, since they are more detailed and forthcoming than the principles set out in international human rights norms. Also the AC has cited similar aspects. In order to enhance the integration of Muslims into society, ECRI has called for, among other things, a positive approach to Islam. Additionally, ECRI has generally addressed integration and discriminatory features of immigration and integration policies according foreigners different statuses, and has drawn particular attention to the significance of legal status for the integration of non-EU citizens (in the EU states).

As regards particular emphases put forward by the HCNM, his remarks on the importance of good and democratic governance entailing broad participation of all those subject to the government’s decisions in the making of those decisions are of significance. The HCNM has also openly linked, i.e. more so than the AC and ECRI, policing in multi-ethnic societies to the question of integration of (national) minorities.⁶⁷⁹ Additionally, the HCNM has viewed the effective participation of national minorities in public life as an essential component of a peaceful and democratic society, and has discussed the integration of minority communi-

679. It is notable that although both the AC and ECRI have cited the aspects considered in the HCNM’s Guidelines on Policing (2006), including e.g. drawing attention to the conduct of law enforcement officials and to the need to recruit persons from minority groups in the police force, they have not explicitly discussed these aspects in terms of integration. For instance, ECRI’s recent GPR No. 11 addressing policing contains no express references to integration.

ties into society in terms of long-term stability. The Commissioner has also given some consideration to the issue of co-operation amongst neighbouring states in the area of minority education in view of promoting national integration (and enhancing regional stability). The HCNM has strongly stressed that integration in various countries requires paying attention to the specific situation of each country, and consequently he has highlighted somewhat different questions relating to integration depending on the country at hand.

4.4.3 Conclusions – Major Differences in the Approaches and the Questions Needing Further Development

While the three international bodies have identified a number of similar elements in the area of integration, and while there are differences in minor points, there are also some clear differences in their emphases. One of these differences stems from the mandates of the bodies; whereas the AC and the HCNM make a somewhat clear difference between groups labelled national minorities – which as a rule are “older” or more “traditional” minorities – and newer minority groups that have emerged from more recent immigration, ECRI does not maintain this difference, but calls for the protection and promotion of identities and differences of all (ethnic) minority groups. However, it may also be observed that ECRI’s remarks do not in general provide clear indications on that what kinds of measures should be taken in the public sphere for the support of various identities and differences.⁶⁸⁰

Another evident difference is to be found in the views concerning the roles and duties of the different stakeholders in the process of integration, i.e. particularly those of the state, the majority population and minorities. ECRI has clearly put stress on the importance of focusing on the duty of society or the state to integrate and promote integration as well as the duty and need for mainstream society to adapt to and accept persons of new and different cultures and backgrounds, and it has been somewhat hesitant to cite the duties pertaining to integration of individuals belonging to minorities. It has only cautiously addressed the roles and duties of various groups in integration by noting that integration calls for a commitment to the goals and objectives of the government’s integration programme and to the cohesion and integration of society from all sections of the community.⁶⁸¹

The HCNM for his part has clearly linked both the rights and responsibilities of the state, society as a whole (including the majority) and persons belonging to

680. See also the remarks *infra* in this section.

681. ECRI has also expressly welcomed an emphasis on the duty of the whole society to integrate. It is of some interest that ECRI’s express remarks on integration in the case of the Roma suggest that in this context the Commission has been more explicit on the responsibility of both majority and minority groups in building a cohesive society.

national minorities to the concept of “integration with respect for diversity”. The HCNM views the relationship between the state and the minority from a certain “give-and-take” standpoint; i.e. in exchange for respect by the state for the rights of the minorities to maintain their culture, language and religion and for opportunities to participate fully in political and economic life, the state can expect their loyalty and responsibility. For the persons belonging to national minorities integration appears in terms of the responsibility, the right and the ability to integrate.

Consequently, in general, it may be observed that in the area of integration ECRI envisages an active role primarily for the state (for the government and authorities) as well as for the majority population, whereas the HCNM underlines that also individuals belonging to (national) minorities should take an active part in the process of integration. ECRI’s cautiousness to speak in terms of duties on the part of persons belonging to minorities may be seen as a result of its focus on the role of states in eradicating discrimination and combating racism and other forms of intolerance⁶⁸² as well as of the fact that ECRI often addresses the situation of individuals who are in a very vulnerable situation.

Limits of tolerance or respect: The need to value diversity and the need for tolerance are among the recurrent themes highlighted by all three bodies. They all have frequently referred to respect for diversity. The AC’s call for a positive approach to ethnic differences pertaining to national minorities is also worthy of note. While both the AC and ECRI have spoken about the importance of acknowledging the positive contribution of persons of immigrant background in society, ECRI has underlined the importance of a culture of tolerance and respect for differences. The HCNM has referred to the creation of a multicultural society in which all cultures are valued and appreciated.

Although international human rights norms underscore the work of all three bodies by way of creating the basis of their work, and although respect for human rights – including raising awareness of human rights – has been cited by the bodies, the remarks on tolerance, respecting differences and valuing and appreciating various cultures also invite the question of the limits of tolerance. In general, it may be seen that the bodies have not been very forthcoming in discussing these limits concretely. Of the three bodies, the HCNM appears to have been the most vocal with respect to this aspect in that the Commissioner has referred to the importance of maintaining certain basic values, including respect for human rights, expressly mentioning respect for the rights of children and women.

ECRI has touched upon the limits of tolerance to some extent when it has addressed such issues as the ritual animal slaughter practised by the Muslim and the

682. The fact that ECRI has put a considerable emphasis on the fight against discrimination in integration strategies also directs attention to the measures aimed at the majority population.

Jewish communities, racist expressions (including hate speech), and practices such as honour-killings, forced marriages and female genital mutilations. So far, ECRI has not discussed these questions by linking them specifically to the issue of integration. When ECRI has considered ritual animal slaughter, it has called for avoiding measures that might create tensions and fuel prejudices. In banning hate or racial speech, ECRI has, among other things, sought to underline the importance of sending a strong signal that incitement to racial hatred is not tolerated. ECRI's few remarks on honour-related violence, forced marriages and female genital mutilation have essentially concerned the manner in which these issues are featured in public debate and in the media, when ECRI has pointed out that the consideration of these issues should not further contribute to a climate where minority groups, and notably Muslims, are the targets of generalisations and stereotypes that may lead to acts of racism or discrimination. While avoiding generalisations and stereotypes seems to have been ECRI's major concern in these situations, the Commission has not been very forthcoming in addressing cultural or religious practices of various groups that may be viewed as violating human rights. For instance, although ECRI has touched upon the issue of honour killings, to date it has not openly condemned this practice; it has condemned the practices of forced marriages and female genital mutilation only in one country report.⁶⁸³ Whilst the AC has neither been keen to look into cultural or religious practices of the groups it considers, its attention to the circumcision of boys and call to pay due regard to the interest of the health of children in this connection is worthy of note.⁶⁸⁴

While the international bodies considered in this research have stressed preserving and even promoting differences, it is also important to realise, that they have also discussed integration difficulties relating to differences. The AC has noted integration difficulties and eliminating barriers under article 6 of the CoE Framework Convention. It is also notable that while the AC in its earlier opinions refers to the need to try to remedy any possible integration difficulties certain groups may encounter because of their religious and cultural differences from the majority population, more recently it has rather spoken in terms of integration difficulties deriving from discrimination and intolerance. Additionally, although the AC has called for viewing ethnic differences relating to national minorities positively, it has also brought out the risks of ethnic belonging. Similarly, ECRI has referred to the problematic of ethnic affiliations and divisions along ethnic lines, in that strict ethnic affiliations run counter to integration of society.⁶⁸⁵

683. For the remarks on ECRI's views on the issues mentioned, see chapter 4.2.2 *supra*.

684. See the remarks *supra* in chapter 4.1.2.

685. ECRI has voiced these concerns when it has considered the situation in FYROM and Bosnia and Herzegovina. The AC's remarks on ethnic belonging concern Bosnia and Herzegovina. See the remarks *supra* in chapters 4.1.2 and 4.2.2.

Regarding *various dimensions* possibly affecting individuals' integration, including gender and age, i.e. drawing attention to possibly different challenges that men and women or boys and girls belonging to various groups may encounter in their efforts to integrate, so far none of the three bodies has shown a receptive attitude to these considerations.⁶⁸⁶ The dimension of age becomes most apparent in the area of education, as the remarks put forth in that context often have implications for children and the young.⁶⁸⁷ Regarding the gender dimension, the AC and ECRI have made some explicit remarks on the need to draw particular attention to integration challenges faced by women of immigrant background.⁶⁸⁸ An indicative example of the persistent marginality given to such dimensions as gender or age is the recent remark of ECRI concerning the importance of monitoring the achievement of integration objectives and the need to collect data for this purpose. When ECRI refers to the importance of collecting data broken down by religion, language, nationality and national or ethnic origin, there is no recommendation to collect this data paying due regard for instance to gender and/or age dimensions as well. In this regard it is notable that the AC has referred to – albeit not expressly with reference to the question of integration – the importance to collect data by taking into account also such aspects as age and sex/gender, for example.⁶⁸⁹ The marginal role of various dimensions has been most apparent in the work of the HCNM. Against this background, the HCNM's recent statement concerning mainstreaming the gender perspective in HCNM programmes and projects appears as a groundbreaking addition to the perspectives in his work.

The paucity of remarks on the need to pay attention to Muslims in the area of integration also signify that the question of integration is viewed to have dimensions relating to *religion*.⁶⁹⁰ It may be seen, however, that whilst the question of religion has sometimes been prominently addressed by the AC and ECRI, including in their remarks on Muslims, the issue of religion is not actively discussed when these bodies have expressly tackled the issue of integration. The AC has made no more than a note on integration challenges faced by Muslims of immigrant background. And while ECRI has considered Muslims from the viewpoint of integration more often, it has essentially only called for a positive approach to Islam and awareness-

686. This is also reflected in the fact that the bodies have not addressed very actively the issue of double or multiple discrimination.

687. This is e.g. when integration into schools or the educational system has been stressed.

688. The AC has also made a note on Romani girls with respect to integration in the area of education.

689. See the remarks *supra* in chapter 4.1.2.

690. Some kind of a recognition of the role of religion for integration may also be read from ECRI's general remark on the fact that similarities in (physical appearance and) religion do not necessarily make it easier to integrate into society.

raising in order to fight prejudices and stereotypes against Muslims. The role of religion as such in integration processes has not been touched upon.

When it comes to *different situations of various groups* from the viewpoint of integration, the HCNM has been the most vocal in drawing distinctions between the situations of more traditional or older and “new” minorities.⁶⁹¹ The AC for its part has not been very sensitive towards the differing needs of various groups from the viewpoint of integration.⁶⁹² This is apparent for instance, when the Committee has drawn attention to the distinction upheld by the Finnish government between “Old Russians” and other Russian-speakers,⁶⁹³ and when it has called for reconsideration of this distinction.⁶⁹⁴ While there is undoubtedly room for consideration – even for reconsideration – in this context, the mere fact that the AC has not paid attention to the different situations of the various groups of Russian-speakers from the viewpoint of integration appears somewhat problematic. While many persons belonging to the group labelled “Old Russians” may have lost their Russian language, or at least they have particular challenges in maintaining their mother tongue and consequently need support for maintaining this language, the challenge for the Russian-speaking newcomers is to learn the official language(s) of their new home country, i.e. Finnish (and Swedish). However, instead of drawing attention to this aspect the AC has expressed its concern essentially for the availability of Russian language education designed for native speakers (the majority of whom are de facto the newer arrivals).⁶⁹⁵ In view of the fact that the Russian-speaking minority is the fastest-growing minority in Finland, the AC’s remarks do not seem very pertinent, and in particular they are not very helpful from the viewpoint of integrating persons belonging to the groups of Russian-speaking newcomers in Finland.

691. As discussed, the HCNM has also stressed that every situation is different due to which there should also be possibility of different approaches and solutions with respect to integration policies.

692. The AC has touched upon paying attention to specific needs of the various groups concerned in the context of strategy of integration most clearly when it has discussed the integration of Roma in its second opinion on Italy (under art. 4), and when it has raised the possibility to put stronger emphasis on the preservation and development of the identity of the Roma who have been traditionally present in the state compared to recently-settled persons. See also the remarks *supra* in chapter 4.1.3.

693. Regarding the Russian-speaking minority in Finland, the Finnish government has wanted to maintain the distinction between the “Old Russians”, a group of Russian-speakers that has existed in the area of Finland since the 19th century, and other Russian-speakers, often labelled the “New Russians”, a group of Russian-speakers that has emerged as a result of the new immigration wave starting in the beginning of the 1990s. See also the remarks *supra* in chapter 2.1.1.3.2. In general, the Russian-speakers form a rather heterogeneous group in Finland.

694. See the AC’s first and second opinions on Finland, para. 43, and paras 124–128, respectively. See also the remarks *supra* in chapter 4.1.2.

695. See the AC’s opinions on Finland mentioned in the preceding footnote.

It is noteworthy that ECRI has also commented on the same group of Russian-speakers in Finland, and has been a bit more forthcoming in mentioning the challenges posed by integration; it has referred to the integration of the “Old Russians” and the vulnerability to marginalisation of the more recent Russian-speaking immigrants.⁶⁹⁶ In fact, ECRI has been the most explicit of the three bodies in drawing attention to different situations of persons belonging broadly to the same (ethnic) group and to the different challenges faced by more recent newcomers when it has considered persons of the Vietnamese background in Poland. ECRI has discussed the Vietnamese who arrived a long time ago and the Vietnamese who arrived in the 1990s and noted that the latter face challenges in the area of integration, including the lack of command of the official language and a difficult economic situation.⁶⁹⁷

Need for developing a coherent approach to integration: On the basis of the express remarks on integration made by the AC, ECRI and the HCNM, it is possible to derive some substance and even an operational dimension for the concept of integration. However, there is still an urgent need for further clarify and develop the concept. While the HCNM’s approach to integration is rather well-constructed around the concept of “integration with respect for diversity”, with the questions of participation, identity, a balanced approach as well as the rights and duties of various stakeholders being addressed, it would be important that the AC and ECRI consolidated their views on integration in order to develop a more coherent approach. Developing their views on the central or necessary elements linked to the process of integration would be not only useful but even necessary, since so far these bodies have not been very systematic in their approaches to the issue. For instance, when ECRI has discussed integration and an integrated society, it appears that even the general content or thrust given to integration differs somewhat depending, for instance, on the state in question. At times, ECRI’s remarks on the need to create an integrated society seem to suggest that integration and an integrated society signify building an inclusive society by “only” ensuring non-discrimination and equal opportunities,⁶⁹⁸ whereas at times an integrated society seems to require enabling and supporting various identities. Although ECRI’s hesitant, or in fact almost non-existent, remarks on the question of identity, for instance with respect to France, may be explained by the general French policy towards minorities, and while the specific circumstances prevailing in each country must also be taken into account when practical measures of integration are planned and implemented (as strongly

696. ECRI has stated that whilst the “old Russians” are well-integrated, the more recent Russian-speaking immigrants are vulnerable to marginalisation. See the remarks in the second report on Finland, para. 36.

697. See the remarks on the second report on Poland *supra* in chapter 4.2.3.

698. See e.g. the third reports on France and on Portugal (the latter discussing the Roma).

underlined by the HCNM), putting forward different basic elements in the area of integration with respect to similar kinds of groups is quite problematic from the viewpoint of general policy coherence.

Additionally, while ECRI has put forward a considerable number of remarks on integration, including linking integration to such aspects as non-forcible assimilation, recognising the positive contribution of persons of immigrant background, and the protection and promotion of identities and differences of all (ethnic) minority groups, the fact that these various points are scattered in various country reports makes it very difficult to construct a general and coherent picture of the elements ECRI views as important for integration in general. For instance, whilst ECRI has called for recognition of differences and identities, it has not been very clear on the extent of the measures that should be taken in the public sphere to enable these various identities and differences. On the basis of ECRI's remarks in various country reports, it appears that this entails at least endorsing the values of multiculturalism and interculturalism in the area of education in the form of distributing information on various (ethnic) groups in the society and some kind of recognition of the possibility to receive teaching in the mother tongue.

In light of the remarks made by the AC, integration for the Committee appears to signify non-assimilation for persons belonging to national minorities and non-forcible assimilation and non-discrimination for others as well as recognition of their positive contribution. While the AC has addressed identities and differences most clearly with respect to national minorities, it has also discussed accommodating differences when it has considered the situation of the Roma under article 4 of the Convention, i.e. under the provision on equality and non-discrimination. For instance, under this provision the AC has highlighted the importance of adapting health care services to the linguistic and other needs of the Roma, in particular Romani women. Furthermore, when the AC has discussed discriminatory attitudes against Roma in the area of employment, it has called for specific efforts to encourage and prepare Romani women to enter the labour market and to promote the re-evaluation of their role in the family and society, as well as respect for the traditions peculiar to Romani lifestyles and culture.⁶⁹⁹ These kinds of remarks touch upon what is a very tension-ridden relationship between maintaining traditional culture and the requirement of reassessing the traditions of the minority in view of advancing the participation of minorities in the mainstream society. What deserves a particular mention is the AC's remark on the contribution to integration of the inclusive application of the CoE Framework Convention.

It may be seen that both the AC and ECRI have often raised issues similar to those that the HCNM has viewed as important under the concept of "integration

699. See the remarks on the second opinion on the Slovak Republic and the first opinion on Spain *supra* in chapter 4.1.3.

with respect for diversity” used by the Commissioner. Furthermore, the remarks of the AC and ECRI also show that sometimes they address certain issue – for instance language training or imparting information on minorities – by expressly linking it to the question of integration while sometimes the same substantive issue is discussed without express linkages to integration.⁷⁰⁰ In general, the remarks made so far by ECRI and the AC, though numerous, still leave the overall picture of integration resting on a rather thin basis, and therefore clarifications and elaborations by these bodies in the area would be most important. It would be crucial to clarify the relationship of integration particularly to the concepts of inclusion and assimilation. The fact that the AC has been set up to participate in the monitoring of the implementation of the only minority-specific international instrument that also incorporates explicit references to integration may also be said to create some additional expectations as regards the views of the Committee in the area. Furthermore, although ECRI has introduced the concept of “mutual integration”, to date it has not employed this concept systematically but only rather sporadically. However, this concept does appear to be a good basis for the elaboration of a coherent approach by ECRI to the question of integration enabling the Commission to develop it as an overarching concept for its work on integration similar to what the HCNM has done with respect to the concept of “integration with respect for diversity”.

Analytical and well-reasoned views of the AC and ECRI on the various dimensions of the integration of the groups whose situation they have addressed in their work would be most helpful in clarifying the extremely topical issue of integration of various groups and individuals and in assisting the efforts of states to accommodate differences, manage diversity and create an integrated society.⁷⁰¹ Also the elaboration by the HCNM of the applicability of the concept of “integration with respect for diversity” in the case of “new” minorities, including the Commissioner’s concrete views on the pertinent differences affecting integration measures, would be most beneficial, providing valuable additions and viewpoints to the discussion on integration. Clearly, it would be most useful if the views of the international bodies were also somewhat in line with one another, so that they do not convey contradictory messages to governments. Furthermore, in any further efforts to clarify the concept of integration it would also be crucial to draw an increasing amount of attention to a range of dimensions, including those relating to gender and age, that may affect the process of integration.

700. This can be seen when the remarks put forth *supra* in chapters 4.1.2 and 4.1.3 as well as in 4.2.2 and 4.2.3 are compared.

701. The AC and ECRI could clarify their approaches to integration e.g. by adopting a thematic commentary or a set of recommendations on the issue, respectively.

5 COMPARISONS, ANALYSES AND CONCLUSIONS

5.1 The Concept of Integration in International Human Rights Norms and Practice

5.1.1 Numerous References to Integration

Using the concept of integration in the area of international human rights is no novelty; it appeared in human rights instruments and discussions already some time ago.¹ The concept as well as a number of related ones, such as inclusion, exclusion and marginalisation, has been employed increasingly in various human rights norms, in particular in those adopted in the area of anti-racist action promoting diversity and pluralism.² By contrast, the international norms addressing the situation of specific groups do not refer to integration as readily, and primarily convey a message that integration concerns newer groups and foreign residents.³ Despite this, the question of integration has been expressly raised with respect to more traditional, or older minorities, most prominently in the CoE Framework Convention and the CoE Language Charter. The OSCE documents consider the issue of integration in the most detailed manner in the case of the Roma.⁴ While there are no references to integration in ILO Convention No. 169 on Indigenous Peoples, the UN Declaration on Indigenous Peoples for its part expressly refers to this concept.⁵

The increased international mobility of individuals has placed the integration of persons of immigrant background and non-nationals/non-citizens among the widely discussed and politically significant issues of today. The first group of foreign residents with respect to which the issue of integration was mentioned in international human rights documents was migrant workers. While the earlier international norms on these persons treated them as mere visitors in the host country, some more recent norms envisage a more permanent stay for them and refer to their integration in the host societies. In Europe, this normative shift has taken place chiefly within the OSCE, which has focussed on the treatment of migrant workers

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1. See in particular the references in ILO Convention No. 107 on Indigenous Peoples. See also UNESCO (1959).
 2. See the remarks *supra* in chapter 2.2.3.
 3. See the remarks *supra* in chapter 2.1.4.3.
 4. See in particular the OSCE Action Plan on Roma and the remarks *supra* in chapter 2.2.1.2.
 5. See the remarks *supra* in chapter 2.1.2.

from other OSCE states.⁶ The declaration adopted at the second CoE summit, in 1997, also incorporates a call for integrating lawfully resident migrant workers in their host societies, and in recent years the ILO has been vocal in stressing an urgent need to provide migrant workers with protection, including integration in their host countries.⁷ Despite these appeals, the attitude of the European states towards the integration of migrant workers may generally be viewed as a cautious one. The practically non-existent interest among those states in ratifying the UN Convention on Migrant Workers, which contains somewhat strong provisions on the protection of migrant workers – including provisions on human rights – points to a lack of political will on the part of states to take on stronger obligations in the area. The EU has established its own systems (of protection) based on various statuses of individuals and graded rights, creating a dynamic of its own in the area of labour-related (im)migration in Europe. The EU states' reluctance to ratify the UN Convention on Migrant Workers can undoubtedly be attributed to the differences and incompatibilities between the UN protection system and the EU system, the latter being characterised by a clear differentiation of legal statuses between EU citizens and third-country nationals.

In the case of asylum-seekers and refugees, the solution laid down in the international norms aims primarily at the voluntary repatriation, but also a more permanent stay is possible when it is necessary for their protection, i.e. if return or resettlement is not a viable option. The insistence of states on relying on the international refugee protection system, which is generally viewed as outdated from the viewpoint of offering protection to persons in need of protection outside their countries,⁸ reflects a desire on the part of states to control and limit the circulation of such persons. The increasingly stringent policy of the EU states towards receiving these individuals is particularly indicative of this. A reserved or even negative attitude somewhat similar to that taken with respect to asylum-seekers and refugees can be seen in the treatment of the victims of human trafficking: international norms point to their repatriation as the preferred solution and only exceptionally allow their stay and even integration in the receiving state. This approach to trafficking victims is also a prevalent one within the EU, in addition to which the Union has also openly conditioned the possibility of trafficking victims to stay in

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6. It is notable that within the OSCE, as within the CoE, the questions relating to migrant workers have been clearly considered apart from those on national minorities. This approach thus differs from that taken by the HRC, which has viewed the minority provision of the ICCPR, i.e. art. 27, as covering migrant workers as well. See the remarks *supra* in chapters 2.1.1.1.1, 2.1.1.2.2 and 2.1.3.1.1.
 7. ILO's remarks are set out e.g. in the ILO Action Plan on Migrant Workers. See the remarks *supra* in chapter 2.1.3.1.1.
 8. See the remarks *supra* in chapter 2.1.3.1.3.

the host state on the victim's assistance to authorities in solving trafficking crimes.⁹ The attitude of the European states towards asylum-seekers, refugees and trafficking victims is intrinsically linked to the states' interest in economic migration and in receiving particularly high-skilled workers (preferably of the states' own choice) and combating irregular migration, including both the smuggling of and trafficking in human beings.

EU law has some bearing on the integration of persons belonging to the groups whose situation is addressed in the EU norms, i.e. primarily when the integration of legally residing long-term third-country nationals, refugees and persons granted subsidiary protection is concerned. The EU has shown clearly less intense interest in the integration of EU citizens, whose integration in(to) the society of the host member state is viewed as being secured by implementing the rights of EU citizens, including those relating to moving and residing within the area of the EU.¹⁰ International norms reflect the insistence of states on retaining national decision-making power with respect to integration issues, undoubtedly since integration is closely related to authorisation to stay in the area of states.¹¹ This is particularly evident in the EU approaches, where intra-state integration issues are in practice left to the discretion of each member state.

Of the three international bodies considered in detail in this research, both the Advisory Committee (AC) of the CoE Framework Convention and the European Commission against Racism and Intolerance (ECRI) have made most of their observations on integration with reference to the Roma and persons of immigrant origin. The AC has also discussed the issue with respect to national minorities. The silence of the OSCE norms on national minorities with regard to integration has not prevented the High Commissioner on National Minorities (HCNM) from actively taking up the question of integration; he has developed the concept of "integration with respect for diversity" as an overarching concept for his work on national minorities. In recent years the HCNM has also paid some attention to the situations of "new" minorities. The remarks by both the AC and ECRI on the integration of refugees, persons granted protection on other grounds, and asylum-seekers deserve particular mention: these observations, especially the ones on asylum-seekers, are more forthcoming in that the calls to integrate these persons clearly go further than the views of states set out in international norms and the practice reflected in the actions of states. ECRI has also paid some specific attention to the integration of Muslims, non-EU citizens, and workers of immigrant background.¹² As regards the

9. See the remarks *supra* in chapter 3.3.

10. Ibid.

11. See also the remarks *infra* in chapter 5.2.1.

12. ECRI has even called for the integration of seasonal workers. It has also mentioned the reintegration of trafficked children, without, however, being more specific. See the remarks *supra* in chapter 4.2.3.

question of integration and indigenous peoples, the practice of the three international bodies echoes the cautious approach to the issue of the pertinent international norms, for the bodies have not broached the situation of indigenous peoples in their positions on integration.

The concept of integration appears most prominently and is also employed most frequently in the human rights norms and discussions concerning the groups whose defining features relate to ethnicity (ethnic origin), culture, language or religion, but it is also used with respect to women, children, persons with disabilities, and the elderly.¹³ The need to integrate persons with disabilities has been expressly cited within the EU as well.¹⁴

5.1.2 In Search of the Content of Integration

Although the concept of integration has been increasingly highlighted in the area of human rights, its content remains often rather unclear. This situation may derive from the lack of definitions in the area, which in turn is undoubtedly a result of the fact that integration is not a normative concept, but a process.¹⁵ And even if some definitions were put forth,¹⁶ and whilst, for instance, both ECRI and the HCNM have employed specific concepts relating to integration – “mutual integration” and “integration with respect for diversity”, respectively – determining more concrete content for the concept of integration and the elements linked to it requires a closer look both at the pertinent norms and the views presented in the area. While these norms and views offer some guidance as to what integration entails (or may entail), it may also be observed that the content given to integration also seems to differ depending, for instance, on the groups involved. This is reflected clearly in the remarks of both the AC and the HCNM. Furthermore, the EU explicitly considers EU citizens and non-EU citizens differently from the viewpoint of integration requirements.

Without doubt the contexts or levels of integration are of importance.¹⁷ The international human rights norms refer explicitly to integration in(to) society and to social integration, in addition to which local integration, integration into a community, and the importance of the area of education for integration have been men-

13. See the remarks *supra* in chapter 2.1.3.2.

14. See the remarks *supra* in chapter 3.3. The remark in the Durban Document on the integration of persons with disabilities also deserves to be noted. See the remarks *supra* in chapter 2.2.1.1.3.

15. See the remarks *supra* in chapter 1.2.

16. This has been done e.g. within the EU. See the remarks *supra* in chapter 3.3. See also the remarks on definitions *supra* in chapter 1.2.

17. Ziegler (2005), p. 120. Ziegler refers to integration in a society, in a state or even in a culture as the possible levels of integration. For the remarks on the difference between state and society, see e.g. Habermas (1996), p. 299.

tioned.¹⁸ While the three international bodies considered at length in this research have made similar references, they have also discussed, among other things, integration in the state, integration into the social, economic, political and civic life of the state, integration in the local population, and integration into municipalities. ECRI has increasingly spoken in terms of creating an integrated society. The three bodies have underscored integration in the areas of education and participation, and ECRI in the spheres of employment (the labour market) and housing as well.¹⁹ Within the EU, integration into society, the state, and the life of the host country have been mentioned, in addition to which a considerable emphasis has been placed on integration into the labour market.²⁰

5.1.2.1 Elements Linked to Integration

The elements viewed as important for the integration of persons belonging to groups with the features of ethnicity (ethnic origin), culture, language or religion are the firm implementation of the principles of equality and non-discrimination, the fight against racism and other forms of intolerance, language questions, participation, nationality/citizenship, education, and identity. These elements have been set out both in the international human rights norms and in the remarks of the three focal international bodies. The importance of a knowledge of the official language(s) of the state for integration has been strongly stressed. The three bodies have also established a link between the maintaining of one's mother tongue and integration, most clearly with respect to national minorities and the Roma, but also with respect to persons belonging to groups of immigrant background.²¹ With participation closely associated with integration,²² the intrinsic connection between participatory rights and nationality/citizenship²³ has meant that the integrative role of nationality/citizenship has also been highlighted. This is done openly by the three international bodies, which have spoken in favour of granting dual nationality/citizenship

18. See the remarks *supra* in chapters 2.1.4.3 and 2.2.3.2.

19. The AC has also made some remarks on an integrated approach to housing. See the remarks *supra* in chapter 4.1.3.

20. See the remarks *supra* in chapter 3.3.

21. See the remarks *supra* in chapter 4.4.2. While the importance of multilingualism and reciprocity in learning languages involving also the speakers of the state's official language(s) has not been expressly discussed in terms of integration, these aspects have been pointed out as facilitating understanding between language groups and strengthening tolerance and multiculturalism within the state. See the remarks *supra* in chapters 2.1.1.3.1 and 4.3.3.

22. Of the international norms, this link has been raised most clearly in the Convention on the Participation of Foreigners in Public Life at Local Level and the Durban Document, and of the three international bodies, particularly ECRI and the HCNM have underlined the participation-integration link. See the remarks *supra* in chapters 2.1.3.1.2, 2.2.1.1.3 and 4.4.2.

23. See the remarks on the concepts of citizenship and nationality *supra* in chapter 2.2.2.

in order to enhance integration.²⁴ Although the international human rights norms underscore the importance of education, they do not – with the notable exception of UNESCO documents – expressly link the issues of integration and education.²⁵ However, when the international bodies have discussed the “integrative role of education”, many of the elements they have highlighted are the same as those set out in the norms.²⁶

Other elements of importance for integration noted both in the international human rights norms and by the three international bodies include interculturalism, contacts and dialogue,²⁷ family reunification,²⁸ and access to health care and other social services.²⁹ The documents adopted at the CoE summits even cite the role of sports for integration.³⁰ In their integration-related remarks, the AC, ECRI and the HCNM have put forward – with varying emphases – a number of other aspects they consider relevant for the process of integration. These include the training of various officials, the role of the media, the significance of legal statuses, the importance of housing policies, offering persons information about the host society and rights and regulations in force, the role of policing in multiethnic societies, and the importance of involving various actors, including the business sector, in integration efforts. The bodies have also made calls for the adoption of a comprehensive immigration and/or integration plan, strategy or policy, and have addressed the importance of promoting public understanding of and support for government integration policies among both minority groups and the population at large.³¹ Characteristic of the HCNM’s approaches to integration are linkages to stability and security issues, in line with the general approaches of the OSCE. One of the most prominent differences in the emphases of the international bodies in the area of integration lies in their views

24. The European Convention on Nationality touches upon the issue of the integrative role of nationality. See the remarks *supra* in chapters 2.2.2 and 4.4.2.

25. It is notable that the OSCE Action Plan on Roma also addresses education and integration. See the remarks *supra* in chapter 2.2.1.2.

26. These elements include distributing information on various groups in schools, i.e. ensuring that the country’s diversity is reflected in school curricula. Distributing information on various groups has been mentioned in the norms on minorities and indigenous peoples and in the anti-racism norms; the issue is cited clearly in the Durban Document. See the remarks *supra* in chapters 2.1.4.1 and 2.2.1.1.3.

27. These elements have been considered particularly by the three international bodies. Of the international norms, the CoE Language Charter discusses the importance of interculturalism for integration. See the remarks *supra* in chapters 2.1.1.3.1 and 4.4.2.

28. This is clearly put forward in the Durban Document and by ECRI. See also the General Conclusions of the European Conference against Racism. See the remarks *supra* in chapters 2.2.1.1.3, 2.2.1.3.2 and 4.2.3.

29. The norms and the three international bodies have taken up this aspect most clearly with respect to the Roma. See the remarks *supra* in chapters 2.2.3 and 4, in particular chapter 4.1.3 on the AC.

30. See the remarks *supra* in chapter 2.1.1.3.3.

31. See the remarks *supra* in chapter 4.

on the roles – or rather duties – of the different stakeholders in the process of integration. While both ECRI and the HCNM have underlined the reciprocal nature of integration, which entails measures of accommodation on the part of not only individuals but also society at large – including the majority – ECRI, unlike the HCNM, has been clearly reluctant to speak in terms of the duties of individuals belonging to minorities in the area of integration.³²

While the EU has directed its attention to the integration of third-country nationals, and EC law allows the EU states to set requirements for the integration of such persons in accordance with their national law, the principles pertaining to integration have also been adopted at the EU level. These principles underline such aspects as the importance of participation of immigrants; the role of employment; education (in order to prepare immigrants to be successful and active participants in society); a basic knowledge of the host society's language, history and institutions; equal and non-discriminatory access to institutions and to public and private goods and services; and frequent interaction between immigrants and member states' citizens. Although the reciprocity of integration has been mentioned, the EU approaches stress the role of individuals in the area of integration, and call for respect for both the basic values of the EU and national values.³³

When the concept of integration is mentioned in the international norms pertaining to such groups as women, persons with disabilities and the elderly, it is closely linked to the principles of equality and non-discrimination, including calls for ensuring the full and equal enjoyment of all human rights and fundamental freedoms by these persons. The international norms on children stress the protection of children and call for the social integration of children in special need of assistance, including disabled children.³⁴

5.1.2.2 Recognising Differences and Identities:

Integration in Relation to Assimilation and Inclusion

In searching for the content of the concept of integration in the area of human rights, it is also necessary to have a look at the broader frameworks within which integration is usually discussed. The issue of integration seems to revolve primarily

32. See the remarks *supra* in chapters 4.2.3, 4.3.3 and 4.4.2. It is notable that UNESCO has also made some remarks on the duties of individuals, and that the importance of an active role of individuals themselves has been raised in the OSCE commitments on migrant workers. See the remarks *supra* in chapters 2.2.1.1.4 and 2.1.3.1.1.

33. See particularly the CBPs adopted by the Council of the EU. Reciprocity in integration is noted e.g. in the definitions of integration put forth at the EU level. See the remarks *supra* in chapter 3.3.

34. See the remarks *supra* in chapter 2.1.3.2.

around *the question of differences*, which includes identity discourses and recognising differences particularly in the public sphere.

Due to the public-private divide that underlies the international human rights norms and the fact that the norms provide protection for the sphere of privacy and home in particular from interference, various forms of diversity, including cultural differences, have been allowed expression particularly within the private sphere. As regards the public sphere, the human rights norms have not readily recognised differences pertaining to individuals or groups, for the application of human rights rests firmly on an equality paradigm that plays down differences rather than giving them positive recognition.³⁵ It is precisely this predominantly negative approach to differences, including even total difference-blindness, in the public sphere that has triggered criticism towards the existing equality paradigms and approaches to diversity and differences, particularly by those adhering to theories on multiculturalism³⁶ and feminist theories of law.³⁷ This criticism has been elaborated in theories on the politics of difference and the politics of recognition,³⁸ and the crux of this criticism relates to the fact that the public sphere is defined by cultural and other practices of the majority and in general those in positions of power; i.e. it is far from being value-neutral, as it builds upon the patterns of behaviour and the characteristics valued by the majority and often also by the men. When differences are seen as deviations from the dominant standards, there is the pressure on various minorities and women to adapt to the institutions and practices that structurally disadvantage them; i.e. there is pressure to assimilate.

Beyond the private sphere, the international human rights norms recognise various differences primarily with respect to the groups addressed in the international norms on minorities and indigenous peoples. In practice, these norms entail the public recognition of certain differences or characteristics of the groups concerned, and enable the preservation, expression and development of these differences or characteristics in the areas of public life, even with the assistance of states. The

35. This negative recognition of differences pertains to both the formal equality model and the substantial equality models. See the remarks *supra* in chapter 2.3.

36. See e.g. Taylor (1992), Kymlicka (1995), and Parekh (2000).

37. Habermas (1996), pp. 409–427. The feminist discussion has been particularly strong in the USA. The vocal critics of the existing equality paradigms and the considerations of gender differences include e.g. Iris Marion Young, D.L. Rhonde and Martha Minow. *Ibid.* For the feminist critique of rights, including human rights, see Mullally (2006).

38. The well-known theory of the politics of recognition, including the politics of difference, has been developed by Charles Taylor, who has linked the issues of recognition, identity and dignity and called for the recognition of particular identities by public institutions. Taylor sees due recognition as a vital human need and proposes that a politics of recognition is a basic element of justice. Taylor (1992). Although Taylor has also noted women in the context of his theory, he has concentrated on considering the recognition of the identities of cultural and disadvantaged minorities. See also Abbey (2004), p. 17. For different failures of recognition, including recognition of cultures and women, see Wolf (1992), pp. 76–77.

norms and discussions on minorities and indigenous peoples in the area of human rights also closely link discussions on differences to identity questions, defined explicitly mainly in terms of the identities of the pertinent groups, i.e. in terms of collective identities.³⁹ These identity aspects have also been openly considered by the AC and the HCNM in their observations on national minorities.⁴⁰ Consequently, in the area of human rights, the “right to be different” concerns groups labelled indigenous peoples, national minorities and (older) minorities, which are characterised by the features relating to ethnicity, culture, language or religion, and entails the endorsement of the equality and non-discrimination norms, as well as the dimension of “added value” described in the pertinent norms.⁴¹ The acknowledgement of differences in these contexts often also requires concrete measures of adjustment or accommodation on the part of society more broadly. This is the case, for instance, when language rights envisaged in the norms are implemented in the areas of education and in relations with authorities and the provisions calling for the dissemination of information on minorities and indigenous peoples in society at large (among the majority) entail changes in the area of general education and school curricula.

In recent years, the discourse on differences and identities has also entered the area of international anti-racist action. The pertinent norms there generally proclaim respect for diversity and address identity aspects similar to those in the international norms on minorities and indigenous peoples, i.e. those pertaining to ethnic, cultural, linguistic or religious features. The provisions contain references to both collective and individual identities. In the area of tolerance and racial prejudice in particular, UNESCO has also put forward a general proclamation of individuals’ and groups’ “right to be different” without, however, being more specific on the extent or content of this “right”.⁴² ECRI, with a mandate focussing on anti-racism action, has discussed the protection and promotion of the identities and differences of various minority groups coming within its remit, thus also addressing identities of persons with an immigrant background.⁴³

International human rights norms often discuss the concept of integration together with that of *inclusion* and link it at times rather openly to the concept of *assimilation* as well. While in the past the concepts of integration and assimilation were clearly equated in the area of human rights, most notably in the norms on indigenous peoples,⁴⁴ more recent developments in the area point to a differentia-

39. See the remarks *supra* in chapter 2.1.4.1.

40. See the remarks *supra* in chapters 4.1 and 4.3.

41. See the remarks *supra* in chapter 2.1.4.2.

42. See the remarks *supra* in chapters 2.2.1.1.4 and 2.2.3.1.

43. See the remarks *supra* in chapter 4.2. Although the CoE Framework Convention expressly addresses the issue of identity in connection with art. 6, which is of relevance for anti-racist action, the AC has not openly discussed this. See the remarks *supra* in chapter 4.1.

44. See the remarks on the 1957 ILO Convention No. 107 on *supra* in chapter 2.1.2.1.

tion between the two – or at least an attempt to do so. This may be inferred from the attempts of ILO Convention No. 169 on Indigenous Peoples, adopted in 1989, to depart from the policy of assimilation reflected in the earlier norms,⁴⁵ and particularly from the remarks on the unacceptability of both forced assimilation and integration of indigenous peoples put forward in the UN Declaration on Indigenous Peoples.⁴⁶ Some international minority-related norms, particularly those in the CoE Language Charter, suggest a difference between the concepts of integration and assimilation.⁴⁷ The CoE Framework Convention presents integration in relation to assimilation, noting particularly that forced assimilation is banned.⁴⁸ The minority norms also expressly stress that voluntary assimilation should be possible.⁴⁹

While the concept of assimilation has been addressed in the international norms on minorities and indigenous peoples, it appears only exceptionally in the international anti-racism norms.⁵⁰ The anti-racism norms frequently use the term “integration”, often with the concept of inclusion,⁵¹ so that it is difficult to see whether these two concepts are meant to be different in practice. In fact, it appears that the anti-racism norms use “integration” often as a synonym for “inclusion” rather than giving it a different content. The fact that the anti-racism discourse is firmly built on the idea of the non-discriminatory application of human rights in advancing the idea of inclusiveness points in the same direction.

Consequently, despite the references to identities, respect for diversity, and the “right to be different” in the area of the international anti-racist action, the remarks and observations made are so vague that they necessarily invite questions regarding the kind of recognition called for, and particularly the kinds of concrete measures of recognition that are required from states in the area of public life. Although the international norms on minorities and indigenous peoples and the anti-racism norms

45. While ILO Convention No. 169 addresses neither the concept of integration nor that of assimilation as a result of the burden attached to the earlier usage of these terms, it does envisage both the incorporation of indigenous peoples within the existing states and a certain interactive relationship between these peoples and the rest of the society. Despite the stated aim of departing from the assimilationist orientation, the Convention has also been criticised for not in fact succeeding in doing so. *Ibid.*

46. This provision may also be taken to imply that voluntary assimilation or integration is (and should be) possible. For the Declaration, see the remarks *supra* in chapter 2.1.2.2.

47. See the remarks *supra* in chapter 2.1.1.3.1.

48. See the remarks *supra* in chapter 2.1.1.3.2.

49. See the OSCE commitments on national minorities and the CoE Framework Convention, and the remarks *supra* in chapters 2.1.1.2.2 and 2.1.1.3.2.

50. One of the rare express references to assimilation can be found in the Declaration on Race and Racial Prejudice, adopted by UNESCO in 1978, which contains a reference to avoiding forced assimilation of disadvantaged groups. See the remarks *supra* in chapter 2.2.1.1.4.

51. International norms in the area contain numerous references to integration, inclusion, inclusive societies, combating marginalisation and exclusion. See the remarks *supra* in chapter 2.2.3.2.

concern groups sharing the same kinds of (identity) features (i.e. those linked to ethnicity (ethnic origin), culture, language or religion), the anti-racism norms are clearly more limited when it comes to recognising differences. For example, they do not provide for enabling the use of various languages with the authorities or a similar possibility to establish and maintain private educational establishments.⁵² Moreover, both the AC and ECRI have underlined the importance of integrated schooling/education for persons with an immigrant background (as well as in the case of the Roma). The AC and the HCNM have not generally viewed separate schools or education as problematic in the case of national minorities as long as there are contacts and interculturalism.⁵³ Due to these kinds of differences in the scope of international norms, drawing boundaries between the groups entitled to protection under the international norms on minorities and indigenous peoples and the groups not entitled to this protection acquires a tremendous significance from the viewpoint of the recognition of differences.

When integration is anchored to the implementation of human rights norms – the three focal international bodies, for example, have clearly done⁵⁴ – establishing this connection also signifies that integration entails the “right to be different” and protection against forcible assimilation for minorities and indigenous peoples, and inclusion for the groups covered by the international anti-racism norms. However, a look at the integration-related remarks of the AC, ECRI and the HCNM indicates that these bodies go somewhat further than the pertinent international norms. This can be seen, for instance, in that the AC has discussed the integration of persons belonging to the groups characterised as national minorities in terms of non-assimilation, and both the AC and ECRI have considered the integration of persons of immigrant background in terms of non-forcible/forced assimilation.

The AC has stated that the integration of persons belonging to national minorities entails both non-assimilation and the possibility – in fact, even expectation – of their maintaining their differences. For persons belonging to groups other than national minorities but coming within the ambit of the CoE Framework Convention, primarily through article 6 – and including also persons of immigrant origin – integration signifies protection against discrimination and racism and other forms of intolerance. With reference to article 6 the AC has also mentioned that there

52. See the remarks *supra* in chapters 2.1.4.1 and 2.2.3.1. It is worthy of note that the UNESCO Convention against Discrimination in Education considers establishing and maintaining separate educational systems or institutions for religious and linguistic reasons. See the remarks *supra* in chapter 2.2.1.1.4.

53. See the remarks *supra* in chapter 4.4.2.

54. It is notable that particularly ECRI and the HCNM, both of which have broad and flexible perspectives on their agenda, have raised a number of elements of relevance for integration, many of which do not concern directly human rights. See the remarks *supra* in chapters 4.2.3 and 4.3.3.

should be no forcible assimilation of these persons, and that there should be a possibility for persons with a mother tongue other than the official language of the state to study their own language in schools, thus suggesting the recognition of some linguistic differences in the public sphere.⁵⁵

In its remarks on integration ECRI has underlined the non-forcible assimilation of the minority groups it has considered. The Commission has called for measures in the public sphere to support various identities and differences, and has placed importance on the values of multiculturalism and interculturalism in the area of education and distributing information on various (ethnic) groups in society. Like the AC, ECRI has referred to the possibility to study one's mother tongue.⁵⁶ Both the AC and ECRI have also called for recognising the positive contribution of persons of immigrant background to society.⁵⁷

In the framework of the concept of "integration with respect for diversity" employed by the HCNM, the Commissioner has underscored the importance of protecting the rights of national minorities to maintain their own identity as well as of finding a fair balance between the promotion and protection of minority rights and policies of integration in order to manage diversity and reduce ethnic tensions.⁵⁸ Although to date the HCNM has not been very eager to look into the situations of "new" minorities, he has pointed out that his approaches to integration also provide elements for integrating persons belonging to these newer groups.⁵⁹

On the basis of the current human rights norms and the views of the three international bodies addressing the question of integration, it is possible to identify some aspects that in fact signify *the added value of integration* compared to both assimilation and inclusion. These aspects relate to the departure from the traditional idea of seeing differences generally as negative⁶⁰ and attaching a more positive value to differences relating to ethnic, cultural, linguistic or religious features. The positive recognition of such characteristics is to be concretised primarily through education, i.e. through distributing information on diversity and various groups in society

55. See the remarks *supra* in chapter 4.1.3.

56. See the remarks *supra* in chapter 4.2.3.

57. While the AC has called for a positive attitude towards ethnic differences pertaining to national minorities, with respect to persons of foreign background, it has called for drawing attention to the positive contribution of foreigners' participation in society. ECRI has called for recognising positive contribution of persons of immigrant background in society. See the remarks *supra* in chapters 4.1.3 and 4.2.3.

58. In finding this balance the HCNM has stressed the importance of the CoE Framework Convention. The HCNM has also referred to the importance of the inclusive application of the CoE Framework Convention regardless of citizenship. See the remarks *supra* in chapter 4.3.3.1.

59. See the remarks *supra* in chapter 4.3.3.2.

60. See the remarks on a negative approach to differences being the recurrent theme of the prevailing equality paradigms *supra* in chapter 2.3.

in the area of general education. The international bodies have also underlined the importance of the possibility to learn and study one's mother tongue. The element of reciprocity in the process of integration stressed by ECRI and the HCNM points to the roles of both individuals and the society at large. Additionally, the remarks on integration may also be seen as calling for a more active role by states in incorporating into society persons belonging to various groups.⁶¹

Although the concept of integration seems to have been given meanings that distance it from the concept of forced assimilation in particular, and it has been associated with a positive approach to differences, there still remain *numerous ambiguities* where the more concrete meaning of integration is concerned. In practice, the dividing line between integration and assimilation remains rather thin. In the case of national minorities, and in the light of the CoE Framework Convention, this line has been seen as reflected in the distinction whereby integration makes the (national) minority and its culture part of the state, helping to define it, whereas assimilation makes members of the (national) minority part of the state to the exclusion of their (national) minority status.⁶² It has also been pointed out that whilst the CoE Framework Convention protects persons belonging to national minorities against forced assimilation, it would be against the *raison d'être* of minority protection if the persons concerned established "parallel societies" in which the fundamental values of the constitutional order of the state were not fully respected.⁶³ A further observation notes that the protection of minorities is intended to ensure that integration does not become unwanted assimilation or undermine the group identity of persons living in the territory of the particular state.⁶⁴ These kinds of remarks on "unwanted assimilation" and "undermining the group identity" necessarily lack clarity, and thus are rather like "lines writ in water". While such measures as ethnocide, i.e. destruction of culture, would clearly amount to a violation of the CoE Framework Convention, and the situations in which the members of a particular national minority decide to assimilate (voluntarily) may be questioned in the light of state obligations under this Convention,⁶⁵ less drastic or obvious situations necessarily remain in a grey area. This grey area and its boundaries remain vague, and it is difficult, in fact almost impossible, to give clear answers to the question when, for instance, integration turns into assimilation in violation of the international human rights norms.

61. Whilst this call comes to the fore particularly in the remarks on integration by the international bodies discussed in this research, the Durban Document also makes a remark on it. See the remarks *supra* in chapters 2.2.1.1.3 and 4.4.2.

62. Gilbert (2005a), pp. 173–174.

63. Hofmann (2006), pp. 13–14.

64. Eide (2001), para. 21, commenting on art. 1 of the UN Minority Declaration.

65. See the remarks *supra* in chapter 2.1.1.3.2. See also the remarks on the criminalisation of such extreme acts as genocide, apartheid and ethnic cleansing *supra* in chapter 2.2.1.

The thin line between integrationist and assimilationist approaches becomes highlighted when one takes a closer look at the international norms on minorities and indigenous peoples, for these reveal that the cautiousness of states in acknowledging differences beyond the private sphere is a recurrent theme also in these frameworks. As discussed in this research, the international norms pertaining to minorities in particular contain numerous elements that evidence a great cautiousness on the part of states in recognising differences in the public sphere. Of the various differences, states have been most prepared to accommodate linguistic ones, which they perhaps view as “safer” than other kinds.⁶⁶ Although international norms suggest that there has been willingness to grant indigenous peoples a more far-reaching empowering code than to any other group, including minorities, the low number of ratifications of ILO Convention No. 169 may be taken to signal the reservations of states towards recognising differences in practice.⁶⁷ The difficulty of adopting the UN Declaration on Indigenous Peoples is also indicative of the cautiousness of states in this respect. Whilst such questions as financial, administrative and technical inputs may be found to underlie states’ reluctance, concerns for the unity of states and/or the cohesion of societies clearly also figure among states’ preoccupations. Undoubtedly, other considerations, such as power – and, in the case of indigenous peoples, also the use of natural resources and land⁶⁸ and therefore economic interests – play a significant role as well.

A look at the EU policies and practices shows that *the EU* plainly links the concept of integration to combating social exclusion, to advancing inclusion and to equal and non-discriminatory treatment. These emphases signify that integration in fact comes very close to or is synonymous with inclusion. Although societal diversity and pluralism have been viewed positively, various identities do not receive active (positive) protection within the EU, a situation reflected most clearly in the absence of a positive intra-EU policy on minorities. In general, within the Union, and particularly in the area of EU law, cultural or other differences of various groups or individuals do not receive positive acknowledgement similar to that which they are accorded under the international human rights norms and by the international bodies discussed in this research; rather, in the EU the “right to be different” is primarily associated with the EU states, i.e. with inter-state diversity, an attitude coming to the fore in the remarks on identities made solely with reference to the EU member states or Europe (the Union) as a whole.⁶⁹ However, the mainstreaming policies

66. See the remarks *supra* in chapter 2.1.4.2. The HCNM has also remarked on the sensitivity of language issues. See the remarks *supra* in chapter 4.3.3.1.

67. See the remarks on the status of the ratification of this convention *supra* in chapter 2.1.2.1.

68. Questions pertaining to land rights have been among the central reasons why e.g. the Finnish government has had difficulties ratifying ILO Convention No. 169.

69. The EU’s support for lesser-used languages deserves mention. See the remarks *supra* in chapter 3.1.

developed within the EU, as well as the various diversity plans encouraged by the EU and designed expressly for the area of employment, contain more positive approaches to diversity and various differences pertaining to groups and individuals.⁷⁰

The use of the concept of integration in the international human rights norms concerning *women, children, persons with disabilities and the elderly* does not provide much information that would enable one to draw a distinction between integration and inclusion; integration appears to be closely linked to the idea of inclusiveness (inclusion) and combating marginalisation and segregation by implementing the principles of equality and non-discrimination and ensuring the full and equal enjoyment of all human rights and fundamental freedoms.⁷¹ Generally, while various differences of individuals differ in nature, i.e. there are “differences in differences”,⁷² the differences of women, children, persons with disabilities and the elderly have not received the same kind of positive recognition as has been the case with groups characterised by ethnic, cultural, linguistic and religious features. In fact, the clearest acknowledgement of differences in these contexts reiterates these same features: the norms on children address the development of the child’s personality and respect for the child’s (and his/her parents’) cultural identity, language and values. And when the international norms consider the issue of identity with respect to women, the pertinent provisions deal with women’s cultural, religious or ethnic identity.⁷³ Recognising differences of women (primarily from men) and a different identity as a woman, i.e. some sort of overarching women’s identity, has been among the issues widely discussed and debated in the literature.⁷⁴ The observations put forward note, for example, that, on the one hand, the situation of women is comparable to that of disadvantaged cultural minorities,⁷⁵ but that, on the other, the failures to acknowledge women’s rights are essentially failures to recognise women as individuals.⁷⁶ Since the protective norms with respect to women – especially those adopted earlier – have tended to embody a paternalistic treatment of women and women’s

70. See the remarks *supra* in chapter 3.3.

71. See the remarks *supra* in chapter 2.1.3.2.

72. E.g. certain differences such as skin colour and to a great extent also sex are more or less permanent and cannot be (easily) regulated by the decisions of individuals themselves, while differences relating to cultures, religions and language can be altered more easily. For the difficulties of defining ethnicity, see the remarks *supra* in chapter 2.1.4.1.

73. The Beijing Document contains references to the identity of indigenous women, and the Durban Document refers to women’s cultural or religious identity. See the remarks *supra* in chapters 2.1.3.2 and 2.2.1.1.3.

74. For the remarks on an identity as a woman and the differences of this identity to other identities, particularly to cultural identity, and differences in the problems of recognition for women and for cultures, see Wolf (1992), pp. 76–77. For the remarks on differences and identities with respect to women, see Nousiainen and Pylkkänen (2001), pp. 16–67.

75. Gutmann (1992), p. 8.

76. Wolf (1992), pp. 76–77.

exclusion from various areas of activities, the non-discriminatory norms have often been viewed as providing women better access to participation in various contexts, for instance in the areas of political participation and employment.⁷⁷ A step forward in recognising differences or different identities more broadly may be seen in the recently adopted international norms on persons with disabilities, which call for respect for difference and the acceptance of disabled persons as part of human diversity and humanity and for respect for the right of children with disabilities to preserve their identities.⁷⁸

It is worthy of note that when integration has been discussed with respect to the persons belonging to groups in a marginalised or vulnerable position in particular – these often including groups such as the Roma, persons of immigrant background, women, children, and persons with disabilities – it has been openly associated with the question of protection. This protection is closely anchored to the upholding of the principles of equality and non-discrimination, which for their part have strong links to the idea of inclusiveness.⁷⁹ Additionally, it may be observed that although the issue of identity has been raised in the context of article 6 of the CoE Framework Convention⁸⁰ – thus pointing to a positive attitude on the part of states towards the broader acknowledgement of the identities of persons with ethnic, cultural, linguistic or religious features – the international norms of relevance for persons of immigrant background otherwise suggest that the more permanent the stay of the foreign residents, the more cautious states' attitude towards supporting their identities becomes.⁸¹

Finally, if the approaches to integration incorporated in the international human rights norms and taken within the EU are assessed against the incorporation models discussed in the introductory chapter of this thesis,⁸² in the light of that presented by Stephen Castles, it may be said that the international human rights norms set out a multiculturalist model of sorts with respect to the groups falling within the scope of the norms on minorities and indigenous peoples. Otherwise, i.e. with respect to other groups considered in the norms, the approach comes closer to the assimilationist or differential exclusion models. The EU approaches, which are set out particularly in the EU norms, favour the two last-mentioned models more or less across the board, although a nod towards a multiculturalist model may

77. Pentikäinen (1999), pp. 21–27. See also the remarks *supra* in chapter 2.1.3.2.

78. See the remarks on the Convention on the Rights of Persons with Disabilities *supra* in chapter 2.1.3.2.

79. See the remarks *supra* in chapter 2.3.

80. See the remarks *supra* in chapter 2.2.1.3.1.

81. This may be inferred from the international norms on migrant workers, from the hesitant provisions on identity in the Convention on the Participation of Foreigners in Public Life at Local Level, and particularly from the practice of the EU. See the remarks *supra* in chapters 2.1.3.1.1, 2.1.3.1.2 and 3.3.

82. See the remarks *supra* in chapter 1.2.

be found in the Union's non-normative approaches laid down primarily in various mainstreaming policies and diversity plans. The three international bodies discussed here have adopted clearly and generally more positive attitudes than states towards approaches with multiculturalist undertones.

5.1.2.3 Tensions, Problems and Challenges

Tensions, problems and challenges linked to differences, distinctions and boundaries: The cautiousness of states in assuming strong obligations to support differences boils down to one of a fundamental tension between allowing differences and securing the unity of a state or cohesion of a society; states have clearly viewed these issues as having an uneasy relationship. This concern of states can be clearly seen both in the international norms on minorities and on indigenous peoples.⁸³ This tense relationship is fraught with complexities and difficulties involving finding a proper balance among various aspects of relevance in this dynamic. It may be seen that although in particular the protection of ethnic, cultural, linguistic and religious differences has been addressed in the human rights norms, these very same differences have also been viewed as potentially destructive to unity and cohesion. Undoubtedly this concern of states has contributed, on the one hand, to the attention given to the groups with these characteristics in the international human rights norms and, on the other, to the cautiousness of states in recognising or allowing differences in practice.⁸⁴

The persistence of assimilation is closely associated with nation-building, and especially with the idea of culturally homogenous independent nation-states.⁸⁵ Difficulties in granting and even a reluctance to grant specific rights or entitlements to minorities in the processes of nation-building may have been seen in Europe – both in the past and the present – as the borders of European states have been redrawn and new states have consolidated their national identities.⁸⁶ However, an assimilation orientation persists even in states that have long since established their independence.⁸⁷ In general, the politics of difference has been considered as endan-

83. See the remarks *supra* in chapter 2.1.4.

84. See also the remarks *supra* in chapter 5.1.2.2 and *infra* in chapter 5.2.4.

85. Anaya (2004), p. 55. It has been pointed out that when the meaning given to “race” started to broaden at the end of the 18th century and racial theories developed in the course of the 19th century, “race” for many became synonymous with “nation”, i.e. a large group of persons sharing a common language who wished to be governed as a single political unit. Banton (1996), p. 83.

86. Due to the redrawing of borders in Europe after the Cold War, there are a number of European states that are still in the process of building (or rebuilding) their national identities. It suffices to refer e.g. to the situation of the Baltic states. See also the HCNM's remarks on nation-building and state identities *supra* in chapter 4.3.

87. In Europe, France and its policy of rejecting any specific minority entitlements stands as a prime example of these kinds of states.

gering national identity.⁸⁸ The identity of states is also overtly linked to the question of nationality/citizenship, with states expressing their own identities either in the inclusive or exclusive principle of nationality/citizenship.⁸⁹ Nationality/citizenship for its part has an intrinsic link to the issue of belonging to a society, primarily belonging to a polity; the identity of states is often built on a narrow view of the reach of a polity such as that reflected in the laws on nationality/citizenship of the European states.

The great and persistent importance attached by states to the question of nationality/citizenship is apparent in states' reluctance to conclude international norms on the issue, thus indicating states' unwillingness to give up their sovereign rights and decision-making power in the area. This is readily seen within the EU, for instance, in the EU states insisting on retaining their national decision-making power in nationality decisions.⁹⁰ The sensitiveness of and importance attributed to the question of nationality/citizenship may also be read in the international human rights norms. As discussed in this research, the issue of nationality/citizenship is a subject of a constant debate particularly in the area of minority rights, with governments generally preferring a less inclusive approach with respect to the extent of minority protection than international bodies by linking this protection to nationality/citizenship.⁹¹ The question of nationality/citizenship comes to the fore also in the international norms regulating the legal status of migrant workers. Additionally, the international human rights norms of general application include elements exclusive of non-nationals/non-citizens in that political rights, as well as economic and social rights, may be restricted on the basis of person's nationality/citizenship.⁹²

To mitigate the consequences of the exclusion of non-nationals/non-citizens from broader political participation, and particularly from formal national political decision-making structures and processes, states have concluded international instruments, of which the Convention on the Participation of Foreigners in Public Life at Local Level openly addresses the issue of the enhancement of participation of foreign residents. While this CoE convention also establishes a link between participation of foreign (permanent) residents and their integration into the life of the community, it contains a number of features indicating how sensitive the issue of political participation is for states. These include limiting the Convention's scope

88. Young (2000), pp. 84–85.

89. Fredman (2002), p. 40. For the links between citizenship and a national identity, see also Habermas (1996), pp. 491–492.

90. See also the remarks *supra* in chapter 3.3.

91. For broader protection, see in particular the remarks on the views of the AC and the HCNM *supra* in chapters 4.1.2 and 4.3.2. Although the personal scope of art. 27 of the ICCPR is broad, covering also e.g. non-nationals/non-citizens, the protection provided by this provision is rather weak. See the remarks *supra* in chapter 2.1.1.1.1. See also the remarks *supra* in chapter 2.1.4.1.

92. See the remarks *supra* in chapter 2.3.1.2.

of application to participation at the local level and granting the states parties a wide margin of discretion. What is more, the Convention has not attracted many ratifications.⁹³ The EU norms go further in providing non-nationals with political rights, with the limitation, however, that these rights are granted to EU citizens; pursuant to the EU norms, EU citizens have rights with respect to participation in local elections in other EU states, i.e. the right to vote in the EU state in which they are residing, as well the right to vote in the elections of the European Parliament.⁹⁴

Exclusions on the basis of nationality/citizenship are powerful in creating and maintaining boundaries and distinctions among individuals and groups of individuals.⁹⁵ Whilst nationality/citizenship is among the most distinct markers of exclusion and inclusion where the enjoyment of various rights is concerned, nationality also has an intrinsic link to nationalism. Nationalism has various facets and manifestations,⁹⁶ and it is also among the concepts that are hard to capture in definitions.⁹⁷ The HCNM has expressed particular concern for the aggressive forms of nationalism that are prone to fuel tensions both between and within states.⁹⁸ While nationalism relates to and is one of the outcomes of the emergence of new divisions and understandings of the meanings of “nation” and “state” in the global condition,⁹⁹ it has also been viewed as a form of racism.¹⁰⁰ Additionally, nationalism has often had links to religion(s) and in fact has features bringing it close to religion(s).¹⁰¹

In general, broad concepts such as nation, state and democracy have been moulded by historical developments and their content has changed in the course of time. All these concepts have in fact often come to favour sameness (homogeneousness).¹⁰² Historically, the international community has particularly valued the (cultural) diversity among the different states (and colonial territories), not the diversity within them.¹⁰³ Although in recent years (cultural) diversity and pluralism have emerged

93. States may also ratify the Convention by excluding non-nationals' right to vote and/or to stand as a candidate in local elections. See the remarks *supra* in chapter 2.1.3.1.2.

94. See the remarks *supra* in chapter 3.3. See also the remarks on the suggestions relating to developing the model of civic citizenship *infra* in chapter 5.2.2.

95. For the remarks on the existing nation-state systems enacting and legitimising profound exclusions many of which are unjust, see Young (2000), pp. 236–275.

96. For the existence of various forms of nationalisms, see e.g. Pakkasvirta and Saukkonen (2005). For the benign and malignant forms of nationalism, see Taylor (1992), p. 31. For an intriguing account of the history of nationalism, see Anderson (2006).

97. For the remarks on difficulties to both define and analyse the concepts of nation, nationality and nationalism, see *ibid.*, p. 3.

98. See the remarks *supra* in chapter 4.3.

99. Martikainen (2004), p. 47.

100. Fitzpatrick (1995). For the remarks on nationalism having roots in fear and hatred of the “Other”, see Anderson (2006), p. 141.

101. Anderson (2006).

102. Fredman (2002), p. 40.

103. Anaya (2004), p. 55.

among the repeated slogans in the area of human rights, with intra-state diversity gaining increased attention, the emphasis on inter-state diversity persists and even recently adopted norms refer to it. While inter-state diversity has been clearly addressed in the human rights documents adopted within the UN and UNESCO,¹⁰⁴ emphases on inter-state diversity are particularly prominent within the EU, which underlines the diversity among its member states in the context of European state-level integration. In the EU the identity issue has been raised predominantly at the level of states or “Greater Europe”. It may also be seen that when the European states – in the instruments adopted within the CoE – have addressed identity in broader frameworks, for instance at the level of Europe, it is particularly historical regional or minority languages and national minorities that are viewed as part of Europe’s cultural identity and European identity; i.e. European identity is closely associated with cultures that have existed in Europe for a long period of time.¹⁰⁵

The documents adopted within the CoE and the EU openly consider the question of social cohesion, thus suggesting that the European states are particularly concerned about the issue. Whilst the human rights norms mention the issue of social cohesion also in connection with older minorities, and whilst these minority questions are overtly linked to national unity and territorial integrity (as well as to peace and security), states have discussed social cohesion particularly with respect to newer minority groups; in other words, increasing diversity resulting from migration is considered as creating particular challenges for social cohesion. Social cohesion is among the concepts that is frequently used but often left undefined – rather like the very concept of integration – undoubtedly due to the difficulty of capturing in a definition the content of such a broad and vague phenomenon.¹⁰⁶ The international human rights instruments establish links between the issues of (social) cohesion and integration and highlight the issues of differences and tolerance in this connection. States have also associated social cohesion with common values. The EU has combined integration, security and greater social cohesion. The issue of cohesion has also been discussed by the AC, ECRI and the HCNM.¹⁰⁷ It may

104. Of the UN documents, see e.g. the Durban Document and the Vienna Document of the 1993 World Conference on Human Rights. See the remarks *supra* in chapters 2.2.1.1.3 and 2.1.1.1.2.

105. This has been set out particularly in the CoE Language Charter and the documents adopted at the CoE summits. See the remarks *supra* in chapters 2.1.1.3.1 and 2.1.1.3.3.

106. It has been pointed out that the term “cohesion” is often used in the context of policy debates on employment and poverty and how measures are needed to reverse or remedy processes of (partial) societal disintegration and the social exclusion and marginalisation of certain groups. Social cohesion policies aim to counterbalance the processes of societal fragmentation. CoE (2000), p. 37.

107. See the remarks *supra* in chapters 2.1.4.3, 2.2.3.2, 3.3 and 4.4.2. See also the remarks on contemporary debates as well as national integration practices reflecting trends whereby longstanding commitments to multiculturalism in some states are increasingly overshadowed.

be said that in general the observations on social cohesion often appear to attach to the concept of social cohesion elements similar to those found in discussions on an integrated society.

In addition to the tensions seen to exist between recognising (and allowing) differences and unity and cohesion, there are other kinds of tensions and challenges that may be detected in the human rights norms discussed in this research. While the anti-racism discourse has encompassed the issues of identity and a call for recognising differences positively, at the same time it is clearly worried about distinctions, boundaries and barriers between individuals and groups and seeks to eradicate them. International norms also point to the issue of a shared identity potentially resulting in exclusiveness and marginalisation, and thus the creation of certain boundaries between various groups.¹⁰⁸

The concerns raised and the strands seen in the same discourse underlining diversity and calling for respect for (cultural) diversity – in practice respect for differences – seem to introduce a certain internal tension. On the one hand, an emphasis is put on the non-discriminatory and equal enjoyment of human rights, on the other, differences among human beings and cultures are underlined. Whether this leads to a tense relationship depends on the equality model advanced within this framework. When the model is one of formal equality requiring that differences be ignored, some sort of tension, even conflict, between the calls for equality and for diversity seems to be evident. Resorting to a more substantial model of equality does not necessarily eliminate the tension, since although differences are recognised to a degree, they are as a rule viewed negatively rather than positively.¹⁰⁹ The call for respect for (cultural) diversity entails a positive acknowledgment of differences. The tension deriving from these different emphases is likely to disappear if, for example, the positive call for diversity primarily concerns the private sphere of life, which is beyond the active reach of human rights. However, as discussed above, the demand for diversity in the area of anti-racist action does not confine itself to the private sphere but entails certain positive acknowledgement also in the public sphere, including in the area of education. It may also be said that the tension does not come to the fore as long as the anti-discrimination laws incorporating a negative approach to differences and the areas within which positive recognition of differences have been endorsed do not coincide. This would be possible since the former does not cover all areas and activities.¹¹⁰ Thus, it is primarily when a person relies on the

owed by questions about the need for shared values and means to promote community cohesion *supra* in chapter 4.3.3.2.

108. See e.g. the remarks in the CoE Language Charter and the OSCE commitments on intolerance *supra* in chapters 2.1.1.3.1 and 2.2.1.2.

109. See the remarks *supra* in chapter 2.3.

110. See the remarks *supra* in chapter 2.3.1.1.

anti-discrimination laws that his/her differences do not receive positive acknowledgement. Outside that legal framework, a positive attitude towards differences has been called for, for instance, in diversity plans in the area of employment.¹¹¹ However, the coexistence of these frameworks with disparate approaches to differences – and the fact that the equality model underlying the human rights paradigm is based on a negative rather than positive attitude towards differences – contribute to creating a tense relationship between these two areas and invite a rethinking of the equality model(s) employed.

When the international anti-racism discourse is considered together with the international norms on minorities and indigenous peoples, tensions come to the fore again, perhaps in the most distinct manner. Whilst the international norms on minorities and indigenous peoples suggest that persons belonging to these kinds of groups have the “right to be different”, including the possibility to get protection for their group identities in the public sphere, this in fact echoes the arguments invoked by those adhering to the culturally oriented racism that claims that cultures are exclusive, bounded entities and that culturally similar people belong together to the exclusion of “Others”.¹¹² These boundary-creating aspects have also triggered both warnings about the risks of classifications of human beings¹¹³ and criticism towards the multiculturalist model of accommodation or ethnicity management.¹¹⁴ Racism has a tendency to undergo mutations and one of the more visible shifts has been that from colour racism to cultural racism, the latter being among the acute contemporary challenges in the area of anti-racist action.¹¹⁵

The tense relationship between group-specific rights and (traditional) anti-racist action, the former incorporating positive and the latter – in its traditional and thus earlier forms – a rather negative recognition of differences, may also explain to some extent why these discourses have been kept somewhat apart.¹¹⁶ However, in recent

111. In practice there is a panoply of measures that can be taken in the area of employment to promote employment and integration of individuals and that are not based on anti-discrimination laws. For these measures, see e.g. CoE (1998).

112. Makkonen (2004), p. 172.

113. Michael Foucault was among the first 20th century philosophers to warn about the risks of classifications of human beings. Dreyfus and Rabinow (1982), pp. 212–213.

114. Makkonen (2000), p. 44.

115. Fredman (2001), and Marks and Clapham (2005), pp. 289–292.

It has been pointed out that any method of combating discrimination which makes use of a racial (or ethnic) classification would legitimise a view of human differences that has been used to justify the denial of human rights. Furthermore, a racial categorisation may lie behind expressions which make no use of racial terms. Banton (1996), pp. 52 and 85.

116. See the remarks on the norms on minorities and indigenous peoples, including the observations on the absence of references to racism *supra* in chapter 2.1.4.1. In addition, the somewhat cautious attitude of the HCNM towards raising the issues of racism and other forms of intolerance in the context of national minorities is worthy of note. See the remarks *supra* in chapter 4.3.2.

years the discourses have been increasingly brought together, with various minorities – including the older ones – and indigenous peoples being considered in the more recent anti-racism norms and practice.¹¹⁷ The relative lack of express references to racism in the international norms on minorities and on indigenous peoples may also be taken as suggesting that states have viewed racism as concerning primarily newer groups such as immigrants, not so much older minorities and indigenous peoples.¹¹⁸ The Roma seem to constitute a case in their own right: while they have been considered within the framework of minority rights, among other contexts, a clear emphasis has been placed on combating the discrimination and racism they face.

It is extremely important to be aware of the risks of the emphasis put on diversity and differences both within the anti-racism discourse and particularly in the discourses on minorities and indigenous peoples, for the emphasis may contribute to the rise of new forms of racism, i.e. cultural racism. The great challenge is that when new boundaries and distinctions are created among groups,¹¹⁹ new hierarchies may be created in which various groups and the individuals belonging to them are (again) given varying value. The case of the Roma stands as a prime example of the tendency to attach lower value to a group due to its (cultural) differences, resulting in inferior treatment.¹²⁰ The challenge here is related to the fact that differences are still, as a rule, viewed as negative, not positive attributes of groups. This same dynamic of associating differences with a different (sometimes lower) value has also been patent in the considerations concerning women.¹²¹

A further challenge pertaining to an emphasis placed on distinctiveness and (distinct) collective identities of various groups arises if it results – as it often does – in pressure for homogenisation within the group. The need to draw a boundary vis-à-vis other groups in fact signifies a threat to in-group diversity. In reality, individuals may possess several identities, and in open societies with increasing movement of persons and ideas many individuals have multiple identities that coincide, coexist or are layered, reflecting their various associations. Identities are neither based solely

117. See the remarks *supra* in chapter 2.2.3.1. The OSCE documents contain cross-references between the minority and anti-racism norms. See the remarks *supra* in chapters 2.1.1.2.2 and 2.2.1.2.

118. It is notable that the UN Declaration on Indigenous Peoples expressly mentions the issue of racism. See the remarks *supra* in chapter 2.1.2.2.

119. As discussed, the identity remarks in the international norms considered in this research often address the identities of groups, i.e. collective identities. In addition, the requirement of distinctiveness/distinct identity of a minority group in order for it to receive protection under the CoE Framework Convention is noteworthy. See the remarks *supra* in chapters 2.1.4.1 and 4.1.2. See also the remarks put forward by the HCNM *supra* in chapter 4.3.2.

120. CERD has linked the cultural differences of the Roma and their marginalised status in its General Recommendation No. 27 on discrimination against Roma. See the remarks *supra* in chapter 2.2.3.2.

121. Nousiainen and Pylkkänen (2001), pp. 24 and 48–49.

on ethnicity nor uniform within the same community, and they may be held by different members in varying shades and degrees.¹²² However, the celebration of diversity in a society at large and stressing group identities in particular may in practice reduce the possibilities of people to various groups to express their multiple and layered identities as individuals. This may materialise when a community as a distinct entity has an independent interest in drawing a boundary vis-à-vis other groups and this interest conflicts with the interests and wishes of individual members of that community.¹²³ Consequently, such groups as minorities within minorities, as well as individual members of a minority (or an indigenous) group, may have difficulties in expressing their distinct identities within their own group. Attention has also been drawn to the effects of multicultural policies and collective rights or entitlements on women.¹²⁴ Thus, as a result of a search for distinctiveness at the level of groups, individuals belonging to minorities, for instance, may in practice have more limited possibilities to express their multiple identities than individuals in majority groups.

Due to conflicts of interests between collectives and the individuals belonging to them, and the often vulnerable position of the latter, endorsing individual rights has been viewed as being of crucial importance.¹²⁵ In general, criticism has been directed in particular at the negative outcomes of the emphasis placed on group identities, and attention has been drawn to the importance of individual or individualised identities and the possibility to define one's own identity.¹²⁶ Stressing differences between groups and group identities, rather than various differences and identities of individuals, also has both the tendency to stimulate group opposition and open the trap of essentialism, overshadowing heterogeneity within groups by ascribing to the individuals belonging to groups primarily and extensively the attributes of

122. This has been well summarised in the Lund Recommendations used by the HCNM. These recommendations both point out that individuals identify themselves in numerous ways in addition to their identity as members of national minority and stress that an individual's freedom to identify him- or herself as he or she chooses is necessary to ensure respect for individual autonomy and liberty. See the pertinent remarks on the Lund Recommendations *supra* in chapter 4.3.3.1. For the remarks on various identity groups and shared social markers, see also Gutmann (2003), p. 9.

123. This kind of conflict of interests of the group and an individual came to the fore e.g. in the first individual communication considered by the HRC, i.e. in *Sandra Lovelace v. Canada*. See also the remarks on this case in Banton (1996), p. 40, and Anaya (2004), pp. 135–136. For the remarks on tensions and difficulties in reconciling strong collective goals and respecting diversity, see also Taylor (1992), pp. 57–58.

124. Among the most notable writings in the area is Susan Okin's "Is Multiculturalism Bad for Women". Okin (1999). See also Shachar (2001).

125. Ronald Dworkin has defended individual rights over collective rights, and has described individual rights as being (political) trumps held by individuals. Dworkin (1980), pp. xi.

126. See e.g. Taylor (1992), pp. 28 and 42. For the remarks on liberal democracy being suspicious of the demand to enlist politics in the preservation of separate group identities, see Gutmann (1992), p. 10.

the group. Furthermore, a rigid conceptualisation of group differences denies the similarities that group members have with those not considered in the group, thus diverting attention from similarities shared by a great number of individuals and existing across various cultural or other boundaries.¹²⁷ Part of the problematic pertaining to identities is that while states have made the distinctiveness of minority identity a relevant criterion for minority protection, they have also defined the relevant elements of minority identity in the international instruments.¹²⁸ Against this background the statement in the UN Declaration on Indigenous Peoples that indigenous peoples have the right to determine their own identity is worthy of mention.

A word of warning has been voiced against stressing ethnic and religious identities in particular, and politicising religious and ethnic differences. The special challenge mentioned as characterising both religious and ethnic identities is their non-negotiability and intractability,¹²⁹ and that they are prone to open the door to instances of intolerance.¹³⁰ While the concerns relating to these issues can be seen to some extent in the international human rights norms,¹³¹ it is notable that both the AC and ECRI have touched upon the challenges associated with ethnic affiliations and divisions along ethnic lines.¹³² Furthermore, the root-causes of the conflicts that are the focus of the HCNM's attention often derive from issues pertaining to ethnicity.¹³³ The recent incidents in Europe triggered by the publication of drawings of the Prophet Muhammad¹³⁴ stand as an example of the sensitiveness and explosive nature, even non-negotiability, of issues pertaining to religion(s).

127. Iris Marion Young has criticised views of social differences as identity markers, since these contribute to an essentialist approach to defining social groups that freezes the experienced fluidity of social relations by setting up rigid inside-outside distinctions among groups. A rigid conceptualisation of group differences both denies the similarities that group members have with those not considered in the group and denies the many shadings and differentiations with the group. Thus, a politics of difference should not be reduced to "identity politics", and groups should not have identities as such, but rather individuals should construct their own identities. Young (2000), pp. 87–92.

For the remarks on the overemphasis upon difference leading to the lack of emphasis on similarity, see also Makkonen (2000), p. 19.

128. Reetta Toivanen has described the situation as giving minorities a certain "dress code", i.e. that there are certain features one has to carry or express in order to be an "authentic" minority. Toivanen (2004b), p. 120.

129. Parekh (2000), pp. 198–199.

130. For the remarks on ethnic identity being prone to open the door for intolerance, see Rockefeller (1992), p. 88. Rockefeller points out that ethnic identity is not even a person's primary identity and that ethnic identity should not be viewed as the foundation of recognition of equal value; he contends that an emphasis should be placed on human identity instead. For the remarks on the need to replace the talk about ethnic groups with talk about individual ethnic identities, see Makkonen (2000), p. 44.

131. See the remarks *supra* in this section.

132. See the remarks *supra* in chapter 4.4.3.

133. See the remarks *supra* in chapters 2.1.1.2.2 and 4.3.

134. See also the remarks *supra* in chapters 1.1 and 4.2.2.

Persistence of discrimination, racism and other forms of intolerance: In the area of human rights, states have directed substantial international efforts to tackling especially racial discrimination, racism and other forms of intolerance. The action in this area has frequently been observed to be a matter of priority for states and for the international community as a whole.¹³⁵ Despite this, the results have not been very encouraging; whilst racist theories have been officially banned and respect for diversity and plurality has become an oft-repeated slogan of our time, the phenomenon of racism and other forms of intolerance persist. The ICERD, which has been frequently referred to by states as the cornerstone international instrument in the area of combating racial discrimination and racism, has proved insufficient to force states to enact comprehensive legislative protection against racial and ethnic discrimination.¹³⁶ It is also already generally acknowledged that an emphasis on anti-discrimination laws is not enough to eliminate racial discrimination and racism, but that also other measures are necessary to enable the social change required.¹³⁷ For instance, ECRI has highlighted the need to take an array of measures, both legal and non-legal, at the national level.¹³⁸ The mutations of racism from colour racism towards forms of cultural racism discussed above have also posed new challenges for anti-racism efforts.

Traditional human rights adjudication has been criticised for being incapable of generating the rich concept of equality needed to fully address the phenomenon of racism, and that of sexism as well. Additionally, the individualised nature of human rights adjudication is sometimes not able to incorporate the important group dimension.¹³⁹ While international norms contain some references to (positive) obligations of states to advance tolerance, the principles of equality and non-discrimination set out in the international human rights norms do not, as a rule, entail positive duties for states to promote equality.¹⁴⁰ However, positive duties in the area of equality would change the whole landscape of the anti-discrimination laws by shifting the focus from the perpetrator of a discriminatory act to the body in the best position to promote equality, thus moving beyond the fault-based model of the current laws. A focus on a positive duty would also signify recognition of the fact that societal discrimination extends well beyond individual acts of prejudice. Among other things, this would draw attention to the important issue of structural discrimination, which is presently both a neglected aspect of the norms pertaining to equality and non-

135. See the remarks *supra* in chapter 2.2.3.

136. Boyle and Baldaccini (2001), pp. 135–136.

137. *Ibid.*, p. 137.

138. See the remarks *supra* in chapter 4.2.2.

139. Fredman (2001b), p. 30. In practice, states have also created only limited avenues of complaint and redress for victims of racial discrimination and racism. McCrudden (2001).

140. See the remarks *supra* in chapter 2.3.1.1.

discrimination¹⁴¹ and a marginalised issue in the activities of many international bodies, including the three considered in detail in this research.¹⁴² The most prominent positive duties to promote equality have been incorporated in plans addressing the policies of mainstreaming and aiming at dismantling institutional racism and sexism. In the implementation of mainstreaming policies, the choice of the principle of equality is still of great relevance. In order to truly accommodate diversity, the measures taken must genuinely address and change the underlying distributive structures and reshape them to reflect diversity.¹⁴³

Finally, similarly to the group-specific norms, it is also characteristic of the structure and functioning of anti-discrimination laws that they create boundaries and pose the challenge of essentialism. The equality model, which is based on bright line distinctions between different categories of groups facing discrimination, is also unable to capture the challenges relating to cumulative discrimination.¹⁴⁴ This has contributed to situations in which cross-cutting themes such as gender or age seem to be difficult to fit into the equality discourses focussed on ethnic discrimination. This problem is reflected also in the work of the three international bodies considered in length in this research, which have given only marginal attention to the issue of double or multiple discrimination.¹⁴⁵ It is also worthy of mention that while the issue of sex/gender has been incorporated in the international norms on indigenous peoples, this has not been done with respect to the international norms on minorities.¹⁴⁶

141. Ibid. It is noteworthy that the international norms on women and on persons with disabilities contain express provisions pertaining to addressing institutional or structural discrimination. See the remarks *supra* in chapter 2.1.3.2.

It has been stated that a particularly important dimension of the equality regulation laying down positive duties to promote equality is its potential to encourage participation by affected groups in the decision-making process, which for its part renders strategies more successful and the very process of achieving equality more democratic. For the remarks on the aspects linked to positive duties, see Fredman (2001b), pp. 26–27, and (2002), pp. 121–124.

142. See the remarks *supra* in chapter 4.

143. See the remarks *supra* in chapter 2.3.1.1.

144. Ibid. For the remarks on problems linked to the rights discourse and functioning of anti-discrimination laws, including compelling the victims of discrimination to use a specific language of rights, see Toivanen (2004a).

145. See the remarks *supra* in chapter 4.

146. See the remarks *supra* in chapter 2.1.4.1.

5.2 Concluding Analysis and Remarks

5.2.1 Challenge for the European States: Creating an Integrated Society

A society lacking cohesion, a sense of belonging, and integration is, and also should be, of great concern for states. ECRI has brought up some of the risks of a non-integrated society by drawing attention to the vulnerability of persons of immigrant background (non-citizens) at times when economic and social conditions deteriorate. It has also pointed to the risk of identity-based withdrawal and radicalisation, i.e. how persons who lack reference points in society may react to exclusion by establishing other ones through their affiliation with an ethnic or religious community and develop even violent attitudes towards other communities. The OSCE has linked failure to integrate societies to instability. Building on this, the HCNM has underscored the importance of integration in enhancing both the security and unity of a state.¹⁴⁷

The issue of integration and creating an integrated society has become an extremely topical one in Europe, where an increasing number of states have become immigrant-receiving states and many have only recently officially acknowledged this fundamental demographic shift. In recent years, many European states have developed their national policies in the area to incorporate newcomers, with some states reviewing old policies that have been seen as requiring adjustment or redirection and others consolidating their first policy strategies and plans in the area. There is also an urgent need for these new policies, since in general the European states have thus far not been very successful in integrating newcomers, given that the issue of integration has often not received the attention it requires and has even been ignored. In view of the importance of the issue, it has been pointed out that the integration of migrants must become a national priority for the European states if they are to produce more resilient societies that are better able to deal with social conflicts and to withstand social “shocks” created by the transformative forces of migration.¹⁴⁸

ECRI’s observation that similarities in physical appearance and religion do not necessarily make it easier to integrate in(to) society as a whole, but that the persons sharing these features with the dominant group also face challenges in integration

147. See the remarks *supra* in chapters 4.2.3 and 4.3.3.

148. For the inadequate attention to the issue of integration in Europe and the need to shift migration and integration management towards the centre of the policy stage, see also IOM (2005), pp. 139, 147, 303 and 305. For the forces of transformation in societies produced by migration, see also the remarks *supra* in chapter 1.1.

is an important reminder of the difficulties in the area.¹⁴⁹ Adding to these are the challenges stemming from the somewhat ambivalent attitudes of states towards integration. While, on the one hand, it is in the interest of states to integrate various individuals in(to) society in order to create a cohesive and integrated society, on the other, they have also viewed integration negatively since it restricts their decision-making power in regulating the stay of non-nationals/non-citizens in their area. For instance, the human rights principle of *non-refoulement*¹⁵⁰ and the norms on the right to privacy, home and family life in practice limit states' margin of discretion with respect to decisions on deportation or expulsion.¹⁵¹ This fact even prompted the United Kingdom recently to propose denouncing the ECHR, since its provisions limit the state's possibilities to decide on the presence of non-nationals/non-citizens in its area. States' insistence on having decision-making power in this issue is also clearly seen in the international norms and practices of states with respect to such groups as migrant workers, refugees and asylum-seekers as well as in the fact that states have insisted on retaining their power of decision in questions of nationality/citizenship.

5.2.2 The Need for Clarification and Further Development of the Concept of Integration

While the term "integration" has become a frequently used concept also in the area of human rights, its undefined or vague use there causes considerable confusion. What matters at the end of the day is not so much what kinds of terms or concepts are used, but what the actual content given to them is and in what kinds of contexts one uses them. An inadequate and unclear explanation of the concepts employed is fertile ground for misunderstandings and it leaves room for a plethora of interpretations, perhaps even contradictory ones. For instance, although nowadays the concept of integration should have a positive content, it may still have negative connotations (for some minorities) due to the fact that the term is not adequately explained.¹⁵² The situation is further complicated by the fact that although, as dis-

149. See the remarks *supra* in chapter 4.2.3.

150. See the remarks on this principle *supra* in chapter 2.1.3.1.3.

151. David A. Martin has pointed out that art. 8 of the ECHR offers extensive protections against expulsion decisions and that the European Court of Human Rights has applied this provision in several decisions to forbid the expulsion of long-time alien residents. Martin (2003), p. 36. Of these cases, see e.g. *Beldjoudi v. France* and *Moustaquim v. Belgium*. For human rights constraining both admission and expulsion decisions, including for the principle of *non-refoulement*, see Martin (2003), pp. 34–38, and Fitzpatrick (2003), p. 178. See also the remarks on integration limiting the expulsion of EU citizens *supra* in chapter 3.3.

152. The problems deriving from obscurities surrounding the concept of integration have been explicitly cited e.g. by the Roma. Project on Ethnic Relations (2001), pp. 27 and 29. The divergent usage of the same term has been explained *supra* in chapter 1.2.

cussed above, the concept of integration and particularly that of forced/forcible assimilation are often distanced from one another in Europe, and certain differences have received positive recognition also reflected in the human rights norms,¹⁵³ in practice for some European governments the term “integration” still tends to be equated with assimilation. In other words, it entails an expectation that one should give up one’s own cultural or other characteristics – or at least refrain from showing them in the public sphere – in order to become an accepted member of society. While the term “assimilation” has fallen into disrepute (in Europe), the positively viewed term “integration” is employed, sometimes even purposefully, to shield what may be a de facto assimilationist orientation of incorporation policies.

It would be most unfortunate if the positive resonance that the concept of integration has acquired over the years were lost, and therefore it is important to make further efforts to keep the concepts apart by clarifying what their actual content is and what the various elements linked to them are. In these efforts clarifying the relationship of integration to the concepts of inclusion and assimilation is of particular importance. Whilst the views already put forward by such international bodies as the three studied in detail in this research are useful in helping to clarify the content of integration and various elements of significance for the process of integration, as already suggested, the further elaborations and specifications by these bodies in the area would be most important and helpful to states in their efforts to accommodate differences and manage diversity.¹⁵⁴

Although differences and the issue of integration have been discussed in the area of human rights with respect to groups with varying characteristics, including children, women, persons with disabilities, and the elderly, the efforts to create an integrated society, manage diversity and thereby prevent social unrest necessitate particular attention to accommodating groups with the features of ethnicity, culture, language or religion, which tend to entail special challenges in this respect. However, this should not be taken to imply that groups with other kinds of defining features deserve no attention or are less important; they and the differences pertaining to them should also be taken on board in the efforts of accommodation and in creating an integrated society.¹⁵⁵

As discussed in this research, implementation of *the international human rights norms* is considered important for the process of integration. This emphasis can also

153. See the remarks *supra* in chapter 5.1.2.2. As discussed in this research, making a distinction between integration and assimilation in the context of the incorporation of individuals into society is also particularly characteristic of the discussions in Europe, while e.g. in the USA the concept of assimilation is still widely used. See the remarks *supra* in chapter 1.2.

154. See the remarks *supra* in chapter 4.4.3.

155. See also the remarks on the need to draw attention to various dimensions in the area of integration *infra* in this section.

be seen in the views of the three international bodies considered in this research.¹⁵⁶ While ECRI and the HCNM in particular have highlighted a number of other elements of importance for integration, *language*, *education* and *participation* have particularly close links to the international human rights norms. Learning the official language, support for maintaining one's mother tongue, and education undoubtedly offer good building blocks for the integration of many persons belonging both to "older" and "newer" minorities. The area of education is one of the significant arenas within which information on various groups, cultures and human rights can be imparted and where differences can be taught and even debated.¹⁵⁷ Language learning and education also have an intrinsic relationship to participation in that they provide individuals the means to engage in participatory processes. In general, the question of participation, which has become one of the most frequently stressed questions in the area of human rights,¹⁵⁸ should be given a prominent role in the area of integration due to its role in nurturing individuals' sense of belonging.¹⁵⁹ Accordingly, integration through participation can be considered as being one of the important means to advance an integrated society.

156. See the remarks *supra* in chapter 5.1.2.2.

157. For the remarks on the importance of the area of education for recognising differences, see e.g. Taylor (1992), pp. 65–66, and Wolf (1992), pp. 75–85. For the remarks on multicultural education, see Parekh (2000), pp. 224–230.

158. This emphasis is clear in the international norms on minorities, indigenous peoples and women. While the question of participation is addressed also in the international anti-racism norms, these norms often seem to prefer to speak in terms of dialogue. The AC and ECRI have also often referred to dialogue. See the remarks *supra* in chapters 2.1.4.1, 2.2.3.1, 4.1.2 and 4.2.2.

159. The HCNM has actively discussed integration through participation and thereby enhancing a sense of belonging. See the remarks *supra* in chapter 4.3.3.

Jürgen Habermas has developed a theory of communicative action which underscores the importance of the participation of individuals making up society for social integration. Habermas has underlined a "proceduralist concept of democracy" enabled by the endorsement of the principles of the private and public autonomy. Human rights play an important role for upholding private autonomy, and popular sovereignty is intrinsically linked to public autonomy; combining these interlinked autonomies enables citizens' rational self-legislation, thereby also serving as a mechanism for social integration. Habermas expounded his theory most fully in his two-volume *Theorie des Kommunikativen Handelns*, published in 1981, and continued his consideration of it in *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, published in 1992.

For the importance of participation and a theory of a communicative model of democracy signifying that democratic legitimacy requires that all those affected by decisions should be included in the discussing in reaching them, see Young (2000). See also the remarks on the importance of giving individuals a feeling of belonging to the larger community in Rockefeller (1992), pp. 97–98. For the importance of participation of indigenous peoples, see Anaya, (2004), pp. 56–58.

While the linkage between participation and integration has been established in international norms,¹⁶⁰ the HCNM's remarks on the importance of *good and democratic governance* also deserve attention. According to the HCNM, such governance entails allowing, encouraging and supporting all those who are subject to the government's decisions to participate in the making of those decisions. The Commissioner has also underlined the importance of both the process and content of participation. The international norms addressing the participation of minorities and indigenous peoples often refer to hearing, consultation and co-operation,¹⁶¹ but the HCNM has stressed that if the aim is to enhance a sense of belonging through participation, individuals should also feel that they are genuinely heard and that they also have a real possibility to affect the outcomes of the decision-making processes pertaining to them.¹⁶² As all this points to participation in a broader sense, the international bodies have specifically called for the participation of specific groups (of relevance from the viewpoint of integration) in planning and implementing integration plans and policies.¹⁶³

In societies characterised by increasing diversity, rules of conduct applying to all individuals in a society but reflecting one-sidedly the patterns of behaviour and values of the majority – or men for that matter – are hardly in line with the demands for justice or viable.¹⁶⁴ Optimally, the broad-based participation of all those residing in a state (or in a local community), as well as decision-making processes that genuinely take into account various views and concerns produce decisions for which various stakeholders feel “ownership”. Additionally, whilst engaging individuals in decision-making processes is democratic and signifies combating exclusion, openness to other and different ways of conducting common affairs, i.e. allowing differences to function as a resource, offers new insights to the ways of doing things and thereby potentially opens the door to innovations and development.¹⁶⁵

160. See the remarks *supra* in chapter 5.1.2.1.

161. See the remarks *supra* in chapter 2.1.4.1.

162. See the remarks *supra* in chapter 4.3.3.1. It is worthy of note that the third CoE summit called for effective democracy and good governance. See the remarks *supra* in chapter 2.1.1.3.3. For the concept of good governance implying that government must work for the benefit of the whole population and not merely the majority or that part of the population who voted for those in power and must take steps so far as is practicable to accommodate also minority will(s) and viewpoints, see Packer (2000), pp. 30–39.

163. See the remarks *supra* in chapter 4.4.2.

164. The equal participation of men and women is linked to democracy and also often to justice. See the remarks *supra* in chapter 2.1.3.2. The Durban Document connects equal participation, justice and democracy. See the remarks *supra* in chapter 2.2.1.1.3. Iris Marion Young has discussed democracy and justice by linking inclusive democratic processes and promoting justice. Young (2000), pp. 16–51 and 119. See also the remarks on justice *infra* in chapter 5.2.4.

165. For seeing social differences and group differentiations as a political resource, see Young (2000), pp. 81–83.

One of the more extensive contemporary challenges for achieving participation that promotes forging various groups into an integrated society is the decline of popular participation in general.¹⁶⁶ In this challenge for democracy the role (and responsibility) of state as well as regional and local actors, including authorities and politicians, would be to maintain and strengthen democratic structures to enable and improve effective, broad-based participation. It has been observed that Europe faces a unique challenge in that there is an ever greater gap between those who are passively affected and those who actively participate. This stems from the fact that an increasing number of measures decided at the supranational level, particularly within the EU, increasingly affect individuals, but the role of citizens with respect to participation has been effectively institutionalised at the national level only.¹⁶⁷

Although less formal channels of participation for non-nationals/non-citizens have been created, particularly at local levels,¹⁶⁸ and these provide important sites enabling participation, the reluctance of states to open their more formal decision-making processes even to long-residing non-nationals/non-citizens merits critical examination. ECRI has openly called for improving the integration and participation in society of non-nationals/non-citizens who are long-term residents by according them certain political rights, such as the right to vote and eligibility to stand as candidates in local elections and, among other things, has urged the governments of the CoE states to ratify the Convention on the Participation of Foreigners in Public Life at Local Level. Due to the fact that this Convention concerns only nationals of the CoE states parties to the Convention,¹⁶⁹ ECRI's remarks on granting political rights in local elections more broadly to non-EU citizens residing in the EU states is of particular significance. ECRI has also made important observations on the significance of improved participatory rights for non-citizens, i.e. how they both enhance the feeling of acceptance in society among non-citizen communities and encourage political parties to focus more attention on the interests of non-citizens.¹⁷⁰ It is noteworthy that the problem of excluding third-country nationals from political decision-making has been increasingly discussed within the EU; suggestions to

166. Inoguchi, Newman and Keane (1998), p. 4.

167. Habermas (1996), p. 503.

168. This is done e.g. by supporting the creation of associations by immigrants and establishing co-operative links between these associations and authorities. For the role of immigrant organisations in the process of integration in Finland, see Pyykkönen (2007). For the remarks on how the need of local and national civil servants to have organisations to negotiate with on such matters as education and health care has contributed to creating immigrant organisations in Finland, see Martikainen (2004), p. 222.

169. See the remarks *supra* in chapter 2.1.3.1.2.

170. See the remarks *supra* in chapter 4.2.3. Also the HCNM has cited the links between integration and increasing the rights of non-citizens, especially by granting them voting rights in municipal elections. See the remarks *supra* in chapter 4.3.3.

remedy the situation include a proposal to create the concept of civic citizenship, a form falling short of full-fledged citizenship.¹⁷¹

Whilst political participation is among the important arenas of participation, participation has been, and also should be, viewed in broad perspective to cover areas such as access to employment, education, goods and services, with these services to include health care and other social services.¹⁷² The EU and ECRI (more so than the AC and HCNM) have put considerable emphasis on the role of participation in the labour market for the process of integration.¹⁷³

Integration is necessarily a process requiring *measures from various stakeholders*, i.e. the state, local actors, and individuals, both those belonging to various minorities and to the majority. The role of public authorities would include, for instance, vigorously implementing the principles of equality and non-discrimination, organising education that reflects diversity, and enabling effective, broad-based participation. While ECRI has been cautious about speaking in terms of duties on the part of persons belonging to minorities – undoubtedly for valid reasons of avoiding the language of duties with respect to individuals who are often in a very vulnerable situation – it would be nevertheless worthwhile if the important question of the roles and duties of various stakeholders in the area of integration were taken up by international bodies. The fact that the EU approaches to integration seem to place a considerable emphasis on the role and even duties of third-country nationals in integration without doing the same in the case of other persons (including EU citizens) – and without clearly describing the role (and duties) of states in the “two-way process of integration” proclaimed by the EU – urges a more balanced consideration of the roles and duties of various stakeholders in the area of integration.¹⁷⁴

The current human rights norms and the remarks of the three international bodies considered in this research indicate that *the attitude towards differences* is one of the important aspects of integration, indeed one which would also set the concept of integration apart from that of assimilation, and even from that of inclusion. The concept of integration contains – and should – a positive attitude towards (cultural) diversity and recognising differences, suggesting that the differences should not be

171. See the remarks *supra* in chapter 3.3. For the view that equalising the legal statuses and rights and responsibilities of third-country long-term residents with the EU citizens, including the extension of a European (civic) citizenship to them, is important for the integration of these persons into society, see EESC (2002), pp. 9 and 65.

172. As discussed, in the human rights norms and the views of the three international bodies studied in this research, the importance of access to health and other social services for integration has been highlighted most clearly with respect to the Roma. See the remarks *supra* in chapter 5.1.2.1. For the importance of health care and other services being fully accessible also for persons of immigrant origin, see EESC (2002), pp. 73–74.

173. For the stress on securing access to employment, see also *ibid.*, pp. 69 and 72.

174. For the remarks on the role of both the persons of immigrant background and the host societies, see also *ibid.*, pp. 69–70.

viewed as a threat or burden but rather as an asset and source of enrichment.¹⁷⁵ This very same aspect of the need to view differences positively as a resource rather than as “handicaps” has also been highlighted in the discussions pertaining to women and gender differences.¹⁷⁶ However, as discussed above, instead of emphasising differences among groups and collective identities, the focus should be placed on the various identities of individuals in order to avoid pitfalls linked to group entitlements.¹⁷⁷

Where the attitude towards differences is concerned, and if the aim is genuinely the creation of an integrated society, *various broader concepts should also be re-evaluated*. While the importance of tackling discrimination has been strongly underlined in the process of integration, the way forward in addressing discrimination and various forms of intolerance and in alleviating many limitations of the (traditional) human rights adjudication may be to introduce a richer concept of equality. This may be done by paying attention to the choice of the concept of equality, developing the content of positive duties, and departing from the traditional way of viewing differences as negative.¹⁷⁸ In addition to focussing greater attention on structural forms of discrimination,¹⁷⁹ redefining the equality model to incorporate a more positive acknowledgement of differences has the potential to both ease tensions and promote situations in which acknowledging differences does not result (easily) in new hierarchies that might contribute to new forms of racism or sexism.¹⁸⁰ In the efforts to reshape structures to enable diversity to be reflected in various arenas of participation, more attention should also be paid to the policies of mainstreaming, which contain the idea of positive duties and measures. Moreover, the interplay of racism and sexism necessitates further consideration.¹⁸¹

175. See also the remarks on Young’s remarks on social differences as a political resource *supra* in this section (n. 165).

176. See the remarks e.g. in Habermas (1996), pp. 422–425.

177. See the remarks *supra* in chapter 5.1.2.3.

178. See also the remarks *supra* in chapter 2.3.2. For the remarks on not viewing all kinds of differences as worthy of positive acknowledgement, see chapter 5.2.3 *infra*.

179. See the remarks *supra* in chapters 2.3 and 5.1.2.3. For the remarks on structural inequalities privileging some people in certain respects and disadvantaging others relatively, see Young (2000), p. 98.

For the remarks on restructuring the existing equality paradigm to make it possible to take the differences of minority groups into account by relying effectively on the concepts of indirect, systemic and intersectional discrimination, see Scheinin (2003), pp. 502–504. Whilst the considerations of justice are part of the discussions on (the models of) equality (see the remarks *supra* in chapter 2.3.1.1), Ronald Dworkin has spoken about the fundamental right to equality signifying the right to equal concern and respect. Dworkin (1980), pp. xii, xv, 150–183 and 266–278. See also the remarks on justice *infra* in chapter 5.2.4.

180. See the remarks *supra* in chapter 5.1.2.3.

181. The importance of looking into the interplay of racism and sexism has been cited in the Political Conclusions of the European Conference against Racism. See the remarks *supra* in chapter 2.2.1.3.2. See also van Boven (2001), p. 127.

Additionally, it would be important to open such central concepts as nation, state, national or state identity, European identity, and even democracy to scrutiny and develop them to be more receptive to the differences and diversity that exist in societies. Due to the occasionally pervasive exclusions and boundaries created by nationality/citizenship regulations,¹⁸² in order to further integration processes states should be prepared to adopt a more open approach to granting nationality/citizenship than they presently do. The acquisition of nationality/citizenship is likely to be an important measure of integration, since nationality/citizenship generally connotes full membership, typically endowing its holder with the full range of domestic rights recognised by the state.¹⁸³ In general, immigration changes the identity of nations and states and therefore it is important to take steps to enhance belonging to society by redefining national and state identities so that they support the creation of an integrated society.¹⁸⁴ Similarly, together with the need to reassess the content of national or state identity, the discourse on European identity should be subjected to re-evaluation. In a time of increasing diversity of societies and the emergence of new cultural groups in Europe, anchoring European identity primarily or even solely to cultures that have existed in Europe for a long period of time produces identity policies that exclude many even permanently residing Europeans.

Furthermore, as the issue of loyalty to the state often comes to the fore in situations when state boundaries have been changed,¹⁸⁵ the modern era – characterised by the increasing mobility of people – has contributed to the loosening of individu-

182. It has been pointed out that the protracted crisis and restructuring of the modern welfare state, which became manifest in the mid-1970s and intensified during the 1980s and 1990s, brought incremental and permanent exclusion of substantial population groups from the established social rights of citizenship in liberal democratic states. This development has meant that national citizenship is becoming an exclusive rather than an inclusive status. Schierup, Hansen and Castles (2006), pp. 1–4.

183. See also Aleinikoff (2003), p. 21.

184. For the remarks on immigration changing the identity of nations and the need to move to a post-national society, see Habermas (1996), pp. 465–466. Kaarlo Tuori has pointed out that while the pluralism of modern culture(s) means that values at the level of individuals and life-forms are increasingly differentiated, the substantive reach of the values constituting what can be called national identity is narrowed. In a modern multicultural society, national identity does not refer to the value foundation of an ethnic but a political community whose unifying values support rather than impede the value pluralism of life-forms. Tuori (2002), p. 239. See also the remarks on national identity and migration in IOM (2005), pp. 204–210. ECRI has called for enriching national/state identity by new elements resulting from the emergence of new (ethnic) minority groups. See the remarks *supra* in chapter 4.2.2.

185. It has been observed that when, particularly after a war, a state acquires new territory with a resident minority, possible discontent of the members of that minority may turn into sympathy for their kin-state. In such circumstances, states are anxious that the new citizens acknowledge an obligation of loyalty to the state. Banton (1996), p. 16. The redrawing of state boundaries and the emergence of “kin-minorities” as a result has also prompted the HCNM broach the issue of loyalty. See the remarks *supra* in chapter 4.3.

als' allegiances to certain states or nations. The increased transborder mobility of individuals has also resulted in situations in which it is increasingly commonplace that even members of the same family have different nationalities/citizenships. People do not necessarily feel that they have links to one state only, or to any particular state or states for that matter. Consequently, contemporary migration, which is characterised by the diversification, proliferation and intermingling of types of flows, also produces new forms of attachments, transnationalism and hybrid or multiple identities that undermine the traditional nation-state-based assumptions of belonging.¹⁸⁶ This is a further reason why states should – in addition to reassessing their restrictive views on granting nationality/citizenship in the first place – relax their negative attitude towards granting multiple nationalities/citizenships.¹⁸⁷

In clarifying the concept of integration, it would be crucial to draw an increasing amount of attention to *various dimensions that may affect the integration process*. For the time being, for instance, gender dimensions are rather inadequately addressed both in the international norms and in the work of international bodies, including those taken up in this research.¹⁸⁸ One of the challenges linked to the incorporation of gender perspectives in the area seems to be that gender is intrinsically associated with women (and girls) only, not men (and boys). This mindset is somewhat similar to that by which ethnicity and ethnic origin are often viewed as relevant only in the case of minorities or indigenous peoples and the fact that the majority group may be also characterised by this feature seems to be forgotten.¹⁸⁹ This “gender concerns only women” approach has at least partly contributed to demands for attention to gender dimensions erroneously becoming part of the discussion on equality and equal rights of men and women.¹⁹⁰

However, in the area of anti-racist action, for instance, a call for taking the gender dimension into account should mean that the relevant phenomena should be assessed from the viewpoint that men and women – or boys and girls – belonging to the groups whose members are often victims of discrimination, racism or other forms of intolerance, may be – and often are – differently affected, which in turn may necessitate different responses. The feminisation of international migration¹⁹¹ requires more attention to situations that affect women specifically, including the

186. See the remarks *supra* in chapter 1.1. For transnationalism, see Ruiz Balzola (2005).

187. For the remarks on the non-existent consensus on whether multiple nationality is an adequate tool for promoting integration or whether it may obstruct integration by facilitating the formation of separate cultural and political interest groups, identifying with their country of origin rather than with the country of residence, see Hailbronner (2003), p. 80.

188. See the remarks *supra* in chapter 4.4.3.

189. For the remark on ethnicity, see Fredman (2001b), p. 11.

190. This is the experience of the author of this research after having participated in discussions on these issues in various contexts, including in the meetings organised at the CoE.

191. See the remarks *supra* in chapter 1.1.

problems and challenges they encounter in the area of integration.¹⁹² In the labour market, in the most extreme cases, discrimination and even racism may even relegate individuals to situations comparable to slavery. A gender analysis reveals that women in particular may become victimised in this context in such areas as domestic work and the sex industry, whereas in the case of men victimisation may occur in such areas as construction or agricultural work. Furthermore, in the area of racism, a gender analysis would highlight the fact that men are disproportionately victimised in the area of racist violence in the public sphere, including violence by law enforcement officials, and women in trafficking in human beings, the latter also being an overtly racist phenomenon.¹⁹³ Assessing various questions from a gender perspective also helps to reveal the situations in which various cultural and/or religious practices may prevent individuals from participating in society and thereby from integrating therein. In general, it is of interest that there often seems to be a more receptive attitude towards considering the gender dimensions of various questions at the level of the UN than at the regional level in Europe. This is apparent in the area of anti-racist action, for CERD and the Durban Document have more clearly focussed attention on the gender dimensions of racism and racial discrimination than have the European-level actors and instruments.¹⁹⁴

In addition to the importance of drawing attention to the gender dimensions of integration, there are other factors, such as age, that may clearly affect the situation of individuals and their possibilities or abilities to integrate. For instance, both elderly and young persons may face various and differing integration challenges because of their age. Whilst the elderly have received some attention in the area of integration,¹⁹⁵ the fact that the mobility of young people is on the increase requires further attention to these persons in the area of integration.¹⁹⁶ Consequently, there are various relevant dimensions that should be taken into account when integration measures are planned and the results of integration efforts are assessed. Successful monitoring would require that the statistical data collected in the area be disaggregated by the relevant factors, including sex/gender and age.¹⁹⁷ In recent years, calls have been made for further attention to the role of the whole family in the

192. See also Vicente and Setién (2005). See also various writings in Tastsoglou and Dobrowolsky (2006).

193. It may be said that the role of sports for integration raised by the CoE summits also has a gender dimension (although not usually expressly voiced), since football clubs, etc., are most prominently sites for boys and men. For the importance of the role of sports in integration, see also EESC (2002), p. 74.

194. See the remarks *supra* in chapter 2.2.3.1.

195. See the remarks *supra* particularly in chapter 2.1.3.2.

196. See also Setién and Beganza (2005).

197. Whereas ECRI recently made a call to collect data broken down by religion, language, nationality and national or ethnic origin in order to monitor integration, it did not recommend that this data be collected with due regard also e.g. to gender or age dimensions. See

process of integration in the case of persons of immigrant background,¹⁹⁸ thereby raising the question of there being a family dimension of integration. The issue of family reunification dealt with in the area of human rights is naturally linked to this aspect.¹⁹⁹

As discussed in this research, integration has been envisaged to take place on various levels or in various contexts.²⁰⁰ In the case of integration of persons of immigrant background, *integration at local levels*, including in cities, where most persons of immigrant background reside, is viewed as being of central importance, as these levels are close to individuals and their everyday lives.²⁰¹ International migration contributes to the globalisation of local societies.²⁰² From the viewpoint of integration and local communities, the recent recommendations developed for the use of the HCNM that draw attention to the important role of professional, service-oriented community policing for inter-ethnic relations and the integration of minorities at national and local levels, include elements of significance for any multiethnic and multicultural societies.²⁰³

The issue of the role of *geographical concentration or residential segregation* in integration has prompted a variety of opinions. While importance has been attached to preventing ghetto conditions,²⁰⁴ there are also opinions suggesting that a geographical concentration is not necessarily a negative development that would automatically lead to fewer possibilities to integrate.²⁰⁵ The international bodies analysed in this research have made a number of remarks on the issue, with the AC condemning

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- the remarks *supra* in chapter 4.2.3. It is notable the third CoE summit called for integrating a youth dimension in all activities of the CoE. See the remarks *supra* in chapter 2.1.1.3.3.
198. These views were put forth e.g. in the hearing of the CoE Parliamentary Assembly on “integration of migrant women in Europe”, organised on 1 March 2005 in Paris. See also Martikainen and Tiilikainen (2007).
199. See the remarks *supra* in chapter 5.1.2.1. For the importance of family reunification for integration, see also EESC (2002), p. 57.
200. See the remarks *supra* in chapter 5.1.2.
201. Penninx, Kraal, Martiniello and Vetrovec (2004), p. 1. This publication considers integration extensively at the local levels. For local level integration, including integration in cities, see also e.g. Ireland (2004) and OECD (1998). It may be seen that the EU has also emphasised integration at the local level. See the remarks *supra* in chapter 3.3.
202. Martikainen (2004), p. 2.
203. See the remarks on the Recommendations on Policing in Multi-Ethnic Societies *supra* in chapter 4.3.3.1.
204. See e.g. the remarks in EESC (2002), p. 73. The EESC has highlighted the importance of access to housing and organising urban environment on the basis of non-discrimination and segregation.
205. It has been pointed out that a “geographical concentration” of immigrants does not necessarily mean that there is segregation. OECD (1998), p. 9. Iris Marion Young has discussed critically an ideal of integration with respect to residential segregation. Young (2000), pp. 216–221.

the residential segregation of the Roma, in particular their placement in camps.²⁰⁶ While ECRI has noted the divergent views on the issue of residential segregation, it has also stated that residential segregation has links to de facto segregation in education/schools and generally to difficulties in integrating.²⁰⁷

The role of *religion* in integration has attracted an increasing amount of attention as scholars of religion have in recent years shown interest in studying the ways in which the cultural, ethnic and religious backgrounds of immigrants affect the process of integration particularly in local and national societies. Much of this interest, especially in Europe, has been directed to Muslim communities, and religion has been identified as a central factor affecting the integration process. It has been observed that religious identity and organisations are among the most persistent features that descendants of immigrants retain – even long after the role of language and other cultural aspects has diminished – and that religion may play a role basically in all dimensions of the process of integration.²⁰⁸ While these observations on the role of religion may not be generalised to all immigrants, they are nevertheless of crucial importance in view of the fact that Muslim immigration and integration has received a considerable amount of attention in Europe.²⁰⁹

While the AC and in particular ECRI have addressed the issue of religion and/or religious intolerance in the course of their work, they have not been very forthcoming in discussing the role of religion in the process of integration. Although the bodies have made remarks on the need to pay attention to the situation of Muslims, only some of the remarks concern the issue of integration; moreover, when they do, they are not very informative from the viewpoint of the multifaceted challenges linked to integration.²¹⁰ Given that religion is viewed as one of the most important – sometimes even the central – factors affecting the integration process, more concrete views from the international bodies on this issue would be most welcome. Among other things, whilst it would be important to look into the aspects of religion that enhance integration, it is similarly crucial to address the role that religions and various questions relating to them may play as an obstacle to integration, from the viewpoint of both individuals and the society. As in the case of cultural practices, religious practices may prevent individuals from participating in society at large, including the labour market, education and various decision-making structures.²¹¹

206. The AC has also made a call for integrated housing in the case of Northern Ireland. See the remarks *supra* in chapter 4.1.3.

207. See the remarks *supra* in chapter 4.2.3.

208. Martikainen (2005), pp. 1 and 11–12, and Baumann (2002), pp. 95–98. Martikainen has pointed out that religious studies still lack theoretical clarity with regard to integration. Martikainen (2005), p. 1.

209. For the special importance of religious institutions and organisations in the process of integration, see also EESC (2002), p. 74.

210. See the remarks *supra* in chapter 4.4.3.

211. See also the remarks on religions *infra* in chapter 5.2.3.

The states in Europe have developed a *two-fold approach to minorities* whereby “old” minorities may receive stronger protection for the preservation of their specific characteristics by means of positive state obligations and minority-specific rights and individuals belonging to “new” minorities are protected through the application of the human rights provisions of general application and the anti-racism norms. This arrangement contains an important temporal dynamic. With European states searching for appropriate ways to address the challenge of accommodating increasing diversity posed by the emergence of new minority groups, pressure necessarily arises to re-evaluate the distinction between old and new minorities; in the course of time, there will come a point when a new minority will not be viewed as “new” anymore but may be considered to have become an “old” minority and thus one potentially entitled to minority protection under the international minority norms.²¹² Most European states have clearly become immigrant-receiving states gradually since the Second World War and have not reached the critical point yet, but this is an issue that evidently has to be addressed in a number of states. Thus far, for instance the HCNM has not been very eager to put the situation of “new” minorities onto his agenda either, although, when touching upon the issue of integration, he has observed that there are a number of points in common that both “newer” minorities and “older” (national) minorities face.²¹³ However, the need or pressure to reconsider the division upheld between “old” and “new” minorities has already come to the fore in the opinions of the AC, reflected in its suggestion on the inclusive application of the CoE Framework Convention also with respect to persons of immigrant origin.²¹⁴

In view of the increasing need to reconsider minority boundaries, and also of the fact that the number of new minorities is clearly on rise in relation to “old” minorities in Europe, states may be seen as having two main paths to follow. One alternative is to maintain the distinction between the two groups of minorities and to continue to provide stronger protection to the old ones, while noting, however, that in the course of time the circle of old minorities may need to be expanded. The other major option is to equalise the protection afforded to individuals belonging to various minority groups.

Since the increasing diversity in Europe is primarily connected to immigration, and as the US and Canada have a long history of immigration compared to the

212. See also e.g. Hannikainen (1996).

213. The HCNM has referred to the legal and practical differences between recent migrants and members of long-established minorities as signifying that the treatment of these groups may not be identical, including in the area of integration. See the remarks *supra* in chapter 4.3.3.2.

214. See the remarks *supra* in chapter 4.1.3. The AC has also called for the reassessment of the distinction the Finnish government has upheld between the “Old Russians” and “New Russians”. See the remarks *supra* in chapters 4.1.2 and 4.4.3.

European states, the two countries are also the natural points of reference when the European states are looking for solutions to create integrated societies. The approach to minorities has been generally different on the different sides of the Atlantic Ocean: whereas old minorities have been subject to particular attention and norm-creation in Europe, the distinction between old and new minorities has not received similar recognition in the US and Canada.²¹⁵ The situations in these countries have primarily involved relations between indigenous peoples and immigrant peoples as well as between different immigrant groups.²¹⁶ However, the two states have also adopted different models for the incorporation of various groups. Whilst the Canadian model based on multiculturalism may be criticised for its excessive focus on differences, the US model – often labelled assimilationist – may be criticised for not sufficiently acknowledging cultural differences in the public sphere.²¹⁷ Probably the ideal model may be found somewhere in between the two. Such a model would attach a positive aspect to differences – with an emphasis differences among individuals – but instead of emphasising differences it would also seek to find the commonalities among individuals and groups. Moreover, instead of rejecting the possibility to preserve one’s (cultural) identity in the public sphere, the model would make it possible for individuals to maintain, with the assistance of the state, some basic features of their identities.

In fact, in developing the model(s) of integration in Europe, one observation deserving further exploration and development is that put forward by the AC suggesting the inclusive application of the CoE Framework Convention to cover individuals broadly – and thus also persons with immigrant background – in order to enhance their integration. Similarly, the fundamental principles of the HCNM’s approach to integration developed under the banner of “integration with respect for diversity”, in which the Commissioner has emphasised the significance of the CoE Framework Convention, offer sound general elements for developing integration policies. The principles underscore participation, developing a sense of belonging, and finding a fair balance between the protection of the rights of persons belonging to (minority) groups.²¹⁸

While the CoE Framework Convention contains many elements that may not be viably implemented for a large number of groups, for instance the provisions on

215. For the two conflicting schools of thought having affected also the drafting processes of international norms on minorities, i.e. the traditional (Central and Northern) European approach of protecting “old” minorities and the non-discrimination approach that does not want to distinguish between “old” and “new” minorities, see the remarks *supra* in chapter 2.1.1.1.1.

216. Banton (1996), p. 85, and Walzer (1992), p. 101.

217. See also the remarks on the incorporation models in the USA and Canada *supra* in chapter 1.2. See also the remark in the same chapter (n. 50) on multiculturalism paying too much attention to difference.

218. See the remarks *supra* in chapter 4.3.3.

topographical signs and the possibility to use one's own language with the administrative authorities, the instrument may well serve as a good starting point and source of inspiration for developing viable policies in the area of integration. In fact, the Convention's provisions on languages, participation and education also cite the questions that have been explicitly tackled and highlighted in discussions on integration, including the importance of learning the official language, possibilities to maintain one's own mother tongue and participate in decision-making processes, imparting information on various minorities in the context of general education, and combating discrimination and racism and other forms of intolerance. As regards the question of mother tongue, the possibility of individuals to maintain their mother tongue has been increasingly stressed as an important element of a person's identity.²¹⁹ Implementing some of the entitlements mentioned, including linguistic rights, with respect to a wider group of individuals is necessarily resource-bound, requiring considerable financial and other inputs, but may turn out to be money and effort well spent: if individuals belonging to various (minority) groups feel that they, as well as their special characteristics, receive public recognition, this may enhance their sense of belonging in society and ultimately the cohesion of the whole society. This would also send a message that diversity and differences among individuals, as well as that found in various groups, are assets rather than a burden or threat to a society,²²⁰ thereby potentially being among the most powerful means to forge an integrated society.

Whilst equalising the situations of various minorities in the manner suggested above may be viewed as beneficial for integration and thus for creating an integrated society, indigenous peoples still require consideration of their own due to their different situation and the special characteristics of their cultures.²²¹

Without doubt successful integration measures in various countries entail drawing attention to various groups in a particular state and their situations.²²² However, it is also important to design broader policies on integration and articulate the values underlying such policies.²²³ In the implementation of these policies – and particularly in designing more concrete integration measures – the actual needs of

219. See e.g. the contributions in Kymlicka and Patten (2003), as well as Ruiz Vieytez (2005), and Malloy (2005), pp. 35–36.

220. For differences not worthy of positive acknowledgement, see the remarks *infra* in chapter 5.2.3.

221. See the remarks *supra* in chapter 2.1.2. In this respect, i.e. viewing indigenous peoples in special need of attention, the author of this research concurs with the remarks put forth by Will Kymlicka in Kymlicka (1995).

222. In practice, integration may entail, and often also requires, different measures at the national level. These possibly different domestic measures of integration have been underlined by the HCNM. See the remarks *supra* in chapter 4.3.3.

223. See also the remarks *supra* in chapter 4.4.3.

individuals should be taken into account.²²⁴ The needs of individuals are also affected by the fact that the contemporary diversified and intermingled flows of migration mean that people's stay in another country may be permanent or temporary. Consequently, integration may involve rather different measures depending on the needs and wishes of various individuals. For instance, for those staying only for a short period of time the learning of the language of the host state may not be a major issue, while for those staying longer it is often the key to successful participation in the various arenas of the host society.

Finally, there is need to pay *attention to the groups that may be in an especially vulnerable position or that may face particular challenges in their integration*. In the European context, the integration of the Roma, who are persistently marginalised and excluded in many societies, necessitates special consideration. From the viewpoint of integration, the groups that may be in a vulnerable situation and thus also require special attention may include minorities within minorities and minority women, who may encounter additional barriers in integrating in(to) a wider society. Furthermore, while discrimination and intolerance faced by workers of immigrant background, including migrant workers, have been cited as a particular problem in a number of international documents adopted in the area of anti-racist action, and ECRI has drawn increasing attention to the vulnerable situation of these persons, including those whose stay in the country is not properly authorised, this concern has not been duly reflected in the policies and practices of states. With respect to migrant workers, the situation has been described even as a stark reluctance on the part of states to tackle discrimination against these persons.²²⁵ The systematic tightening of asylum and refugee policies by the EU states in recent years – including the attempts to restrict the access of asylum-seekers to the EU area – together with the “pull” effect of the demand for labour in the EU states and the lack of legal avenues to enter the EU area (the “fortress Europe”) for employment, particularly for low-skilled workers, have had a role in fuelling unregulated immigration into the EU states.²²⁶ In practice this (expanding) group of persons that has entered the EU through unregulated routes²²⁷ lacks legal protection and is thus in an extremely vulnerable situation, one subjecting them to various forms of abuse; the reality of the persons in irregular situations is characterised by discrimination, segregation and

224. See also the remarks by ECRI *supra* in chapter 4.2.3.

225. Boyle and Baldaccini (2001), p. 155. See also van Boven (2001), p. 121.

226. For the remarks on policies limiting the entry of immigrants and asylum-seekers and by continued demand for labour in the EU area producing a “pull” effect resulting in widespread irregular immigration, see EESC (2002), p. 20. Also ECRI has pointed out that having strict requirements for low-skilled persons to enter the country results in an increase in the numbers of persons working illegally. See the remarks *supra* in chapter 4.2.3.

227. See also the remarks *supra* in chapter 1.1.

huge barriers on the path to social integration.²²⁸ However, many EU states “tolerate” and in practice accept the presence of these persons with no proper authorisation due to the significance of their contribution to the economic performance of the states concerned.

In view of the vulnerable situation of unauthorised migrants in the EU states, particularly that of non-EU citizens, it is of utmost importance that actors such as ECRI have drawn increasing attention to these persons. ECRI has also welcomed the measures taken to legalise the situation of unauthorised migrants.²²⁹ Additionally, ECRI has generally addressed the discriminatory features of immigration and integration policies that accord foreigners different statuses, and it has drawn some special attention to the EU system of differentiating in law and in practice between EU citizens and non-EU citizens; ECRI views this differentiation as an obstacle to the integration of non-EU citizens and thus to the creation of an integrated society.²³⁰ While the system of different statuses may not necessarily be a problem as such, serious problems arise if the system pushes individuals belonging to certain groups into the margins of society, excluded from proper protection. Such outcomes urge the review of the existing systems. Since these problems exist in the framework of the EU in particular, equalising the legal statuses and rights and responsibilities of third-country nationals in the EU is an important step in enhancing the integration of these persons into society.²³¹ Furthermore, it would be of utmost importance for the EU states to open up more legal avenues for labour migration, also for low-skilled persons, in order to reduce and avoid the abuse of individuals in irregular situations within the European labour market.²³² Another evident problem within the EU is that the issue of integration is not viewed as particularly relevant in the case of EU citizens, who nevertheless in practice face challenges in the area of integration.²³³ The situation of EU citizens and the problems of their integration in other

228. EESC (2002), p. 33.

229. ECRI has e.g. welcomed the legalisation of the status of persons without legal protection in Portugal. See the remarks *supra* in chapter 4.2.2.

230. In the context of integration, and relating to enhancing participation, ECRI has also specifically called for granting eligibility and voting rights in local elections to non-EU citizens. See the remarks *supra* in chapter 4.2.3. For the EU approach of making a somewhat sharp distinction between the legal statuses of EU citizens and non-EU citizens, see the remarks *supra* in chapter 3.3.

231. It has also been suggested that European citizenship should be extended to third-country nationals. EESC (2002), pp. 9 and 65.

232. The EU’s restrictive immigration and asylum policies have also been linked to the issue of the (in)consistency in politics. It has been observed that what the EU’s social policy on social integration gives with one hand may be (and at times is) taken away with the other through restrictive immigration and asylum policies. *Ibid.*, p. 75.

233. See the remarks *supra* in chapter 3.3. This lack of attention to EU citizens in the area of integration has also been noted by ECRI. See the remarks *supra* in chapter 4.2.3.

EU states stand as a prime example of the fact that even stronger legal statuses do not as such guarantee successful integration.²³⁴

5.2.3 The Need to Clarify the Limits of Tolerance and Respect: The Delicate Issue of Religion

Achieving a viable policy on integration would necessitate clarifying the limits of tolerance and respect. Over time, the condemnation of racial discrimination, racism and other forms of intolerance has acquired a prominent place both in political speeches and in a large body of norms at both the international and national levels. In the same vein, the liberal value of tolerance, forcefully advocated in the same contexts, has become a key aim.²³⁵ The requirement of understanding and toleration is also prominently incorporated in the international anti-racism norms.²³⁶ The need to value diversity and the need for tolerance are also among the recurrent themes raised by all three international bodies discussed in this research.²³⁷ In recent years, the concept of tolerance has fallen into some disrepute, with demands for respect being voiced instead; critics of the concept of tolerance have asserted that individuals must not be tolerated but respected.²³⁸ Demands for respect have also appeared in the human rights norms, particularly those adopted in the area of anti-racist action. For instance, the pertinent norms contain calls for mutual respect for all persons living in the territory of the state, as well as respect for (cultural) diversity, human dignity and differences, the equal dignity of all human beings, human rights, and cultures and civilizations.²³⁹ The AC, ECRI and the HCNM have openly advocated respect for diversity.²⁴⁰

Human interactions and living together in a common society necessitate certain common rules of conduct, for instance to enable decision-making and the general functioning of society. The European states have called for respect for common or shared values, such as democracy, tolerance, solidarity, cultural diversity and human rights.²⁴¹ The importance of international human rights has also been cited in the international group-specific human rights norms, notably those on minorities

234. In discussing the integration of the Roma, ECRI has also pointed out that granting citizenship does not necessarily lead to integration. *Ibid.*

235. For both toleration and pluralism as liberal values, see Galeotti (2002), pp. 1–2 and 44. For the remarks on tolerance as well as basic human rights and freedoms being among the liberal democratic virtues, see Rockefeller (1992), pp. 90–91.

236. See the remarks *supra* in chapter 2.2.3.1.

237. See the remarks *supra* in chapter 4.

238. For the remarks on the difference between respect and toleration, see also Gutmann (1992), pp. 21–22.

239. See the remarks *supra* in chapter 2.2.3.1.

240. See the remarks *supra* in chapter 4.4.

241. See the remarks *supra* in chapter 2.2.3.1.

and indigenous peoples.²⁴² Of the documents adopted in the area of anti-racism, UNESCO documents make the most explicit references to the limits of tolerance based on human rights.²⁴³ The HCNM has underscored the importance of maintaining certain basic values, including respect for human rights, and respect for the rights of women and children in particular.²⁴⁴ When the limits of tolerance or respect have been considered within the EU, respect for the basic values of the EU – as set out primarily in the EU Charter of Fundamental Rights – and the importance of national law and values have been highlighted.²⁴⁵

In general, human rights provide a sound value basis for European societies and for the values underlying integration policies at the societal level. This is essentially due to the philosophical core of human rights that recognises the equal value and inherent dignity of all human beings and underlines that all human beings are worthy of equal respect. While this core is there, however, there is a challenge in that the very generally formulated human rights norms are insufficient to solve the concrete problem of establishing the limits of tolerance or respect. Furthermore, the contexts proclaiming tolerance often leave open what exactly is meant by the demand for tolerance²⁴⁶ and, most importantly, there is often no clear discussion of whether tolerance has any limits. For example, although the international human rights norms inform the work of all three international bodies discussed in this research, these bodies have not been very forthcoming in discussing the limits of tolerance or respect more concretely.²⁴⁷ No doubt this stems from the fact that the limits of tolerance are often difficult to define in practice, and are, as a result, contested.²⁴⁸

Establishing the limits of tolerance or respect is an especially challenging task when two (or more) human rights values conflict with one another, which occurs rather frequently in practice. There also sometimes exist even strongly divergent views on the permissible limitations to human rights.²⁴⁹ Debates and disagreements surrounding permissible limitations on the right to freedom of expression with a

242. See the remarks on the compatibility clauses contained in the pertinent norms *supra* in chapter 2.1.4.2.

243. See the remarks *supra* in chapter 2.2.1.1.4.

244. See the remarks *supra* in chapter 4.3.3.

245. See the remarks *supra* in chapter 3.3. It is notable that the compatibility clauses incorporated in the international norms on minorities and indigenous peoples also contain references to national laws. See the remarks *supra* in chapter 2.1.4.2.

246. See e.g. the Durban Document. See the remarks *supra* in chapter 2.2.3.1.

247. See also the remarks *supra* in chapter 4.4.3.

248. Galeotti (2002), p. 119. Galeotti suggests viewing toleration as recognition of differences, i.e. as the acknowledgement that any culture, any form of life, and any way of being has some value in some respect as a form of human endeavour. See p. 104.

249. The dynamic of the ECHR, which includes the margin of appreciation doctrine, also enables drawing somewhat different limits in the area of human rights in various CoE states. See also the remarks *supra* in chapter 2.3.1.1.

view to preventing the spread of racist or otherwise intolerant expression are a good example of the concrete challenges in the area.²⁵⁰ Although the need to limit freedom of expression in this context has been cited both in the international norms²⁵¹ and by the focal international bodies,²⁵² restricting this freedom, which is viewed as one of the building blocks of democracy, remains a constant site of disagreements, among both states and experts.²⁵³ This issue came particularly forcefully to the fore in the debate triggered by the publication of the caricatures of the Prophet Muhammad in a Danish newspaper in 2005,²⁵⁴ which, in addition to raising the question of freedom of expression, foregrounded the issue of intolerance, particularly religious intolerance towards Muslims (and/or Islam). These kinds of clashes, and the fact that the human rights norms themselves do not provide answers to these kinds of challenges,²⁵⁵ underscore the need not only to clarify the limits of freedom of expression but also to discuss the substance or more concrete content of respect and tolerance demanded.²⁵⁶

While the limits of freedom of expression vis-à-vis tolerance have been debated even at the highest political level within and among states, certain cultural and/or religious practices pose particular challenges for tolerance and respect. The question of what the cultural and/or religious practices are that cannot be tolerated or that should not be respected in the name of human rights is a burning issue in Europe, which is characterised by increasing cultural and religious diversity. Particularly such practices as female genital mutilation, honour killings and forced marriages, which have appeared, reappeared or been reinforced in Europe as a consequence of increased migration, have caused a great deal of discomfort among Europeans. The interpretation of international human rights norms has also developed to condemn

250. This also relates to the component of the anti-racist action that enables anti-racist initiatives in certain circumstances to breach human rights in order to combat racism. Marks and Clapham (2005), pp. 295–307. See also the remarks *supra* in the beginning of chapter 2.2.1 (n. 523).

251. See the provisions on allowing restrictions on freedom of expression in human rights norms, and particularly the provisions specifically addressing limiting freedom of expression in order to combat racism e.g. in art. 4 of the ICERD. See also art. 20.2 of the ICCPR and the Additional Protocol to the CoE Convention on Cybercrime, concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed through Computer Systems.

252. Of the international bodies discussed in depth in this research, ECRI has often addressed the issue of hate speech. See the remarks *supra* in chapter 4.2.2.

253. This disagreement is reflected e.g. in the reluctance of many states to accept the specific provisions of human rights instruments limiting freedom of expression, due to which many states have filed reservations to the pertinent norms.

254. See also the remarks on this issue *supra* in chapters 1.1 and 4.2.2.

255. For the remarks on indeterminate language of human rights, the conflictual nature of rights, and the impossibility of solving conflicts of human rights on the basis of these rights, see Koskeniemi (1999), pp. 107–111, and (2005b), pp. 197–202.

256. See also the references to Amy Gutmann's remarks on differences between respect and toleration *supra* and *infra* in this section (n. 238 and n. 262).

these kinds of traditional practices.²⁵⁷ The particular challenge linked to such practices is that they tend to be carried on in the private sphere, which is beyond the active reach of human rights protection.²⁵⁸ It may also be seen that the international bodies discussed in this research have not actively addressed the practices that often take place within the private sphere. ECRI has, however, taken up the issue to some extent by commenting on domestic violence.²⁵⁹ On the other hand, when it recently condemned female genital mutilation and forced marriages, it did so only in passing, as it was primarily concerned with freedom of expression and proper ways to discuss immigrants in the media and by politicians. Although ECRI has also touched upon the practice of honour killings, it has not as yet expressly condemned the practice.²⁶⁰

While demands for respect for human dignity, human rights, and individuals generally create a highly positive resonance, the calls made to respect cultures and civilizations bring problems to the fore. The demands for recognising the equal value of various cultures and civilizations may not be problematic as such,²⁶¹ particularly if they are meant to point to the non-existence of hierarchies among various cultures by way of attaching less value to some cultures and civilizations. However, arguably all (or at least most) cultures have features that are hardly worthy of respect. Allowing recourse to violence (including in private relationships), suppressing minorities or other vulnerable groups even by violent means, maintain thoroughly undemocratic decision-making patterns that exclude the plurality of voices in a society or in a group, attaching lower value to individuals on the basis of their personal characteristics (such as sex/gender or ethnicity), and like practices may be deeply embedded in a culture. These kinds of practices do not comply with the core requirements of human rights, and cultures characterised by such features hardly deserve to be respected for them.²⁶² It should go without saying that such practices

257. See also Warzazi (2003). Kaarlo Tuori has discussed the limits to the reach of the protection that a legal order based on human rights principles can grant individual and collective values. The safeguards cannot extend to values that contradict these principles. The tolerance expressed by the principles of democratic *Rechtsstaat* does not concern values hostile to them. According to Tuori, here we confront the inevitable ethnocentrism of the democratic *Rechtsstaat*, the point where the democratic *Rechtsstaat* must decline to yield space to a fundamentally “other” culture. Tuori takes the example of female circumcision practiced by certain immigrant groups and notes that such a practice should not be permitted in the name of cultural tolerance. Tuori (2002), p. 240.

258. See the remarks *supra* in chapter 2.3.

259. See the remarks *supra* in chapter 4.2.2. See also the remarks *infra* in this section.

260. See the remarks *supra* in chapters 4.2.2 and 4.4.3.

261. For the remarks on recognising equal respect for all cultures, see Taylor (1992), pp. 66–68.

262. For showing no respect for racism and anti-Semitism, see e.g. Gutmann (1992), p. 21. The approaches taken in the USA on the question of freedom of expression differ from those upheld in Europe, including the wider possibility in the latter of subjecting freedom of expression to limitations. For example, it has been remarked in the American context that

as the above-mentioned practices of female genital mutilation, honour killings and forced marriages deserve neither respect nor toleration.

In accordance with the core of human rights referring to equal dignity for all human beings, it would be crucial that in practice a distinction be made between respect for individuals and for various cultures and practices. There should be no cultural, religious or other practice that cannot be examined critically from the basic premises of human rights. It is important that no culture is treated as an endangered species,²⁶³ and to recall that all cultures are subject to change.²⁶⁴

In general, the primary focus of human rights protection on the relationship between individuals and the state and the public-private divide incorporated in the human rights paradigm have contributed to the situation one sees today in which violations and concerns beyond the public sphere have not been given the attention they deserve and would require. The public-private divide has been particularly criticised because it has discouraged consideration of private life and privacy, the sphere within which women often have the greatest risk of being subjected to violence and the denial of their rights.²⁶⁵ Therefore, it would be crucially important for the practices within the private sphere to be increasingly scrutinised, also by international bodies. This is important also from the viewpoint of the topic of the research at hand, since many cultural or religious practices upheld in the private sphere may be among the most significant obstacles to the integration of individuals in a wider community or society. These practices may also have a gender dimension, since they often concern women and girls in particular, for instance in the form of restrictions on their freedom of movement or their possibilities to make choices concerning their own lives.²⁶⁶

Paying attention to practices taking place in the private sphere and taking resolute measures to protect individuals in that context so that they may enjoy their human rights is linked in practice to anti-racism action at a more general level. For instance, practices such as female genital mutilation, honour killings and forced marriages that are clearly contrary to human rights values upheld in Europe easily result in stigmatising entire groups of a certain cultural or religious background among the general public and may subject these groups and thus also the individuals belonging to them to racist attitudes or prejudice. Consequently, it may be said

whilst not every aspect of (cultural) diversity, including racism and anti-Semitism, is worthy of respect, expressions of racist and anti-Semitic views must nevertheless be tolerated. Ibid.

263. See also Walzer (1992), p. 103.

264. See also the remarks made by UNESCO *supra* in chapter 2.2.1.1.4.

265. Pentikäinen (1999), pp. 109–115.

266. E.g. the practices of forced marriages and honour killings effectively limit the choices of individuals. While, as discussed above, ECRI has cautiously addressed these problems, it is also notable that the Commission has crossed the public-private divide e.g. in drawing attention to domestic violence against women of immigrant background. See the remarks *supra* in chapter 4.2.2.

that the increasing heterogeneity of societies increases the pressure to pay more attention to practices among individuals that take place in the private sphere. Therefore, it would be important to cross the public-private divide in the human rights norms, as failing to scrutinise the acts of individuals from the viewpoint of human rights is simply a short-sighted, and potentially also even a dangerous path in the longer run, a shortcoming that may strengthen particularism and cultural relativism in the area of human rights. This puts further pressure on international bodies to assume a more active role in clarifying the limits of tolerance or respect, i.e. in determining what kinds of practices may not be respected or tolerated in the name of tolerance and human rights. In general, a critical examination and going beyond the public-private divide is required, for instance, in the case of domestic violence, including violence against women, which is prevalent throughout Europe – among the cultures of both majority and minority populations.²⁶⁷

Furthermore, individuals should also be enabled – and at times even encouraged – to voice their concerns and to exchange views on the issues that preoccupy them. Discussions should be allowed and encouraged on various cultural and/or religious practices as well as on the broader issues of relevance in society. For instance, ECRI has viewed it as important that states start extensive discussions on immigration and integration among the general public.²⁶⁸ Preventing or discouraging debates on issues that clearly preoccupy a number of people may, at worst, develop into outbursts of intolerance.²⁶⁹ For their part, those participating in such discussions should also assume certain responsibilities, particularly to show due respect for individuals as well as due consideration for issues that some may view as very sensitive. It is of

267. For the emergence of the question of violence against women as a human rights issue, see also the remarks *infra* in chapter 5.2.4.

268. See the remarks *supra* in chapter 4.2.3. For the remarks on a multicultural society as inevitably including a wide range of (moral) disagreements and the importance of deliberation of our (respectable) differences being part of the democratic political ideal, see Gutmann (1992), pp. 23–24.

269. For example, in Finland the status of the Swedish language – the mother tongue of a minority comprising less than 6 % of the population – as the second official language of the country and equal to Finnish, and particularly the compulsory learning of the Swedish language throughout the country, is a heated issue. This is seen in outbursts of opinions e.g. in the form of letters to the editor and nowadays also frequently in the discussion sites on the Internet. In its second opinion on Finland, the AC drew attention to the Internet discussions reflecting intolerant attitudes towards Swedish speakers in Finland. See the remarks *supra* in chapter 4.1.2. It may well be asked whether enabling and initiating more general discussions on the status of the Swedish language might reduce the outbursts of intolerant views, given that there are no general discussions on the issue in Finnish society, that there are no other opportunities in practice to air one's opinions on the issue than the channels mentioned, and that those who wish to begin the discussion on the issue may be seen as advancing racist or intolerant views. Naturally, it would be important to keep distinct the critical remarks on the status of the Swedish language and intolerant views on Swedish speakers.

crucial importance that a distinction be made between (even critical) remarks on substantive questions and intolerant views on individuals or groups of individuals such that there is room for the former but not for the latter. Public figures, including politicians, and the media play a particularly important role when sensitive and controversial issues are (or should be) addressed in society. Far too often, issues are raised one-sidedly and in view of advancing, for instance, the interests of populist politicians or sensationalist reporting; the aim instead should be to create discussions reflecting broader interests of the society and carried out responsibly with due regard for sensitivities linked to the issues being dealt with. Individuals in prominent and powerful positions, including politicians and other public figures, can best lead by example and may also influence contemporary politics and norms. Pluralism in the media and responsible reporting by journalists have a key role in securing balanced reporting and preventing sensationalism that may fuel prejudices towards certain groups, including many minorities.²⁷⁰

Dialogue, particularly intercultural and/or inter-faith dialogue, has been increasingly viewed as one of the important means to address discrimination, racism and other forms of intolerance and to enhance integration and social cohesion.²⁷¹ Whilst this emphasis on dialogue must be seen as a very positive development, a mere coming together is not necessarily enough to effect changes or ease tensions;²⁷² some shared premises should exist, including equal respect for all those participating in the dialogue.²⁷³ Ensuring respect for human dignity – underlined by human rights – should also highlight these contexts.²⁷⁴ In the same vein, as Europe becomes increasingly multicultural and multireligious, Europeans must also be prepared to discuss the values upheld both in individual societies and at the level of greater Europe – including even the human rights values and norms – with “new” Europeans. The emergence of new groups in Europe signifies that there are increasing numbers of people who call into question the existing philosophical and moral boundaries.²⁷⁵ Furthermore, as with participation in general, when dialogues are conducted, it is

270. ECRI has put forth some remarks on the role of the media in preventing prejudice against Muslims and Islamophobia in its GPR No. 5. See the remarks *supra* in chapter 4.2.2.

271. See the remarks *supra* in chapter 2.2.3.1. See also the remarks on the EU *supra* in chapter 3.3. For a remark on interfaith initiatives having much potential for redrawing religious boundaries, see Martikainen (2004), p. 264.

272. For the remarks on contacts between members of different (ethnic) groups not necessarily leading to lessening of ethnic tensions, see Makkonen (2000), p. 44.

273. For the remarks on disrespect and on the lack of constructive communication among the spokespersons for ethnic, religious, and racial groups potentially even leading to violence, see Gutmann (1992), p. 21. For the importance of shared premises in the area of participation, more particularly in communicatively democratic discussions, see also Young (2000), p. 75.

274. The importance of human rights in intercultural and interfaith dialogues was highlighted by the third CoE summit. See the remarks *supra* in chapter 2.2.1.3.1.

275. For the remarks on increasing multiculturalism posing challenges for philosophical boundaries, see Taylor (1992), p. 63.

crucial that they reflect broadly the concerns within various groups – for instance those of both men and women in the groups – as well as the concerns of young people and the elderly.²⁷⁶

The delicate issue of religion: The calls for tolerance and respect made in the name of religion bring particularly sensitive and difficult issues to the fore. In general, the question of religion has a somewhat ambivalent place in the area of human rights. Historically and today differences marked by religious boundaries have been the sites of tensions and even inter-state conflicts, and different religious beliefs have subjected individuals to discrimination, prejudice, intolerance and even persecution.²⁷⁷ Political considerations prompted the exclusion of the grounds of religion and belief from the scope of the ICERD, but otherwise these grounds are frequently addressed in the area of anti-racist action.²⁷⁸ The international human rights norms on minorities and indigenous peoples also refer to religion as one of the characteristics and elements of the identities to be protected.²⁷⁹ Furthermore, in recent years, the issues pertaining to religion and religious intolerance have received an increasing amount of attention, and many of the more extensive debates today in the area of human rights often have strong religious underpinnings.²⁸⁰ While in Europe attention has often been drawn to anti-Semitism, more recently the focus has turned to Islam and Islamophobia.²⁸¹ It is also worth noting that when the OSCE has developed its activities in the area of combating intolerance in recent years, it has drawn particular attention to religious intolerance.²⁸²

276. It may be observed that the importance of broad-based participation, or even the importance of the concerns of various groups within groups being reflected in intercultural and interfaith dialogues, is usually not referred to in the international human rights norms. In view of this, the call made in the third CoE summit for involving both men and women in intercultural and interfaith dialogue is worthy of particular note. See the remarks *supra* in chapter 2.2.1.3.1.

277. As a reflection of this, religion has also been expressly mentioned in the international norms on refugees, thereby recognising that the violation of religious freedoms may have been an important reason for refugees' flight. See the remarks *supra* in chapter 2.1.3.1.3. For a historical account of the protection of religious groups (minorities), see Thornberry (1991), pp. 25–54.

278. See the remarks *supra* in chapter 2.2.3.1. See also the definitions of ECRI on racism and racial discrimination *supra* in chapter 4.2.1.

279. See the remarks *supra* in chapter 2.1.4.1.

280. It suffices to mention the outcry triggered by the caricatures of the Prophet Muhammad and the debates centring on the use of Muslim headscarves.

281. This is also reflected in the work of the AC and ECRI. See the remarks *supra* in chapters 4.1.2 and 4.2.2.

282. See the remarks on the appointment of the three special representatives in the OSCE to follow the issues pertaining to various forms of religious intolerance *supra* in chapter 2.2.1.2.

Although distinctions on the basis of religion have been drawn throughout history,²⁸³ and despite the increasing indications of concern for religious intolerance against religious communities and their members, a certain extra cautiousness, particularly on the part of states, with respect to religion may be detected.²⁸⁴ For instance, when respect for diversity, and thus for differences, is called for, and when these demands have been incorporated in international human rights norms, the references principally concern cultural, not religious diversity.²⁸⁵ Having said this, it is important to realise that it is not always very clear what the relationship between culture and religion is, and culture may sometimes include religion. For example, such groups as Jews and Sikhs are often defined by both religion and ethnic origin.²⁸⁶

In general, the role of religion as a marker of differences among groups and individuals is rather special, and often differs from such differences as language or culture.²⁸⁷ Differences relating to religion(s) tend to draw particularly distinct boundaries among groups and individuals, often between “believers” and “non-believers”. Additionally, whereas changes in cultures are often viewed as a quite normal course of events,²⁸⁸ religions – or rather religious interpretations – are characterised by a certain stability and seen as not easily responding to the changes in the surrounding world or society. The holy books and writings produced in history and forming the bases for religions are not easily subjected to reinterpretation, for there are many who wish to adhere to the original meaning of the writings. The role given to religious groups and religion(s) in a society also has a great significance for many groups, including women and many minorities, since, from their viewpoint, various rights, even human rights, are often compromised on the basis of religious

283. In history, the Europeans who penetrated other regions of the world and came into contact with other peoples thought of themselves as Christians and usually conceptualised the differences between themselves and other groups in religious terms. Banton (1996), pp. 82–83.

284. For sensitivity with regard to religion, see also Boyle and Baldaccini (2001), p. 148. For the remarks on the lack of attention to religion in international relations and on the need to bring religion into the area, see Fox and Sandler (2004).

285. The norms on minorities and indigenous peoples address religious identity quite clearly. See the remarks *supra* in chapter 2.1.4.1. The recent decisions on tolerance and non-discrimination taken within the OSCE by its Ministerial Council refer to both cultural and religious diversity. See the remarks *supra* in chapter 2.2.1.2.

286. It has been stated that “race”, like religion, can be a shared attribute which leads to the formation of a group and which displays a political character in some settings but not others. Banton (1996), pp. 192 and 195. When addressing the use of minority languages in the context of religion, the Explanatory Note to the Oslo Recommendations developed for the use of the HCNM states that in minority contexts the practice of religion is often especially closely related to the preservation of cultural and linguistic identity. See the remarks *supra* in chapter 4.3.3.1. For the remarks on ambiguities in the relationship between culture and religion, see also Makkonen (2000), pp. 25–26.

287. For a special role of religion, see also the remarks in Ibrahim (1998).

288. Rockefeller (1992), p. 89. See also the remarks by UNESCO *supra* in chapter 2.2.1.1.4.

considerations.²⁸⁹ From women's viewpoint, religious contexts appear particularly problematic, since within (many) churches or religions women are often excluded from the pertinent decision-making processes, including the circles of persons entitled to interpret religious texts and teachings. In general, decision-making structures and processes in many religions are thoroughly exclusive and undemocratic, excluding not only women, but also a number of other groups, including most men.²⁹⁰ Against this background, the participation of religious groups or entities (churches etc.) in general decision-making structures in societies and other contexts (e.g. at international level), and in particular, providing them with decision-making power in these frameworks, must be subjected to the most careful scrutiny. This is particularly so where these broader decision-making contexts claim to be based on democratic principles that favour the broad-based participation of various groups and individuals.²⁹¹

In light of the special structures of religions and churches characterised by, among other things, exclusive decision-making, calls for the separation of church and state have a powerful resonance.²⁹² In prominently addressing the issue of religion and/or religious intolerance, the AC and ECRI have made critical remarks on the privileged position given to certain religion(s) in the state structures. In addition, they have called for non-denominational education in the area of general education.²⁹³ While the Durban Document quite rightly points to the important and positive role that religion plays in lives of many individuals, its consideration of the issues pertaining to religions is highly uncritical compared, for instance, to the Vienna Document of the 1993 World Conference on Human Rights and the Beijing Document, both of which also note the more negative aspects of religion, including the negative impacts of religious extremism on women.²⁹⁴

The issues relating to religions deserve special attention, since, among other things, strong religions beliefs and convictions have a tendency to create intolerance.²⁹⁵ Furthermore, the remarks made on the "religionisation of culture" deserve particular mention. It has been observed that when societies show extreme sensitivity to religion by not wishing to appear intolerant of deeply held religious beliefs

289. See e.g. the contributions in Howland (1999), which address broadly the significance of various forms of religious fundamentalism(s) particularly for women.

290. For a note on male domination in the immigrant congregations (in Finland), see Martikainen (2004), p. 264.

291. The author of this research has discussed these questions in Pentikäinen (2003).

292. This has been vocally demanded by those adhering to liberalistic strands of thought. Taylor (1992), p. 57, and Gutmann (1992), pp. 10–11.

293. See the remarks *supra* in chapters 4.1.2 and 4.2.2.

294. See the remarks *supra* in chapters 2.1.1.1.2, 2.1.3.2 and 2.2.1.1.3.

295. This has also been pointed out by the AC and ECRI. See the remarks *supra* in chapters 4.1.2 and 4.2.2. For interesting recent publications discussing religions in Europe, see Cesari and McLoughlin (2005) (concerning Muslims), and Byrnes and Katzenstein (2006).

and practices, the result may be the religionisation of culture, i.e. increasing demands for recognition of differences on the grounds that they are an integral part of individuals' religion. The threat or risk linked to this kind of religionisation is that demands for the recognition of differences are turned into mandatory religious requirements, with religion acquiring considerable influence on the development of the culture in question. In these situations religious leaders may assume undue authority, critical voices may be silenced, and easily negotiable cultural demands may take on a strident and uncompromising religious character.²⁹⁶

5.2.4 Creating Europe as an Area of Freedom, Security and Justice for All and Redefining the Human Rights Regime

The message put forth by the EU – primarily the rhetoric asserting that the EU is an area of freedom, security and justice for its citizens²⁹⁷ – and the attention and focus of the CoE states on the security of citizens²⁹⁸ send a signal of exclusion to the effect that there is a group of individuals, i.e. citizens, who are worthy of particular protection whilst others (non-citizens, but possibly de facto residents) necessarily are not. Whether these proclamations have an exclusive tone naturally depends on the definition of “citizens” in these contexts. In light of the fact that, for instance, the concept of citizenship in the EU is intrinsically linked to being a national of an EU state, speaking of citizens clearly points to the division between “Us” and “Others”. In the EU, this division is further underlined by a somewhat sharp distinction between the legal statuses of EU citizens and non-EU citizens created under EU law.²⁹⁹ In general, the closed normative systems of the European regional frameworks limit the circles of the well-protected persons to those having nationality/citizenship of the respective states.³⁰⁰ The result of the kinds of rhetoric used and systems of graded and differentiated rights closely linked to nationality/citizenship is that those who may often be in the greatest need of security, justice

296. Parekh (2000), p. 198. Parekh discusses also the problematic of the ethnicising of cultural practices, i.e. that when regionalisation of their demands does not yield the desired results, minorities may be tempted to legitimise them in ethnic terms. According to Parekh, the problem of both religion and ethnicity is their intractability and non-negotiability. Ibid, p. 199. See also the remarks *supra* in chapter 5.1.2.3.

297. See the remarks *supra* in chapter 3.

298. This emphasis comes to the fore in the CoE summit documents. See the remarks *supra* in chapter 2.1.1.3.3.

299. See the remarks *supra* in chapter 3.3. It is noted that by failing to grant long-term third-country nationals the foundation necessary for their full integration into the Community, i.e. the rights to equal treatment with nationals, a signal is sent that these persons are second-class citizens. Accordingly, the Community's visions for “social cohesion and social justice” are little more than empty promises. Halleskov (2005), p. 201.

300. This concerns basically all regional frameworks, i.e. the EU, the CoE, and the OSCE.

and protection, i.e. in practice those belonging to the most vulnerable groups, may receive the least protection from states. In today's era of globalisation and increased mobility of individuals, the systems signifying and producing de facto exclusion and marginalisation should be subjected to particularly close scrutiny. It has been rightly observed that, for instance, European integration will not be complete as long as third-country nationals resident in the territory of the Union are not regarded as an integral part of the area of freedom, security and justice.³⁰¹

The European regional systems become particularly problematic when they are less forthcoming than global ones in protecting individuals. One instance when the human rights norms negotiated within the UN do not seem to fit neatly into the European normative "architecture", but rather conflict with the approaches advanced by the European regional inter-governmental actors, in particular those advocated by the EU, is the UN Convention on Migrant Workers; the Convention has a broad personal scope of application, one extending also to non-documented migrant workers (or those in an irregular situation), and it addresses extensively their human rights.³⁰² Generally speaking, there is sometimes a clear tension between the approaches taken within the EU and those pursued in the context of the international human rights norms and practices.³⁰³

While in Europe there is a need to draw increasing attention to various vulnerable groups – including workers of immigrant background, particularly those who are non-documented (or in an irregular situation) – it may be said that the treatment of the Roma is a real litmus test for the European states. Given how long this minority has existed in Europe and how marginalised and excluded most Roma still are in many countries, the European states are not doing very well and are hardly living up to the human rights values they themselves have established and claim to respect. Another, and more recent, litmus test for the European states is the treatment of victims of trafficking in human beings. This is among the most telling examples of how those in the most difficult situation may receive the least amount of attention and help. Although the problem of trafficking in human beings was acknowledged in international norms already in the beginning of the 20th century, states have been rather slow to react to the problem in its contemporary forms and particularly to the need to provide protection for trafficking victims.³⁰⁴ The problem of trafficking has been prominently considered from the viewpoint of international crime prevention, whereas the situation of the victims, including the protection of their human rights, has clearly received more marginal attention.

301. Gross (2005), p. 161.

302. See the remarks *supra* in chapter 2.1.3.1.1

303. See the remarks *supra* in chapter 3.4.

304. Venla Roth has discussed inadequate responses to the trafficking problem in Finland in Roth (2007).

Trafficking victims are also often viewed rather as the tools or means to facilitate the apprehension of criminals than human beings in need of all available protection and assistance. This is plainly seen in the international regulation on trafficking in human beings, and particularly in the practice of the EU.³⁰⁵ While the Convention on Action against Trafficking in Human Beings, adopted within the CoE in 2005, stands as a more positive development from the viewpoint of trafficking victims, the CoE states have been slow to file ratifications to this instrument.³⁰⁶ As pointed out, the states and other actors in Europe have also had more difficulties in acknowledging the racist implications of trafficking than has been the case at the level of the UN.³⁰⁷ Therefore, the increasing attention by ECRI to the problem is highly welcome, although the body's treatment of the issue so far has been neither coherent nor very extensive.³⁰⁸

In the process of creating various normative frameworks focussing on economic and market interests and imperatives and on combating international crimes, of which terrorism is a prominent one nowadays, the very same European states that assert their adherence to the values of human rights have in fact often lost the thrust of these rights, essentially the recognition of human dignity with respect to a large number of individuals who in practice are residents of Europe. The EU appears to be a particularly problematic context in that human rights values have been taken on board by underlining their significance as the basic values of the Union, but the actual policy orientation and actions of the Union are strongly anchored to such values as economic competitiveness and growth. In this constellation, human rights have become subservient to interests that often work contrary to the very values that underpin human rights.³⁰⁹ In fact, one of the great challenges in the successful fight against racism and discrimination is that these phenomena tend to serve the needs of capitalism.³¹⁰ A similarly tense relationship exists also between capitalism and democracy.³¹¹

Furthermore, while states in what is an increasingly multicultural Europe need to reconsider their identity politics, including the identity rhetoric at the European

305. See the remarks *supra* in chapters 2.2.2 and 3.3.

306. The majority of the CoE member states have not ratified the Convention yet. The Convention entered into force in February 2008, when the sixteenth ratification to the instrument was filed at the CoE. See the CoE website at <http://conventions.coe.int> (visited on 9 April 2008).

307. See the remarks on the broader perspective of the UN in the area of anti-racist action *supra* in chapters 2.2.3.1 and 5.2.2. For the more general remarks on Europe not having been in the forefront in taking actions against racial discrimination, see van Boven (2001), p. 128.

308. See the remarks *supra* in chapter 4.2.2.

309. See also the remarks *supra* in chapter 3.

310. Fredman (2001b), p. 10. For the remarks on the forces of the market tending to increase inequalities, see van Boven (2001), p. 123.

311. Habermas (1996), p. 501.

level, attention should also be paid to avoiding any signals of double standards when it comes to protecting individuals. For instance, it may be asked if this (upholding of double standards) has occurred in the area of reacting to (religious) intolerance when anti-Semitism and Islamophobia have received different considerations. For historical reasons the questions of combating anti-Semitism and reservations regarding Holocaust denial have received a great deal of understanding among European states – and rightly so – that has also resulted in limitations of freedom of opinion and expression.³¹² In the case of the caricatures of the Prophet Muhammad published in a Danish newspaper in 2005, Europeans put forward demands for understanding European values, particularly those of freedom of opinion and expression. The sensitiveness towards the Jews and anti-Semitism is certainly understandable on the continent on which the Jews were subjected to the most horrific atrocities and, in accordance with the European human rights tradition, limits on freedom of expression may be possible and sometimes even necessary in a democratic society.³¹³ However, it is also important to pay due regard to the possibly confusing message in sending different signals, i.e. indicating that some groups are more worthy of protection than others. Europe is nevertheless home to millions of Muslims, among other groups, and it would be crucial to indicate that all of these groups are equally protected and that the views and concerns of individuals belonging to them are equally taken into account.³¹⁴ Having said this, and as discussed above, it is also of utmost importance that exchanges of views are allowed even on sensitive issues, including those relating to religion, but these exchanges of views should be carried out with due sensitivity and respect for individuals.

In general, the existing international human rights regime should be subjected to a critical assessment from the viewpoint of how it protects various individuals in its present form in the present time. Like any normative system, the human rights regime is an evolving one and its norms and functioning should be reassessed when circumstances so warrant. Since the human rights norms necessarily reflect the concerns and interests of those who participated in or were otherwise able to influence the drafting of the pertinent norms,³¹⁵ at times the international human rights regime has been severely criticised. While the international (global) human rights regime has been often criticised for reflecting Western values and thus being biased,

312. Many European states have even criminalised Holocaust denial, and there have been attempts within the EU to introduce similar kinds of prohibitions.

313. In general, the European states have adopted a more forthcoming attitude in allowing limitations on freedom of expression than is the case e.g. in the US. See also the remarks by Amy Gutmann *supra* in chapter 5.2.3 (n. 262).

314. For the remarks on the European Court of Human Rights prioritising Christian values, see Petman (2004).

315. Martti Koskenniemi has frequently discussed how human rights incorporate certain interests and are thus not value-neutral. See e.g. Koskenniemi (1999) and (2005b).

some of the most vocal critics of the regime have focussed on its ignorance or marginalisation of many concerns of women, including violence against women, one of the most acute concerns for women around the world. This criticism has resulted in the gradual recognition of the problem of violence against women as a human rights issue since the beginning of the 1990s.³¹⁶ The existing human rights regime may also be criticised for acknowledging and giving protection primarily to a certain limited number of (identity) groups or group characteristics, essentially those relating to ethnic, cultural, religious or linguistic features.³¹⁷ Additionally, states have taken the view that “newer” minorities characterised by these features deserve clearly less protection than “older” minorities.

To date, the HCNM has been somewhat reluctant to draw more attention to new minorities, claiming that the ethnic tensions between older, national minorities are more conflict-prone and therefore a more justifiable focus of his activities. While the Commissioner is correct in underlining the need to continue paying attention to these national minority situations, ethnic tensions and even conflicts involving new minorities have become increasingly commonplace in what are ethnically diverse European societies. The riots in the suburbs of French cities in 2005 are examples of these kinds of situations.³¹⁸ And it is also precisely these kinds of intra-state ethnic tensions and conflicts that are at the heart of contemporary security concerns in many states, particularly in Western Europe.

The common denominator of the international minority and anti-racism discourses is their inter-state dimension and overt links to international peace and security.³¹⁹ This signifies that the (identity) groups that have received attention in these contexts are often considered relevant from the viewpoint of peace and security as well as inter-state relations. This linkage has prompted states to acknowledge intra-state diversity as well and to recognise differences in the case of such groups. In general, the groups that receive support from a state or group of states are the groups considered in the context of inter-state relations; this is particularly the case when there is a kin-state which supports minority demands.³²⁰ Whereas the vulnerability of both the Roma and indigenous peoples has received attention at the international level – a concern reflected also in the international norms – the issues are not linked to the peace and security dimensions of international relations, primarily

316. For this development, see e.g. Pentikäinen (1999), pp. 109–115.

317. While the human rights provisions setting out the prohibited grounds of discrimination also include some kind of recognition of the identities linked to these grounds, as discussed, instead of addressing differences positively they contain negative recognition of differences. See the remarks *supra* in chapter 2.3.

318. See also the remarks *supra* in chapter 1.1.

319. See the remarks *supra* in chapters 2.1.4.1 and 2.2.3.1.

320. The anti-racism discourse has also had inter-state reach since its inception. See the remarks *supra* in chapter 2.2.3.

because they lack a kin-state. Consequently, the treatment of the Roma and indigenous peoples does not usually appear as an inter-state issue.³²¹ The state-centred system of international relations means that the concerns of various groups receive attention primarily only when there is a state (or states) that has taken the questions concerning these groups to the inter-state discussion tables, i.e. when groups are able to get support or backing from states to have their cause better heard.³²²

Linking the recognition of (certain) identity groups to the peace and security concerns of states and excluding others is highly problematic for a number of reasons. On the one hand, the message conveyed is that (national and international) attention may be received by causing problems that preferably have state security dimensions. On the other hand, these security linkages may in fact also hinder – as has happened in reality – the acknowledgement and allowing of differences in practice, as these prompt concern about awakening minority interests and thereby threats to the stability and even the integrity of states.³²³ Connecting rights to state security such that those who cause security- and peace-related challenges acquire rights is also highly problematic from the viewpoint of justice.³²⁴ It is precisely this state-security link that has often excluded a number of groups, including the Roma and indigenous peoples, from having their characteristics acknowledged and even from protection. As regards the lack of protection, again the actions of states in the area of combating trafficking in human beings stand as an extreme example of how security concerns have even led to a disregard of the needs of individuals (trafficking victims) for protection and assistance.

Consequently, there is a need to reassess the linkages between the discourse on human rights and that on state security to remedy the present situation, in which those who are in the most vulnerable situations and without any voice receive the least attention and protection. The way forward may be found in developing security concepts that are closer to individuals, i.e. which revolve more around individuals than states such that the starting point is the security of individuals instead of that of states.³²⁵ Therefore, it would be important to develop such concepts as human

321. The recent attention to the Roma among the EU states is worthy of note. It has been prompted by the appearance of an increasing number of Romani beggars from the newest EU member states – Romania and Bulgaria – in the older EU member states.

322. For example, the European Forum for Roma and Travellers, established recently to cooperate especially with the CoE in order to provide a forum for the Roma to discuss and influence the decision-making concerning them at the European level, was created by the policy initiatives of states. The most prominent of these initiatives were the ones taken by the President and government of Finland. For this forum, see also the remarks *supra* in chapter 2.2.3.1.

323. This is reflected in the cautiousness of states particularly in the area of minority norms. See the remarks *supra* in chapter 2.1.4.2.

324. See also Kymlicka (1995), p. 68. See also the remarks on justice *infra* in this section

325. See also Smith (2006), pp. 44–46.

security, which has been employed at times and which focusses on individuals and their personal security, signifying an important shift in the perspective. Although this concept has been used in the UN and the OSCE, for example,³²⁶ its content and practical application require further development and concretisation.³²⁷

As European societies are becoming increasingly diverse, and the subject of integration is of vital importance for the European states, any measures or elements contributing to the integration of individuals on a practical level should be taken on board. As discussed in this research, the international human rights have an important role in the process of integration and in creating an integrated society, but it is obvious that the support provided by these norms is not enough; other measures are needed, as also suggested by the remarks of ECRI and the HCNM, for instance. In the same vein as what was said about the insufficiency of the anti-discrimination laws to generate the social change that would be required to efficiently address the phenomena of racial discrimination and racism,³²⁸ human rights are not enough to create an integrated society. The limited role of human rights relates, among other things, to the fact that human rights norms simply do not cover all aspects of successful integration.³²⁹ Furthermore, the primary application of human rights to the relationship between the state and individuals under the state's power³³⁰ may be viewed as limiting the role of human rights in the area of integration. Rights-rhetoric has its limitations; implementing human rights is simply not adequate to prevent tensions along ethnic lines, for example.³³¹ Additionally, in the present era, which is characterised by globalisation and privatisation of the economy and telecommunication systems and by a growing reliance on the forces of the market economy, the role of the state in general is in decline.³³² Accordingly, the process of successfully creating an integrated society requires efforts on a broad front, including input from business and civil society actors as well as the media.³³³

326. See the remarks *supra* in chapter 2.1.1.2.1.

327. It is notable that both the EU and the CoE (summits) have drawn attention to the security of individuals, albeit, as discussed, limiting this attention to citizens. See the remarks *supra* in the beginning of this section. It is also worthy of note that ECRI's GPR No. 11 refers to human security. See e.g. paras 23 and 25.

328. See the remarks *supra* in chapter 5.2.2.

329. See the variety of issues discussed *supra* in chapter 5.2.2.

330. See the remarks *supra* in chapter 2.3.1.1.

331. For the inadequacy of human rights in preventing ethnic conflicts, see also the remarks by the HCNM *supra* in chapter 4.3. Martti Koskeniemi has discussed the limited usefulness of rights-rhetoric e.g. in Koskeniemi (1999).

332. See also van Boven (2001), pp. 122–123.

333. For the role of the media and business actors in integration, see also the remarks by the three international bodies discussed in this research *supra* in chapter 4.4.2. For the important role of business involvement and initiatives by employers to provide employment and integration of immigrants, see also CoE (1998). For the role of civil society and the media, see EESC (2002), pp. 14–15 and 67–75.

The role of various actors in the area of integration becomes particularly apparent when importance is attached to perceptions. While the European states have voiced a strong need to increase the number of workers of immigrant background to meet the labour market needs in Europe, a parallel debate has arisen on the capacity of the economic system to absorb these groups of individuals.³³⁴ It has been observed that the crux of the matter, i.e. how the integration of immigrants seeking economic betterment succeeds, boils down to perceptions, that is, to how Europeans perceive the social and economic problems posed by immigration.³³⁵ Undoubtedly these perceptions are profoundly affected by the individuals' own feelings of insecurity resulting from uncertainties relating to employment in the era of globalised labour markets.³³⁶ While states have their role to play in influencing these perceptions through state policies, actors such as individual politicians, civil society and the media – as the originators of public discussions – take on a particularly important role. Various business actors, including transnational corporations, also play a role in this dynamic. In general, creating an integrated and cohesive society requires broad-mindedness, openness to various differences, and respect for individuals across board.

Although efforts to create an integrated society are needed on various fronts and by various actors, the human rights regime can also be developed to support better the process of integration. This may be done by refining the regime to provide better protection for individuals, especially those in the most vulnerable situations; the human rights regime can hardly be said to be working properly if it is incapable of protecting the most vulnerable persons. Refining the regime would necessitate the rethinking and restructuring of the equality paradigm underlying it to incorporate a positive acknowledgement of differences and in general shifting the emphasis on looking at differences through a negative prism to viewing them from the outset as having a positive value. This positive acknowledgement of differences should also be extensive enough to embrace various differences of relevance for individuals, including sex/gender and age. Other differences that affect individuals' identities, such as disabilities and sexual orientation, should also be more actively taken into account.

A critical look at the human rights regime should also focus on the (normative) approaches developed for the protection of various groups, minorities in particular. The existing international minority protection system in its present form and application is not capable of providing tools to address the contemporary minority situations and challenges, and therefore it must be re-evaluated and restructured. Among the problems of the existing minority protection system is that the pertinent norms leave a wide margin of discretion for states as regards which groups are entitled to

334. Habermas (1996), p. 508.

335. Ibid.

336. See also the remarks *supra* in chapter 1.1.

minority protection and what the concrete reach of that protection is. This state of affairs often creates rather than solves problems, since the system makes it possible to draw rather arbitrary distinctions among various groups. Additionally, while the protection of older minorities has been associated with the questions of justice and democracy,³³⁷ the treatment of individuals belonging to newer minorities, particularly those of immigrant origin, has been linked more to fair treatment.³³⁸ This observation raises the question of the content of the concepts of justice and fairness. Whilst there are no uniform conceptions of justice but rather a number of different theories on it,³³⁹ it may be seen that considerations of justice are often connected to the issue of equality.³⁴⁰ Fairness for its part often falls short of endorsing equality,³⁴¹ which renders it necessarily a more vague concept than justice,³⁴² thereby opening the door to greater arbitrariness.

In fact, the suggestion put forward above to rectify the problems in the existing international system of protection of various minorities by discarding the rather strict distinction upheld between old and new minorities and equalising their treatment³⁴³ relates to the broader debate on justice and fairness. In general, in Europe there is a need to create democratic societies in which all individuals are genuinely respected and the most vulnerable ones are taken care of. In the same vein, care should be taken that various group protection systems, including those for minorities, do not turn out to be *de facto* straightjackets for individuals that prevent them expressing their multiple identities. Much as it is important that a national identity should encompass a plurality of identities, group identities should not suppress expressions of various multiple and layered identities. The very functioning or the role of human rights (fundamental rights) and protecting individuals within the economic- and market-driven contexts such as those found within the EU necessitate a critical look in their own right – particularly from the viewpoint of justice. Justice matters – as the rhetoric of the EU concerning the area of freedom, security and justice suggests – but it is a highly questionable justice if and when it is linked only

337. See the remarks *supra* in chapter 2.1.4.1.

338. See the remarks *supra* in chapters 2.2.3.1 and 3.3.

339. Among the best-known theories exploring the fundamentals of justice is John Rawls's theory of justice. See Rawls (2000). For discussions on justice, see also e.g. Dworkin (1980) and (1986), and Habermas (1996). Charles Taylor has viewed the politics of recognition as the basic element of justice. See the remarks *supra* in chapter 5.1.2.2 (n. 38). According to Iris Marion Young, claims of justice are claims for fairness, equal opportunities and political inclusion. Young (2000), p. 107. Seyla Benhabib has called for a cosmopolitan theory of justice incorporating a vision of just membership that includes challenging state sovereignty and addressing the status of alienage. Benhabib (2004), p. 3.

340. See the remarks *supra* in chapter 2.3.1.1. See also the remarks on women *supra* in chapter 2.1.3.2. See also the writings of the authors mentioned in the preceding footnote.

341. See also the remarks *supra* in chapter 3.3.

342. See also Dworkin (1980), pp. 150–183, and Young (2000), p. 110.

343. See the remarks *supra* in chapter 5.2.2.

to privileged groups of persons. It is also extremely problematic – even dangerous – not only for individuals but also societies at large if diversity is primarily valued as an economic asset and the treatment of individuals is inextricably linked to the economic performance of states; in this constellation, prominent within the EU, individuals are treated as economic units rather than as human beings entitled to protection at all times. ECRI has drawn attention to the particular vulnerability of persons of immigrant background in a non-integrated society when economic and social conditions deteriorate.³⁴⁴ In general, the critical examination called for in this research urges that also many strands of the liberalistic theories underlying the existing normative frameworks and other contexts should be challenged and reassessed.

344. See the remarks *supra* in chapters 4.2.3 and 5.2.1.

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