COMMITTEE OF EXPERTS ON ISSUES RELATING TO THE PROTECTION OF NATIONAL MINORITIES (DH-MIN)

7th meeting

Strasbourg, 12-13 March 2008

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The protection of national minorities in the case-law of the European Court of Human Rights

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SUMMARY

The Court appears to have "imperceptibly" and "indirectly" become the protector of national minorities. This protection is provided indirectly through the defence of individual rights, which can be enjoyed both individually and collectively. While this offers protection in practice, based on the principle of "pluralist democracy", there is still no theoretical basis since the Court does not define the concept of "national minority" within the meaning of the Convention. It is therefore impossible to distinguish between the scope of the protection it affords national minorities and that which it affords other minorities.

Introduction

1. National minorities can either be protected unilaterally by the state on whose territory they live, which is referred to as the "*home-state*", or unilaterally by the state with which they still identify to some extent, the so-called *kin-state*[1], or be protected bilaterally, under agreements between the kin-state and the home-state. Apart from specific instruments adopted by the United Nations or the Organisation for Security and Co-operation in Europe, it is the Council of Europe Framework Convention for the Protection of National Minorities of 1 February 1995 which is most recognised at European level for the multilateral protection it provides.

2. The expression "national minority" appears in only two articles of the European Convention on Human Rights: Article 14 of the Convention (prohibition of discrimination) and Article 1 §1 of Protocol no. 12 (general prohibition of discrimination). Neither of these articles is designed to create specific rights for national minorities, as such rights should, by definition, be collective rather than individual. Article 14 provides for the prohibition of discrimination in the exercise of the individual rights set forth in the Convention while Article 1 of Protocol no. 12 provides for a general prohibition of discrimination in the exercise of the individual rights set forth by the national law of the States parties to the Convention.

3. None of the articles of the Convention, including the two mentioned above, contains a definition of the concept of "national minority". Nor do the "travaux préparatoires" really clarify this point. The issue is admittedly a sensitive one, as minorities that might be described as "national minorities" are often associated with secessionist claims or demands for independence and are therefore seen by states as a direct threat to their sovereignty, if not to their existence. There is no international or European consensus whatsoever on the subject: no international instrument, has, to date, provided a definition of "national minority" and that, I believe, includes your Framework Convention, which prefers to leave states free to provide their own definition.

4. Legal writers seem to think that the Court has entered the arena of minority protection and some authors even go so far as to claim that it has "imperceptibly, all be it indirectly, become the

1. *The protection of national minorities by their kin-state*, Strasbourg, Council of Europe, 2002.

protector of national minorities"[2]. Before establishing the scope of the protection it offers **(II)**, it is necessary to consider how the concept of "national minority" fits into the Court's case-law **(I)**.

I. The concept of "national minority" in the Court's case-law

5. Given the political difficulties the task presents, the Court has, to date, avoided giving a definition of "national minority" ***(B)***. Nevertheless, by requiring compliance with the principle of pluralist democracy, it provides *de facto* protection. It is therefore legal academics ***(A)*** who have sought to define the concept of "national minority" within the meaning of the Convention.

A. The interpretation given by legal academics

6. I have obviously not been able to paint a complete picture of the way in which legal academics interpret the concept of "national minority" within the meaning of the Convention. The following examples simply suggest that "national minorities" may be understood as a relatively broad category.

7. For example, in an article published in 2002 in the *Revue trimestrielle des droits de l'homme*, Fl. Benoît-Rohmer seems to include in the national minorities category the Russian-speaking community of Latvia[3], the Kurdish "people" of Turkey[4], Greek Macedonians with "irredentist" aspirations[5], the Macedonian minority of Bulgaria[6] and even the religious minority in Moldova, which claim to belong to the Metropolitan Church of Bessarabia[7]. According to Fl. Benoît-Rohmer, the *United Communist Party of Turkey and Others* judgment of 30 January 1998, concerning the dissolution of a political party which was said to represent the demands of the Kurdish minority, marked the beginning of changes to the Court's case-law in favour of political parties which defend the interests of national minorities.

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2. Fl. BENOÎT-ROHMER, "*La Cour européenne des droits de l'homme et la défense des droits des minorités nationales*", *Revue trimestrielle des droits de l'homme*, 2002, pp. 563 et seq.
3. Through reference to the *Podkolzina v. Latvia* judgment of 9 April 2002.
4. Through reference to several Turkish cases.
5. Through reference to the *Sidiropoulos and Others v. Greece* judgment of 10 July 1998.
6. Through reference to the *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* judgment of 2 October 2001.
7. Through reference to the *Metropolitan Church of Bessarabia and Others v. Moldova* judgment of 13 December 2001.

8. Legal academics can usually do no more than note that there is no international consensus with regard to this concept and refer to the definitions provided by the national legislation of both kin-states and home-states. The Court takes a similar approach.

B. The absence of an explicit definition in the Court's case-law

9. The impossibility of securing an international or even a European consensus on the concept of national minority is linked not only to the fact that this is a highly political issue but also to the fact that several different concepts of "minority" exist side by side. Indeed, although it is true that the concept of "national minority" usually refers to populations which are established in a "home-state" but still have ties with a "kin-state", the features which characterise such communities are sometimes more likely to be religion, language or ethnic origin than actual bonds with another nation. Nationalist demands are sometimes also made by ethnic, religious or linguistic minorities which wish to establish an independent state without necessarily having or claiming to have ties with another nation (as in the case of the Corsican separatists) or which, at the very most, have ties with a corresponding minority in a neighbouring country (as in the case of the Basque and Kurdish separatists).

10. Consequently, although the Court has no difficulty in explicitly classifying a group as an ethnic, linguistic or religious minority by using, for example, expressions such as "ethnic identity" when referring to Gypsies (*Beard v. the United Kingdom*, [GC] judgment of 18 January 2001), it never ventures to use the term "national identity".

11. In its *Gorzelik and Others v. Poland judgment of* 17 February 2004, referring to the absence of an explicit definition of "national minority" in the Framework Convention for the Protection of National Minorities (§45) and in the relevant instruments adopted by the United Nations, the Grand Chamber of the Court noted that there was no consensus on this point and itself avoided defining the scope of the concept:

> "45. At the material time Poland was a signatory to the Council of Europe Framework Convention for the Protection of National Minorities (European Treaty Series no. 157); the date of signature was 1 February 1995. Poland ratified the Framework Convention on 20 December 2000. It came into force in respect of Poland on 1 April 2001.

46. The Framework Convention contains no definition of the notion of 'national minority'. Its explanatory report mentions that it was decided to adopt a pragmatic approach, based on the recognition that at that stage it was impossible to arrive at a definition capable of mustering the general support of all Council of Europe member States.

67. It is not for the Court to express a view on the appropriateness of methods chosen by the legislature of a respondent State to regulate a given field. Its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention.

With regard to the applicants' argument that Polish law did not provide any definition of a 'national minority', the Court observes firstly, that, as the Chamber rightly pointed out, such a definition would be very difficult to formulate. In particular, the notion is not defined in any international treaty, including the Council of Europe Framework Convention (see paragraph 62 of the Chamber's judgment and paragraph 46 above and, for example, Article 27 of the United Nations International Covenant on Civil and Political Rights, Article 39 of the United Nations Convention on the Rights of the Child and the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities).

Likewise, practice regarding official recognition by States of national, ethnic or other minorities within their population varies from country to country or even within countries. The choice as to what form such recognition should take and whether it should be implemented through international treaties or bilateral agreements or incorporated into the Constitution or a special statute must, by the nature of things, be left largely to the State concerned, as it will depend on particular national circumstances.

68. While it appears to be a commonly shared European view that, as laid down in the preamble to the Framework Convention, 'the upheavals of European history have shown that the protection of national minorities is essential to stability, democratic security and peace on this continent' and that respect for them is a condition sine qua non for a democratic society, it cannot be said that the Contracting States are obliged by international law to adopt a particular concept of 'national minority' in their legislation or to introduce a procedure for the official recognition of minority groups."

12. In the case in question, the members of an ethnic group, the Silesians of Poland, had explicitly demanded the status of national minority in order to take advantage of a number of privileges granted under electoral laws.

13. Not only has the Court never sought to define the expression "national minority", but it rarely uses the expression in its judgments. When the expression appears in the Court's case-law, it is usually in reference to the arguments submitted by the applicant parties, as for example in the *Podkolzina v. Latvia* judgment of 9 April 2002, which concerned the decision to strike the applicant, who belonged to the Russian-speaking minority of Latvia, off the list of candidates in the parliamentary elections, or in reference to the provisions of national and international law which

apply to the case in question. In this connection, the *Chapman v. the United* Kingdom judgment of 18 January 2001 very clearly illustrates the pragmatic position taken by the Court. When required to rule on whether the refusal to allow a person of Gypsy origin to park a caravan on land belonging to her was in conformity with the Convention, the Grand Chamber, while preferring to use the expression "identity as a Gypsy" instead of "national identity", also quoted a number of articles of the Council of Europe Framework Convention for the Protection of National Minorities (§56) *in extenso* and pointed out that the United Kingdom itself considered the Gypsies to be a national minority (§57)

> "56. The convention entered into force on 1 February 1998. The United Kingdom signed the convention on the date it opened for signature and ratified it on 15 January 1998. It entered into force for the United Kingdom on 1 May 1998. By 9 February 2000, it had been signed by 37 of the Council of Europe's 41 member States and ratified by 28.
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> 57. The convention does not contain any definition of 'national minority'. However, the United Kingdom in its report of July 1999 to the advisory committee concerned with the convention accepted that Gypsies are within the definition."

14. It therefore appears that when the concept of "national minority" is clearly defined in national law, or any other official act or decision of the state concerned, the Court does not hesitate to refer to it. In other cases, ie in cases where the Court's case-law concerns the interests of an ethnic, political, religious or linguistic minority, which the respondent state does not recognise as a "national minority", one can only refer to the interpretation made by legal academics.

II. Scope of the protection afforded to national minorities

15. The Convention does not provide for any specific collective rights for minorities. From the material standpoint ***(A)***, this protection is only an indirect form of protection, via the individual rights of persons belonging to a minority. From the personal standpoint ***(B)***, it does not apply only to the members of minorities residing on the territory of States parties to the Convention but also to foreigners coming under the jurisdiction of a State party to the Convention and belonging to a minority residing in a third country.

A. Material scope

16. An examination of the Court's case-law shows that the rights of national or other minorities are protected in particular by Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression) and 11 (freedom of association) of the Convention and Article 3 of Protocol no. 1 (right to free elections).[8] These rights are central to all problems concerning minorities, as religion, language and traditions are all fundamental aspects of identity, and the possibility to exercise these rights in public or private, individually or collectively, is the means by which this identity can be acknowledged, transmitted and preserved.

17. In the *Gorzelik and Others v. Poland* judgment of 17 February 2004 the Court held that "respect for them (national minorities) is a condition *sine qua non* for a democratic society"[9]. In its *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, it had already asserted that "pluralism, tolerance and broadmindedness are hallmarks of a 'democratic society'" and that in a democracy "a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".[10]

18. The concept of "pluralist democracy"[11] therefore constitutes the basis of the Court's accumulated case-law in favour of national minorities, irrespective of the article of the Convention which is invoked (1). Moreover, States have both negative and positive obligations (2). At any event, the Court's approach to the margin of discretion it leaves States in seeking to achieve a balance between the rights of the majority and those of minorities and avoid any abuse of a dominant position is not always consistent.

1. "Pluralist democracy": the basis of the protection of national minorities

19. The principle of "pluralist democracy" does not apply only to cases concerning minority identity groups but to all of the Court's judgments relating to the aforementioned articles. For example, with regard to Article 10 of the Convention, the principle is clearly laid down in the *Handyside v. United Kingdom* judgment of 7 December 1976, concerning the right to freedom of

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8. Although cases concerning minorities often also give rise to violations of other provisions, in particular of Article 8 of the Convention and Article 1 of Protocol No. 1, and a certain number of procedural rights. Articles 2 and 3 of the Convention play a particularly important role in the protection of national minorities (see below).
9. Eur Court HR (GC), *Gorzelik and Others v. Poland* judgment of 17 February 2004, §68.
10. Eur Court HR, *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, §63.
11. See Fl. BENOÎT-ROHMER, "La Cour européenne des droits de l'homme et la défense des droits des minorités nationales", *op. cit.*

expression of a publisher who had published a book which the authorities considered morally shocking:

> "49. (…) The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."

20. However, when a case concerns the protection of minorities in terms of identity and not simply minority opinions (as in the *Handyside case*), the principle of "pluralist democracy" is of particular importance. The Court does not hesitate, for example, to make a clear link between the freedom of association and expression of a political party and the demands of a clearly defined ethnic or national minority. The *Turkish Communist Party* case, concerning the Kurdish minority in Turkey, is emblematic here because the Court states in its judgment that "there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State's population and to take part in the nation's political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned"[12].

21. The *Sidiropoulos and Others v. Greece* judgment of 10 July 1998 confirms this:

> "41. (…) Territorial integrity, national security and public order were not threatened by the activities of an association whose aim was to promote a region's culture, even supposing that it also aimed partly to promote the culture of a minority; the existence of minorities and different cultures in a country was a historical fact that a 'democratic society' had to tolerate and even protect and support according to the principles of international law."

22. Although it does not refer to a particular minority, a recent judgment, *Baczkowski and Others v. Poland* of 3 May 2007, makes the Court's position on this subject very clear:

> "61. As has been stated many times in the Court's judgments, not only is democracy a fundamental feature of the European public order but the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy, the Court has stressed, is the only political model

12. Eur Court HR, *United Communist Party of Turkey and Others v. Turkey* judgment of 30 January 1998, §57.

contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention, the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from 'democratic society' (see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, §§86-89, ECHR 2003-II; *Christian Democratic People's Party v. Moldova*, 28793/02, 14 May 2006).

62. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, §92, 17 February 2004).

63. Referring to the hallmarks of a 'democratic society', the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, p. 25, §63, and *Chassagnou and Others v. France* [GC], nos. 25088/95 and 28443/95, ECHR 1999-III, p. 65, §112)."

23. The concepts of balance and abuse of a dominant position to which the Court refers in the last paragraph above take us back to the question of the margin of discretion that States have in their relations with national minorities.

2. Multiple obligations

24. In the Court's case-law, the enjoyment of the rights of persons belonging to a national minority imposes both a negative *(a)* and a positive *(b)* obligation on states. The protection of minorities can involve even more than just a positive obligation given that, in some cases, the Court authorises States to give preferential treatment to a minority to the detriment of the individual rights of persons who do not belong to that minority *(c)*.

a) A negative obligation

25. According to the Court's established case-law, the State may not interfere in the enjoyment of the rights set forth in Articles 9, 10, 11 of the Convention and Article 3 of Protocol no. 1 unless such interference pursues a legitimate aim and corresponds to a pressing social need, is necessary in a democratic society and is proportionate to the aim pursued. In cases concerning minorities, in particular national minorities, the Court generally holds that the objectives invoked by States constitute legitimate aims within the meaning of the Convention and appears to take a relatively flexible approach to this question.

26. However, it takes a much less flexible approach when assessing whether the interference is relevant and proportionate to the aim pursued. In a large number of judgments concerning Articles 9, 10 and 11, the Court recognises the right of persons belonging to national minorities to freely express, individually, or collectively via political parties, religious organisations or associations, all sorts of identity-based demands, including demands which challenge the existing constitutional order or the territorial integrity of a State. The only condition which the case-law appears to impose is that minority demands should not in themselves be incompatible with democracy and should be expressed by lawful means, in other words without recourse to violence or incitement to violence and hatred. In this connection, I refer you to the *Yazar, Karatas and Aksoy, on behalf of the People's Labour Party, judgment of* 9 April 2002, in which the Court reaches the following conclusions concerning the dissolution of the People's Labour Party (*Halkın Emeği Partisi*):

> "49 On that point, the Court considers that a political party may campaign for a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which does not comply with one or more of the rules of democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds (see, mutatis mutandis, *Socialist Party and Others v. Turkey*, judgment of 25 May 1998, Reports 1998-III, pp. 1256-57, §§46-47, and *Lawless v. Ireland* (merits) judgment of 1 July 1961, Series A no. 3, pp. 45-46, §7)."
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> 50. Nor can it be ruled out that the programme of a political party or the statements of its leaders may conceal objectives and intentions different from those they proclaim. To verify that they do not, the content

of the programme or statements must be compared with the actions of the party and its leaders and the positions they defend taken as a whole (see *United Communist Party of Turkey and Others*, p. 27, §58, and *Socialist Party and Others*, pp. 1257-58, §48).

51. Moreover, for the purpose of determining whether an interference is necessary in a democratic society, the adjective 'necessary', within the meaning of Article 11 §2, implies the existence of a 'pressing social need'.

57. The Court accepts that the principles supported by the HEP, such as the right to self-determination and recognition of language rights, are not in themselves contrary to the fundamental principles of democracy. It likewise agrees with the Commission's reasoning that if merely by advocating those principles a political group were held to be supporting acts of terrorism, that would reduce the possibility of dealing with related issues in the context of a democratic debate and would allow armed movements to monopolise support for the principles in question. That in turn would be strongly at variance with the spirit of Article 11 and the democratic principles on which it is based.

58. Moreover, the Court considers that, even if proposals inspired by such principles are likely to clash with the main strands of government policy or the convictions of the majority of the public, it is necessary for the proper functioning of democracy that political groups should be able to introduce them into public debate in order to help find solutions to general problems concerning politicians of all persuasions."

27. This case-law was further developed by the Grand Chamber in the *Refah Partisi (Welfare Party) and Others v. Turkey* judgment of 13 February 2003 and was recently confirmed in the *Demokratik Kitle Partisi and Elçi v. Turkey* judgment of 3 May 2007 in the following terms:

"29. The case-law which is applicable to the present case is described in paragraphs 86-89 and 96-100 of the *Refah Partisi (Prosperity Party) and Others v. Turkey* ([GC] judgment, nos. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II). A political party may campaign for a change in the law or the legal and constitutional structures of a State on two conditions: firstly, the means used to that end must be legal and democratic and secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds (*Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, ECHR 2002-II, §49, and the aforementioned *Refah Partisi (the Welfare Party) and Others,* §98)."

28. The same case-law was applied with regard to Article 11 in a case concerning the refusal to register an association. In the *Bekir-Ousta and Others v. Greece* judgment of 11 October 2007:

"36. The Court points out that the right to freedom of association laid down in Article 11 incorporates the right to form an association. The ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be meaningless. Although the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes, including those protecting cultural or spiritual heritage, pursuing various socio-economic aims, seeking an ethnic identity or asserting a minority consciousness, are also important to the proper functioning of democracy (*Gorzelik and Others v. Poland* [GC], no. 44158/98, §92, ECHR 2004 I).

37. Indeed, the state of democracy in the country concerned can be gauged by the way in which this freedom is secured under national legislation. Certainly States have a right to satisfy themselves that an association's aim and activities are in conformity with the rules laid down in legislation, but they must do so in a manner compatible with their obligations under the Convention and subject to review by the Court.

42. The Court first notes that the refusal to register the applicants' association was mainly motivated by the wish to put a stop to the applicants' suspected intention of promoting the idea that there was an ethnic minority in Greece and that the rights of the members of this minority were not being fully respected. In other words, the disputed measure was based on a mere suspicion regarding the true intentions of the founding members of the association and the action it might have taken once it had begun to operate. However, it was impossible to ascertain what the applicants' actual intentions were as regards the practical activities of the association, given that it was never registered.

44. Moreover, although it is not for the Court to assess the importance the respondent state gives to issues concerning the Muslim minority in Western Thrace, it nevertheless believes that, even if the actual aim of the association was to promote the idea that there is an ethnic minority in Greece, that in itself could not be considered to be a threat to a democratic society; moreover, there was nothing in the association's statutes to suggest that its members advocated the use of violence or anti-democratic or anti-constitutional methods.

46. In the light of the above, the Court finds it difficult to see what 'pressing social need' could justify the refusal to register the applicants' association and concludes that the impugned measure was disproportionate to the aims pursued. The Court therefore holds that there has been a violation of Article 11".[13]

29. In other cases concerning, for example, Articles 10 and 11, the Court appears to give States a wider margin of discretion, however. In a recent judgment, *Parti Nationaliste Basque – organisation régionale d'Iparralde v. France* of 7 April 2007, the Court recognised the lawfulness of prohibiting a political party, which claimed to represent the French Basque minority, from securing funds from foreign states:

13. See also Eur Court HR, *Emin and Others v. Greece* judgment of 27 March 2008.

"47. In the instant case the Court has no difficulty in accepting that the prohibition on the funding of political parties by foreign States is necessary for the preservation of national sovereignty; indeed, the 'Guidelines on the financing of political parties' adopted by the Venice Commission (see paragraph 16 above) state that financial contributions from foreign States should be prohibited.

It is not so easily persuaded, however, with regard to the prohibition on funding by foreign political parties. It fails to see exactly how State sovereignty would be undermined by this factor alone. Moreover, it is striking that the above-mentioned guidelines – which, precisely, approach this question from the standpoint both of the need to ensure 'democratic security' and of freedom of political association – do not indicate that there should be such a ban, whereas they emphasise the need to prohibit funding by 'foreign enterprises'.

The Court considers, however, that this matter falls within the residual margin of appreciation afforded to the Contracting States, which remain free to determine which sources of foreign funding may be received by political parties."

30. This Basque case, which concerns Articles 10 and 11 of the Convention, is very similar to the case-law relating to Article 3 of Protocol no. 1, which consistently grants states a wide margin of discretion in electoral matters. Take, for example, the *Aziz v. Cyprus* judgment of 22 June 2004 concerning the voting rights of Cypriot citizens belonging to the Turkish community:

"25. While Article 3 of Protocol No. 1 is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people, the Court's case-law establishes that it guarantees individual rights, including the right to vote and to stand for election. Although those rights are central to democracy and the rule of law, they are not absolute and may be subject to limitations. The Contracting States have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with: it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate."

31. This position, which is fully consistent with the leading judgment *Mathieu-Mohin and Clerfayt v. Belgium* of 2 March 1987[14], was recently confirmed in the *Kavakci v. Turkey* judgment of 5 April 2007, concerning the exclusion of a female member from the Turkish Parliament because she was wearing an Islamic headscarf, although, in this specific case, it is not really possible to talk of the protection of a minority at all, let alone a national minority.

14. Concerning the objection by two French-speaking elected representatives to the method of appointing representatives from the administrative district of Hal-Vilvorde to the Flemish Council.

b) A positive obligation

32. With a view to protecting rights which are "practical and effective as opposed to theoretical and illusory", the Convention bodies have always applied the theory of "positive obligations" to a wide range of provisions. This approach is particularly important when the case concerns minorities, especially national minorities, because States not only have a duty to tolerate such minorities without interfering with their rights but also to take a more proactive attitude towards them.

33. The Court admits that there is a positive obligation under Articles 10 and 11, quite apart from any consideration concerning the protection of a minority. For example, in the *Wilson, National Union of Journalists and Others v. United Kingdom* judgment of 2 July 2002, which concerned a case of trade-union law, the Court held that:

> "48. By permitting employers to use financial incentives to induce employees to surrender important union rights, the respondent State has failed in its positive obligation to secure the enjoyment of the rights under Article 11 of the Convention. This failure amounted to a violation of Article 11, as regards both the applicant trade unions and the individual applicants."

34. As regards the rights of persons belonging to a minority, in the *Baczkowski and Others v. Poland* judgment of 3 May 2007, the Court very clearly found that States had a positive obligation and underlined the particular vulnerability of these persons:

> " 64. In *Informationsverein Lentia and Others v. Austria* (judgment of 24 November 1993, Series A no. 276) the Court described the State as the ultimate guarantor of the principle of pluralism (see the judgment of 24 November 1993, Series A no. 276, p. 16, §38). A genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conception would not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms (see *Wilson & the National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, §41, ECHR 2002-V; *Ouranio Toxo v. Greece*, no. 74989/01, 20 October 2005, §37). This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation."

35. The same type of approach has been taken under Articles 2 and 3 of the Convention, in a series of cases concerning persons belonging to an ethnic or national minority who had been subjected to extreme brutality for racist reasons. There are many such cases. One example is the

Nachova and Others v. Bulgaria Grand Chamber judgment of 6 July 2005, concerning the killing of a number of members of the Roma community by members of the Bulgarian military police:

> "145. Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment. (…)
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> 160. The Grand Chamber endorses the Chamber's analysis in the present case of the Contracting States' procedural obligation to investigate possible racist motives for acts of violence."

36. However, the protection of national minorities in the Court's case-law goes even further. In some cases, states are authorised to give national minorities preferential treatment, sometimes to the detriment of the interests of other citizens who do not belong to the national minority in question.

c) Preferential treatment

37. In the *Tjibaou and Others v. France case*, the applicants, who were French citizens of Melanesian origin residing in New Caledonia, lodged a complaint concerning the composition of the New Caledonia Assizes Court jury at a trial concerning several cases of murders linked to the agitation for independence in the archipelago at that time. Relying on Article 6 §1 and Article 14 of the Convention, the applicants claimed that the jury was not impartial because all of its members without exception were of European origin. In its decision of 6 September 1990, the Commission held that the application was inadmissible on grounds of failure to exhaust domestic remedies and did not rule on the merits. The question of whether, in order to guarantee the fairness of a trial, the membership of a trial jury which is required to judge the members of a national minority should, to a certain extent, reflect ethnic/national diversity, has, therefore, not yet been answered.

38. The acceptance of a certain amount of "positive discrimination" can be clearly seen in another case concerning New Caledonia. In 2005, the Court had to rule on the conformity with the Convention of the French Institutional Act which stipulated that French citizens residing in New Caledonia for less than ten years could neither stand for election nor vote in the election of the new representative bodies set up as part of the process of self-determination launched in 1998. In its *Py v. France* judgment of 11 January 2005, the Court, following the findings of the UN Human Rights Committee on the same subject, held that:

"61. (…) New Caledonia's current status reflects a transitional phase prior to the acquisition of full sovereignty and is part of a process of self-determination. The system in place is '*incomplete and provisional*', like that examined by the Court in the *Mathieu-Mohin and Clerfayt* case cited above.

62. After a turbulent political and institutional history, the ten-year residence requirement laid down in the Institutional Act of 19 March 1999 has been instrumental in alleviating the bloody conflict. This local factor, resulting from problems that are more deep-seated and have more far-reaching consequences than the linguistic disputes at the origin of the *Polacco and Garofalo* and *Mathieu-Mohin and Clerfayt* cases cited above, has brought about a more peaceful political climate in New Caledonia and has enabled the territory to continue its political, economic and social development.

63. As the United Nations Human Rights Committee noted on 15 July 2002 (see above, p.13 §14.7):

'... the cut-off points set for the referendum of 1998 and referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory.'

64. The Court therefore considers that the history and status of New Caledonia are such that they may be said to constitute 'local requirements' warranting the restrictions imposed on the applicant's right to vote".

39. The position taken by the Court in this case clearly shows its willingness to authorise States to apply policies in favour of a minority, when special circumstances so require, even if such policies affect the individual rights of citizens who do not belong to that minority. The case in question concerned such a policy in favour of a "national" minority, given that the population of New Caledonia was engaged in a process of self-determination.

B. Personal scope

40. The Court's case-law with regard to the expulsion of foreigners shows that the protection indirectly afforded by the Convention to national minorities is not confined to members of minorities residing on the territory of States parties to the Convention but also covers individuals living on the territory of a State Party but who belong to national minorities established in third countries. This case-law has been developed, in particular with regard to Articles 2 and 3, to prevent the expulsion

of foreigners to countries where their life or their safety would have been jeopardised, but also applies to other rights such as freedom of religion.

1. The right to life and to safety

41. The *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991 clearly encapsulates the case-law of the Convention bodies here. This case concerned the expulsion, to Sri Lanka, of young members of the Tamil community, who feared that, on returning to their country of origin, they would be subjected to ill-treatment and persecution. The Court recognised that the expulsion could have been a violation of Article 3 of the Convention but, after considering the situation of the Tamil minority *in concreto*, found that, in the case in question, no "serious grounds had been established" for believing that the applicants would be exposed to a real risk of being subjected to inhuman or degrading treatment on their return to Sri Lanka.

42. On the other hand, in the *Chahal v. the United Kingdom* judgment of 15 November 1996, the Grand Chamber held that there had been a violation of Article 3, in a case concerning the expulsion of a Sikh separatist to India.

43. Many cases following directly on from the *Vilvarajah* case concern the protection of national or ethnic minorities residing in States which are not party to the Convention. Indeed, these cases perhaps constitute the majority of expulsion cases brought before the Court. There have, for example, been cases concerning the Ethiopian minority in Eritrea[15] and the Ashraf minority in Somalia.[16]

2. Religious freedom

44. Although, in its decision dated 28 February 2006 on the admissibility of the *Z and T v. the United Kingdom* case, the Court held that the application was manifestly ill-founded, it did recognise that the deportation of foreigners to a country where they risked being subjected to religious persecution because they belonged to a minority could, in exceptional circumstances, constitute a violation of Article 9:

15. Eur Court HR, *Gebremedhin v. France* judgment of 26 April 2007.
16. Eur Court HR, *Salah Sheek v. the Netherlands* judgment of 11 January 2007.

"This is however first and foremost the standard applied within the Contracting States, which are committed to democratic ideals, the rule of law and human rights. The Contracting States nonetheless have obligations towards those from other jurisdictions, imposed variously under the 1951 United Nations Convention on the Status of Refugees and under the above-mentioned Articles 2 and 3 of the Convention. As a result, protection is offered to those who have a substantiated claim that they will either suffer persecution for, *inter alia*, religious reasons or will be at real risk of death or serious ill-treatment, and possibly flagrant denial of a fair trial or arbitrary detention, because of their religious affiliation (as for any other reason). Where, however, an individual claims that on return to his own country he would be impeded in his religious worship in a manner which falls short of those proscribed levels, the Court considers that very limited assistance, if any, can be derived from Article 9 by itself. Otherwise it would be imposing an obligation on Contracting States effectively to act as indirect guarantors of freedom of worship for the rest of world. If, for example, a country outside the umbrella of the Convention were to ban a religion but not impose any measure of persecution, prosecution, deprivation of liberty or ill-treatment, the Court doubts that the Convention could be interpreted as requiring a Contracting State to provide the adherents of that banned sect with the possibility of pursuing that religion freely and openly on their own territories. While the Court would not rule out the possibility that the responsibility of the returning State might in exceptional circumstances be engaged under Article 9 of the Convention where the person concerned ran a real risk of flagrant violation of that Article in the receiving State, the Court shares the view of the House of Lords in the *Ullah* case that it would be difficult to visualise a case in which a sufficiently flagrant violation of Article 9 would not also involve treatment in violation of Article 3 of the Convention."

45. It is true that the case concerned members of the Pakistani Christian community, which is a religious rather than national minority, but the same reasoning could be applied *mutatis mutandis* to members of national minorities, whose distinguishing features in terms of identity include the fact that they have a different religion from the majority of the inhabitants of the country concerned.