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THE PROTECTION OF NATIONAL MINORITIES BY THEIR KIN-STATE

LA PROTECTION DES MINORITES NATIONALES PAR LEUR ETAT-PARENT

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REFLEXIONS LINGUISTIQUES

M. Jean-François ALLAIN
Chef du Service de la Traduction française
Conseil de l'Europe

L'analyse d'un nouveau champ de la connaissance oblige à clarifier les concepts utilisés ou à en créer de nouveaux. Ces nouveaux concepts peuvent s'exprimer sous la forme d'un *néologisme* ou, au contraire, d'un *sens nouveau* qui vient enrichir un mot existant mais aussi « troubler » sa clarté sémantique.
Cette deuxième solution, en effet, prête parfois à malentendu et oblige souvent, pour lever toute ambiguïté, à *qualifier* le terme. On parlera ainsi de « l'Etat au sens hégelien du terme » ou de « la patrie au sens 2 de tel dictionnaire ».

Dans le domaine particulier qui nous occupe – celui de minorités nationales – la situation est linguistiquement complexe à plusieurs titres.

Tout d'abord, une même désignation peut avoir un sens politique/juridique et un sens géographique/historique qui ne se recouvrent pas entièrement. Un Slovène peut être un citoyen de Slovénie ou, historiquement, une personne appartenant à une communauté linguistique et culturelle plus ou moins bien définie.

Certains pays (ou certaines langues) ont la chance d'avoir deux mots qui lèvent ce genre d'ambiguïté. Ainsi, « azéri » renvoie à la communauté linguistique et culturelle, « azerbaïdjanais » désigne l'appartenance à un Etat. Autrement dit, « tous les Azerbaïdjanais ne sont pas des Azéris et tous les Azéris ne sont pas azerbaïdjanais ».

Mais si l'on traduit cette phrase dans un système linguistique qui ignore le distinguo « nation »/« citoyen d'un Etat », on obtiendrait une équivalence absurde, du genre : « tous les Roumains ne sont pas des Roumains et tous les Roumains ne sont pas des Roumains ». Cette absurdité met clairement en relief le problème de la polysémie mais aussi les risques de glissements sémantiques, parfois dangereux. Il faudrait dire : « tous les Roumains au sens 1 (= citoyens de Roumanie) ne sont pas des Roumains au sens 2 (= personnes appartenant à une nation définie par une langue, une culture, une histoire). Inversement, tous les Roumains (au sens 2) ne sont pas roumains (au sens 1) ».

Or, ce type de glissement est fréquent dans les textes, et parfois pernicieux. Si « l'Ukraine veille à la satisfaction des besoins nationaux, culturels et linguistiques des Ukrainiens résidant à l'extérieur de l'État », faut-il comprendre par « Ukrainiens » des ressortissants (= citoyens) ukrainiens vivant à l'étranger ou des personnes se réclamant d'une « identité ukrainienne » qui se trouvent vivre, à la suite d'aléas politiques ou historiques, dans un État tiers dont ils sont citoyens. Linguistiquement, cette phrase est ambiguë.

Les dénominations nouvelles adoptées par certains pays ont l'avantage de clarifier les découpages sémantiques. Ainsi, la Moldavie demeure une région géographique tandis que la Moldova est une réalité politique ; leurs frontières ne se recouvrent pas entièrement. On peut dire « la Moldova comprend une grande partie de la Moldavie ». En revanche, il n'existe pas

deux mots pour désigner respectivement les habitants de la région et les citoyens de l'État, sauf à adopter l'opposition « Moldave/Moldove » que l'on rencontre parfois.

Deuxième difficulté : dans une organisation qui travaille au moins en deux langues, les mêmes mots n'ont pas le même sens dans une langue et dans l'autre. Le mot anglais « nation » se traduit une fois sur deux par « pays » ; le mot « pays » a d'autres usages que « country ». Ce recouvrement partiel des champs sémantiques entre les deux langues nous entraîne dans la problématique bien connue des « faux amis », sources de confusions possibles, voire de contre-sens.

Dans le domaine des minorités nationales, la situation à décrire est la suivante. Une fraction d'une communauté linguistique et/ou culturelle se retrouve par suite d'un redécoupage des frontières (parfois d'un déplacement de population) coupé de l'Etat dans lequel se trouve la majorité de la communauté en question. Exemple : une communauté hongroise se trouve politiquement rattachée à la Slovaquie. Ce sont donc des Hongrois (au sens 2) mais aussi des Slovaques (au sens 1) !

Pour décrire ce genre de situation, il convient, on le comprendra, d'éviter les mots polysémiques : « homeland », « patrie », « pays », souvent chargés en outre de connotations affectives, romantiques ou idéologiquement marquées. L'anglais a donc créé plusieurs concepts qui semblent s'être établis : « *kin-state*» (la Hongrie dans l'exemple ci-dessus) et « *kin-minority* » (les « Hongrois » vivant en Slovaquie). Ce sont les termes adoptés par la Commission de Venise. Ils ont l'avantage, par leur formation, de faire apparaître clairement les relations entre les deux concepts.

S'ajoute à cela le concept de « *home-state* », qui n'est pas le *homeland* comme on risquerait de le penser, mais le pays d'accueil, traduit sans ambiguïté en français par l'expression « État de résidence ». L'anglais parle également en ce sens de « *territorial state* ».

Pour traduire « *kin-state* » en français, plusieurs mots sont en concurrence. Le meilleur choix semble être « État-parent », expression très neutre, très factuelle, contrairement peut-être à « mère-patrie », et qui prend facilement des connotations de sentimentalisme nostalgique ou de « patriotisme ». Par contre, « nation-mère » serait possible si la « nation » de référence de la « *kin-minority* » se trouve elle-même dans un État multinational, puisqu'il n'y a pas nécessairement coïncidence entre un État et une nation. Dans tous les cas, cette « nation-mère » est également dans « l'État-parent ».

La traduction de « *kin-minority* » est plus problématique. C'est génériquement une minorité, mais qui se pense dans une *relation* à un État autre que celui dans lequel elle réside et dont elle a la citoyenneté. Cette relation s'exprime de plusieurs manières : on parlera de tel État et de ses minorités à l'étranger. On parlera d'une minorité *de souche* grecque, etc. Dans d'autres cas, le mot « minorité » employé seul suffit à désigner l'idée, mais pour lever toute ambiguïté et désigner clairement le concept, une expression comme « minorité exocentrée » semble parfaitement convenir, au sens de « communauté dont le centre est ailleurs » (dans son « État-parent »).

Ces quelques réflexions n'entendent pas épuiser le sujet. De toute façon, une langue ne cesse d'évoluer, mais dans un domaine sensible, parfois difficile à cerner, et *a fortiori* dans un contexte multilingue, il n'est pas vain de perdre un peu de temps à s'entendre sur les mots. C'est autant de gagné par la suite.

SOME THOUGHTS ON LANGUAGE

Mr Jean-François ALLAIN
Head of the French Translation Department
Council of Europe

When analysing a new field of knowledge, it is necessary to clarify the concepts used or devise new ones. These new concepts may be expressed in the form of *neologisms* or, alternatively, *new meanings* that enrich existing words while also, however, "blurring" their semantic clarity.

The latter solution sometimes leads to misunderstandings and often generates a need to *qualify* the term concerned so as to rule out any ambiguity. Examples include "State in the Hegelian sense of the term" and "fatherland within meaning 2 of dictionary X".

In the particular field we are dealing with here – national minorities – the situation is linguistically complex in several respects.

First of all, the political/legal and geographical/historical meanings of a single term may not correspond entirely. A Slovenian may be a citizen of Slovenia or, historically, a person belonging to a linguistic and cultural community that may not be totally clearly defined.

Some countries (or some languages) are lucky enough to have two words that remove any ambiguity of this kind. For instance, "Azeri" refers to a linguistic and cultural community, while "Azerbaijani" denotes belonging to a State. In other words, "not all Azerbaijanis are Azeris and not all Azeris are Azerbaijanis".

However, translating this sentence into a language system that makes no "nation"/"citizen of a State" distinction produces an absurd equivalent along the lines of "not all Romanians are Romanians and not all Romanians are Romanians". This clearly highlights the problems of polysemy and also the risks of shifts in meaning, which are sometimes dangerous. It would be necessary to say: "not all Romanians within meaning 1 (citizens of Romania) are Romanians within meaning 2 (persons belonging to a nation defined by a language, culture and history). Conversely, not all Romanians (within meaning 2) are Romanians (within meaning 1)".

Yet shifts of this kind are common in legislative texts and may have insidious effects. If "Ukraine provides for the satisfaction of national and cultural, and linguistic needs of Ukrainians residing beyond the borders of the State", does "Ukrainians" mean Ukrainian nationals (citizens) living abroad or persons claiming to be of "Ukrainian identity" who, as a result of accidents of politics or history, happen to live in third States of which they are citizens? Linguistically, the sentence is ambiguous.

The new names adopted by certain countries have the advantage of clarifying semantic boundaries. For instance, Moldavia remains a geographical region, while Moldova is a political reality: their borders do not overlap entirely. It can be said that "Moldova includes a

large part of Moldavia". However, we do not have two words respectively to describe the inhabitants of the region and the citizens of the State, unless we use the pair "Moldavian/Moldovan" that is sometimes encountered.

A second difficulty also exists. In an organisation that works in at least two languages, individual words do not have the same meaning in both. Five times out of ten, the English word "nation" is translated into French as "*pays*"; "*pays*" having other uses than "country". This only partial overlapping of semantic fields between the two languages brings us to the well-known problems of "false friends", which are sources of possible confusion, if not misinterpretations.

In the field of national minorities, the situation to be described is as follows. As the result of the redrawing of borders (or, in some cases, population displacements), sections of linguistic and/or cultural communities find themselves cut off from the States where the relevant majority communities live. For instance, a Hungarian community is attached politically to Slovakia. Those concerned are therefore Hungarians (within meaning 2) and also Slovakians (within meaning 1)!

To describe this type of situation, it is understandably better to avoid polysemic terms such as "homeland", "fatherland" and "country", which often also have emotional, romantic or ideologically charged connotations. In English, a number of concepts have therefore emerged and appear to have established themselves: "kin-State" (Hungary in the above example) and "kin-minority" (the "Hungarians" living in Slovakia). These are the terms adopted by the Venice Commission. The way they are formed has the advantage of clearly establishing the relationship between the two concepts.

On top of this comes the concept of "home-State", which is not "homeland" as one might think, but the country where the groups concerned live, which is translated entirely unambiguously into French as "*État de résidence*" (State of residence). English also uses "territorial State" here.

There are several competing French translations for "kin-State". The best choice would appear to be "*État-parent*", which is very neutral and factual, unlike, perhaps, "*mère-patrie*", which quickly takes on connotations of nostalgic sentimentalism or "patriotism". On the other hand, "*nation-mère*" would be possible if the reference "nation" of the kin-minority was itself inside the boundaries of a multinational State, as States and nations are not necessarily identical. In any case, "*nation-mère*" is also contained in "*État parent*".

Translating "kin-minority" is more problematical. Generically it is a minority, but one whose members see themselves in *relation* to a State other than that where they live and whose citizenship they hold. This relationship can be expressed in various manners, for instance, with references to a particular State and *its* minorities abroad or to a minority of Greek *origin*, etc. In other cases, the word "minority" on its own is enough to describe the idea, but in order to rule out any ambiguity and denote the concept clearly in French an expression such as "*minorité exocentrée*" (exocentric minority) seems perfectly suitable, in the sense of a community whose centre lies elsewhere (ie in the kin-State).

These few thoughts lay no claim to be exhaustive. In any case, languages evolve constantly. However, in a sensitive field that is sometimes difficult to narrow down and especially in a

multilingual environment, it is worthwhile taking a little time to agree about the terms used. It pays off in the long run.

REPORT ON THE PREFERENTIAL TREATMENT OF NATIONAL MINORITIES BY THEIR KIN-STATE

adopted by the Venice Commission at its 48th Plenary Session (Venice, 19-20 October 2001)

Introduction

On 21 June 2001, Romania's Prime Minister, Mr A. Nastase, requested the Venice Commission to examine the compatibility of the Act on Hungarians living in neighbouring countries, adopted by the Hungarian Parliament on 19 June 2001, with the European standards and the norms and principles of contemporary public international law.

On 2 July 2001, the Hungarian Minister of Foreign Affairs, Mr J Martonyi, requested the Venice Commission to carry out a comparative study of the recent tendencies of the legislations in Europe concerning the preferential treatment of persons belonging to national minorities living outside the borders of their country of citizenship.

At its plenary session of 6-7 July 2001, the Venice Commission decided to undertake a study, based on the legislation and practice of certain member States of the Council of Europe, on the preferential treatment by a State of its kin-minorities abroad. The aim of the study would be to establish whether such treatment could be said to be compatible with the standards of the Council of Europe and with the principles of international law.

A working group was thereafter formed, consisting of Messrs Franz Matscher, François Luchaire, Giorgio Malinverni and Pieter Van Dijk. A meeting was held in Paris on 18 September 2001. The Rapporteurs met with representatives of the Romanian and the Hungarian Governments respectively, in order to obtain certain clarifications following the information that both parties had submitted, at the Commission's request, in August.

The present report was prepared on the basis of comments by Messrs. Matscher, Luchaire, Malinverni and Van Dijk; it was discussed within the Sub-Commission for the Protection of Minorities on 18 October 2001, and was subsequently adopted by the Commission at its 48th Plenary Meeting held in Venice on 19-20 October 2001.

A. Historical background[1]

[1] *For full reference, see: J. Marko, E. Lantschner and R. Medda, Protection of National Minorities through Bilateral Agreements in South-Eastern Europe, 2001.*

The concern of the "kin-States" for the fate of the persons belonging to their national communities[2] (hereinafter referred to as "kin-minorities") who are citizens of other countries ("the home-States") and reside abroad is not a new phenomenon in international law.

Besides some few general principles of customary international law, the pertinent international agreements entrust home-States with the task of securing to everybody within their jurisdiction the enjoyment of fundamental human rights, including minority rights, and assign to the international community as a whole a role of supervision of the home-States' obligations[3]. Kin-States, however, have shown their wish to intervene more significantly, and directly, i.e. parallel to the *fora* provided in the framework of international co-operation in this field[4], in favour of their kin-minorities.

The main tool which kin-States dispose of in this respect is the negotiation of multilateral or bilateral agreements aiming at the protection of their kin-minority, with the relevant home-States.

The bilateral approach to minority protection was first attempted after the collapse of the Russian, Austro-Hungarian and Ottoman empires after the First World War, under the aegis of the League of Nations[5]. It was adopted again after World War II. The experience of South Tyrol is particularly interesting. Following the peace treaty of Saint-Germain en Laye (1919), South Tyrol had been annexed to Italy against the will of the local population (a few thousands Italians and 280,000 South-Tyrolese – the latter acquired Italian citizenship). No protection had been afforded to this minority during the fascist years. In 1945, the South-Tyrolese claimed a right to self-determination. As a measure of compensation, the Allies urged Italy and Austria to find a solution through a bilateral agreement, which was reached on 4 September 1946 (the Gruber-de Gasperi Agreement, later annexed to the Peace Treaty between the Allied Powers and Italy of 10 February 1947). The region was thereby given limited autonomy. After the Vienna Treaty of 15 May 1955 re-establishing the full independence of Austria, the latter sought a better implementation of the Agreement, and requested further bilateral negotiations, which Italy, between 1958 and 1961, refused. In 1959, Austria brought the case before the General Assembly of the United Nations, which, through two resolutions of 1960 and 1961 respectively, prompted Italy and Austria to engage in negotiations, thus ratifying implicitly the right of Austria to care for the fate of the South-Tyrolese on the basis of the Treaty of Paris. The conflict escalated into terrorist attacks. In 1969, the "package agreements" ("*pacchetto*") in favour of the South-Tyrolese minority were agreed upon. In summer 1992 the Austrian Government issued a statement that the Italian

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[2] *In the pieces of legislation that will be examined hereinafter, the term "nationality" is at times found with the meaning of "citizenship". For the purposes of this study, however, "nationality" means the legal bond between a person and the State and does not indicate the person's ethnic origin (see Article 2 of the European Convention on Nationality).*

[3] *See Article 1 of the Framework Convention for the Protection of National Minorities (hereinafter: "the Framework Convention").*

[4] *There are various procedures for minority protection in Europe. In primis, the mechanism foreseen by the European Convention on Human Rights (individual as well as inter-state applications). Further, the monitoring of the Framework Convention by the Committee of Ministers of the Council of Europe and by the Advisory Committee on the basis of reports by the States concerned. The activities of the OSCE High Commissioner on National Minorities and of the United Nations Working Group on Minorities must also be recalled.*

[5] *The settlement of the Aland Islands dispute in 1920 was a success, while the main minority problems originating from the Peace treaties remained unresolved.*

Government had finally implemented the package. In 1996, Austria and Italy informed the United Nations that a mutually satisfactory solution had been found. Nowadays, Austria continues to supervise the implementation of the "package", and, in the light of the good relations which now exist between the two countries, Italy does not challenge Austria's right to do so.

In the 1990s, subsequent to the end of the Cold War and the collapse of communism, the issue of the protection of minorities became a prominent one, and the wish of the countries of Central and Eastern Europe to play a decisive role in the protection of their kin-minorities became even more apparent[6].

Provisions to the extent that the kin-State cares for its kin-minorities abroad and fosters its links with them were indeed included in a number of new Constitutions dating back to those years.

For example, Article 6 of the Hungarian Constitution (revised in 1989) provides:

> *"The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary".*

Article 7 of the Romanian Constitution (1991) reads:

> "*The State shall support the strengthening of links with Romanians living abroad and shall act accordingly for the preservation, development and expression of their ethnic, cultural, linguistic, and religious identity under observance of the legislation of the State of which they are citizens*."

Article 5 of the Slovenian Constitution (1991) provides, *inter alia*, that:

> "*Slovenia shall maintain concern for autochthonous Slovene national minorities in neighbouring countries and shall foster their contacts with the homeland*. (…) *Slovenes not holding Slovene citizenship may enjoy special rights and privileges in Slovenia. The nature and extent of such rights and privileges shall be regulated by law*".

Article 49 of the Constitution of the "Former Yugoslav Republic of Macedonia" (1991) stipulates that:

> "*The Republic cares for the status and rights of those persons belonging to the Macedonian people in neighbouring countries (...), assists their cultural development and promotes links with them*."

Article 10 of the Croatian Constitution (1991) provides that:

> "*Parts of the Croatian nation in other states are guaranteed special concern and protection by the Republic of Croatia*."

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[6] *The present report deals primarily with the protection of minorities in the context of Central and Eastern Europe in the last decade. Indeed, there are numerous other examples (the protection of the Slovenian and the Croatian minorities in Austria by virtue of Article 7 of the Austrian State Treaty of 1955) that can be relevant for its conclusions.*

Article 12 of the Ukrainian Constitution (1996) similarly provides that

> "*Ukraine provides for the satisfaction of national and cultural, and linguistic needs of Ukrainians residing beyond the borders of the State*."

Article 6 of the 1997 Polish Constitution provides:

"The Republic of Poland shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage."

Article 7a of the Slovak Constitution (amended in 2001) provides:

> *"The Slovak Republic shall support national awareness and cultural identity of Slovaks living abroad and their institutions for achieving these goals as well as their relationships with their homeland."*

In the same period, the treaty approach to minority protection re-emerged – and on a large scale. Germany, in order to secure its borders and to afford protection to its kin-minorities which after World War II had been placed under the rule of central and eastern European states, concluded agreements on friendly co-operation and partnership, notably with Poland, Bulgaria, Hungary and Romania[7]. Hungary concluded similar agreements with three of its neighbouring countries: Ukraine, Croatia and Slovenia[8].

The potentialities of bilateral treaties in respect of reducing tensions between kin-states and home-states appeared to be significant, to the extent that they can procure specified commitments on sensitive issues, while multilateral agreements can only provide for an indirect approach to those issues[9]. Furthermore, they allow for the specific characteristics and needs of each national minority as well as of the peculiar historical, political and social context to be taken into direct consideration.

Thus, the European Union regarded bilateral treaties as an attractive tool for guaranteeing stability in Central and Eastern Europe. In 1993, it endorsed and launched a French initiative

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[7] *Treaty between the Federal Republic of Germany and the Republic of Poland on Good Neighbourly Relations and Friendly Co-operation (17 June 1991); Treaty between the Federal Republic of Germany and Bulgaria on Friendly Relations and Partnership in Europe (9 October 1991); Treaty between the Federal Republic of Germany and Hungary concerning Friendly Co-operation and Partnership in Europe (6 February 1992); Treaty between the Federal Republic of Germany and Romania concerning Friendly Co-operation and Partnership in Europe (21 April 1992).*

[8] *Treaty between the Republic of Hungary and Ukraine on the Foundations of Good Neighbourly Relations and Co-operation (6 December 1991); Treaty between the Republic of Hungary and Slovenia on Friendship and Co-operation (1 December 1992); Treaty between the Republic of Hungary and Croatia on Friendly Relations and Co-operation (16 December 1992).*

[9] *The signature of bilateral agreements on the protection of minorities "in order to promote tolerance, prosperity, stability and peace" (see the Explanatory Report to the Framework Convention) is foreseen in Article 18 § 1 of the Framework Convention, according to which States "endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned". The same is encouraged under the Stability Pact for South Eastern Europe (1999). The United Nations also promotes the stipulation of bilateral and multilateral treaties: see resolution of the Human Rights Commission of 22 February 1995, UN Doc. E/CN.4/1995 L. 32*

("the Balladur initiative") towards concluding a Pact on Stability in Europe. It aimed at achieving "stability through the promotion of good neighbourly relations, including questions related to frontiers and minorities, as well as regional co-operation and the strengthening of democratic institutions through co-operation arrangements to be established in the different fields that can contribute to the objective"[10]. The Pact, which was signed by 52 States and was adopted in 1995, concerned Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia, all of which had expressed an interest in joining the European Union. These States were called upon "intensifying their good-neighbourly relations in all their aspects, including those related to the rights of persons belonging to national minorities"; this intensification was deemed to require the effective implementation of the principles of sovereign equality, respect of the rights inherent in sovereignty, refraining from the threat or use of force, inviolability of frontiers, peaceful settlement of disputes, non-intervention in internal affairs, respect for human rights, including the rights of persons belonging to national minorities, and fundamental freedoms, including freedom of thought, conscience, religion or belief, equal rights and self-determination of peoples, cooperation amongst States and fulfilment in good faith of obligations under international law[11].

About a hundred new and existing bilateral and regional co-operation agreements on, *inter alia*, minority protection were included in the Pact.

The States participating in the Pact committed themselves, in the Final Declaration, to compliance with the principles of the OSCE. In the event of problems over observance of the agreements, they would rely on the existing OSCE institutions and procedures for preventing conflict and settling disputes peacefully. These include the possibility of consulting the High Commissioner on National Minorities (Article 15 of the Final Declaration) and that of referring disputes concerning the interpretation or implementation of the treaties to the International Conciliation and Arbitration Court (Article 16 of the Final Declaration).

Under the auspices of the Pact, two further bilateral treaties on cooperation were signed, between Hungary and Slovakia (1995) and between Hungary and Romania (1996) respectively[12].

B. The bilateral approach to minority protection

Stability and peace, it is well known, cannot be achieved without a satisfactory protection of national minorities. Thus, all the bilateral treaties on friendly relations in question contain provisions on the protection of the (respective) minorities[13]. In the context of these bilateral agreements, kin-States attempt to secure a high level of protection to their minorities ,

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[10] *See the "Concluding document of the inaugural conference for a Pact on Stability in Europe" in 94/367/CFSP: Council Decision of 14 June 1994 on the continuation of the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union on the inaugural conference on the Stability Pact.*

[11] *See the Final Declaration of the Pact on Stability, §§ 6 and 7.*

[12] *Treaty between the Republic of Hungary and Slovakia on Good Neighbourliness and Friendly Co-operation (19 March 1995); Treaty between the Republic of Hungary and Romania on Understanding, Co-operation and Good-neighbourly Relations (16 September 1996).*

[13] *It is common practice for States to sign bilateral agreements on cultural co-operation where certain provisions are specifically devoted to the training of and other assistance to teachers involved in the education of national minorities. These agreements are normally implemented and complemented by inter-ministerial agreements.*

whereas home-States aim at achieving an equal treatment and integration of the minorities within their borders, thus preserving the integrity of the latter.

In certain cases, the friendship treaties refer to pre-existing bilateral instruments specifically concerning minorities (for example, the co-operation Treaty between Hungary and Slovenia follows the *Convention on providing special rights for the Slovenian minority living in the Republic of Hungary and for the Hungarian minority living in the Republic of Slovenia* of 6 November 1992, and the *Treaty between Hungary and Ukraine on the Foundations of Good Neighbourly Relations and Co-operation* follows the *Declaration on the principles of co-operation between the Republic of Hungary and the Ukrainian Soviet Socialist Republic in guaranteeing the rights of national minorities* of 31 May 1991.)

In other cases, a specific instrument on minorities follows in time the bilateral treaty; the Treaty between Hungary and Croatia on Friendly Relations and Cooperation, for instance, was later complemented by a *Convention on the protection of the Hungarian minority in the Republic of Croatia and the Croatian minority in the Republic of Hungary* (5 April 1995). Similarly, the *Declaration on the principles guiding the co-operation between the Republic of Hungary and the Russian Federation regarding the guarantee of the rights of national minorities* of 11 November 1992 follows and refers to the *Treaty between the Republic of Hungary and the Russian Soviet Federative Socialist Republic on friendly relations and co-operation* of 6 December 1991.

These treaties and conventions usually contain mutual commitments to respect international norms and principles regarding national minorities. They often incorporate soft law provisions, such as the Council of Europe's Parliamentary Assembly's Recommendation no. 1201 (1993) and the CSCE Copenhagen Document (1990), and, by doing so, give them binding effect in their mutual relations.

A detailed comparative analysis of the content of these treaties goes far beyond the object of the present document. It is sufficient for our purposes to point out that they provide for certain "classic" core rights (right to identity; linguistic rights; cultural rights; education rights; rights related to the use of the media; freedom of expression and association; freedom of religion; right to participate in decision-making processes). Sometimes, more rarely, other rights such as that to trans-frontier contacts and preservation of the architectural heritage, are included. Certain treaties grant collective rights or certain forms of autonomy. Further, some of them emphasise the duties of the persons belonging to the minorities in respect of their home-States.

These treaties are, to a greater or lesser degree, framework treaties: they need to be implemented through specific pieces of legislation or through intergovernmental agreements on specific matters.

The implementation of the treaties involves two distinct questions: on the one hand, the parties must respect the obligations which they have reciprocally undertaken; on the other hand, they must pursue bilateral talks on the matters which are the object of the treaties with a view to committing themselves to new or different obligations. The effective and correct implementation of the treaties, however, is generally not subjected to any legal control:

indeed, none of these treaties sets up a jurisdictional or legal mechanism of control[14]. Their implementation is rather vested in joint intergovernmental commissions (normally, representatives of the minorities sit in each governmental delegation, but they do not have a veto power). These commissions are to be convened at regular intervals, or whenever it is deemed necessary, and are normally empowered with making recommendations to their respective governments as regards the execution or even the modification of the treaties.

There is no explicit sanction for the failure by one Party to co-operate in implementing a treaty.

Insofar as most of these treaties have been included in the Pact on Stability, any State could apply to the International Conciliation and Arbitration Court, seeking the solution to a dispute or the interpretation of a provision of the bilateral treaty in question. In practice, however, this has never been attempted. Furthermore, the assistance of the OSCE High Commissioner on National Minorities could be sought in pursuance of Article 15 of the Final Declaration of the Pact on Stability, but never was.

In addition, inasmuch as the treaties in question embody provisions of the Framework Convention, their implementation falls, if only indirectly, within the scope of competence of the relevant Advisory Committee and of the Committee of Ministers of the Council of Europe; indeed, States have submitted, though only indirectly, detailed information on these matters in their reports.

As regards domestic remedies, the theoretical possibility, in countries whose constitutional system allows treaty rules to be directly applicable in domestic law, of bringing before a domestic court the matter of the failure to respect a self-executing treaty has not been used so far (and does not appear very likely, due in particular to the little awareness of this possibility amongst the legal practitioners).

It follows that, as things stand nowadays, if a party refuses to participate in bilateral talks on the implementation of a treaty, only political pressure coming from either the other party or the international community can persuade it to do so.

Yet, this refusal would be in breach not only of the specific obligation, undertaken in the treaty, to conduct negotiations on the measures of implementation of the said treaty (a breach, therefore, of the principle *pacta sunt servanda*), but also of the general principle of international law according to which "in their mutual relations, States shall act in accordance with the principles and rules of friendly neighbourly relations which must guide their action at international level, particularly in the local and regional context"[15].

C. Domestic legislation on the protection of kin-minorities: analysis[16]

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[14] *See, however, the Agreement between Austria and Italy of 17 July 1971 (concluded in accordance with the "operational time-table"- "calendario operativo" of 1969) submitting disputes concerning the implementation of the Gruber-de Gasperi agreement of 1947 to the mechanism provided for by the European Convention of 29 April 1957 on the Pacific Settlement of Disputes.*

[15] *See European Commission for Democracy through Law, Law and foreign policy, Collection "Science and technique of democracy", No. 24, p.14. See Article 2 of the Framework Convention.*

[16] *This analysis is based on the material that has been brought to the attention of the Commission Secretariat.*

In addition to the bilateral agreements and to the domestic legislation and regulations implementing them, a number of European States have enacted specific pieces of legislation or regulations, conferring special benefits, thus a preferential treatment, to the persons belonging to their kin-minorities[17].

The following laws are worth remembering in this context:

- The *Law on the equation of the South-Tyrolese with the Austrian citizens in particular administrative fields*, 25 January 1979 (Austria) (hereinafter: "the Austrian law", or AL)[18]

- The *Act on Expatriate Slovaks and changing and complementing some laws* - no. 70 of 14 February 1997 (Slovakia) (hereinafter: "the Slovak Law" or SL)

- The *Law regarding the support granted to the Romanian communities from all over the world*, 15 July 1998 (Romania) (hereinafter: "the Romanian Law" or RL)

- The *Federal Law on the State policy of the Russian Federation in respect of the compariots abroad*, March 1999 (Russian Federation) (herinafter: "the Russian Law" or RuL)

- The *Law for the Bulgarians living outside the Republic of Bulgaria*, 11 April 2000 (Bulgaria) (hereinafter: the Bulgarian law" or BL)

- The *Law on the Measures in favour of the Italian Minority in Slovenia and Croatia*, 21 March 2001 no. 73 (extending the validity of Article 14 § 2 of the *Provisions for the development of economic activities and international cooperation of the Region Friuli-Venezia Giulia, the province of Belluno and the neighbouring areas*, 9 January 1991, no. 19) (Italy) (hereinafter: "the Italian law" or IL)

- The *Act on Hungarians living in neighbouring countries*, 19 June 2001 (to enter into force on 1 January 2002) (Hungary) (hereinafter: "the Hungarian law" or HL)

The following are also worth noticing:

- The R*esolution* of the Slovenian Parliament *on the status and situation of the Slovenian minorities living in neighbouring countries and the duties of the Slovenian State and other bodies in this respect,* of 27 June 1996)

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[17] *Sometimes, certain benefits, concerning matters that are not directly envisaged by the bilateral agreements, e.g. concerning health care or other questions, are regulated by informal (private law) agreements between the regional bodies of the kin-State and the home-State. The beneficiaries of such preferential treatment are not necessarily the members of the minority but all the persons residing in the region where the minority is settled (see, e.g., the relations between Tyrol and South-Tyrol).*

[18] *This law was amended by a regulation of the Austrian Minister for Science and Traffic in 1997 (see the Bundesgesetzblatt der Republik Österreich 1. August 1997, Teil I). Nowadays, South Tyroleans may enrol in Austrian universities if they have attended a German-speaking high school, and not any more if they belong to the German or Ladin linguistic minorities.*

- The *Joint Ministerial Decision* no. 4000/3/10/e of the Ministers of the Interior, of Defence, of Foreign Affairs, of Labour and of Public Order of 15-29 April 1998 on the *Conditions, Duration and Procedure for the delivery of a Special Identity Card to Albanian citizens of Greek origin* (Greece) (hereinafter: "the Greek ministerial decision" or GMD)

Scope of application *ratione personae*

The Romanian and Italian laws confine themselves to referring to their "communities" or "minorities" living outside of their respective territories. The other laws under examination, instead, set out in detail the criteria that are to be met in order for an individual to fall within their ambit of application. These criteria are as follows:

- Foreign citizenship

This criterion flows from the very same *ratio* of these laws and is therefore common to them all (with the partial exception of the Russian one). It is not always explicitly set out (see the already mentioned Romanian and Italian laws; the Bulgarian law does not specify this in its Article 2, but it does so in the second chapter). The Hungarian act specifies that Hungarian nationality must have been lost for reasons other that by voluntary renunciation.

Belonging to the specific national background

While the Italian and Romanian laws do not explicitly set out any criteria for establishing the national background, the other laws do, in greater or lesser detail.

Under the Slovak law, the Slovak "ethnic origin" derives from a "direct ancestor up to the third generation" (article 2 § 3 SL). For the Bulgarian law, it is necessary to have at least one ascendant of Bulgarian origin (article 2 BL). Under the Hungarian law, it is a Hungarian "national" he or she who so declares (article 1 HL). For the Russians, the compatriots are "those who share a common language, religion, culture, traditions and customs, as well as their direct descendants" (article 1 RuL).

As to the proof of the national background, the Slovak law requires a "supporting document" which may consist of a birth certificate, a baptism certificate, a statement by the registry office, a "proof of nationality" or a permanent residence permit; failing these, a written testimony of a Slovak countryman organisation abroad or the testimony of at least two fellow Slovak expatriates is required (article 2 § 4 SL). The Bulgarian law requires a document issued by a foreign authority or by an association of Bulgarians abroad or by the Bulgarian Orthodox Church; failing this, the Bulgarian background can be proved through judicial means (article 3 BL). The Russian law requires, besides the "free choice" of the individual, "supporting documents" of the previous Soviet or Russian citizenship or of the previous residence on the territory of Russia/URSS/RSFSR/FdR, or of the direct descent from immigrants (article 4 RuL).

The proof of the Hungarian background is more complex; if the wording of Article 1 § 1 of the Hungarian law seems to suggest that the mere declaration by the applicant suffices, it

appears[19] that the organisations representing the Hungarian national community in the neighbouring countries will have to investigate the applicant's national background before issuing - or refusing – the relevant recommendation. However, it is not specified in the law what criteria they will be applying.

- Residence abroad

The Bulgarian and the Russian laws require that the person concerned reside on the territory of a foreign country (Articles 2 and 1 respectively), as does the Romanian law (Article 1). The Hungarian law prescribes that only those who reside in one of its neighbouring countries (with the exception of Austria) are entitled to the benefits in question (Article 1 § 1 HL). The Italian law is limited to the Italian minorities in Croatia and Slovenia[20].

- Lack of a permit of permanent stay in the kin-State

This requirement is contained in the Hungarian Law (Article 1 § 1). In fact, the obtainment of a permit of permanent stay in Hungary constitutes a ground for withdrawing the "Certificate of Hungarian Nationality" (Article 21 § 3 (b) HL). The Slovak law, instead, encourages expatriates to apply for permanent residence in Slovakia (Article 5 § 3 SL). The Greek special identity card amounts to a permit of stay of three years (Article 3 GMD).

- Language awareness

Under the Slovak law, the "expatriate" must have at least a passive knowledge of the Slovak language, which must be certified by the results of his/her activities, or by the testimony of the Slovak organisation of his/her place of residence or the testimony of at least two fellow expatriates (article 2 §§ 6, 7 SL).

- Cultural awareness

The Slovak law requires a basic knowledge of the Slovak culture, to be proved in the same way as the linguistic knowledge (see above). The Bulgarian law requires a "Bulgarian national awareness" (article 2 BL).

- Spouses and minor children

Under the Hungarian law, cohabiting spouses and minor children are entitled to receive the benefits under the Act (Article 1 § 2 HL). The Greek ministerial decision extends the benefits for the Albanians of Greek origin to their spouses and descendants who can prove their kinship through official documents (Article 1 § 2 GMD). The benefits under the Slovak law are extended to the Expatriate's children under the age of 15 who are mentioned in the Expatriate Card (Article 4 § 1 SL)

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[19] *The wording of Article 20 of the Law does not clarify the role of the recommending organisations; the Hungarian Ministry of Foreign Affairs, however, has pointed out in its submissions of 14 September 2001 (CDL (2001) 93) that they will be entrusted with the task of verifying the existence of the objective criteria as to belonging to the Hungarian minority.*

[20] *In this respect, it is worth noticing that the provisions in the Slovenian and Macedonian Constitutions concerning the wish of those countries to be concerned with the fate of their kin-minorities, refer to national minorities "in neighbouring countries" (see above, Articles 5 and 49 of the Slovenian and Macedonian Constitution respectively).*

- The document proving entitlement to the benefits under the law

The Hungarian, Slovak and Russian laws subordinate entitlement to specific benefits to the holding of a particular document. So does the Greek ministerial decision.

The nature of this document is not always the same.

Under the Greek regulation, it is (and is called) an identity card (bearing a photograph and the fingerprints of its holder), issued for a period of three years (renewable); it also functions as a permit of stay and a work permit (see the relevant statement/circular of the Greek Ministry of Public Order).

The Slovak "Expatriate Card", which is issued for an indefinite period of time, contains the personal data of the holder, as well as his permanent address (the data of minor children can also be included, at the request of the person concerned, insofar as this is compatible with the applicable international treaties). This card does not amount to an identity card in that it is only valid when used together with a valid identification document (Article 4 § 2 SL) issued in the home-State. The holder of the card, however, is admitted to the Slovak territory without written invitation, visa and permit of stay.

The "Certificate of Hungarian Nationality" – which is issued for a period of five years or until the holder turns 18, or for an indefinite time if the holder is over sixty - bears a photograph of its holder and contains all his personal data (article 21 § 5 HL).

The Russian law prescribes that belonging to the category of "compatriots" can be proved – as well as through a Russian passport for Russian citizens or those holding a double nationality - through a certificate issued by the diplomatic or consular representations of the Russian Federation or by the Russian competent authorities (article 3 RuL). This certificate, unaccompanied by a photograph of its holder, does not amount to an identity card.

As regards the procedure for issuing the documents in question, they are issued by the authorities of the kin-State: a "central public administration body designated by the Hungarian Government (article 19 § 2 HL; the Slovak Ministry of Foreign Affairs (article 3 § 1 SL); the "competent authorities" or the Russian diplomatic missions or consulates abroad (article 3 RuL); the police department responsible for foreigners (article 1 GMD).

The kin-States' consulates or embassies on the territories of the home-States may have a role in the procedure. Under article 1 of the Slovak law, the Slovak missions or consular offices may receive applications for the Expatriate Card, which they forward to the Ministry of Foreign Affairs for decision. Russian diplomatic missions or consulates can issue the certificate proving Russian origin (article 3 RuL). The Greek consular authorities do not and cannot play any role, given that the Greek special identity card can only be delivered to those who find themselves on the Greek territory (article 1 § 1 GMD).

The Hungarian law does not assign any role to the Hungarian consulates or diplomatic missions, but provides for a constitutive role of the organisations of Hungarians abroad in the procedure. The Certificate of Hungarian Nationality, in fact, is issued by the Hungarian authorities if the applicant has been "recommended" by one of these organisations, which have to verify the declaration made by the applicant about his/her belonging to the Hungarian

minority, to certify the authenticity of his/her signature and provide, *inter alia*, the applicant's photograph and personal data (article 20 § 1 HL). In the absence of such recommendation, the certificate cannot be issued[21]; no remedy is available against the refusal by an organisation to provide the recommendation. It has been noted above that the criteria, which the organisations are to use, are uncleArticle

A quite different role is assigned to such organisations under the Slovak law. Pursuant to article 2 § 5 SL, they can testify that an individual belongs to the Slovak minority in case he or she cannot provide the formal documents listed in article 2 § 4 SL. It must be remembered in this context that the Slovak law provides for a clear criterion for assessing national origin. Similarly, the Bulgarian law (article 3 BL) provides for the possibility of proving one's Bulgarian origin through a statement of an association of Bulgarians abroad; the law, however, specifies what needs to be proved, i.e. to have at least on Bulgarian ascendant.

- Nature of the benefits

- Benefits relating to Education and Culture

These benefits usually consist of: scholarships to students for the pursuit of their studies in the kin-State; reduction or exemption from fees for the use of cultural and educational facilities (such as museums, libraries and archives); support to educational institutions teaching in the kin-language in the home-States; training for teachers in the kin-language in the home-States (article 6 § 1 SL; article 17 RuL; articles 9 and 10 BL; article 7 BL; articles 4 and 9-14 HL), mutual recognition of academic diplomas (see the numerous agreements between Austria and Italy); access to academic career (articles 2 and 4 § 2 AL).

Article 10 § 1 of the Hungarian Law further provides for the granting of scholarships to students belonging to the kin-minority pursuing any kind of studies in institutions for higher education – irrespective of the language or curriculum - in the home-States.

Article 18 of the Hungarian Law sets out the bases for the assistance by Hungary of organisations operating abroad and promoting the knowledge and preservation of the Hungarian language, literature and cultural heritage.

- Social Security and Health Coverage

Under Article 7 of the Hungarian Law, workers holding the Certificate of Hungarian Nationality are allowed to contribute to the health insurance and pension schemes. They are also entitled to immediate medical assistance in Hungary on the basis of bilateral social security agreements. Article 2 of the Romanian law refers to the possibility for members of Romanian communities to receive individual aid in special medical cases. Slovak expatriates may request exemption from Social Security payments abroad if they meet the conditions for receiving their rights on Slovak territory (article 6 § 1 (d)).

- Travelling benefits

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[21] *Pursuant to article 29 § 2(3) of the Hungarian Law, however, the Minister of Foreign Affairs may substitute his own declaration for the recommendation of the organisations "in cases deserving exceptional treatment on ground of equity" and "in cases where the proceedings ... are impeded to ensure the smooth conduct of administrative proceedings".*

They consist of special rates for those who travel to or within the territory of the kin-State (see article 8 HL; see also article 6 § 3 SL which provides for special rates for retired, disabled or elderly expatriates).

- Work permits

Under the Slovak law, job-seekers holding a Slovak Expatriate Card are not required to apply for a work permit or for permanent residence in Slovakia (article 6 (b) SL). Under the Hungarian law, work permits can exceptionally be granted to kin-foreigners for a duration of three months without prior assessment of the needs of the labour market (article 15 HL). More, kin-foreigners may apply for reimbursement of the costs incurred for meeting the legal conditions for employment (article 16 HL).

- Exemption from visas

Under the Slovak law, holders of an Expatriate Card wishing to enter the territory of Slovakia do not need any visa or invitation, insofar as this is possible under the applicable international agreements (article 5 § 1 SL). Under Article 5 of the Austrian Law, South Tyroleans as defined in the law do not need visas in order to stay in Austria.

- Exemption from permits of stay and reimbursement of/exemption from costs incurred for the stay

Slovak expatriates are admitted to stay for a long period on Slovak territory by virtue of their Expatriate Cards (article 5 § 2 SL). The Greek Special Identity Card amounts to a permit of stay for the duration of its validity (up to three years, renewable) (articles 1 and 3 GMD).

Bulgarians are entitled to a special regime of costs relating to their stay or settling down on the Bulgarian territory (article 6 § 2 BL). The Romanian law provides the possibility for students wishing to pursue their studies in Romania to benefit from free accommodation in student hostels for the duration of their stay (other forms of support may be granted from the Government) (article 9 RL).

- Acquisition of property

Under Article 6 § 2 of the Slovak law, expatriates have the right to own and acquire real estate. Under the Bulgarian Law, kin-foreigners can participate in privatisation, be reinstated in their property, inherit real estate (article 8 BL).

- Acquisition of citizenship

Under the Russian law (article 11 RuL), "compatriots" may be promptly granted Russian citizenship upon a simple request. Under the Slovak law, "expatriates" may apply for Slovak citizenship for outstanding personality reasons (article 6 § 1 c) SL).

  - Scope of application *ratione loci*

Benefits are normally granted to kin-foreigners when they find themselves on the territory of the kin-State.

Under the Hungarian law, certain benefits are available in the home-State (see article 10 HL on benefits for students of public education institutions teaching in Hungarian in the neighbouring countries or of "any higher education institution"; article 12 HL on benefits to Hungarian teachers living abroad; article 13 HL: Education abroad in affiliated departments"; article 14 HL on "Educational assistance available in the native country"; article 18 HL on assistance to organisations operating abroad).

D. Assessment of the compatibility of the protection of minorities by their kin-State through domestic legislation with European standards and with the norms and principles of international law[22]

The paramount importance of an adequate and effective protection of national minorities as a particular aspect of the protection of human rights and fundamental freedoms and also in order to promote stability, democratic security and peace in Europe has been repeatedly underlined and emphasised. The full implementation of the international agreements on this matter – *in primis* the Framework Convention for the Protection of National Minorities, and also the Charter for Regional or Minority Languages as well as, be it less specifically, the European Convention on Human Rights – has become a priority for all the member States of the Council of Europe.

Against this background, the emerging of new and original forms of minority protection, particularly by the kin-States, constitutes a positive trend insofar as they can contribute to the realisation of this goal.

The practice of stipulating bilateral treaties on friendly co-operation or on minority protection is already the object of encouragement and assistance as well as of close scrutiny by the international community.

The more recent tendency of kin-States to enact domestic legislation or regulations conferring special rights to their kin-minorities had not, until very recently, attracted particular attention, nor aroused much, if any at all, interest in the international community. No supervision or co-ordination of the laws and regulations in question has so far been sought or attempted. Yet, the campaign surrounding the adoption of the Hungarian *Act on Hungarians living in neighbouring countries* shows the impellent necessity of addressing the question of the compatibility of such laws and regulations with international law and with the European standards on minority protection.

In the Commission's opinion, the possibility for States to adopt unilateral measures on the protection of their kin-minorities, irrespective of whether they live in neighbouring or in other countries, is conditional upon the respect of the following principles: a) the territorial sovereignty of States; b) *pacta sunt servanda*; c) friendly relations amongst States, and d) the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination.

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[22] *Further to the European Parliament's resolution of 5 September 2001 (Resolution on Hungary's application for membership of the European Union and the state of negotiations (COM(2000) 705 – C5-0605/2000-1997/2175 (COS)), an evaluation by the European Commission of the compatibility of the legislation on special regulations and privileges granted to persons belonging to national minorities by their kin-States with the acquis communautaire as well as with the spirit of good neighbourhood and co-operation amongst EU Member States is currently in progress. For this reason, it will not be the object of the present study.*

a. The principle of territorial sovereignty of States

States enjoy exclusive sovereignty, hence jurisdiction, over their national territory[23] This implies, in principle, jurisdiction over all persons, property and activities in their territory, and in their internal waters, territorial sea and the air space above their national territory. No other State or international organisation can exercise jurisdiction in the territory of a State without the latter's consent. Public international law however confers specific powers to States as regards laws related to their embassies, ships or nationals abroad.

Legislative and administrative acts (as well as judicial ones) are emanations of that sovereign jurisdiction: their natural addressees are therefore the relevant inhabitants, and the natural place of application is the national territory.

A first question arises in this context: can the mere adoption of legislation with extraterritorial effects, *per se*, be seen as an interference with the internal affairs of the other State or States concerned and therefore an infringement of the principle of territorial sovereignty of states?

In order to provide an exhaustive answer, it is necessary to make a distinction, as regards the meaning of "extraterritoriality", between the effects of a State's legislation on foreign citizens, within that State's territory or abroad, and the exercise of a State's powers outside that State's borders.

i. The effects of a State's legislation on foreign citizens

The mere fact that the addressees of a piece of legislation are foreign citizens does not, in the Commission's opinion, constitute an infringement of the principle of territorial sovereignty. Indeed, there are numerous examples of legislative acts which consider foreign citizenship, not of a specific State but in general (for instance in private international law, regarding the penal jurisdiction of the State etc.), as "connecting points". All these acts are in conformity with the general principles of international law.

A State can legitimately issue laws or regulations concerning foreign citizens without seeking the prior consent of the relevant States of citizenship, as long as the effects of these laws or regulations are to take place within its borders only. For example, a State can unilaterally decide to grant a certain number of scholarships to meritorious foreign students who wish to pursue their studies in the universities of that State.

When the law specifically aims at deploying its effects on foreign citizens in a foreign country, its legitimacy is not so straightforward. It is not conceivable, in fact, that the home-State of the individuals concerned should not have a word to say on the matter.

In certain fields such as education and culture, certain practices, which pursue obvious cultural aims[24], have developed and have been followed by numerous States. It is mostly

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[23] *This principle of international law has been codified, in particular, in Article 21 of the Framework Convention.*

[24] *See Article 2 § 2 of the Cultural Convention reads: "Each Contracting Party shall, insofar as may be possible, (…) endeavour to promote the study of its language or languages, history and civilisation in the territory of the other Contracting Parties and grant facilities to the nationals of those Parties to pursue such studies in its territories"*

accepted, for instance, at least between States, which have friendly relations, that States grant scholarships to foreign students of their kin-minorities for their studies in the kin-language in educational institutions abroad. These institutions, on the other hand, are often financed by the kin-States. Similarly, it is common for States to promote the study of their language and culture also through incentives to be granted to foreign students, independently of their national background.

In these fields, if there exists an international custom, the consent of the home-State can be presumed and kin-States may take unilateral administrative or legislative measures[25]. Further, when a kin-State takes unilateral measures on the preferential treatment of its kin-minorities in a particular home-State, the latter may presume the consent of the said kin-State to similar measures concerning its citizens.

In fields, which are not covered by treaties or international customs, instead, the consent of the home-States affected by the kin-State's measures should be explicit. So, to cite an example, if a State unilaterally decided to grant scholarships to foreign students of its kin-minorities irrespective of the link of their studies with the kin-State itself, this decision might be considered as interfering with the relevant home-States' internal affairs (their educational policies, for example).

ii. The exercise of State powers outside the national borders

In the absence of a permissive rule to the contrary – either an international custom[26] or a convention - a State cannot exercise its powers, in any form, on the territory of other States[27].

The grant by a State of administrative, quasi-official functions to non-governmental associations registered in another country constitutes an indirect form of state power: as such, it is not permissible unless specifically allowed.

This grant appears to be particularly problematic when these functions are neither allowed nor regulated under the law of the home-State. Under these circumstances, in fact, in performing them the associations in question would not be subjected to any effective legal control: the authorities of the home-State would have jurisdiction but might not recognise the bases for these acts, for the above-stated reason that the latter are not foreseen in that legal system; the kin-State, despite having provided for the bases for issuing the acts in question, would lack jurisdiction thereover, given that the associations are registered and operate abroad. This is even more applicable, when the conditions and limits of the exercise of this power are not clearly enunciated in the originating law.

Should a kin-State require any kind of certification *in situ*, in the Commission's opinion the natural "actors" would be the consular authorities: which are duly authorised by the home-

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The Cultural Convention was ratified, inter alia, by Bulgaria on 2 September 1991; by Greece on 10 January 1962; by Hungary on 16 November 1989; by Italy on 15 May 1957; by Romania on 19 December 1991; by Russia on 21 February 1991; by Slovakia on 10 May 1990 and by Slovenia on 2 July 1992.

[25] *However, these measures are often taken within the framework of intergovernmental agreements.*

[26] *See, for example, the common consular conventions.*

[27] *In this respect, the extraterritorial jurisdiction in civil matters even on foreign citizens residing in their home-country or elsewhere exercised by the United States is largely controversial.*

State, in conformity with international law[28], to perform official acts on its territory. It is understood that these official acts must be of an ordinary nature, and the consulates must not be vested with tasks going beyond what is generally practiced and admitted.

In the latter respect, and with reference to the need expressed in various of the laws under examination to obtain proof of the national background of foreigners seeking access to the benefits provided to kin-minorities, the Commission considers that it is preferable (even if it is not required by international law) that the relevant legislation set out the exact criteria that must be employed in the assessment of the national background. This indication, in fact, would prevent consulates from being given discretionary power that, being exempted from any substantial, not merely formal judicial review, would risk becoming arbitrary. In this respect, the Commission wishes to refer, *mutatis mutandis*, to the Framework Convention, which, while enshrining the principle of the individual's free choice as to affiliation to a minority, does not prevent States from requiring the fulfilment of certain criteria when it comes to granting privileges to the persons belonging to that minority. In other words, the personal choice of the individual is a necessary element, but not a sufficient one for entitlement to specific privileges.

Similar considerations pertain as concerns the associations of kin-minorities abroad. In the Commission's view, a role of these associations cannot be excluded, if they are only required by the kin-States to provide information on precise, legally determined facts, in the absence of other supporting documents or material or if they are only entrusted with giving a non-binding informal recommendation for the consular authorities of the kin-State. For example, they may provide a statement about the circumstance that the grandfather of an individual was a citizen of the kin-State, in a case where any formal documents were missing.

b. The principle that *pacta sunt servanda*

Treaties must be respected and performed in good faith[29]. When a State is party to bilateral treaties concerning, or containing provisions, on minority protection[30], it must duly fulfil all the obligations contained therein, including that of pursuing bilateral talks with a view to assessing the state of implementation of the treaty and to addressing the possible enlargement or modification of the rights granted to the respective minorities.

Should possible difficulties in holding these bilateral talks lead to alternative, unilateral forms of intervention in the matters pre-empted by the treaty, this would be in breach of the obligation to perform treaties in good faith, at least unless all the existing procedures for settling the dispute (including requests for intervention of the OSCE High Commissioner for National Minorities and of the International Conciliation and Arbitration Court) had been used in good faith[31], and had proved ineffective.

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[28] *See for instance Article 5 of the Vienna Convention of 1963 on consular relations.*

[29] *See article 26 of the 1969 Vienna Convention on the Law of Treaties.*

[30] *It has to be stressed that the adoption of preferential treatment rules is not necessarily conditioned by the existence of a bilateral agreement between the States concerned. However, if such an agreement exists, the measures in question and the procedure of their application must be in conformity with that agreement.*

[31] *See article 31 of the Vienna Convention, according to which "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose."*

Legislation or regulations on the preferential treatment of kin-minorities should therefore not touch upon areas demonstrably pre-empted by existing bilateral treaties, unless of course the home-State concerned had been consulted and had approved of this step or had implicitly – but unambiguously - accepted it, by not raising objections.

Similar considerations are valid in the case that a given area is not covered by specific rules of an existing treaty.

c. The principle of friendly neighbourly relations

The framework of bilateral treaties connecting Central and Eastern European States draws from the principle of good neighbourliness and holds it as the main purpose of the treaties themselves.

The obligation for States to work towards the achievement of friendly inter-state relations derives also from a more general principle; Article 2 of the Framework Convention promotes the principles of good neighbourliness, friendly relations and co-operation among States. Friendly inter-state relations are indeed nowadays unanimously considered as a precondition for peace and stability in Europe.

States should accordingly abstain from taking unilateral measures, which would risk compromising the climate of co-operation with other States.

The legislation under examination touches upon sensitive areas for the reasons analysed above. One specific aspect thereof raises issues that deserve close examination: the issuing by the kin-State of a document that proves that its holder belongs to the kin-minority, and, in particular, the modalities of the issuing of the relevant documents.

This document, in its different forms (see above), has been justified by the States that have introduced it as a means to simplify of the administrative steps that the individual needs to take in order to have access to the benefits provided for by the legislation concerned.

To the extent that it allows easier access to these benefits, the Commission finds that this document can prove useful. However, it observes that in a number of countries this document has the characteristics of an identity document: it contains a photograph of its holder and all of his/her personal data. It makes reference to the national background of its holder. It is highly likely that the holders of these documents will use them as identity cards at least on the territory of the kin-State.

In such form, this document therefore creates a political bond between these foreigners and their kin-State. Such a bond has been an understandable cause of concern for the home-States, which, in the Commission's opinion, should have been consulted prior to the adoption of any measure aimed at creating the documents in question.

In order to be used solely as a tool of administrative simplification, the Commission considers that the document should be a mere proof of entitlement to the services provided for under a specified law or regulation. It should not aim at establishing a political bond between its holder and the kin-State and should not substitute for an identity document issued by the authorities of the home-State.

d. The respect of human rights and fundamental freedoms. The prohibition of discrimination.

States are bound to respect the international agreements on human rights to which they are parties. Accordingly, in exercising their powers, they must at all times respect human rights and fundamental freedoms. Amongst these, the prohibition of discrimination, provided for, *inter alia*, by the UN Charter, by the Universal Declaration of Human Rights[32], by the International Covenant on Civil and Political rights[33] and by the Framework Convention[34].

In particular, States that are parties to the European Convention on Human Rights (hereinafter "the Convention" or ECHR) must secure the non-discriminatory enjoyment of the rights enshrined therein to everyone who is within their jurisdiction[35]. A State is held accountable under Article 1 of the Convention also for its acts with extraterritorial effects: all the individuals affected thereby, be they foreigners or nationals, may fall within the jurisdiction of that State.

The legislation and regulations that are the object of the present study aim at conferring a preferential treatment to certain individuals, i.e. foreign citizens with a specific national background. They thus create a difference in treatment (between these individuals and the citizens of the kin-State; between them and the other citizens of the home-State; between them and foreigners belonging to other minorities), which could constitute discrimination – based on essentially ethnic reasons - and be in breach of the principle of non-discrimination outlined above.

The discrimination must be invoked in relation to a right guaranteed by the Convention. Not all the benefits granted by the legislation under consideration refer, at least *prima facie*, to guaranteed rights. Some ECHR provisions could be pertinent: *in primis* Article 2 of the First Protocol; possibly, Article 8 of the Convention and Article 1 of the First Protocol.

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[32] *Article 7 of the Universal Declaration of Human Rights reads: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination."*

[33] *Article 26 ICCPR reads: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

[34] *Article 4 of the Framework Convention provides: "(1) The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited. (2) The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities. (3) The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination.*

[35] *See Article 1 and Article 14 ECHR. The latter reads as follows: "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". If Article 14 prohibits discrimination only in respect of the rights and freedoms set out elsewhere in the Convention, a Protocol thereto, the twelfth, containing a general clause against discrimination, has been drafted and opened to signature on 4 November 2000.*

The Strasbourg established case-law[36] shows that different treatment of persons in similar situations[37] is not always forbidden: this is not the case when the difference in treatment can be objectively and reasonably justified having regard to the applicable margin of appreciation. The existence of a justification must be assessed in relation to the aims pursued (which must be legitimate) and the effects that the measure in question causes, regard being had to the general principles prevailing in democratic societies (there must be a reasonable relation of proportionality between the legitimate aim pursued and the means employed to obtain it).

Article 14 prohibits discrimination between individuals based on their personal status; it contains an open-ended list of examples of banned grounds for discrimination, which includes language, religion, and national origin. As regards the basis for the difference in treatment under the laws and regulations in question, in the Commission's opinion the circumstance that part of the population is given a less favourable treatment on the basis of their not belonging to a specific ethnic group is not, of itself, discriminatory, nor contrary to the principles of international law[38]. Indeed, the ethnic targeting is commonly done, for example, in laws on citizenship[39]. The acceptability of this criterion will depend of course on the aim pursued.

In this respect, the Commission finds it appropriate to distinguish, as regards the nature of the benefits granted by the legislation in question, between those relating to education and culture and the others.

Insofar as the first are concerned, the differential treatment they engender may be justified by the legitimate aim of fostering the cultural links of the targeted population with population of the kin-State. However, in order to be acceptable, the preferences accorded must be genuinely linked with the culture of the State, and proportionate. In the Commission's view, for instance, the justification of a grant of educational benefits on the basis of purely ethnic criteria, independent of the nature of the studies pursued by the individual in question, would not be straightforward.

In fields other than education and culture, the Commission considers that preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of maintaining the links with the kin-States and to be proportionate to that aim (for example, when the preference concerns access to benefits which are at any rate available to other foreign citizens who do not have the national background of the kin-State).

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[36] *See the leading case on the meaning of "discrimination" within the meaning of Article 14 of the Convention: European Court of Human Rights, Belgian linguistics judgment of 9 February 1967, Series A no. 6.*

[37] *A claim of discrimination is meaningful only where the applicant seeks to compare his situation to that of those who are in the same or analogous, or "relevantly similar" situation.*

[38] *See, in particular, paragraph 3 of Article 4 of the Framework Convention.*

[39] *See Article 116 of the German Grundgesetz, which provides: "Unless otherwise provided by Statute, a German within the meaning of this Constitution is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendent of such person. (2) Former German citizens who, between 30 January 1933 and 8 May 1945 were deprived of their citizenship on political, racial or religious grounds, and their descendants, are re-granted German citizenship on application. They are considered as not having been deprived of their German citizenship where they have established their residence in Germany after 8 May 1945 and have not expressed a contrary intention."*

E. Conclusions

The Commission considers, however, that respect for the existing framework of minority protection must be held as a priority. In this field, multilateral and bilateral treaties have been stipulated under the umbrella of European initiatives. The effectiveness of the treaty approach could be undermined, if these treaties were not interpreted and implemented in good faith in the light of the principle of good neighbourly relations between States.

The adoption by States of unilateral measures granting benefits to the persons belonging to their kin-minorities, which in the Commission's opinion does not have sufficient *diuturnitas* to have become an international custom, is only legitimate if the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected.

Respect for these principles would seem to require that certain features of the measures in question be respected, in particular:

- A State may issue acts concerning foreign citizens inasmuch as the effects of these acts are to take place within its borders.

- When these acts aim at deploying their effects on foreign citizens abroad, in fields that are not covered by treaties or international customs allowing the kin-State to assume the consent of the relevant home-states, such consent should be sought prior to the implementation of any measure.

- No quasi-official function may be assigned by a State to non-governmental associations registered in another State. Any form of certification *in situ* should be obtained through the consular authorities within the limits of their commonly accepted attributions. The laws or regulations in question should preferably list the exact criteria for falling within their scope of application. Associations could provide information concerning these criteria in the absence of formal supporting documents.

- Unilateral measures on the preferential treatment of kin-minorities should not touch upon areas demonstrably pre-empted by bilateral treaties without the express consent or the implicit but unambiguous acceptance of the home-State. In case of disputes on the implementation or interpretation of bilateral treaties, all the existing procedures for settling the dispute must be used in good faith, and such unilateral measures can only be taken by the kin-State if and after these procedures prove ineffective.

- An administrative document issued by the kin-State may only certify the entitlement of its bearer to the benefits provided for under the applicable laws and regulations.

- Preferential treatment may be granted to persons belonging to kin-minorities in the fields of education and culture, insofar as it pursues the legitimate aim of fostering cultural links and is proportionate to that aim.

- Preferential treatment cannot be granted in fields other than education and culture, save in exceptional cases and if it is shown to pursue a legitimate aim and to be proportionate to that aim.

RAPPORT SUR LE TRAITEMENT PREFERENTIEL DES MINORITES NATIONALES PAR LEUR ETAT-PARENT

Adopté par la Commission de Venise lors de sa 48e session plénière (Venise, les 19-20 octobre 2001)

Introduction

Le 21 juin 2001, le Premier ministre roumain, M. A. Nastase, a demandé à la Commission de Venise d'examiner la compatibilité de la loi relative aux Hongrois vivant dans les pays voisins, adoptée par le Parlement hongrois le 19 juin 2001, avec les normes européennes et les normes et principes du droit international public contemporain.

Le 2 juillet 2001, le ministre hongrois des Affaires étrangères, M. J. Martonyi, a demandé à la Commission de Venise d'effectuer une étude comparative des tendances récentes des législations européennes concernant le traitement préférentiel des personnes appartenant à des minorités nationales vivant hors du pays dont elles ont la citoyenneté.

Lors de sa session plénière les 6-7 juillet 2001, la Commission de Venise a décidé d'entreprendre une étude sur le traitement préférentiel par un Etat de ses minorités à l'étranger, en se fondant sur la législation et la pratique dans certains pays membres du Conseil de l'Europe. L'objectif de cette étude était de voir si les traitements préférentiels étaient compatibles avec les normes du Conseil de l'Europe et les principes du droit international.

Un groupe de travail a donc été créé, constitué de MM. Franz Matscher, François Luchaire, Giorgio Malinverni et Pieter Van Dijk. Une réunion a eu lieu à Paris le 18 septembre 2001. Les rapporteurs ont rencontré des représentants des gouvernements roumain et hongrois, afin d'éclaircir certains points concernant les informations fournies par les deux parties à la demande de la Commission en août.

Le présent rapport a été rédigé sur la base des remarques de MM. Matscher, Luchaire, Malinverni et Van Dijk ; il a été examiné par la Sous-Commission pour la Protection des Minorités le 18 octobre 2001, puis adopté par la Commission lors de sa 48e réunion plénière à Venise les 19-20 octobre 2001.

A. Contexte historique[1]

La préoccupation des Etats-parents pour le sort des personnes appartenant à leurs communautés nationales[2] (ci-après « minorités nationales »), citoyens d'autres pays (ci-après les « Etats de résidence ») et résidant à l'étranger n'est pas un phénomène nouveau en droit international.

Outre quelques principes généraux de droit international coutumier, les accords internationaux dans ce domaine confient aux Etats de résidence la tâche de garantir à toute personne ressortissant à leur autorité la jouissance des droits fondamentaux, y compris les droits des minorités, et laissent à la communauté internationale dans son ensemble le soin de surveiller le respect de ces obligations[3]. Toutefois, les Etats-parents ont exprimé leur souhait d'intervenir de façon plus importante et plus directe, c'est-à-dire parallèlement à la tribune offerte dans le cadre de la coopération internationale dans ce domaine[4], en faveur de leurs minorités nationales.

Le principal instrument dont disposent les Etats-parents en la matière est la négociation d'accords multilatéraux ou bilatéraux, visant à la protection de leurs minorités nationales, avec les Etats de résidence concernés.

L'approche bilatérale de la protection des minorités a été adoptée pour la première fois après la Première Guerre mondiale – après la chute des empires russe, austro-hongrois et ottoman - sous l'égide de la Société des Nations[5], puis de nouveau après la Deuxième Guerre mondiale. L'expérience du Tyrol du Sud est particulièrement intéressante. A la suite du traité de paix de Saint-Germain en Laye en 1919, le Tyrol du Sud avait été annexé à l'Italie contre la volonté de la population locale, composée de quelques milliers d'Italiens et de 280 000 Tyroliens du Sud, qui acquirent la citoyenneté italienne. Aucune protection ne fut offerte à cette minorité pendant les années fascistes. En 1945, les Tyroliens du Sud revendiquèrent leur droit à l'autodétermination. En guise de compensation, les Alliés demandèrent à l'Italie et à l'Autriche de résoudre ce problème par un accord bilatéral, qui fut conclu le 4 septembre 1946 (Il s'agit de l'accord Gruber-de Gasperi, annexé par la suite au traité de paix entre les Alliés et l'Italie du 10 février 1947). Une autonomie restreinte fut ainsi accordée à la région. Après le traité de Vienne du 15 mai 1955, restaurant la totale indépendance de l'Autriche, celle-ci demanda une meilleure application de l'accord et de nouvelles négociations

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1 *Pour des informations plus complètes, voir J. Marko, E. Lantschner et R. Medda, Protection of National Minorities through Bilateral Agreements in South-Eastern Europe, 2001.*

2 *Dans les lois examinées ici, le terme « nationalité » apparaît parfois pour signifier « citoyenneté ». Néanmoins, dans cette étude, on entend par « nationalité » le lien juridique entre une personne et un Etat, n'indiquant pas l'origine ethnique de la personne (Voir Article 2 de la Convention européenne sur la nationalité).*

3 *Voir l'Article 1 de la Convention cadre pour la protection des minorités nationales (ci-après « la Convention cadre »).*

4 *Il existe plusieurs procédures pour la protection des minorités en Europe. D'une part, le mécanisme prévu par la Convention européenne des droits de l'homme (requêtes individuelles ou interétatiques). D'autre part, la surveillance de la mise en œuvre de la Convention cadre par le Comité des Ministres du Conseil de l'Europe et le comité consultatif, sur la base des informations fournies par les Etats concernés. Il faut également signaler les activités du Haut commissaire pour les minorités nationales de l'OSCE et du groupe de travail des Nations Unies sur les minorités.*

5 *Le règlement du différend sur les îles Åland en 1920 a été un succès, mais les problèmes principaux des minorités créés par les traités de paix n'ont pas été résolus.*

bilatérales, refusées par l'Italie entre 1958 et 1961. En 1959, l'Autriche porta l'affaire devant l'Assemblée générale des Nations Unies qui, au moyen de deux résolutions, en 1960 et 1961, incita les deux pays à négocier, ratifiant ainsi de façon implicite le droit de l'Autriche à veiller au sort des Tyroliens du Sud aux termes du Traité de Paris. Le conflit s'envenima jusqu'à des actes terroristes. En 1969, l'accord « paquet » ("*pacchetto*"), en faveur de la minorité des Tyroliens du Sud fut signé. Au cours de l'été 1992, le gouvernement autrichien annonça que le gouvernement italien avait finalement appliqué les mesures de l'accord « paquet ». En 1996, l'Autriche et l'Italie informèrent les Nations unies qu'une solution mutuellement satisfaisante avait été trouvée. Aujourd'hui, l'Autriche continue à surveiller l'application de l'accord et, compte tenu des bonnes relations qu'entretiennent maintenant entre les deux pays, l'Italie lui conteste pas ce droit.

Dans les années 90, avec la fin de la Guerre froide et l'effondrement du communisme, la question de la protection des minorités est devenue plus importante, et les pays d'Europe centrale et orientale ont manifesté encore plus leur désir de jouer un rôle décisif dans la protection de leurs minorités nationales[6].

Des dispositions prévoyant que l'Etat-parent s'occupe de ses minorités à l'étranger et maintient ses relations avec elles ont ainsi été inclues dans un certain nombre de nouvelles Constitutions datant de cette décennie.

Par exemple, l'Article 6 §3 de la Constitution hongroise (modifié en 1989) stipule que :

> « *La République de Hongrie se considère responsable du sort des Hongrois vivant en dehors de ses frontières et favorise le maintien de leurs relations avec la Hongrie* ».

L'Article 7 de la Constitution roumaine (1991) prévoit que :

> « *L'Etat soutient le resserrement des liens avec les Roumains vivant au-delà des frontières du pays et agit pour préserver, développer et exprimer leur identité ethnique, culturelle, linguistique et religieuse, en respectant la législation de l'Etat dont ils sont les citoyens.* »

L'Article 5 de la Constitution slovène (1991), stipule, entre autres, que :

> « *L'Etat veille sur les minorités nationales slovènes autochtones dans les Etats voisins, sur les émigrés et émigrants slovènes, et favorise leurs contacts avec la patrie. (...) Les Slovènes dépourvus de la nationalité slovène peuvent jouir en Slovénie de droits et d'avantages particuliers. La nature et l'étendue de ces droits et avantages sont fixées par la loi.* »

L'Article 49 de la Constitution de l'"ex-République yougoslave de Macédoine" (1991) prévoit que :

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[6] *Cette étude porte essentiellement sur la protection des minorités en Europe centrale et orientale dans la dernière décennie, mais il existe beaucoup d'autres exemples pertinents pour ses conclusions (comme la protection des minorités slovaque et croate en vertu de l'Article 7 du traité d'Etat autrichien de 1955).*

« *La République veille à la situation et aux droits des membres du peuple macédonien dans les états voisins et des expatriés macédoniens, aide leur développement culturel et se charge de la promotion des rapports avec eux*. »

L'Article 10 de la Constitution croate (1991) stipule que :

« *Les éléments du peuple croate au sein d'autres Etats, jouissent de la sécurité personnelle et de la protection que leur garantit la République de croatie.* »

De même, l'Article 12 de la Constitution ukrainienne (1996) prévoit que :

« *L'Ukraine veille à la satisfaction des besoins nationaux, culturels et linguistiques des Ukrainiens résidant à l'extérieur de l'Etat*. »

L'Article 6 §2 de la Constitution polonaise (1997) stipule que :

« *La République de Pologne accorde son aide aux Polonais résidant à l'étranger pour qu'ils puissent entretenir les liens avec le patrimoine national culturel*. »

L'Article 7a de la Constitution slovaque (modifié en 2001) prévoit que :

« *La Slovaquie soutient la sensibilisation nationale et l'identité culturelle des Slovaques vivant à l'étranger ainsi que leurs relations avec elle et soutient les institutions qui œuvrent en ce sens.* »

A la même époque, la protection des minorités par des traités a été remise à l'ordre du jour et adoptée à grande échelle. Afin de protéger ses frontières et d'offrir une protection à ses minorités nationales placées sous l'autorité de pays d'Europe centrale et orientale après la Deuxième Guerre mondiale, l'Allemagne a conclu des accords de coopération amicale et de partenariat en particulier avec la Pologne, la Bulgarie, la Hongrie et la Roumanie[7]. La Hongrie a passé des accords semblables avec trois de ses pays voisins : l'Ukraine, la Croatie et la Slovénie[8].

Les possibilités offertes par les traités bilatéraux pour réduire les tensions entre Etats-parents et Etats de résidence semblent importantes, dans la mesure où ils peuvent inclure des engagements précis sur des questions sensibles, tandis que les accords multilatéraux ne permettent qu'une approche indirecte[9]. De plus, ils permettent de prendre directement en

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[7] *Traité de bon voisinage et de coopération amicale entre l'Allemagne et la Pologne (17 juin 1991) ; Traité de relations amicales et de partenariat en Europe entre l'Allemagne et la Bulgarie (9 octobre 1991) ; Traité de coopération amicale et de partenariat en Europe entre l'Allemagne et la Hongrie (6 février 1992) ; Traité de coopération amicale et de partenariat en Europe entre l'Allemagne et la Roumanie (21 avril 1992).*

[8] *Traité sur les fondements de relations de bon voisinage et de coopération entre la Hongrie et l'Ukraine (6 décembre 1991) ; Traité de relations amicales et de coopération entre la Hongrie et la Slovénie (1er décembre 1992) ; Traité de relations amicales et de coopération entre la Hongrie et la Croatie (16 décembre 1992).*

[9] *La signature d'accords bilatéraux sur la protection des minorités, afin de promouvoir la tolérance, la prospérité, la stabilité et la paix (Voir rapport explicatif de la Convention cadre), est prévue par l'Article 18 §1 de la Convention cadre, aux termes duquel les Etats « s'efforceront de conclure, si nécessaire, des accords bilatéraux et multilatéraux avec d'autres Etats, notamment les Etats voisins, pour assurer la protection des personnes appartenant aux minorités nationales concernées ». Ces traités sont également encouragés par le*

considération les caractéristiques et les besoins spécifiques de chaque minorité nationale, ainsi que les particularités du contexte historique, politique et social.

L'Union européenne a considéré par conséquent les traités bilatéraux comme des instruments intéressant pour garantir la stabilité en Europe centrale et orientale. En 1993, elle a approuvé et lancé une initiative française, « l'initiative Balladur », visant à la signature d'un pacte de stabilité en Europe. Il s'agissait de parvenir à la stabilité « par la promotion de relations de bon voisinage, y compris pour les questions relatives aux frontières et aux minorités, ainsi que par la coopération régionale et le renforcement des institutions démocratiques grâce à des arrangements de coopération à établir dans les différents domaines qui peuvent contribuer à cet objectif »[10]. Le Pacte, signé par 52 Etats et adopté en 1995, concernait la Bulgarie, la République Tchèque, l'Estonie, la Hongrie, la Lettonie, la Lituanie, la Pologne, la Roumanie et la Slovaquie, tous ces pays ayant fait part de leur désir d'adhérer à l'Union européenne. On leur demandait d'intensifier leurs relations de bon voisinage sous toutes leurs formes, notamment dans le domaine des droits des personnes appartenant à des minorités nationales. Ils devaient appliquer pour cela les principes d'égalité souveraine, de respect des droits inhérents à la souveraineté, de non-recours à la menace ou à l'emploi de la force, d'inviolabilité des frontières, de règlement pacifique des différends, de non-intervention dans les affaires intérieures, de respect des droits de l'homme - y compris les droits des personnes appartenant à une minorité nationale - et des libertés fondamentales - notamment les libertés de pensée, de conscience, de religion ou de croyance -, d'égalité des droits des peuples et de droit des peuples à disposer d'eux-mêmes, de coopération entre Etats et d'exécution de bonne foi des obligations assumées conformément au droit international[11].

Environ une centaine d'accords bilatéraux et régionaux de coopération, existants ou nouveaux, concernant, entre autres, la protection des minorités, ont été inclus dans le Pacte.

Les Etats participants se sont engagés, dans la Déclaration finale, à se conformer aux principes de l'OSCE. En cas de problèmes concernant le respect des accords, ces pays s'en remettraient aux institutions et aux procédures existantes de l'OSCE pour prévenir les conflits et régler les différends de façon pacifique : en consultant le Haut commissaire pour les minorités nationales (Article 15 de la Déclaration finale) ou en soumettant les litiges portant sur l'interprétation ou l'application des traités à la Cour internationale de conciliation et d'arbitrage (Article 16 de la Déclaration finale).

Sous les auspices du Pacte, deux autres traités bilatéraux de coopération ont été signés : l'un entre la Hongrie et la Slovaquie en 1995, l'autre entre la Hongrie et la Roumanie en 1996[12].

B. Approche bilatérale de la protection des minorités.

Pacte de stabilité pour l'Europe du Sud-Est (1999) et par les Nations Unies (voir résolution de la Commission des droits de l'homme du 22 février 1995, document ONU E/CN.4/1995 L. 32).

[10] *Voir le « Document de conclusion de la conférence inaugurale pour un pacte de stabilité en Europe » in 94/367/PESC : Décision du Conseil, du 14 juin 1994, relative à la poursuite de l'action commune adoptée par le Conseil sur la base de l'article J.3 du traité sur l'Union européenne concernant la conférence de lancement du pacte de stabilité.*

[11] *Voir Déclaration finale du Pacte de stabilité, §§ 6 et 7.*

[12] *Traité de bon voisinage et de coopération amicale entre la Hongrie et la Slovaquie (19 mars 1995) ; Traité de compréhension, de coopération et de bon voisinage entre la Hongrie et la Roumanie (16 septembre 1996).*

Il est bien connu que la stabilité et la paix ne peuvent être obtenues sans une protection satisfaisante des minorités nationales. C'est pourquoi tous les traités de relations amicales en question comportent des clauses sur la protection des minorités[13] (respectives[14]). Dans le contexte de ces accords bilatéraux, les Etats-parents essayent de garantir un haut niveau de protection pour leurs minorités, tandis que les Etats de résidence ont pour objectif un traitement et un processus d'intégration égaux pour toutes les minorités à l'intérieur de leurs frontières, afin de préserver l'intégrité de celles-ci.

Dans certains cas, les traités de coopération amicale se réfèrent à des instruments bilatéraux préexistants concernant spécifiquement les minorités. Par exemple, le traité de coopération entre la Hongrie et la Slovénie fait suite à la convention sur les droits spéciaux accordés à la minorité slovène en Hongrie et à la minorité hongroise en Slovénie du 6 novembre 1992, et le traité sur les fondements de relations de bon voisinage et de coopération entre la Hongrie et l'Ukraine à la déclaration sur les principes de coopération entre la Hongrie et l'Ukraine afin de garantir les droits des minorités nationales du 31 mai 1991.

Dans d'autres cas, un instrument spécifique pour les minorités est mis en place après le traité bilatéral. Ainsi, le traité de relations amicales et de coopération entre la Hongrie et la Croatie a été complété le 5 avril 1995 par une convention sur la protection de la minorité hongroise en Croatie et de la minorité croate en Hongrie. De même, la déclaration sur les principes de coopération entre la Hongrie et la Fédération de Russie concernant la garantie des droits des minorités nationales du 11 novembre 1992 fait suite et se réfère au traité de relations amicales et de coopération entre la Hongrie et la RSFSR du 6 décembre 1991.

Ces traités et conventions comportent généralement des engagements mutuels de respect des normes et des principes internationaux relatifs aux minorités nationales. Ils incluent souvent des normes juridiques non contraignantes, comme la Recommandation 1201 (1993) de l'Assemblée parlementaire du Conseil de l'Europe et le Document de Copenhague de l'OSCE (1990), et leurs donnent ainsi force d'obligation dans leurs relations mutuelles.

Une analyse comparative détaillée du contenu de ces traités irait bien au-delà de l'objectif du présent document. Il suffit ici de souligner qu'ils garantissent certains droits fondamentaux « classiques » : le droit à l'identité, les droits linguistiques et culturels, le droit à l'éducation, les droits liés à l'utilisation des médias, les libertés d'expression et d'association, la liberté de religion, le droit de participer au processus de prise de décision. Plus rarement, d'autres droits sont inclus, concernant les contacts transfrontaliers et la protection du patrimoine architectural. Certains traités accordent des droits collectifs ou certaines formes d'autonomie. Par ailleurs, certains mettent l'accent sur les devoirs des personnes appartenant à une minorité nationale vis-à-vis de leur Etat de résidence.

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[13] *Il est courant que des Etats signent des accords bilatéraux sur la coopération culturelle comportant des clauses spécialement consacrées à la formation et au soutien des enseignants impliqués dans l'éducation des minorités nationales. Ces accords sont généralement appliqués et complétés par des accords interministériels.*

[14] *Quand les deux parties sont à la fois Etat de résidence et Etat-parent, les traités comportent des obligations mutuelles. Dans le cas contraire, le traité ne comporte que des obligations pour l'Etat de résidence, (comme par exemple le Traité de bon voisinage et de coopération amicale entre l'Allemagne et la Pologne de 1991).*

Ces traités sont, dans une plus ou moins large mesure, des conventions cadres : ils doivent être appliqués par des lois spécifiques ou des accords intergouvernementaux sur des questions précises.

L'application des traités recouvre deux aspects : premièrement, les parties doivent respecter les obligations qu'elles ont mutuellement contracté, deuxièmement, elles doivent poursuivre les négociations bilatérales sur les sujets qui font l'objet des traités, dans le but de prendre des engagements nouveaux ou différents. Néanmoins, l'application effective et correcte des traités n'est généralement soumise à aucun contrôle légal : de fait, aucun de ces traités ne prévoit de mécanisme juridictionnel ou légal de contrôle[15]. Leur application est plutôt assignée à des commissions intergouvernementales conjointes (normalement, des représentants des minorités siègent dans chaque délégation gouvernementale, mais sans droit de veto), convoquées à intervalles réguliers ou quand cela est jugé nécessaire, et normalement habilitées à faire des recommandations à leurs gouvernements respectifs quant à l'exécution ou même à la modification des traités.

Il n'existe pas de sanction formelle si l'une des parties ne coopère pas à l'application d'un traité.

Dans la mesure où la plupart de ces traités ont été inclus dans le Pacte de stabilité, tout Etat peut s'adresser à la Cour internationale de conciliation et d'arbitrage pour régler un différend ou préciser l'interprétation d'une clause d'un traité bilatéral. Toutefois, en pratique, cela n'a jamais eu lieu. De même, le Haut commissaire pour les minorités nationales de l'OSCE n'a jamais été consulté, alors que cela est prévu à l'Article 15 de la Déclaration finale du Pacte de stabilité.

De plus, attendu que les traités en question comprennent des clauses de la Convention cadre, leur application relève, même de façon indirecte, de la compétence du comité consultatif concerné et du Comité des Ministres du Conseil de l'Europe. Les Etats ont soumis, bien qu'uniquement de façon indirecte, des informations détaillées sur ces questions dans leurs rapports.

En ce qui concerne les recours nationaux, la possibilité – qui existe en théorie dans les pays dont le système constitutionnel permet aux traités d'être directement applicables en droit national - de porter devant une juridiction nationale la question du non-respect d'un traité directement applicable, n'a pas été utilisée jusqu'ici (l'usage de ce recours semble peu probable, en particulier faute d'information des juristes en la matière).

Il s'ensuit que, dans l'état actuel des choses, si une partie refuse de participer à des négociations bilatérales sur l'application d'un traité, seule la pression politique provenant de l'autre partie ou de la communauté internationale peut le convaincre d'accepter.

Pourtant, ce refus constituerait une violation non seulement de l'obligation, aux termes du traité, de mener des négociations sur son application (donc une violation du principe *pacta sunt servanda*), mais également du principe général de droit international selon lequel « les

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[15] *Voir cependant l'accord entre l'Autriche et l'Italie du 17 juillet 1971 (conclu conformément au calendrier opérationnel, « calendario operativo » de 1969) soumettant les différends concernant l'application de l'accord Gruber-de Gasperi de 1947 au mécanisme prévu par la Convention européenne pour le règlement pacifique des différends du 29 avril 1957.*

Etats sont tenu, dans leurs relations mutuelles, de se comporter conformément aux principes et règles régissant leurs relations amicales et de bon voisinage, lesquels doivent guider leurs actions sur le plan international, notamment local et régional »[16].

C. Législation nationale en matière de protection des minorités : analyse[17]

Outre les accords bilatéraux et la législation nationale ainsi que la réglementation permettant son application, un certain nombre d'Etats européens ont promulgué des lois particulières, consentant des avantages, et donc un traitement préférentiel, aux personnes appartenant à leurs minorités nationales[18].

Dans ce contexte, il convient de signaler les textes suivants :

- Loi sur l'égalité entre les Tyroliens du Sud et les Autrichiens dans certains domaines administratifs, 25 janvier 1979, Autriche (ci-après « la loi autrichienne » ou AL)[19]

- Texte n°70 sur les slovaques expatriés et la modification de certaines lois, 14 février 1997, Slovaquie (ci-après « la loi slovaque » ou SL)

- Loi sur la promotion des relations avec les communautés roumaines qui vivent à l'extérieur du pays, 15 juillet 1998, Roumanie (ci-après « la loi roumaine » ou RL)

- Loi fédérale sur la politique étatique de la Fédération de Russie par rapport aux compatriotes à l'étranger, mars 1999, Fédération de Russie (ci-après « la loi russe » ou RuL)

- Loi concernant les Bulgares vivant à l'extérieur de la Bulgarie, 11 avril 2000, Bulgarie (ci-après « la loi bulgare » ou BL)

- Loi sur les mesures en faveur de la minorité italienne en Slovénie et en Croatie, 21 mars 2001, n°73 (prolongeant la validité de l'Article 14 §2 des Dispositions pour le développement d'activités économiques et de coopération internationale dans les régions Friuli-Venezia Giulia, Belluno et les environs, 9 janvier 1991, n°19), Italie (ci-après « la loi italienne » ou IL)

- Loi relative aux Hongrois vivant dans les pays voisins, 19 juin 2001 (entrée en vigueur le 1er janvier 2002), Hongrie (ci-après « la loi hongroise » ou HL)

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16 *Voir Commission européenne pour la démocratie par le droit, Droit et politique étrangère, Collection "Science et techniquede la démocratie", n°24, p.14. Voir Article 2 de la Convention cadre.*

17 *Cette analyse se fonde sur les documents qui ont été présentés au Secrétariat de la Commission.*

18 *Il arrive que certains avantages, concernant des domaines qui ne sont pas directement touchés par les accords bilatéraux – comme la santé – soient réglementés par des accords informels (en droit privé) entre les organes régionaux de l'Etat-parent et le l'Etat de résidence. Les bénéficiaires de ces traitements préférentiels ne sont pas nécessairement des membres de la minorité, mais toutes les personnes résidant dans la région où la minorité est installée (voir par exemple les relations entre le Tyrol et le Tyrol du Sud).*

19 *Cette loi a été modifiée par le ministère autrichien de la Science et des Transports en 1997 (voir Bundesgesetzblatt der Republik Österreich, 1. August 1997, Teil I). Aujourd'hui, les Tyroliens du Sud peuvent s'inscrire dans une université autrichienne s'ils ont été scolarisés dans un lycée de langue allemande, et non plus s'ils appartiennent aux minorités linguistiques allemande ou ladine.*

Il convient également de signaler :

- Résolution du Parlement slovène sur le statut et la situation des minorités slovènes vivant dans les pays voisins et les devoirs de l'Etat slovène et d'autres organismes dans ce domaine, Slovenie, 27 juin 1996

- Décision ministérielle commune n°4000/3/10/e des Ministres de l'Intérieur, de la Défense, des Affaires étrangères, du Travail et de l'Ordre public des 15-29 avril 1998 sur les conditions, la durée et la procédure d'octroi de la carte d'identité spéciale aux ressortissants albanais d'origine grecque, Grèce (ci-après « la décision ministérielle grecque » ou GMD)

  - Champ d'application *ratione personae*

Les lois roumaine et italienne font simplement allusion à leurs « communautés » ou « minorités » vivant à l'étranger. En revanche, les autres lois examinées ici précisent clairement les critères qu'un individu doit remplir pour être concerné par leur application. Ces critères sont les suivants :

- Citoyenneté étrangère

Ce critère découle de la raison d'être de ces lois et est donc commun à tous les textes (à l'exception de la loi russe). Il n'est pas toujours explicite (voir les lois roumaine et italienne déjà mentionnées ; la loi bulgare ne le précise pas dans son Article 2, mais plus tard au Titre II). La loi hongroise précise que la nationalité hongroise doit avoir été perdue pour des raisons autres qu'une renonciation volontaire.

- Origine nationale

Tandis que les lois italienne et roumaine ne définissent pas formellement de critère permettant d'établir l'origine nationale, les autres lois le font, avec plus ou moins de détails.

Selon la loi slovaque, l' « origine ethnique » slovaque provient d'un ascendant direct, jusqu'à la troisième génération (Article 2 §3 SL). Pour la loi bulgare, il est nécessaire d'avoir au moins un ascendant d'origine bulgare (Article 2 BL). Aux termes de la loi hongroise, est hongroise toute personne qui en fait la déclaration (Article 1 HL). Pour les Russes, les compatriotes sont les personnes « qui partagent la langue commune, la religion, la culture, les traditions et les coutumes », ainsi que leurs descendants directs (Article 1 RuL).

En ce qui concerne la preuve de l'origine nationale, pour la loi slovaque elle doit être attestée par un document : extrait de naissance, certificat de baptême, document de l'état civil, « preuve de la nationalité », permis de séjour permanent, ou à défaut, un témoignage écrit émanant d'une organisation slovaque à l'étranger ou un témoignage d'au moins deux autres Slovaques expatriés (Article 2 §4 SL). La loi bulgare demande un document délivré par une autorité étrangère, par une association de Bulgares à l'étranger, ou par l'église orthodoxe bulgare. A défaut, l'origine bulgare peut être prouvée par des moyens judiciaires (Article 3 BL). La loi russe exige, outre le « libre choix » de l'individu, des documents attestant de l'ancienne citoyenneté soviétique ou russe, de la résidence précédente sur le territoire de la

Russie/URSS/RSFSR/Fédération de Russie, ou de la descendance directe de personnes ayant immigré (Article 4 RuL).

Il est plus complexe de prouver l'origine hongroise. Le libellé de l'Article 1 §1 de la loi hongroise semble indiquer que la simple déclaration du demandeur suffit, mais les organisations représentant la communauté nationale hongroise dans les pays voisins doivent apparemment[20] enquêter sur l'origine du demandeur avant de délivrer - ou de refuser de délivrer - une recommandation. Néanmoins, il n'est pas dit sur quels critères elles doivent se fonder.

- Résidence à l'étranger

Les lois bulgare, russe et roumaine (Articles 2, 1 et 1 respectivement) exigent que la personne concernée réside sur le territoire d'un pays étranger. La loi hongroise prévoit que seules les personnes qui résident dans l'un des pays voisins (à l'exception de l'Autriche) ont droit aux avantages en question (Article 1 §1 HL). La loi italienne est limitée aux minorités italiennes en Croatie et en Slovénie[21].

- Absence d'un permis de séjour permanent dans l'Etat-parent

Ce critère apparaît dans la loi hongroise (Article 1 §1). En réalité, l'obtention d'un permis de séjour permanent en Hongrie constitue un motif de retrait du certificat de nationalité hongroise (Article 21 §3 (b) HL). La loi slovaque encourage au contraire les expatriés à faire une demande de résidence permanente en Slovaquie (Article 5 §3 SL). Les cartes d'identité spéciales grecques confèrent un droit de séjour de trois ans (Article 3 GMD).

- Connaissances linguistiques

Aux termes de la loi slovaque, une personne expatriée doit maîtriser au moins de façon passive la langue slovaque, et elle doit prouver ses connaissances grâce à ses activités, au témoignage d'une organisation slovaque sur son lieu de résidence ou à celui d'au moins deux autres expatriés (Article 2 §§6, 7 SL).

- Connaissances culturelles

La loi slovaque requiert des connaissances minimales de la culture slovaque, qui doivent être prouvées de la même façon que les connaissances linguistiques (voir ci-dessus). La loi bulgare requiert une sensibilisation nationale bulgare.

- Conjoints et enfants mineurs

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[20] *Le libellé de l'Article 20 de la loi ne clarifie pas le rôle des organisations qui fournissent les recommandations. Toutefois, le ministre hongrois des Affaires étrangères, dans les précisions apportées le 14 septembre 2001, a souligné qu'elles seraient chargées de vérifier l'existence de critères objectifs d'appartenance à la minorité hongroise.*

[21] *A ce sujet, il convient de signaler que les dispositions des Constitutions de Slovénie et de Macédoine concernant le souhait de ces pays de veiller sur leurs minorités nationales font allusion à des minorités « dans les Etats voisins » (voir ci-dessus, Articles 5 et 49 respectivement des Constitutions slovène et macédonienne).*

Aux termes de la loi hongroise, les conjoints vivant sous le même toit et les enfants mineurs ont droit aux mêmes avantages (Article 1 §2 HL). La Décision ministérielle grecque accorde les avantages des ressortissants albanais d'origine grecque à leurs conjoints et descendants en mesure de prouver leur parenté par des documents officiels (Article 1 §2 GMD). Les avantages consentis par la loi slovaque sont étendus aux enfants des expatriés âgés de moins de 15 ans qui sont mentionnés sur la carte d'expatriation (Article 4 §1 SL).

- Documents prouvant que la personne a droit aux avantages accordés par la loi

Les lois hongroise, slovaque et russe et la Décision ministérielle grecque conditionnent l'accès aux avantages à la possession d'un document spécial.

Toutefois, la nature de ce document varie.

En Grèce, ce document s'appelle une carte d'identité. Il porte la photographie ainsi que les empreintes digitales du titulaire, est délivré pour une période de trois ans renouvelable et sert aussi de permis de séjour et de travail (voir la circulaire correspondante du ministère grec de l'Ordre public).

La carte d'expatriation slovaque, délivrée sans limitation de durée, porte des données personnelles sur le titulaire ainsi que son adresse permanente. Des renseignements concernant les enfants mineurs peuvent également être inclus à la demande du titulaire, dans la mesure où cela est compatible avec les traités internationaux applicables. Cette carte n'est pas une carte d'identité dans le sens où elle n'est valable qu'accompagnée d'une pièce d'identité en cours de validité délivré par l'Etat de résidence (Article 4 §2 SL). Le titulaire est toutefois admis sur le territoire slovaque sans invitation écrite, visa ou permis de séjour.

Le certificat de nationalité hongroise est valable pour une période de cinq ans, jusqu'à ce que le titulaire ait 18 ans, ou sans limitation de durée si le titulaire a plus de 60 ans. Il porte une photographie du titulaire et toutes les données personnelles le concernant (Article 21 §5 HL).

La loi russe prévoit que l'appartenance aux compatriotes peut être prouvée non seulement par un passeport russe, pour les personnes qui ont la citoyenneté de la Fédération de Russie ou la double nationalité, mais également par un certificat délivré par les représentations diplomatiques ou consulaires de la Fédération de Russie, ou par les autorités compétentes sur le territoire (Article 3 RuL). En l'absence d'une photographie du titulaire, ce certificat n'est pas une carte d'identité.

Tous ces documents sont délivrés selon diverses procédures, par les autorités de l'Etat-parent : un organe central d'administration publique désigné par le gouvernement hongrois (Article 19 §2 HL), le ministère slovaque des Affaires étrangères (Article 3 §1 SL), les autorités compétentes ou les représentations diplomatiques ou consulaires russes à l'étranger (Article 3 RuL), le services des étrangers de la police (Article 1 GMD).

Les consulats ou ambassades des Etats-parents sur le territoire des Etats de résidence ont parfois un rôle à jouer. Aux termes de l'Article 3 §1 de la loi slovaque, les représentations ou consulats slovaques peuvent recevoir des demandes d'obtention de carte d'expatriation, qu'ils transmettent au ministère des Affaires étrangères pour décision. Les représentations diplomatiques ou consulaires russes peuvent délivrer le certificat attestant l'origine russe (Article 3 RuL). Les autorités consulaires grecques ne jouent aucun rôle, et elles ne peuvent

le faire en aucun cas, car la carte d'identité spéciale ne peut être délivrée qu'aux personnes qui se trouvent sur le territoire grec (Article 1 §1 GMD).

La loi hongroise ne prévoit aucun rôle des consulats ou représentations diplomatiques, mais accorde un rôle essentiel aux organisations hongroises à l'étranger. Le certificat de nationalité hongroise est en effet délivré par les autorités si le candidat a été « recommandé » par l'une de ces organisations, qui doivent vérifier la déclaration faite par le demandeur quant à son appartenance à la minorité hongroise, certifier sa signature et fournir, entre autres, une photographie et les informations personnelles le concernant (Article 20 §1 HL). A défaut de cette recommandation, le certificat ne peut pas être délivré[22]. Il n'existe aucun recours si une organisation refuse de donner cette recommandation, et il a été souligné plus haut que les critères qu'elles doivent utiliser sont mal définis.

Ces organisations sont investies d'un rôle très différent par la loi slovaque. Aux termes de l'Article 2 §5 SL, elles témoignent de l'appartenance d'un individu à la minorité slovaque s'il ne peut pas fournir les documents officiels listés à l'Article 2 §4 SL. Il faut rappeler à ce propos que la loi slovaque prévoit un critère bien défini pour prouver l'origine. De même, la loi bulgare (Article 3 BL) permet au demandeur de prouver son origine bulgare par une déclaration d'une association de Bulgares à l'étranger et précise ce qui doit être prouvé, c'est-à-dire d'avoir au moins un ascendant bulgare.

- Nature des avantages

- <u>Culture et éducation</u>

Les avantages dans ce domaine sont généralement les suivants : bourses d'études permettant à des étudiants de poursuivre leurs études dans l'Etat-parent, tarifs réduits ou gratuité pour l'usage des infrastructures culturelles et éducatives (musées, bibliothèques, archives, etc.), soutien d'institutions et formation d'enseignants dans la langue de l'Etat-parent dans l'Etat de résidence, (Article 6 §1 SL, Article 17 RuL, Articles 9 et 10 BL, Article 7 RL, Articles 4 et 9-14 HL), reconnaissance mutuelle des diplômes universitaires (Voir les nombreux accords entre l'Autriche et l'Italie), accès aux carrières universitaires (Articles 2 et 4 §2 AL).

L'Article 10 §1 de la loi hongroise prévoit l'octroi de bourses d'études à des étudiants appartenant à des minorités nationales, qui poursuivent des études - quelles qu'elles soient et quels que soient la langue d'enseignement et le programme, dans des institutions d'enseignement supérieur dans les Etats de résidence.

L'Article 18 de la loi hongroise prévoit que la Hongrie soutienne les organisations travaillant à l'étranger pour encourager l'apprentissage et la sauvegarde de la langue, de la littérature et du patrimoine hongrois.

- <u>Sécurité sociale et couverture médicale</u>

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[22] *Toutefois, conformément à l'Article 29 §2(3) de la loi hongroise, le ministre des Affaires étrangères peut remplacer la recommandation des organisations par une déclaration, dans les cas méritant un traitement exceptionnel pour des raisons d'équité, ou lorsque la procédure est entravée, afin de garantir son bon déroulement.*

L'Article 7 de la loi hongroise accorde aux travailleurs en possession du certificat de nationalité hongroise le droit de cotiser pour les assurances vieillesse et maladie, et leur offre une assistance médicale immédiate en Hongrie en vertu d'accords bilatéraux dans ce domaine. L'Article 2 de la loi roumaine mentionne la possibilité pour les membres des communautés roumaines de bénéficier d'une aide médicale individuelle dans certains cas particuliers. Les expatriés slovaques peuvent demander l'exemption du paiement de la sécurité sociale à l'étranger s'ils remplissent les conditions pour bénéficier de leurs droits sur le territoire slovaque (Article 6 §1(d)).

- Transports

Il s'agit de tarifs préférentiels pour ceux qui voyagent vers ou sur le territoire de l'Etat-parent (voir Article 8 HL et Article 6 §3 SL, notamment pour les expatriés retraités, handicapés ou âgés).

- Permis de travail

Selon la loi slovaque, les demandeurs d'emploi en possession d'une carte d'expatriation n'ont pas besoin de demander un permis de travail ou de séjour permanent en Slovaquie (Article 6 (b) SL). Selon la loi hongroise, un permis de travail peut être accordé à titre exceptionnel à des étrangers d'origine hongroise pour une durée de trois mois, sans tenir compte des besoins du marché du travail (Article 15 HL). De plus, ces citoyens étrangers ont la possibilité de demander le remboursement des frais occasionnés pour se mettre en règle (Article 16 HL).

- Exemption de visa

Aux termes de la loi hongroise, le titulaire d'une carte d'expatriation souhaitant pénétrer sur le territoire slovaque n'a besoin ni d'un visa ni d'une invitation, dans la mesure où cela est possible dans le respect des accords internationaux applicables (Article 5 §1 SL). Aux termes de l'Article 5 de la loi autrichienne, les Tyroliens du Sud tels que définis par cette loi n'ont pas besoin de visas pour séjourner en Autriche.

- Exemption de permis de séjour et remboursement/exemption des droits

Les expatriés slovaques peuvent séjourner pour une longue période sur le territoire slovaque en vertu de leur carte d'expatriation (Article 5 §2 SL). La carte d'identité spéciale grecque tient lieu de permis de séjour pour la durée de sa validité, à savoir jusqu'à trois ans renouvelable (Articles 1 et 3 GMD).

Les Bulgares bénéficient d'un régime spécial pour le paiement des droits relatifs à leur résidence ou à leur installation (Article 6 §2 BL). La loi roumaine prévoit la possibilité pour les étudiants qui souhaitent poursuivre leurs études en Roumanie d'être logés gratuitement dans des auberges de jeunesse pour toute la durée de leur séjour. D'autres aides peuvent également être accordées par le gouvernement (Article 9 RL).

- Accès à la propriété

Aux termes de l'Article 6 §2 de la loi slovaque, les expatriés ont le droit de posséder et d'acquérir des biens immobiliers. Selon la loi bulgare, les étrangers d'origine bulgare peuvent

participer à des opérations de privatisation, être rétablis dans leur propriété et hériter de biens immobiliers (Article 8 BL).

- Acquisition de la citoyenneté

Selon la loi russe (Article 11 RuL), les compatriotes obtiennent rapidement la citoyenneté russe sur simple demande. Selon la loi slovaque, les expatriés peuvent demander la citoyenneté slovaque pour des raisons personnelles exceptionnelles (Article 6 §1 c) SL).

- Champ d'application *ratione loci*

Ces avantages sont généralement accordés aux étrangers originaires de l'Etat-parent lorsqu'il se trouvent sur le territoire de celui-ci.

Toutefois, selon la loi hongroise, certains avantages sont accordés dans l'Etat de résidence. Voir Article 10 HL, sur les avantages accordés aux étudiants d'institutions publiques enseignant en hongrois dans les pays voisins ou de toute institution d'enseignement supérieur ; Article 12 HL sur ceux dont bénéficient les enseignants hongrois vivant à l'étranger ; Article 13 HL sur les études à l'étranger dans des départements associés ; Article 14 HL sur l'aide à la scolarisation dans le pays de naissance ; Article 18 HL sur l'aide apportée aux organisations travaillant à l'étranger.

D. Avis de la Commission sur la compatibilité des législations nationales portant sur la protection des minorités avec les normes européennes et les normes et principes du droit international[23]

L'importance fondamentale d'une protection adéquate et efficace des minorités nationales, dans le cadre de la protection des droits de l'homme et des libertés fondamentales, mais également pour encourager la stabilité, la sécurité démocratique et la paix en Europe, a été soulignée à maintes reprises. L'application complète des accords internationaux en la matière - avant tout la Convention cadre pour la protection des minorités nationales, la Charte des langues régionales et minoritaires ainsi que, de façon moins spécifique, la Convention européenne des droits de l'homme – est désormais une priorité pour tous les pays membres du Conseil de l'Europe.

Dans ce contexte, l'émergence de formes nouvelles et originales de protection des minorités, en particulier par les Etats-parents, est une tendance positive dans la mesure où elle contribue à la réalisation de cet objectif.

La communauté internationale encourage déjà la signature de traités bilatéraux sur la coopération amicale ou la protection des minorités ; elle les soutient et surveille leur application.

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[23] *Suite à la résolution du Parlement européen du 5 septembre 2001 (Résolution sur la demande d'adhésion de la Hongrie à l'Union européenne et l'état des négociations, COM (1999) 505-C5-0028/2000-1997/2175 (COS)), la Commission européenne examine actuellement la compatibilité de la législation concernant des réglementations spéciales et des privilèges accordés aux personnes appartenant à des minorités nationales par leur Etat-parent avec l'acquis communautaire ainsi que l'esprit de bon voisinage et de coopération entre les pays membres de l'Union européenne. Cet aspect ne fait donc pas l'objet de la présente étude.*

La tendance plus récente des Etats-parents de prendre des dispositions législatives ou administratives consentant des droits spéciaux aux personnes appartenant à leurs minorités à l'étranger n'avait pas suscité particulièrement l'attention ou l'intérêt de la communauté internationale. Aucune surveillance ou coordination des lois et réglementations en question n'avait été jusqu'à présent mise en place, ni même envisagée. Pourtant, la campagne autour de l'adoption de la loi relative aux Hongrois vivant dans les pays voisins montre la nécessité impérieuse de résoudre la question de la compatibilité de ces lois et réglementations avec le droit international et les normes européennes sur la protection des minorités.

La Commission estime que la possibilité pour les Etats de prendre des mesures de façon unilatérale pour la protection de leurs minorités, qu'elles vivent dans des pays voisins ou dans d'autres pays, dépend du respect des principes suivants : a) souveraineté territoriale des Etats, b) *pacta sunt servanda*, c) relations amicales entre Etats et d) respect des droits de l'homme et des libertés fondamentales, en particulier l'interdiction de la discrimination.

a. Souveraineté territoriale des Etats

Les Etats jouissent d'une souveraineté exclusive sur leur territoire national[24]. Cela signifie, en principe, que tous les personnes, biens et activités sur leur territoire et dans leurs eaux intérieures, leurs mers territoriales et leur espace aérien relèvent de leur juridiction. Aucun autre Etat ou organisation internationale ne peut exercer sa juridiction sur le territoire d'un Etat sans son consentement. Le droit international public confère cependant des pouvoirs spécifiques aux Etats en ce qui concerne leurs ambassades, leurs navires ou leurs nationaux à l'étranger.

Les dispositions législatives et administratives (ainsi que judiciaires) émanent de cette juridiction souveraine : elles s'adressent donc naturellement aux habitants concernés et leur lieu naturel d'application est le territoire national.

Une première question se pose alors : la simple adoption de lois ayant des effets à l'extérieur du territoire national constitue-t-elle en elle-même une ingérence dans les affaires intérieures de l'autre ou des autres Etats concernés, et donc une violation du principe de souveraineté territoriale ?

Afin d'apporter une réponse complète, il est nécessaire de distinguer, en ce qui concerne le sens d'« extraterritorialité », entre les effets d'une loi nationale sur des citoyens étrangers dans le pays ou à l'étranger, et l'exercice de ses pouvoirs par un Etat en dehors de ses frontières.

i. Les effets d'une loi nationale sur des citoyens étrangers.

Le simple fait qu'une loi concerne des citoyens étrangers ne constitue pas, pour la Commission, une violation du principe de souveraineté territoriale. De fait, il existe de nombreux exemples de lois qui mentionnent la citoyenneté étrangère, non d'un Etat particulier mais en général (par exemple en droit international privé, pour la compétence de l'Etat en matière pénale, etc.) et toutes sont en conformité avec les principes généraux du droit international.

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[24] *Ce principe de droit international est codifié, en particulier, à l'Article 21 de la Convention cadre.*

Il est légitime pour un Etat d'adopter des mesures législatives ou administratives concernant des citoyens étrangers sans demander le consentement préalable des pays concernés, du moment que ces lois ou réglementations ne prennent effet qu'à l'intérieur de ses frontières. Par exemple, un Etat peut décider de façon unilatérale d'accorder un certain nombre de bourses d'études à des étudiants étrangers méritants, qui souhaitent poursuivre leurs études dans ses universités.

En revanche, quand la loi a spécifiquement des effets sur des citoyens étrangers dans un pays étranger, sa légitimité n'est pas aussi évidente. En réalité, il est inconcevable que l'Etat de résidence des individus concernés n'ait pas son mot à dire.

Dans certains domaines comme l'éducation et la culture, des pratiques ayant des objectifs culturels[25] clairs se sont développées et ont été adoptées par de nombreux Etats. Par exemple, il est généralement accepté, au moins entre les Etats qui entretiennent des relations amicales, que les Etats-parents accordent des bourses d'études à des étudiants étrangers appartenant à leurs minorités nationales, pour leurs études dans la langue nationale dans des établissements à l'étranger, qu'ils financent souvent eux-mêmes. Il est également commun pour des Etats de promouvoir l'étude de leur langue et de leur culture, y compris grâce à des bourses accordées à des étudiants étrangers, quelle que soit leur origine.

Dans ces domaines, s'il existe une coutume internationale, le consentement de l'Etat de résidence peut être présumé et les Etats-parents peuvent prendre des mesures législatives ou administratives de manière unilatérale[26]. En outre, quand un Etat-parent prend des mesures sur le traitement préférentiel de ses minorités dans un Etat particulier, ce dernier peut supposer le consentement du premier pour des mesures similaires concernant ses citoyens.

En revanche, dans les domaines qui ne sont pas couverts par des traités ou une coutume internationale, le consentement des Etats de résidence touchés par les mesures prises par l'Etat-parent doit être explicite. Par exemple, si un Etat décide unilatéralement d'accorder des bourses d'études à des étudiants étrangers appartenant à ses minorités, qu'il y ait ou non de lien entre leurs études et lui, cette décision peut être considérée comme une ingérence dans les affaires intérieures de l'Etat de résidence (sa politique éducative par exemple).

ii. L'exercice des pouvoirs d'un Etat en dehors de ses frontières

En l'absence d'une règle contraire l'autorisant – une coutume internationale[27] ou une convention – un Etat ne peut sous aucune forme exercer ses pouvoirs sur le territoire d'autres Etats[28].

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[25] *Voir l'Article 2 §2 de la Convention culturelle européenne : « Chaque Partie Contractante, dans la mesure du possible, (…) s'efforcera de développer l'étude de sa langue ou de ses langues, de son histoire et de sa civilisation sur le territoire des autres Parties Contractantes et d'offrir aux nationaux de ces dernières la possibilité de poursuivre semblables études sur son territoire ».*

Cette convention culturelle a été ratifiée, entre autres, par la Bulgarie le 2 septembre 1991, la Grèce le 10 janvier 1962, la Hongrie le 16 novembre 1989, l'Italie le 15 mai 1957, la Roumanie le 19 décembre 1991, la Russie le 21 février 1991, la Slovaquie le 10 mai 1990 et la Slovénie le 2 juillet 1992.

[26] *Néanmoins, ces mesures sont souvent prises dans le cadre d'accords intergouvernementaux.*

[27] *Voir par exemple les conventions consulaires.*

[28] *A ce sujet, la compétence extraterritoriale en matière civile, même pour les citoyens étrangers résidant dans leur pays d'origine ou ailleurs, exercée par les Etats-Unis est très controversée.*

L'accord par un Etat de fonctions administratives quasi-officielles à des associations non-gouvernementales déclarées dans un autre pays constitue une forme indirecte d'exercice de ses pouvoirs : il n'est donc pas acceptable, sauf autorisation spéciale.

Les fonctions en question semblent particulièrement problématiques quand elles ne sont ni autorisées ni réglementées par la loi de l'Etat de résidence. Dans ces circonstances, les associations qui les exerceraient ne seraient en fait soumises à aucun contrôle légal : en effet, les autorités de l'Etat de résidence sont compétentes mais peuvent ne pas reconnaître le fondement de ces fonctions, pour la raison mentionnée plus haut qu'elles ne sont pas prévues dans son système légal, et l'Etat-parent, bien qu'étant à l'origine de ces fonctions, ne pourrait pas exercer sa juridiction, du fait que les associations sont déclarées et fonctionnent à l'étranger. Le problème est d'autant plus délicat quand les conditions et les limites de l'exercice de ces fonctions ne sont pas clairement énoncées dans la loi d'origine.

Si un Etat-parent requiert la remise d'un certificat sur place, la Commission estime que cette fonction incombe naturellement aux autorités consulaires, dûment autorisées par l'Etat de résidence, conformément au droit international[29], à exercer des fonctions officielles sur son territoire. Il va de soi que ces fonctions officielles doivent être ordinaires et que les consulats ne doivent pas être chargés de tâches allant au-delà de celles couramment pratiquées et admises.

A cet égard, et en rapport avec le besoin exprimé par plusieurs des lois examinées d'obtenir une preuve de l'origine des étrangers souhaitant bénéficier des avantages offerts aux minorités, la Commission considère qu'il est préférable (même si cela n'est pas requis en droit international) que ces lois précisent les critères qui doivent être employés pour attester l'origine du demandeur. Cela éviterait que les consulats soient investis de pouvoirs discrétionnaires qui, en l'absence de tout contrôle judiciaire substantiel, et pas uniquement formel, risqueraient de devenir arbitraires. A ce sujet, la Commission souhaite se référer, *mutatis mutandis*, à la Convention cadre qui, tout en garantissant le principe que chaque individu puisse choisir librement d'être traité ou non comme une personne appartenant à une minorité, n'empêche pas les Etats de demander le respect de certains critères avant d'accorder des privilèges aux personnes appartenant à cette minorité. En d'autres termes, le choix personnel de l'individu est nécessaire mais non suffisant pour lui donner droit à des avantages spécifiques.

Des considérations similaires s'appliquent en ce qui concerne les associations de minorités à l'étranger. Aux yeux de la Commission, leur rôle n'est pas exclus, s'il se limite à fournir aux Etats-parents des informations sur des questions précises et déterminées par la loi, en l'absence de tout autre document officiel, ou à donner une recommandation informelle et non contraignante aux autorités consulaires de l'Etat-parent. Par exemple, si elles fournissent une déclaration sur le fait que le grand-père d'un individu était citoyen de l'Etat-parent, car les documents officiels sont manquants.

b. *Pacta sunt servanda*

[29] *Voir par exemple l'Article 5 de la Convention de Vienne de 1963 sur les relations consulaires.*

Tout traité doit être respecté et exécuté de bonne foi[30]. Lorsqu'un Etat est partie à des traités bilatéraux concernant, ou comportant des clauses sur, la protection des minorités[31], il doit dûment respecter toutes les obligations qui y sont mentionnées, y compris celle de poursuivre les négociations bilatérales en vue d'évaluer l'application du traité et éventuellement d'élargir ou de modifier les droits accordés aux minorités concernées.

Si des difficultés pour la tenue de ces négociations bilatérales entraînent d'autres formes d'intervention, unilatérales, sur les questions envisagées par le traité, il s'agit d'un cas de non-respect de l'obligation d'exécuter les traités de bonne foi, sauf si toutes les procédures existantes pour le règlement des différends (y compris l'intervention du Haut commissaire pour les minorités nationales de l'OSCE et de la Cour internationale de conciliation et d'arbitrage) ont été utilisées de bonne foi[32] et se sont avérées inefficaces.

Les lois et la réglementation concernant le traitement préférentiel des minorités nationales ne devraient donc pas toucher des domaines manifestement couverts par des traités bilatéraux existants, à moins bien entendu que l'Etat de résidence concerné ne soit consulté et n'approuve cette démarche ou ne l'accepte implicitement – mais sans ambiguïté –, en ne faisant aucune objection.

Des considérations similaires s'appliquent dans le cas où un domaine donné n'est pas couvert par des règles spécifiques ou un traité existant.

c. Relations amicales de bon voisinage

Les traités bilatéraux entre les Etats d'Europe centrale et orientale relèvent du principe de relations de bon voisinage et en font leur objectif principal.

L'obligation pour les Etats d'œuvrer pour des relations amicales provient également d'un principe plus général. L'Article 2 de la Convention cadre met en avant les principes de bon voisinage, de relations amicales et de coopération entre les Etats. Les relations amicales entre Etats sont de fait considérées aujourd'hui par tous comme une condition *sine qua non* pour la paix et la stabilité en Europe.

Les Etats doivent en conséquence s'abstenir d'adopter des mesures unilatérales, qui risqueraient de compromettre le climat de coopération avec d'autres Etats.

Les lois examinées ici concernent des domaines sensibles pour les raisons analysées plus haut. L'un des aspects de ces lois soulève des questions qui méritent un examen plus précis : il s'agit de l'octroi par l'Etat-parent d'un document attestant l'appartenance du titulaire à la minorité nationale et, en particulier, de la procédure de délivrance de ce document.

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[30] *Voir Article 6 de la Convention de Vienne de 1969 sur le droit des traités.*

[31] *Il faut souligner que l'adoption de lois sur le traitement préférentiel n'est pas nécessairement conditionné à l'existence d'un accord bilatéral entre les Etats concernés. Toutefois, si un tel accord existe, les mesures adoptées et leur procédure d'application doivent y être conformes.*

[32] *Voir Article 31 de la Convention de Vienne : « Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but ».*

Les Etats qui délivrent ces documents, sous des formes différentes (voir plus haut), justifient leur existence en soutenant qu'ils simplifient les démarches administratives qu'un individu doit accomplir afin d'avoir accès aux avantages offerts par la législation correspondante.

Dans la mesure où il facilite l'accès aux avantages, la Commission conçoit que ce document puisse être utile. Toutefois, elle constate que, dans un certain nombre de pays, ce document présente toutes les caractéristiques d'une pièce d'identité, avec la photographie du titulaire et toutes les données personnelles le concernant, ainsi que la mention de son origine nationale. Il est très probable que les titulaires de ces documents les utilisent comme des pièces d'identité, au moins sur le territoire de leur Etat-parent.

Sous cette forme, le document crée un lien politique entre ces étrangers et leur Etat-parent. Il est compréhensible qu'un tel lien préoccupe les Etats de résidence qui, selon la Commission, auraient dû être consultés avant l'adoption de toute mesure visant à la mise en place des documents en question.

La Commission estime que, pour être utilisé uniquement comme un outil de simplification des démarches administratives, le document doit être une simple preuve du droit du titulaire à bénéficier des services offerts aux termes d'une certaine loi ou réglementation. Il ne doit pas avoir pour but d'établir un lien politique entre le titulaire et son Etat-parent et ne doit pas se substituer à une pièce d'identité délivrée par les autorités de l'Etat de résidence.

d. Respect des droits de l'homme et des libertés fondamentales. Interdiction de la discrimination.

Les Etats sont tenus de respecter les accords internationaux relatifs aux droits de l'homme auxquels ils sont parties. En conséquence, dans l'exercice de leurs pouvoirs, ils doivent à tout moment respecter les droits de l'homme et les libertés fondamentales, et notamment l'interdiction de la discrimination, énoncée entre autres par la Charte des Nations Unies, la Déclaration universelle des droits de l'homme[33], le Pacte international relatif aux droits civils et politiques[34] et la Convention cadre[35].

En particulier, les Etats parties à la Convention européenne des droits de l'homme (ci-après « la Convention » ou CEDH) doivent garantir la jouissance sans discrimination des droits qui

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[33] *Voir Article 7 de la Déclaration universelle des droits de l'homme : « Tous sont égaux devant la loi et ont droit sans distinction à l'égale protection de la loi. Tous ont droit à une protection égale contre toute discrimination qui violerait la présente Déclaration et contre toute provocation à une telle discrimination ».*

[34] *Voir Article 26 du PIRDCP : « Toutes les personnes sont égales devant la loi et ont droit sans discrimination à une égale protection de la loi. À cet égard, la loi doit interdire toute discrimination et garantir à toutes les personnes une protection égale et efficace contre toute discrimination, notamment de race, de couleur, de sexe, de langue, de religion, d'opinion politique et de toute autre opinion, d'origine nationale ou sociale, de fortune, de naissance ou de toute autre situation ».*

[35] *Voir Article 4 de la Convention cadre : « 1) Les Parties s'engagent à garantir à toute personne appartenant à une minorité nationale le droit à l'égalité devant la loi et à une égale protection de la loi. A cet égard, toute discrimination fondée sur l'appartenance à une minorité nationale est interdite. 2) Les Parties s'engagent à adopter, s'il y a lieu, des mesures adéquates en vue de promouvoir, dans tous les domaines de la vie économique, sociale, politique et culturelle, une égalité pleine et effective entre les personnes appartenant à une minorité nationale et celles appartenant à la majorité. Elles tiennent dûment compte, à cet égard, des conditions spécifiques des personnes appartenant à des minorités nationales. 3) Les mesures adoptées conformément au paragraphe 2 ne sont pas considérées comme un acte de discrimination.*

y sont énoncés à toutes les personnes relevant de leur juridiction[36]. Un Etat est également responsable, aux termes de l'Article 1 de la Convention, de ses actes ayant des effets extraterritoriaux : tous les individus concernés, qu'ils soient étrangers ou nationaux, relèvent de sa juridiction.

Les législations et réglementations examinées ici visent à consentir un traitement préférentiel à certains individus, à savoir des citoyens étrangers ayant des origines nationales particulières. Elles créent donc des différences de traitement (entre ces individus et les citoyens de l'Etat-parent, entre ces individus et les autres citoyens de l'Etat de résidence, entre ces individus et les étrangers appartenant à d'autres minorités) qui peuvent constituer une discrimination – fondée sur des motifs essentiellement ethniques – et une violation du principe de non-discrimination souligné plus haut.

La discrimination doit être invoquée en rapport à un droit garanti par la Convention. Or tous les avantages accordés par les législations étudiées ici ne concernent pas, du moins à première vue, des droits garantis. Certaines clauses de la CEDH sont pertinentes : avant tout l'Article 2 du Premier protocole mais aussi les Articles 8 de la Convention et 1[er] du Premier protocole.

La jurisprudence de Strasbourg[37] montre que le traitement différent de personnes dans des situations similaires[38] n'est pas toujours interdit : il ne l'est pas lorsque la différence de traitement peut être justifiée de façon objective et raisonnable, compte tenu d'une marge d'appréciation. La justification doit être appréciée en relation avec les objectifs poursuivis (qui doivent être légitimes) et avec les conséquences des mesures adoptées, en tenant compte des principes généraux qui prévalent dans les sociétés démocratiques (le but légitime poursuivi et les moyens employés pour y parvenir doivent être raisonnablement proportionnels).

L'Article 14 interdit la discrimination entre individus fondée sur leur statut personnel. Il comporte une liste ouverte d'exemples de motifs de discrimination interdits, qui comprend la langue, la religion et l'origine nationale. A l'égard du fondement des différences de traitement aux termes des lois et réglementations examinées, la Commission estime que le fait qu'une partie de la population reçoive un traitement moins favorable parce qu'elle n'appartient pas à un groupe ethnique spécifique n'est pas, en lui-même, ni discriminatoire ni contraire aux principes du droit international[39]. En réalité, les mesures visant un groupe

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[36] *Voir Article 1 et 14 CEDH. Aux termes de ce dernier : « La jouissance des droits et libertés reconnus dans la présente Convention doit être assurée, sans distinction aucune, fondée notamment sur le sexe, la race, la couleur, la langue, la religion, les opinions politiques ou toutes autres opinions, l'origine nationale ou sociale, l'appartenance à une minorité nationale, la fortune, la naissance ou toute autre situation ». Si l'Article 14 interdit la discrimination seulement en rapport avec les droits et libertés définis ailleurs dans la Convention, le Protocole n°12, contenant une clause générale contre la discrimination, a été rédigé et ouvert aux signatures le 4 novembre 2000.*

[37] *Voir le cas d'espèce sur la signification de « discrimination » au sens de l'Article 14 de la Convention : Cour européenne des droits de l'homme, affaire relative à certains aspects du régime linguistique de l'enseignement en Belgique. Arrêt du 9 février 1967, Série A n°6.*

[38] *Une plainte pour discrimination n'a de sens que si le demandeur compare sa situation à celle de ceux qui se trouvent dans une situation identique, analogue, ou suffisamment similaire pour être pertinente.*

[39] *Voir en particulier l'Article 4 §3 de la Convention cadre.*

ethnique particulier sont d'usage courant, par exemple dans les lois sur la citoyenneté[40]. L'acceptabilité de ce critère dépend bien entendu du but poursuivi.

A cet égard, la Commission juge approprié de distinguer, en ce qui concerne la nature des avantages accordés par les lois examinées, entre ceux qui concernent l'éducation et la culture et les autres.

En ce qui concerne les premiers, le traitement différent peut se justifier par l'objectif légitime d'encourager les liens culturels de la population visée avec la population de l'Etat-parent. Néanmoins, pour être acceptables, les avantages accordés doivent être véritablement liés à la culture du pays, et proportionnés. La Commission considère par exemple que l'accord d'une bourse d'études sur des critères strictement ethniques, quelles que soient les études poursuivies par l'individu, se justifie difficilement.

Dans les domaines autres que l'éducation et la culture, la Commission considère qu'un traitement préférentiel peut être accordé uniquement dans des cas exceptionnels et quand il sert un objectif authentique de maintien des liens avec l'Etat-parent et est proportionné (par exemple lorsqu'il s'agit de l'accès à des avantages qui sont de toute façon disponibles pour des citoyens étrangers non originaires de l'Etat-parent).

E. Conclusions

La responsabilité de la protection des minorités incombe en premier lieu aux Etats de résidence. La Commission note que les Etats-parents jouent également un rôle dans la protection et la sauvegarde de leurs minorités nationales, pour garantir que leurs véritables liens linguistiques et culturels restent fort. L'Europe a développé une unité culturelle fondée sur la diversité de traditions linguistiques et culturelles étroitement liées. La diversité culturelle est une richesse, et son acceptation est une condition nécessaire pour la paix et la stabilité en Europe.

La Commission considère cependant que le respect des instruments existants pour la protection des minorités doit être prioritaire. Dans ce domaine, des traités multilatéraux et bilatéraux ont été conclu sous l'égide d'initiatives européennes. L'efficacité de cette approche pourrait être menacée si ces traités n'étaient pas interprétés et appliqués de bonne foi à la lumière du principe de bon voisinage entre Etats.

L'adoption par des Etats de mesures unilatérales consentant des avantages aux personnes appartenant à leurs minorités nationales, qui pour la Commission n'est pas une pratique suffisamment ancienne pour constituer une coutume internationale, n'est légitime que si les principes de souveraineté territoriale des Etats, de respect des accords en vigueur, de relations amicales entre Etats et de respect des droits de l'homme et des libertés fondamentales, notamment l'interdiction de la discrimination, sont respectés.

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[40] *Voir l'Article 116 de la Grundgesetz (Loi fondamentale) allemande : « 1) Sauf réglementation législative contraire, est Allemand au sens de la présente Loi fondamentale, quiconque possède la nationalité allemande ou a été admis sur le territoire du Reich allemand tel qu'il existait au 31 décembre 1937, en qualité de réfugié ou d'expulsé appartenant au peuple allemand, ou de conjoint ou de descendant de ces derniers. 2) 1 - Les anciens nationaux allemands déchus de leur nationalité entre le 30 janvier 1933 et le 8 mai 1945 pour des raisons politiques, raciales ou religieuses ainsi que leurs descendants doivent être réintégrés à leur demande dans la nationalité allemande. 2 - Ils sont considérés comme n'ayant pas été déchus de leur nationalité s'ils ont fixé leur domicile en Allemagne après le 8 mai 1945 et s'ils n'ont pas exprimé une volonté contraire. »*

Le respect de ces principes implique le respect des points suivants :

- Un Etat peut promulguer des lois concernant des citoyens étrangers, dans la mesure où elles n'ont d'effet qu'à l'intérieur de ses frontières.

- Lorsque ces lois concernent spécifiquement des citoyens étrangers à l'étranger dans des domaines qui ne sont pas couverts par des traités ou une coutume internationale permettant à l'Etat-parent de supposer le consentement des Etats de résidence concernés, ce consentement doit être demandé avant l'application de toute mesure.

- Aucune fonction quasi-officielle ne peut être assignée par un Etat à une association non-gouvernementale déclarée dans un autre Etat. Toute forme de certificat sur place doit être obtenu auprès des autorités consulaires, dans la limite de leurs attributions communément acceptées. Les lois ou réglementations doivent de préférence énumérer les critères exacts qui définissent une personne concernée par leur application. En l'absence de tout document officiel, les associations peuvent fournir des informations concernant ces critères.

- Les mesures unilatérales relatives au traitement préférentiel des minorités ne doivent pas concerner des domaines manifestement couverts par des traités bilatéraux, sans le consentement formel ou implicite mais non ambigu de l'Etat de résidence. En cas de différend concernant l'application ou l'interprétation de traités bilatéraux, toutes les procédures existantes pour le règlement doivent être utilisées de bonne foi, et les mesures unilatérales ne peuvent être adoptées par l'Etat-parent que si ces procédures se sont avérées inefficaces.

- Un document administratif délivré par l'Etat-parent ne peut certifier que le droit pour son titulaire de bénéficier des avantages offerts par les lois et réglementations applicables.

- Un traitement préférentiel peut être accordé à des personnes appartenant à des minorités nationales dans les domaines de l'éducation et de la culture dans la mesure où il poursuit un but légitime et est proportionné.

- Le traitement préférentiel ne peut pas être accordé dans les autres domaines, sauf dans des cas exceptionnels et s'il contribue à un but légitime et est proportionné.

REPORTS PRESENTED[1] AT THE COLLOQUY[2] ON THE PROTECTION OF NATIONAL MINORITIES BY THEIR KIN-STATE ORGANISED BY THE VENICE COMMISSION IN COOPERATION WITH THE MINORITY GROUP RESEARCH CENTRE (KEMO) AND THE OFFICE OF THE GREEK OMBUDSMAN

(Athens, 7-8 June 2002)

RAPPORTS PRESENTES[1] LORS DU COLLOQUE[2] SUR LA PROTECTION DES MINORITES NATIONALES PAR LEUR ETAT-PARENT ORGANISEE PAR LA COMMISSION DE VENISE EN COOPERATION AVEC LE CENTRE DE RECHERCHES SUR LES GROUPES DE MINORITES (KEMO) ET LE BUREAU DE L'OMBUDSMAN GREC

(Athènes, 7-8 juin 2002)

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[1] *Mr John Packer, Office of the OSCE High Commissioner on National Minorities, presented an oral report but did not submit it in writing.*

[2] *This activity was organised within the framework of the Joint Programme between the European Commission and the Venice Commission of the Council of Europe for strengthening democracy and constitutional development in Central and Eastern Europe and the CIS.*

Cette activité est organisée dans le cadre du Programme commun entre la Commission européenne et la Commission de Venise du Conseil de l'Europe pour renforcer la démocratie et le développement constitutionnel en Europe centrale et orientale et dans la CEI.

DISCOURS D'INTRODUCTION

M. Giorgos KAMINIS
Adjoint au Défenseur du citoyen pour les droits de l'homme, Athènes

Mesdames et Messieurs,

Le Défenseur du Citoyen, le Professeur Nikiforos Diamandouros, étant malheureusement empêché de vous accueillir lui-même, m'a honoré de sa confiance en me remettant cette tâche. De sa part, et en m'associant à lui, je vous souhaite donc la bienvenue.

J'ai la conviction que ce colloque international nous offrira l'opportunité de réfléchir ensemble sur la protection des minorités nationales par leurs États parents.

Dans ce cadre, et à titre introductif, je voudrais partager avec vous quelques expériences acquises dans mon travail quotidien auprès du *Défenseur du Citoyen*. Il convient ici de souligner que cette Institution, malgré sa dénomination, a compétence pour examiner des plaintes déposées *par toute* personne se prétendant victime d'un acte administratif individuel illégal. Autrement dit, la nationalité du plaignant ne joue aucun rôle en la matière.

Normalement, la question de protection concerne surtout les minorités nationales installées en dehors du territoire national, à savoir les personnes soumises à la souveraineté d'un Etat étranger. C'est le cas envisagé par l'Article 108 de la Constitution, qui charge l'Etat grec de *« veiller aux conditions de vie de la diaspora hellénique et au maintien de ses liens avec la Mère Patrie »*. L'Etat doit également *« veiller à l'instruction et à la promotion sociale et professionnelle des Hellènes qui travaillent en dehors du territoire national »*. Etant donné cependant que *Le Défenseur du Citoyen* ne s'occupe que des cas de mal administration provenant des organes administratifs de l'Etat grec, les problèmes des minorités nationales grecques, auxquels nous sommes confrontés tous les jours, concernent presque exclusivement des personnes d'origine grecque qui, après l'effondrement des régimes communistes d'Europe centrale et orientale, sont entrées, de façon légale ou illégale, dans le territoire grec ; la majorité d'entre elles, avec l'espoir de s'installer définitivement en Grèce et d'y jouir du statut privilégié de résident, voire, pour certaines, de citoyen de l'Etat grec, et par conséquent, de citoyen d'un Etat membre de l'Union européenne.
Cela dit, il faut convenir que le travail quotidien du *Défenseur du Citoyen* ne constitue pas un lieu privilégié de réflexion sur le sujet du présent Colloque, qui du point de vue strictement juridique, soulève plutôt des questions relevant du droit international.

Néanmoins, du point de vue politique et institutionnel, l'expérience acquise au sein de cette Autorité Indépendante voit se répéter un phénomène notoire dans l'Europe de l'entre-deux-

guerres, à savoir le fait que les rapports de la minorité nationale avec la « Mère Patrie » (pour ne pas oublier le langage du Constituant grec), sont fortement dominés par des priorités de politique extérieure. Pendant l'entre-deux-guerres, il s'agissait des rapports entre la Grèce et le pays que ces minorités habitaient. Aujourd'hui, il s'agit des rapports de la Grèce avec les pays qu'ils ont quittés. En somme, le statut juridique et par conséquent la vie quotidienne des membres de la minorité nationale, dépendent largement des fluctuations de la politique extérieure de la Grèce vis-à-vis de ces pays. La seule différence d'avec le passé, c'est qu'aujourd'hui ces personnes se trouvent en Grèce, dans leur pays d'origine. Ainsi, la majorité d'entre elles demeurent des ressortissants d'un pays tiers, et en tant que tels sont démunis de droits politiques. De surcroît, le principe d'égalité ne trouve pas de fondement constitutionnel à leur égard, puisque son application est réservée aux seuls citoyens grecs. De manière que l'on pourrait qualifier d'ironique, si l'on ne craignait de commettre une faute de goût, leur existence, même après le retour au pays d'origine, continue toujours de constituer un scandale pour la pensée constitutionnelle libérale traditionnelle. Car, du fait de leur origine nationale, ils ont vécu sous le poids de la majorité dans le pays qu'ils ont quitté. Et du fait de leur nationalité, ils sont actuellement exclus du corps politique au sein de leur pays d'origine. Une catégorie d'individus est donc condamnée à vivre, toujours et partout dans le monde, dans la position défavorable de minorité. Disons toutefois qu'il ne faut pas rechercher le vrai coupable de ce scandale dans les principes constitutionnels abstraits de la démocratie libérale, mais dans le fait que ces principes ont été élaborés, et surtout appliqués, pendant des siècles, dans le cadre de l'Etat Nation.

Après ce bref détour, rentrons dans la réalité de notre travail quotidien auprès du *Défenseur du Citoyen*. En situation d'infériorité donc par rapport aux citoyens grecs, ces minorités nationales grecques de provenance diverse qui aujourd'hui vivent et travaillent à l'intérieur du pays, ne sont pas homogènes : on y discerne des clivages importants ; des clivages formés uniquement en fonction du pays de provenance, certes, mais avec des répercussions considérables sur leurs statuts juridiques respectifs.

La première distinction qui s'impose à cet égard doit être opérée entre les deux groupes numériquement les plus importants, à savoir les Albanais d'origine grecque et la minorité arrivée des pays de l'ex-URSS. Alors que les membres de la deuxième catégorie, auxquels le législateur réserve le qualificatif favorable de « rapatriés », jouissent pleinement des droits sociaux et ont un statut privilégié d'accès à la nationalité grecque, les membres de la minorité arrivés du sud de l'Albanie se trouvent dans une position de nette infériorité, surtout lorsqu'ils expriment leur désir d'être naturalisés grecs. Il est notoire que la politique des autorités grecques à leur égard est de ne pas les naturaliser. Mais il ne s'agit que d'une décision politique officieuse, dictée par des considérations de politique extérieure. Une politique qui n'ose cependant pas se proclamer ouvertement, et ce pour des raisons aussi évidentes qu'inexprimables ? Le résultat de cette politique de cache-cache est que ces personnes attendent des années entières une réponse de l'administration grecque qui se cantonne obstinément dans un silence embarrassé. Incontestablement, il s'agit là d'une violation flagrante des principes les plus élémentaires de l'Etat de droit.

Il existe encore une deuxième catégorie de minorités nationales dont *Le Défenseur du Citoyen* a eu l'occasion de connaître les problèmes. Ce sont les personnes qui, ayant par le passé possédé la nationalité grecque, l'ont perdue à la suite d'actes administratifs provenant des autorités

grecques. Ceux d'entre eux qui expriment aujourd'hui le désir de récupérer leur citoyenneté, se heurtent au même mur de silence et jeu de cache-cache. Ici encore, les raisons profondes de ce comportement se trouvent dans des considérations d'ordre purement politique. Mais ce qui est plus intéressant dans ce cas, c'est que le dispositif législatif appliqué à leur égard introduit le critère de « *genos* », opérant de la sorte une distinction entre Grecs indigènes et allogènes. Cela constitue l'un des très rares cas où le législateur grec reconnaît que, parmi les citoyens grecs, il existait des personnes qui ne faisaient pas partie de la catégorie fabriquée de « grecs autochtones » (autochtones depuis quand ? On pourrait se poser la question). Mais cette reconnaissance n'a été exprimée officiellement que pour adopter des mesures punitives à l'égard de ces gens dont l'existence même trahissait le caractère idéologique du concept de pureté nationale. Ils ont donc été déchus de leur nationalité et ainsi frappés d'ostracisme.

La première sous-catégorie est formée par des gens qui, après avoir participé à la guerre civile aux côtés de la gauche vaincue, se sont vus obligés de quitter la Grèce pour s'installer dans des pays voisins, vivant sous régime communiste. Dans le cadre des mesures de réconciliation nationale adoptées par l'Etat grec au début des années 1980, on leur a accordé le droit de rentrer au pays et recouvrer la nationalité grecque, à condition que ces émigrés politiques soient d'origine ethnique grecque, que leur genos soit grec. Ainsi, les Grecs d'origine slave, par exemple, qui avaient participé à la guerre civile, ont été implicitement exclus du champ d'application de cette mesure. Le Défenseur du Citoyen a été saisi de plaintes de descendants de ces émigrés qui s'adressent en vain à des autorités locales de la Grèce du Nord pour obtenir des documents prouvant que leurs ascendants étaient des ressortissants grecs.

La deuxième sous-catégorie est formée de victimes d'une disposition législative appliquée massivement après la Seconde Guerre mondiale contre les Grecs d'origine turque. Sur la base du fameux Article 19 du Code de Nationalité grecque, on pouvait déchoir de leur nationalité les Grecs d'ascendance allogène qui avaient quitté le territoire du pays sans intention de rapatriement. Conformément à cette disposition législative, plusieurs milliers de personnes ont perdu leur nationalité et n'ont pu rentrer en Grèce. Cette mesure de discrimination n'a été que récemment abrogée, mais sans effet rétroactif (*ex nunc*). Il en résulte que quelques centaines de ces Grecs d'origine turque, qui avaient pu regagner le pays et qui vivent actuellement en Grèce du Nord, sont dépourvues de nationalité, ils se trouvent dans une situation précaire et ont plusieurs problèmes dans leur contact quotidien avec l'administration.

Souvent donc, les problèmes affrontés par *Le Défenseur du Citoyen*, quand il est appelé à traiter de questions de cette nature, sont assez délicats du point de vue politique. Mais, j'ai retenu assez longtemps votre attention. Le moment est arrivé, je crois, d'entrer dans le vif du sujet du présent Colloque.

LA PROTECTION DES MINORITES NATIONALES PAR LEUR ETAT-PARENT - INTRODUCTION -

M. Giorgio MALINVERNI
Professeur à l'Université de Genève,
Membre de la Commission de Venise

1. Le but de ces brefs propos introductifs est d'indiquer les circonstances dans lesquelles la Commission de Venise a été amenée à donner un avis sur la question de la protection des minorités nationales par l'Etat-parent et les conclusions auxquelles elle est parvenue.

Le 21 juin 2001, une demande a été adressée à la Commission de Venise par les autorités roumaines, à propos de la compatibilité avec le droit européen et le droit international d'une loi hongroise relative aux personnes de souche hongroise vivant dans les Etats voisins.

Quelques jours plus tard, une demande semblable a été reçue de la part des autorités hongroises, mais tendant à effectuer une étude de droit comparé qui permette de dégager les tendances récentes des législations européennes dans ce domaine.

Sur la base de ces deux requêtes, la Commission de Venise a décidé d'entreprendre une étude d'ensemble de la législation et de la pratique des Etats européens. L'objectif de cette étude[1] consistait à examiner si le traitement préférentiel accordé par un Etat-parent à des personnes appartenant à son ethnie, mais n'ayant pas sa nationalité, est compatible avec les normes du Conseil de l'Europe et les principes du droit international.

Lorsqu'ils se sont penchés sur cette problématique, les quatre rapporteurs désignés par la Commission de Venise ont rapidement pris conscience de deux réalités.

D'abord, si la préoccupation des Etats-parents pour le sort des personnes appartenant à leurs communautés nationales, mais ressortissants d'autres Etats, n'est pas un phénomène nouveau en droit international[2], c'est à partir des années 1990, avec l'apparition des nouvelles démocraties, qu'il a pris une ampleur sans précédent: presque toutes les nouvelles Constitutions des pays d'Europe centrale et orientale contiennent des dispositions allant dans ce sens.

La deuxième constatation est qu'il n'existe pas, à l'heure actuelle, d'étude d'ensemble traitant de cette question. Les demandes de la Roumanie et de la Hongrie ont donc permis à la Commission de Venise de faire, dans ce domaine, œuvre de pionnier.

2. Il existe deux manières, pour les Etats, d'assurer la protection de leurs minorités nationales à l'étranger: la première est l'approche conventionnelle, consistant en la conclusion de traités internationaux, le plus souvent bilatéraux, entre deux Etats; la deuxième,

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1 *Document CDL-INF (2001) 19 du 19 octobre 2001.*

2 *Voir à ce propos, le rapport de Franz Matscher sur le Tyrol du Sud, ci-après.*

l'approche unilatérale, consiste en l'adoption de lois internes, mais de lois internes ayant un effet et une portée extraterritoriaux.

L'approche conventionnelle ou bilatérale est le plus souvent réalisée par la conclusion de traités sur les relations amicales qui comportent des clauses relatives à la protection des minorités se trouvant sur le territoire des deux Etats. Du fait qu'ils expriment la volonté concordante de deux Etats, ces traités ne posent pas de problèmes juridiques particuliers.

La faiblesse de ce procédé réside dans l'absence de mécanisme international de contrôle du respect des accords conclus, hormis la possibilité qui est offerte aux Etats, dans le cadre du Pacte de stabilité, de s'adresser à la Cour internationale de conciliation et d'arbitrage.

Les problèmes juridiques ne proviennent donc pas des solutions bilatérales qui sont trouvées à ces questions, mais bien de l'approche unilatérale que les Etats adoptent individuellement, sans concertation aucune avec les Etats voisins.

Comme nous l'avons déjà relevé, la plupart des Constitutions des pays d'Europe centrale et orientale contiennent des dispositions prévoyant que l'Etat-parent doit s'occuper, d'une manière ou d'une autre, de ses minorités vivant à l'étranger. Ces dispositions constitutionnelles ont été concrétisées par autant de lois particulières, qui ont pour but d'accorder des avantages ou des traitements préférentiels, aux personnes appartenant à leurs minorités nationales, mais ayant la nationalité d'un autre Etat, et qui résident sur le territoire de ce dernier Etat.

3. Le premier problème juridique posé par ces lois est bien évidemment qu'elles s'appliquent à des personnes ayant l'origine ethnique de l'Etat-parent mais la nationalité d'Etats-tiers et qu'elles résident sur le territoire de ces Etats-tiers. Le deuxième problème est celui de l'établissement de la preuve de l'origine ethnique de ces personnes.

Cette preuve peut être fournie par des critères tels que la religion ou la connaissance de la langue de l'Etat-parent, mais elle se concrétise souvent par l'établissement d'un document spécial, une sorte de carte d'identité attestant l'origine nationale des intéressés, et cela pose la question de savoir qui, de l'Etat-parent ou de l'Etat de résidence, a la compétence pour établir un tel document.

4. Sur le premier problème, la Commission de Venise a estimé que la possibilité, pour un Etat, d'adopter des mesures unilatérales pour protéger ses minorités à l'étranger doit s'effectuer dans le respect de quatre principes fondamentaux: celui de la souveraineté territoriale des Etats; celui des relations amicales entre les Etats; celui de l'interdiction de la discrimination et, enfin, le principe "pacta sunt servanda".

5. La première question qui se pose est celle de savoir si la simple adoption d'une loi ayant des effets à l'extérieur des frontières du territoire national constitue en elle-même une ingérence dans les affaires intérieures d'un autre Etat, et viole par là le principe de la souveraineté territoriale de ce dernier Etat.

La réponse à cette question doit être nuancée et il convient de distinguer plusieurs cas de figure. Le simple fait qu'une loi nationale vise des citoyens étrangers ne constitue pas, en lui-même, une violation du principe de la souveraineté territoriale. Plusieurs lois, par exemple de droit international privé, ou établissant la compétence d'un Etat en matière pénale, visent en

fait des ressortissants étrangers. De même, un Etat peut parfaitement adopter des lois sur le statut des étrangers, si ces lois déploient leur effet uniquement sur le territoire national.

S'agissant des lois qui ont un effet extraterritorial, la Commission de Venise a été d'avis qu'il convient de distinguer, pour apprécier leur validité, selon la nature et le type des avantages qu'elles confèrent à leurs bénéficiaires.

L'examen des lois actuellement en vigueur révèle que ces avantages ou traitements préférentiels concernent en général les domaines suivants: culture et éducation, sécurité sociale et couverture médicale, transports, permis de travail, exemption de l'obligation d'avoir un visa, accès facilité à la propriété, acquisition facilitée de la citoyenneté.

D'une manière générale, la Commission de Venise a opéré une distinction entre les domaines de l'éducation et de la culture d'une part, et les autres domaines, d'autre part.

Dans le domaine de l'éducation et de la culture, la Commission de Venise a constaté que des pratiques ayant des objectifs culturels se sont développées dans de nombreux Etats. Ainsi, il est généralement accepté que les Etats-parents accordent des bourses d'études à des étudiants étrangers appartenant à leurs minorités nationales, pour que ces étudiants accomplissent leurs études dans leur langue dans des Universités à l'étranger.

Dans ces domaines, la pratique est telle que l'on peut presque parler d'une coutume internationale. Le consentement de l'Etat de résidence peut pour ainsi dire être présumé et la Commission de Venise a donc été d'avis que les Etats-parents peuvent adopter, dans le domaine de la culture et de l'éducation, des mesures de manière unilatérale.

Il n'en va pas de même, en revanche, dans les autres domaines, pour lesquels il faudrait obtenir l'accord explicite des Etats de résidence.

6. Les Etats doivent de toute façon s'abstenir d'adopter de manière unilatérale des mesures qui risqueraient de compromettre le climat de coopération et de bonne entente avec d'autres Etats, comme le veut le principe des relations amicales et de bon voisinage. Or certaines lois en vigueur dans les pays de l'Europe centrale et orientale concernent des domaines sensibles, comme les assurances sociales ou le travail temporaire et saisonnier.

7. Les lois examinées par la Commission de Venise visent à consentir un traitement préférentiel à certains individus, à savoir des citoyens étrangers ayant des origines ethniques particulières. Elles créent donc des différences de traitement entre ces individus et les citoyens de l'Etat-parent, mais, surtout, entre ces mêmes individus et les autres citoyens de l'Etat de résidence. Ces différences de traitement peuvent constituer une discrimination fondée sur des motifs ethniques, et être dès lors constitutives d'une discrimination prohibée par le droit international.

Pour juger de la conformité des avantages accordés à certaines personnes avec le principe de non-discrimination, la Commission de Venise a de nouveau fait intervenir la distinction entre les avantages accordés dans les domaines de l'éducation et de la culture et les autres.

S'agissant des premiers, le traitement différent peut se justifier par un motif objectif et raisonnable, qui est celui d'intensifier les liens culturels entre la minorité nationale et la

population de l'Etat-parent. Néanmoins, pour être acceptables, les avantages accordés doivent véritablement être liés à la culture du pays et respecter le principe de proportionnalité.

Dans les autres domaines, la Commission de Venise a été d'avis qu'un traitement préférentiel ne peut être accordé que dans des cas tout à fait exceptionnels.

8. La Commission de Venise a exprimé l'avis que les lois concernant le traitement préférentiel des minorités nationales ne devraient pas toucher des domaines qui sont déjà réglementés par des traités bilatéraux existants, et les contredire (principe "pacta sunt servanda"). Si un traité bilatéral se heurte à des difficultés au niveau de sa mise en oeuvre, ces difficultés doivent être résolues par des négociations et non par l'adoption de mesures unilatérales.

9. Plusieurs lois en vigueur dans les pays d'Europe centrale et orientale subordonnent l'accès aux avantages qu'elles octroient à la possession d'un document spécial. Cette pratique soulève deux questions: d'abord, celle des critères sur lesquels il convient de se fonder pour attester l'origine du demandeur. Les lois nationales devraient fournir des critères aussi précis et sûrs que possible. Ensuite, celle de savoir quelles sont les autorités compétentes pour octroyer un tel document. Idéalement, cette dernière tâche devrait incomber aux autorités de l'Etat de résidence. L'on ne devrait toutefois pas exclure que, le cas échéant, les autorités diplomatiques et consulaires accréditées par l'Etat-parent auprès de l'Etat de résidence se voient confier cette tâche. Mais celle-ci ne devrait en aucun cas être attribuée à des associations privées.

PROTECTION OF NATIONAL MINORITIES AND KIN-STATES: AN INTERNATIONAL PERSPECTIVE

Mrs Elsa STAMATOPOULOU [1]

INTRODUCTION

The approach I will take to the subject is a human rights-based approach. First, I will make some comments on the terminology of the Colloquy, "Protection of Minorities by their Kin-States", which are relevant to the perception of the subject by the United Nations based on international human rights standards.

The term "protection" in the human rights language refers primarily to the measures that States must take under International Law to discharge their obligations within their borders under the international human rights instruments. In a more specialized analysis developed by human rights treaty bodies, in particular the Committee on Economic, Social and Cultural Rights, the obligations of the State are three-fold:

a) to respect human rights, i.e. State agents must refrain from interfering with the exercise of certain freedoms and rights,
b) to protect human rights, i.e. to avert third parties, non-State actors, from interfering

[1] *The author is Deputy to the Director in the New York Office of the United Nations High Commissioner for Human Rights. The views expressed in this article do not necessarily represent those of the United Nations.*

with the free exercise of human rights by the rights-holders, and

c) to fulfil human rights, i.e. take positive measures to create the conditions for the fulfilment of human rights.

"Protection" of human rights is a term also used to indicate the intervention of United Nations human rights bodies and mechanisms with governments in individual cases. While the United Nations Charter refers to "promotion" of human rights, considered a softer term, the concept of "protection" generally indicates a much more active involvement of the State and of the United Nations and was added later, in the late 1960's, when the Commission on Human Rights was able to launch the first United Nations human rights procedures of protection – those to deal with gross and systematic violations of human rights.
Therefore, the phrase "protection of minorities by their kin-States" would not fit in the above-mentioned understandings of the term within the international human rights terminology. On the other hand, the phrase might mean something else within the developing concepts and language of international humanitarian law, i.e. it could be used to indicate some type of international humanitarian intervention in times of complex emergencies. But emergency situations are not what the organizers meant by the title of the Colloquy. Rather, the Colloquy is about the possible role of kin-States in the well-being of their kin-Minorities in times of peace.

To be a kin-Minority, especially in a neighbouring State, can entail both negative and positive implications, as history has very well shown:

a) negative implications, if minorities are seen with suspicion by the State of citizenship, the territorial State, as the fifth column for territorial aspirations of a neighbouring kin-State, real or perceived, thus resulting in limitation or denial of their human rights and their cultural identity, and in marginalization and even persecution;

b) positive implications, if minorities are seen as a vehicle or the key to friendly relations and cooperation between neighbouring States, where the kin-State's interest in the well-being of its kin-Minority, devoid of territorial aspirations, can encourage the respect, promotion and fulfilment of the rights of minorities by the State of citizenship, and cooperation between the two States can improve the situation of minorities and understanding between the States overall. In a sense, a minority with a kin-State far away, such as the Roma, or with no kin-State, such as the Sami or the Inuit and other indigenous peoples, would have neither the political benefits nor the political disadvantages that I described above.

From a human rights point of view, there is no doubt that it is a true test of the commitment to human dignity of a State and a society whether they will respect the human rights of minorities when there is no kin-State to show an interest. This is the case, again, of the Roma or the Sami and the Inuit. And perhaps the ultimate test of the commitment of a democratic State and society to human dignity is not to lose from sight the human face of people who belong to a minority, even when the very existence of a minority is politically exploited by a kin-State to fuel turmoil and conflict.

Applying a human rights analysis to the subject of the possible role of kin-States, we start with

- **Premise number one**: it is clear that the State where a minority lives has the primary responsibility for the respect, protection and fulfilment of the rights of this minority. The role of the international community, including the kin-State, is one of assistance, upon the request or agreement of the territorial State, as well as a role of monitoring.

- **Premise number two**: persons belonging to minorities, like all people, have civil, cultural, economic, political and social rights, and, as has been repeatedly declared, all human rights are interrelated and interdependent. However, cultural rights require special focus when we examine the role of kin-States. Why? Within the context of democratic societies and peaceful relations between States respecting existing boarders, it is in fact cultural identity that mostly defines the kin-Ship element, the special relationship, the key link, between a minority and a so-called mother-country, a kin-State.

- **Premise number three**: cultural identity and cultural rights are part of a minority's self-definition and self-respect and are profoundly connected to a person's human dignity, one of the highest protectible social goods. The violation of cultural human rights can stir profound resentment and emotion, a sense of rejection and marginalization, capable of sowing the seeds of social upheaval and conflict. It is to be expected that a kin-State will have an interest in the well-being of its kin-Minority. A positive role of a kin-State, that wants to play a role, could be elaborated in the key area of cultural rights. A philosophical underpinning of a human rights approach, however, is that the social good that is to be protected is not some kind of abstract "biological" or "blood" link between a State and its kin-Minority, but the human dignity of persons belonging to a minority.

In this paper I will address two main questions:

a) How the United Nations address the issue of kin-States and minorities;

And

b) What could be a positive role of a kin-State in the respect, protection and fulfilment of the cultural rights of kin-Minorities.

A. THE UNITED NATIONS AND THE ISSUE OF KIN-STATES AND MINORITIES

In the human rights area, the main work of the United Nations is to monitor how States implement their human rights obligations towards minorities, or rather, persons belonging to national or ethnic, religious and linguistic minorities, under the various human rights treaties, in particular the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Eliminations of All Forms of Discrimination against Women and the Convention on the Rights of the Child. But the human rights treaty bodies that carry out this monitoring function, by their very nature and mandate, deal with the behaviour of States within their own boarders and do not expand to any other States, namely kin-States. In other words, kin-States are not a category that enters the vocabulary of human rights treaty bodies. This is also the case with the extra-conventional procedures of the Commission on Human Rights, namely the various country-specific special rapporteurs.

Another mechanism of the United Nations, the Working Group on Minorities of the Sub-Commission on the Promotion and Protection of Human Rights, a body mandated to explore ways of promoting the rights of persons belonging to national or ethnic, religious and linguistic minorities, has until now not dealt with minorities and kin-States[2].

The High Commissioner for Human Rights, in his/her role of good offices at the highest level of government, has in some cases intervened discretely and successfully for the protection of the rights of minorities, sometimes following the mediating effort of a kin-State. But such cases have been rare.

In the political or peace and security area of the work of the United Nations, it is recognized that kin-States can play a positive or a negative role regarding kin-Minorities, depending on how they try to influence the behaviour of these minorities towards reconciliation or not in conflict situations. Overall the perception of the kin-State's interest in its kin-Minorities varies depending on the historical and political relations of the kin-State and the territorial State. In its peace-making practice, the United Nations tries, on an ad hoc basis, to engage kin-States to play a positive role in peace efforts by influencing their kin-Minorities. The benefit of reciprocity is also recognized.

This brief review of the practice of the United Nations shows a relatively low attention to the role of kin-States in the protection of minorities.

B. A POSSIBLE ROLE OF THE KIN-STATE IN THE RESPECT, PROTECTION AND FULFILMENT OF THE CULTURAL RIGHTS OF MINORITIES

Why are the cultural rights of minorities particularly important today?

First of all, we currently experience the phenomenon of the culturalization of political life and rhetoric[3]. Identity politics have been on the rise within States as well as internationally. This emerging battle of the cultures is part of a more fundamental struggle - the struggle for identity, both personal and political[4]. One reason for this increased assertiveness of identity is that globalization has accentuated local awareness, consciousness, sensitivity, sentiment and

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[2] *At its 2002 session from 27 to 31 May, the Working Group had before it a written submission by the Government of Romania containing the Memorandum of Understanding between Romania and Hungary concerning the Law on Hungarians Living in Neighbouring Countries and issues of bilateral co-operation; annexed to that was the Report of the Venice Commission on the Preferential Treatment of National Minorities by their kin-State (E/CN.4/Sub.2/AC.5/2002/WP.4 and Annexes 1 and 2). The Working Group also received information from the Government of Hungary regarding the 2001 Act on Hungarians Living in Neighbouring Countries (E/CN.4/Sub.2/AC.5/2002/WP.5). The Working Group did not hold any substantive discussion on this matter. This year the Working Group paid special attention to the issue of autonomy and integration.*

[3] *Terry Eagleton speaks of this issue in The Idea of Culture, 2000, Blackwell Publishing, Oxford. In Eagleton's words "... it is political interests which usually govern cultural ones, and in doing so define a particular version of humanity", p.7; "... culture wars which matter concern such questions as ethnic cleansing, not the relative merits of Racine and soap opera", p. 51.*

[4] *Margaret Wilson, "Cultural Rights: Definitions and contexts" in Culture, Rights and Cultural Rights: Perspectives from the South Pacific, The proceedings of a colloquium organised by the UNESCO Office for Pacific Member States and the Center for New Zealand Jurisprudence(School of Law, University of Waikato, New Zealand), October 1998; Margaret Wilson and Paul Hunt edts., 2000, Huia Publishers, Wellington, p.14.*

passion[5]. The challenge is how to ensure that the politicization of culture is a positive and not a negative development[6].

Despite the rise in identity politics, globalization and free markets, economic restructuring, economic crises and extreme poverty, the fight against HIV/AIDs and now terrorism seem to have placed cultural policies and cultural rights in the back burner for many policy makers. Cultural tensions were exacerbated after the tragic events of September 11. From the varied reactions that followed in societies, both of developing countries and of developed countries, it became clear that despite all else that unites a "globalized" world, in reality there is, in many senses, a communication dead end at the level of the masses. This dead end is not only sustained by the poverty divide, but also often fueled by religious fundamentalism and exploited by political opportunism. At this dangerous crossroad, respect for cultural freedom, identities and pluralism within a context of a democratic polity is more urgent than ever. And the recognition of cultural rights as legal rights, with corresponding State obligations, is a bold statement and key to galvanizing State action.

The World Conference Against Racism, Racial Discrimination, Xenophobia and related Intolerance that took place in Durban, South Africa, in 2001, gave a new impetus to the challenges of diversity of our time. The anti-racism agenda has become even more important after September 11, especially as it provides a balance to the anti-terrorism agenda and is forward-looking and long-term. The World Conference confirmed the international obligation of States to respect the cultural rights of persons belonging to national or ethnic, religious and linguistic minorities.

In the Declaration and Programme of Action adopted by the World Conference[7] States are urged to guarantee the rights of persons belonging to national or ethnic, religious and linguistic minorities, individually or in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference, and to participate effectively in the cultural, social, economic and political life of the country. States are urged to adopt, where applicable, appropriate measures to ensure that persons belonging to national, or ethnic, religious and linguistic minorities have access to education without discrimination and, where possible, have an opportunity to learn their own language. States are also urged to protect the national or ethnic, cultural, religious and linguistic identity of minorities and to develop appropriate legislative and other measures to encourage conditions for the promotion of that identity, in order to protect them from any form of racism, racial discrimination, xenophobia and related intolerance.

International standards regarding the right to participate in cultural life

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[5] *G. Picco, A.K.Aboulmagd, L.Arizpe, H.Ashrawi, R.Cardoso, J.Delors, L.Gelb, N.Gordimer, Prince El Hassan bin Talal, S.Kapitza, H.Kawai, T.Koh, H.Kung, G.Machel, A.Sen, S.Jian, D.Spring, T.Weiming, R.von Weizsacker, J.Zarif, Crossing the Divide: Dialogue among Civilisations, 2001, School of Diplomacy and International Relations, Seton Hall University, South Orange (report of the Personal Representative of the Secretary-General on Dialogue among Civilisations and the Group of Eminent Persons selected by the United Nations Secretary-General).*

[6] *Ibid., p.22.*

[7] *A/CONF.189/12, especially in Programme of Action, paragraphs 4, 10, 13, 15, 18, 23, 30, 39, 42, 45, 47, 98, 99, 112, 117, 124, 126, 128, 136, 141, 142, 148, 158, 171, 172, 208.*

Five specific human rights are understood as cultural rights under international law:

1. the right to education,
2. the right to participate in cultural life,
3. the right to enjoy the benefits of scientific progress and its applications,
4. the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the person is the author, and
5. the freedom for scientific research and creative activity[8].

I will focus on the least explored of cultural rights, namely the right to participate in cultural life enshrined in Article 27 of the Universal Declaration of Human Rights (UDHR) and Article 15(1) a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[9]. I will not discuss the well-developed right to education and intellectual property rights in any detail, except in as much as they pertain to the right to participate in cultural life.

Article 27 of the UDHR states that

> "*1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*
>
> *2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."*

The major human rights treaty that proclaims cultural rights is the ICESCR which in its Article 15(1)a) states that

> "*1. The States Parties to the present Covenant recognize the right of everyone:*
> *(a) To take part in cultural life;*
> *(b) To enjoy the benefits of scientific progress and its applications;*
> *(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*
>
> *2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.*
>
> *3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*

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[8] *The latter freedom is also closely linked with the right to education and the right to participate in cultural life. Although I will discuss the concept of cultural rights in some detail below, I want to point out from the beginning that the CESCR as well as UNESCO consider the right to education as a major cultural right and have analysed it and are actively promoting it. The right to education is also a social and an economic right and is also, in many ways, a civil and a political right (General Comment no.11 (1999) by the CESCR on Article 14 of the ICESCR regarding plans of action for primary education, E/2000/22, Annex IV). The UN system's development efforts indeed focus considerably on helping to implement the right to education.*

[9] *The international and regional human rights instruments mentioned in this Chapter are reproduced in Human Rights: A Compilation of International Instruments, Volumes I and II, United Nations Publication, Sales no. E.93.XIV.1.*

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scinetific and cultural fields."

Article 27 of the International Covenant on Civil and Political Rights contains a provision specific to minorities:

" *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities, shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language".*

Relevant provisions are also contained in the International Convention on the Elimination of All forms of Racial Discrimination[10] and the Convention on the Elimination of All Forms of Discrimination against Women[11].

The Convention on the Rights of the Child is rich in further references to cultural rights, with special emphasis to the protection and development of the child's identity, including a specific provision on minority or indigenous children in Article 30[12].

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[10] *Article 1 containing the definition of "racial discrimination", defines the term as "... any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".*

Article 5 states: "In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(e) economic, social and cultural rights, in particular:

vi) the right to equal participation in cultural activities.

(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks".

Article 7 states: "States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, a s well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Decl on the Elimination of All Forms of Racial Discrimination, and this Convention".

[11] *The Convention, in Article 5, defines a contravention of the Convention as including "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or nay other field".*

Article 13 requires States to take measures to eliminate discrimination in order to ensure the same rights, in particular "...(c) The right to participate in recreational activities, sports and all aspects of cultural life"

[12] *Article 8 of the Convention establishes the obligation for States to "... respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without interference. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity".*

The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, in Article 1, establishes the obligation of States to protect the existence of the cultural identity of minorities.

According to Article 2, persons belonging to minorities

> "*...have the right to enjoy their own culture, to profess and practice their own religion, and to use their own language, in private and in public, freely and without interference or any form of discrimination".*

They also have the right to

> *"... establish and maintain, without discrimination, free and peaceful contacts with other members of their group and with persons belonging to other minorities, as well as contacts across frontiers with citizens of other states to whom they are related by national or ethnic, religious or linguistic ties".*

According to Article 4 of the Declaration, States :

> *"1. shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in*

Article 17 establishes the obligation for States to "...encourage the mass media to disseminate information and material of social and cultural benefit to the child...

"Encourage international cooperation in the production, exchange and dissemination of such information and material from a diversity of sources.

"Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous".

Article 20 on adoption, kafalah, or institutional placement of the child states that "...due regard shall be paid to the desirability of continuing in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".

Article 20 on education includes among the directions of education both the promotion of cultural identity and the promotion of cultural pluralism for the child "... the development of...his or her own cultural identity, language and values... and for Civilisations different from his or her own".

Article 23 on mentally or physically disabled children provides that the disabled child shall have effective access to and receive "...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".

Article 29 on the right to education and its aims includes in the aims "the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values in which the country is living, the country from which he or she may originate, and for Civilisations different from his or her own".

Article 30 states that a child belonging to a minority or who is indigenous "... shall not be denied the right, in community with other members of his or her group, to enjoy his or her culture, to profess and practice his or her religion, or to use his or her language".

Article 31 recognizes "...the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

"2 States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity".

violation of national law and contrary to international standards.

2. should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.

3. should, where appropriate, take measures in the field of education, in order to encourage knowledge of the history, traditions, language and culture of the minorities existing in their territory. Persons belonging to minorities should have adequate opportunities to gain knowledge of society as a whole".

Turning to regional human rights instruments, Article 17 of the the African Charter on Human and Peoples' Rights recognizes that "*every individual may freely take part in the cultural life of his community*. The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988, Protocol of San Juan) recognizes cultural rights in similar terms to the UDHR and the ICESCR.

The European Convention on Human Rights does not explicitly provide for the protection of cultural rights, but some of its articles, such as those on freedom of expression, freedom of thought, conscience and religion, as well as the non-discrimination clause, are relevant to the free participation in cultural life. The Framework Convention for the Protection of National Minorities clearly recognizes cultural rights and establishes specific obligations on States regarding their respect, protection and fulfilment.

Normative elements of the right to participate in cultural life applicable to all

An analysis of the above-mentioned instruments and the practice of international human rights bodies reveal the following normative elements of the right to participate in cultural life:

a) non-discrimination and equality
b) freedom from interference with the enjoyment of cultural life/freedom to create and contribute to culture
c) freedom to choose in what culture(s) to participate
d) freedom of dissemination
e) freedom to cooperate internationally
f) right to participate in the definition, preparation and implementation of policies on culture

Other rights connected to the right to participate in cultural life:

a) right to life,
b) freedom of movement,
c) right to participate in the conduct of public affairs,
d) right to an adequate standard of living, healthcare, food and housing,
e) right to rest and leisure,
f) right to education (itself a cultural rights, but also an economic, social, civil and political right) and others.

The rights to participate in cultural life are a true demonstration of the interdependence of all human rights.

Elements of the right to participate in cultural life in connection with minorities: the practice of international human rights bodies

A border between the individual and the group is that an individual within a minority is free to exercise or not to exercise her rights as minority person, i.e. the cultural autonomy of the individual is recognized. Also, within the minority, the internationally recognized rights of its members must be respected. According to the Document of the Copenhagen Conference on the Human Dimension of the Conference on Security and Cooperation in Europe[13], paragraph 38, "...States, in their efforts to protect and promote that rights of persons belonging to national minorities, will fully respect their undertakings under existing human rights conventions and other relevant international instruments...". Paragraph 32 states that "to belong to a national minority is a matter of a person's individual choice and no disadvantage may arise from the exercise of such choice" and "no disadvantage may arise for a person belonging to a national minority on account of the exercise or non-exercise of any such rights". A similar provision is included in Article 3 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. This Declaration also provides, in Article 4, that the expression by minorities of their special characteristics are limited when "...specific practices are in violation of national law and contrary to international standards".

Human rights treaty bodies have shown concern over various aspects of cultural rights related to minorities. Apart from its case law, the Human Rights Committee has been thorough in its monitoring of cultural rights of minorities when it discusses the periodic reports of States Parties under the International Covenant on Civil and Political Rights. The Committee has paid particular attention to linguistic rights[14], protection of sites of religious or cultural significance[15] as well as protection of cultural rights of non-citizens and immigrant communities[16].
The Committee on Economic, Social and Cultural Rights has paid attention to the lack of opportunities for education of minorities in their own languages[17], non-discrimination in national legal frameworks[18], and the need for steps to safeguard the cultural identity and heritage of ethnic groups[19].

The Committee on the Elimination of Racial Discrimination has systematically focused on linguistic rights of minorities, indigenous peoples and migrants in education as well as in the

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13 *Supra 9.*

14 *For example A/56/40, paragraph 79(5) where the Committee welcomes Uzbekistan's language policy whereby education at all levels is offered in ten languages, including the languages of the minority groups.*

15 *For example A/55/40, paragraph 510 regarding Australia.*

16 *For example A/54/40, paragraph 155 regarding the Korean minority in Japan; A/49/40, regarding migrants in Slovenia.*

17 *For example E/2000/22, paragraph 231 regarding Bulgaria.*

18 *For example E/1998/22, paragraph 79 regarding Zimbabwe.*

19 *For example E/1997/22, paragraph 209 regarding Guinea.*

media[20]. The Committee has also paid attention to the following aspects of cultural rights related to groups:

a) use of minority languages in administration[21] and health services[22],
b) measures for regaining linguistic and cultural identity[23],
c) preservation of cultural identity of minorities[24],
d) policies to ensure that tribal people live according to their original customs[25],
e) prevention of the illegal export of indigenous art[26],
f) promotion of multicultural training for teachers[27],
g) enactment of legal provisions to preserve the existence, culture and traditions of minorities[28],
h) teaching the history of different ethnic groups and cultures at schools[29],
i) concern over budget cuts for the education in a mother tongue[30],
j) concern over assimilation[31],
k) concern over different levels of protection to different groups[32], culture, traditions[33],
l) concern over the lack of statistical and qualitative data on the demographic composition of the population[34], cultural autonomy[35] and regional cultural development[36].

Minorities must be free to have their own institutions on cultural matters and to participate in cultural decision-making: this message resonates systematically in international instruments and practice. Transparent and participatory democracy and pluralism are the vehicles for the respect of cultural rights in their collective aspect. International human rights instruments and the practice of the Human Rights Committee, the bodies of the OAS and the OSCE are consistent on this matter. The Document of the Copenhagen Meeting of the Conference on

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[20] *For example A/44/18, paragraph 51 regarding France, paragraph 64 regarding Mexico, paragraph 89 regarding Venezuela, paragraph 113 regarding Poland, paragraph 145 regarding Norway, paragraph 193 regarding Niger, A/48/18, paragraph 75 regarding Algeria, paragraph 116 regarding Sudan, paragraph 185 regarding Poland, paragraph 519 regarding Yugoslavia and paragraph 523 regarding Bulgaria.*

[21] *For example A/45/18, paragraph 133 regarding Czechoslovakia.*

[22] *For example A/46/18, paragraph 234 regarding Australia.*

[23] *For example A/51/18, paragraph 111 regarding Hungary.*

[24] *For example A/48/18, paragraph 113 regarding Poland.*

[25] *For example A/45/18, paragraph 73 regarding Bangladesh.*

[26] *For example A/45/18, paragraph 246 regarding New Zealand.*

[27] *For example A/45/18, paragraph 273 regarding the Byelorussian SSR.*

[28] *For example A/46/18, paragraph 68 regarding the Ukrainian SSR.*

[29] *For example A/46/18, paragraph 101 regarding Burundi.*

[30] *For example A/46/18, paragraph 214 regarding Sweden.*

[31] *For example A/46/18, paragraph 136 regarding Ecuador.*

[32] *For example A/48/18, paragraph 431 regarding Germany.*

[33] *For example A/50/18, paragraphs 490-492 regarding El Salvador.*

[34] *For example A/51/18, paragraph 43 regarding Colombia.*

[35] *For example A/51/18, paragraph 111 regarding Hungary.*

[36] *For example A/53/18, paragraph 405 regarding Morocco.*

the Human Dimension of the CSCE (1990), in paragraph 33 states that the participating States will protect the ethnic, cultural, religious and linguistic identity of national minorities in their territory and create conditions for the promotion of that identity; they will take measures to that effect after due consultations, including contacts with organizations or associations of such minorities, in accordance with the decision-making procedures of each State.

Sometimes the concept of self-governance and internal self-determination is evoked in connection with cultural rights of minorities or indigenous peoples. In the doctrine developed by the OSCE High Commissioner on National Minorities, Max Van der Stoel, internal self-determination can also have a non-territorial character (sometimes referred to as personal, cultural or extra-territorial autonomy). The United Nations Working Group on Minorities has also discussed the issue in a similar vein, indicating that cultural autonomy effectively seeks to protect a culturally defined, rather than a territorially defined, group, through the right to self-rule or self-management[37]. This type of autonomy or self-governance is useful when the minority population is widely dispersed within a State and could relate, *inter alia*, to the use and official recognition of names in minority languages, the right to use their own symbols, to determine their own education curricula for teaching in minority languages and other forms of cultural expression[38]. The Committee on the Elimination of Racial Discrimination has also supported cultural autonomy of minorities[39].

One of the most significant features of cultural rights of indigenous peoples and minorities are those linked with language. The collective use or the public use of minority languages is crucial, especially in schools, but also the media, the courts, the administration, if a person's individual right to her language is to be respected. Minorities are still victims of assimilationist policies that often lead to the disappearance of languages and cultures. In some countries minority languages have been recognized as national languages, in others they are only tolerated. The Committee on Economic, Social and Cultural Rights has stated that, among the specific legal obligations of States regarding the right to education, is to fulfil the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all[40]. The balance between the legitimate need of the State for some degree of linguistic uniformity and of minorities for the practical and/or symbolic recognition of their languages may not be easy to determine, but good faith efforts to arrive at such a balance are essential to maintain intra-state harmony[41].

Education in the mother tongue is one of the most desired aspects of linguistic rights, but with difficulties regarding commitment of resources and specialized teacher training. The international human rights instruments clearly recognize linguistic rights and international

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[37] *E/CN.4/Sub.2/2001/22.*

[38] *Walter Kemp ed., "Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities", 2001, Kluwer Law International, The Hague/London/Boston, p. 110.*

[39] *For example A/51/18, paragraph 111 regarding Hungary, where the Committee commends the government for its new policy "based on the principles of preservation of their self-identity, special preference treatment and cultural autonomy".*

[40] *General Comment no 13 on the right to education, Article 13 of the Covenant, E/2000/22, paragraph 50.*

[41] *Hurst Hannum, Autonomy, Sovereignty, and Self-Determination: The Accomodation of Conflicting Rights, 1992, University of Pennsylvania Press, Philadelphia.*

human rights procedures pay special attention to them, including the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. In terms of education in the mother tongue, the State's obligations are to facilitate access and opportunity to such education[42] and to involve the full participation of the groups concerned in the decisions and policies affecting language and education in the mother tongue. The Special Rapporteur on the right to education has pointed out that the right to be educated in one's mother tongue has been on the international human rights agenda since the 1950s and controversies intensified in the 1990s", that "the financial implications of multilingualism have further exacerbated the existing controversies", and that demands that minority schools be made "free", i.e. State-financed, are often made but seldom granted[43].

Religion is closely linked to culture and therefore respect for freedom of religion is an important element for the right to participate in culture not only of religious minorities but also of national or ethnic minorities. The international human rights instruments are clear on this subject. Limitation to religious practices is permissible when they violate internationally recognized human rights.

Public information and the education of the larger society about minorities are also viewed as crucial. Minorities should have access to mainstream media and the media should refrain from exploiting or sensationalizing their heritage. School curricula and textbooks should teach understanding and respect for their heritage. Policies should support the translation of literature from minority languages into the majority languages in order to enhance mutual understanding.

Another significant additional element regarding cultural rights of minorities is their contact with their kin beyond national boarders. This is recognized in the Copenhagen Document, paragraph 32.4 and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Article 2. This aspect of cultural rights acquires particular significance given the suspicion that is often prevalent between neighbouring States whose kin-Minorities live in the other's territory, suspicion sometimes dipped in painful histories. However, it is in these cases that the freedom for international cultural cooperation so clearly enshrined in international instruments is especially relevant. Multiethnic society is a reality that one cannot "solve"[44], it is part of our world and here to stay, irrespective of national boarders often drawn by might arbitrarily during the times of colonialism and empires. Being a minority should not be felt as being in a cage, with freedom of movement and contact with kin-Communities suspected, implicitly or explicitly discouraged or simply suppressed. Such confinement would only be likely to create frustration and simmering tensions. Free cultural cooperation with kin-Communities across boarders is key to the respect of cultural rights and also to the preservation of peace and understanding between peoples and States.

To fulfil the cultural rights of groups means the State taking positive measures and committing resources. Defining the parameters of the obligation to fulfil is no easy matter.

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[42] *For example, Article 45 of the Convention on the Rights of Migrant Workers and Members of Their Families, paragraph 34 of the Copenhagen Document, Article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Stronger language is included in terms of State obligations on the Draft Declaration on the Rights of Indigenous Peoples, Article 15.*

[43] *E/CN.4/1999/49, paragraph 66.*

[44] *Ibid, p.106.*

Difficulties include lack of or limited resources and the major question of distribution of resources. Any assessment on whether the State has discharged the above-mentioned minimum core obligations must take into account the resource constraints applying in the country concerned and it is up to the State to demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations[45].

SUMMARY

I have argued above, based on international instruments, the practice of international human rights bodies and international law literature that there are six main characteristics of cultural rights pertaining to minorities in international law. I will cite them and indicate the possible role of a kin-State in each case.

a) The State and its agents have the obligation to respect the freedom of persons belonging to minorities and minority groups to freely participate in cultural life, to assert their cultural identity and to express themselves culturally in the way they choose, i.e. the authorities must not interfere with this freedom unless conditions under (b) below are present. The State, within the purview of its regular discharge of police and justice functions, must also protect such free participation in cultural life from others, i.e. prevent their violation by third parties, whether they are individuals, groups, corporations, or economic interests, domestic or foreign. The principles of non-discrimination and equality must guide the State's actions, in accordance with Article 2(2) of the ICESCR. The State must establish laws and policies regarding non-discrimination in the enjoyment of cultural rights. Equality will not amount to forced assimilation. Special positive measures by the State to secure advancement of minorities, i.e. affirmative action, are allowed. The positive actions of the State for the fulfilment of cultural rights, i.e. in terms of the provision of resources, subsidies, etc, will be guided by the principle of non-discrimination. If the State does not have adequate resources to respond to its obligation to fulfil, it should explore the possibility of international assistance.

Role of kin-State: If the kin-State has a high level of performance towards minorities in its own territory, this would be expected to have a positive impact on policies of its neighbours. Contacts between kin-State and territorial State at a political and technical level to discuss appropriate measures for minorities under the International Law standards could also be positive. In addition, if the territorial State requests assistance which the kin-State can provide, this can also help the fulfilment of minorities' cultural rights.

b) International norms prohibit the exercise of cultural practices that contravene internationally proclaimed human rights. States should thus adopt preventive and corrective policies and measures and promote awareness of this problem so that such practices can stop.

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[45] *General Comment no. 3 of the CESCR on the nature of States parties obligations, Article 2 (1) of the Covenant), E/1991/23 Annex III. In an excellent discussion of the report of Sweden in 1992 (and exceptional in the sense of the attention given to cultural rights), the Committee asked whether underpriviledged groups were the same as the minority groups, including the Sami and immigrants; whether the government had taken any steps to ease the marginalization of the Gypsy population; whether the reported 0.7% of the national budget allocated to cultural activities was sufficient to attain the objectives of the Covenant; whether the aim of subsidies to large cultural institutions was to make the activities more affordable for the majority of people or simply maintain them; whether there was any government policy to subsidize sports (E/1992/23, paragraph 248).*

Role of kin-State: The kin-State should not consider such policies and measures as undermining the identity of the kin-minority or as an effort of assimilation, but should understand them as being dictated by the international human rights instruments, and should therefore abstain from any statements and actions indicating a negative understanding.

c) Individuals living within groups are free to participate or not to participate in the cultural practices of the group and no negative consequences may ensue because of their choice. In other words, the cultural autonomy of the individual is recognized.

Role of the kin-State: As under (b) above, the kin-State must understand that this matter is under the purview of international law and must abstain from declarations and actions indicating a negative understanding.

d) The cultural rights of minorities consist of: the right to education; the right to use their language in private life and various aspects of public life, such as before judicial authorities and to identify themselves as well as place names; the right to establish their own schools; access to mother tongue education to every extent possible; access to the means of dissemination of culture, such as the media, museums, theatres, etc, on the basis of non-discrimination; the right to practice their religion; the freedom to maintain relations with their kin beyond national boarders and the right to participate in decisions affecting them through their own institutions.

Role of the kin-State: These are elements where the kin-State could play a positive role, especially in the area of language and education, through technical exchanges and cooperation between kin-State and territorial State. Both States should facilitate the free movement across boarders for contacts between kin-Communities. Reciprocity, meaning an equally positive treatment of kin-Minorities of the neighbouring State, wherever this is applicable, would be expected to play an important role as well.

e) Minorities have the right to pursue their cultural development through their own institutions and via those they have the right to participate in the definition, preparation and implementation of cultural policies that concern them. The State must consult the groups concerned via democratic and transparent processes.

Role of the kin-State: This particular right to participate touches the core of a democratic polity and should be exercised effectively by the minorities concerned. It should not need any reminders by a kin-State, as such "reminders" could touch on the political sensitivity and fears of the territorial state and promote defensive reactions.

f) The education of the larger society about cultural diversity and minority cultures must also be pursued by the territorial State. The media and other institutions should play a special role in promoting this knowledge.

Role of the kin-State: This is an area where cultural and scientific exchanges between kin-State and territorial State could be useful. At the same time, it should be kept in mind that knowledge about a minority culture is not the same as about its kin-State culture. Societies and groups, develop differently under different socio-political, historical circumstances. For this reason it is crucial for the minority concerned to participate itself actively in describing its identity and what knowledge should be divulged about it.

CONCLUSION

Over the past fifty years, the development of international human rights law has helped the international community get beyond a peculiar "jus sanguinis" of kin-Ship. Primary responsibility for the protection of all persons in its territory lies with the State. International human rights instruments, treaties in particular, provide a solid basis for the respect of the rights of persons belonging to national or ethnic, religious and linguistic minorities. International instruments also provide the ground for reciprocity between countries that have national minorities in each other's territory. A visible commitment of States to those instruments as well as their international monitoring by established mechanisms is the foundation for the building of trust, cooperation and peace among States. No bilateral agreement can provide an excuse for the territorial State to avoid its legal obligations for which it has primary responsibility, namely to respect, protect and fulfil the human rights of all persons, including persons belonging to minorities, living within its borders. As the OSCE High Commissioner on National Minorities stated in October 2001, "[A] bilateral approach should not undercut the fundamental principles laid down in multilateral instruments"[46]. Nor should preferential treatment by kin-States result in discrimination on the basis of national origin in kin-States themselves or in territorial States.

Given the complexities and ever-changing map of modern migrations, the provision of preferential treatment to historical kin-Minorities is not easily sustainable, either politically or legally. It is doubtful to what extent and for how long preferential treatment of a kin-Minority can be considered as lawful and respectful of the principle of non-discrimination - if it is legal at all. International bodies, including the European Court of Human Rights and the Human Rights Committee, increasingly tend, when considering the issue of minorities, to equate migrants with minorities, especially in terms of respect of their identities and in terms of non-discrimination. It is therefore preferable to envisage, not a preferential treatment of a minority by a kin-State, but, rather, a role of a kin-State. Such role must be within the parameters of the international human rights legal framework provided by the international human rights instruments. Such a role of assistance by the kin-State is conditional upon the agreement of the territorial State.

The area in which it is more understandable and acceptable for the kin-State to demonstrate an interest is that of cultural rights. The elements of those rights have been summarized above. Extension of the role of the kin-State into other areas would raise serious questions in terms of respect of the principle of non-discrimination.

For the sake of peaceful societies and peaceful relations among States, the vision of public policies should be away from sustaining, encouraging or creating myths of a cultural or "blood" purity of society. Public policies should rather focus on the re-shaping of national identities to include today's multicultural realities.

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[46] *UN doc. E/CN.4/Sub.2/AC.5/2002/WP.4, Annex 2.*

BILATERAL APPROACH TO THE PROTECTION OF KIN-MINORITIES[1]

Mrs Emma LANTSCHNER and Mrs Roberta MEDDA,
Experts, Italy

The protection of minorities through bilateral agreements does not represent a new phenomenon in international law, as this instrument has already been used in previous centuries. In the twentieth century the protection of national minorities became predominant due to the creation of new borders after each of the World Wars. After World War I, most bilateral agreements were incorporated into different peace treaties. The treaty between Finland and Sweden on the status of the Åland Islands (1921) is, however, the only treaty to have survived the League of Nations era. The idea of minority protection through bilateral agreements reappeared after World War II, for example in the Austro-Italian agreement on the status of South Tyrol (Gruber – De Gasperi Agreement of 1946). Furthermore, as a result of bilateral negotiations, the situation of minorities on both sides of the German-Danish border was regulated through unilateral declarations of 1955 by Germany and Denmark on the respective rights of the Danish and German minority.[2]

Bilateral agreements appear again with the break-up of the communist regimes in Central and Eastern Europe which led many countries to the conclusion of agreements on good neighbourly relations. These agreements aim, on one hand, to guarantee stability in the newly formed democracies by ensuring, amongst other matters, respect of existing borders and settlement of long lasting disputes. On the other hand, they establish commitments regarding the protection of national minorities living on their territory.

The approach in the use of the bilateral instrument as a means of dealing with the issue of minority protection has changed over the years. Whereas the earlier treaties on minorities (following World War I and World War II) refer to minorities as such and include different concepts and provisions of autonomy, the bilateral treaties concluded mostly in the nineties in Central and Eastern Europe explicitly focus upon individual rights and provide individuals belonging to national minorities with certain rights. However, as stated also by Gál, the examples of the Åland Islands and South Tyrol prove that bilateral agreements may be suitable for establishing autonomies and/or a special status for regions inhabited by national minorities, or for establishing personal autonomy where the minorities live dispersed.[3]

As the recent case of the very much discussed Hungarian Status Law[4] has shown, this classical State-to-State approach, characterised by the principles of territorial sovereignty and

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1 *Parts of this paper are drawn from: Emma Lantschner and Roberta Medda, Protection of National Minorities through Bilateral Agreements in South Eastern Europe, in Arie Bloed, Rainer Hofmann, Joseph Marko, Marc Weller (eds.), European Yearbook of Minority Issues,Volume 1, 2001/02, Kluwer Law International, 2002.*

2 *Kinga Gál, Bilateral agreements in Central and Eastern Europe: A New Inter-State Framework for Minority Protection? ECMI working paper 4, 1999, pp. 2-3.*

3 *ibid., p. 22.*

4 *Act LX1I of 2001 on Hungarians Living in Neighbouring Countries.*

equal citizenship, now seems to be challenged by another, 'post-modern' approach which aims at institutionalising a relationship between States and individuals who are *neither* their citizens *nor* their residents, creating thereby an alternative to the 'modern' territorial State and its citizenry as the sole means of organising political space. However, international community continues to keep high the primacy of territorial statehood and State-to-State relations, thereby backing efforts made at the bilateral level to settle minority issues.[5]

The present article will not deepen this approach but aims in its first part to draw a picture of existing bilateral agreements for the protection of minorities in South Eastern Europe. The second part will briefly describe the rights included in these agreements, whereas the third part will focus upon the monitoring mechanisms foreseen in such arrangements. Chapter four will examine the role of on the one hand, the kin-State and on the other, the international community. Finally, the strengths and weaknesses of bilateral agreements will be summarised.

I. The Agreements[6]

The focus of this paper will be mainly upon the treaties concluded by Hungary and Romania with their respective neighbours, among others Slovenia, Croatia, Slovakia, Albania, Bulgaria, the Federal Republic of Yugoslavia, and sometimes also with other countries in South-Eastern Europe. These treaties were concluded in the beginning and the middle of the nineties, partly promoted by the European Union's Pact on Stability.[7]

1. General remarks

Hungary, alongside Germany, was one of the countries that pursued with more consistency than others a policy of concluding agreements on good neighbourly relations. Both were not only concerned by the protection of their co-ethnics in neighbouring States, but also by the consolidation of the existing borders. The German-Polish Agreement is often regarded as a

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[5] *For more details on this new approach, see Brigid Fowler, Fuzzing citizenship, nationalizing political space: A framework for interpreting the Hungarian 'status law' as a new form of kin-State policy in Central and Eastern Europe, Working Paper 40/02, Centre for Russian and East European Studies, European Research Institute, University of Birmingham, 2002.*

[6] *See appendix to this Article for a list of bilateral agreements touching upon minority rights in Albania, Bosnia and Herzegovina (at Entity level), Bulgaria, Croatia, the Federal Republic of Yugoslavia, Hungary, Moldova, Romania and Slovenia. For the full text of the Hungarian agreements, see http://www.htmh.hu/bilat-frame.htm. For the texts of other agreements see also Fernand de Varennes, Language, Minorities and Human Rights, The Hague/Boston/London, 1996; Arie Bloed and Pieter van Dijk (eds.), Protection of Minority Rights through Bilateral Treaties. The Case of Central and Eastern Europe, The Hague/Boston/London, 1999; Emma Lantschner and Roberta Medda, "Protection of National Minorities though Bilateral Agreements in South-Eastern Europe", Draft Report and Collection of Agreements prepared for the Council of Europe, 2001.*

[7] *The Pact on Stability (not to confound with the Stability Pact for South Eastern Europe) is also known as the "Balladur Plan" because it was proposed by the French Prime Minister Edouard Balladur. The Pact was adopted by the representatives of 52 member states of the OSCE at the conference held in Paris on 20-21 March 1995. It consists of a Declaration and a list of bilateral agreements which the participating states decided to include. For more details on the Pact on Stability, Declaration and Agreements included, see Florence Benoît-Rohmer, The minority question in Europe, Council of Europe Publishing, 1996, p. 30-36 and p. 81-90.*

"model agreement" providing a wide range of minority rights. Many of the agreements concluded between other States are modelled on this treaty.

In most cases the provisions enshrined in the agreements refer to the respective kin-Minority. Sometimes this personal scope is clearly stated in the text; in some other cases this definition is only implicit. As a consequence, other minorities living in the countries concerned cannot benefit from these provisions. This can partly be alleviated by the fact that they have their own kin-State, who potentially could conclude a similar agreement. However, minorities without a kin-State will remain excluded from the possibility of benefiting from a kin-State's advocacy for their interests and might be placed into a less favourable position.

Usually, minority issues are regulated by one or two extensive provisions included in more comprehensive agreements on good neighbourly relations and friendship. There exist only a few agreements between two States dealing solely with the minority issue. This is for example the case of the 'Convention providing special rights for the Slovenian minority living in the Republic of Hungary and the Hungarian minority living in the Republic of Slovenia' (November 1992). The Hungarian-Slovenian treaty on Friendship and Co-operation (December 1992) makes reference to this earlier Convention. According to article 16 of the treaty, the Convention is a legally binding document. The 'Treaty on the Bases of Good-neighbourhood and Co-operation between the Republic of Hungary and Ukraine' (December 1991) followed in time and made reference to the 'Declaration on the Principles of Co-operation in Guaranteeing the Rights of National Minorities' between Hungary and the Ukraine (May 1991). In the case of Croatia, Hungary concluded first a treaty on co-operation, leading later to the conclusion of a similar Convention as with Slovenia.[8]

The standards set up by international organisations, such as UN, OSCE and Council of Europe, serve essentially as a basis for the drafting of provisions concerning minorities in bilateral agreements. The most often quoted documents are the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (1992), the relevant OSCE documents in general, and the Concluding Document of the Copenhagen Meeting of the Conference on the Human Dimension (1990) in particular, Article 27 of the International Covenant on Civil and Political Rights (1966), and the Recommendation 1201 (1993) on an additional protocol on the rights of national minorities to the European Convention on Human Rights of the Parliamentary Assembly of the Council of Europe. In some of the most recent agreements, reference is also made to the Framework Convention for the Protection of National Minorities.

In many cases the agreements refer to and/or use phrases that are evidently borrowed from standards set out in these instruments. According to Bloed and van Dijk, "except in cases where a bilateral treaty provides for a level of protection that is higher than in the (…) multilateral standards, the bilateral treaty's reference to multilateral standards is to be preferred over a separate, detailed formulation of each specific right", even if comparable or identical. There would otherwise be a danger of diverging interpretations and the suggestion that unincorporated elements or provisions do not apply.[9]

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8 *Gál, op. cit., at p. 8.*

9 *Bloed/van Dijk, op. cit., at p. 14.*

Restrictive interpretations of mostly the same provisions of bilateral agreements on collective rights and autonomy do not detract from the fact that a political document, such as the Recommendation 1201, becomes legally binding once incorporated into a bilateral treaty.

2. Recent developments

The countries of the former Yugoslavia have not yet made much use of bilateral instruments. In the case of "the former Yugoslav Republic of Macedonia" the main hindrance lies in the fact that the Macedonians are not recognised as a national minority by any neighbouring country, except Albania.[10] A recent treaty on friendship and cooperation has been concluded with Romania.[11] Within this treaty, parties commit themselves to the highest international standards in the protection of ethnic, cultural, linguistic and religious identity of persons belonging to national minorities, making reference to the Framework Convention for the Protection of National Minorities of the Council of Europe (hereinafter 'Framework Convention') and relevant documents of the OSCE and the United Nations. Furthermore, the parties affirm that the belonging to a national minority is an individual choice and that persons belonging to such minorities have the right to establish their own cultural and other institutions. Persons belonging to a national minority are required to respect national legislation as any other citizens of the State concerned.

Apart from the treaty concluded with Romania, the year 2001 has seen the signature of the Agreement between the "former Yugoslav Republic of Macedonia" and the Federal Republic of Yugoslavia[12] on the demarcation and determination of borders as concluded on 23 February 2001. As discussed below, the border issue is often raised alongside the question of minorities, as a result of the concern of individual States to safeguard their territorial integrity. The signature of the agreement between the "former Yugoslav Republic of Macedonia" and the Federal Republic of Yugoslavia should be seen as an expression of good political will and commitment to solve the continuing problems between the two countries.

Bosnia and Herzegovina has so far concluded no bilateral agreement with neighbouring countries. Agreements of Special Parallel Relations have instead been concluded by the two entities: the Federation of Bosnia and Herzegovina with Croatia[13] and Republika Srpska with the Federal Republic of Yugoslavia.[14] Both of these agreements aim primarily at establishing economic cooperation and reconstruction, but touch also upon education and culture,

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[10] *Macedonians are officially recognised as national minority in Albania. Nevertheless, the last census of 2001, unlike the census in 1989, did not contain a question about ethnicity. For this reason, the Macedonian (and Greek) minority decided to boycott the census. It is therefore difficult to receive reliable statistical data about their numerical strength and geographic distribution.*

[11] *Treaty on Friendship and Co-operation between Romania and "the former Yugoslav Republic of Macedonia", signed in Bucharest, 30 April 2001.*

[12] *Since the signing of the Agreement entitled "Proceeding Points for the Restructuring of Relations between Serbia and Montenegro" on 14 March 2002, the name of the new state union has been Serbia and Montenegro. In the following text, the previous name will be used in the context of agreements concluded before that date.*

[13] *The Agreement on Special Relations between the Republic of Croatia and the Federation of Bosnia and Herzegovina was concluded in Zagreb, on 22 November 1998. Full text to be found at http://www.ohr.int/docu/d990512a.htm.*

[14] *The Agreement on the Establishment of Special Parallel Relations between the Federal Republic of Yugoslavia and Republika Srpska was signed in Banja Luka on 5 March 2001.*

information and, in the case of the agreement concluded by the Federation of Bosnia and Herzegovina with Croatia, also upon the development of regional and local administration and self-rule.

Even if the Dayton Agreement grants the right for Special Parallel Relationship Agreements to be concluded between an entity and a neighbouring State (providing that this is consistent with the sovereignty and the territorial integrity of Bosnia and Herzegovina), it is desirable that efforts in the field of bilateral relations and good neighbourliness are made at State level. Croatia has expressed its desire to focus on relations with Bosnia and Herzegovina as opposed to the Federation of Bosnia and Herzegovina. The Agreement on Special Relations between Croatia and the Federation is therefore essentially defunct. During a meeting of the Bosnia and Herzegovinian Presidency with a Croatian Parliamentary delegation in early November 2001 the idea of drafting a general bilateral agreement, which would define all relations between the two countries, has been discussed.

Croatia, Serbia and Montenegro are considering talks or are already negotiating on bilateral agreements on the protection of minorities with their neighbours. This tendency in the countries of former Yugoslavia is quite useful to create a legal framework in which these countries could assist each other in the reconstruction of their economy and civil society.

II. Substantive Rights included in the Agreements

This part will provide a brief comparative analysis of the above-mentioned agreements with regard to their provisions concerning minorities.[15]

1. The right to identity

The right to identity is one of the basic rights granted to minorities. It protects minority cultures and codifies the international understanding of the necessary legal framework which permits cultures to survive and develop.[16] Article 5(1) of the Framework Convention takes this importance into account.[17] The right to identity is expressed in different degrees in most of the analysed treaties. In some of the agreements the parties "commit themselves to apply the international standards regarding the protection of the ethnic, cultural, linguistic and religious identity of the persons belonging to national minorities and to undertake no activities which do not comply with this treaty".[18] Others apply a stronger language, stating that "persons belonging to national minorities shall have the right, individually or in community with other members of their group, to express, maintain and develop their ethnic,

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[15] *Note that this report does not take into consideration the agreements on co-operation in the fields of Culture and Education. Croatia, for example, has concluded Agreements on the co-operation in the field of Culture and Education with, amongst others, Romania (1993) and Slovenia (1994). Albania concluded an Agreement on Cooperation in the Fields of Education, Culture and Science with Slovenia in 1993. In 2001 an agreement on culture has been concluded by Slovenia with Austria.*

[16] *Patrick Thornberry, "Hungarian Bilateral Treaties and Declarations", in Bloed/van Dijk, op. cit., at p. 147.*

[17] *Article 5(1) states: "The Parties undertake 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, namely their religion, language, traditions and cultural heritage."*

[18] *Article 17(3) of the Romanian-Croatian treaty; Article 20(2) of the Romanian-Federal Republic of Yugoslavia treaty; Article 20 of the Romanian-Slovak treaty; Hungarian-Bulgarian Declaration.*

cultural, linguistic or religious identity."[19] The treaty between Ukraine and Moldova adds "the right to be safe from any attempts of assimilation against their will."[20] In addition, the Hungarian-Slovak[21] and the Hungarian-Croatian[22] treaties contain the provision that the parties will refrain from any assimilation or alteration of the proportions of the populations in areas inhabited by persons belonging to national minorities.[23]

2. Linguistic rights

Linguistic rights are included in all bilateral agreements concluded by Hungary.[24] The exact content of these rights goes from the right to use one's mother tongue in private and public to the right to register and use the names and surnames, to display topographical indications, and to use the minority language in contacts with public administration and justice. The size of a minority group within a territorial unit and its claims are decisive, especially regarding the right to use the minority language in contacts with local authorities and justice.

Article 4 of the Hungarian-Slovenian Convention combines all the aforementioned rights. This article contains similar wording to Articles 10 and 11 of the Framework Convention. A difference can be seen in the fact that the Hungarian-Slovenian Convention foresees as a condition for the exercise of the right that the territory is "historically inhabited by their respective minorities", whereas for the Framework Convention the presence of a minority in "substantial numbers" is sufficient, hence there is no need for further recourse to historical presence.

The restrictive wording "in conformity with domestic legislation", found in other treaties, particularly with regard to the right to use the mother tongue in administration and justice,[25] considerably reduces the effectiveness of the provisions by leaving room for implementation to be circumvented.

3. Education rights

The right of education is not necessarily associated with the question of language. In addition to the right to learn or be taught in the minority language, a general compulsory curriculum

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19 *For example Article 15(2) of the Romanian-Hungarian treaty, Article 15(2)(c) of the Hungarian-Slovak treaty.*

20 *Article 7(2)*

21 *Article 15(2)(d)*

22 *Article 9(2)*

23 *Article 16 of the Framework Convention takes position on this issue: "The Parties shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework Convention."*

24 *Article 9 of the Hungarian-Ukrainian treaty (does not include the right to use the minority language in relations with public administration and justice); Article 4 of the Hungarian-Croatian convention; Article 4 of the Hungarian-Slovenian convention; Article 15(2)(g) of the Hungarian-Slovak treaty; Article 15(3) of the Romanian-Hungarian treaty.*

25 *For example Article 15(3) of the Romanian-Hungarian treaty.*

should be developed, which also includes the teaching of the history, culture and tradition of national minorities and is worked out in co-operation with representatives of these groups.[26]

An extensive provision can be found in Article 2 of the Hungarian-Slovenian Convention. All Hungarian treaties and the Romanian treaty with Albania contain, if not the same strong wording, at least the provision, that persons belonging to minorities shall have the right to be taught in their language. The rights are often based upon the demands of the minorities. The right to be taught in one's mother tongue is often coupled with the requirement that this must not prejudice the learning of the official language or the teaching in this language.[27] This provision exactly reflects the content of Article 14(3) of the Framework Convention.[28] The Moldovan treaties with Bulgaria and Ukraine and the Romanian treaties with Bulgaria and the Federal Republic of Yugoslavia just assure the right to learn the minority language.

The mutual recognition of school certificates and academic degrees comes within the context of education. The Hungarian-Romanian treaty only envisages a separate agreement in this field.[29] The Slovak treaty provides for recognition "on the basis of the respective agreements", of diplomas "issued in accordance with the respective domestic legislation." Also the Romanian-Federal Republic of Yugoslavia agreement leaves the regulation to a specific agreement. None of the other bilateral agreements even addresses the issue.

4. Media

Provisions on media can contain the following: access to public media and minorities' own media for dissemination and exchange of information in the minorities' mother tongue, access and ability to apply to printed materials, radio and television, co-operation among the mass media, concrete measures and support for initiatives to facilitate access to culture. Article 9 of the Framework Convention contains a wide range of principles regarding media.

The treaty between Moldova and Ukraine includes a provision according to which the identity of the respective minorities can be developed through "providing favourable conditions for (…) radio and television programmes in the mother tongue"[30]. The provisions of the Hungarian treaties with Croatia, Ukraine, Slovenia, Slovakia and Romania are all similar and include the right of both minorities to receive information through printed media, radio and TV broadcasts in their mother tongue. In compliance with their domestic legislation, the Parties shall enable regular radio and television broadcasts in their mother tongue in an appropriate length of time, encourage the adoption and distribution of radio and television programs of the mother nation and support the minorities to exercise their own information activities.

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[26] *See the Hague Recommendations Regarding the Education Rights of National Minorities, October 1996.*

[27] *Article 15(2)(g) of the Hungarian-Slovak treaty.*

[28] *Article 14(2) states, that persons belonging to national minorities should have, under certain conditions, "adequate opportunities for being taught the minority language or for receiving instruction in this language." Paragraph 3 adds that "Paragraph 2 of this Article shall be implemented without prejudice to the learning of the official language or the teaching in this language."*

[29] *Article 12(5)*

[30] *Article 8*

In addition to facilitate the minority media, home-states should take care of avoiding the use of hate speech and prejudice in public media, which increases the potential for violence between majority and minority groups.

5. The right to establish organisations

The right to establish and run their own organisations, associations, as well as educational, cultural and religious institutions is also granted in most of the treaties. The possibility of organising itself is essential for strong representation and effective participation of minorities in public life. The Romanian-Slovak treaty contains a provision according to which the right to establish their own organisations, must not be used against the interest of the other contracting party.[31] Only few bilateral agreements include the right of minorities to establish political parties.[32] This point leads immediately to the next right: participation in decision-making processes.

6. Participation in decision-making processes

Effective participation in decision-making can be displayed at various degrees, going from informal or formal consultation to the right to be represented in parliament. Depending on the size of the minority group it should be contained in these various degrees in bilateral agreements. Normally, provisions concerning this right appear only in the treaties where strong minority communities exist in the territory of at least one of the contracting parties.[33]

The Hungarian-Croatian and the Hungarian-Slovenian Conventions provide for "appropriate participation of the national minorities in adopting decisions at local, regional and national level concerning the rights and situation of the national minorities and their members".[34] The treaties between Hungary and Romania, and Hungary and Slovakia contain similar wordings.

In addition to the right to participate in decision-making processes at the national level, in the Hungarian-Croatian and the Hungarian-Slovenian Convention parties commit themselves to "ensure the participation of the representatives of the national minorities in the conclusion of treaties directly concerning the situation and rights deriving from this Convention"[35], which implies participation of members of a minority at the external level, also. Both levels of participation, national as well as external, are quite a new phenomenon in public international law. If States fully respected this right, minorities would finally be involved in decisions affecting them directly.

7. Other rights granted

The aforementioned rights can be considered as the core rights, which can be found in most of the bilateral treaties and which already allow, if implemented, a satisfactory level of minority protection. Some other rights are less common in the bilateral treaties, but it does not mean that they cannot have a significant impact on the overall situation of a minority.

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31 *Article 20 (4)*

32 *For example Article 15 (2)(e) of the Hungarian-Slovak treaty.*

33 *Kinga Gál, op. cit., at p. 9.*

34 *Article 8 Hungarian-Slovenian Convention; Article 9 Hungarian-Croatian Convention.*

35 *Article 11 Hungarian-Slovenian Convention; Article 12 Hungarian-Croatian Convention.*

For example, the right to establish and maintain undisturbed contacts across the border with citizens of other States, with whom minority groups share common national origins,[36] can be implemented by the readiness to open new border posts.[37] Only few consider the right to preserve their material and architectural heritage.[38] Separate articles of certain treaties condemn xenophobia and manifestations of racial, ethnic or religious hatred and declare that the parties will take effective measures in order to prevent any such manifestations.[39] The treaties between countries which have been affected by a recent war contain provisions on the free and safe return of refugees and displaced persons.[40]

Contracting parties are particularly careful when collective rights or any form of autonomy is claimed. Except in the Convention concluded by Hungary with Croatia,[41] the parties never accepted any autonomy provisions. The Hungarian-Slovenian Convention is the only one that mentions collective rights.[42] All the other treaties render a great deal of attention to constant use of the wording "persons belonging to national minorities" and not minorities as such.

8. Duties

Most of the treaties concluded by Hungary contain a self-executing provision concerning common borders.[43] The treaty with Slovenia states that "no provision of the present Convention shall be interpreted in a way that it harms the territorial integrity of each Contracting Parties."[44] Whilst the Croatian treaty contains a similar general clause,[45] in the treaties with Romania[46] and with Slovakia[47] the parties are more explicit and confirm that

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[36] *Article 17(1) of the Framework Convention for the Protection of National Minorities refers to this issue.*

[37] *Article 11 of the Hungarian-Slovak treaty; Article 19 of the Hungarian-Romanian treaty.*

[38] *Article 15 of the Romanian-Albanian treaty; Article 10(4) of the Romanian-Bulgarian treaty; Article 3(3) of the Hungarian-Croatian Convention; Article 13 of the Hungarian-Slovak treaty.*

[39] *Article 14 of the Hungarian-Romanian treaty.*

[40] *Article 7 of the Croatia-Federal Republic of Yugoslavia agreement; Article 10 of the Hungarian-Croatian treaty.*

[41] *Article 9 (4): The Republic of Croatia shall confirm to ensure, in accordance with its domestic legislation, the right of the Hungarian minority to cultural autonomy.*

[42] *See the Preamble of the Hungarian-Slovenian Convention referring to special individual and common rights for national minorities.*

[43] *It is important to note that the border issue has been taken into account by both, the Copenhagen Document in paragraph 37 and the Framework Convention for the Protection of National Minorities of the Council of Europe in its Article 21.*

[44] *Article 14 of the Convention on providing special rights for the Slovenian minority living in the Republic of Hungary and the Hungarian minority living in the Republic of Slovenia, 6 November 1992 (hereinafter the 'Hungarian-Slovenian Convention').*

[45] *Article 15 of the Convention between the Republic of Croatia and the Republic of Hungary on the protection of the Hungarian minority in the Republic of Croatia and the Croatian Minority in the Republic of Hungary, 5 April 1995.*

[46] *Article 4 of the Treaty between the Republic of Hungary and Romania on Understanding, Co-operation and Good Neighbourhood, 16 September 1996.*

[47] *Article 3 of the Treaty on Good-neighbourly Relations and Friendly Co-operation between the Republic of Hungary and the Slovak Republic, 19 March 1995.*

"they have no territorial claims on each other and that they shall not raise any such claims in the future." Romanian treaties with the Federal Republic of Yugoslavia,[48] Albania, Croatia and Bulgaria also ensure that the existing borders are respected as definitive and inviolable.

This issue is of great concern to the parties, especially if they fear a secessionist movement from within large minorities living in their countries. It is therefore important that the kin-State explicitly recognises and respects the sovereignty, independence, and territorial integrity of the State where co-ethnics reside. The inclusion of border clauses remains extremely important for States in order to create more relaxed relations between neighbouring countries.

Formulations such as "The Contracting Parties agree that the same rights and duties flowing from their citizenship shall be applied to the persons belonging to national minorities as to any other citizens of the State concerned"[49] can be found in some of the treaties[50] and are in general unobjectionable.

Implementation and Monitoring Bodies of Bilateral Agreements

The implementation of bilateral treaties can be examined from the political as well as the legal perspective. Whilst effective legal protection mechanisms are lacking in most cases, the political aspects of the implementation mechanisms have received primacy over the legal possibilities.[51]

There are four possible procedures for the implementation and monitoring of bilateral agreements.

(1) Most of the treaties analysed in this study have been incorporated in the Pact on Stability. Article 16 of the Declaration of the Pact states that "the States party to the OSCE Convention establishing the International Conciliation and Arbitration Court may refer to the Court possible disputes concerning the interpretation or implementation of their good-neighbourliness agreements". The role conferred in this context to the OSCE has been, however, the subject of lively controversy. Some OSCE States consider that the guarantee mechanisms provided for, in particular the opportunity given in certain cases to third States to raise disputes, could be abused especially by the kin-States of the minorities referred to in the bilateral agreements. So far, OSCE countries have never made recourse to this provision.

(2) Article 15 of the Pact on Stability further states that the parties "with regard to the observance of (…) commitments in the implementation of the agreements and arrangements included in the Pact, (can) resort to the instruments and procedures of the OSCE, including those concerning conflict prevention, peaceful settlement of disputes and the human dimension." This also includes the opportunity to consult the High Commissioner on National Minorities on problems regarding the implementation of bilateral agreements. This

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[48] *Article 2 of the Treaty on friendship, good neighbourly relations and co-operation between Romania and the Federal Republic of Yugoslavia, (16 May 1996)*

[49] *Article 15(3) of the Hungarian-Slovak treaty.*

[50] *Article 15(8) of the Hungarian-Romanian treaty; Article 1 of the Hungarian-Ukrainian Declaration; Article 17(2) of the Romanian-Croatian treaty; Article 20(2) of the Romanian-Slovak treaty.*

[51] *Kinga Gál, op. cit., at p. 13.*

provision has also never been applied.

(3) Use of domestic remedies in the form of court proceedings might be another possible monitoring instrument, as long as the constitutional system permits treaty rules to operate directly in domestic law, and the rights are self-executing. Since self-executing provisions in bilateral agreements are rare, there is little likelihood of rights included in a bilateral agreement being effectively invoked before a court.

(4) In the light of the above, the Joint Intergovernmental Commissions (and their Sub-Committees on Minorities), foreseen in a number of treaties,[52] could become the most effective implementation mechanism. According to the Hungarian-Slovenian Convention, the Joint Commission should have meetings twice a yeArticle The meetings are generally headed by both Foreign Ministers. In this Commission, a representative of both minorities is appointed upon the proposal of their organisations.[53] In this way they have the opportunity of directly influencing the Commission's work. The composition, as in the Hungarian-Slovenian agreement, is considered adequate. The real problem of these Commissions in general is that they have no decision-making or sanctioning power. The Croatian agreement contains a very similar wording to the Slovenian treaty. In both, the mandate is clearly described:

> "The tasks of the Joint Committee are the following:
>
> - to discuss the current issues relevant to the two minorities
> - to evaluate the implementation of obligations under the present Convention
> - to prepare and adopt recommendations for their respective governments concerning the implementation and in case of necessity the modification of this Convention." [54]

The Commissions can only address recommendations to the Government, and therefore again, the degree to which the proposals are taken into consideration, depends on the good will of the Government.

It should be noted that the protocols of the Commission's meetings are not confidential and this could contribute to the implementation of the agreements. The international community or other monitoring bodies can consult them and, if necessary, put pressure on the national Government and Parliament to take the requested measures.

The participation of representatives of minorities should be aspired to in all cases and is, so far, respected in the existing Joint Committees. As discussed above, it depends on the good political will of the contracting parties whether they take the recommendations of the Committee into consideration or not. This will again depend on the internal development of the State in question, and its general state of democracy. Nevertheless, the existence of these bodies justifies itself through having established a discussion forum where minority issues can be addressed. Furthermore, an ongoing dialogue to channel and refocus debate in a

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[52] *Hungary's treaties and Conventions concluded with Ukraine (Article 16 and Protocol to the declaration), Slovenia (Article 15), Croatia (Article 16), Slovakia (Article 15(6)) and Romania (Article 15(8)).*

[53] *The Hungarian-Slovenian Convention foresees a joint commission composed by 5 governmental representatives for each party and 1 minority representative for the respective groups.*

[54] *Article 16(3) of the Hungarian-Croatian Convention.*

productive manner has thus been created.[55] As a positive result of the activity of the joint commission established between Hungary and Romania can be cited the recent easing of tensions emerged between the two countries from the so called Hungarian Status Law, where the meetings and discussions in the joint commission led to the conclusion of the Memorandum of Understanding between the Hungarian and Romanian governments, signed in December 2001.

In light of the above, one has to draw the conclusion that the existing bilateral agreements do not dispose of any strong monitoring mechanism, nor are sanctions foreseen in the case of non-compliance. Effective implementation is therefore left to the political good will of the contracting parties and, to a certain extent, international pressure.

The Role of the kin-State and of the International Community

The position of the home-State when negotiating bilateral agreements touching upon minority rights is generally influenced by several factors, such as the domestic political situation or the strength of the unitary nation-State concept. The existence of real or artificial fears that minority groups might secede by evoking the principle of self-determination complicate the bilateral talks. The fact that most of the countries concerned have an interest in being integrated into European and Euro-Atlantic structures, does however contribute to the willingness of these states to accept compromises.

In the following the role of the home-State's counterpart, the kin-State, and of the international community in bilateral relations will be examined.

1. The kin-State

According to Huber and Mickey,[56] kin-State's behaviour can be grouped into four categories: (1) direct support to kin-groups in their home-States, (2) resettlement assistance, (3) bilateral contacts with the home-State and (4) initiatives at the multilateral level. Special attention will be given to the case of direct support and the bilateral approach.

a. Direct support to kin-Groups in their home-States.

Direct support can range from cultural, educational and linguistic assistance (to be considered legitimate by international law) to military support and intervention on behalf of secessionist groups. Home-States might perceive this cross-border character as a "fundamental violation of a country's sovereignty, and/or territorial integrity".[57]

When kin-States provide resources, financial incentive and support for the ongoing development of co-ethnics in a home-State, or even the eligibility for citizenship or forms of residency that enable them to emigrate to, or work in the kin-State, there is not only the possibility, that the number of persons declaring themselves as members of this minority increases considerably, but also the risk that this preferential treatment generates tensions and

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55 *Patrick Thornberry, op. cit., at p. 159.*

56 *Konrad Huber and Robert W. Mickey, "Defining the Kin-State: An analysis of its Role and Prescriptions for Moderating its Impact", in Bloed/van Dijk, op. cit., at p. 31-41.*

57 *ibid. p. 34*

acute jealousy among the rest of the population, including other minority groups living in the home-State leading to strong resentment and anti-minority feelings on the long run.[58]
A recent example, where this direct support has given raise to much discussion, is the Hungarian Status Law. According to this piece of legislation, ethnic Hungarians living in neighbouring countries, among other benefits will be given social, health, transportation, and education benefits. Romania and Slovakia claimed in particular that the legislation envisaged the implementation of discriminatory measures on the territory of other States which would be contrary not only to current European standards but also principles as enshrined in bilateral agreements. The Romanian and Hungarian governments requested the Council of Europe Commission for Democracy through Law (Venice Commission) to examine the issue. The Venice Commission's Report[59] found that unilateral measures such as those contained within the Hungarian Status Law are "legitimate" provided that they respect the principle of state sovereignty, and respect not only agreements already in force, but also friendly relations amongst States, human rights and fundamental freedoms, including the prohibition of discrimination. In the Commission's view, preferential treatment is permissible provided that it pursues a legitimate aim and is proportionate.

OSCE High Commissioner on National Minorities, Rolf Ekeus, sees in unilateral measures for the protection of kin-ethnics living outside of the jurisdiction of a State a potential source of conflict. "Protection of minority rights is the obligation of the State where the minority resides."[60] The High Commissioner emphasised that the principle according to which a State may act only within its jurisdiction neither precludes certain preferential treatment within its jurisdiction (on a non discriminatory basis), nor does it preclude cross-border contact between persons belonging to a national minority and citizens of other States to whom they are related by national or ethnic, religious or linguistic ties.[61]

For a kin-State not to raise the suspicion in the home-State, that its assistance is discriminatory or supports secessionist claims, it is important that it provides appropriate assistance to the kin-groups in a transparent manner, after consultations with the country concerned. In this way, material assistance from the kin-State should be provided to co-ethnic communities with the full knowledge of the respective home-State authorities. Ideally, such assistance could be jointly financed and administered by home- and kin-ministries concerned, thereby guaranteeing financial double check and enhancing confidence-building processes. This kind of joint assistance will contribute to maximise the effectiveness of this aid.[62]

b. Bilateral contacts with the home-state

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[58] *Minority Rights Group International, "The Role of Minorities in International and Transborder Relations in Central an Eastern Europe", A Skills Exchange Workshop, held in Warsaw, Poland, 30 April-3 May 1998, 7, at:*

http://www.minorityrights.org/workshopreps/pics/MIFB.pdf

[59] *Report on the preferential treatment of national minorities by their kin-State, adopted by the Venice Commission at its 48th Plenary Meeting (Venice, 19-20 October 2001) CDL-INF(2001)019. Full text to be found at http://www.venice.coe.int/site/interface/English.htm.*

[60] *Rolf Ekeus, "Sovereignty, responsibility, and national minorities: statement by OSCE minorities commissioner" (26 October 2001).*

[61] *See Article 2(5) of the UN Declaration in the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities and Article 17 of the Council of Europe Framework Convention for the Protection of National Minorities.*

[62] *Huber and Mickey, op. cit., at p. 45.*

Problems involving minorities and kin-States across borders were, and still are frequent source of tension between states. Bilateral relations are frequently complicated by various factors, only one of which might be minority issues. Often there is the historical legacy of war, military occupation, or imperial domination, all of which might contribute to mutual suspicion at the bilateral level, particularly in the contemporary context of regional insecurity.[63]

Although bilateral agreements tend to reduce tension between kin and home-States, the greatest danger is that contacts between kin-State officials and minority groups in the home-State might be perceived as interference in the latter internal affairs. From the home-state's perspective, the principal fear may be that the kin-State is exploiting minority issues in order to suit its geopolitical interests, or even to encourage the eventual separation and incorporation of a minority populated region.

With regard to the balance between the fear of secessionism and the need for minority rights, bilateral agreements encourage both, minority protection and respect for the territorial integrity of States, in order to prevent the recognition of minority rights being exploited by the minorities to claim a change of borders. It has to be emphasised that bilateral agreements impose duties on minorities. Most bilateral agreements indicate that the protection of minorities does not imply any right to engage in any activity, or perform any act, contrary to the fundamental principles of international law, including the principles of the Charter of the United Nations,[64] and in particular of the sovereign equality, territorial integrity and political independence of States.

In general, contacts between kin-States and co-ethnics are best carried out through friendly relations between kin- and home-State. These bilateral contacts can take place at all levels, from the highest national political levels down to regional and local authorities. Non-official contacts in the cultural, educational and economic fields should also be encouraged. This bilateral co-operation could end up in a formal treaty on friendship and co-operation, possibly including measures for the protection of minorities, thereby providing a clear framework of contacts channelling and institutionalising further discussion on the issue.[65]

2. International Community

In the light of the tensions that might result from kin-State assistance at the bilateral level, the importance of the role to be played by multilateral mechanisms in the negotiation, drafting and monitoring process should be stressed. As impartial and authoritative third-parties they can help resolve minority-related tensions in a more depoliticised fashion.[66] Furthermore, their expertise in the field of minorities can help in the drafting process.

External actors, in particular the OSCE, Council of Europe and EU, can encourage cooperative bilateral relations. In fact, the first Stabilisation and Association Agreements

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63 *ibid. p. 37*

64 *See Article 37 of the Copenhagen Document (CSCE 1990); Article 21 of the Framework Convention for the Protection of National Minorities.*

65 *Huber and Mickey, op. cit., at p. 47-49*

66 *ibid. p. 41.*

signed in 2001 between EU and "the former Yugoslav Republic of Macedonia" and the EU and Croatia focus, amongst other things, on the development of good neighbourly relations, democratic principles and human rights, as well as the rights of persons belonging to national minorities. These agreements should be an incentive for the countries to work positively on their relations with the neighbouring countries.

The disadvantage of involving international bodies arises from the danger that their pressure might push countries to the premature conclusion of treaties. Haste in drafting entails the risk of not taking due consideration of the knowledge already gained in the field. Another problem when giving too much weight to international pressure is that countries might sign bilateral agreements containing minority rights, not because they are concerned for their minorities, but because they aspire to membership of the European and Euro-Atlantic structures.[67]
It is however not enough to encourage countries to conclude bilateral agreements without then overseeing proper implementation. Some countries commit themselves to applying the rules of the Council of Europe and the Organisation for Security and Cooperation in Europe in monitoring the implementation of their commitments in the field of protection of national minorities.[68] External actors, such as the Advisory Committee on the Framework Convention and the Committee of Ministers of the Council of Europe or the Office of the High Commissioner on National Minorities of the OSCE, can help in monitoring implementation of minority policies, and facilitating dispute resolution.

Strengths and Weaknesses of the Bilateral Agreements

Every minority situation presents its own particular characteristics and there is consequently no standard means of resolving the multitude of concrete problems, which each case presents in a national context.

A condition for the effective impact of bilateral agreements upon the protection of minority rights is the involvement of the groups concerned in the preparation and conclusion of these treaties as well as in the implementation mechanism and in the work of the monitoring commissions. Members of national minorities are the ones who know their needs best and can greatly contribute to bilateral activities. In addition, the groups' non-participation in the preparation and conclusion of bilateral agreements runs counter to the basic rules on equal enjoyment of all human rights and non-discrimination. Minority rights standards have indeed established the right of persons belonging to national minorities to have a serious say in national affairs affecting their position in society.[69] However, in most cases these treaties are

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[67] *This was most probably the case in the Hungarian-Romanian Treaty, where the parties — in particular Hungary — did not want to endanger its prospects of Nato membership. The Hungarian-Slovak Treaty was signed under the pressure of the Stability Pact and does not represent in all respects a sound compromise between desires, concerns and fears of the two sides. In some cases the parties put it clearly that they share the interest in acceding to these structures: Article 6 of the Hungarian-Slovak Treaty states: "The Contracting Parties confirm that their interests and endeavours are identical in relation to their integration into the European Union, the North Atlantic Treaty Organisation and the Western European Union and in relation to the Council of Europe and the Organisation for Security and Cooperation in Europe ...".*

[68] *See e.g. Article 15(6) Hungarian-Slovak Treaty.*

[69] *See e.g. Article 2 of the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, or Article 15 of the Framework Convention for the Protection of National Minorities. See Gudmundur Alfredsson. "Disadvantages of Bilateral Agreements", in Bloed and van Dijk, op. cit., at p. 171.*

negotiated in the absence of the minority community they were designed to protect. States with a larger minority community tend to be reluctant to involve the minorities, while the kin-States expressly enforce their involvement. In particular, the composition of the monitoring committees is often debated between the governments to such an extent that it even hinders their convocation.

1. Strengths of bilateral agreements

On the whole bilateral treaties constitute a useful and sometimes even essential addition to the international regime for the protection of persons belonging to national minorities. If effectively implemented, the substantive rights included in the existing bilateral agreements hold a considerable potential for the development of minority protection.

One of the positive aspects of bilateral agreements in comparison to general minority regulations included in international and regional instruments is that they take into account the specific historical and traditional needs of the minorities concerned. However, as mentioned in previous paragraphs, this restrictive perspective also has the disadvantage that the minority-related provision do not refer to all the minorities in the respective country, but only to a specific minority group.

The conclusion of these treaties often reflects a remarkable relaxation of tensions between treaty parties, and their implementation can further stimulate a climate of good-neighbourliness and cooperation. Besides having this relaxing effect, bilateral treaties constitute important instruments for the prevention of conflict between States, by providing a clear framework for contacts and contributing to transparency in the actions of the kin-State in support of the minority in question.

In addition to strengthen confidence and stability among/and in border regions, bilateral treaties give legal force, through confirmation and/or incorporation, to international instruments, which are not legally binding documents. The political undertakings and standards set out in these documents are in fact raised to the status of legal obligations in bilateral treaties drawn up between various states of South Eastern Europe.

Bilateral treaties usually contain provisions which reduce the fear of secession. They refer, amongst other things, to the mutual recognition of borders, provisions on territorial integrity of States and reinforcement of the inviolability of borders, measures regarding cooperation and mutual understanding, as well as the readiness to open new border posts in order to increase the openness of the frontier, thus influencing the rights of members of a minority to maintain contacts with the main body of their nation.

Economic provisions included in bilateral agreements enhance the overall situation of minorities settled in border regions, contributing, amongst other things, to reduce the rate of unemployment for national minorities which is often a consequence of the economic centralisation existing in many European countries.

2. Weaknesses of bilateral agreements

Usually bilateral treaties, especially their minority regulations, reflect the actual political orientation of the states concerned, and are subject to strong political influence. The basic precondition for efficiency of an agreement is the political will to apply that agreement in

practice because the legal provisions enshrined in bilateral treaties can be easily curtailed by government decrees or circumvented by local decrees dependent on the political formation and political will of the actual government, without any possibility of sanctioning the non-implementation.[70]

In any case it has to be avoided that bilateral treaties lower existing standards, for example when referring to the Framework Convention, which might contain lower standards than already existed in the national legislation. Further concerns may arise from the fact that vague wording and formulations potentially obstruct the effective implementation of the provisions.

Bilateral treaties normally protect only kin-Minorities and might place other groups of inhabitants into a less favourable position, in particular minority groups without a kin-State, thereby risking the creation of tensions among minority groups within a given country.

There is also the risk of disregarding acquired expertise on minority rights as a consequence of hasty drafting processes and the strong political influence to which these treaties are often subject. Moreover, treaties are often negotiated without consultation with the minorities designed to protect.

Conclusion

Most of the countries of South-Eastern Europe face many of the same problems and their economies are linked in various degrees of interdependence. The difficult position of the Roma, as a minority without a kin-State, but living in many European countries, and in particular in the South-Eastern European region, is an issue which could be significantly improved by the conclusion of a multilateral treaty. A regional and multilateral approach should therefore be enhanced to avoid the risks of concentrating solely on a policy of selective bilateralism to the detriment of a more effective regional strategy.

The Stability Pact is one step in this direction. Indeed it pursues the aim of strengthening countries in South-Eastern Europe in their efforts to foster peace, democracy, respect for human rights and economic prosperity, in order to achieve stability in the whole region and to cooperate towards protecting minorities and preserving the multinational and multiethnic diversity of countries in the region.

In cases where new bilateral agreements are being concluded, the assistance by the international community could consist in expert advise and technical assistance in the drafting of the texts, starting from the international standards and including the experience of some well functioning bilateral agreements (for example the treaties concluded by Germany with Poland or Hungary). Considering the great variety of situations, the drafting of a model agreement would appear difficult.

Furthermore, the international community should endeavour to mitigate overt or latent controversial issues and support cross-border cooperation, especially in the economic domain. The proposal to create a common economic market in the region should be strongly supported, and the decision on bilateral free trade agreements adopted by SEECP states as well as the Action Plan on Economic cooperation adopted within the Stability Pact, are directed along these lines.

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[70] *Kinga Gál, op. cit., at p. 17.*

Finally, one of the major factors influencing neighbourly relations among countries of South Eastern Europe is integration into European and Euro-Atlantic institutions and, in particular, to the EU. The EU Stabilisation and Association process constitutes an incentive for aspiring members to promote cooperation and good-neighbourly relations. By acceding to a broader structure, such as the EU, the destabilising character of the border issue might be diminished. Furthermore, the EU has made it clear that enhancing respect for minority rights and fostering good-neighbourly relations are important criteria for entry.

Appendix

List of Agreements

Agreements ratified by Albania

- Treaty on the mutual understanding, co-operation and good neighbourhood between Romania and Albania (11 May 1994)

Agreements ratified by Bosnia and Herzegovina (at Entity level)

- Agreement on the Establishment of Special Parallel Relations Between the Federal Republic of Yugoslavia and Republika Srpska (5 March 2001)

- The Agreement on Special Relations between the Republic of Croatia and the Federation of Bosnia and Herzegovina (22 November 1998)

Agreements ratified by Bulgaria

- Treaty on Friendly Relations and Cooperation between Bulgaria and Moldova, (7 September 1992)

- Treaty on the friendship, co-operation and good neighbourhood between Romania and Bulgaria, (27 January 1992)

- Common Declaration between the Republic of Hungary and the Republic of Bulgaria on the Basis of Relations, (18 April 1991)

Agreements ratified by the Republic of Croatia

- The Agreement on Special Relations between the Republic of Croatia and the Federation of Bosnia and Herzegovina (22 November 1998) Treaty between the Republic of Italy and the Republic of Croatia on the rights of minorities, (5 November 1996)

- Agreement on the normalisation of the relations between the Federal Republic of Yugoslavia and the Republic of Croatia, (23 August 1996)

- Convention between the Republic of Croatia and the Republic of Hungary on the protection of the Hungarian minority in the Republic of Croatia and the Croatian Minority in the Republic of Hungary, (5 April 1995)

- Treaty regarding the friendship and co-operation relations between Romania and Croatia, (16 February 1994)

- Treaty between the Republic of Hungary and the Republic of Croatia on Friendly Relations and Co-operation, (16 December, 1992)

Croatia is also signatory to several agreements on cooperation in the fields of Culture and Education with many neighbouring countries, for example:

- Article 4 of the Treaty on cooperation between the Government of the Republic of Croatia and the Government of the Republic of Romania in the field of education, culture and science (29 August 1993)

- Article 10 of the Agreement on cooperation in the fields of Culture and Education between the Government of the Republic of Slovenia and the Government of the Republic of Croatia (7 February 1994)

Agreements ratified by the Federal Republic of Yugoslavia

- Agreement on the Establishment of Special Parallel Relations Between the Federal Republic of Yugoslavia and Republika Srpska (5 March 2001)

- Agreement on the normalisation of the relations between the Federal Republic of Yugoslavia and the Republic of Croatia, (23 August 1996)

- Treaty on friendship, good neighbourly relations and co-operation between Romania and the Federal Republic of Yugoslavia, (16 May 1996)

Agreements ratified by the Republic of Hungary

- Treaty between the Republic of Hungary and Romania on Understanding, Co-operation and Good Neighbourhood, (16 September 1996)

- Convention between the Republic of Croatia and the Republic of Hungary on the protection of the Hungarian minority in the Republic of Croatia and the Croatian Minority in the Republic of Hungary, (5 April 1995

- Treaty on Good-neighbourly Relations and Friendly Co-operation between the Republic of Hungary and the Slovak Republic, (19 March 1995)

- Treaty between the Republic of Hungary and the Republic of Croatia on Friendly Relations and Co-operation, (16 December, 1992)

- Convention on providing special rights for the Slovenian minority living in the Republic of Hungary and the Hungarian minority living in the Republic of Slovenia, (6 November 1992)

- Declaration on the principles of cooperation between the Republic of Hungary and the Ukrainian Soviet Socialist Republic in guaranteeing the rights of national minorities (31 May 1991)

- Common Declaration between the Republic of Hungary and the Republic of Bulgaria on the Basis of Relations, (18 April 1991)

Agreements signed by Moldova

- Treaty on Good Neighbourly Relations, Friendship and Cooperation between Ukraine and the Republic of Moldova (23 October 1992) Treaty on Friendly Relations and Cooperation between Bulgaria and Moldova, (7 September 1992)

Agreements ratified by Romania

- Treaty on Friendship and Co-operation between Romania and the Republic of Macedonia, (30 April 2001)

- Treaty between the Republic of Hungary and Romania on Understanding, Co-operation and Good Neighbourhood, (16 September 1996)

- Treaty on friendship, good neighbourly relations and co-operation between Romania and the Federal Republic of Yugoslavia, (16 May 1996)

- Treaty on the mutual understanding, co-operation and good neighbourhood between Romania and Albania, (11 May 1994)

- Treaty regarding the friendship and co-operation relations between Romania and Croatia, (16 February 1994)

- Treaty on friendly relations between Romania and the Slovak Republic, (24 September 1993)

- Treaty on the friendship, co-operation and good neighbourhood between Romania and Bulgaria, (27 January 1992)

Romania has agreements on cooperation in the fields of culture and education with neighbouring countries, for example:

- Treaty on cooperation between the Government of the Republic of Croatia and the Government of the Republic of Romania in the field of education, culture and science (29 August 1993)

Agreements ratified by Slovenia

- Convention on providing special rights for the Slovenian minority living in the Republic of Hungary and the Hungarian minority living in the Republic of Slovenia, (6 November 1992)

Slovenia has Agreements on cooperation in the fields of culture and education with neighbouring countries, for example:

- Article 10 of the Agreement on cooperation in the fields of Culture and Education between the Government of the Republic of Slovenia and the Government of the Republic of Croatia (7 February 1994)

EXCHANGE OF POPULATION: A PARADIGM OF LEGAL PERVERSION

Mr Konstantinos TSITSELIKIS
Lecturer, Law School, University of Thrace

Introduction

The beginning of the 1910s found the newly founded states of the Balkans in a quest to establish their national frontiers: land, as well as population, was at stake as the Ottoman Empire disintegrated. War was the procedure and nationalism the fuel of the events of 1912-13. All Balkan states aimed to gain as much of the territory gradually left by the Ottoman Empire as they could and also to embrace the population as their future citizens and members of their new nation. Muslim minorities were granted a special status as a counterweight for the recognition of the independence of the new states by the Great Powers and the Ottomans. Thus, minority protection was already experienced before 1913: in Greece, the Muslims of Thessalia had been enjoying special legal status since 1881. The Muslims of the Cretan Autonomous State and Bulgaria (since 1909) enjoyed a certain level of legal protection in the form of bilateral treaties signed with the Ottoman Empire as the kin-State of the Muslim populations scattered in the Balkans.

The outcome of the Balkan Wars enhanced minority rights, but the new turmoil of the First World War and the consequent Greco-Turkish War brought radical new ideas and ethnic cleansing was established and regulated by the law. Bulgaria and the Ottoman Empire were the first states to decide upon a mutual exchange[1] of their respective minorities, settled in Thrace. A year later, in 1914, Greece and the Ottoman Empire entered a partial *de facto* population exchange. Nevertheless this exchange never took a binding legal form or had binding legal effects. These were the first steps of a practice which later became the subject of a mainstream settlement. The mutual exchange of population between states seemed to be the ultimate solution to erase any ground for territorial claims and internal instability, in particular minorities, whatever their existence could mean for the state of citizenship and their kin-State. The population transfer, volunteered or forced, was the product of a radical nationalism using international law in order to satisfy its ultimate scope: the purity of the national state where a minority would not be tolerated any more. Sweeping out any ethnic alien elements came to be considered as a normal or natural solution in order to prevent War. The controversy reached its apogee as a necessary additional legal protection was provided for the remaining minority population.

The Balkan Wars: the nationalization/ethnicisation of land and minority protection

As a result of the Balkan Wars of 1912-13, Greece, Serbia and Bulgaria made important territorial gains to the detriment of the Ottoman Empire. As regards Greece, it increased its area and population by 68%. Hence, an important number of Muslims became Greek citizens and therefore came to constitute a minority population. According to official estimates, in

[1] *Protocol no 1 of the Treaty of Istanbul signed in October 1913.*

1912 more than 560,000 Muslims inhabited Northern Greece (or 39% of the local population).

The legal regime regarding the Muslim population of Greece was set up again by the Treaty of Peace between Greece and Turkey, which was concluded on 1/14 November 1913 in Athens. Article 11 of the Treaty provided special rights for the Muslims, namely equality before the law, religious freedom, religious autonomy and acknowledgement of their religious hierarchy. Furthermore, the Muslim communities were granted legal personality (Article 13 of Protocol 3 of the Treaty). However, more detailed provisions on minority protection came after the end of World War I and the Greek-Turkish war (1919-1922). The Treaty of Sevres on the protection of minorities in Greece was signed in 1920, but it came into force at the same time as the Treaty of Lausanne, which provided a special status for the non-Muslim minorities in Turkey and the Muslim minority in Greece (Articles 37-45).

However, states envisaged "ethnicising" as much as possible their territory. Population exchange or transfer took place under legal regulations in order to minimize minority presence. Greece, Bulgaria and Turkey took the initiative to undertake such a task. The population exchange, which took place in the 1920's between Bulgaria and Greece and Greece and Turkey, had a great impact on the fate of their respective minorities. The last example of attempting the homogeneity of the state's "national land" in the inter war in the Balkans was the minority population transfer governed by the Convention between Romania and Turkey signed on 4 September 1936 in Bucharest aiming at facilitating the voluntary migration of the Turkish and Muslim population of Dobroucha to Turkey.

The Greco-Bulgarian population exchange

The voluntary migration of the citizens of one state to their kin-State is founded on the free choice of those who belong to a minority to be able to migrate to their kin-State or to stay in their homeland. This idea was implemented by Greece and Bulgaria in the Treaty of Neuilly of 27 November 1919 concerning their mutual minorities and was provided for by the Peace Treaty of Neuilly regarding Bulgaria (Article 56). Those who emigrated under the Treaty were granted the citizenship of the new state of settlement. In theory the emigrants had the right to compensation according to the value of the property left behind. In practice this happened only occasionally. Those entitled to migrate were of ethnic, linguistic or religious kinship with Greece or Bulgaria. A disagreement between Greece and Bulgaria to identify the content of the term 'community' was brought to the Permanent Court of International Justice[2]. Greece and Bulgaria attempted to minimize the presence of their respective minorities, but at the same time they tried to set up a legal minority protection. In the course of the implementation of the exchange, Politis and Kalfoff signed two identical Protocols in September 1924 under the auspices of the League of Nations. These two protocols intended to implement the minority obligations of Greece and Bulgaria stemming from the Treaty of Sevres (1920) and the Treaty of Neuilly (1919), respectively. In effect, the protocols granted minority rights to Bulgarians and Greeks who would not migrate in terms of the population exchange and who would remain settled in their respective homelands. As a result of this agreement numerous individuals entitled to emigrate believed that the protocol would ensure their stay in Greece and Bulgaria.

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[2] *PCIJ, Greco-Bulgarian Communities, Series B, no 17, 1930.*

In fact, the protocols never came into force because the Greek National Assembly rejected the agreement in January 1925, as it would recognize a Bulgarian minority in Greece. 46,000 Greeks migrated from Bulgaria to Greece and 92,000 Bulgarians left Greece for Bulgaria. The conditions of the migrations could in no way be described as good. In many cases, the population was forced to leave their country, as it would be unbearable to stay any more. Thus, what was, in theory, a voluntary exchange became, as already stated, in effect compulsory in most areas. Moreover, the outcome of the Greco-Turkish war gave no choice to those who intended to stay in Thrace[3].

By the end of the process, several tens of thousands of those who had the right to leave Greece opted not to do so. Since that time they have never been granted a special minority status. After the failure of the Politis-Kalfoff protocols and the attempt to establish in 1925 minority education in their mother tongue, the question has not been revisited to date.

The question of an optional exchange was dealt with again in 1920 under the terms of the Peace Treaty of Sevres which provided the means for Greece and Turkey to mutually exchange their populations (Article 143, paragraph 2). This treaty has, in fact, never come into force as the military operations and the political settlement of the Greco-Turkish war forced more radical solutions.

The compulsory exchange of Greek and Turkish populations

The end of the Greco-Turkish war affected the fate and the status of the minorities in both countries. The foundation of the Turkish State under the leadership of Kemal Attatürk created a political framework affecting drastically the existence of the Muslims in Greece and the Greek Orthodox in Turkey. The "minority question" was about to be solved by radical and irreversible means.

In the aftermath of the Greco-Turkish war of 1919-1922 and the establishment of the new Turkish State, the Lausanne Conference set up a new era of nation states. The concept of a "clear national state" was enhanced by adopting relevant measures under the auspices of the League of Nations, namely a mandatory exchange of population[4]. The Convention of Lausanne signed between Greece and Turkey on 31 January 1923, six months prior to the final settlement of the question, is a classic example of a compulsory population exchange aimed at minimizing the minority presence in the contracting States. The Convention affected nearly two million people: 1,400,000 Orthodox from Turkey and 450,000 Muslims from Greece became refugees under very difficult conditions, before and during the transfer and often after their settlement in their new homeland. The convention regularized to a large extent a migratory movement which had already had been carried out during the Balkan Wars and the Greco-Turkish war of 1919-1922. In this context a legal arrangement retroactively

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[3] *Especially as far as the Bulgarians of Thrace are concerned, S. Ladas, The exchange of minorities. Bulgaria, Greece and Turkey, McMillan, New York 1932, pp. 108-109 and 721.*

[4] *S. Ladas, op.cit., and K. Koufa & C. Svolopoulos, "The compulsory exchange of populations between Greece and Turkey: the settlement of minority questions at the Conference of Lausanne, 1923, and its impact on the Greek-Turkish relations", Comparative studies on governments and non-dominant ethnic groups in Europe, 1850-1940, vol. V, P. Smith (edt.), New York University Press, Dartmouth 1985, pp. 288. See relevant decision of Greece's High Court (Areios Pagos), 465/1936, D´ Efimeris Ellinon Nomikon 1937, p. 218 and Permanent Court of International Justice on the "établis" (the ones who had the right to be exempted from the exchange), Advisory Opinion, Series B, no 10, 21.2.1925.*

granted citizenship and property rights to those who suffered as a result of the war and, in effect, they were expelled on the basis of their ethnic identity.
The convention attempted to regulate compensation to emigrants for property left behind. It failed entirely, however, to achieve its real purpose, which was to furnish promptly those who emigrated under the terms of the convention the necessary financial means to begin a new life in their country of destination[5].

About 360,000 Muslims of Greece had to abandon their home country and to move to Turkey. By the middle of 1925, 192,000 Greek-Orthodox and 355,000 Muslims had been mutually exchanged[6]. All the rest had been previously forced to leave their homes. About 850,000 Greeks had fled Anatolia following the withdrawal of the Greek army, or before, while 115,000 Muslims had left Greece already in 1914. In effect the Convention of Lausanne regulated *de jure* partly what was already a *de facto* reality for hundred of thousands of emigrants, Muslims and Christians, who had fled Greece and Turkey respectively seeking safety and stability.

The forced exchange of population was conceived and implemented on the ground of religion. The populations were compelled to leave their homes and transfer themselves to the country to which they were nationally akin or considered to be so, through their religious identity.

Exchangeable populations had the right to take with them all movable property. On the contrary real estate had to be confiscated under law and re-distributed to the refugees coming from the other side of the new frontier. The total value of the Greek-Orthodox property left behind in Turkey was considered as five times what was the Muslim property left on Greek soil[7]. This caused serious problems for the Greek government as regards the redistribution of the land to the newcomers. Special Agreements had been concluded between Greece and Turkey temporarily dealing with the question in 1925, 1926 and 1930. Complex legislation was adopted to solve the problem of the re-distribution of real estate. Numerous cases of legal disputes were brought before the domestic courts during the Inter War period and even after World War II. In a remarkable case examined recently by the European Court of Human Rights, the descendents of a Muslim family from Thessaloniki, which had been exempted from the population exchange, had suffered expropriation without compensation[8]. The case lasted more than 65 years and revealed several legal sides of this issue, which had remained in the shadows for decades.
Forced exchange of population constitutes an infringement of fundamental human rights under contemporary international law but also under the legal frame in which it was conceived. According to Professor Tenekides (1924), *"the compulsory exchange constitutes the most serious infringement of individual freedom and the right to property, as well as a sad retrogression of international law. It leads us to savage and primitive perceptions of war, as defeat results in the destruction of the population, whose goods are looted by the winner*

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5 *S. Ladas, op.cit., p. 720.*

6 *V. Aarbakke, The Muslim minority of Greek Thrace, vol. 1, PhD Thesis, University of Bergen, 2000, p. 52.*

7 *M. Theotokas, "The conventional position of the Greeks in Turkey and the Turks in Greece after the war", (in Greek), 6 Dikaiosini 1928, p. 218.*

8 *ECHR, Yagtzilar v Greece (petition 417127/98), decision of 6.12.2000.*

and the population itself is forced to exile or slavery"[9]. Moreover, Professor Seferiades (1928) supported the view that all treaties providing for compulsory population exchange violate all respect for human dignity, breaching the then international law of minority protection and consequently the Statute of the League of Nations: *"thus, any treaty which attempts to violate the positive international law, universal ethical rules and fundamental human rights should be recognized as void because of its illegal content* "[10].

A radical solution to the minority question, population exchange (which preceded or succeeded military confrontations, inter-ethnic clashes or border changes) is aimed at the ethnical homogeneity of the state. In the long European history expulsion and forced transfer of populations in order to achieve ethnic cleansing has been done in many cases. It has never been organized so far by legal rules in the framework of international law, but was the innovation of the Balkan States, affecting their populations' future.

The exemption from the exchange or how to create a minority

One could argue that after a disastrous war, fueled by competitive nationalism, the only viable solution was indeed the uprooting of the minorities, which would again create the conditions for a new military confrontation and irredentist aspirations. If population exchange intended to clean the "national land" of any alien element, then the exception to the exchange created new minorities and the establishment of new minority legal protection. The exception by itself could not be seen as contrary to the law but it stressed the shortcomings of the argument in favor of population exchange.

In the terms of the Greco-Turkish exchange, the exceptions had both a treaty and a non-treaty basis. For political reasons envisaged by both sides, Article 2 of the Convention of Lausanne exempted from the exchange the Muslims of Western Thrace, the latter becoming Greek territory, and the Greek-Orthodox of Constantinople (Istanbul). According to Article 14 of the Treaty of Lausanne (July 1923) Greek-Orthodox of the Aegean islands Imvros (Gökçeada) and Tenedos (Bozcaada) were included in the exemption.

After long negotiations held at the Lausanne Conference, the Mixed Commission decided on 14 March 1924 to exempt from the exchange Greek citizens who were Muslims of Albanian origin following the proposal of Albania and Greece[11]. This formal, though non treaty-based exception, gave the right to any Muslim who could prove his Albanian origin to remain in Greece. From the exchange were exempted Turkey's Orthodox Arabs of Kilikia and other Orthodox groups which had no kinship to Greece. Last, the Greek government by ad hoc decisions exempted from the exchange Muslim individuals who had an important activity useful to the Greek State. In some other cases a few hundred Muslims were given foreign citizenship (such as Serb, Italian, French or Austrian etc.) so that they could skip the exchange as alien nationals.

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[9] *C. Tenekides, « Le statut des minorités et l'échange obligatoire des minorités gréco-turques », XXXI RGDIP 1924, p. 86. N. Politis, «Le transfert des populations», Revue de la politique étrangère 1940, p. 83.*

[10] *S. Seferiades, « L'échange des populations, 24/IV RCADI 1928, pp. 327-330››.*

[11] *The representative of Greece Kaklamanos declared on 19.1.1923 that the Albanians of Epirus were to be excluded, since "s'ils sont des corélégionnaires des Turcs, ils n'en sont nullement les compatriotes", S. Ladas, op.cit., pp. 380 and 385.*

The process of population exchange was conducted until 1933 when the Mixed Committee was finally abolished.

Minority protection: phase 2

Worthy of note is the shift from minority protection to the elimination of the minority through forced population exchange, and then back again to the establishment of legal protection.

The Treaty of Lausanne (July 1923) has to be considered as one of the most important legal binding texts regarding the South-Eastern Balkans: it regulates the status of modern Turkey and determines the Greek-Turkish border by attributing Western Thrace to Greece and Eastern Thrace to Turkey. Furthermore, Muslims in Greece and non-Muslims of Turkey are granted special legal protection (Articles 37-45). The minority rights guaranteed by the Treaty fall in the general legal framework established by the Treaty of Sevres on the protection of minorities in Greece signed in 1920, which did not enter into force until 1923 (according to Protocol XVI of the Treaty of Lausanne[12]). The Treaty set the general framework of minority rights and relevant obligations of the Greek State (Article 14). After all, the whole package regarding minority protection in Greece was made under the auspices of the League of Nations and the supervision of its competent organs.

As mentioned above, the population exchange drastically affected the Muslim-Turkish presence in Greece. Due to the exception, regarding the exchange, the minority presence was concentrated in Thrace (and Epirus until 1944[13]). In 1951 there were 111,990 Muslim Greek citizens[14]. Last, due to the annexation of the Dodecanese islands in the aftermath of World War II (Treaty of Paris, 1947) there are 4,000 Muslims who are Greek citizens in Rodos and Kos islands.

In Turkey the Orthodox minority who remained in Istanbul, Imvros and Tenedos governed by the same provisions of the Treaty of Lausanne was gradually shrunk from more than 200,000 in 1930 to less than 3,000 today. Restrictive measures and direct maltreatment led the minority to flee Turkey.

The forced emigration in Europe

Several European States used the paradigm of the forced migration of minorities, albeit criticized, on several occasions. What happened in the Balkans in the 1910s and 1920s gave a convenient precedent to other European states. In cases of "national emergency" they used this in order to get rid of the minority populations expelling them to their kin-State. If a mutual exchange was not feasible, then a transfer of the minority population had the same effect. In the following examples European States adopted such solutions in order to eliminate their minority populations, before or just after World War II. General principles of law on human dignity were derogated from a silence imposed by political necessity. National

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12 *K. Tsitselikis, The international and European status of linguistic minority rights and the Greek legal order, (in Greek), A.N. Sakkoulas, Athens/Komotini 1996, pp. 283 and 324.*

13 *"The Turkish minority in Thrace was of 104,700. Out of 18,200 Muslims who were living in Thesprotia, nowadays there are 207 […]". Gennadius Library, F. Dragoumis Archives, Telegram of 1.9.1946, Ministry for Foreign Affairs, Fak. 64.2/doc. 23.*

14 *Census of 1951, National Service on Statistics, Athens, p. 184.*

homogeneity was again the paramount principle in order to avoid territorial claims and subsequent War. A few examples of minority population exchange or transfer, which were carried out or just planned, give an idea of the extent of a phenomenon that a few years later would be considered as prohibited by international law:

- The transfer of Germans living outside the then Germany to Germany, according to Hitler's will. Bilateral agreements signed between Germany and Romania (1940), the USSR (1939), Estonia (1939), Latvia (1939), Italy (1939 and 1944), Hungary (1940), Croatia (1941), and Bulgaria (1943).

- The Potsdam Agreements concluded on 2 August 1945, between USA, the UK and the USSR for the transfer of all German populations from Czechoslovakia, Hungary and Poland to Germany[15]. The idea is again to clear the states of any ethnic element, which could lead to new territorial claims by Germany.

- During the Paris Conference of 1946, the participant states facilitated the migration of the Italian speaking populations of neighbouring countries to Italy and the Slavic minority populations living in Italy to settle voluntarily to Yugoslavia[16].

- A massive population transfer took place between Hungary and Czechoslovakia (Agreement of 2.7.1946): it was compulsory for the Hungarians living in Czechoslovakia and optional for Slovaks living in Hungary.

- A compulsory population exchange agreement was reached in 1944-46 between USSR-Poland and USSR-Czechoslovakia regarding their mutual minorities.

- Greece during the civil war (1947) submitted to the United Nations, without success though,[17] a draft proposal for the voluntary migration of minority populations related to Albania, Yugoslavia and Bulgaria, which were involved in the military operations.

One could assert that to force a population group to emigrate from its homeland on the basis of its religious, linguistic or ethnic kinship certainly falls within the general rules of international law which today are covered by the prohibition of the Convention against the crime of genocide. The total uprooting of a population because of its ethnic characteristics should be odious under any legal, philosophical and humanitarian terms. Certainly, the political imposition to migrate without any other choice cannot be compensated by any means. If a war between states could be expected to result in such a forced population flow, compulsory migration in terms of peace could surprise by its open cruelty. In 1945 W. Churchill stated that expulsion was the most satisfactory method and the most permanent. It excluded any mixed population from provoking infinite problems.[18]

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15 *J-W. Bruegel, "A Neglected Field. The Protection of Minorities", 9 Revue des Droits de l'Homme 1971, p. 417.*

16 *I. O. Bokatola, L'ONU et la protection des minorités, E. Bruylant, Bruxelles 1992, p. 83.*

17 *General Assembly Resolution 109 (II), 21.10.1947, UN doc. E/CN.4/46 Add. 1, p. 1. See Digest of International Law, vol. 12, 1971, p. 51*

18 *Cited by F. Rousso-Lenoir, Minorités et droits de l'homme: L'Europe et son double, Bruylant-LGDJ, Bruxelles-Paris 1994, p. 45.*

Conclusions

The exchange of population constitutes a concerted and institutionalized transfer of citizens according to the will of the state. In the historical cases of such an arrangement used between the Balkan States in the beginning of the past century, the international law of minority protection became an instrumental means used by the nationalism of the respective states. As absolute national homogeneity has been proven unrealistic, States introduced again the status of minority protection. This legal protection is the product of a dynamic relation between the state, the minority and the kin-State. What seems to be explained by political conditions appears as a legal perversion. The state decides to uproot the minorities (as the domestic enemy) with or without the consensus of the kin-State of the minority, undermining the citizenship which was established as the securing legal bond between the citizens and the State. Last but not least, the states excluded from the transfer of the minority population a certain part of it. Sometimes this may be small but it cannot be ignored. Then, they again set up the old pattern of minority protection, under the terms of international law.

States'interests, both kin-State and home-State, were given priority over the legitimate rights of the minority and the guarantee of the principle of free consent. The cold numerical figures indicate in their own silent way the drama of the cost in human suffering brought about as a consequence of nationalist confrontation, war and the forcible expulsion of populations from their homelands.

After all, the idea to expel populations because of their kinship with another state raises the question of exclusion from participation in the state's legal order. To pull out of the country population groups on the basis of language, religion or national affiliation would be breaching fundamental values. One could add that the same would be valid for people excluded because of their foreign citizenship, namely immigrants. If the law had tolerated massive expulsion of minority population in the past would it be the same for the "new minorities"? To answer this question however is outside the scope of this paper.

It seems that the formation of states has been carried out with a hidden and irresistible criterion: national identity that premises the creation of national homogeneity. This political goal is not in harmony with the advanced, as it was at the time, legal structure of the state, which in theory would not have tolerated any discrimination regarding citizens of the state on the basis of linguistic, religious or ethnic identity.

This would explain why Greece, Turkey, Bulgaria or other states in central Europe in the aftermath of the World War II attempted to "clean" from among their citizens any element which could create new irredentism. After the ethnic cleansing took place, again it was time to grant minority rights for those who could not be removed. Recently, history was again repeated in the case of former Yugoslavia: in the aftermath of systematic ethnic cleansing the new legal status, as established after 1995, recognises the final outcome of population expulsion and forced migration. The right for the refugees to return home, as set by international law, seems too good to be true and yet again, the lessons of history have not been learnt.

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THE EXPERIENCE OF SOUTH TYROL

Mr Franz MATSCHER
Professor, Member of Venice Commission, Austria

I. Introduction

It is not up to me and it would go beyond the scope of my report to explain in detail the origin and the further development of the South Tyrol problem. Neither would it be possible to do so within the time-limit of about twenty minutes.

Nevertheless one cannot understand this particular minority problem without knowing its origins. In brief:

1. From the end of the 19th century up to the beginning of the First World War, Italy was a member of the Triple-Alliance with Austria and Germany. However, at the outbreak of war, Italy chose to change its Allies and joined the Western Powers. Following the victory of the latter and as compensation for its behaviour, by virtue of the Peace Treaty of St. Germain of 1919, Italy was adjudicated i.e. South Tyrol, a territory of about 7,400 square kilometres with a total population of about 280,000 nearly exclusively German-speaking inhabitants; only about 7,000 = 3 % of them, were Italian speakers. Bolzano, the biggest city of the region, had about 30,000 inhabitants, amongst them only 4,000 Italians. The Allies' decision was taken in spite of the fact that for more than eight centuries South Tyrol belonged to Austria and that the Peace programme designed by President Wilson provided that the borders between Austria and Italy were to be established at "along clearly recognisable lines of nationality" (point 9 of President Wilson's Fourteen Points as delivered in his speech before congress on 8 January 1918). Relying on that programme, the South Tyrolians claimed the right to self determination, but in vain.

The democratic Italian regime of the early 1920s introduced Italian administration and Italian school, but at least partly respected local autonomy and the language of the local population. This regime, however, was quickly swept away by Fascism, which had from the outset intended to carry out a thorough Italianisation of South Tyrol: schooling in Italian was made

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compulsory, the use of German was banned in public life and attempts were made to restrict it in private life, indigenous administrators were replaced with functionaries from elsewhere in Italy, and above all there was massive forced immigration from the south. By the late 1930s the population of the Province had swelled to 350,000, of which about 100,000 were Italian speakers. The population of Bolzano had increased to 80,000, of which 50,000 were Italians.

2. At the end of the Second World War, in 1945, Italy and Germany had both been defeated. A general movement for the self-determination of South Tyrol, in line with the United Nations Charter (Article 1, paragraph 2) and Austrian support, was again rejected by the Allies. For a number of reasons they decided to leave the region to Italy, recommending that Italy and Austria should direct their efforts towards an amicable settlement of the controversy.

This took the form of the Paris Agreement – also known as the De Gasperi-Gruber Agreement of 5 September 1946, under which Italy granted the German-speaking population of the Bolzano province a vague and poorly defined degree of legislative and executive autonomy. The Paris Agreement was incorporated as Appendix IV in the peace treaty between Italy and the Allies signed on 10 February 1947.

The rather generic provisions of the Paris Agreement were then transformed into Italian constitutional law in the Statute of Autonomy of 1948, but this extended the autonomy to the newly-created region of Trentino-Alto Adige, leaving the province of Bolzano with a flimsy sub-autonomy. The South Tyrolian people, though a strong majority in the province of Bolzano, thus remained a minority in the autonomous body of the region.

The state of affairs therefore remained unsatisfactory. The 1948 Statute of Autonomy did not grant the South Tyrolians the effective autonomy to which, if we exclude the Fascist regime in the 1920s and ´30s, they had been accustomed to for centuries. Neither was the limited autonomy for the province of Bolzano laid down in the Statute fully implemented. In addition, government sponsored mass immigration from the south continued, aided by the large-scale construction of public housing reserved almost exclusively for immigrants, which fuelled the discontent of the resident population.

At that time, Austria was still occupied by the four Allied Powers and had little room to manoeuvre, so its continuous diplomatic protests were ignored by the Italian government.

Having regained its freedom and independence with the Treaty of Vienna on 15 May 1955, Austria took the initiative. Through a series of diplomatic notes starting in 1956, it called for bilateral negotiations with Italy with a view to implementing the provisions of the Paris agreement, which, in the opinion of the Austrians and South Tyroleans, had been distorted by the 1948 Statute of Autonomy.

According to Italy the Paris Agreement had been adhered to, and they thus refused to enter into formal negotiations and stated that they would be prepared to take part in nothing more than non-binding talks.

To get the discussions started, Austria agreed to meet the Italian government's delegation under these conditions, but various meetings and diplomatic exchanges did nothing to bring the two sides together. In the meantime the situation on the ground in South Tyrol was

becoming explosive. Mass "Out of Trento" demonstrations started in 1957, and a chain of clashes with the Italian authorities followed.

Having achieved nothing through bilateral diplomacy, Austria took its grievances to the United Nations in the summer of 1960. That summer also marked the beginning of a series of bomb attacks on railway property, electric power installations and Fascist monuments in South Tyrol.

On the night of 11 June 1961, about one hundred electric power pylons were blown up near Bolzano and Merano. This resulted in considerable material damage but only one death, and that was caused by accident.

This frightened the Italians. The Austrian initiative at the United Nations had led to the internationalisation of the dispute over South Tyrol. And despite massive repression by the Italian forces and the arrest of hundreds of South Tyrolians, the bombing campaign continued.

On 18 June 1961 the Minister of the Interior, Mario Scelba, went to Bolzano with a proposal for the South Tyrolean political leaders that negotiations on the question of the autonomy be conducted by a Commission (the Commission of the Nineteen) presided over by the Hon. Paolo Rossi.
The aim was clear: to forestall the development of a serious movement for self-determination, restore calm in the region and de-internationalise the dispute by seeking a domestic solution.

Meanwhile, the UN General Assembly had passed a resolution (no. 1479 XV of 31 October 1960) calling on Italy and Austria to reach a solution by peaceful means, starting with bilateral negotiations. Resolution no 1661 XVI of 28 November 1961was also adopted to that effect. In so doing the United Nations had implicitly espoused the Austrian position, recognising that the dispute was an international one, affirming Austria's right to act on the basis of the Paris agreement and acknowledging Italy's obligation to accept negotiations.

During the following years various negotiations took place at Foreign Minister level without any substantial results.

Austria and Italy then reached a tacit agreement for a sort of diplomatic truce pending the publication of the results of the above-mentioned Commission of the Nineteen, which presented its final report in April 1964. The report provided no satisfactory solution.

A pragmatic course of action was then chosen: negotiations between senior officials and experts from the two countries, accompanied by direct negotiations between Sjlvius Magnago, then the now legendary President of the province and leader of the South Tyrol People's Party (SVP), and whoever was Italian Prime Minister at the time; the succession of incumbents included Moro, Colombo and Andreotti.

The objective to be pursued was a dual one: strengthening the autonomy to meet the main demands of the South Tyroleans (this became known as a "Package"), and finding a way of guaranteeing to South Tyrol, Austria and Italy that the new forms of autonomy granted would be observed after all the provisions of the Package had been implemented. This was known as the "Optional Schedule" – a sort of procedural gentlemen's agreement, also called an

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"anchorage" or a "string", whose function was to tie the Package together and keep it from falling to pieces.

The Package and the Optional Schedule were an ingenious formula: extensive autonomy for South Tyrol under a new Statute of Autonomy (passed in 1971), underpinned by the inclusion of the Statute in the Italian legal structure and accompanied by the right of Austria to monitor the implementation of the Package and intervene if necessary.

The implementation process lasted until 1992.

At that time the measures to be applied by Italy and Austria were – more or less – fulfilled. There remained the approval of the result, to be given by South Tyrol and the governments and parliaments of the two countries. This was granted at the end of 1991 and the beginning of 1992.

Further discussions were necessary to formulate the official settlement of the dispute. They were complicated by the intention of both sides to safeguard their juridical positions.

On 22 April 1992, Italy gave Austria official communication of the documents relating to the execution of the Package, and on 11 June 1992 was informed by Austria of their receipt and approval.

On 19 June 1992, the two countries notified the Secretary General of the United Nations of the settlement of the dispute which was the subject of the General Assembly resolutions of 1960 and 1961. Notification was also sent to the Secretary General of the Council of Europe and to the International Court of Justice in The Hague.

3. Why did I address the developments between 1945 and 1992 *in extenso*? My purpose was to show that even a very sensitive minority problem can be resolved by peaceful and patient negotiations conducted in good faith, with mutual trust, and accepting historical realities, both sides being aware of the necessities and of the possibilities of the counter part. Of course the result of negotiations of that kind is always a compromise but such a compromise may lead to a satisfactory situation for the minority in question and to the establishment or the re-establishment of good and even friendly relations between the States concerned.

I think that, as regards South Tyrol, such a solution has been reached.

II. Preferential treatment by Austria of the South Tyrolian minority in Italy; Italy's reactions

Which measures of preferential treatment did (or does) Austria adopt in favour of the German-speaking minority living in South Tyrol, which means, in Italy, and how did (or does) Italy react?

That is the main aim of my short report.

1. Let me say at the outset that the basis for the protection of the German-speaking minority in Italy, i.e. the South Tyroleans, is a system of regional autonomy. All the struggles, disputes and negotiations which took place before 1992 were aimed at giving South

Tyrol a substantial and effective autonomy, allowing the South Tyroleans to preserve their identity as a German speaking ethnic group living within the frame of the Italian State, in community with the now considerable group of Italian speakers, resident in the region.

The Paris Agreement of 1946 gives Austria a solid international title to supervise the continuous implementation of the agreement, and beyond that, to take care for its kin-Minority in Italy.

The United Nations resolutions of 1960 and 1961 implicitly ratified that title.

All the following developments (Package, Operational Schedule) have to be seen in that light.

Nowadays, no one seriously thinks of a change of frontiers between the two States.

2. Of course, the existence of an important group of Italian speakers in South Tyrol (about 1/3 of the population) is now a reality. As they are a minority in the region, they do deserve protection. The Statute of autonomy, amended several times (the last one entered into force in 2000), even if it aims primarily at the protection of the South Tyroleans, provides for a balanced protection of the rights and the interests of the two groups, in conformity with Article 20 of the Framework Convention of the Council of Europe of 1995 and the Draft Convention already elaborated by the Venice Commission in 1991.

3. Beyond that, after 1945, Austria unilaterally took a series of collateral measures which had the same aim - i.e. the preservation of the ethnic identity of the German speaking population living in South Tyrol by supporting its cultural, social and economic development.

I would like to give you some examples:

- There is a strong interest for South Tyrolians to pursue their university studies in Austria, mainly in Innsbruck. Of course, academic training is of the utmost importance for the cultural development of young people who will become the leading personalities in South Tyrol.

- To that end, a series of bilateral agreements between Austria and Italy provide for the mutual recognition of university degrees. Formally, these agreements are considered as affecting indistinctly all Italian citizens studying in Austria and vice versa, but in reality they concern almost exclusively South Tyroleans. The system works very well.

- But, for obvious reasons, in view of the particularities of the Austrian and Italian legal systems, a degree acquired at an Austrian university, even if it is formally recognised in Italy, would be of little use for exercising the legal profession in Italy. Therefore, since the 70s of the last century, there are special curricula at Innsbruck University run by Italian professors, mainly from Padua, who give their lectures and conduct their examinations in Italian law and in the Italian language in the matters typically falling within the reserved domain of States (civil and penal law, commercial law, civil and penal procedure, administrative law). These special curricula are integrated into normal Austrian law studies and lead to a normal law degree which, as such, is recognised in Italy. More and more students, not only German but also Italian speakers from South Tyrol, make use of this opportunity which enables them to work in bilingual administrations and other law professions in South Tyrol, and also gives

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them a solid basis for careers in the European Communities and in Community members.

- Other measures concern e.g. access to Austrian universities, taking up employment as university teachers or assistants, the equation of foreign students with Austrian students in the field of university taxes. At the outset, these measures were provided only in the interests of the South Tyroleans – I refer specially to the Austrian law of 1979, subsequently amended several times – but they have practically lost their importance in view of the equality rules of European Community law.

- The same is true as regards access to professions in general, working permits and other matters. In earlier years they too were framed in favour of the South Tyroleans, putting them on an equal footing with Austrian citizens.

- Furthermore, special scholarship-systems financed by the Austrian and Tyrolean governments were set up in favour of German speaking South Tyroleans studying in Austria and providing accommodation in student homes in Innsbruck and in Vienna. Currently, due to the economic prosperity of South Tyrol, these scholarships and places in student homes are financed primarily by the autonomous Province of Bolzano and they are granted to all persons resident in the Province.

- The financial subsidies for cultural activities of the German-speaking South Tyroleans, granted by Austrian and German cultural institutions and supported partly by public funds have practically come to an end and this is also due to the economic prosperity of the Province.

- In the field of medical care there are special agreements between the autonomous province of Bolzano and Austrian health institutions, providing facilities for all persons resident in the province, in specialised institutions in Austria.

- There are also special agreements between the social insurance institutions of the Province of Bolzano and their partners in Tyrol granting residents of the Province the same treatment as that provided for Austrian citizens.

- In this context, I should also mention a series of special agreements between Austrian and Italian medical centres regulating the professional training for medical specialisations. These agreements were entered into by Faculties of medicine or special medical centres in Austria and in Italy and they are available for young doctors resident primarily in the Province, without distinction whether they belong to the German or to the Italian-speaking group.

4. You can gather from the foregoing that, at the outset, the special measures in question were intended to favour the German-speaking South Tyroleans only.

Austria felt entitled to adopt these measures of preferential treatment as a necessary means to preserve the cultural and ethnic identity of the South Tyroleans and to promote their economic well being, as it considers itself the mother State or kin-State for the South Tyroleans, the basic legal title being the Paris Agreement concluded with Italy on 5 September 1946. Italy accepted these measures with some reluctance, but never formally objected.

Since the preferential measures – and the regional autonomy as a whole – favour both linguistic groups living in South Tyrol, including the Ladius, Italy is satisfied and even welcomes the measures in question, these measures being in the interest of the whole population living in the region.

All this is the result of the good neighbourly and friendly relations between the two States.

Let me conclude by saying that, if two States live in good relations and if one does not fear that the other one intends to assimilate the minority and the second one does not think that the first one has a secession in mind, minority problems can be resolved without tension and preferential measures can be conceived by both sides as natural and even necessary means for the protection of a minority.

THE HUNGARIAN LEGISLATION ON HUNGARIANS LIVING IN NEIGHBOURING COUNTRIES

Mr Kinga GÁL
Vice-President, Government Office
for Hungarian Minorities Abroad
Budapest, Hungary

I. New trends and important steps in the overall protection of national minorities

The bilateral treaties signed between neighbouring States in Central and Eastern Europe during the 1990s have been rediscovered in 2001. These treaties, especially the process of their adoption and their implementation, were followed with interest by the international institutions in Europe. Special attention was paid to the provisions on the protection of national minorities incorporated in these treaties, as the first instances where the issue of minorities in neighbouring countries, relation between home-State, minority and kin-State, were codified bilaterally after the Second World War. Last fall, these issues were suddendly again on the agenda of bilateral relations and international institutions due to the adoption by the Hungarian Parliament of the Law on Hungarians Living in Neighbouring Countries[1] and the reactions following the adoption of this law. It raised special attention regarding the issue of preferential treatment of minorities, as well as regarding the role played by kin-States in the development of these minorities.

It brought unexpected reactions from two of the neighbouring countries of Hungary (Romania, Slovakia) and was discussed intensively by international institutions, such as the Council of Europe, the OSCE High Commissioner on National Minorities or the European Commission. The most important expert body of the Council of Europe, the European Commission for Democracy Through Law (also known as the Venice Commission), adopted a detailed report on the preferential treatment of national minorities by their kin-State in October 2001[2]. In this report the importance of the bilateral treaties was stressed and certain

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[1] *Law LXII on Hungarians Living in Neighbouring Countries, adopted by the Hungarian Parliament on 19 June 2001 and entered into force on 1 January 2002, provides benefits and assistance to persons who are of Hungarian origin/identity but foreign nationality and live as indigenous in the neighbouring countries to Hungary.*

[2] *European Commission for Democracy Through Law, "Report on the Preferential Treatment of National Minorities by their Kin-State", adopted by the Venice Commission at its 48th Plenary Meeting, Venice 19-20 October 2001, CDL-INF(2001)019. According to the Introduction of the Report, "[o]n 21 June 2001, Romania's Prime Minister, Mr A. Nastase, requested the Venice Commission to examine the compatibility of the Law on Hungarians Living in Neighbouring Countries, adopted by the Hungarian Parliament on 19 June 2001 , with the European standards and the norms and principles of contemporary public international law. On 2 July 2001, the Hungarian Minister of Foreign Affairs, Mr J Martonyi, requested the Venice Commission to carry out a comparative study of the recent tendencies of the legislations in Europe concerning the preferential treatment of persons belonging to national minorities living outside the borders of their country of citizenship. At its plenary session of 6-7 July 2001, the Venice Commission decided to undertake a study, based on the legislation and practice of certain member States of the Council of Europe, on the preferential treatment by a State of its kin-Minorities abroad". The aim of the study was to establish whether such treatment could be said to be compatible with the standards of the Council of Europe and with the principles of international law.*

aspects of these treaties, their content and implementation, were emphasised. This highly respected body established certain basic principles in the field of the protection of national minorities which can be regarded as a solid basis for further positive developments in this particular field. The Venice Commission Report stressed, among others, that:

> "(t)he potentialities of bilateral treaties in respect of reducing tensions between kin-States and home-States appeared to be significant, to the extent that they can procure specified commitments on sensitive issues, while multilateral agreements can only provide for an indirect approach to those issues. Furthermore, they allow for the specific characteristics and needs of each national minority as well as of the peculiar historical, political and social context to be taken into direct consideration."[3]

Further on, the report 168/2000 of the Venice Commission states that "Responsibility for minority protection lies primarily with the home-States", which is an important step in the European minority-protection system as this responsibility had not been expressed directly by the existing documents so far. The Report also mentions that beside multilateral and bilateral arrangements, unilateral measures of kin-States granting benefits to their kin-minorities, especially in the fields of culture and education, are legitimate, as far as they pursue the legitimate aim of fostering cultural links between minorities and their kin-States in order to preserve their identity. This way, as regards the often-raised issue of non-discrimination, the Venice Commission recognises the principle of positive action if "this pursues a legitimate aim and the measure taken is proportionate to this aim". (This principle is also accepted by the European Union in its Council Directive 2000/43/EC, Article 5[4]).

Despite the existing legislation of this kind in Central Europe and existing practice in Western Europe, as well as certain trends at the international level, the sensitivity of some of the neighbouring countries resulted in unexpected reactions. However, it is also question of fact that these reactions, supposing that a common understanding is or will be reached soon between the respective governments, also contributed to the exposure of the issue on the international field, therefore directly or indirectly contributed positively to the promotion of minority protection in Europe.

On top of the professional report of the Venice Commission, the improvements reached in the framework of the Joint Intergovernmental Committees in following and monitoring the implementation of the bilateral treaties signed between Hungary and most of its neighbours also contributed to the promotion of general minority standards due to the negotiations linked to the adoption of the Hungarian Law. Following the active role of these joint intergovernmental committees in reaching an agreement on the implementation of the Law between Hungary and Croatia, Slovenia, and Ukraine respectively, the role of those joint committees, that hardly worked before, came out reinforced. This way next to the Croatian-Hungarian, Slovenian-Hungarian, Ukraine-Hungarian Joint Commissions on Minorities, where agreement was reached and no objections or questions were raised regarding this Law, the Romanian-Hungarian and Slovak-Hungarian Joint Commissions were also revitalised.

For example the Recommendations of the Protocol of the Committee on national minorities of the Romanian-Hungarian Intergovernmental Joint Commission on Active Co-operation

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[3] *European Commission for Democracy Through Law, "Report on the Preferential Treatment of National Minorities by their Kin-State", CDL-INF(2001)019, p. 5.*

[4] *See footnote no. 9.*

and Partnership, Fourth Session, negotiated on 25 September in Bucharest and signed on 19 October 2001 in Budapest, welcomed all such measures by their governments that offer to provide support for preserving the ethnic, cultural, linguistic and religious identity of their minority living on the territory of the other State and have been mutually discussed by the Parties. The document incorporates principles such as the "positive discrimination, if necessary, in order to secure full equal opportunities for both persons belonging to national minorities and persons living in their states and belonging to the majority in preserving their cultural, ethnic and religious identity"; or the "adoption of an annual program of co-operation in which the methods of common action for preserving the ethnic, cultural, linguistic and religious identity of their kin minorities and establishing and supporting the operations of their associations and organisations would be determined".

Following the positive steps taken by these Committees towards an agreement on the implementation of the debated Hungarian Law, a protocol was signed in December 2001 between Romania and Hungary, which agreement established conditions for implementing the Law on Hungarians Living in Neighbouring Countries in regard to Romanian citizens. The Memorandum of Understanding contains principles relevant for the overall protection of minorities, such as the acknowledgement that "providing effective equality in rights and chances for the national minorities living in their respective countries and creating conditions for them to prosper in their land of birth, constitute an indispensable contribution to the stability of the region and to the creation of a future Europe, based on values as cultural and linguistic diversity and tolerance". The Memorandum also contains an important provision on the role of Joint Intergovernmental Committees: "In order to work out a plan to make concrete steps forward in their bilateral co-operation, Parties will, in the Committees of the Hungarian-Romanian Intergovernmental Joint Commission on Active Co-operation and Partnership and at its plenary session scheduled for the first quarter of 2002, survey the full range of the bilateral relations and make recommendations for measures to be taken"[5]

II. The Law on Hungarians Living in Neighbouring Countries

The existence of Hungarian national minorities living in neighbouring countries and their wish to maintain and promote their identity and foster cultural links with their kin-State are questions of fact. (see Appendix 1)

At the same time it is also a question of fact that the Hungarian population living in these countries is facing problems. The unofficial results of the Slovak census of 2001 show that the number of Hungarians in Slovakia is rapidly decreasing. While in 1991 some 567,000 persons identified themselves as Hungarians, only 520,000 Hungarians were registered in 2001. This means that in the past decade, the size of the Hungarian community has shrunk considerably - by 8%. According to the first unofficial figures, similar tendencies of rapidly decreasing Hungarian population can also be observed in Romania and in Yugoslavia (Vojvodina).

Hungary had to address these questions in some way and explicitly wished to address these demands in firm conformity with its international undertakings. Theoretically, there were

[5] Memorandum of Understanding between the Government of the Republic of Hungary and the Government of Romania concerning the Law on Hungarians Living in Neighbouring Countries and issues of bilateral co-operation.

three options to address the question of Hungarians living in neighbouring countries, all of them present in the relevant European practice:

(1) The first option would have been to passively acknowledge the migration of Hungarians living in neighbouring countries to Hungary and support their resettlement. However, this was not the intention of Hungary, since the main aim was to preserve the identity and culture of these Hungarians on their native land, where they live.

(2) The second option would have been the idea of a dual citizenship, by granting Hungarian citizenship to persons belonging to the Hungarian national minorities. There was a constant claim by the representatives of Hungarian minorities to get a special dual citizenship, a 'foreign resident citizenship' conceived as conveying status according to the last proposals.[6]

The Hungarian political leaders clarified on several occasions that dual citizenship would be a very delicate issue for Hungary, both at the domestic and the international level. According to the Prime Minister, an amendment to the electoral law that would give voting rights to Hungarians living abroad had no chance of being passed through the Parliament[7]. The Hungarian Foreign Minister also rejected any idea related to granting dual citizenship to ethnic Hungarians living abroad – this would be almost impossible also because of the accession negotiations with the EU.

(3) The third option, chosen by the Hungarian Government, was less harmful, taking into consideration all circumstances (historical, geographical, demographic, etc.) of the region: granting, by secondary measures, benefits and assistance to the Hungarian minorities living in the neighbouring countries without offering them any special "status" in legal terms.

With the adoption of this Law, Hungary reiterates that the main responsibility for minority protection lies with the home-State. Hungary does not attempt to take over such responsibility but rather plays a contributory or secondary role alongside the home-State and the international community. In fact, the Hungarian Law cannot and should not be understood as a kind of criticism of the treatment of the Hungarian minorities in the neighbouring States – it simply assists the realisation of the generally accepted goals of international minority protection in case of persons of Hungarian national identity in neighbouring States who otherwise are obviously decreasing in numbers.

As it has been outlined many times, the concept of the Law is based on the "nation" as a cultural phenomenon. In the context of the Law, therefore, this notion is used in its cultural sense. While persons belonging to the Hungarian national minorities are citizens of different countries, they declare themselves as having Hungarian cultural, linguistic and national identity – without claiming any political bond to their kin-State. Consequently, the Law does not intend to establish any political bond.

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[6] *Miklós Patrubány, President of the World Federation of Hungarians, speech delivered during the OSCE Review Conference, Vienna, 28 September 1999: "The institution of foreign citizenship, as a token for diminishing ethnical tension".*

[7] *Prime Minister Viktor Orbán, RFE/RL 18 November 1999, "Status of ethnic Hungarians to be settled in two years".*

The question of 'loyalty' of the minorities towards their home-States has been addressed on several occasions after the adoption of the Law. This Law, through its clearly stated and declared objectives, clears any doubts in this context: it does not intend to serve as a basis for questioning the loyalty of these minorities who are citizens of their home-States but rather emphasizes the importance of their well-being and flourishing existence in their home countries. The loyalty of an individual towards his/her home country has objective measures: a citizen of a State who does not emigrate, contributes to the social undertakings of the country by paying taxes and social contributions, takes up his duties in the military service, moreover studies, works and establishes existence in his/her home country, cannot prove more effectively his/her loyalty irrespective of the ethnic or national origin. It would be an evidence of a 'symbolic discrimination' to expect more evidence of loyalty from the minorities than expected from the majority in a given State. The Hungarian minorities living in the neighbouring countries to Hungary prove day after day that they are loyal citizens of their home countries.

This Law does not intend to touch upon these issues: on the contrary, it is designed to encourage persons belonging to national minorities to stay in their home countries while contributing to their well-being there, through promoting their identity and allowing them to keep ties with their kin-State, thus preserving the cultural diversity of the region. Paragraph 5 of the Preamble of the Law states that: "in *order to ensure that Hungarians living in neighbouring countries form part of the Hungarian nation as a whole and to promote and preserve their well-being and awareness of national identity within their home country…"*[8]. Furthermore, it has to be interpreted in the context of the whole Preamble, where it is also stated that interpretation must be done "Having regard to the generally recognized rules of international law, as well as to the obligations of the Republic of Hungary assumed under international law; Having regard to the development of bilateral and multilateral relations of good neighbourhood and regional co-operation in the Central European area and to the strengthening of the stabilising role of Hungary;" (paragraphs 3 and 4).

The whole philosophy of the Law confirms in the most apparent way that territorial revision is not a "solution" for questions raised by national minorities. Moreover, Hungary confirmed its international undertakings in this regard through bilateral treaties concluded with its neighbours in general, and through the Treaty between the Republic of Hungary and Romania on Understanding, Co-operation and Good Neighbourhood, which states at its Article 4 that: "The Contracting Parties confirm that, in accordance with the principles and norms of international law and the principles of the Helsinki Final Act, they shall respect the inviolability of their common border and the territorial integrity of the other Party. They further confirm that they have no territorial claims on each other and that they shall not raise any such claims in the future."

The Law ensures nothing more than the same assistance for persons belonging to Hungarian minorities living in the neighbouring countries that Hungary, a home-State for a number of minority communities, welcomes from other States.

The overwhelming majority of persons of Hungarian national identity who live in emigration in Western Europe, in the United States, in South America or in Australia are Hungarian citizens. They preserved and transmitted this citizenship to their descendants – beside, of

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[8] *Quotations appear in italics.*

course, the citizenship of their home country. Therefore, in Hungary, they are enjoying (almost) the same rights as a Hungarian citizen living in Hungary. The Preamble of the Hungarian Law clearly states that this Law is adopted "*without prejudice to the benefits and assistance provided by law for persons of Hungarian nationality living outside the Hungarian borders in other parts of the world.*"

These persons – or their ascendants – left Hungary, after all, as a result of their own decision and preserved, regained or wish to regain their citizenship due to their own decision. This difference in status results in a difference in regulation.

Benefits and assistance

Government experts, opposition parties, as well as representatives of the Hungarian minorities outside Hungary, were involved in the preparation and negotiation of this law in the framework of a Permanent Hungarian Conference established in 1999. The debate on the relevancy and adequacy of such a law was of a constant debate between government and opposition, and also in the mass media.

Before approaching the issue of promoting identity-keeping of kin-Minorities, several examples of this type of promotion have to be referred to, such as the Slovak, the Bulgarian or the Romanian legislation, which have been examined by the initiators of the Law. These examples were then analysed by the Venice Commission – which shows that the Hungarian Law was neither new nor unique in Europe. The establishment of its theoretical basis has been made possible through developments in the fields of human and minority rights. Numerous countries in our neighbourhood and in the region have or are planning to pass similar legislation on minorities living in neighbouring countries. In several member states of the European Union, there is also specific legislation in force to handle special cultural bonds (for instance in Germany, Ireland, Spain, Portugal, Greece).

As already stated, the Law is designed to encourage persons belonging to national minorities to stay in their home countries, preventing them from migrating to Hungary, while also contributing to the promotion of their identity: in this way the Law provides secondary measures and benefits to support this aim.

The citizens subjected to the Law are eligible for benefits available only in Hungary, while also having the possibility to apply for different types of assistance in the field of culture through civic organizations or foundations functioning under the jurisdiction of their home countries.

The benefits and assistance provided by the Law are closely linked to the preservation and promotion of their cultural and linguistic identity – except for the benefit regarding the work permit with certain simplified procedure for a period of three months work in Hungary and the health care benefits partly connected to the employment in Hungary. The complex sociological and psychological nature of the 'identity' justifies this broader approach, as international instruments are also referring to the economic and social aspects of the protection of national minorities.

In order to be eligible for benefits in Hungary, the persons falling under the criteria established by the Law may apply for a Hungarian Certificate. This Certificate may only be

used together with the valid passport of the individual and does not entitle its possessor to use it for border crossing or identification in any way.

Benefits and assistance in the field of culture are of primary importance. As cultural identity is mainly reflected through language, its promotion is an indispensable element of the preservation of the identity. Culture does not mean exclusively literature or folklore. The notion of culture, therefore the language as well, has to be approached in a more comprehensive sense. The provisions of the Law are general in this respect, while the concrete implementation of the general principles follows through the relevant government decrees, such as Decree no.21/2001 (XI.25) and Decree no.23/2001 (XII.29) of the Minister of National Cultural Heritage, or Decree no. 319/2001. (XII.29) of the Government of the Republic of Hungary on Student Benefits of Persons Falling Within the Scope of Act LXII of 2001 on Hungarians Living in Neighbouring Countries.

The legitimacy of a preferential treatment, as one of the theoretical foundation of the Law, can be objectively and reasonably justified. It is the constant need to effectively assure equality between the majority and the minority that justifies the preferential treatment for minorities.

The principle of preferential treatment is not new in international law. For example the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[9] refers to positive action in its Article 5, stating that "(*w)ith a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin".*

The Council of Europe Framework Convention as well as the Council of Europe Charter on Regional and Minority Languages also promote the principle that preferential treatment of minorities does not constitute discrimination. According to the Framework Convention, Article 4, paragraph 2: *"The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities."* It also states that *"the measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination."*

This principle is emphasised in the Language Charter, stating that "The adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population, or which take due account of their specific conditions, is not considered to be an act of discrimination against the users of more widely-used languages".

The general principle that supporting minorities is not considered as a discriminating act is not limited exclusively to the internal affairs of a State supporting its minorities within its borders, since it does not exclude any help (even those coming from another State) aimed at establishing the full-equality of these communities. In the spirit of the documents and the European practice (EU States and a similar financing policy of the Committee), it may refer to supporting the minorities of a kin-State inasmuch as financial support is ensured in the

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[9] *Official Journal L 180, 19/07/2000 p. 0022 - 0026*

form of some year long-projects preserving and developing minority communities (e.g. establishing and developing bilingual radio programs in Austria, publishing geography and history course books in Catalan in France, Roma projects in Hungary, Romania and the Czech Republic[10]).

This principle is also enshrined in the Framework Convention signed and ratified by most of the EU countries and by all of the neighbouring countries of Hungary: "the protection of national minorities and of the rights and freedoms of persons belonging to those minorities forms an integral part of the international protection of human rights, and as such falls within the scope of international co-operation." (Article 1)

The OSCE (their expert meeting on national minorities in Geneva, 1991) also explicitly declared that "(i)ssues concerning national minorities, as well as compliance with international obligations and commitments concerning the rights of persons belonging to them, are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective State."[11]

Benefits other than cultural ones

In the field of other benefits than cultural ones, the Law simply institutionalises the existing practice in case of persons belonging to Hungarian national minorities. In respect of health care, the same regulation applies to the subjects of the Law than to any other foreign citizen. There is no difference in this regard.

For example Romanian citizens – according to the bilateral Agreement on the co-operation in the field of social policy signed in 1961 and still in force – receive health care in case of an emergency or an urgency in Hungary.

Those foreign citizens who work officially in Hungary are receiving health care in Hungary on the basis of their social contributions similarly to the subjects of the Law, and similarly to Hungarian citizens.

The competent Foundation (Segítő Jobb), dealing with the health care assistance of applicants from neighbouring countries and financed partly by the State budget, is attributing coverage irrespective of ethnic belonging. The Foundation is designed to financially support individuals in neighbouring countries who cannot afford expensive medical treatments. According to its statute as a humanitarian body, the foundation cannot differentiate between its patients on an ethnic basis. Criteria for selection of those who are in need of medical treatment are the same for ethnic Hungarians and others. The ten years-long practice of the Foundation shows neutrality in selecting the beneficiaries.

The present practice, codified in the Law, is not discriminatory: there is no differentiation between a person belonging to the Hungarian national minority and anyone else.

Travel benefits

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[10] *Source: http://europa.eu.int C:/TEMP/Promoting and safeguarding regional and minority languages and cultures.html.*

[11] *Report of the CSCE Meeting of Experts on National Minorities, II. (3), Geneva, 1991.*

The government decree filling in with content the provisions of the Law Hungarian governmental decree is the Government Decree no. 287/1997, as amended by Government Decree no. 242/2001 (XII.10), which regulates the various rates of discount at public local and regional railway and bus networks. It states that Hungarian citizens and foreign citizens under relevant bilateral treaties, are entitled to free travel on the above-mentioned means of public transportation, once they are more than sixty years of age. There are such treaties in force between Hungary and, among others, Slovakia, the Ukraine and in some respect between Hungary and Romania. The same preferences are available for children under age of six (whether Hungarian citizens or foreigners) in the public transportation. There is no differentiation on ethnic basis.

Further on, benefits for different proportions of travel discount are available for all foreign citizens under the age of 26 according to international agreements and practice.

In this field, therefore, benefits granted by the Law are no more than reinforced regulations in a structured way and establish additional preferential treatment only for the generation between the two age limits and according to the relevant treaties respectively. We are of the opinion that this measure is not disproportionate and it follows a legitimate aim, namely to facilitate the access to cultural goods and foster cultural ties. The measure in question therefore fulfils the necessary preconditions set by the Venice Commission: *"...to pursue a legitimate aim and to be proportionate to that aim*."

Employment

The employment benefits provided by the Law consist only of a simplified administrative procedure in order to get work permit in Hungary, while the work permit or the entrance visa for the purpose of employment and residence permit are required from all foreigners (also from the subject of this Law) employed in this country.

The employment benefits did not raise objections in relation to the neighbouring countries, except for Romania. Preferential treatment in this field is not a new phenomenon in Europe as analysed by the Venice Commission. Moreover, some acts, such as the Slovak Law[12], establish an even broader preferential treatment regarding employment when stating that "the status of a foreign Slovak makes it possible to apply for employment without stated permits" (Article 6(b)) and "(b)y entering the territory of the Slovak Republic are the invitations and visa not required from the foreign Slovaks (…)".

According to the Memorandum of Understanding between the Government of the Republic of Hungary and the Government of Romania concerning the Law on Hungarians Living in Neighbouring Countries and issues of bilateral co-operation, the objections of the Romanian side were satisfied: "*All Romanian citizens, notwithstanding their ethnic origin, will enjoy the same conditions and treatment in the field of employment on the basis of a work permit on the territory of the Republic of Hungary. Work permits shall be issued under the general provisions on the authorisation of employment of foreign citizens in Hungary. When work permits are issued for a maximum of three months per calendar year, there is the possibility of their prolongation and the Romanian citizens enjoy some facilities on the territory of the*

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[12] *70/1997 Coll. Laws; Law of the National Council of the Slovak Republic on foreign Slovaks and on change and amendment of some laws.*

See at: http://www.culture.gov.sk/ANGLICKY/3SCT/LEGISLATIVE/Z97_70.html.

Republic of Hungary, which are the following: Romanian citizens working on the territory of the Republic of Hungary on the basis of any type of contract of employment shall have the right to apply to the public benefit organisation established for this purpose for the reimbursement of the costs of self-pay health care services in advance."

III. The implementation of the Law on Hungarians Living in Neighbouring Countries in the light of the opinions of the Venice Commission

As it had been envisaged immediately after its publication on 19 October 2001, the legal opinion of the Venice Commission *Report* was seriously considered by the Hungarian Government while preparing the implementation decrees. As the Hungarian Law is a framework legislation of a general character, the implementation rules referred to in Article 28 of the Law turned the general terms into practice. This allowed for the incorporation of the observations made by the Venice Commission and by some of the neighbouring countries without formally amending the Law. The most relevant rule in this regard was the Government Decree no. 318/2001 on the procedure for the issuance of the Hungarian Certificate and the Hungarian Dependant Certificate.

The implementation decrees and the practice not only follow the Venice Commission observations but they also conform to the undertakings of the Memorandum of Understanding in respect of Romania.

This way the role of the associations of Hungarian minorities is not indispensable in the procedure since the recommendation of informative character is not a pre-condition to the issuance of the certificate. The possible contribution of the associations is restricted to the supply of information – in case it is needed in the absence of formal supporting documents. All this is in full conformity with the Venice Commission's opinion: no quasi-official function is assigned to these associations; they simply provide information on criteria in the absence of formal supporting documents.

Also in line with the observations of the Venice Commission, the Hungarian consulates play a role in the implementation of the Law. They check the existence of the criteria and forward the applications to the competent Hungarian authority.

The observations of the Venice Commission as to the criteria for falling within the scope of the Law were accepted. These criteria were incorporated in the implementation rules, and also the *Memorandum of Understanding between the Government of the Republic of Hungary and the Government of Romania concerning the Law on Hungarians Living in Neighbouring Countries and issues of bilateral co-operation was taken into account*[13].

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13 (Memorandum of Understanding between the Government of the Republic of Hungary and the Government of Romania concerning the Law on Hungarians Living in Neighbouring Countries and issues of bilateral co-operation)

"The compulsory criteria on which certificates are granted shall be the following:

– Relevant application,

– Free declaration of the person of belonging to the Hungarian minority in the State of citizenship, founding on his/her Hungarian ethnic identity,

– Knowledge of the Hungarian language, or

– The person should have declared himself/herself in the State of citizenship to have Hungarian ethnic identity, or

According to the implementation decree (*Article 5 (2)): "such a certification may be issued to an applicant falling within the scope of the Act who:*

a) has declared his/her belonging to the Hungarian national community by submitting an application for the Certificate, as well as
b) masters the Hungarian language or

c) is registered

1) in the state of his/her residence as a person declaring himself/herself of Hungarian national identity, or

2) as a member of an organisation, operating on the territory of his/her state of residence, that draws its members from persons of Hungarian national identity, or

3) in a registry of a church operating in the territory of the state of his/her residence as a person of Hungarian national identity."

Also in conformity with the opinion of the Venice Commission, the certificate is a mere proof of entitlement to the benefits and assistance provided by the Law and not an instrument to create any kind of political bond between the holder and the issuing authority. The Certificate does not substitute for an identity document issued by the authorities of the home-State: it cannot be used as a passport, it does not authorise visa-free entrance into Hungary and it does not entitle to a permanent stay in Hungary. Moreover, it is not accepted by the Hungarian authorities as a substitute for an identity document issued by the authorities of the home-State. The Hungarian certificate contains the strictly necessary personal data of the person subjected to the Law.

Since the Law is not based on an ethnic approach and the family is perceived as an indispensable element of the preservation of identity, a 'basic cultural unit', family members belonging to the majority population are entitled to the same benefits and assistance. This provision aims at avoiding the break up of the unity of the family. Nevertheless, as this was unacceptable for Romania, according to the Memorandum of Understanding between the two countries, the following was approved "*The Romanian citizens of non-Hungarian ethnic identity shall not be granted any certificate and shall not be entitled to any benefits set forth by the Law on Hungarians Living in Neighbouring Countries*."

Bilateral agreements, monitoring of the implementation of the Law:

As mentioned above, the work of the Joint Intergovernmental Committees had a positive role in relation to the consultations between neighbouring States with regard to the Hungarian Law. There were consultations and consequently joint declarations adopted by the heads of the Croatian-Hungarian, Slovenian–Hungarian, Ukraine–Hungarian Commissions on Minorities. The Hungarian–Slovak debate on the implementation of the Hungarian Law might also get a positive turn in the framework of its respective Joint Commission.

– Optionally, the person should either belong to a Hungarian representative Organisation (notably membership of the UDMR), or be registered as ethnic Hungarian in a church."

Looking at the above-presented work of the Romanian-Hungarian Joint Commission, one can conclude that this commission hardly worked, as there was no will to make it flourishing. However, as soon as it became clear that it might be the only forum to come to an agreement, the political will revitalised it. The recent issue of the Law on Hungarians Living in Neighbouring Countries and its effect on Romanian–Hungarian relations shows that Joint Commissions have the potential to become the most appropriate forum to deal with misunderstandings and problematic issues between neighbouring States when provided with the political will to convoke them and give them a proper mandate. (Nevertheless, this very case is again a good example of "politicisation" of the issue hindering or making it difficult to take rational steps. On the other hand, it shows that when the political will exists on both sides a positive agreement may be adopted easily.)

Conclusion:

If the triangle relation between home–State, minority and kin-State was not such a sensitive issue in the region, the declared objectives of the Hungarian Law could have been interpreted and used as positive signs towards bilateral relations in general. What was clearly not fully taken into account is the specific nature of this particular region whenever the issue of minorities comes up, whether it is in the form of an official meeting of representatives of these communities with high ranking leaders of the kin-State, over the course of a joint project, or co-operation in the framework of a Euroregion or transfrontier project.

The Law is far from being perfect. It certainly contains measures, provisions that have to be reformulated. Practice will show which provisions are more, and which are less adequate and interesting for the targeted groups. It certainly has negative aspects, but I would stress the positive ones: it is good that it tries to give clear answers to often raised questions and establishes a clear structure which might help to stop doubts about any hidden agenda in this context. As the reactions to this particular Law and the lack of interest in other similar ones on the same field show, there were doubts about a hidden agenda regarding this Law and the aims incorporated in this law. Well, hopefully the implementation, the practice and the time will prove that the Law intended to clarify needs and address these needs in a clear way, in strict conformity with the international undertakings of the country.

Since the adoption of the Law, several constructive remarks were made by the international organisations which were or will be taken into account in improving this legislative act. The importance and the adequacy of the issue were not questioned (as this conference also proves) – certainly the methods and modalities chosen differ from scholar to scholar and from country to country. The adoption of such a Law or the solution chosen in this Law does not mean that this practice should be automatically taken by others as a model – the cases might be very different. In the same way as in the case of adoption of bilateral treaties, whenever addressing the adequacy of such legal documents, the differences and realities must also be taken into account.

As a concluding remark, let me inform you that, by today, around 400,000 demands for Hungarian Certificates were registered, 100,000 of the requests were approved and signs of conflicts were not experienced. Some people, especially students and young people apply for the Certificate in order to be able to use the benefits in Hungary, others wait for the possibility to apply for some assistance.

The implementation of the law hopefully will show that this kind of help offered by the kin-State does not take away benefits from others, nor does it discriminate against others or offend neighbours or other foreigners. It simply contributes to the protection of identity and to a sense of well-being of these minority communities, therefore to the well-being of their home country and the whole region.

Annex no. 1: Kin-States and kin-Minorities in home-States of the Carpathian Basin (around 1990)

Hungarians in Slovakia	567,296 (653,000)	Slovaks in Hungary	10,459 (80,000)
Hungarians in Ukraine	163,111 (200,000)	Ukrainians in Hungary	657 (1000)
Hungarians in Romania	1,627,021 (2,000,000)	Romanians in Hungary	10,740 (15,000)
Hungarians in Serbia	343,942 (365,000)	Serbs in Hungary	2,905 (5,000)
Hungarians in Croatia	22,355 (40,000)	Croats in Hungary	13,570 (40,000)
Hungarians in Slovenia	8,499 (12,000)	Slovenes in Hungary	1,930 (5,000)
Hungarians in Burgenland	6,763 (7,000)	Germans in West-Hungary	1,531 (17,000)

Source: Census data /Ukraine 1989, Hungary 1990, Slovakia, Serbia, Croatia, Slovenia, Austria 1991, Romania 1992/ according to the ethnicity (in Austria: everyday language). In parentheses are the estimates – according to the language knowledge and ethnic origin – of the organizations of the minorities and the calculations of K. Kocsis (1988). Hungarians in Transylvania include the Székely- and Csángó-Hungarians

ROMANIAN LEGISLATION ON KIN-MINORITIES

Mr Bogdan AURESCU
Director general for legal affairs in
the Ministry of Foreign Affairs of Romania,
Substitute member of the Venice Commission

General considerations

Until recently, the theme of the protection of national minorities by their kin-States had not been approached at the multilateral level. Consequently, the rules and standards applying in this field are the general ones set forth in the international documents pertaining to the protection of human rights and fundamental freedoms, including the rights of persons belonging to national minorities and the rules of general Public International Law, especially those related to sovereignty and jurisdiction.

The debate over this theme was inspired by the adoption on 19 June 2001, by the Hungarian Parliament, of the Law on Hungarians Living in Neighbouring Countries, followed by the consideration of the compatibility of the Hungarian Law and of the other European pieces of legislation setting forth preferential treatment for kin-Minorities with the international and European standards by the European Commission for Democracy through Law (the Venice Commission), upon the request of the Romanian and Hungarian Governments.

The examination by the Venice Commission last year of the European practice and legislation and of the comprehensive position documents of the Romanian Government and, respectively, of the Hungarian Government was finalized with the Report on the preferential treatment of national minorities by their kin-States (hereinafter referred to as "the Venice Commission Report"), adopted on 19 October 2001, in the presence of the Romanian and Hungarian ministers of foreign affairs. The Venice Commission Report concluded that the adoption by States of unilateral measures granting benefits to persons belonging to national minorities does not have sufficient *diuturnitas* to have become an international custom and emphasized some fundamental principles to be taken into account, as, for instance, the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations among States and respect of human rights and fundamental freedoms, in particular the prohibition on discrimination.

Shortly after the adoption of the Report, on 26 October 2001, the OSCE High Commissioner on National Minorities issued a Statement, "Sovereignty, Responsibility and National Minorities" (hereinafter referred to as "the OSCE High Commissioner's Statement"), outlining essential guidelines to be taken into account by the kin-State in the elaboration of its policy with regard to kin-Minorities.

In the opinion of the *rapporteur*, the most important aspect reflected in the Statement is that the kin-State does not have a right to exercise protection of the right of persons belonging to national minorities, but only an interest in doing so, and that the primary responsibility in granting such a protection lies with the home-State.

Although the practice developed could not be considered an international custom until now (in order to be susceptible to develop customary rules), this European debate is nevertheless of high importance in the opinion of the *rapporteur*. This importance resides, in fact, in the nature of the subject – nowadays, protection of national minorities is a politically sensitive and perpetually developing subject in Europe – and in the possibility of developing standards, in order to concretise a uniform approach, and to avoid fragmentary and, sometimes, dangerous practices.

The present Report contains an overview of the Romanian domestic legislation (the first Section) and bilateral treaties (the second Section) with regard to the kin-State involvement in the protection of the rights of persons belonging to national minorities, an assessment of this practice (the third Section) and the Conclusions of the analysis.

I. Domestic Legal Acts

1. The Constitution of Romania

The Constitution of Romania, adopted in 1991, sets forth in Article 7, on "The Romanians of abroad", that the "State supports the enhancement of the links with the Romanians from outside the borders of the country and that measures must be taken in order to preserve and develop their ethnic, cultural, linguistic and religious identity, in full observance of the legislation of the State whose citizens they are".

The most important elements of the above-mentioned article, which clearly shows the self-established limits of the Romanian State concerning its involvement in favour of the Romanians living abroad, are the following:

a. The Romanian State does not intend to establish a link with the Romanian communities living abroad; it only supports the enhancement of the links between its population and the members of the persons belonging to the national minorities. Thus, the exercise of the right of the persons belonging to national minorities to maintain links with the population of the State with whom it shares the same cultural identity is supported by the Romanian State without creating a separate political link between the State and the Romanian minorities living abroad. In the Venice Commission Report, this principle is emphasized as a fundamental one in what concerns the involvement of the kin-State.

b. The measures taken by the Romanian State in favour of its kin-Minorities living abroad are circumscribed by the need to preserve and develop the ethnic, cultural, linguistic identity of the Romanian minorities. They are not directed, for instance, towards the creation of social economic rights for these persons.

c. The Romanian State not only takes the legislation of the home-state into consideration but it is preoccupied to act in full observance of it, which becomes a *sine qua non* condition for the Romanian State's involvement in favour of its kin-Minorities**.**

2. Law no. 150/1998

Law no.150/1998 regarding the support granted to Romanian communities from all over the world is the only Romanian legal document whose object pertains to the Romanian communities living abroad. The Law provides for the creation of a Fund, at the disposal of the Romanian Prime minister, in order to ensure the financing of the activities supporting the Romanian communities living on the territory of other States, fund which is approved by the annual budgetary laws.

The creation of this Fund is motivated by the constitutional provisions of Article 7, setting forth the support of the Romanian State for the enhancement of links with the Romanian communities living abroad.

The activities which justify the use of budgetary resources are enumerated in Article 2 of the Law. Their nature is a cultural-educational one: it is about cultural and artistic activities, activities supporting the schools and education in the Romanian language, activities for youth, education activities or other activities set forth in programmes of co-operation concluded by the Romanian Government with the Governments of the States whose citizens are the persons belonging to Romanian national minorities. In other terms, the enumeration of Article 2 is limitative. The provisions set forth at letter Article 2 letter f), pertaining to "other situations set forth in programs of co-operation", stand as exceptions. The variety of such situations is, indeed, unlimited, but it has to be taken into account that, according to Article 2 letter f), such extensions take place only if they are set forth in bilateral agreements, which have the prevalent role in the policy of granting advantages for Romanians living abroad, as clearly results from the section below.

The only case which refers to activities of support other than those of a cultural or educational nature is the possibility of granting individual aid in special medical cases. It cannot be used for ordinary assistance for illness which is granted by the State of citizenship. Such assistance is granted only in very serious cases and, for now, was used only to help the persons of Romanian ethnic origin which were disabled during some past armed conflicts. That is why such an exception is not susceptible to create a situation of a discriminatory nature, which could appear to be created, taking into account that it belongs to the field of social economic rights.

The procedure to be followed for the allocation of funds involves a specific body also created by the Law no. 150/1998 – the Inter-ministerial Council for the Support of the Romanian Communities from All Over the World.

The Center "Eudoxiu Hurmuzachi" was also created for the fulfillment of the activities set forth in the Law no. 150/1998. The Centre provides for the accommodation, in students hostels, of ethnic Romanians during the years in which they prepare to attend university. During these preparatory years, ethnic Romanians get familiar with the specifics of Romanian terminology in

order to achieve a level of language proficiency that is similar to other Romanian students before entering university. The office of the Centre is subordinated to the Ministry of National Education and its general manager, given the cultural-educational dimension of the activity of the Centre, is a member of the Romanian Academy, this request being provided in the text of the Law itself.

It has to be pointed out that the Romanian Law regarding the support to Romanian communities from all over the world makes no distinction among the ethnic Romanians living abroad, therefore not favouring the ethnic Romanians living in the neighbouring countries although the largest Romanian minorities live there.

Thus, the concise Romanian Law only regulates the modalities for granting advantages in the field of culture and education, pursuant to the legitimate objective of preserving the cultural, linguistic, religious identity of the ethnic Romanians living abroad, in accordance with the international and European standards and with the bilateral agreements concluded by Romania and with the Romanian Constitution of 1991.

Such framework Law is not conceived to be primarily implemented by domestic norms of application, but by the conclusion of programs and agreements with the home-States of Romanian minorities, by which the number of pupils, students and attendants of post-university training opportunities is established in conditions of reciprocity. The financial support for other educational and cultural activities is to be discussed annually in the frame of the Joint Committees established by the political basic treaties concluded by Romania with each country whose citizens include ethnic Romanians, as presented in detail in the section dedicated to bilateral treaties.

The Romanian Law does not establish any procedure or institution whose competencies might affect the relation of citizenship linking the persons to their home-State. Therefore, no document with ethnic or political connotations is issued for these persons and no inquiry of the ethnic origin of the persons is undertaken or file is elaborated, excepting those concerning the studies of the person (the student card is not, of course, to be taken for such a document).

The Romanian Law avoids assigning tasks related to its kin-Minorities to any institution or authority of a foreign country or to non-governmental organizations. At the request of the interested ethnic Romanians, organizations of Romanians living abroad sometimes send lists of the names of those demanding scholarships without opting for individual requests.

3. Law no. 84/1995

Article 176 (3) of *Law no. 84/1995 on Education*, re-published on the basis of Article II of the Law no. 151/1999 on the approval of the Emergency Ordinance no. 36/1997 on the amendment and completion of the Law mentioned above, sets forth the right for the pupils and students to benefit from preferential rates for accessing museums, concerts, theatre performances, opera, movies and other cultural and sport events organized by public institutions.

Article 176 (5) sets forth the exemption of the pupils and students, which are ethnic Romanians from abroad and benefit from scholarships of the Romanian State, from the payment of tariffs for participation to the manifestations set forth in paragraph 3.

Such facilities, aimed at improving the access of ethnic Romanians to Romanian cultural opportunities, are allowed by European standards. The Venice Commission Report permitted the establishment of preferential treatment by the kin-State in the field of cultural-educational rights.

These are the only privileges of ethnic Romanians pupils and students from abroad that are stipulated by the Romanian Law on Education. Such pupils and students receive a student card which is identical to the student card granted to any other pupils and students of other ethnic origins, in order to prevent ethnic segregation.

4. Government Decision No. 876/2001 of 14 September 2001 concerning the creation of the Interministerial Committee for the support of Romanians from all over the world

The Interministerial Committee is a body without legal personality, whose president is the Prime minister of Romania. The institutions and authorities represented in the Committee are those with direct attributions with regard to the implementation of domestic legal acts concerning ethnic Romanians living abroad, as well as the President of the Romanian Cultural Foundation and the directors of the Romanian Television and of the Department Radio Romania International. The Committee is co-ordinated by the Ministry of Public Information. The objective of the Interministerial Committee is the elaboration and implementation of strategies and programs regarding the support of Romanians from all over the world.

5. Government Decisions in the Field of Education

Before 1997, Government Decisions were adopted on an annual basis, in conformity with the programmes concluded between the Ministry of Education of Romania and similar organisms in the home-States of ethnic Romanians. On top of allocating scholarships, these decisions set forth, *inter alia*, free accommodations for students or free transportation for those benefiting from scholarships from the town where the University lies to the frontier by 2nd class train, as well as the possibility for the children of those benefiting from scholarships to attend free kindergarten or school (Government Decisions no. 235/1992, no. 277/1993, no. 695/1997, no. 945/1997, etc.). As well, these decisions set forth that scholarships are going to be granted with priority to those intending to study philology, pedagogy, ecology, philosophy, history, economy, law, art or theology. Since 1997, the above-mentioned privileges, *inter alia*, were no longer granted. The Romanian Government continues to grant scholarships on the basis of bilateral programmes, according to the conditions provided by domestic legislation, especially the Law on Education.

II. Bilateral treaties concluded by Romania with States where kin-Minorities live

The practice at international level is to protect persons belonging to national minorities by concluding agreements, which represent the best way to foster concomitantly friendly relations

between sovereign States and to facilitate protection of the rights of persons belonging to national minorities.[1]

When each Party is a kin-State for a certain minority living on the territory of the other Party, by means of concluding bilateral agreements, kin-Minorities become "bridges" facilitating the communication and understanding between the Parties. This role of natural bridge is, for instance, set forth in paragraph 7 of the Preamble of the Treaty on friendly co-operation and partnership in Europe between Romania and the Federal Republic of Germany[2].

Article 2 of the Framework Convention enumerates the principles to be taken into account for international co-operation, namely, *the principles of good neighbourliness, friendly relations and relations of co-operation between States.* These principles are reiterated in the Venice Commission Report on the preferential treatment of national minorities by their kin-States, adopted on 19 October 2001.

Most of the treaties pertaining to the protection of kin-Minorities concluded by Romania are basic treaties setting forth that the Parties shall conclude future programmes and understandings to implement the framework obligations stipulated by the basic bilateral treaty.

1. Treaty on the Relations Friendship and co-operation between Romania and the Slovak Republic[3]

A provision of particular importance, taking into account the prevalent quality of the persons belonging to the national minority, which is that of citizenship, is the one stipulating that belonging to a national minority does not exempt the persons concerned from the obligation of loyalty to the State whose citizens they are and to respect its national legislation (Article 20 paragraph 2 of the Romanian-Slovak Treaty).

The Treaty also includes a commitment from each Party to ensure the protection and realisation of the rights of persons belonging to national minorities on their territory (Article 20 paragraph 1), which implicitly reiterates the principle of territorial sovereignty and the primary role of the home-State.

Taking into account the imperative that no political link be established between the minority and the kin-State, the Treaty provides for the obligation of the Contracting parties not to allow that the exercise of the right to free association of the persons belonging to national minorities be used against the interests of the other Contracting Party (Article 20 paragraph 4).

2. Treaty on the Relations of Friendship and Co-operation between Romania and the Republic of Croatia[4]

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[1] *Adrian NASTASE, Raluca MIGA-BESTELIU, Bogdan AURESCU, Irina DONCIU, Protecting Minorities in the Future Europe –Between Political Interest and International Law, Editura Monitorul Oficial, Bucuresti, 2002, p. 107*

[2] *Signed in Bucharest on 21 April 1992*

[3] *Signed in Bratislava on 24 September 1993*

This Treaty sets forth an obligation of loyalty that is similar to the one encountered in the above-mentioned Treaty with the Slovak Republic (Article 17 paragraph 2).

Moreover, it also contains a commitment to ensure the protection and realisation of the rights of persons belonging to national minorities, each of them, on their own territory, which is fully respecting the principle of territorial sovereignty of States (Article 17 paragraph 1).

The obligation of the Contracting Parties to ensure that the exercise of the right to free association of the persons belonging to national minorities is not used against the interests of the other Contracting Party is also mentioned.

3. Treaty on Understanding, Co-operation and Good Neighbourliness between Romania and the Republic of Albania[5]

This Treaty explicitly provides for the support that the Parties intend to give for the conclusion of direct understandings between universities, research centres, cultural institutions, mass-media (Article 11 paragraph 2) and that they are going to act for the extension of possibilities for studying each other's language in institutions of education and to mutually support each other in the activity linguistic studies, thus showing their preference for the bilateral approach of issues concerning kin-Minorities.

4. Treaty on the Relations of Friendship and Co-operation between Romania and the Czech Republic[6]

This Treaty provides for the same bilateral approach of issues concerning the kin-Minorities living abroad by setting forth that the Parties shall support the co-operation between schools and universities and between research institutes, by exchange of pupils, students, teachers, and researchers and by rendering solutions to themes of common interest and that they shall provide mutual support for the study of their languages and for the training of teachers.

5. Treaty on the Relations of Friendship, Good Neighbourliness and Co-operation between Romania and the Federal Republic of Yugoslavia[7]

This Treaty also limits the activities of the Parties in ensuring, on their own territory, the protection and realisation of the rights of persons belonging to national minorities (article 20 of the Treaty), which may be found in the bilateral treaties concluded with Croatia, Slovakia, Ukraine mentioned in this Section of the Report.

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4 *Signed in Bucharest on 16 February 1994*

5 *Signed in Bucharest on 11 May 1994*

6 *Signed in Bucharest on 22 June 1994*

7 *Signed in Belgrade on 16 May 1996*

6. Treaty on Understanding, Co-operation and Good Neighbourliness between Romania and the Republic of Hungary[8]

The basic bilateral treaty is one of the most detailed and comprehensive documents of this kind concluded in Central and Eastern Europe.

A provision of particular importance of the Treaty is the one setting forth that persons belonging to national minorities shall "enjoy the same rights and have the same duties as the other citizens of the State where they live" (Article 15 paragraph 8 of the Romanian-Hungarian Treaty)

It also stresses that minorities are an integral part of the society of the State they are living in (paragraph 4 of the Preamble), thus acquiescing to the concept of "civic nation" which is embraced by most European States as a basis for contemporary States.

As one of the most advanced regulations in the field of the protection of persons belonging to national minorities, the Treaty sets forth:

- the right of minorities to create and maintain their own institutions and organizations as well as their educational, cultural and religious associations (Article 15 paragraph 2);

- the right to freely use their mother tongue in private and in public, orally and in writing, as well as the right to be educated in their mother tongue at all levels of education, according to their needs (Article 15 paragraph 2);

- the right to free use and registration of the names of persons belonging to national minorities in their mother tongue (Article 15 paragraph 3 of the Romanian-Hungarian basic Treaty);

- the use of their mother tongue in relation with the local administrative and judicial authorities (Article 15 paragraph 3 of the Romanian-Hungarian basic Treaty);

- the permission that traditional local denominations, denominations of streets and other public topographic denominations be also exposed in the language of the minority (Article 15 paragraph 3 of the Romanian-Hungarian basic Treaty);

- the right to create and conduct their own mass media (Article 15 paragraph 4);

- the right to effectively participate to the political, economic, social and cultural life as well as to the decision-making process (Article 15 paragraph 5); and, finally,

- the right to maintain contacts over the frontiers with persons with whom they share the same ethnic origin (Article 15 paragraph 7).

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[8] *Signed in Timisoara on 16 September 1996*

All these rights are effectively implemented by the Romanian State, as it was its primary responsibility to ensure the protection of the persons belonging to the Hungarian minority according to the Venice Commission Report (first paragraph of the Conclusions) and the OSCE High Commissioner Statement (paragraphs 2 and 3).

The provisions of the Treaty emphasize the prevalent role of bilateral co-operation when setting forth that the two States shall develop and support co-operation, including by means of direct understandings between universities and other educational institutions, institutes and research centres, as well as the exchange of pupils, students and professors (Article 15 paragraph 3). Moreover, the Parties are to conclude, for the fulfillement of these provisions, a new agreement of co-operation in the field of culture, education, science and other conventions.

The full implementation of these rights, of cultural and educational nature may be, in practice, facilitated by the possible contribution of the kin-State with the consent of the home-State.
The policies of both the Hungarian State towards the Hungarians living in Romania and of the Romanian State towards the Romanians living in the Republic of Hungary should be expressed *vis à vis* the individuals and not towards the community as a whole, as the Parties make reference to the Recommendation 1201/1993 of the Council of Europe as a document which expressly refers to the rights of persons belonging to national minorities as individual rights and not as collective rights.

7. Treaty on the Relations of Good-neighbourliness and co-operation between Romania and Ukraine[9]

In Ukraine, according to the last published census, a large community of Romanians, which are called either Romanians or Moldavians, account for approximately 600,000 persons. Most of them live in the area of Northern Bucovina, a territory inhabited by a compact Romanian population.

Article 13 of the Treaty concerns the protection of the rights of persons belonging to the Romanian minority living in Ukraine and, respectively, to the Ukrainian minority living in Romania.

As to the potential involvement of the kin-State in the activities facilitating the protection of the rights of persons belonging to national minorities, Article 13 paragraph 12 of the Romanian-Ukrainian Treaty sets forth that this protection may not be interpreted as providing a right to undertake any activity or to perform any action which might be contrary the objectives and the principles of the United Nations Charter and other obligations set forth by Public International Law, such as the obligations found in the Helsinki Final Act and the Charter of Paris for a New Europe, including the principle of territorial integrity of States.

Another provision of tremendous importance – taking into consideration the principle of territorial sovereignty of States – is the one containing the commitment by the contracting Parties to ensure, each of them, on their own territory, the protection and realisation of the rights of

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9 *Signed in Constanta on 2 June 1997*

persons belonging to national minorities (Article 3 paragraph 10 of the Romanian-Ukrainian Treaty).

The provisions are equally detailed and liberal, similarly to the provisions of the Romanian-Hungarian Treaty.

8. Treaty on Friendship and Co-operation between Romania and the Republic of Macedonia[10]

The Treaty on Friendship and Co-operation between Romania and the Republic of Macedonia contains a provision referring to the commitment of the Parties "to take note *inter alia* of the Recommendation 1333/1997 of the Parliamentary Assembly of the Council of Europe" concerning the Aromanian language and culture, which is the first reference to this Recommendation in a legal document. A provision such as Article 12, pertaining to the protection of the rights of persons belonging to national minorities, is motivated by the desire of the Romanian State to express its interest for the way in which Aromanians – a population whose "language, Macedo-Romanian, belongs to the Romanian branch of the Romance languages…." (According also to the Explanatory Memorandum to the Report on the Aromanian Culture and Language drafted by Mr. Lluis Maria de Puig)[11] – are treated in Macedonia. Correlatively, Article 12 paragraph 1 expressly mentions that belonging to a national minority is an individual option for these persons.

9. The mechanism of Joint Intergovernmental Committees

Most of the basic treaties concluded by Romania establish various joint intergovernmental mechanisms of co-operation.

The most developed mechanism is the Joint Intergovernmental Commission, an entity with specialized committees structured to cover the whole spectrum of bilateral co-operation between the two countries. One of the most important of these committees is the Joint Intergovernmental Commission of Co-operation and Active Partnership between Romania and the Republic of Hungary. Its main tasks are to:

- periodically evaluate the observance of the basic Treaty and of other understandings;
- to render proposals and recommendations concerning the main directions to be taken into account and to be followed by the contracting Parties;
- to include new fields in the scope of the bilateral partnership;
- to improve the institutional and legal framework of co-operation;

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[10] *Signed in Bucharest on 30 April 2001*

[11] *Doc. 7728 of 17 January 1997*

- to follow the rhythm of confidence building and to identify situations which are susceptible to diminish confidence;

- and, consequently, to render proposals for eliminating such situations[12].

This bilateral mechanism, which convenes on a regular basis in order to examine the implementation of the bilateral treaties, constitutes the ideal framework for the development of the bilateral dialogue and co-operation, including in the field of minorities' protection. In 2001, the specialty Committee on national minorities of the Joint Romanian-Hungarian Intergovernmental Committee convened three times and had its last annual session on 19 October 2001. It adopted a Protocol (which is not a legal document) containing an assessment of the situation and needs of the Romanian minority living in the Republic of Hungary and, respectively, of the Hungarian minority living in Romania, as well as the recommendations of the Committee for the two respective Governments. Both the Romanian and the Hungarian Governments finalized the domestic procedures for the approval of this Protocol.

In September 2001, in the framework of this Committee, the Romanian side presented a draft Agreement concerning minorities as an alternative to the Law on Hungarians Living in Neighbouring Countries. Thus, this work environment is ideal both for joint assessments and - in parallel - for stimulating favourable domestic policies and for developing the bilateral legal framework.

Other Joint Committees are established in the relationship with Germany and Ukraine.

The Romanian-German specificity comes from the fact that only the German State is a kin-State to the German minority living in Romania. Its action is directed towards the development of the regions also inhabited by German population, particularly under the form of investments.

The Romanian-Ukrainian Committee on Minorities did not have spectacular results, given the reluctance of the Ukrainian authorities towards the expansion of the university education in Romanian language in Ukraine.

10. Programmes concluded by the Romanian Ministries of Education and Culture with similar institutions of home-States for ethnic Romanians

On the basis of the bilateral treaties, the Ministry of Education of Romania annually concludes programs of co-operation with the Ministries of Education of the countries where ethnic Romanians live. With the help of such programmes, the two Parties grant, in conditions of reciprocity, a certain number of scholarships at the pre-university, university and post-university levels, or for the training of teachers and for summer courses. The Parties may also indicate a

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[12] In the case of the Romanian-Hungarian relationship, this mechanism is composed of 11 Sub-committees - in the field of foreign policy and integration with the European and Euro-Atlantic structures strategy, on European security and confidence building, on minorities issue, on economic affairs, trade and tourism, on transfrontier and public local administrations co-operation, on infrastructure, transports, waters and environmental protection, on culture, education and mass-media, on social policy, youth, health and sport, and, respectively, on police, foreigners and frontier security.

certain threshold (1,000 or 500 scholarships) to be taken into account by their domestic educational policies. They may grant, by domestic legal acts, any number of scholarships within the threshold established by the bilateral programmes.

In such programs, the parties set forth measures for encouraging the study of the mother tongue of ethic minorities, as, for instance, exchanges of professors teaching their respective language, exchanges of students in philology or exchanges of groups of pupils and students in order to participate to international Olympiads and other manifestations. Such programmes are concluded between the ministries of education of Ukraine and of the Republic of Hungary.

Other programmes are concluded by the Romanian Ministry of Culture concerning, for instance, organisation of festivals in each other's country on the minority culture, on the exchanges of cultural personalities, cultural bands, groups visiting the cultural institutions of each country or organisation of museum activities on the minority culture, on a basis of reciprocity.

11. The specific situation of the Republic of Moldova

A particular situation is represented by the relations between Romania and the Republic of Moldova. The rapporteur opted for a special section to approach the relations with the Republic of Moldova, taking into account that in this case, the Romanian State supports Romanians living abroad which, in this particular situation, do not constitute a kin-minority but a majority of the population.

Agreements of co-operation in the field of education and culture were constantly concluded.

A special Fund for the Republic of Moldova is established at the disposal of the Prime minister of Romania. The resources of the Fund are used inter alia for the support of manifestations celebrating, in the Republic of Moldova, the birth of Romanian writers, to also celebrate "Days of the Romanian language", the restoration of religious objectives, publishing as well as distribution of Romanian literature in the libraries of the Republic of Moldova. The Fund also serves for the allocation of scholarships, financing cultural programs in Romanian language, etc.

The population of the Republic of Moldova went through a difficult period during the soviet communist age, as constraints of political nature forced the writing in a foreign alphabet - the language written in a foreign alphabet being considered "Moldavian language".

Therefore, according to the above-mentioned agreements, the Romanian State grants a certain number of scholarships to pupils and students of the Republic of Moldova selected on criteria of performance. The Romanian Ministry of Education also grants manuals and pedagogic materials.

III. Overview of the behaviour of the Romanian State with regard to its kin-Minorities

The Romanian policies with regard to ethnic Romanians living abroad fully respect the European and international standards.

Therefore, in 2001, at the moment of adoption of an act which contradicted the Romanian view

with regard to kin-Minorities – namely, the Law on Hungarians Living in Neighbouring Countries by the Parliament of the Republic of Hungary, the Government of Romania objected to the contents and implementation of this Law, as a non-reaction would have constituted a tacit acceptance or acquiescence of "principles" which are neither compatible with the European nor international standards in that respect nor the behaviour of the Romanian authorities, including the attitude vis à vis the ethnic Romanians living in the Republic of Hungary. Consequently, a Memorandum of Understanding between the Government of Romania and the Government of the Republic of Hungary was concluded in Budapest on 22 December 2001, after intense negotiations. The Report of the Venice Commission constituted a point of reference which helped the conclusions of this Memorandum of Understanding.

The issue of the Hungarian Law was of particular importance as it started a European debate on the subject of the kin-State involvement in granting preferential treatment to its kin-Minorities, which still continues – this Colloquy of Athens, organized by the Venice Commission between 7-8 June 2002, being a clear proof in this regard.

As results from the domestic provisions and bilateral treaties analysed above, the Romanian policy developed according to a fundamental axis, represented by the respect for the territorial sovereignty and of the sovereign jurisdiction of the State whose citizens include ethnic Romanian minorities, by avoiding the adoption of unilateral measures directed towards these ethnic Romanians and by seeking the prior consent of the home-State for any other action in that respect. Also, this policy avoided the creation of any mechanism which would establish a political link with the citizens of a foreign State, irrespective of the ethnic origin of such persons – be it by issuing an administrative document for these persons or by establishing direct links and financial support to non-governmental organizations of Romanians from abroad.

As well, Romania is convinced of the fact that the State of citizenship has the primary responsibility in ensuring the preservation of the ethnic, cultural and linguistic identity of the minority, the kin-State having also a role, sometimes important, in preserving and enhancing the cultural and linguistic links, depending on the consent of the home-State. This consent is not founded on a right to involve in the protection, but on an interest, as the OSCE High Commissioner on National Minorities emphasizes[13]. In this sense, the bilateral agreements concluded by Romania with home-States have a prevalent place in the general policy of the Romanian State.

Another element of this policy is the preoccupation to avoid discrimination. Therefore, the Romanian efforts for the support of the ethnic Romanians from all over the world are directed towards the preservation of the ethnic, cultural, linguistic and religious identity of these persons. The Romanian policies do not involve granting social-economic facilities which could create unwilled discriminations – such as facilities concerning the right to work and rights in the field of social assistance.

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[13] *The Statement "Sovereignty, Responsibility and National Minorities", issued by the OSCE High Commissioner on National Minorities on 26 October 2001, at paragraph 5.*

Both the Venice Commission and the OSCE High Commissioner on National Minorities underlined the necessity for the principles of pacta sunt servanda, of territorial sovereignty as well as of respect for human rights and fundamental freedoms, especially for the principle of non-discrimination, to be respected by yhre kin-States.

Thus, in the opinion of the rapporteur, the European bodies guaranteed the viability of the fundamental axis "sovereignty, non-discrimination, bilateral approach".

Therefore, the Memorandum of Understanding between the Government of Romania and the Government of the Republic of Hungary concerning the Law on Hungarians Living in Neighbouring Countries and issues of bilateral co-operation sets forth peculiar provisions pertaining to national minorities such as the criteria to be taken into account for granting benefits to persons belonging to the Hungarian minority, criteria which may contribute to identify, on a clear basis, the real ethnic origin of these persons.[14]

Also, the Memorandum of Understanding sets forth, in detail, a similar regime concerning the circulation of labour force, which the Hungarian Law granted only for the ethnic Hungarians and is now granted to all Romanian citizens. These provisions aim to re-establish non-discrimination, which was infringed by the Law on Hungarians Living in Neighbouring Countries.

And, last but not least, this international agreement brought back the problems raised by the Hungarian Law in the natural frame of the Committee on minorities.

Thus, the Committee is also the framework where the discussions upon the amendment of the Law on Hungarians Living in Neighbouring Countries are taking place, with a view to eliminate its discriminatory character, which does not only affect the majority of the Romanian population, but also constitutes a negative precedent which creates inequalities among minorities in this part of Europe.

With the amendment of the Law on Hungarians Living in Neighbouring Countries by the end of the year 2002 at the latest, the international standards, the guidelines already formulated by the European organisms, the observations of the States affected by the implementation of the mentioned Law shall probably be taken into account and consequently the Hungarian Law might become, after its serious amendment, a precedent to be taken into account. For now, it only represents a negative experiment with negative consequences in the field of bilateral relations, irrespectful of current standards in the field of the protection of the rights of persons belonging to national minorities.

Conclusions

The *rapporteur* considers that the fundamental axis of the principles of territorial sovereignty of

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[14] *In this way, the Memorandum of Understanding makes a direct application of the relevant conclusion of the Venice Commission Report regarding these criteria. The concerns of the Romanian authorities were directed towards the economic advantages granted by the Law. The representatives of other ethnic minorities - specially Roma, declared at the occasion of the census organised in Romania in March 2002, that they shall declare themselves Hungarians to make sure that the benefits of the Hungarian Law shall be also available for them.*

States, *pacta sunt servanda*, friendly neighbourly relations among States, respect of human rights and fundamental freedoms, especially of the principle of non-discrimination and the consequences coming from their observance for the policies undertaken by States with regard to their kin minorities, should be maintained at the core of the European debate until an uniform approach is developed and accepted in this field. "We must not erode the principles, standards and mechanisms that have been carefully developed in the past half-century".[15]

[15] *The Statement "Sovereignty, Responsibility and National Minorities", issued by the OSCE High Commissioner on National Minorities on 26 October 2001, last paragraph.*

GREEK STATE POLICY FROM "IRREDENTISM" TO "HOME-COMING / IMMIGRATION": THE CASE OF TWO REPATRIATED KIN-MINORITY GROUPS

Mr Miltos PAVLOU[1]
Sociologist,
Senior Investigator of the Greek Ombudsman

Introductive remarks

The Greek experience of relations between a 'mother-State' and its kin-Minorities abroad is the subject of this report. The case of the kin-Minorities immigrated and settled in Greece is examined more specifically in order to individuate the deficiencies and the contradictions of a kin-State protective or irredentist policy towards its minorities.

This paper does not focus on all kin-Minorities of Greek ethnic origin, but only on those more numerous in the recent decades. The emphasis is on the phenomenon of their repatriation in Greece and on how the Greek State has articulated policies in this connection.

My purpose is to demonstrate that policies of a kin-State regarding ethnic minorities in a neighbouring country are often revealed to be instrumental and contradictory. While they are founded on emotional patriotic discourse and practices about a common ethnic membership and belonging, they may not correspond to policies of acceptance and integration when kin-Minorities repatriate in the "mother-country".

While a 'mother-State' with a vivid interest about kin-Minorities tends to vindicate citizen rights, on their behalf and towards a foreign State, it is reluctant to concede them citizenship rights when they are repatriated.

This does not happen always and does not concern all kin-Minorities. The declared, apparent and effective criteria for that distinction and classification between kin-Minorities – in conceding rights and privileges when repatriated – is also an object of this brief report.

1. Kin-Minorities – definition: 'Homoghenís'

Greek law uses the term 'homoghenís' to define the non-Greek citizen of Greek ethnic origin, thus a member of a Greek minority in a foreign country. As this composite word describes, 'homoghenís' is a person who makes part of the same 'genos' (descent), thus of the same nation,

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[1] *Professor of International Law and Director of the Walther-Schücking-Institute for International Law, University of Kiel, Germany; President of the Advisory Committee on the Council of Europe Framework Convention for the Protection of National Minorities. The following views, however, are solely those of the author.*

while he is a citizen of another country. The principle that lies behind the legal status of 'homoghenís' is that the individual is a descendent of Greeks. However, what is decisive to make that determination is his 'Greek national consciousness'. The latter is defined as the connection with the Greek nation through common language, religion and traditions[2]. In this sense, an individual may be considered and recognized as Greek in conscience ("thinking, beliefs") even if he has no Greek origins through a blood parentage. However, the administration requires a case-by-case examination in order to determine a sense of belonging and an ethnic membership.

The interesting thing about this pair of blood and beliefs' criteria – which seems to be more incompatible than complementary – is that it is selectively used by the administration when dealing with different kin-Minorities coming from different countries.

It is obvious that this perception is a result of the nation-building process in Greece, which has been characterized by efforts of pursuing nation's homogeneity, in culture, as well as in ethnic, cultural or racial purity (mostly through assimilation), no matter how unrealistic this has proven to be. Even today this "myth" of national homogeneity dominates public discourse[3].

2. The shift: from Greek minorities in foreign countries to repatriated Greeks.

For many decades, minorities of Greek ethnic origin lived in more or less neighbouring countries. They were represented under this form – as brothers living or suffering abroad – by the Greek governments. During the last decade of the 20th century, things changed. Brothers and sisters came and chose to live in Greece[4]. Their figure became an everyday presence in Greek society. These persons raised urging demands from the Greek State for a policy of acceptance and support while they claimed recognition of "Greekness"[5] and social integration and / or assimilation.

Major kin-Minority groups in the post WW2 era

Turkey - Istanbul and Imvros, Tenedos Greeks
Southern Albania Greeks
Ex USSR and eastern block – Greek Pontians and political refugees

Minor groups from other countries (mostly Egypt)

2.1. 'Irredentism' era

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[2] *Παπασιώπη-Πασιά (Papasiopi-Pasia) Ζ., Δίκαιο Ιθαγενείας, Σάκκουλα, 1994, p.45 και 93.*

[3] *For issues concerning the myth of Greek national homogeneity see Χριστόπουλος Δ. (Christopoulos D), Το τέλος της εθνικής ομ(οι)ογένειας, in coll.vol. Μαρβάκης Θ., Παρσάνογλου Δ. Παύλου Μ., Μετανάστες στην Ελλάδα, Ελληνικά Γράμματα, 2001.*

[4] *In some cases they have been encouraged to do so through patriotic call by Greek foreign policy actors.*

[5] *For what this labeling tool may mean from a socio-psychological point of view, which is not my intention to demonstrate here. In brief, this would be the everyday use of the term, which corresponds to the 'Greek national consciousness' required for the status of 'homogenous'.*

Greek minorities were conceived and used instrumentally as tools for political pressure and tension management in relations with neighbouring host countries (Albania, Turkey).

Under an irredentist approach, kin-Minorities in foreign States were represented as brothers suffering from foreign governments (mostly Turkey) or residing on land that has been contested in the past (and eventually in the future, such as Southern Albania, also known as North Epirus).

Different policies and measures were articulated for different kin-Minorities, according, in each case, to the objectives of Greek foreign policy. They varied between:

- Encouraging 'escape' and return from USSR and 'iron curtain' countries, in the context of an anti-communist propaganda, providing favourable repatriation conditions. After the collapse of the totalitarian regimes in these countries in the late 80s, this policy was also enhanced by a policy for the reconciliation and the recognition by the Greek State of the civil war refugees' contribution during World War II[6];
- Penalizing repatriation from neighbouring countries, such as Turkey and Albania, where the presence of kin-Minorities was considered vital for promoting the interests of Greece: potential territorial claims (mostly concerning Albania) or using the minorities' condition as a reciprocity tool and indicator for treating ethnic minorities in Greece and in the context of Greek foreign policy (concerning Turkey and treatment of the so-called Muslim minority in western Thrace).

2.2. Repatriation/'Immigration' or 'refuges'/'immigrants' era

This approach led to the complex problematic of today's policies for repatriated kin-Minorities. These policies differ according to the country of origin of the repatriating kin-Minorities and they are strongly contradictory.

They also vary between:

1) Encouraging repatriation from the ex-USSR countries and providing extensive support for establishing the repatriated in Greece and their social integration: housing and land programs, loans under extremely favourable conditions, health and social care services, payments and legal aid. Nonetheless, the Greek citizenship is conceded even to those not yet repatriated, thus residing in the foreign country, while all rights of repatriated Greeks are extended to other family members, etc. In few words, the Greek State treated them as Greek refugees (in a sense and extent of support similar to the one provided to the Greek war refugees and Pontians from Asia Minor and Eastern Thrace in the early 20th century);

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[6] Greek citizenship is conceded to civil war political refugees, as well as to their husbands, wives and children (according to a Common Minist. Decision no. 10684/82-83) coming form ex-USSR and ex-Eastern block countries. However, it is indicative of the selective application of objective and subjective principles (racial belonging and free will and consciousness) in conceding 'homoghenís' rights that the same '83 provisions excluded for citizens who had lost Greek citizenship because of the civil War. In fact they were not allowed to repatriate as not being part of the Greek 'genos', thus not racially descendent of Greeks. It seems that some kin-Minorities are suspected of constituting a "national danger", see Christopoulos op.cit.

2) Penalizing repatriation from Albania – the word which is commonly used for the repatriation of this group is "descended" from Albania because of the map orientation. This penalization took place mostly through lack or absence of policies with positive or integration measures, thus more or less treating the kin-Minority members as 'immigrants' and, perhaps, indirectly, as persons, the patriotic duty of whom was to stay on the once contested territory and serve to the Greek-Albanian political and diplomatic confrontation[7].

Under this logic, the elites of the latter kin-Minority had a double role: from one side of mediation in order to provide certificates of minority membership and facilitating migration in Greece and from the other side to accept and speculate on the ungenerous repatriation policies from the kin-State. In this period of transformation and numerical decline of the Greek minority in Albania, they widened their clientele (Greek Albanians and Albanians claiming Greek minority identity for migration reasons) while they tried to conserve and consolidate their position in home society by recalling and moving Greek Albanians residing in Greece for electoral purposes.

Istanbul Greeks are not subject to these policies, since their majority repatriated after the violence crisis of 1965. While they lost almost everything, the Greek State did not provide them any assistance. Certainly, they have not been awarded for abandoning the traditionally Greek 'quartiers' of Constantinople.

As the education statistics demonstrate[8], smaller groups of 'homoghenís' Greeks also repatriated from non-neighbouring countries during the 90s: mostly the USA and Canada, then Germany, Arab countries, South Africa, Australia etc.

2.3 Demographic profile: numbers, settlement, education and family.

The two major groups of repatriated minorities as above, the Greek-Pontians from ex-USSR and the Greek-Albanians are present in large numbers, mostly in urban conglomerates.

It is significant that valid official statistics exist mostly for the Greeks-Pontians, since a lot of government funded research concerning their settlement and social integration has been performed during the past years.

Their presence is particularly accentuated in the city of Thessalonica and in Northern Greece as opposed to Athens and the rest of the country. On a total of 160.000 persons, 74% have settled in Northern Greece[9].

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[7] *See the conclusions of a recent report on Greek minority in Albania, by Baltsiotis, Christopoulos, Telloglou, Tsitselikis. In review "Synhrona Themata", no. 78-79, pp. 24-52.*

[8] *National Statistics Agency of Greece, Education Statistics, Year 1998/99.*

[9] *Υπουργείο Μακεδονίας – Θράκης, Γενική Γραμματεία Παλιννοστούντων Ομογενών, Η Ταυτότητα των Παλιννοστούντων Ομογενών από την πρώην ΕΣΣΔ, Θεσσαλονίκη, 2000, p.6.*

Inversely, Greek-Albanians represent the largest population group in Athens and in Western or Southern Greece, while they are also present in Thessalonica (region of Central Macedonia) and in the region of Epirus.

Table I: Repatriated and foreign students in Greek Elementary and High Schools – School Year 1998-1999

Born in	**Country total**	**Elementary – High schools of Central Macedonia**	**Elementary – High schools of Attica**
Albania	16258	1622	8075
ex USSR	19758	8780	5391
Total pupils (repatriated)	**41923**	**7659**	**9581**

Source: National Statistics Agency of Greece, Education Statistics

It is also interesting to find out, according to the same statistics, that half of Greek-Albanian schoolboys and girls declare Albanian to be their mother tongue. This is due to a large and equivalent number of mixed marriage between members of the Greek minority of Albania and Albanians[10].

3. Different measures as a consequence of 'national homogeneity'.

Historical experience induces us to believe that kin-Minorities are used instrumentally under the priorities set by the kin-State's foreign policy, to achieve the latter's objectives. This obvious, and for many kin state operators legitimate, practice renders the kin-Minority members not "useful" any more, once "repatriated" to the "mother" country.

However, policies of penalizing repatriation are articulated not only depending on the State of origin, but also on the grade of "Greekness" of the minority.

3.1 "Palinostountes" & "Vorioipirotes" ("Homecomers" & "North Epirots")

Differentiation in policies and treatment is the basis for discrimination of the new comers' status in Greece. In the arena of public policy, discourse and legitimisation of policies, terms are not only descriptive but also explanatory and causative.

[10] *Here, we should also consider that a large number of Albanian immigrants claim Greek identity through irregular practices (falsification, corruption). The homoghenís status allows them to legally stay and work in Greece.*

The adjective "palinostountes" (which means "repatriated" but the exact translation of which is "home-coming"), used as a substantive, is the term adopted to describe the status of the homoghenís and Greek-Pontians coming from ex-USSR. This term corresponded to a series of positive and generous integration measures. It has not been conceded – nor the measures that accompanied the use of the term – to the large group of the Greek-Albanians. In fact, a term proposed – yet not formally adopted – for the ex-USSR repatriated homoghenís was the composite word 'neoprosfigas', thus new refugee, which put emphasis on the recognition of a refugee-equivalent status.

Instead, the Greek Albanians are referred to as "North Epirots" in public and everyday life discourse, thus as inhabitants of Southern Albania, the so-called "North Epirus", an area once contested between Greece and Albania. It should be underlined here that the name of this place is commonly used in Greece and accepted by all political actors, as well as by the large public.

So, their "public adjective" puts emphasis on the fact that they exist only in relation to the territory which they have "abandoned" coming in Greece. While this label has been useful, as a passport of sympathy during the first years of immigrating in Greece, its value has been self-cancelled and vanished after many years of stay. The once "North-Epirot" is now just another Albanian, since it is hard to distinguish him from other Albanian citizens also residing in Greece for many years.

But this could be a prejudice and a simplification of everyday life, which occasionally may lead to exclusion and discrimination. What is important to know is whether the state policies and practices towards this group were permeated by such attitudes and if so to what extent.

3.2 Legal framework and discrimination

The legal framework regarding Greek-Pontians is represented by the Law no.2790/2000 entitled *"Settlement (or re-establishment/rehabilitation) of repatriated homoghenís from ex-USSR"* (as completed also by provisions included in the L.2910/2001 on immigration). Meanwhile, it is only in the late 90s (1998) that the Greek State defined, on a long-term and not temporary basis, the *"conditions, duration and procedure for providing right of stay and work to Albanian citizens of Greek origin"* (Common Minist.Decision no.4000/3/10/1998).

The discrimination between the two categories of homoghenís Greeks is even present in the order of legislative text and in its title. The term 'homoghenís' is not conceded to Greek-Albanians in the title, while the legal status of 'homogenis' is exclusively connected to blood parentage and not to 'Greek conscience" (as instead goes for the 'homecoming' from ex-USSR). The Greek Ombudsman in a recent report on migration law (December 2001) clearly describes and criticizes the differentiated treatment of the two homoghenís groups for what concerns the different prerequisites and procedures for applying and obtaining the Greek citizenship.

As well, the same differentiation goes for claiming the status of homoghenís: for the repatriated from ex-USSR, it is the Secretary of the Region, based on a Region Committee interview, who decides on the recognition of this status. For those who come from Albania, instead, it is the

Police to whom they apply and the Ministry of Public Order services dealing with foreigners who decide about conceding this status.

The Greek Albanians' right of stay and work is extended to other members of the family through an extension of the right to a homoghenís identity card (according to the above-mentioned Min.Dec.). However, this does not give them access to other rights, such as free healthcare. These rights are connected to blood origin and are not accessible for family members without Greek origins (Min.Dec.n.Y4α/7472/95). For example, husbands, wives or members of the family nucleus of the Greek-Pontians from ex-USSR may be directly recognized as homoghenís (based on the criteria of Greek consciousness), with access to all rights deriving from this status. On the other hand, only an extension of the permit of stay and work is conceded to Albanian husbands and wives of Greek-Albanians. They do obtain the same identity card, as an indirect right, but they are not given access to the full homoghenís status, which is exclusively connected to blood origin.[11]

In the case of Greek-Albanians, the numerous Albanian citizens who are present in the territory since the early 90s and are speaking fluent Greek made things more difficult. It appears that mixed marriages and the difficulty in determining Greek ethnic origins has been an obstacle in recognizing the status of homoghenís to this group, especially under the climate of "albanophobia[12]" which dominated the Greek public discourse. For a number of years, during the 90s, Albanians settled in Greece under a temporary status, the so-called: *"homoghenís according to their statement*", which protected them from extradition but did not provide them considerable repatriating Greeks' rights or support, as opposed to those granted to other groups.

Here, it is interesting to consider that the generous housing, land, work and loan programs directed to Greek-Pontians from the ex-USSR have never been provided to this extent for the thousands of Romas in Greece, formally Greek citizens, the living conditions of whom till today represents a 'social emergency'. This fact suggests that an implicit indicator is used for planning social policies: an indicator of 'Greekness' that, in practice, serves as a subjective instrument of social classification. It is not my intention to launch easy accusations of racism but to make it clear that:

Even if the underlying motivation for short-term policy usually is public relations – which seems to be the case for the ex-USSR repatriated Greek-Pontians – the outcome is the unjustifiable discrimination between citizens.

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[11] *This also goes for other rights to support, such as social welfare payments, since all legislative texts refer to origins. While the recent law on migration no. 2910/2001 extended the right to social protection to all persons having an homoghenís identity card (Article 76), the Ministry of Health and Welfare refuses to provide social protection to all Greek-Albanians, on the basis of contradictory legislation. The Social Welfare Dept of the Greek Ombudsman has an open discussion for this purpose with the Ministry.*

[12] *Triantafyllidou A., chapter on Greece in: Jessika ter Wal (ed.), Racism and Cultural Diversity in the Mass Media. An overview of research and examples of good practice in the EU Member States, 1995-2000 on behalf of the European Monitoring Centre on Racism and Xenophobia, Vienna (EUMC) by European Research Centre on Migration and Ethnic Relations (ERCOMER), Vienna, February 2002.*

If the only significant distinction between citizens comes from their proximity to the norm of Greek ethnic, racial and cultural ideal, and if this categorization leads to social subordination of the less compliant – in work, in society, in education or in living conditions – the applied policy may be characterized as discriminating and may lead to racism phenomena[13].

4. Kin-Minorities' identity (-ies)

So, on the one hand, lies the kin-State's temptation of an old nationalist inspiration: the possibility of complicating the attainment of Greek citizenship by those who do not exactly fit the stereotype of the ethnic-cultural 'ideal'.

On the other hand, there has been a more or less problematic acceptance of the newcomers by the general population. Very often, in everyday social life[14], Greek-Albanians have been negatively identified to the Albanian immigrants[15] while the labour market reserved them a similarly disadvantaged position, thus of low skill jobs and exploitation.

It should also be noticed that Greek-Pontians from the ex-USSR have faced similar problems, though in lesser intensity, despite the favourable measures undertaken by the kin-State in order to facilitate their integration.

Immigrated kin-Minorities had never before been a part of kin-society. Their social and cultural identity had been formed in their home state, which *de facto* provided for a cultural 'difference' once they decided to reside in their 'mother country'.

Once this movement took place, individual and collective identity management strategies of these groups oscillated between showing off 'Greekness' in order to be accepted – in the dead end of identity politics – and the preservation of social networks and (multi) cultural schemes of the (ex) home society *vis-à-vis* the difficult integration and assimilation conditions in Greek society.

This apparent confusion represents nothing more – and nothing less – than efforts to build webs of multiple and compatible identities in order to face and successfully manage their social, professional and personal lives.[16] What, in any case, is performed by all social subjects – especially in a society where dominant public discourse tends to vindicate a virtual 'homogeneity' – is more than evident to the repatriated kin-Minorities' members.

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[13] *From the analytical point of view of the social sciences, which is broader than a judicial definition, State racism is considered here to be: the process of social exclusion of social groups, through public policies and measures, obliging them to live under subordination because of a presumed or effective difference in origin, culture or beliefs which often leads to their representation as dangerous minorities. For more detail see Τσιάκαλος Γ.(Tsiakalos G.), Οδηγός Αντιρατσιστικής Εκπαίδευσης, Ελληνικά Γράμματα, 2000, pp.81-82.*

[14] *Not in public discourse and the media, since the positive abstract category of 'North Epirots' dominates there, which refers to the home country territory.*

[15] *Which constitute the most numerous immigrant group, as well as the most common subject to racism and discrimination.*

[16] *From Marvakis Ath., Pavlou M., Tsiakalos G., The identity of European Citizens, unpublished work.*

It is interesting to briefly consider what recently emerged from the field of social research about the construction of social identities by the first generation of the Greek-Albanian kin-Minority[17]: the compatible amalgam of Greek (as "love" for the mother country) and of Albanian (as "love" for the home land and the people) ethnic and cultural membership. As for the second generation, it has no memory of the origin country and Greece is the homeland. Discrimination for reasons which are connected to their parents' past appears to be nothing more than strange and inexplicable to them.

Conclusions

1. The scheme of the relation between the Greek State and its repatriated kin-Minorities is the following:

- Protective or irredentist kin-State policies encouraged kin-Minorities to claim protection not from home-State but from the kin-State.

- Once repatriation/immigration was made possible, kin-Minorities repatriated massively in the kin-State's territory claiming protection, support and social integration.

- In this occasion the kin-State demonstrated reluctance in conceding such assistance and acceptance to all minorities.

- The criteria used by the kin-State to classify and distinguish kin-Minorities for integration purposes have been: the country of origin, thus the foreign policy towards the home-State, and the selectively adopted pair of criteria consisting of Greek consciousness and Greek/blood origins.

The practices of a "protective" kin-State, such as Greece, often focus on state and political interest, namely the '*national interest'*. The rhetoric and the underlying justifications for such practices, openly declared or not, usually are:

a) The objective of national and cultural - or possibly racial - homogeneity

b) The priority of foreign policy issues and relative national interest

c) The public relations with the members or the elites of the kin-Minorities.

2. The situation of today's kin-Minorities in Greece may be conceived as a mixture of problems and challenges:

- Greek public policy is faced with the challenge of balancing national and cultural homogeneity with the urging issue of social cohesion and racism. Legislative and State

[17] *A 2002 research, through interviews with Greek Albanian families in Athens, by M.Pavlou and G.Kaplani, which provided material for the report by M.Pavlou in a collective volume of the KEMO (Center of research on Minority Groups) about the Greek minority of Albania (to be published).*

policy practices which lead to discrimination, also justify and legitimise everyday social discrimination practices in the large society.

- Greek citizenship is claimed by the 'homoghenís' on the basis of individual will and the sense of membership and belonging to the Greek society. Public discourse in Europe today reserves a prominent position for the respect of the 'other'.

Since repatriated kin-Minorities, thanks to mixed marriages and pre-existing multicultural identities, also put forward strategies and claims of integration in national society, though maintaining cultural values and difference, a citizenship policy based on free will and not on 'genos' (ius sanguinis) is a one-way exit.

- Equality in treatment of all repatriated kin-Minorities is the only coherent remedy to the presently unjustifiable discrimination between them[18].

- Difficulty in defining 'Greek national consciousness' (or hesitation in recognizing it) can be resolved through a generous citizenship policy that is inclusive of those who wish and may participate productively in the Greek society. While this may seem to be a rather opportune subjective criterion to be adopted by a democratic State, it also has to be redefined in its content and comprehension (e.g. excluding religion and including free will and citizenry commitment). This question, obviously, is also connected to a State policy concerning immigration.

3. Treatment of kin-Minorities has crucial social consequences: social cohesion of the home or kin-State society and the respect of individual and collective rights, such as human and civil rights. Therefore, kin-State's policies which focus on 'national interest' often end up perpetuating the kin-Minorities' subaltern position, either in the home or the kin-State society.

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[18] *This is the recommendation of the Greek Ombudsman through the above-mentioned report of December 2001.*

LE STATUT (DE PROTECTION) DES MINORITES NATIONALES : UNE EXCEPTION EN DROIT PUBLIC

M. Dimitris CHRISTOPOULOS
Chargé de cours à l'Université Aristotelion de Thessalonique, Bureau du Médiateur de la République hellénique

L'émergence des droits de l'homme se fonde sur une fiction : l'homme non déterminé. Une telle fiction ne constitue en aucun cas une catégorie exceptionnelle dans le champ de la construction juridique de la modernité. Les théories du contrat social sont aussi basées sur « une pure fiction ou, en d'autres termes, un mensonge » comme dit Jeremy Bentham dans ses *Anarchical fallacies*.[1] En effet, tout ordre juridique se construit sur des apparences sur lesquelles s'établit un accord. Il s'agit de faire semblant qu'une telle catégorie existe, en dépit de la connaissance qu'elle n'existe pas. C'est un « procédé de technique juridique par lequel on qualifie une situation de manière contraire au réel, en vue de lui attribuer des conséquences juridiques découlant de la qualification».[2]

Les dispositions générales de la Déclaration de 1789, ainsi que de toute Déclaration des droits de l'homme de l'époque, témoignent que leur concept part de l'idée qu'il existe une dignité inhérente à la personne humaine, « *à toute personne* », à partir de laquelle se construit le noyau dur des droits subjectifs, attribués à la nature humaine : «des droits naturels et imprescriptibles de l'homme », dit l'Article 2 de la Déclaration. Dans la problématique fictive, inhérente à l'invention et à l'application des droits de l'homme, nous prétendons que « les hommes naissent et demeurent libres et égaux en droits», nous faisons *comme si* notre volonté était réalité.[3]

C'est à partir d'une telle thèse que se pose la question des minorités, en termes de droits.

Exception 1ère : le minoritaire n'est pas "toute personne"

Travailler sur le concept de la *protection* des minorités, séparément de la protection de « toute personne », implique la reconnaissance de la fiction ou mieux la reconnaissance du fait que la reproduction fictive de la réalité sociale ne produit pas des résultats légitimateurs de cette même fiction. Bref, lorsque surgit la question de la protection des minorités, comme c'est le cas aujourd'hui, cela implique que nous avons reconnu que se pose un problème d'égalité ou de liberté pour les personnes appartenant aux minorités, insoluble par la formulation générale « tous sont libres et égaux ». Et, lorsque le problème des minorités se pose principalement en termes de

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1 *Sophismes Parlementaires, Paris, 1840, p. 501.*

2 *Salmon, J., « Le procédé de la fiction en droit international », Revue belge de Droit International, 1974, p.11.*

3 *Sur la question du volontarisme dans ce contexte cf., Wachsmann P., Naturalisme et volontarisme dans la Déclaration des droits de l'homme de 1789, Droits, n° 2, 1985*

droits de l'homme,[4] dévoiler la fiction en matière de droits de l'homme et de droits des minorités signifierait élaborer une *politique* des droits de l'homme des personnes appartenant aux minorités, une politique, comme dit Balibar, « qui ne soit pas simplement une politique en vue de leur proclamation, mais la politique même de leur réalisation et de leur mise en oeuvre »[5].

Pour ce faire, il faut penser sur les droits de l'homme, réfléchir à leurs fondements philosophiques propres, à savoir nos propres fondements épistémologiques. Bref, il faut penser les droits de l'homme en se pensant.[6] Toutes les critiques du concept, de la plus conservatrice jusqu'à celles d'inspiration marxiste mettent en question le caractère abstrait, indéterminé de l'individu-paradigme des droits de l'homme.

1789 est le moment philosophique et historique de l'auto-affirmation de l'individu abstrait à travers ses caractéristiques universelles reconnues « à toute personne ». Cependant, à travers « toute personne », l'individu se découvre lui-même avec ses propres caractéristiques particulières qui deviennent repérables uniquement quand il devient porteur des droits. L'individu ne peut se comprendre qu'au niveau universel. Mais, lorsqu'il prend conscience de lui, il est prêt à intégrer son particularisme ethnique, linguistique, religieux, dans le nouveau contexte conceptuel de ses droits. Il ne se sent plus porteur d'une langue, d'une religion, d'une culture, mais il se sent porteur du droit à une langue, une religion, une culture. Et pourtant, il demeure l'être universel, non situé, « égal et libre », produit de son identification à l'Etat.

Burke fut le premier à mettre le doigt sur les dangers inclus dans cet égalitarisme issu de 1789, qui allait entraîner une « pratique sociale unificatrice, puissamment assimilationniste dans les domaines linguistiques et culturels »[7]. Les *Considérations sur la France*[8](1796) de J. De Maistre constituent une nouvelle étape dans la critique conservatrice des droits de l'homme. Quoique visiblement antimoderne, dans le sens où il refuse d'accepter et mettre en valeur les acquis de la modernité (positivisme, sécularisation, souveraineté populaire), De Maistre fait un pas dans la perspective tracée par ces mêmes idées, au moins en ce qui concerne la formation d'un esprit nationaliste : esprit fondé sur la mémoire collective d'une population composée d'hommes animés par un sentiment d'appartenance particulariste. C'est dans ce sens qu'une partie de la critique qu'il lance au concept des droits de l'homme dévoile l'image de l'homme cachée par la Déclaration, l'homme conditionné, à l'image duquel le concept de minorité peut surgir.

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[4] *Rappelons qu'il se pose aussi dans la perspective de la résolution des conflits, de la médiation politique, des politiques de régionalisme etc.*

[5] *Cf. Balibar E., « Qu'est-ce qu'une politique des droits de l'homme ? » in Les frontières de la démocratie, Paris, La Découverte, 1992, pp. 238-266.*

[6] *Cf. Villey M., La formation de la pensée juridique moderne, Paris, Montchrestien, p. 4: «La science du droit telle qu'elle nous est exposée à la Faculté repose sur des principes dont elle-même omet de donner la justification rationnelle. Exemple : nos civilistes admettent sans guère prendre soin de fonder ce présupposé que la loi soit la source la plus haute de droit. »*

[7] *Fenet A., « Présentation générale », in Les minorités et leur droits depuis 1789, Fenet A., Soulier G., (éd), p.10.*

[8] *Ed. Tulard, Ganrier, Paris, 1980.*

En renonçant à l'universalisme abstrait de la Constitution de la France de 1795, il proclame : « La constitution de 1795, tout comme les aînées, est faite pour *l'homme*. Or il n'y point d'*homme* dans le monde. J'ai vu, dans ma vie des Français, des Italiens, des Russes etc. ; mais quant à l'*homme*, je déclare ne l'avoir rencontré de ma vie ; s'il existe, c'est bien à mon insu... »[9] Derrière l'irréalité de l'individu universel abstrait de la Déclaration de 1789, de Maistre « découvre » la réalité des hommes déterminés par leur appartenance particulariste, voire nationale. Le concept de minorité est là, lorsque s'opère une relation dialectique entre les deux pôles du paradoxe : *le particularisme devient revendication à travers l'avènement de l'universalisme.*

Ce n'est donc pas par hasard que le premier à concevoir cette dialectique, dans sa forme primaire, fut Hegel dans ses *Principes de Philosophie du Droit*[10]. Dans la pensée de Hegel, s'opère une conciliation entre l'esprit universaliste des Lumières et celui du romantisme, « bref l'essai visant à concilier ce qui, apparemment, est inconciliable».[11] A côté de l'élément particulier du *Volksgeist*, il ajoute sa dimension universelle : « l'esprit du monde », le *Weltgeist*, la procession universelle de l'Histoire mondiale. Or pour lui, il n'y a pas de nature abstraite de l'homme, mais des hommes insérés dans un peuple qui, pour sa part, constitue une étape de l'évolution du *Weltgeist*.

Parler des minorités à partir du schéma hégélien constituerait une discontinuité historique. Néanmoins, la contribution de Hegel, intégrée dans sa conception idéaliste de l'évolution historique, est sans doute signifiante : dévoiler que les droits de l'homme sont exercés par des individus à travers leur appartenance à une ethnie, une nation ou une culture, pourrait signifier aussi l'inverse : que le fait de l'appartenance, lorsque celle-ci est placée en position minoritaire au sein d'un Etat, pourrait aussi constituer une bonne raison pour la non-jouissance de ces droits et libertés pour les personnes appartenant à des minorités.[12]

L'usage de la philosophie par Hegel comme moyen de critique sociale devient l'étayage du marxisme. Selon les fondateurs du marxisme, dire que « les hommes sont égaux » serait une norme de justice qui ne prend pas en considération les relations sociales. Un tel axiome pourrait être valable dans les conditions d'une abstraction infinie des êtres humains, considérés en dehors de leur milieu social et de leurs qualités individuelles. En vue d'arriver à la formulation d'égalité pure, la personne humaine perd toute sa substance réelle et en devenant entièrement égale avec les autres, elle devient entièrement vide. Or, il se crée une situation de séparation complète : d'une part l'homme, à savoir l'individu, est égal à l'autre dans la sphère de l'abstraction, mais la réalité sociale de la société bourgeoise forme nécessairement des inégalités réelles et concrètes. Engels tire à l'extrême sa conclusion dans *Anti-Dühring*, lorsqu'il propose le paradoxe que les gens peuvent être dominés contre leur volonté au nom de l'égalité. En somme, l'égalité libérale pour Marx et Engels est une égalité formelle qui peut cacher ou même servir l'inégalité réelle.

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9 *Cité in Binoche B., Critiques des droits de l'homme, op.cit., p. 44.*

10 *Ed.Vrin, Paris, 1982.*

11 *Cf. Haarscher G., « Les droits de l'homme, notion à contenu variable », in Perelman C., Vander Elst R., (dir.) Les notions à contenu variable en droit, Ed. Bruylant, Bruxelles, 1984, p.331.*

12 *Sur Hegel et les droits de l'homme cf. Bourgeois B., Hegel et les droits de l'homme in Droit et liberté selon Hegel, Paris, PUF, 1986 et du même, « Philosophie de droits de l'homme de Kant à Marx », Paris, PUF, 1990.*

Comme le note B. Bourgeois, « la négation communiste des « Droits de l'homme » *ne* s'appuie *pas* sur la *lecture* directe, *immédiate*, du contenu *manifeste* de la célèbre Déclaration (de 1789), mais sur *l'interprétation* fort *médiatisée* de sa *fonction historique*.»[13] Ce que Marx dénonce dans la doctrine des droits de l'homme, c'est - en premier temps - son caractère historiquement déterminé se situant à l'origine de la dichotomie entre égalité réelle et égalité formelle.

De fait, une grande partie de la littérature juridique contemporaine sur la question de la protection des minorités s'articule très souvent autour de la contradiction entre ces deux concepts : l'égalité formelle et réelle. Les personnes appartenant à des minorités, quoique formellement égales aux autres au titre de la clause de non-discrimination inscrite dans les constitutions nationales ou dans l'Article 14 de la Convention européenne des droits de l'homme, sont en réalité inégales et c'est pourquoi des mesures de discrimination positive sont proposées en vue d'atteindre une égalité de fait.

C'est dans la *Question juive* (1843) que le jeune Marx a livré l'essentiel de sa critique célèbre des droits de l'homme :[14] « Avant tout nous constatons le fait que les soi-disant *droits de l'homme*, distingués des *droits des citoyens* ne sont rien d'autre que les droits du *membre de la société civile-bourgeoise*, c'est-à-dire de l'homme égoïste, de l'homme séparé de l'homme de la communauté.(…) En quoi consiste la liberté ? ... La liberté est le pouvoir qui appartient à l'homme de faire tout ce qui ne nuit pas aux droits d'autrui... Il s'agit de la liberté de l'homme considéré comme monade isolée, repliée sur elle-même... Le droit de l'homme, qui est la liberté ne repose pas sur les relations de l'homme avec l'homme, mais plutôt sur la séparation de l'homme d'avec l'homme ». Cette liberté, c'est tout simplement, selon Marx, la métaphore de la propriété privée. En effet, la *Question juive* est destinée à démontrer que le droit à exprimer les convictions religieuses d'un peuple dont les croyances sont en contradiction avec leur appartenance à une communauté politique et en position minoritaire dans le contexte d'Etat, ne fait que témoigner de la scission advenue par les droits de l'homme entre la dimension universelle, constitutive de la société civile, et la vie de l'Etat : entre le membre de la société capitaliste et le citoyen. Et la réponse de Marx est sans ambages : «la « *séparation* »… est envisagée d'abord comme division des hommes (« atomisation »), ensuite comme écartèlement entre les individus (divisés) d'une part, et l'universel (« l'essence humaine ») d'autre part ».[15]

La *séparation* dévoilée par Marx constitue par excellence le vécu juridique de tout minoritaire dans l'ordre libéral, libre et égal dans son abstraction universelle, dominé dans la réalité concrète de sa vie. Cependant, Marx avance encore plus son syllogisme. Ce qu'il reproche en dernière analyse aux droits de l'homme n'est pas leur caractère formel, mais leur propre identité : le fait d'*être des droits*. La séparation de Marx ne signifie pas que ces deux éléments ne peuvent pas coexister : le juif peut très bien être un citoyen, mieux il est citoyen. A ce point, Marx devient encore plus radical : «...parce que vous pouvez être émancipés politiquement sans vous départir pleinement du judaïsme - et sans qu'il y ait contradiction - l'émancipation politique proprement

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[13] *Bourgeois B., « Marx et les droits de l'homme » in La philosophie et droits de l'homme de Kant à Marx, op.cit., p. 101.*

[14] *Oeuvres Complètes, t.III, éd. M. Rubel, Gallimard, Pléiade, 1982, p. 365-373.*

[15] *Cf. Haarscher G., « La génèse de l'idée de l'égalité chez le jeune Marx », in L'égalité, Vol.V, Bruxelles, Etablissements E. Bruyland, 1977, p. 199.*

dite n'est pas l'émancipation humaine. »[16] Il nous dit, en somme, que le fait de l'émancipation politique d'une minorité, ne la libère en aucun cas de sa plus profonde aliénation et domination : son *credo* d'appartenance nationale ou religieuse.

Pour reprendre la problématique de l'émergence philosophique du concept des minorités, il faut revenir au lieu de l'appartenance politique de l'individu, au contexte final qui fait surgir le concept en cause : au « scandale philosophique »[17] de la *nation*.

« *L'existence d'une nation est un plébiscite de tous les jours* comme l'existence d'un individu est une affirmation perpétuelle de vie... Une nation est une âme, un principe spirituel », dit Renan. Si la nation se définit comme un plébiscite quotidien, le concept de minorité que nous examinons surgit comme un produit de circonstances, un produit de rapport de forces dans le contexte du plébiscite. La minorité surgit d'abord dans sa forme numérique. Elle émerge par le biais du plébiscite, elle s'exclut par son résultat. L'Etat-nation dévoile, dès son origine, une dynamique d'enfermement : une dynamique qui atteint son point culminant dans le cadre de l'Etat *de* nation, dans l'Etat *d'une* nation.

En effet, la formation de l'Etat-nation moderne renvoie à des individus vides, abstraits, non situés dans un réseau de relations sociales hétérogènes. Elle réussit à les alimenter avec le sentiment d'appartenance nationale et le « vouloir-vivre » collectif en vue de constituer, à travers l'expression de leur volonté générale, un véritable corps autonome, doté d'une existence propre et d'une légitimité historique. Et tout cela, par le biais de l'imposition d'une mémoire commune qui en fait détermine les individus abstraits dans le temps et l'espace.

Après la Révolution française, la nation légitime l'Etat, elle devient le lieu de la rencontre de l'homme avec l'Etat : l'individu universel s'identifie avec l'Etat par le biais de la nation : il devient citoyen. D'autre part, la nation représente le lieu où s'unit toute la société en offrant à l'Etat la justification de son existence. Tout processus d'unification sociale présuppose l'inclusion de ceux qui veulent s'identifier à la nation et l'exclusion des autres. Or, la nation émerge au pluriel. Prendre conscience d'une nation équivaut à prendre conscience de la multiplicité du phénomène. Comment concilier alors cette diversité de l'appartenance nationale avec le concept d'individu universel abstrait issu de la modernité européenne ?

L'unification de la société constituée dans le cadre de l'Etat-nation n'est en pratique jamais pure ni totale. Divers facteurs, tels que les frontières naturelles[18], le hasard, la force économique ou militaire de certaines populations en processus de constitution nationale, la conjoncture

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16 *Question Juive, op.cit., p. 189.*

17 *Nous empruntons l'expression de la Philosophie Politique de N. TENZER, op.ci., p. 465.*

18 *« C'est alors (en 1792) que surgit dans la conscience politique le thème des frontières naturelles : les limites de la France sont tracées par la nature, elles sont le Rhin, les Alpes, les Pyrénées et la mer. Ce qui correspond au territoire de la Gaule romaine. Autrement dit, une donnée historique et naturelle à la fois, qui n'est pas d'ordre ethnique mais peut y conduire, qui est plutôt d'ordre culturel et, par l'association de la nature et de l'histoire - c'est-à-dire de la raison et l'histoire - tend à fonder une spécificité. » ibid, p. 104.*

géopolitique, la procédure de la codification juridique[19], la tradition culturelle, etc. ont fait que certaines communautés ont pu se constituer en Etat-nation tandis que certaines autres ont perdu cette chance. De surcroît, ces mêmes facteurs ont fait qu'une bonne partie des nouveaux Etats-nations n'ont pas pu comprendre toutes les populations partageant le même sentiment d'appartenance dans leurs territoires : le concept de minorité se *territorialise* sur le continent européen, à travers son exclusion de l'Etat-nation.

Exception 2ème : le minoritaire est ennemi

Toute unité politique implique l'existence éventuelle d'un ennemi.[20]

Un concept, un signe n'est intelligible que par le fait qu'il se détermine en tant que tel par *opposition* à un autre. Dans l'ordre géopolitique, un Etat-nation est un territoire dont l'identité est autant ce qu'il est que ce qu'il n'est pas ; ses frontières le démarquent nettement des territoires des autres Etats-nations. Ultimement, le politique repose sur cette distinction entre *soi* et *autre*. Nous utiliserons le schéma schmittien de la *Notion du politique* à travers lequel se dévoile pleinement le processus de l'exclusion de la minorité par l'Etat-nation. La distinction *ami-ennemi* introduite par le juriste allemand est la réponse qu'il se donne à la définition de ladite essence du politique : « quoi qu'il en soit, est politique tout regroupement qui se fait dans la perspective de l'épreuve de force »[21]. Schmitt se pose la question du *critère approprié* pour identifier le politique. Quelle est alors la distinction pertinente qui spécifie le domaine du politique? La réponse de Schmitt, qui contribua à asseoir sa triste célébrité, est stupéfiante pour l'humanisme : « Ainsi la pierre de touche théorique de la pensée politique est-elle cette aptitude à discerner l'ami et l'ennemi ».[22] Comme le souligne J. Freund dans la Préface de la traduction française, la méthode relève, encore et toujours, de « l'analyse des cas d'exception quand l'instance étatique est, elle-même, mise en question ». Tout ceci nous fait pour autant voir que le politique ne se révèle pas dans la normalité gestionnaire, mais bien dans la sphère extrême de l'agression, potentielle ou réelle, extérieure ou intérieure.

L'ami est par excellence le national de l'Etat-nation. Il est ce même Etat-nation qui possède cette prérogative de souveraineté qui consiste à désigner l'ennemi, c'est lui qui *décide*. Et là encore la perversion guette. *L'ennemi c'est l'autre*, proclame Schmitt dans une formule très sartrienne : l'autre que l'Etat-nation, son dissident en son sein. Toujours dans la préface de la *Notion du politique*, J. Freund cite un texte étonnant tiré d'*EX Captivitate Salus* que Schmitt publia en 1950 : «Qui puis-je donc reconnaître enfin comme mon ennemi ? Manifestement celui-là seul qui me met en question. En tant que je le reconnais comme mon ennemi, je reconnais qu'il me met en question. Mais qui peut véritablement me mettre en question ? Il n'y a que moi-même. Ou encore

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19 *Comme Arnaud J.-A. le montre dans son ouvrage « Les Origines doctrinales du Code Civil », LGDJ, 1969, le Code Civil est le résultat d'une initiative d'unification des traditions et coutumes juridiques exercées sur le territoire français et coïncide historiquement avec la formation de l'idée nationale.*

20 *Schmitt C., La notion du politique, Théorie du partisan, Calmann-Lévy, Paris, 1972, p.97.*

21 *Ibidem, p. 80.*

22 *ibid, p. 114.*

mon frère. C'est cela. L'*autre* est mon frère. L'autre se trouve être mon frère et mon frère se trouve être mon ennemi. »[23]

Le cynisme de Schmitt dissout substantiellement les fondements de l'humanisme universaliste de la modernité européenne et met véritablement en question la devise de la Révolution française, « liberté, égalité, fraternité ». Car le premier *ennemi intérieur, l'autre* de l'Etat-nation, c'est la minorité. La minorité, résultat du plébiscite quotidien, l'entité qui ne partage pas le destin commun de l'Etat-nation, le particulier dans l'universel national, dévalorisé, marginalisé dès son existence. L'Etat-nation libère l'individu en tant qu'être abstrait, porteur des droits de l'homme consacrés par la Déclaration de 1789 et le rend citoyen souverain au fur et à mesure qu'il peut se reconnaître en son sein. La Déclaration de 1789 est celle des « droits de l'homme et du citoyen », dans le contexte de l'Etat-nation : elle témoigne du lien historique qui existe entre les droits de l'homme et la citoyenneté, celle-ci étant définie comme l'appartenance à part entière à une communauté politique. La preuve de cette appartenance partielle des minoritaires à la communauté politique, est solennellement proclamée dans la phrase célèbre à propos de juifs : « Il faut tout refuser aux juifs comme nation et tout accorder aux juifs comme individus... ; il faut refuser la protection légale au maintien des prétendues lois de leur corporation judaïque ; il faut qu'ils ne fassent plus dans l'Etat ni corps politique, ni ordre ; il faut qu'ils soient individuellement citoyens. »[24]

La souveraineté ne réside pas dans la personne de chaque citoyen, mais dans la réalité collective résultant de leur union, issue de leur *volonté générale*. Sieyès proclame : « Je me figure la loi au centre d'un globe immense : tous les citoyens, sans exception, sont à la même distance sur la circonférence, et n'y occupent que des places égales ».[25] Comme la volonté générale est une qualité supérieure à celle de l'agrégat des volontés individuelles qui la composent, la nation ne se définit pas comme l'ensemble des volontés individuelles mais comme leur *résultat*. Ce résultat est obtenu à partir d'un contrat[26] qui définit la volonté commune que la souveraineté nationale est chargée de légitimer. Mais la souveraineté nationale, bien que procédant de l'assemblage des co-contractants, est *une* et *indivisible*. Les individus qui forment la nation sont isolés, on dirait déshumanisés dans leur capacité d'abstraction infinie ; la nation est une et, dans sa singularité

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[23] *Ibid, p. 37. Et il continue : « Adam et Eve avaient deux fils, Caïn et Avel. Ainsi commence l'histoire de l'humanité. C'est ainsi que nous apparaît le père de toutes choses. C'est là la tension dialectique qui maintient l'histoire du monde en mouvement, et l'histoire du monde n'est pas encore parvenue à son terme. »*

[24] *Cité in Philippe B., Etre juif dans la société française, Ed. Pluriel, Paris, p. 143.*

[25] *Sieyes E.J., Qu'est-ce que le Tiers Etat ? Paris, PUF, 1982, p. 44.*

[26] *A cet égard, voir les remarques très éclairantes de J. Crowley : « En ce sens, tout contrat, considéré de la manière statique que suggère sa cristallisation de fait dans une nation et dans un Etat, fonctionne à la fois à l'inclusion et à l'exclusion. La fragilité du contrat social, quand l'espace public qu'il définit n'est pas coextensif avec ce qu'impliqueraient les structures étatiques, provient de son lien nécessaire avec le principe majoritaire. Fondamentalement, le contrat social est un mécanisme de légitimation de la soumission, ou plus exactement de transformation de la soumission en liberté. C'est pourquoi il permet, mais aussi exige, le principe majoritaire. Pour ceux qui en sont exclus, cependant, il n'existe aucun mécanisme de sublimation de la soumission, soumission aggravée quand l'exclusion est subie par une minorité déterminée (par exemple par sa nature ethnique) dont le caractère minoritaire est constitutif de la position sociale. La volonté exprimée par les groupes ethniques minoritaires de disposer des mécanismes spécifiques, délibérément anti-majoritaires, de participation aux processus politiques exprime donc très clairement une faillite du contrat social. » in Dellanoi G., Taguieff P.-A., (dir.) Les théories du nationalisme, Ed. Kime, Paris, 1991, p. 210.*

mythique, tend à l'assimilation à l'Etat. A la volonté « une et indivisible » du pouvoir monarchique, la Déclaration de 1789, impose la même perception absolue de la souveraineté pour légitimer le nouveau détenteur : la nation. La nouvelle « volonté générale » également « une et indivisible ». Le concept de minorité émerge de nouveau à travers son exclusion : telle est la dialectique de l'exclusion de minorités. Elles existent *parce qu*'elles sont exclues.
La souveraineté nationale de la Révolution inspire graduellement tous les peuples européens. Le message de la Révolution tend par définition vers son universalisation. *L'appartenance devient revendication à travers la reconnaissance des droits.* Les minorités se reconnaissent en tant que telles à travers la revendication des mêmes idéaux, mais le seul privilège qu'elles puissent se donner dans le nouvel ordre des Etats nationaux est la reconnaissance de leur *infériorité* : rien de plus, bien souvent beaucoup moins, que leur *protection*.

Exception 3ème: la minorité nationale est une nationalité sans droits nationaux

Le principe des nationalités constitue le corollaire du processus d'identification de l'Etat à la nation : que l'Etat-nation soit l'Etat *de* Nation (l'Etat d'une nation). Or, en vertu du principe des nationalités, les nations tendent à s'organiser politiquement en Etats dont les frontières doivent être fixées non d'après les limites considérées naturelles d'un territoire, des conquêtes et des conventions arbitraires de diplomates, mais par des zones déterminées par l'appartenance ethnique et par la libre disposition des groupes nationaux : *l'autodétermination des peuples*. Le principe des nationalités constitue la version de l'idée nationale qui a prévalu au cours du XIXe et à l'aube de XXe siècle. Une version fondée sur l'identification volontaire des deux termes de la bipolarité Etat-nation. Par définition, un tel processus d'identification porte en lui-même le risque d'une déviation, le risque de son application sélective. Nombreuses sont les ethnies ou les nationalités qui n'ont pas pu se donner un Etat dans ce moment décisif de leur histoire ainsi que les Etats-nations qui n'ont pas pu étendre leur souveraineté à tous les territoires habités par des individus partageant la conscience d'appartenance dominante dans ces mêmes Etats.

Le principe des nationalités, tel qu'il fut appliqué au cours de l'histoire européenne à partir du XIXe siècle fut une perversion du paradigme philosophique initial de la nation : les nationalités ou les ethnies étant si mélangées dans certaines régions de l'Europe, il est impossible d'établir un régime d'application universelle du principe. En effet, si le principe des nationalités avait été intégralement appliqué, le concept de minorité nationale n'aurait guère d'existence dans l'histoire et sur le territoire de l'Europe. En cela consiste la force ambivalente du principe des nationalités. D'une part, il est libérateur : il prétend que les nations disposent de l'autorité à décider de leur sort, contre les vœux des monarques et des alliances. Dans le cas de disparité entre nation et Etat, un rapprochement est légitime, soit par la création d'un Etat nouveau, soit par l'incorporation à un autre Etat voisin existant et dont les ressortissants partagent le même héritage ethnique. L'annexion d'un territoire uniquement par la force et contre la volonté de la population est donc nettement condamnée. Mais d'autre part, et pour les mêmes causes, le principe des nationalités est à l'origine d'une nouvelle oppression sur les populations qui n'ont pas pu identifier leur singularité avec la formation d'un Etat-nation. Une fois établi, le principe des nationalités devient un axiome juridique[27], un cadre institutionnel *intuitif*, dans le sens qu'il

[27] *Le Fur L., un des représentants de la revitalisation du droit naturel au début de notre siècle, souligne à ce propos: « Les nationalités constituent… les véritables sujets du droit international ou en tous cas elles sont l'assise*

n'a guère besoin de justification préalable, lorsque lui-même offre, en tant que tel, les outils de sa propre justification. Enraciné dans la conscience collective des peuples et dans les fondements de l'ordre juridique moderne, le principe des nationalités devient le postulat de la légitimité d'Etat. « Par le truchement du plébiscite, il se présente comme un principe de légitimation propre à fournir un fondement juridique aux transformations territoriales qu'appelle la convergence croissante de la nation et de l'Etat. »[28] L'idéal du principe des nationalités devient la forme de lutte contre l'oppression, tout en produisant lui-même de nouvelles formes d'oppression. Les victimes du nouvel ordre institutionnel sont cette fois les minorités nationales. Il incombe à l'application sélective du principe des nationalités de désigner les nations qui auront le droit à l'autodétermination, consacré solennellement au début du XXe siècle.

L'Etat moderne, formé selon le principe des nationalités, devient le sujet juridique du droit international ; d'un droit pour lequel la qualification ''interétatique'' correspondrait par excellence à ses fonctions au moins pendant la période que nous examinons. En effet, ce que ses fondateurs ont appelé 'droit des gens' est un droit exercé uniquement par des Etats, un cadre juridique au sein duquel la souveraineté étatique - le pouvoir de décider - devient le principe fondamental. Le principe de souveraineté en droit international public contemporain est la « traduction » de la souveraineté - telle que nous l'avons connue jusqu'ici - sur le plan externe. L'Etat est le sujet de droit et aucun autre pouvoir - Etat ou instance internationale - ne peut intervenir dans son domaine de souveraineté. L'existence des minorités constitue un facteur de relativisation de cette souveraineté, puisque le droit international intervient dans les affaires internes d'Etat en se donnant comme tâche leur protection.

Au cours des développements précédents nous avons qualifié les minorités comme des formes d'*exception* à la souveraineté étatique, un concept exclu par la souveraineté nationale. La souveraineté internationale de l'Etat implique que son statut international ne soit pas soumis à une autre autorité, qu'elle soit gouvernementale, judiciaire, législative ou exécutive, sauf au droit international lui-même. En termes généraux, la souveraineté internationale implique l'égalité des Etats et le principe de la non-intervention. Or, le concept de protection internationale des droits de l'homme constitue par définition une limitation à l'exercice de la souveraineté internationale car il implique une intervention dans les affaires internes d'un Etat. La doctrine traditionnelle du droit international qui considérait la protection des droits de l'homme comme une affaire exclusivement interne des Etats est radicalement transformée après la première guerre mondiale et la protection des droits de l'homme devient une préoccupation internationale. C'est à ce moment historique que s'institutionnalise d'une façon systématique la protection des minorités par la Société des Nations.

En même temps que le système international établit son nouvel ordre par le découpage ethnique du territoire européen, la souveraineté internationale des nouveaux Etats s'affirme à travers le principe des nationalités. L' « injustice » historique commise à l'égard des nationalités sans Etat, y compris les populations qui se sont trouvées en dehors du territoire de leur patrie, sera compensée par leur protection. D'une part, la protection spéciale des minorités en tant que

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fondamentale, le substratum de l'Etat, qui n'est légitime que là où il concorde avec la nationalité. » « Philosophie du droit international », in RGDIP, Tome 98, 1921, p. 578.

[28] *De Visscher C., Théories et réalités en droit international public, Paris Pedone, 1953, p. 51.*

groupes ou des personnes y appartenant, implique la reconnaissance préalable de leur infériorité dans l'ordre juridique national par rapport aux autres citoyens sur la base de leur appartenance ethnique. D'autre part, la protection internationale des minorités implique que la communauté internationale institutionnalisée considère que l'action souveraine de l'Etat national ne suffit pas pour que ces populations soient suffisamment protégées. On reconnaît alors que l'Etat n'arrive pas à satisfaire sa mission initiale, à savoir *totaliser le bien commun*. Pour cela, elle juge nécessaire sa propre intervention.

Quoi qu'il en soit, le principe qui est largement mis en question, est celui de la souveraineté internationale de l'Etat. Celle-ci est jugée insuffisante pour assumer la responsabilité exclusive des intérêts et des droits des groupes de citoyens ; elle s'avère incapable de totaliser le bien commun de la population de l'Etat, prétention inhérente au concept même de souveraineté.

Ce signe d'échec de la souveraineté internationale de l'Etat livre un nouveau sujet juridique en droit international. Les minorités sont des sujets identifiés par leur protection. Or, comment se définit la protection des minorités ? Comment tracer ses limites ? Le problème renvoie à une autre question préalable: qu'entend-on par protection en droit international ?

La Cour Internationale de Justice dans son Arrêt *Nottebohm* de 1955 remarque que d' «exercer la protection... c'est se placer sur le plan du droit international. C'est le droit international qui détermine si un Etat a qualité pour exercer la protection et saisir la Cour.»[29]

Ratione personae, la protection internationale concerne «toute personne». C'est ainsi que la protection attribuée aux minorités doit être d'abord qualifiée comme *indirecte*. Soit au niveau formel, soit au niveau réel, le minoritaire peut d'abord jouir de la protection des droits de l'homme, comme tout autre citoyen par le biais des dispositions générales qui visent « toute personne». Le fait que le minoritaire ne se reconnaisse pas comme un sujet juridique dans l'ordre national comme « toute personne », découle de son attachement à une réalité collective autre que celle officiellement proposée par les instances souveraines. Là où triomphe le principe des nationalités, il demeure attaché à une autre nationalité sans ou hors Etat. Lorsque l'Etat s'efforce de construire une conscience nationale homogène pour ses citoyens à travers l'officialisation d'une langue ou d'une religion nationale, le minoritaire se trouve finalement différent parmi les égaux.

Les minorités nationales sont ainsi qualifiées justement en raison de leur incapacité à exercer le droit des peuples : le droit à l'autodétermination. L'application du principe wilsonien et l'expérience historique de la protection des minorités menée par la Société des Nations ont formulé l'expression solennelle et définitive de leur spécificité. Quelle qu'elle soit, la protection des minorités se situe toujours entre les deux pôles du dilemme paradoxal de la modernité : *raison d'Etat* et *liberté individuelle*. Il se peut bien que le statut social ou juridique d'une minorité puisse être en dehors des limites tracées par le deuxième pôle du paradoxe moderne - la liberté individuelle - voire par la protection des droits de l'homme des minoritaires. Très souvent, une minorité n'est ni reconnue, ni protégée. Pour autant, la protection des minorités ne peut jamais aller au-delà de l'autre pôle du paradoxe moderne, la raison d'Etat. La revendication

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[29] *C.I.J. Rapports, 1955, p. 20 et 21.*

légitime de toute minorité prend fin là où commence l'exercice du droit à l'autodétermination. Le fait d'être déjà minorité signifie qu'elle a définitivement perdu le pari de son autodétermination.

Le transfert des populations est une mesure qui avait été préconisée comme une des solutions au problème des minorités, comme pouvant donner satisfaction à l'exigence historique des nationalités de s'identifier avec leur Etat. Au risque de cynisme, on dirait qu'il s'agit d'une solution simple d'ordre mécanique. Elle consiste à déplacer un des éléments constitutifs de l'Etat. La Société des Nations a affirmé le principe de l'autodétermination interne, à savoir le droit inaliénable des peuples de choisir librement leur gouvernement et l'intangibilité du territoire des nouveaux Etats. Du moment que la population, le territoire et le gouvernement ne se trouvent pas en concordance ethnique, il demeure un élément constitutif de l'Etat à modifier, le seul de nature humaine : la population. Les frontières sont intangibles. Le caractère multiethnique d'une série d'Etats aussi bien que le désir de désamorcer des conflits à venir, inspira la conclusion de plusieurs traités relatifs au transfert des populations minoritaires. « C'est l'un des aspects importants de la politique de la Société des Nations. Ainsi espérait-on avoir la paix. Pour le dire crûment : les Etats pensaient qu'ainsi les minorités leur ficheraient la paix. »[30]

Au nom du principe des nationalités et de l'adaptation de la nation à l'Etat, la migration obligatoire fut appliquée en 1923, quand les gouvernements grec et turc signèrent une Convention concernant *l'échange obligatoire* des populations grecques et turques, dont le premier Article est ainsi libellé : « Il sera procédé dès le 1er mai 1923 à l'échange obligatoire des ressortissants turcs de religion grecque-orthodoxe établis sur les territoires turcs et des ressortissants grecs de religion musulmane établis sur le territoire grecs. »[31]

Dire que le transfert obligatoire des populations est profondément contraire à toute notion de dignité ou de liberté humaine serait quelque peu banal. L'application isolée de la mesure est pourtant significative des intentions des décideurs. La convention gréco-turque de Lausanne constitua un précèdent *exceptionnel* dans l'histoire des droits des minorités. La convention de Lausanne fait par excellence partie de cette sphère d'exception dans le contexte de laquelle la raison d'Etat national entre en contradiction avec ses propres acquis universalistes, ceux de la souveraineté populaire et des droits de l'homme.[32] En définitive, les minorités se trouvent

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[30] *Soulier G., « Minorités, Etat et société », in Les minorités et leurs droits depuis 1789, op.cit., p.49-50.*

[31] *Sur l'échange des populations gréco-turques cf. : Seferiades G., L'échange des populations, RCADI., 1928, IV, op.cit., Tenekides G., « Le statut des minorités et l'échange obligatoire des populations gréco-turques » in RGDIP., 1924, pp. 7-72, Ladas S., The exchange of Minorities, Bulgaria, Greece, Turkey, The McMillan Co., New York, 1932.*

[32] *Voici l'opinion de juristes de cette époque. Seferiades G., « L'échange d'hommes malgré leur volonté, est une conception que plus d'une conscience juridique se refusera à comprendre et à accepter, bien qu'elle ait été considérée comme nécessaire par la politique. » Dans cette perspective et par un raisonnement iusnaturaliste, l'auteur considéra le traité comme nul et non avenu (L'échange de populations, op.cit. p. 328). Mandelstam note : « Cette convention s'explique, dans une certaine mesure, par l'état d'animosité existant entre Turcs et Grecs, à la suite de leur terrible lutte. Du point de vue du droit international, la convention de Lausanne constitue néanmoins un regrettable pas en arrière. Lord Curzon a dit à la séance du 13 décembre 1992 de la Conférence de Lausanne, à propos de l'échange forcé des populations, que c'était « une solution extrêmement défectueuse »... La triste situation dans laquelle les malheureux Grecs et Turcs, échangés en vertu de la Convention de Lausanne, malgré tous les secours qui leur sont prodigués, semble donner raison à lord Curzon. Il faut espérer, en tout cas, que la convention*

confirmées solennellement comme les *ennemis internes* de l'Etat-nation et le nouvel ordre européen issu de la première guerre mondiale se sent plus à l'aise quand il réussit à éliminer le phénomène dès sa constitution, même par la force.[33]

Si dans les cas *exceptionnels* les populations à destin minoritaire sont expulsées, dans les cas *normaux* elles seront protégées, ignorées ou même opprimées.

Exception 4ème : le phénomène minoritaire est un obstacle de conceptualisation

« Qu'il s'agisse de prescrire une norme, de l'interpréter ou de la légitimer par référence à des valeurs méta-juridiques, nos schémas de pensée demeurent fortement marqués par l'époque des Lumières. Des règles précises, un raisonnement syllogistique et des valeurs homogènes - en somme un ordre « monologique » - ont de loin la préférence des juristes. Mais il est vrai que le droit n'appartient pas aux juristes et qu'il a évolué sans eux, parfois malgré eux, vers une complexité qu'il ne suffit pas de déplorer et qu'il faut bien s'efforcer de penser ».[34] Or, *le droit est complexe* car la société est complexe.

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gréco-turque de Lausanne restera un précédent isolé dans l'histoire de la protection des minorités. » op.cit. p.417. Redslob ajoute: « La transplantation forcée d'un peuple ne peut être approuvée parce qu'elle est en contradiction avec un droit primordial. Certes, la migration obligatoire se met au service d'une cause utile, elle crée l'unité nationale dans le cadre politique existant, elle rassemble en une vie commune les membres épars d'une même famille. Ce procédé réalise ainsi l'Etat unique et homogène que les conationaux postulent au nom du principe de l'autodétermination ; il le réalise par des moyens mécaniques. Mais, en le constituant, il sacrifie un autre bien suprême auquel l'homme aspire au nom d'un droit non moins sacré : ce bien, c'est la terre. Elle aussi, la terre, est l'objet d'une revendication initiale qui plonge ses racines dans des croyances de justice. Il est un droit à la terre, c'est un droit de l'homme. Or, à regarder le fond des choses, le droit de l'homme est de la même famille que le droit des nationalités. Tous deux procèdent d'une même croyance: l'autodétermination. » op.cit. p. 166.

[33] *En 1928, Carl Schmitt qui n'avait pas la moindre prétention de se montrer humaniste ou avocat du nouveau système, dévoile d'une façon extraordinaire la nature des choses : « Si on envisage la Nation comme substance de l'égalité démocratique, il en résulte des conséquences pratiques d'un genre précis. Un Etat démocratique qui trouve dans l'homogénéité nationale de ses citoyens la condition préalable de sa démocratie, répond au fameux principe des nationalités, selon lequel une Nation forme un Etat, un Etat englobe une Nation. Un Etat nationalement homogène devient alors le cas normal. Un Etat auquel cette homogénéité fait défaut a quelque chose d'anormal, de dangereux pour la paix. Le principe des nationalités devient aussi la condition préalable de la paix et le « fondement du droit international. Si cette homogénéité nationale vient à se défaire dans la pratique parce qu'un Etat se compose de plusieurs nationalités ou englobe des minorités nationales, plusieurs éventualités se présentent. D'abord la tentative d'une solution pacifique ; mais en fait cela implique soit une dissociation et une séparation pacifique, soit une assimilation pacifique et progressive à la nation dominante. La protection des minorités nationales établie de nos jours en droit international cherche à garantir une solution pacifique. La minorité nationale n'est alors protégée en tant que nation ; elle n'est pas censée avoir des droits politiques en tant que nation à l'égard de la nation dominante, sinon ce serait non seulement le principe de nationalité, mais encore le principe même de l'Etat démocratique qui serait abandonné. Dans le droit international actuel, la réglementation de la protection des minorités nationales se place plutôt dans la perspective de la protection des droits individuels de l'homme à qui, en tant qu'individu, on garantit l'égalité, la liberté, la propriété et l'usage de sa langue maternelle. L'idée ouvertement déclarée, est de produire ainsi pacifiquement l'homogénéité nationale, dans la condition préalable de la démocratie. L'autre méthode est plus rapide et plus violente : éliminer le corps étranger par l'oppression, l'expulsion de la population hétérogène et d'autres moyens radicaux. Le meilleur exemple de cette méthode est fourni par le traité gréco-turc du 30 janvier 1930.» Théorie de la Constitution, Paris, Léviathan, P.U.F. 1989, Ch.17 « La théorie de la démocratie. Concepts fondamentaux », p. 369-370.*

[34] *M. Delmas-Marty, Pour un droit commun, Paris, P.U.F., 1993, p. 79.*

A propos de notre objet de connaissance, une aporie juridique se manifeste lorsque le droit s'efforce de traiter de quelque manière qu'il soit la question des minorités. Car, ce droit s'est historiquement et philosophiquement constitué sur ces deux piliers : l'homme et l'Etat. Entre ces deux catégories conceptuelles, créatrices et créations à la fois de l'ordre juridique moderne, national ou international, il y a un vide juridique. « Reposant fermement sur les principes d'identité et de non-contradiction, la pensée classique exclut le tiers. Aussi bien s'enferme-t-elle dans des systèmes d'opposition irréductible, se condamnant tantôt au monisme, tantôt au dualisme, tantôt encore *à l'oscillation sans fin d'un pôle à l'autre*.»[35]

Comment, alors, le droit a-t-il conçu la question de l'appartenance particulariste des individus ? D'abord, *par la création des Etats,* dans un effort de régler le fait de l'appartenance par la constitution des Etats correspondant à une nation. Cela s'est bien souvent révélé impossible. Rares sont d'ailleurs les frontières des ethnies qui coïncident parfaitement avec celles des nouveaux Etats. Une fois que les minorités sont constituées, à travers la négation du droit de se constituer en Etat ou d'adhérer à un autre Etat, le droit, qui ne voit que des Etats ou des individus, intègre la nouvelle entité collective dans sa deuxième catégorie constitutive : les minorités sont rarement reconnues en tant que collectivités, seuls sont reconnus comme sujets juridiques les individus qui les composent. Et cela, non pas à titre de leur appartenance au groupe, mais à titre de leur essence humaine.

En effet, les deux pôles du paradigme moderne se sont constitués d'une façon dichotomique. D'une part, en tant qu'opposition continue: les droits de l'individu sont un appel *contre* la raison d'Etat, contre l'arbitraire de l'espace public et les empiétements qu'il peut pratiquer sur l'espace privé. D'autre part, les droits de l'individu sont un appel *à* l'Etat, car l'individu devient sujet des droits uniquement dans le contexte de l'Etat, et il incombe à ce dernier de sanctionner les violations éventuelles des droits subjectifs. Entre les deux, idéalement, rien : ce sera ou l'appartenance ou le rejet. Ce que le droit libéral, fondé sur la problématique du « tiers-exclu », a pu offrir aux minorités n'est pas autre chose que le premier pôle de sa bipolarité dichotomique : les droits subjectifs des individus (appartenant aux minorités), les *droits de l'homme*.

Or, la minorité en tant que catégorie sociale collective, n'est ni Etat, ni individu, quoique constituée d'individus. Comment la situer dans la tension des deux pôles, dans leur solidarité conflictuelle et leur intime articulation ? On voit alors que le phénomène minoritaire se dresse comme un obstacle conceptuel pour le droit. Ceci ne doit pas nous étonner.

« Quand on cherche les conditions psychologiques des progrès de la science, on arrive bientôt à cette conviction que *c'est en termes d'obstacles qu'il faut poser le problème de la connaissance scientifique* »[36], dit G. Bachelard. Il en va de même pour la connaissance juridique. Bachelard continue: « La science... s'oppose absolument à l'opinion... L'opinion *pense* mal ; elle ne *pense*

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[35] *Osr F., et Van de Kerchove M., Penser la complexité du droit : pour une théorie dialectique, (étude dactylographiée), Bruxelles, Cours donnés à l'U.L.B., p. 2, 1994. E. Durcheim dit : « L'Etat a été le libérateur de l'individu. C'est l'Etat qui a pris de la force à affranchir l'individu des groupes particuliers et locaux qui tendaient à l'absorber, famille, cité, corporation, etc. L'individualisme a marché au même pas que l'étatisme ». Textes, 3 vol. Ed. de Minuit, 1975, t. 3,, p. 17, cité in Soulier G., « Minorités, Etat et Société », in Les minorités et leurs droits depuis 1789, op.cit., p. 45.*

[36] *La formation de l'esprit scientifique, op.cit. p.13.*

pas : elle traduit des besoins en connaissances ».[37] Or, le problème fondamental du droit contemporain de la protection des minorités en Europe réside dans le fait que ce droit s'est bâti dans l'urgence. On n'a jamais pensé les minorités en tant que catégories autonomes d'existence, sauf dans les cas où la stabilité politique et diplomatique sur le continent a été menacée par ces dernières.

L'histoire de la protection des minorités est une histoire des *opinions*, une histoire qui, par excellence, traduit ses besoins en axiomes juridiques : au début on a protégé les groupes parce qu'on a cru qu'en protégeant certaines populations qui ont été mises en position minoritaire, on pourrait sauvegarder l'équilibre diplomatique dans l'Europe des nations. Ensuite et notamment dans le cadre de la Société des Nations, les vainqueurs de la première guerre mondiale ont imposé un régime partiel de protection des minorités habitant les territoires des vaincus, puisqu'on a cru, à tort d'ailleurs, qu'on pourrait établir de cette façon une paix durable sur le continent. Dans le cadre des Nations Unies on a également cru qu'en protégeant les droits de l'homme *in abstracto*, on pourrait régler définitivement le problème des minorités en occultant la dimension particulariste de la culture de l'être humain. De même, aujourd'hui la question de la protection des minorités surgit de nouveau comme un besoin imposé par l'urgence absolue de régler, de quelque façon que ce soit, l' émergence des nationalismes en Europe centrale ou orientale. Or, la question s'avère une affaire difficile à traiter par le droit international étant donné qu'il a lui-même fourni les éléments pour la constitution historique du problème. Pour comprendre les minorités, Il faut donc penser autrement. L'exercice ne va pas de soi : il implique qu'on sache se penser autrement.

Dans tous les cas, le problème se pose en termes de concepts : on ne sait où placer la minorité dans cette dichotomie. La construction juridique du phénomène minoritaire est absente. Dans le premier cas, l'argument moderne de la libre disposition de la minorité n'est pas valable pour des raisons déjà évoquées. Dans le deuxième cas, la construction juridique qui réglementerait la situation de minorité en tant que catégorie sociale autonome nécessite une analyse qui exprime l'idée selon laquelle *l'identité politique doit être distincte de l'identité nationale ou culturelle*, ouverte à toutes les cultures et tous les particularismes au sein de l'Etat.

Voici alors comment se pose la question contemporaine d'appartenance. Il s'agit d'une forme de dépassement partiel du concept de l'Etat-nation, qualifié par un auteur d'« identité postnationale ».[38] « Le criticisme de l'identité postnationale doit s'expliquer avec les tentations écartelées du supranationalisme et du régionalisme »[39] et « l'identité politique désormais dissociée de l'appartenance nationale, est à construire sur les principes d'universalité, d'autonomie et de responsabilité qui sous-tendent les conceptions de la démocratie et de l'Etat de droit ».[40]

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37 *ibid, p.14*

38 *Ferry J. M., Les puissances de l'expérience, II : Les ordres de la reconnaissance, Paris, Cerf, 1991, p. 191.*

39 *ibid, p. 177.*

40 *ibid, p. 194.*

L'Europe politique tend de nos jours vers l'adoption de règles juridiques et d'engagements politiques au sein du Conseil de l'Europe et de l'OSCE, qui expriment à un certain degré ce modèle de dissociation du *national* et du *politique*. La réglementation juridique en question signifie la reconnaissance implicite, bien souvent explicite, du fait de la faible régulation juridique du phénomène minoritaire.

La population qui a définitivement accepté sa situation minoritaire au sein du territoire d'un Etat donné veut être protégée. A cette constatation évidente s'oppose la volonté irréductible de la population qui n'accepte pas le fait de sa minorisation et qui refuse sa protection en se considérant titulaire du droit à l'autodétermination. C'est ainsi que toute idée de protection est incompatible avec la volonté du groupe. Le concept de la protection présuppose, comme nous l'avons déjà examiné, la reconnaissance explicite ou implicite de la légitimité de la souveraineté étatique et de l'infériorité sociale de la minorité par rapport au reste de la population. Le terme même 'minorité' dévoile une infériorité : en latin le *minor* est le moindre. Or, seuls les premiers groupes - ceux qui veulent la protection - sont concernés par cette question dite « post-nationale » d'appartenance. Les autres n'ont pas encore pu résoudre leur propre question nationale d'appartenance, la question de leur autodétermination et, comme tels, ils transforment toute différence communautaire en rêve d'indépendance nationale.

Exception 5éme : la protection des minoritaires par leurs "patries"

L'expérience de l'histoire constitutionnelle et des relations internationales du 20ème siècle en Europe offre une multitude d'exemples de protection des minorités par des Etats limitrophes qui se présentent comme les patries des populations avec lesquelles ils partagent une conscience nationale commune, pour le dire autrement une image commune du passé imaginaire. Pour des raisons d'un «accident historique» ces populations se sont trouvées en dehors du territoire de cet Etat «patrie».

Déjà, aux fondements du concept de protection des populations situées en dehors du territoire d'un Etat se trouve un argument d'ordre eschatologique d'accomplissement de ce que la raison nationale n'a pas pu terminer dans l'Etat. C'est là, la racine de l'idéologie irrédentiste.

Le droit international de la protection des droits de l'homme constitue une déviation normale de la juridiction exclusive des Etats souverains sur les droits des personnes se trouvent sur leur territoire et, pour cela, une conquête de la culture et l'ordre juridique libérale. L'intervention d'un Etat tiers sur la base d'un argument généalogique de parenté ou d'affinité avec un fragment des citoyens d'un autre Etat constitue *a priori* une politique discriminatoire qui se justifie par des raisons d'un devoir ethnique et de solidarité aux populations qui - selon le principe des nationalités - n'ont pas trouvé d'espace au sein de leur « patrie », mais ailleurs. La protection des minorités par leurs Etats-«patries» se présente alors comme une sorte de compensation pour la responsabilité de l'Etat-parent, qui, au moment crucial n'a pas pu accomplir le devoir historique qui lui incombe, c'est-à-dire l'identification du territoire étatique avec l'espace territorial occupé par la nation.

La compensation qui est offerte à ces populations est alors une expansion fragmentaire et exceptionnelle de la juridiction des Etats parents à "leurs" minorités en dehors de leur territoire.

Si alors la protection des minoritaires, comme la protection de tout homme par les institutions internationales doit se voir comme une conquête – un pas en avant – la protection des minoritaires par leurs Etats-parents devrait se voir comme une subsistance d'inertie des formes d'organisation de pouvoir qui se ne fondent pas sur le concept de citoyenneté mais sur la notion ambivalente et politiquement fort discutable de l'appartenance ethnique. Dans ce sens la protection des minorités par leurs Etats-parents est un pas suspendu, pour ne pas dire un pas en arrière. Pourtant dans l'histoire du droit et des relations internationales tout pas – même en arrière – démontre et signifie un phénomène qui demande d'être expliqué et interprété.

Dès sa formation, la fondation de la protection des minorités par leurs Etats "patries" rencontre des problèmes insurmontables de point de vue des droits de l'homme. Nous connaissons très bien, par exemple, que toute mesure de discrimination positive (*affirmative action)* est *à priori* régie par deux pré-conditions nécessaires : *premièrement*, un groupe - sujet des droits - très précisément déterminé par la reconnaissance qu'il est victime d'une certaine injustice sociale qui doit être rectifier par la mesure déterminée et, deuxièmement, un horizon temporel bien limité pour la correction de l'injustice au-delà duquel la mesure n'est pas justifiée. Dans le cas de la protection des minorités par des Etats-parents, aucune de deux conditions mentionnées n'est remplie. D'un côté, le groupe minoritaire n'est pas constitué en termes sociaux, mais en termes d'appartenance subjective à une collectivité nationale. Mais d'un autre côté, qui est d'ailleurs le plus important ici, le temps d'application des mesures des discriminations positives est prolongé à l'infinie, étant donnée que leur objectif ne pourrait pas être le rétablissement de l'égalité après la correction de l'injustice, mais la compensation, l'indemnité pour un « accident historique » commis à l'égard des minorités qui n'a rien d'ordre social : il a plutôt à faire avec la formation des Etats modernes. Cet accident peut être compris en termes qui renvoient aux droits historiques des entités culturelles d'un Savigny et le nationalisme romantique de Herder et de Fichte, pourtant il est complètement irrecevable aux termes d'une analyse de l'unité universelle de la dignité humaine, qui constitue la base de la protection moderne des droits de l'homme.

Selon ce qui est déjà dit, nous pouvons aboutir aux positions suivantes. La protection des minorités par leurs Etats-patries constitue :

> *Premièrement*, une rupture de l'unité réelle et/ou symbolique du territoire et du droit public ne provenant pas du droit international (de la protection des droits de l'homme) mais par un Etat tiers avec une histoire souvent tourmentée à l'égard de l'Etat voisin et de la communauté minoritaire. Les exemples sont innombrables. Ce qui est le plus intéressant ici est que les deux Etats, même l'Etat territorial perçoivent l'intérêt de l'Etat-parent à l'égard "sa" minorité comme historiquement naturel.
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> *Deuxièmement*, une rupture du concept central pour la compréhension de la modernité politique, celui de la citoyenneté, étant donnée qu'une section de citoyens se tourne pour son bien-être non pas vers l'Etat dont il porte la citoyenneté, mais vers l'Etat avec qui elle partage la même origine ethnique. Or, la souveraineté constitutionnelle de l'Etat en se trouvant dans l'impossibilité ou manquant de bonne volonté à produire son objectif primordial, à savoir réaliser le bien commun pour tous les citoyens, ne produit pas les garanties nécessaires pour la légitimation de la reproduction de sa propre autorité.

Troisièmement, développement du noyau normatif des droits de l'homme au sein d'un Etat, qui ne se fonde pas sur les pratiques, besoins et revendications intérieures, mais paraît plutôt comme le résultat des négociations interétatiques et des considérations tout à fait irrélevants aux droits de l'homme.

Le système des exceptions multiples auquel sont sujettes les minorités nationales est, pour des raisons mentionnées ci-dessus, une affaire qui doit être réglée. L'Etat constitutionnel peut donner à ces minorités, celles que l'Etat-parent offre. Or, celles que la minorité peut demander à son propre Etat sont celles qu'elle exige de sa « patrie ». De sa part, l'Etat sur le territoire duquel se trouve une minorité peut prendre soin de toutes les revendications qui attirent l'intérêt déstabilisateur et les arrières-pensées de l'Etat-parent.

On l'a déjà noté d'ailleurs que « les droits de l'homme n'ont aucun sens sans l'existence d'un espace public au sein duquel les individus s'arrachent au moins partiellement à leurs enracinements particuliers pour communiquer - se reconnaître en tant qu'égaux - par-delà ce qui les distingue.»[41] Le concept même de la protection présuppose une certaine relation dialectique entre le protecteur et le protégé. Le présupposé historique et politique de la protection des droits des hommes n'est pas simplement la formation d'un pouvoir organisé au niveau territorial et politique, mais l'admission – même fictive à ses origines – que cette autorité politiquement organisée est potentiellement source de violations des droits. La reconnaissance des droits de l'homme est alors un acte d'autocritique de l'autorité ayant comme source la force des revendications humaines. On a pertinemment écrit que « tout droit est au départ une revendication ; et le passage au droit se fait à partir du moment où la revendication devient tellement dangereuse pour la communauté, que la communauté est obligée de reconnaître cette revendication comme un droit afin de pacifier, afin de maintenir en vie, l'être même de la communauté. Si une communauté ne reconnaît pas un besoin comme droit, la communauté risque d'exploser ».[42]

Ce qui protège est le souverain. Il protège via sa souveraineté. Il protège de son arbitraire, son autoritarisme, la violence, les tendances innées d'absolutisme qui accompagne toute autorité. De cette façon, en réalité, il se protège. Or, le concept même de la protection des droits de l'homme se fonde sur le noyau dur du paradoxe de la souveraineté moderne qui se repère au niveau des relations entre sujet et Etat : entre raison d'Etat et raison individuelle. Le protecteur est le dangereux : l'Etat. L'accomplissement alors de la protection présuppose une certaine perception des relations de pouvoir à l'égard du sujet. On ne laisse pas n'importe qui nous offrir sa protection, parce qu'à la fin du compte on ne laisse pas n'importe qui nous gouverner.

On arrive alors à la question primordiale du droit public : celle des relations entre légalité et légitimité de la souveraineté. "*Je demande protection"* est équivalent du fait que j'autorise quelqu'un à me protéger. Le fait que la revendication de reconnaissance d'une minorité s'adresse à l'Etat où elle habite est déjà un signe de *communication* : « la revendication minoritaire adressée à l'Etat est en définitive le signe que le groupe entend rester dans la collectivité

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[41] *Haarscher G., « Les droits collectifs contre les droits de l'homme », in RTDH, 1990, p. 234.*

[42] *Rousso-Lenoir D., « La philosophie du droit », in GIORDAN H., Les minorités en Europe, Droits linguistiques et droits de l'homme, Paris, KIME, 1992, p. 81.*

nationale. Tant qu'il pose des réclamations à l'intérieur des liens qui l'unissent à la société globale, il ne s'affirme pas comme porteur exclusif du droit et, quand il s'agit d'une minorité territoriale, il ne cherche pas à faire sécession ».[43]

La règle ici est la légitimation du pouvoir, du principe de légalité. L'Etat est alors le récepteur fondamental de notre demande de protection. La protection se désigne par excellence comme une relation de soumission. Le développement du droit international de protection des droits de l'homme est, dans ce sens là, une conquête, exactement parce que cette relation de soumission du sujet à l'Etat, une relation que les Etats désireraient conserver étanche, se met graduellement sous le regard et le contrôle juridictionnel des institutions internationales.

Pour conclure pourtant, on ne peut fermer les yeux sur le fait que la protection des minorités par leurs Etats-parents est un fait réel. Il serait illusoire de rechercher les routes historiques de cette réalité uniquement dans la sphère de politique d'un Etat limitrophe ou encore au niveau abstrait de l'appartenance individuelle des subjectivités humaines, même si on reconnaît qu'elles jouent un rôle primordial. Le fait que la «*not so straightforward*» ("pas tellement sincère") légitimation de la protection d'un Etat-parent, comme l'appelle la Commission de Venise du Conseil de l'Europe[44] trouve une correspondance politique à une section de la population d'un Etat, dans la plupart des cas (pas toujours pourtant) signifie la déficience, voire l'insuffisance des politiques étatiques à l'égard des minorités se trouvant sur son territoire. De cette façon, ces mêmes Etats sapent leur propre souveraineté et leur juridiction exclusive vis-à-vis de leurs citoyens.

Il ne faut pas oublier d'ailleurs que l'histoire tourmentée du 20ème siècle en Europe nous offre plusieurs exemples où l'Etat-parent s'approprie des personnes qui, pour la juridiction territoriale, se considèrent souvent comme des ennemis, des « étrangers », des rejetés. Des politiques discriminatoires à l'égard des minoritaires renforcent l'attente de protection des minorités par les Etats-parents. Mais le pire résultat de ceci pour la coexistence des hommes est que cette espérance de protection porte le manteau primitif de la légitimité généalogique-ethnique et non pas celui de la dignité universelle. En d'autres termes, «*je demande protection parce que je suis Grec, Turc, Allemand etc. et non pas parce que je suis homme*». Pourtant, «la société se tribaliserait, laissant les individus soumis à autant de règles différentes qu'on leur attribuerait d'appartenances.»[45] Très correctement alors le Haut Commissaire pour les minorités nationales de l'OSCE dit que "*the bilateral approach should not undercut the fundamental principles laid down in multilateral instruments. In addition, States should be careful not to create such privileges for particular groups which could have disintegrative effects in the States where they live.*"[46]

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[43] *Fenet A., Citoyenneté et minorités, (communication écrite) Colloque « De la citoyenneté, notions et définitions, Nantes 3-5/11/1993, p. 3.*

[44] *Venice Commission, Report on the Preferential Treatment of National Minorities, Venice, 19-20 October 2001, Council of Europe, CDL-INF (2001) 19, p.15.*

[45] *Haarscher G., Les fondements juridiques philosophiques ou historiques, Recueil des cours, Institut International des Droits de l'Homme, Vingt-troisième Session d'Enseignement, Strasbourg 2/7-31/7 1992, p. 25.*

[46] *Cf. Statement issued by Rolf Ekeus, OSCE High Commissioner on National Minorities, 26 October 2001.*

Le règlement des problèmes minoritaires est encore une affaire en recherche de solution historique en Europe. Dans cette affaire, le discours national, voire nationaliste des Etats-parents et le discours souvent irrédentiste des minorités jouent un rôle déterminant. Pourtant, la responsabilité incombe, pour le meilleur et pour le pire, à l'Etat. Malgré les premières impressions souvent illusoires, l'acteur central c'est lui.

PREFERENTIAL TREATMENT OF KIN MINORITIES AND MONITORING OF THE IMPLEMENTATION OF THE FRAMEWORK CONVENTION FOR NATIONAL MINORITIES

Mr Rainer HOFMANN[1]
Professor of International Law,
University of Kiel, Germany

I. Introduction

Recent developments, in particular the entry into force of the 2001 Hungarian *Status Law*, drew the attention of the international public on the political and legal problems connected with the protection of national minorities by their kin-States. Some of the rhetorics recalled the inter-war period when national minorities which, under the system of international minority protection established by the peace treaties concluded after World War I and a large number of bilateral treaties were offered protection by their kin-State were often considered as a kind of *fifth column*. In a considerable number of cases, national minorities did not show, for whatever reasons, much loyalty to the state in which they resided and were, at least in some cases, (ab)used as a means to "justify" irredentist approaches. This situation clearly contributed to the demise and final failure of that minority protection system.

It is a truism that unsettled minority issues constitute a high risk for the maintenance of international peace and security. It was, therefore, highly disconcerting to see to what extent the enactment of the Hungarian Status Law resulted in tensions between Hungary and some of its neighbouring States. Although it is true that, due to very recent political developments, the issue as to whether, to what extent and by what means, national minorities might be protected by their kin-State, does not seem to figure anymore among the priorities of the current political agenda of the States primarily concerned - a situation to which the pertinent report prepared by the *Venice Commission* also contributed by showing, *inter alia*, that the protection of national minorities by way of preferential legal treatment accorded to their members by their respective kin-States is not an uncommon phenomenon in Europe - there seems to remain a certain potential for further inter-state dispute over that issue. Therefore, the organisers of this international colloquy are to be commended for their timely initiative.

The subject of this contribution is, first, to report to what extent the relationship between a national minority and its kin-State has, so far, figured in the monitoring of the implementation of the Council of Europe Framework Convention for the Protection of National Minorities (hereinafter: FCNM) and, second, to reflect upon its future relevance for that monitoring process. Before doing so, it seems, however, necessary to give an overview of the current state of this monitoring process.

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[1] *Professor of International Law and Director of the Walther-Schücking-Institute for International Law, University of Kiel, Germany; President of the Advisory Committee on the Council of Europe Framework Convention for the Protection of National Minorities. The following views, however, are solely those of the author.*

II. Overview of the Current State of the Monitoring of the Implementation of the Framework Convention

In order better to understand the current state of the monitoring of the implementation of the FCNM[2], it seems necessary, first, to recall the structure and contents of the FCNM, second, to present the legal basis of the monitoring system, third, to introduce the main procedural aspects of the monitoring activities of the competent bodies, namely the Advisory Committee and the Committee of Ministers, and, fourth, to conclude by some thoughts on the future follow-up procedure.

A. Structure and contents of the framework convention

The FCNM is clearly a result of the impressive *renaissance* of international efforts to safeguard the rights of persons belonging to national minorities which started when, subsequent to the demise of the socialist regimes in Europe, the international community understood that unsettled majority - minority relations constitute a serious threat not only to the internal peace and security of the States primarily concerned, but also to peace and security in Europe as a whole. Consequently, both OSCE and Council of Europe, as the two most relevant international organisations in the human rights field in Europe, have since then been actively engaged with a view to stabilize majority - minority situations with a potential to result in ethnic violence or even civil strife and war.

Whereas the quite successful work of the OSCE High Commissioner on National Minorities is geared, in particular, to preventing, by means of diplomacy and political pressure, such developments, the Council of Europe, with its strong tradition of initiating negotiations aimed at, and providing the forum for, the drafting of legally binding instruments, chose that approach which eventually resulted, *inter alia*, in the adoption of the FCNM[3]. Opened for signature on 1 February 1995, it entered into force on 1 February 1998 and has, as of 1 June 2002, been ratified by 35 States[4]. Thus, it is important to note that the FCNM has become, within a relatively short period of time, one of the Council of Europe's treaties with the highest rate of membership.

It seems necessary to recall that the FCNM, although not the first instrument developed within the Council of Europe relevant to the protection of national minorities, is the most comprehensive document in the field. Its special relevance results from the fact that it is the first legally binding multilateral treaty on the protection of national minorities in general. Moreover, in its Article 1, it is expressly stated that the protection of national minorities

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[2] *For a more extensive discussion of the monitoring of the implementation of the FCNM see Rainer Hofmann, Protecting the Rights of National Minorities in Europe. First Experiences with the Council of Europe Framework Convention for the Protection of National Minorities, German Yearbook of International Law, vol. 44 (2002), 237.*

[3] *European Treaty Series no. 157.*

[4] *Albania, Armenia, Austria, Azerbaijan, Bosnia and Herzegowina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, the former Yugoslav Republic of Macedonia, Germany, Hungary, Ireland, Italy, Liechtenstein, Malta, Moldova, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom, and - as a non-Member State of the Council of Europe after a pertinent invitation as foreseen in Article 27 FCNM - the Federal republic of Yugoslavia (FRY); it has been signed, but not yet ratified by seven States, namely Belgium, Georgia, Greece, Iceland, Latvia, Luxembourg, and the Netherlands; the following three Member States have not yet taken any action with a view to be bound by the FCNM: Andorra, France, and Turkey.*

"forms an integral part of the international protection of human rights"; thus, the FCNM is to be considered as forming part of the European family of human rights treaties.

The FCNM consists of a Preamble and 32 articles which are grouped into five sections[5]. Its specific character is well reflected in its Section II which makes it clear that the FCNM mostly consists of programme-type provisions. This means that States Parties are under the legally binding obligation to ensure the compatibility of their domestic legislation and - what is, for obvious reasons, of crucial importance - its practical application with the principles enshrined in the FCNM. On the other hand, this means also that States Parties are under no legally binding obligation to ensure the direct applicablity of the substantive provisions of the FCNM before their administrative and judicial authorities - they may, however, opt to do so in order to add to their compliance with their obligations under the FCNM.

Moreover, it must be mentioned that the FCNM - notwithstanding its character as an international treaty on the protection of *national minorities* - does not contain any definition of this term. This omission results from the fact that during the drafting of the FCNM it proved to be impossible to agree upon a definition; this situation reflects the pertinent state of international law which is also characterised by the absence of such a generally accepted definition[6]. In this context, it must also be observed that the FCNM contains a number of provisions which are clearly drafted as compromise formulations; thus, this *pragmatic approach* left future determination of the personal scope of application of the FCNM and also of the substance of some operative provisions to the monitoring bodies established under the FCNM as a whole[7]. From a strictly positivistic point of view, this aspect of the FCNM deserves critique; with a view, however, to the fact that minority situations in Council of Europe Member States differ considerably and often constitute politically sensitive issues, it is essential that the FCNM allows for a flexible interpretation and application of its provisions taking into due account this complex nature of minority situations.

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[5] *For assessments of the FCNM see Gudmundur Alfredsson, A Frame with an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures, International Journal on Minority and Group Rights vol. 7, 2000, 291; Florence Benoît-Rohmer, La Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales, European Journal of International Law, vol. 6, 1995, 573; Angela DiStasi, La convenzione-quadro sulla protezione delle minoranze nazionali tra sistema universale e sistema regionale, Rivista internazionale dei diritti dell'uomo, vol. 13, 2000, 452; Hanno Hartig, The role of the Council of Europe in the field of protection of national minorities, in: Franz Matscher (ed.), Wiener Begegnungen zu aktuellen Fragen Nationaler Minderheiten, 1997, 267; Rainer Hofmann, Die Rolle des Europarats beim Minderheitenschutz, in: Manfred Mohr (ed.), Friedenssichernde Aspekte des Minderheitenschutzes, 1996, 159, 180; id., The Preventive Mandate of the Control System Created by the Council of Europe Framework Convention for the Protection of National Minorities, in: Linos-Alexander Sicilianos (ed.), The Prevention of Human Rights Violations, 2001, 39; Heinrich Klebes, The Council of Europe Framework Convention for the Protection of National Minorities, Human Rights Law Journal, vol. 16, 1995, 92; Giorgio Malinverni, La Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales, Schweizerische Zeitschrift für internationales und europäisches Recht, vol. 5, 1995, 521; Gaetano Pentassuglia, Monitoring minority rights in Europe, International Journal on Minority and Group Rights, vol. 6, 1999, 417; and Frank Steketee, The Framework Convention: A Piece of Art or a Tool for Action, International Journal on Minority and Group Rights, vol. 8, 2001, 1.*

[6] *See, in this context, Francesco Capotorti/ Rainer Hofmann, Minorities, in: Rudolf Bernhardt (ed.), Encyclopedia of Public International Law, vol. III, 1997, 410; John Packer, Problems in Defining Minorities, in: D. Fottrell/B. Bowring (eds.), Minority and Group Rights in the New Millennium, 1999, 223; and Patrick Thornberry, International Law and the Rights of Minorities, 1991, 158.*

[7] *For a discussion of the article-by-article approach chosen by the Advisory Committee as regards the personal applicability of the various provisions of the FCNM see Hofmann (supra note 2), 254.*

Section I of the FCNM contains some general principles including, in Article 1 FCNM, the above-mentioned statement that the protection of national minorities and persons belonging to such minorities constitutes an integral part of the international protection of human rights. In Article 3 (1) FCNM, it is also stressed that every person belonging to a national minority is free to choose to be treated, or not to be treated, as such, with no disadvantage arising from that individual decision.

Section II, the main operative part of the FCNM, contains provisions on those principles which States Parties are obliged to implement by means of domestic legislation and policies and through bi- and multilateral treaties[8]. They cover a wide range of issues such as:

- the principle of non-discrimination[9],
- the promotion of effective equality[10],
- the conditions regarding the preservation,
- the development of the culture,
- the religion, language,
- traditions of national minorities[11],
- freedoms of assembly, association, expression, thought, conscience, and religion[12],
- access to and use of media[13],
- linguistic rights relating, *inter alia*, to the use of minority languages in private and in public as well as before administrative authorities, the use of one's own name, the use of minority languages for the display of information of a private nature and for topographical names[14],
- rights concerning education such as the right to learn and to be instructed in the minority language[15]
- rights to transfrontier contacts and cooperation[16] and to participation in the cultural, economic, public, and social life[17]
- the prohibition of forced assimilation[18].

Section III contains some important principles on the interpretation of the FCNM; in particular, pursuant to Article 21, it may not be construed in such a way as to contain a right to engage in activities which might jeopardize the territorial integrity and political independence of a State. In this context, it must be stressed that this statement precisely

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8 *On the potential role of such treaties see, e.g., Arie Bloed/ Pieter van Dijk, Protection of Minority Rights Through Bilateral Treaties: The Case of Central and Eastern Europe, 1999.*

9 *See Article 4 (1) FCNM.*

10 *See Article 4 (2) FCNM.*

11 *See Article 5 (1) FCNM.*

12 *See Article 7 FCNM; as regards freedom of religion, see also Article 8 FCNM..*

13 *See Article 9 FCNM.*

14 *See Articles 10 and 11 FCNM.*

15 *See Articles 12, 13 and 14 FCNM.*

16 *See Article 17 FCNM.*

17 *See Article 15 FCNM.*

18 *See Articles 5 (2) and 16 FCNM.*

reflects the present situation under international law according to which the protection of *national minorities* is not concerned with the internationally protected right of a *people* to self-determination[19]. On the other hand, it must be emphasized that the FCNM does not exclude the establishment of structures of personal or territorial autonomy to the benefit of national minorities - it simply does not deal explicitly with this complex issue. Finally, in Article 22, it is made clear that the FCNM may not be construed as limiting higher standards of human rights protection ensured in other international instruments or under national legislation.

Section IV sets out the main aspects of the monitoring mechanism, an issue to be addressed later on in this paper[20]. Among the final provisions included in Section V, particular attention should be attached to the character of the FCNM as an "open" treaty that non-Member States of the Council of Europe may join subsequent to a pertinent invitation by the Committee of Ministers. This provision is obviously drafted with a view to including States participating in the OSCE. It was relevant for Armenia, Azerbaijan, and Bosnia and Herzegovina which acceded to the FCNM before becoming Member States of the Council of Europe and is presently the legal basis for the ratification of the FCNM by the Federal Republic of Yugoslavia.

B. The legal basis of the monitoring system of the framework convention

According to Articles 24 and 26 FCNM, the legally binding evaluation of the implementation of the FCNM by the States Parties is entrusted to the Committee of Ministers which is assisted in this task by an Advisory Committee. Under Article 25 FCNM, the States Parties are required to submit a report giving full information on legislative and other measures taken to give effect to the principles of the FCNM, within one year of its entry into force for the respective State Party. Further reports are due on a periodical basis (every five years) - and whenever the Committee of Ministers so requests[21].

The FCNM provides, in Article 26 FCNM, for the Committee of Ministers to determine the rules concerning the composition of the Advisory Committee and its procedure. To this end, the Committee of Ministers adopted, on 17 September 1997, Resolution (97) 10, the *Rules on the Monitoring Arrangements under Articles 24 to 26 of the Framework Convention of the Protection of National Minorities*[22].

The Advisory Committee is composed of 18 ordinary members. Each State Party may nominate candidates who have to meet the qualifications and capacities required for membership, namely to have recognised expertise in the field of the protection of national minorities and to effectively serve, independently and impartially, in their individual capacity. The same requirements must be fulfilled by the so-called additional members who are elected by the Committee of Ministers pursuant to Rule 19 of Resolution (97) 10; pending their appointment to the Advisory Committee in accordance with the rotation system

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[19] *See Rainer Hofmann, Der Schutz von Minderheiten in Europa, in: Werner Weidenfeld (ed.), Europa-Handbuch, 2002, 555 (564).*

[20] *See infra under C.*

[21] *See Article 25 FCNM.*

[22] *On this document see Matthias Weckerling, Der Durchführungsmechanismus des Rahmenübereinkommens des Europarates zum Schutz nationaler Minderheiten, Europäische Grundrechte Zeitschrift, vol. 24, 1997, 605.*

established in this Resolution, their main task consists in assisting the ordinary members in the consideration of the State report from a State Party in respect of which they have been elected.

The main task of the Advisory Committee is to examine the State reports which are made public by the Council of Europe upon receipt from the State Party[23], and to prepare an opinion[24] on the measures taken by the State Party in order to meet its obligations under the FCNM.

Pursuant to the legal basis for the monitoring activities of the Advisory Committee, *i.e.* the afore-mentioned Rules laid down in Resolution (97) 10, it may take the following steps: It may request additional information from a State Party[25]; it may receive information from other sources such as indviduals and non-governmental organisations - bearing in mind, however, that the Advisory Committee does not deal with individual complaints as such - and take such information into account when establishing its opinions[26]; it may actively seek information from other sources after having notified the Committee of Ministers of its intention to do so[27]; it may hold meetings with governments and has to do so if the government concerned so requests[28]; and it may hold meetings with others than government representatives after having obtained a specific mandate from the Committee of Ministers to do so[29].

The Advisory Committee transmits its opinions to the Committee of Ministers[30] which shall then take the final decisions - called *conclusions* - as to the adequacy of the measures taken by the State Party concerned. Where appropriate, it may also adopt *recommendations* concerning further steps to be taken by the respective State Parties[31].

The conclusions and recommendations of the Committee of Ministers shall be made public upon their adoption[32], together with any comments the State Party may have submitted in respect of the opinion delivered by the Advisory Committee[33]. The opinion of the Advisory Committee shall, as a rule, be made public together with the conclusions of the Committee of Ministers[34].

Moreover, the above-mentioned Rules laid down in Resolution (97) 10 provide also for the possibility of an involvement of the Advisory Committee, by the Committee of Ministers, in

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23 *See Rule 20 Resolution (97) 10.*

24 *See Rule 23 Resolution (97) 10.*

25 *See Rule 29 Resolution (97) 10.*

26 *See Rule 30 Resolution (97) 10.*

27 *See Rule 31 Resolution (97) 10.*

28 *See Rule 32 (1) Resolution (97) 10.*

29 *See Rule 32 (2) Resolution (97) 10.*

30 *See Rule 23 Resolution (97) 10.*

31 *See Rule 24 Resolution (97) 10.*

32 *See Rule 25 Resolution (97) 10.*

33 *See Rule 27 Resolution (97) 10.*

34 *See Rule 26 Resolution (97) 10.*

the monitoring of the follow-up to the conclusions and recommendations of the Committee of Ministers[35].

C. Procedural aspects of the monitoring activities of the Advisory Committee and the Committee of Ministers

The above mentioned survey of the legal basis of the monitoring system under the FCNM clearly shows that a number of issues of a procedural character needed to be clarified. Therefore, the practice of Advisory Committee and Committee of Ministers was to be of crucial importance.

1. Practice of the Advisory Committee

The FCNM entered into force on 1 February 1998 subsequent to its ratification by twelve Council of Europe Member States[36]. Since pursuant to Article 25 (1) FCNM the first State reports were due one year later, i.e. on 1 February 1999, the Advisory Committee which commenced its work in summer 1998, had considerable time to reflect upon the manner in which it would seek to perform its monitoring activity. To this end, the Advisory Committee not only elaborated an *Outline for State Reports*[37] and drafted its *Rules of Procedures*[38] but had thorough exchanges of views taking into account the following points resulting from its understanding of the provisions of the FCNM and the rules contained in Resolution (97) 10:

- Since the Advisory Committee is construed as a body assisting the Committee of Ministers, the latter is to be considered as the organ upon which is entrusted the ultimate political responsibility for ensuring the success of the monitoring system. It is equally clear, however, that the Advisory Committee - with a view to the norms regulating its composition as well as its activities - is by no means a body subordinate to the Committee of Ministers, but a body composed of independent - and not governmental - experts; this implies, in particular, that it enjoys full independence as regards the formulation of its opinions; it is only bound by the applicable legal rules.

- The drafters of the FCNM deliberately chose not to establish a judicial procedure to monitor the international legal obligations resulting from a State's membership of the FCNM; instead, they agreed upon the institution of a system of periodic State reports. Consequently, the Advisory Committee perceives itself as a body that - primarily - seeks to establish a constructive dialogue with the governments concerned in order to form - in an atmosphere characterised by a spirit of cooperation and not of confrontation - correct and well-founded opinions as to the degree to which States Parties have implemented their legal obligations resulting from their membership of the FCNM[39]. Regarding the textual basis for the work of the Advisory Committee, it

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[35] *See Rule 36 Resolution (97) 10.*

[36] *These were, in chronological order, Romania, Spain, Slovakia, Hungary, Cyprus, Moldova, San Marino, Estonia, FYROM, Germany, Denmark, and Finland.*

[37] *Council of Europe Document ACFC/INF (98) 1, adopted by the Committee of Ministers on 30 September 1998.*

[38] *Council of Europe Document ACFC/INF (98) 2, adopted by the Committee of Ministers on 16 December 1998.*

[39] *A first important step in this context was a meeting, convened by the Council of Europe in Strasbourg on 28 October 1998, of the members of the Advisory Committee with government representatives involved in the*

was clear that it must not be guided by political motives but exclusively by legal criteria.

- The Advisory Committee is tasked to submit well-founded opinions and must, therefore, take into consideration, in addition to the information contained in the respective State reports, also information provided by other sources, including representatives of national minorities and members of civil society[40]. It is also entitled to seek actively information from, *inter alia*, non-governmental organisations and members of civil society, having notified the Committee of Ministers of its intention to do so[41], and to accept invitations by governments to hold meetings with government experts and other persons involved in minority issues in the respective country, or to conduct *on-site missions*, in order to obtain an even more complete understanding of the factual and legal situation and, thus, further to increase the basis for its opinion; moreover, such visits were seen as a good opportunity to establish a constructive dialogue with the respective governmental officials, representatives of national minorities, and members of civil society, and to contribute in a positive way to the necessary domestic dialogue on minority issues.

- The Advisory Committee was - and still is - faced with an enormous workload resulting from the high number of States Parties to the FCNM. Therefore, it decided to establish working-groups which are primarily responsible for establishing the necessary contacts with governments and other actors in a given country and for drafting the text of an opinion on a specific State which would then be submitted to the plenary which alone is entitled to adopt, with the majority of its ordinary members[42], the opinion and to transmit it to the Committee of Ministers. The actual composition of these country-specific working-groups was guided by the desire to take into consideration linguistic and other knowledge of the members concerned while, at the same time, seeking to avoid any doubts as to the impartiality of the respective members. Thus, no member has been appointed to a working-group dealing with the report of the State upon the proposal of which that member had been elected.

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drafting of the respective State reports; this meeting offered, inter alia, a welcome opportunity for an initial exchange of views on the above-mentioned Outline for State Reports.

[40] *In this context, it should be mentioned that, at a meeting with representatives of non-governmental organisations active in the field of minority rights issues, convened by the Council of Europe in Strasbourg on 27 October 1998 and attended by several government representatives, members of the Advisory Committee stressed their preparedness to engage in a constructive dialogue with members of civil society; being informed by such actors, upon their initiative, was seen as an important element for the establishment of that constructive dialogue. Some government experts announced their intention to cooperate closely with relevant non-governmental organisations in the process of drafting the respective State reports; this was generally seen as a most interesting and promising example for a welcome cooperative approach, although members of the Advisory Committee stressed that the final responsibility for the contents of the respective State reports would remain with the government concerned.*

[41] *In this context, it should be noted that the Advisory Committee, at its meeting in Strasbourg on 22 to 25 March 1999, decided to notify the Committee of Ministers, under Rule 31 of Resolution (97) 10, of its intention to seek information sources other than the reporting States. The Advisory Committee felt that, for practical purposes, it would be preferable to transmit to the Committee of Ministers such a notification of a general nature rather than to transmit a specific notification everytime the Advisory Committee feels the need to address sources other than the government of the reporting State in order to enable it to establish a complete picture of the factual and legal situation in a given country. It should also be mentioned that the Committee of Ministers, at its meeting on 19 May 1999, "took note" of this notification.*

[42] *See Rule 34 of the Rules of Procedure of the Advisory Committee.*

> Moreover, no member should - without specific reasons - serve in a working-group on the report of a State the population of which includes a numerically sizable minority having ethnic, historic or other strong ties with the population of the State of which that member is a national[43].

Based upon these facts and considerations, the Advisory Committee has established the following practice as concerns its monitoring activity: immediately after receipt of the State report[44] - in either English or French - by the Secretariat of the Council of Europe, it will be transmitted to all members of the Advisory Committee[45]. The members of the respective working-group receive, in addition thereto, all pertinent information available at the Secretariat such as the often quite voluminous annexes to the State reports with the texts of the relevant legislation and pertinent court decisions, reports of monitoring bodies such as the UN *Human Rights Committee* or the *Committee* under the *Convention on the Elimination of Racial Discrimination* (CERD) or the *European Commission against Racism and Intolerance* (ECRI), and documents of other international organisations such as OSCE. Reports authored by NGOs such as, in particular, *Minority Rights Group* (MRG) or *International Helsinki Federation* and organisations representing national minorities in a given country, are also of particular importance[46].

In a first meeting, the members of the competent working-group identify those issues for which they need additional information in order to adequately assess the implementation of the FCNM in the State concerned[47]. The working-group, with the extremely important assistance of the members of the Secretariat servicing the Advisory Committee, will draft a

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[43] *As an illustration thereof, it might be mentioned that this author - as a German citizen - does not serve in the working-group on Germany nor on any State with a sizable German-speaking minority. It should also be stressed that, by virtue of Rule 34 of Resolution (97) 10, ordinary and additional members may not take part in the vote of the Advisory Committee on the opinion on the report of the State upon the proposal of which they have been elected; they take, however, part in the plenary discussion on the pertinent draft opinion submitted by the respective working-group and are invited by that working-group to provide additional information to its members.*

[44] *In this context, it must be mentioned that the Advisory Committee - just like most other monitoring bodies established under human rights treaties - is faced with the problem of delayed State reports (for an overview see Chart of Submission of State Reports and Status of Monitoring Work on http://www.coe.int/minorities/index.htm). In such a case, the President of the Advisory Committee will inform the Permanent Representative of the respective State at the Council of Europe of this situation. If there is a considerable delay, the President of the Advisory Committee will inform the Chairman of the Committee of Ministers who will then decide upon the action to be taken.*

[45] *As of 1 June 2002, the following 29 State reports have been received (full text available on http://www.coe.int/minorities/index.htm): San Marino - ACFC/SR (99) 1; Cyprus - ACFC/SR (99) 2 rev.; Finland - ACFC/SR (99) 3; Liechtenstein - ACFC/SR (99) 4; Croatia - ACFC/SR (99) 5; Czech Republic - ACFC/SR (99) 6; Italy - ACFC/SR (99) 7; Slovakia - ACFC/SR (99) 8; Denmark - ACFC/SR (99) 9; Hungary - ACFC/SR (99) 10; Romania - ACFC/SR (99) 11; United Kingdom - ACFC/SR (99) 12; Malta - ACFC/SR (99) 13; Ukraine - ACFC/SR (99) 14; Estonia - ACFC/SR (99) 15; Germany - ACFC/SR (2000) 1; Russia - ACFC/SR (2000) 2; Moldova - ACFC/SR (2000) 3; Austria - ACFC/SR (2000) 4; Slovenia - ACFC/SR (2000) 5; Spain - ACFC/SR (2000) 6; Norway - ACFC(SR (2001) 1; Switzerland - ACFC/SR (2001) 2; Sweden - ACFC/SR (2001) 3; Armenia - ACFC/SR (2001) 4; Albania - ACFC/SR (2001) 5; Lithuania - ACFC/SR (2001) 6; and Ireland - ACFC/SR (2001) 7.*

[46] *In many instances, the reports are quite extensive shadow reports providing - just as the official State reports - substantial information on all articles of the FCNM from the perspective of their authors.*

[47] *Rather frequently, the working-groups regretted the absence of sufficient information as regards the factual situation, i.e. the actual implementation - by the competent administrative authorities and courts and tribunals - of the legislation referred to in the State report.*

questionnaire which - subsequent to its adoption by the plenary - will be sent to the competent authorities of the State concerned requesting an answer within a reasonable period of time. As a rule, this letter refers also to the fact that a meeting between government representatives and members of the working-group considerably contributes to clarifying, by means of a constructive dialogue, open issues.

In practice, the government concerned will extend an invitation to the Advisory Committee to meet in the capital of the respective State. Since the Advisory Committee is of the opinion that such country visits are even more informative if they provide also for meetings with representatives of other State organs such as Members of Parliament, Ombudsmen, Judges and with representatives of national minorities and knowledgeable members of civil society, it has always - based upon Rule 32(2) of Resolution (97) 10 - requested - and received - from the Committee of Ministers a pertinent mandate to hold such meetings. This procedure has been considerably facilitated by the Committee of Ministers' decision of 17 May 2000, in which it gave the Advisory Committee a general mandate, applicable to the entire first monitoring cycle, to conduct such visits and meetings.

All such country-visits so far conducted[48] proved to be extraordinarily informative as they were characterised by the determination of all parties to assist the working-group, in open and frank discussions conducted in a spirit of true cooperation, in understanding the extent to which the provisions of the FCNM had been implemented. These discussions regularly addressed the issue of shortcomings in the domestic application and ways and means to reduce them. After the final meeting, the working-group identifies the essential aspects of its draft opinion.

This draft opinion will then be transmitted to the plenary for a first reading and, with the amendments agreed upon, eventually put to vote. In accordance with a proposal put forward by several members of the Committee of Ministers when the discussion of the first activity report of the Advisory Committee was discussed in September 1999, the opinions include not only detailed and article-by-article assessments of the adequateness of the domestic implementation of the FCNM, but also proposals for conclusions and recommendations. It must be stressed, however, that it is entirely up to the Committee of Ministers whether and to what extent it wishes to take these proposals into account when adopting its conclusions and recommendations. The opinions adopted[49] will then be transmitted to the government concerned and to the Committe of Ministers which, in fact, means to the Ministries of Foreign Affairs of all Member States of the Council of Europe.

2. Practice of the Committee of Ministers

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[48] *As of 1 June 2002, such visits have been conducted to the following States Parties (in chronological order): Finland, Hungary, Slovakia, Denmark, Romania, Czech Republic, Croatia, Cyprus, Italy, Estonia, United Kingdom, Germany, Moldova, Ukraine, Armenia, Austria, Slovenia, Russian Federation, Norway, and Albania. It should also be mentioned that the Advisory Committee felt that, with a view to the specific situation in Liechtenstein, Malta, and San Marino and the information avalailable, the work on their State reports could be completed without country-visit.*

[49] *As of 1 June 2002, the Advisory Committee has adopted 19 opinions on the following State reports: on 22 September 2000, on Denmark, Finland, Hungary, and Slovakia; on 30 November 2000 on Liechtenstein, Malta, and San Marino; on 6 April 2001 on Croatia, Cyprus, Czech Republic, and Romania; on 14 September 2001 on Estonia and Italy; on 30 November 2001 on the United Kingdom; on 1 March 2002 on Germany, Moldova, and Ukraine; and on 16 May 2002 on Armenia and Austria.*

The practice established by the Committee of Ministers as regards its monitoring activities under the FCNM may be summarized as follows:

Pursuant to a decision taken by the Committee of Ministers on 7 February 2001, the government concerned is to comment upon the pertinent opinion within four months of its receipt. Another important decision was taken during the 756th meeting of the Committee of Ministers from 12 to 14 June 2001 and concerned the crucial aspect of the publicity of the monitoring process: pursuant to Rule 25 of Resolution (97) 10, the conclusions and recommendations of the Committe of Ministers shall be made public upon adoption; according to Rule 26, the opinions of the Advisory Committee shall be made public at the same time, "unless in a specific case the Committee of Ministers decides otherwise"; finally, under Rule 27, comments of the States Parties shall be made public together with the conclusions and recommendations of the Committee of Ministers and the opinions of the Advisory Committee. With a view to the rapid development of minority issues in many States Parties, many quarters, including governments concerned, indicated the strong need to introduce the opinions as soon as possible into an already existing public dialogue between the government, representatives of national minorities, the domestic and international public, and the Advisory Committee or, if necessary, to stimulate such a dialogue. Therefore, the Committee of Ministers is to be commended for its decision - based upon a creative interpretation of the wording of Rule 26 - to allow the government concerned to make the pertinent opinion public, together with its comments, even before the Committee of Ministers adopts its conclusions and recommendations. This decision, which clearly shows the determination of the Committee of Ministers to contribute to the above-mentioned public dialogue and also reflects its confidence as concerns the legal quality of the opinions, has already been used by several governments including Finland, Slovakia, Liechtenstein, Hungary, Romania, Czech Republic, Estonia, and the United Kingdom[50].

The actual discussion of the opinion including proposed conclusions and recommendations and the pertinent comments, both of the government concerned and of those which other Member States of the Council of Europe including non-Member States Parties to the FCNM might wish to submit, takes place in the Rapporteur-Group on Human Rights (GR-H), a sub-body of the Committee of Ministers. The opinions are introduced by representatives of the Advisory Committee who are also invited to an ensuing exchange of views on their contents. This practice strengthens the constructive dialogue between the two monitoring bodies under the FCNM and adds to mutual understanding.
This atmosphere of cooperation and constructive dialogue is also reflected in the comments by the governments concerned on the opinions of the Advisory Committee. In most instances, they consist, to a large extent, of information on developments which have taken place after the adoption of the opinion and can, frequently, be seen as reactions to concerns raised therein or during the meetings held in the context of the mentioned country-visits. In addition thereto, governments will, of course, express their views if they disagree with the findings of the Advisory Committee.

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[50] *These opinions and governments comments are publicly available at http://www.coe.int/minorities/index.htm. In addition thereto, also the opinions on Malta and San Marino together with comments of the Maltese government - the government of San Marino did not comment upon the opinion on San Marino - as well as on Croatia and Cyprus, together with the comments of the respective governments have been made public when the Committee of Ministers adopted its pertinent conclusions and recommendations. This means that, as of 1 June 2002, the opinions on Italy, Germany, Moldova, Ukraine, Armenia, and Austria were not yet in the public domain.*

3. Substantive aspects of the monitoring activities of the Advisory Committee and the Committee of Ministers

In the framework of this contribution, it is impossible to provide a thorough analysis of the substantive aspects of the opinions of the Advisory Committee[51] and the resolutions of the Committee of Ministers[52]. It must be stressed, however, that the Committee of Ministers when adopting its conclusions and recommendations concerning the implementation of the FCNM by the respective States Parties, was clearly guided by the pertinent opinions of the Advisory Committee[53]. This appears, in particular, from the identical wording used in the operative parts of all resolutions so far adopted: the Committee of Ministers, having identified, based upon the pertinent findings of the Advisory Committee, both the positive steps States have taken with a view to implement the FCNM in their domestic legal order and the areas in which shortcomings still exist, recommends that the State concerned takes appropriate account not only of its conclusions but also of the various comments in the opinion of the Advisory Committee and invites the government concerned to continue the dialogue in progress with the Advisory Committee and to keep it regularly informed of the measures it has taken in response to the conclusions and recommendations of the Committee of Ministers.

D. Some thoughts on the follow-up procedure

As concerns the future design of the follow-up procedure referred to in Article 25 (2) FCNM and, more specifically, in Rule 36 of Resolution (97) 10, it is essential to note that the Committee of Ministers, in its Resolutions recently adopted as regards the application of the FCNM by Denmark, Finland, Hungary, Slovakia, Liechtenstein, Malta, San Marino, Croatia, the Czech Republic, Cyprus, and Romania, has determined the legal basis for this follow-up procedure. In this context, it must strongly be welcomed that the Committee of Ministers, fully in line with the position taken by the Advisory Committee, decided that such follow-up should consist of a continuous dialogue between the respective governments and the Advisory Committee. As reported above, the Committee of Ministers did not only recommend that the States Parties concerned take appropriate account of the pertinent conclusions adopted by the Committee of Ministers, but also of the various comments in the opinion of the Advisory Committee. Moreover, it invited the governments concerned to continue the dialogue in progress with the Advisory Committee and to keep it regularly informed of the measures taken in response to the conclusions and recommendations of the Committee of Ministers.

This means that, in contrast to the mechanisms prevailing in some international human rights treaties monitoring systems, States Parties are not only obliged periodically to report, but are

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[51] *For an extensive, article-by-article analysis of the opinions of the Advisory Committee see Hofmann (supra note 2), 256.*

[52] *See Resolution ResCMN (2001)2 of 31 October 2001 on Denmark; ResCMN (2001)3 of 31 October 2001 on Finland; ResCMN (2001)4 of 21 November 2001 on Hungary; ResCMN (2001)5 of 21 November 2001 on Slovakia; ResCMN (2001) 6 of 27 November 2001 on Liechtenstein; ResCMN (2001)7 of 27 November 2001 on Malta; ResCMN (2001)8 of 27 November 2001 on San Marino; ResCMN (2002)1 of 6 February 2002 on Croatia; ResCMN (2002)2 of 6 February 2002 on the Czech Republic; ResCMN (2002)3 of 21 February 2002 on Cyprus; and ResCMN (2002)5 of 13 March 2002 on Romania. These resolutions are available at http://www.coe.int/minorities/index.htm.*

[53] *For an extensive analysis of the resolutions of the Committee of Ministers see Hofmann (supra note 2), 249.*

under a duty to maintain a continuous dialogue with the Advisory Committee. It should be noted that the comments of the governments concerned on the respective opinions of the Advisory Committee have to be seen as an essential part of that dialogue since they contain, to a large extent, information on recent developments which often directly relate to concerns raised and comments made by the Advisory Committee in its opinions. Moreover, it must be stressed that the governments are expected not only to regularly submit information as to the measures taken in response to the specific conclusions of the Committee of Ministers, but also as regards initiatives taken in respect of the detailed and specific comments made by the Advisory Committee. It could be imagined that, if the Advisory Committee - as a partner of that dialogue in progress - considers that it has not received sufficient information or if that information reveals that no appropriate measures have been taken, it would contact the governments concerned and ask for additional information or, if necessary, remind a government of its obligation to take adequate action. Obviously, the Advisory Committee is neither in a position to impose its views as to which specific action ought to be taken nor would such an approach be in line with the Advisory Committee's understanding of its relationship with governments: as in any dialogue, it would seek to contribute to the identification and subsequent implementation of a solution acceptable for both partners.

It is clear that the above-mentioned Resolutions of the Committee of Ministers entrust the Advisory Committee with a vital role in the follow-up procedure notwithstanding the fact that the ultimate political responsibility for monitoring the application of the FCNM on the domestic level remains with the Committee of Ministers. It must also be noted that this decision of the Committee of Ministers reflects a high degree of confidence in the capacity of the Advisory Committee to perform its tasks within the follow-up procedure in a responsible manner based upon a legally sound interpretation of the provisions of the FCNM. It must be emphasized that the Advisory Committee is determined fully to meet this expectation. In order to be able to do so, however, it is indispensable that the necessary human and financial resources are made available to the Advisory Committee.

Another - possibly even more important - element of the follow-up procedure concerns initiatives aimed at increasing public awareness and knowledge of the opinions of the Advisory Committee and at stimulating a constructive dialogue on the domestic level[54]. To this end, it is essential that the opinions be translated not only into the official language(s) of the State Party concerned, but also into relevant minority languages. Furthermore, it would be most useful to organise seminars, open to the public and attended by competent government officials, representatives of national minorities, members of civil society, and representatives of the Advisory Committee, in order to present the contents of its opinion and the pertinent government comments and to engage in an exchange of views as to the measures to be taken by the government with a view to comply with the Resolution of the Committee of Ministers. Therefore, it must strongly be welcomed that the first seminars of that kind were held in Helsinki on 1 February 2002, and in Zagreb on 23 March 2002, and that similar meetings in other countries including Estonia, Hungary, and Romania, are being planned. Finally, it must be stressed that the members of the Advisory Committee have made it clear that they stand ready actively to participate in such seminars.

III. National Minorities and kin-States in the Context of the Framework Convention

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[54] *As a good example for such a dialogue on the national level, see the debate on the opinion on Denmark in the Danish daily Politiken, 21 November 2001, 9.*

In order adequately to address the issue as to whether, to what extent and by what means kin-States might be involved in the implementation of the FCNM, it seems necessary briefly to analyse the pertinent practice of the monitoring bodies established under the FCNM. Since this issue is, so far, not reflected in the pertinent resolutions of the Committee of Ministers, this analysis will have to be limited to the opinions of the Advisory Committee.

A. The legal basis and pertinent practice of the Advisory Committee

Since all the monitoring activity of the Advisory Committee is based upon the pertinent legal rules establishing its competences, it is necessary briefly to recall the relevant legal basis before discussing its practice as regards the involvement of kin-States in the implemenatation of the FCNM.

1. The legal basis

As to the legal basis for any potential involvement of kin-States in the implemenation of the FCNM and, thus, in the efforts to protect and to promote the distinct identity of national minorities, specific attention must be drawn to a *proviso* in the Preamble to the FCNM and, in particular, to Article 18 FCNM which specifically deals with the relevance of bi- and multilateral treaties and of transfrontier co-operation for the protection of national minorities. However, it seems justified to stress, at the outset, that Article 1 FCNM expressly states that the protection of national minorities "forms an integral part of the international protection of human rights"; thus, the FCNM is to be considered as forming part of the (European) family of human rights treaties - to which, therefore, the pertinent standards of international monitoring are applicable. Moreover, mention is to be made of Article 2 FCNM according to which the provisions of the FCNM "shall be applied in good faith, in a spirit of understanding and tolerance and in conformity with the principles of good neighbourliness, friendly relations and co-operation between States."

The eighth *proviso* of the Preamble to the FCNM states "that the realisation of a tolerant and prosperous Europe does not depend solely on co-operation between States but also requires transfrontier co-operation between local and regional authorities without prejudice to the constitution and territorial integrity of each State". This principle is clearly the basis for Article 18 FCNM and, albeit to a lesser extent, also for Article 17 FCNM.

Article 18 FCNM calls, in its paragraph 1, upon States "to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned." According to paragraph 2, States "shall take measures to encourage transfrontier co-operation". In the pertinent provisions of the Explanatory Report[55] it is stated that this article encourages States Parties to conclude, in addition to the existing international instruments, and where the specific circumstances justify it, bilateral and multilateral agreements for the protection of national minorities, and that it stimulates transfrontier co-operation since such agreements and co-operation are important for the promotion of tolerance, prosperity, stability and peace. More specifically, it is indicated that such agreements might be concluded in the fields of culture, education and information. Moreover, it is emphasised that transfrontier co-operation is not only an important tool for the promotion of mutual

[55] *See paragraphs. 85 - 87.*

understanding and confidence; it also allows for arrangements specifically tailored to the wishes and needs of the persons concerned.

Article 17 paragraph 1 FCNM obliges States "not to interfere with 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 with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage". The pertinent provision of the Explanatory Report[56] stresses the importance of such contacts across frontiers for the maintenance and development of the culture of persons belonging to national minorities.

2. The pertinent pratice of the Advisory Committee

Based upon an analysis of the 13 opinions of the Advisory Committee which, as of 1 June 2002, have been in the public domain and, thus, constitute the object of this analysis[57], it must be said that the issues addressed in these articles have, so far, not been addressed extensively in the monitoring activity of the Advisory Committee. The pertinent findings mainly concern Articles 17 and 18; there are, however, also findings concerning Articles 9, 12 and 14 FCNM.

As to Article 17 FCNM, the Advisory Committee has noted, in several opinions[58], the existence of visa requirements - or plans to introduce them - and expressed its wish that they will be implemented in a manner that does not cause undue restrictions on the rights of persons belonging to national minorities to establish and maintain contacts across frontiers. In this context, it should be stressed that the Advisory Committee is, of course, aware of the fact that the existence of such requirements, or plans to introduce them, is, to a large extent, due to the membership or envisaged membership of the States concerned in the European Union which results in the need to adopt the pertinent European Union system commonly referred to as the *Schengen System*. Since strict visa requirements may seriously impede contacts across frontiers, it is necessary to call upon States to explore the possibilities of establishing flexible regulations favouring the movement across borders of persons belonging to national minorities to their kin-State (and *vice versa*).

As to Article 18 FCNM, the Advisory Committee has consistently welcomed the fact that several States are parties to numerous bilateral treaties and cultural agreements touching upon the protection of persons belonging to national minorities[59]. It is also interesting to note that, in some cases, it has explicitly welcomed attempts to improve the functioning of the joint commissions envisaged under some bilateral treaties[60]. Indeed, it is to be stressed that the

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[56] *See paragraph 83.*

[57] *See supra notes 49 and 50.*

[58] *See paragraph 52 of the opinion on Finland, paragraph 56 of the opinion on Hungary, paragraph 73 of the opinion on Romania, and paragraph 50 of the opinion on Slovakia. Moreover, it has explicitly addressed the issue of the need to improve these rights and welcomed pertinent initiatives in Croatia (see paragraph 57 of that opinion), Cyprus (see paragraph 45 of that opinion), and Estonia (see paragraph 63 of that opinion).*

[59] *See paragraph 68 of the opinion Croatia, paragraph 46 of the opinion on Cyprus, paragraph 74 of the opinion on the Czech Republic, paragraph 57 of the opinion on Hungary, paragraph 74 of the opinion on Romania, and paragraph 51 of the opinion on Slovakia. It has also welcomed mechanisms aimed at improving regional co-operation (see paragraph 54 of the opinion on Estonia and paragraph 53 of the opinion on Finland).*

[60] *See paragraph 57 of the opinion on Hungary and paragraph 51 of the opinion on Slovakia (concerning the 1995 Treaty on Good Neighbourliness and Friendly Co-operation between these two States) and paragraph*

implementation of the principles enshrined in the FCNM can be effected not only by means of domestic legislation and policies, but also by the conclusion and functioning of appropriate bilateral treaties.

Although findings of the Advisory Committee concerning the issue of kin-States under other articles are quite rare indeed, they are to be considered of particular relevance for the topic of this contribution insofar as they relate to (potential) activities of kin-States with a view to improve the factual situation of persons belonging to the national minorities concerned.

In its opinion on Estonia[61], the Advisory Committee underlined, with respect to Article 9 FCNM, that "the availability of foreign broadcasting in Estonia in a language of a national minority does not eradicate the need for, and importance of, domestically produced broadcasting in that language." Although the Advisory Committee is, here, concerned with a potentially more widely spread phenomenon, namely that States might be inclined to reduce the availability of programmes in the languages of national minorities with the argument that such programmes, broadcasted abroad, are easily received, it should also be indicated that current international law prohibits the previously common practice of *jamming* and that such programmes, if produced in a manner respecting the need for goodneighbourly relations, might indeed contribute to the maintenance of the distinct identity of a national minority. In this context, it should be mentioned that information has been provided in certain State reports as to steps taken to ensure that persons belonging to national minorities can watch programmes transmitted from neighbouring States[62]; such steps are, indeed, to be considered as positive examples of supporting the wish of such persons to maintain their distinct identity.

In some cases, the Advisory Committee has noted expressly problems of securing adequate textbooks for persons belonging to national minorities which raises issues both under Articles 12 and 14 FCNM. In this context, it has suggested that the Croatian government should keep this issue under constant review in order to address any shortcomings, including through bilateral co-operation[63]. More specifically, as concerns the Turks, Tatars and Russians in Romania, the Advisory Committee encouraged the government "to facilitate exchanges of textbooks and qualified teachers, bearing in mind the positive experiences with Bulgarians and Poles in this respect"[64]. In view of the considerable costs involved with the education of qualified teachers for minority languages and the creation of adequate textbooks, exchange programmes with the kin-State concerned might indeed contribute to solve this problem faced by many countries with respect to numerically smaller national minorities. Again, as in the case of Article 9 FCNM, it must be stressed that the mere existence of such exchange programmes does not eradicate the need for pertinent efforts to be made by the State of which the persons concerned are citizens.

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74 of the opinion on Romania (concerning the 1996 Treaty between Hungary and Romania on Understanding, Co-operation and Good Neighbourliness).

61 *See paragraph 37 of that opinion.*

62 *See, e.g., information contained in the Albanian State report (at p. 42) as to the installation, by local government authorities, of local TV amplifiers in the territory of Albania by which persons belonging to the Greek national minority can watch Greek TV stations.*

63 *See paragraph 48 of the opinion on Croatia.*

64 *See paragraph 64 of the opinion on Romania.*

B. Some thoughts on the future involvement of kin-States in implementing the framework convention

The future involvement of kin-States in implementing the FCNM might be relevant both as concerns the actual protection and promotion of the distinct identity of persons belonging to national minorities and their potential participation in the monitoring process.

1. Participation of kin-States in the implementation of the framework convention

At the outset, it must be stressed that the primary responsibility for the implementation of the principles enshrined in the FCNM rests with those States Parties in which the persons concerned live. In view of the above-mentioned provisions of the FCNM and the pertinent practice of the Advisory Committee reported above, it seems, however, justified to state that this primary responsibility by no means implies an exclusive role in the implementation of the FCNM: as appears clearly from, in particular Article 18 FCNM, its drafters were fully aware of the potential role which could be played by other States, including by kin-States, in assisting the States of residence in their task fully to implement the obligations flowing from their membership to the FCNM.

Such assistance could, as is already indicated in the, admittedly, still limited practice of the Advisory Committee, relate in particular to such fields as media, education, and culture. It seems indeed possible that kin-States, by broadcasting programmes dealing with issues of particular interest to persons belonging to certain national minorities abroad, or by providing text-books and scholarships as well as sending (and financing) qualified teachers, or by financially supporting cultural and other activities such as the production of print and audiovisual media and the activities of libraries, theaters, and editing houses, or by even contributing to the costs of running educational institutions such as private kindergarten and schools, might considerably contribute to the protection and promotion of the distinct identity of persons belonging to national minorities and, thus, assist the State primarily responsible in the fulfilment of this task. One more important role which could be played by kin-States could be to support activities aimed at regenerating areas by, *inter alia*, attracting foreign investment from which persons belonging to national minorities have emigrated with a view to seek work in a kin-State.

It is, however, of crucial importance that such assistance would be carried out not only in a spirit characterised by deep respect for the territorial integrity and national sovereignty of the State[65] to which such assistance is offered, but also with the aim to promote intercultural tolerance and dialogue. From a procedural point of view, and in line with Article 18 FCNM, the preferred means to achieve this goal is the conclusion of relevant bilateral or multilateral treaties establishing the legal basis and framework for such assistance. The actual implementation of the programmes envisaged in such treaties should be administered and supervised by joint commissions[66]. Obviously, this is by no means a novel idea. To the

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[65] *See, in this context, also Article 21 FCNM which explicitly states "that nothing in the present Framework Convention shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States."*

[66] *In this context, it should be stressed that it would be useful to consult representatives of the national minorities concerned during the process of negotiating such treaties and, wherever possible, to include them in the activities of such joint commissions.*

contrary, it has already been implemented in the numerous bilateral treaties concluded in the 1990s among Central and Eastern European States. It seems, however, that the implementation of such treaties is still a source of considerable concern - or, to put it somewhat more drastically, many of them seem to exist only on paper and do not have any considerable practical relevance.

Notwithstanding the criticism of these bi-lateral treaties, a number of initiatives have been taken in the context of the Stability Pact for South Eastern Europe and more specifically under a project concerning minorities, run by the Secretariat of the Framework Convention for the Protection of National Minorities. The aim of these initiatives has been to strengthen the application of these bi-lateral agreements and to encourage the drafting of new treaties where they are lacking. In this respect, reference can be made to hold a meeting in the autumn of this year, bringing together joint commissions established under the bi-lateral treaties for them to be able to discuss their relative experiences. Mention can also be made of steps to support the Federal Republic of Yugoslavia in preparing agreements with its neighbours (Croatia, Hungary and Romania) and also steps to support Moldova in examining how they can make better use of such agreements with its neighbours.

2. Participation of kin-States in the monitoring of the framework convention

This assessment leads to the second issue to be dealt with in this context, namely the potential participation of kin-States in the monitoring process under the FCNM. At the outset, it must be recalled that the FCNM belongs to the European family of human rights treaties. This, in turn, means that any State Party to the FCNM is legally entitled to be "concerned" with the situation of persons belonging to national minorities as regards their rights addressed in the FCNM. Therefore, activities of States Parties including but not limited to kin-States[67] which remain within the procedural framework established by the FCNM, clearly do not constitute an unlawful intervention into the domestic affairs of another State Party. Moreover, in view of Article 24 FCNM, it is clear that even those Council of Europe Member States which are not States Parties to the FCNM, are legally entitled to such activities since this provision entrusts the Committee of Ministers, and, thus, all Council of Europe Member States, with the monitoring of the implementation of the FCNM.

In more concrete terms, such involvement or participation of kin-States in the monitoring process might be effected by different means according to its various stages: as regards the first stage, it seems possible to argue that any Council of Europe Member State, including any kin-State, might share information with the Advisory Committee with a view to assist it in its task to form a factually well-founded opinion as to the degree with which another State Party has fulfilled its obligations flowing from the FCNM. From a legal point of view, such information must be considered as information received from "sources other than the state reports" in the sense of Rule 30 of Resolution (97) 10. In this context, it can also be noted that, in some cases, kin-State embassies have shown interest in the visits of the Advisory Committee, and participated in some of the awareness raising activities prior to such visits. The Advisory Committee has not, however, to-date, sought specific meetings with kin-State

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[67] *It seems important to stress that participation in the monitoring process must be open for every State Party with a view to the common goal of the community of States Parties, i.e. to ensure the factual implementation of the obligations enshrined in the FCNM. Moreover, it would be difficult to justify if national minorities without a kin-State, such as, e.g., the Roma or Sami, or the Frisians and Sorbs of Germany, would be excluded from such support. Finally, it must also be stressed that, by virtue of Article 24 FCNM, such participation is also open to those Council of Europe Member States which are not States Parties to the FCNM.*

embassies when undertaking country visits, although it is not excluded that such meetings could occur.

With respect to the second stage, i.e. discussion of the opinion in the Committee of Ministers with a view to adopt a Resolution, it appears that States Parties other than the one primarily concerned - obviously including kin-States - have indeed presented written comments[68] on the opinion of the Advisory Committee or, at least, commented upon them orally[69].

With respect to the third stage, i.e. the follow-up procedure, it is not excluded that other States including kin-States might raise issues as to the implementation of the recommendations of the Committee of Ministers within that body and, in addition thereto, might share relevant information with the Advisory Committee with a view to contribute to fulfil its task within the follow-up procedure.

Such steps seem to be all the more compatible with the letter and spirit of the FCNM bearing in mind Article 18 FCNM: at least as far as such information concerns the factual implementation of bilateral treaties touching upon the protection of persons belonging to national minorities, such information falls within the textual ambit of the FCNM and should, therefore, be brought to the attention of the Advisory Committee and, thus, become part of the monitoring process. It must be stressed, however, that neither the Advisory Committee nor the Committee of Ministers, unless specifically entrusted with that competence, is empowered *directly* to monitor the implementation of such bilateral treaties. Insofar, however, as such treaties are concerned with the protection of persons belonging to national minorities, they are empowered *indirectly* to monitor their implementation and to assess as to whether they have indeed contributed to the implemenation of the substantive provisions of the FCNM.

IV. Concluding Remarks

By way of conclusion it seems justified to state that the two monitoring bodies established under the FCNM have succeeded in turning this document from paper to practice. At this stage, more than four years after the entry into force of the FCNM, more than three years after the receipt of the first state reports, almost two years after the adoption of the first opinions of the Advisory Committee and half a year after the adoption of the first resolution of the Committee of Ministers and in light of 19 opinions and 11 resolutions adopted, it is indeed time to move from analysis to action. This action will have to take place within the follow-up procedure with a view further to improve the implementation of the obligations flowing from the FCNM.

In this context, in the combined efforts of all actors to take effective measures in order to protect and promote the distinct identity of persons belonging to national minorities, there is also a role to be played by kin-States which even might include preferential treatment offered to persons belonging to a "kin-Minority". As long as such preferential treatment is exercised in full respect of all rules of general international law, including the principle of territorial sovereignty, and in compatibility with any legal obligations incurred by the State in question,

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68 See the pertinent provisos in the Preambles of the Resolutions on Hungary, referring to the "written comments by Romania and Slovakia", and on Slovakia, referrring to the "written comments by Hungary".

69 See the standard provisos in the Preambles of all Resolutions referring to "comments by other governments."

in particular the pertinent provisions of the FCNM such as, e.g. Articles 2 and 21 FCNM, such an action would not be unlawful. In view, however, of the ultimate goal of the FCNM, i.e. to contribute - by means of a constructive dialogue between all parties concerned - to the realisation of a situation in which the distinct identity of persons belonging to a national minority is protected and promoted as an enrichment for any society, such preferential treatment should be avoided unless based on a bilateral or multilteral treaty concluded, or any other agremeent entered into, by the States concerned.

If not, there is a considerable risk that such preferential treatment might contribute to a situation in which a national minority is reduced to nothing but a pawn in the game of States - and Europe is still aware of far too many cases in which such "games" ended in the physical destruction of national minorities - an option which must not be available anymore at the beginning of the 21st century.

PROTECTION OF KIN-MINORITIES: INTERNATIONAL STANDARDS AND RUSSIAN LEGISLATION

Mr Stanislav CHERNICHENCO
Vice-President of the Russian Association of International Law

Protection of kin-Minorities: International Standards and Russian Legislation.

It is well known that there is no generally recognized, legally binding definition of minorities, including national minorities. To elaborate such a definition is impossible. Nobody doubts it. There is no definition of minorities in the Declaration of the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities adopted by the General Assembly on 18 December 1992. The Framework Convention of the Council of Europe for the Protection of National Minorities does not contain a definition of national minorities either, leaving the solution of this question to the States Parties to it. It is necessary to stress that there is no definition of minorities in the legislation of Russia, which is a Party of the Convention.

It is obviously difficult to raise the question of the protection of kin-Minorities without a definition of minorities. In 1997, the working group on minorities set up by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (from 1999 – The Sub-Commission on the Promotion and Protection of Human Rights) took into account the definition suggested by the author of the present report for orientation, to avoid mixing up the problem of the protection of minorities with that of the protection of indigenous peoples.

On 21 October 1994, the Convention of the CIS on the Guarantee of the Rights of persons Belonging to National Minorities was signed. It embraces "persons-permanent residents in the territory of one Contracting Party and having its citizenship whose ethnic origin, language, culture, religion or traditions are different from the main population of this Contracting Party". This definition can hardly be recognized as successful. For example, persons having religious characteristics different from religious characteristics of the majority of the State population are not necessarily a national minority. The State Duma (the Lower Chamber of the Russian Parliament) negatively assessed the expression "main population"

which could be interpreted as impairing the rights of the minorities. The Convention was not ratified by Russia.

Nevertheless, it is quite possible to give an approximate definition of a kin-Minority: it is a group of persons numerically smaller than the rest of the population of a State, in principle permanently residing, having national characteristics different from the rest of the population but which are typical of the population of another State. In this other State persons having such characteristics form a titular nation. Sometimes such a State is called "maternal".

It is important to note that persons permanently residing, in principle, in the territory of a respective State, should be regarded as minorities. In Latvia and Estonia the most part of Russian-speaking persons who lived permanently in their territories was deprived of the status of permanent residents and, in addition, the authorities of these States refused to recognize them as their citizens in order not to consider them as a minority. However, nothing should prevent persons temporarily living in the territory of a State but having some particular national characteristics from being considered as a minority. Observers of Cuba and Mexico emphasized this point in the Sub-Commission.

It is quite obvious that the question of the protection of kin-Minorities can be raised only in relation to national minorities. A problem that arises is whether the notion "national minority" includes that of "ethnic minority". This problem is not solved yet. The Declaration of 1992 distinguishes between both minorities. Speaking of the Russians living in the territories of other countries the expression "ethnic Russians" is often used in Russia.

There is also a problem with the concept of minorities' protection. Preference is given to the concept of the protection of the rights of persons belonging to minorities, although there is a concept of the protection of the minorities' rights. The latter should not be ignored. It is reflected in Article 1 of the Declaration of 1992. Balance is required between these concepts to guarantee, on the one hand, the preservation of their identity by minorities and, on the other hand, to prevent their artificial isolation. Both concepts are of importance for the protection of kin-Minorities.

At present it is recognized that a "maternal" State has, to some extent, the right to express its concern about the situation of "its" minorities in other countries, to raise this question in bilateral relations with States where the minorities live and at a multilateral level, in international organizations. However, there are no exact, generally recognized norms of international law which would establish the limits of expressing the aforementioned concern.

Persons belonging to kin-Minorities (a) can be citizens of a "maternal" State, (b) can be citizens of the State in which they live and (c) can be stateless persons.
In the first case, diplomatic protection can be rendered to them if their rights are violated or impaired. This category of persons is seldom related to national minorities.

In the second and third cases, diplomatic protection cannot be rendered. States have no right to render their diplomatic protection to foreign citizens or stateless persons living in the territory of another State. These provisions are norms of customary international law and nobody contests them. Exceptions are possible if they are laid down in international treaties.

Since the question of minorities relates to the area of human rights, a "maternal" State has the right to insist on discussing the problems concerning kin-Minorities in international bodies

dealing with human rights and to expect explanations from the State where these minorities live. Nobody doubts that such an action of a "maternal" State should not be considered as a breach of the non-intervention principle. Moreover, even if a "maternal" State raises the question of human rights violations of individual persons perpetrated, in its opinion, just because these persons belong to the kin-Minority, such action will not be regarded as a breach of the non-intervention principle.

These general considerations are based on the interpretation of the principles of respect for human rights and non-intervention as well as on the analysis of customary international law. This interpretation is supported by the acts adopted by the Conference on Human Dimension.

It goes without saying that any interpretation is not enough. Therefore, in practice, specific norms of international treaties and monitoring and control systems created by treaties, in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Framework Convention for the Protection of National Minorities, are of great significance.

At a glance, Russia has no legislation concerning the protection of Russian minorities in other countries. This conclusion, however, would be wrong. The problem which Russia is faced with, in this context, is broader than the problem of the protection of kin-Minorities. From time to time it is necessary to protect the Russians living abroad and having no Russian citizenship. About 25 million Russians live in the territories forming parts of the ex-Soviet Union. 12 million Russians live in Ukraine. In Latvia, they account for about 38 percent of the population. In a number of cases most of them are not considered as minorities, under the pretext that they are not citizens of the pertinent States and deprived of the status of permanent residents (for example, in Latvia and Estonia). In Ukraine the majority of the Russians do not want to be considered as a national minority.

It should be taken into account that it is often difficult to see a difference between the Russians living in countries which were parts of the USSR and persons who are not ethnic Russians but consider the Russian culture and the Russian language as their native ones (for example, Byelorussians, Jewish people). That is why the term "Russian-speaking population" was popular in Russia. So, the problem of the protection of Russian minorities abroad is only a part of the problem concerning the protection of the Russian-speaking population.

The term "Russian-speaking population" was criticized many times in Russia, at official and unofficial levels. This criticism should be recognized as well-grounded. The legal meaning of this term is far from cleArticle In some situations it does not help to solve the question of the protection of the Russians but makes it more complicated. One could probably speak of *de facto* Russian minorities, not *de jure*. But since, in many cases, Russians living in member-countries of the CIS react to the word "minority" negatively, even the expression "*de facto* minority" should be recognized as unacceptable. The fact that, in a State, Russians are numerically smaller than the population constituting the titular nation does not always justify the applicability of the term "minority" to them. In Kazakhstan, for example, before the disintegration of the USSR, the Russians and the Ukrainians formed the majority in comparison with the Kazakhs. Now the Kazakhs are more numerous; but insigntificantly. The arithmetical criterion, in this case, would not be convincing enough to relate Russians to the minority.

The term "compatriot" is now considered as more appropriate than "Russian-speaking population". Its meaning was originally discussed. It did not have a clear legal meaning either. The opinion was expressed that it was not a legal term but a more emotional one. Discussions continue to take place.

The Federal Law "On the State Policy of the Russian Federation in relation to the compatriots abroad" of 24 May 1999 clarifies the content of the term "compatriots". Some of the problems have not been resolved, but categories of persons are enumerated in it that fall under the notion "compatriots". It means that the notion "compatriots" has acquired a more or less precise legal content. The Law is the only legislative act of the highest level which is devoted, in particular, to the protection of Russians living abroad and consequently Russian minorities. Besides, the President and the Government of Russia have also adopted acts aimed at supporting the Russian diaspora.

The following categories of persons are related to compatriots in the Law:

(a) citizens of the Russian Federation permanently residing abroad;

(b) persons who previously were citizens of the USSR and now are living in the States which were parts of the USSR, who acquired the citizenship of these States or became stateless persons;

(c) emigrants from Russia, the RSFSR, the USSR and the Russian Federation who had respective citizenship and who became citizens of a foreign State or got a residence permit, or who became stateless persons;

(d) descendants of the aforesaid persons with the exeption of descendants of persons belonging to titular nations of foreign States.

It is not a quotation. The aforementioned provisions of the Law are given with abbreviations and they are a bit simplified, without distorting their meaning.

The Law does not consider the protection of compatriots but their support. As it has already been pointed out the protection strictly speaking (diplomatic protection) can be rendered only to the citizens. The wording of the Law in this respect is in accordance with international standards, although they have some editorial drawbacks.

Belonging to a diaspora cannot be imposed. It would contradict the main provisions of international law concerning human rights. As for Russian citizens, there is no problem here: if a person is a citizen of Russia and he permanently resides abroad, he (she) *ipso jure* is a compatriot, belongs to the Russian diaspora and, in addition, has the right to protection on the part of Russia according to Article 61 of its Constitution. But belonging to compatriots of persons who are not citizens of Russia and who live abroad depends first of all on a subjective factor – self-identification. Article 3(2) of the Law provides that the recognition of their belonging to compatriots, by persons who were citizens of the USSR, emigrants and descendants of compatriots, must be an act of free choice.

The Law mentions that the Russian Federation's policy in relation to compatriots is based on the recognition of human rights and the obligation for States to observe generally recognized principles and norms of international law. At the same time, the necessity to observe the

principle of non-intervention of the States in each other's internal affairs is emphasized. Therefore, when Russia is supporting its compatriots in the economic and social fields, in the fields of education, language and culture, it is not pursuing the aim to interfere in the domestic jurisdiction of the States in the territories of which its compatriots live. Article 15(1) of the Law considers the protection of compatriots in their action against discrimination on the ground of sex, language, religion, and political or other beliefs, national or social origins, belonging to compatriots, property or any other circumstance. In Article 15(2), however, it is pointed out that support of compatriots in the field of human and citizen's rights is exercised both in accordance with generally recognized principles and norms of international law, international treaties and the legislation of the Russian Federation, and taking into account the legislation of foreign States.

According to the Law, Russia shall create necessary conditions for the transmission of information from Russia to compatriots through various channels (radio and television broadcasting, distribution of the press, etc). The federal budget finances activities of Russia in the field of relations with compatriots. It provides privileges for natural and legal persons rendering assistance to compatriots.

It should be noted that the provisions of the Law are mainly of a general character, which makes their implementation more complicated. It is supposed that different material and organizational measures the purpose of which is the realization of the Law must be laid down in federal and regional programs for the support of compatriots abroad. The first program of this kind was approved by the Government of the Russian Federation on 17 May 1996, before the adoption of the Law of 1999. Unfortunately it is also too general. In August 2002, the Concept for the support of compatriots was adopted. At a regional level the Government of Moscow acts rather effectively but, on the whole, the support of compatriots can be characterized as weak. Many provisions of the Law of 1999 have no direct relation to compatriots. In fact, some of them are devoted to conditions of the acquisition and the loss of the Russian citizenship duplicating the Constitution and the Law of Citizenship of 1991 or even correcting what created problems in the application of the Law on Citizenship. Apparently, these problems will be solved in the near future. On 19 April 2002, the State Duma adopted, at the third reading, the new Federal Law on Citizenship of the Russian Federation. It will replace the Law on Citizenship of 1991 and the provisions of the Law of 1999 relating to the citizenship. Article 14 of the new Law contains a provision which is very important for compatriots: persons who were citizens of the USSR, now living in the States which were parts of the USSR and who did not acquire the citizenship of these States can be naturalized in the Russian Federation following a simplified order.

The new Law corresponds to the European standards in the field of human rights. It was prepared with due regard for the European Convention on Nationality of 6 November 1977, which was signed by Russia but has not been ratified yet. During its elaboration, Russian experts discussed its draft with experts of the Council of Europe and the Office of the UN High Commissioner for Refugees. The Law of 2002 might not be perfect but it undoubtedly represents a step forward from the Law of 1991. Amendments to the Law of 1991 were made several times but it is obvious that it is now out of date.

The solution to the problems concerning compatriots, including kin-Minorities, cannot be the same in all cases. Neither the Law of 1999 nor international treaties of a general character on minorities can solve them. The problems connected with minorities and with a diaspora are generally similArticle But they are only a prerequisite for their solution. In this field, the

conclusion of bilateral treaties provide for a more effective settlement of the question. The Russian Federation has concluded such treaties with some member-States of the CIS.

On 20 January 1995, the treaty between Russia and Kazakhstan on the status of Russian citizens permanently residing in the territory of Kazakhstan and the citizens of Kazakhstan permanently residing in the territory of Russia was concluded. On 18 May 1995, a similar treaty was concluded between Russia and Turkmenistan. Both treaties have much in common, despite being different in some details. For example, they consider that a citizen of one Party permanently residing in the territory of the other enjoys the same rights and freedoms and has the same duties as the citizens of the Party where he (she) lives. Further on, exceptions to this rule are pointed out. They only partly coincide with each other.

On 7 September 1995, the treaty between Russia and Turkmenistan on co-operation for the guarantee of the rights of the Russian minority in Turkmenistan and the Turkmenistan minority in Russia was concluded. Both concepts of the protection of minorities were reflected in the treaty. Most of the Articles of the treaty deal with the rights of persons belonging to the minorities. The Parties, *inter alia*, recognize the right of such persons to use their own language, to establish associations of educational, religious and other character. At the same time the Parties undertake to guarantee the right to participate in public and State life to the minorities, in particular in the solution of questions concerning the protection of their interests and the regions where they live.

The agreement between Russia and Turkmenistan on the settlement of dual citizenship of 23 December 1993 and the treaty between Russia and Tajikistan on the settlement of the same questions of 7 September 1995 also have relation to the protection of compatriots. Their content is analogous. The Parties recognize the right of their citizens to acquire the citizenship of the other Party without the loss of the previous one. The agreement and the treaty removed problems connected with the compulsory military service of persons having the citizenship of both Parties. They say that persons having the citizenship of both Parties can get the protection of each of them. But nothing is said about cases where one of the Parties tries to protect the person having citizenship of both Parties, permanently residing in the territory of the former one. The question is still open as to what the reaction of the other Party should be.

There are no treaties with other States which are similar to the above-mentioned instruments. The existing practice shows that provisions concerning minorities, a diaspora, etc, in bilateral treaties on co-operation of general character for the protection of minorities, are not effective. Even bilateral treaties which are fully devoted to these questions cannot radically change the situation for the better. The financial situation in Russia does not allow to exercise the protection of compatriots on a planned scale.

No models exist regarding the protection of compatriots in countries which were part of the former republic of the USSR. Such models could be a basis for the legal solution. One cannot say that these models do not exist at all. For example, there is an opinion that Finland's experience with regard to the Swedish people could be used in Latvia and Estonia. But in most cases, there are no clear-cut orientations on how to act. In Ukraine, the Russian language is artificially forced out where people mainly speak this very language – in Crimea, in Donbass, in Kharkov, in Odessa. These are vast territories and an attempt to consider their population as a minority artificially separating the Russians from the Ukrainians speaking the

Russian language is, at best, fruitless. By the way in Kiev, the capital of Ukraine, no less than 50 percent of inhabitants speak Russian.

Sometimes life itself pushes for a change in the attitude towards the Russian diaspora in States formerly part of the USSR. In Kyrgyzstan, for example, the Russian language recently got the status of a State language. It is impossible to do everything by legal means. In the long run, demands for economic, scientific and technical cooperation will show what role will be played by the Russian language in the territories of the States formerly part of the USSR. In the meantime, it is necessary to do everything possible to prevent further deterioration of the situation.

There are acute problems in Transdniestria, a part of the Republic of Moldova. Representatives of Transdniestria state that the population of this region has exercised its right to self-determination. The Russians and Ukrainians in Transdniestria are a minority in Moldova. Minorities have no right to self-determination. They have the right to a special regime of protection. The question of self-determination of the population of Transdniestria can arise only if Russian, Ukrainian and Moldavian communities of this region peacefully coexisting are considered as a people. International law has no norms which would allow to define whether a national minority compactly living in some territory has transformed into a people.

The establishment of bilateral bodies (commissions, committees) which would consider the alleged violations of the rights of persons belonging to a diaspora (taking into consideration the reciprocity principle) could promote the solution to problems of the Russian diaspora in the member-States of the CIS and Baltic States. First of all, it would be expedient to consider the alleged violations of the rights of those persons who belong to the Russian diaspora but who are not the citizens of Russia, irrespective of the fact that the State in the territory of which they live considers them to belong to minorities. In this connection, the German-Polish Convention on the Upper Selezia of 15 May 1922 deserves special attention. The state of international relations for the period between the two world wars affected its application. However, the approach to the problem of the protection of minorities reflected in it is interesting.

Two circumstances can prevent the establishment of the above-mentioned bilateral bodies: (a) new financial spending and (b) a negative position of Russian partners. In these conditions, one can hope that the multilateral international mechanisms in the field of human rights set up by the OSCE, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms can be used more intensively for the protection of the Russian diaspora.

THE SLOVAK ACT ON EXPATRIATE SLOVAKS

Government Commissioner for Expatriate Slovaks, Slovak Republic

Introduction

Since losing their statehood in the 10th century until regaining it in 1993, Slovaks were a part of other state formations.

Migration flows, which affected the political, social, economic, cultural and national areas of many European States, between the 18th and 20th century, also deeply impacted the life of the Slovak nation.

Within the context of internal migration, from the 18th century, Slovaks massively moved to countries of south and south-eastern Europe; from the end of the 19th century to the USA; in the interwar period to Canada, South America, Australia and western European countries; and, after 1945, in particular following the occupation of Czechoslovakia by Soviet armies in 1968, to virtually all continents.

At the time of the greatest national suppression, when Slovaks in Slovakia had no opportunities for educational, religious, scientific, social, or political self-fulfilment, Slovaks abroad were sole capable of voicing these facts to rest of the world. Throughout World War I and II, they were involved in front-line battles for freedom and democracy in special national military units, on the side of the Treaty as well as the Allies. At the time of the totalitarian regime and Soviet occupation, they were the key players in the anti-Communist resistance abroad. All this created a firm bond of mutuality between Slovaks in Slovakia and Slovaks abroad.

Slovakia is among those European countries, which have lost a considerable section of their populations due to long-term mass emigration. At present, 4,614,854 Slovaks permanently reside in the territory of the Slovak Republic, while 2,656,100 persons of Slovak origin live abroad; this is 36.53% of the total number of Slovaks living in the world.

This fact was also reflected in the Constitution of the Slovak Republic, where the State committed itself to promoting national awareness and cultural identity of Slovaks living abroad and supporting their institutions established for achieving this purpose and their relations with the mother country.

Along these lines, a special law was adopted in 1997 as *lex specialis*, which, in the context of the dialogue between expatriates and the mother country, enables expatriates and their descendants to take part in the social, economic, and cultural life of their country of origin. By maintaining close relations with its expatriates in and outside Europe, based on respect for different nations and cultures, the Slovak Republic stands against abusing these relations for nationalist objectives and contributes to understanding between nations.

Preparation and objective of the Act

The objective of the Act is to simplify and facilitate expatriate Slovaks' communication, personal contact, entry and residence in the territory of the Slovak Republic, partially and morally compensate the injustices caused by the past long-term Communist anti-expatriate policy, support national awareness and cultural identity of Slovaks abroad, and preserve the new age emigrants' ties to their motherland.

When seeking ways to achieve this, the Slovak Republic had much inspiration to draw on. The authors of the law examined models used in more than 20 countries of the world and tried to utilise political approaches and legal solutions from many of them. The experience

and models, as well as legal regulations from Germany, Switzerland, Slovenia, Hungary, Romania, Greece, Poland, Portugal and others, turned out to be particularly inspirational. The fact that preference was given to the issues of culture and cultural identity is demonstrated in that the Government of the Slovak Republic instructed the Ministry of Culture to take responsibility for the preparation of this law. The Ministry closely co-operated with expatriate clubs and organisations abroad.

When working to strengthen the national cultural identity of members of the Slovak nation living abroad, the Slovak Republic proceeds in compliance with UN, CE and OSCE documents related to the protection of national and ethnic minorities. Back in 1996, in the process of preparing the Act on expatriate Slovaks – the first national legal standard of its kind, the Slovak Republic, via the Slovak Mission at the European Union in Brussels and within the framework of legislative approximation, requested an opinion on the Act's principles and support documentation as regards comparable legislative standards in European Union states. The knowledge acquired from the legislation in Member States and experience from other countries providing care and maintaining cultural co-operation with their expatriates were fully used in the creation of the Slovak law.

Subject of the Act and its application in practice

The Act on Expatriate Slovaks and on amendment and supplementation of certain laws of 14 February 1997 is the first standard of its kind in the Slovak legislation. It concerns the status, rights and obligations of expatriate Slovaks, and this exclusively in the territory of the Slovak Republic. The subject of the Act is to define the term expatriate Slovak, specify who, and under what conditions, can the status of expatriate Slovak be granted, and legislate the rights and obligations of an expatriate Slovak in the territory of the Slovak Republic. It specifies the competence of central state administration bodies and their involvement in the relations *vis-à-vis* expatriate Slovaks. The status of expatriate Slovak can be granted to a person, who is not a citizen of the Slovak Republic and has Slovak nationality or Slovak ethnic origin. This means that, like the majority of European legal standards of this type, it is based on the ethnic principle. No one can obtain the status of expatriate Slovak automatically. This is only possible on the basis of voluntary choice, which is not affected by religious or political belief, state citizenship or racial affiliation. The scope of benefits that a holder of the status can use during his stay in the territory of the Slovak Republic does not grant him rights equal to those of a citizen of the Slovak Republic, it only grants him certain advantages, in particular in the field of culture and education.

The Slovak Republic focuses on the provision of assistance and support in the field of preserving the development of education, reinforcing and disseminating the knowledge of Slovaks, Slovak culture and Slovak cultural heritage. The Slovak Republic does not intend to rip expatriates out of the context of the countries in which they have settled down. It aims to strengthen two languages, two cultures in the environment of its foreign diaspora. When assisting expatriates, it applies the principle of subsidiarity and, on the one hand, supports the expatriates themselves, while on the other, supports the effort of these countries' governments to improve their position in the country and extend minority rights. The Slovak Republic endeavours to ensure that all steps taken to promote the Slovak minority in a given country are in compliance with the minority's interests as well as the interests of the country's government.

The Act on Expatriate Slovaks, with its overall nature, objective and the content of the benefits, is considerably close to repatriation, immigration and other similar laws and legal standards known from a number of European countries (Poland, Germany, Latvia, the Czech Republic, and others). By enabling authorised persons, among expatriates, to temporarily reside and be employed in the Slovak Republic, certain framework conditions are being created for their real repatriation and settlement in their original motherland, or country of their ancestors, Slovakia. Under the Employment Act, however, they are not entitled to inclusion in the register of unemployement if they lose their job, neither are they entitled to unemployment benefits, child benefits, job offers from Labour Office lists, etc. At the same time, the Act does not automatically address the issue of acquiring citizenship by the relevant persons; it only deals with the issue of residence. From this point of view, the content of the Act does not go beyond the legal standards and regulations of this kind customary in other European democratic countries.

The Act on Expatriate Slovaks does not provide the relevant persons with benefits in the place of their permanent residence, but only after they enter and when present in the territory of the Slovak Republic. After they leave the territory of the Slovak Republic, the Slovak expatriate card has no legal power. Therefore, for a number of expatriate Slovaks, citizens of foreign countries, the card only has the nature of a symbolic document.

This means that the Act on Expatriate Slovaks of 1997 is applied exclusively in the territory of the Slovak Republic and this is how it approaches relations towards all expatriates. Its content has a global nature, it relates to all Slovaks abroad, two-thirds of which live outside Europe. It does not attempt to introduce an element of instability in the central European region or cast doubts on the principles of integration processes in the pre-accession period.

8,412 expatriates have acquired the expatriate card since the Act entered into force. It is a relatively small number and the interest has a decreasing tendency. The reasons for this should be mainly looked for in the insufficient fulfilment of expatriates' expectations. Other problems result from the fact that certain promises of benefits for expatriates, intended in the Act, have not been fulfilled. This includes an amendment to the Foreign Exchange Act that would enable the holders of the card to acquire real estate for the purposes of housing and recreation. The fact that the Act has not been amended reduces the chances of expatriates' immigration to the Slovak Republic for the purpose of spending retirement age here (expatriates from western countries, frequently widowed or lonely, desiring to return and spend the rest of their lives in their motherland) or for the purpose of better social or professional self-fulfilment (especially expatriates from surrounding countries).

Similarly, the real content of legislative benefits for expatriates in the field of education has not been fulfilled. Economic problems in the education sector lead to the rejection of the provision of free education to expatriates. This, in reality, considerably limits the chances of expatriates, especially those from the surrounding post-Communist countries, i.e. countries where, thanks to their population, they form national minorities. This framework also fails to apply specific criteria for expatriate students taking entry exams at secondary schools and universities in Slovakia, although these students usually have insufficient proficiency in Slovak, and sometimes in other subjects, to cope with the criteria of entry interviews and exams at schools in the Slovak Republic. Besides some exceptions, Slovak minority schools abroad, which are usually in the position of marginal minority and rural schools, are unable to provide their students with level of education sufficient to achieve this. The failure to take that difference into account with regards to school entries can speed up the process of

expatriates' assimilation in the future, since the already narrow group of Slovak minority intelligentsia in individual countries is becoming even smaller.

Another negative factor is the gradual restriction of the scope of benefits granted by law, by amending further legal standards and regulations. In connection with the reassessment of discounts provided to expatriates of retirement age in public transport, discounts in bus transport have already been withdrawn and a draft amendment proposes that discounts in rail transport be abolished as well.

In order to meet the criteria within the process of accession to the so-called Schengen Treaty, the Ministry of the Interior has made the conditions for the registration of foreigners in the territory of the Slovak Republic stricter, including for persons granted the status of Slovak expatriate. In this respect, since 1 April 2002, the temporary residence of the holders of the status, permitted under the Act on Expatriate Slovaks, is not considered equal with the permit granted by police authorities in accordance with Act no. 48/2002 Coll. on the Residence of Foreigners in the Territory of the Slovak Republic, which devalues the provisions under paragraph 5 (2), guaranteeing expatriates the temporary residence in the Slovak Republic for an unlimited period of time.

Expatriates who are holders of the card are entitled to apply for citizenship of the Slovak Republic for reasons worthy of special attention. In practice, this right is only a limited possibility since the actual mechanism of granting citizenship to expatriate Slovaks, foreign citizens who have never been citizens of Slovakia (especially when they are from central or south-eastern European countries) substantially reduces the number of persons who do obtain citizenship of the Slovak Republic. A positive change has occurred in the case of satisfying the interest of expatriates who are former citizens of our country (mainly from the Czech Republic, USA and others), whose applications are processed practically without problems, on the basis of bilateral international agreements.

An amendment to the Act on Administrative Fees led to the abolishment of benefits arising from paragraph 10 (2) and (3), exempting expatriates from administrative fees. At the same time, it increased the fee for applicants for citizenship of the Slovak Republic from SKK 5,000 to 20,000 per person, which in practice substantially limits and, for many (such as expatriates from less developed countries), eliminates the possibilities of applying for citizenship.

The problem of the lack of attractiveness of the Act on Expatriate Slovaks also relates to certain procedural elements of processing individual applications from expatriates. The need to thoroughly verify individual facts required, by law, from the registrar's office documentation, which is aimed at eliminating unauthorised applicants, renders mass acquisition of the Slovak expatriate card impossible. Moreover, many potential applicants are dissuaded by the applicant's obligation to present a document confirming that they do not suffer from any infectious diseases and have a clean criminal record, even though the applicants often do not intend to reside in the Slovak Republic but want to acquire the card for emotional or patriotic reasons, as a certain bond with their motherland. The restriction whereby the status of expatriate Slovak can only be granted to those who can credibly verify their nationality and their children, but not to non-Slovak spouses, also reduces the number of potential applicants for the card, since the number of ethnically mixed marriages among expatriates is constantly rising.

In this context, it can be stated that, in practice, the content of the benefits from the Act on Expatriate Slovaks has been fulfilled to a relatively small extent and that the indicated comprehensive, so-called large amendment, might even abolish those that have remained.

Changes to the law being prepared

Almost five years after the Act on Expatriate Slovaks began to be applied, experience shows that it is necessary to change, above all, competences of certain central State administration bodies vis-à-vis expatriate Slovaks, which they perform under Act no. 575/2001 Coll. on the Organisation of the Government's Operation and Organisation of the Operation of State Administration. In this respect, it became necessary to redefine the competence of the Deputy Prime Minister of the Slovak Republic for Legislation and the competence of the relevant ministries in implementing State policy towards expatriate Slovaks, and, at the same time, take into account the establishment of the General Secretariat for Expatriate Slovaks, created within the structures of the Office of the Government on 1 January 2002. This is the primary goal of the draft amendment to the Act, which has been approved by the Government and will be submitted for debate and approval to the National Council of the Slovak Republic in the near future. Legislation dealing with other issues related to expatriate Slovaks should be elaborated in a more extensive amendment to this act in 2003. The subject of the draft Act only partially relates to issues addressed in EU law. This, for example, concerns the question of the acquisition of real estate, where the relevant provisions were removed from the draft Act in line with comments from the European Commission.

In connection with this, it should be emphasised that the issue of the status of expatriate Slovaks and benefits for this category of persons should be the subject of an extensive debate to be opened at the occasion of the "Permanent Conference – the Slovak Republic and Expatriate Slovaks 2002". Subsequently, the conclusions of this conference should serve as a basis for the authors of the so-called large amendment to Act no. 70/1997 Coll. It is expected that a completely new act, or an extensive revision, will be adopted by the end of 2003. The so-called large amendment to this act should be in full compliance with the relevant *acquis*, including issues related to the granting of visa and provision of employment opportunities in the Slovak Republic.

Analysis of the Act in the Context of the Venice Commission Report on the Preferential Treatment of National Minorities by their kin-State

The Act on Expatriate Slovaks is a legal standard, which is, considering its essence, parameters and objectives pursued by the Slovak Republic, in full compliance with European standards and norms and the principles of the current international public law. The Act concerns the status of persons of Slovak nationality, or Slovak ethnic origin, without Slovak citizenship (i.e. members of the so-called kin-Minority), when present in the territory of the Slovak Republic. It is clearly a legal standard whose effects do not extend to the legal territory of another State, hence it does not breach the principle of territorial sovereignty; it respects the principle *pacta sunt servanda*, the principle of friendly neighbourly relations and contains no preferential provisions unjustified by the objective to create conditions for the effective promotion of strong cultural and language ties between the Slovak Republic and Slovak ethnic communities living outside its territory.

1. Principle of territorial sovereignty

The Act is in full compliance. Its legal effects are applied only after the person granted the legal status physically enters the State's territory, i.e. only "within its borders". This is confirmed by Article 1, paragraph 1, as well as paragraph 6 (1), which clearly limits the right to apply for benefits contained in the relevant Act to the physical presence and period of residence in the territory of the Slovak Republic, the "kin-State". The internal validity of the status is also explicitly indicated on the document "Slovak expatriate card", which states: "Valid only in the territory of the Slovak Republic when used together with a valid personal identification document".

Neither is this principle breached in paragraph 5 (1) and paragraph 6 (1) a), referred to in the "Venice Commission Report on the Preferential Treatment of National Minorities by their Kin-State" (hereinafter the "Report") and pointed out by the EU as, to a certain extent, incompatible in a negotiation assessment from 2002. In Slovak and in legal interpretation, provisions under paragraph 5 (1) are nothing but a confirmation that the holders of the status can only be advantaged to the extent allowed by valid international agreements, which means that when entering the country, these persons are subject to the same regime as other foreigners, as stipulated in paragraph 3 (1) of valid Act No. 48/2002 Coll. on the Residence of Foreigners in the Territory of the Slovak Republic. Since 1 April 2002, when the new Act on the residence of foreigners in the territory of the Slovak Republic entered into force, the regime for entering the country by holders of the legal status of expatriate Slovak has become stricter. Persons who have been granted temporary residence on the basis of Act no. 70/1997 Coll. on Expatriate Slovaks are no longer allowed to freely leave and re-enter the territory of the Slovak Republic without valid visa of the Slovak Republic, which was possible prior to the above date and is allowed, under paragraph 3 (1) of Act no. 48/2002 Coll., for other foreigners, whose temporary residence in the territory of the Slovak Republic has been legalised in accordance with this Act.

Similarly, the provisions under paragraph 6 (1) a) enact a principle applicable for all persons who are not citizens of the Slovak Republic. The provisions do not give the holders of the "legal status" any advantages. Under the valid legal system, every person - both citizens and foreigners, regardless of nationality - who meets the specific requirements related to the level of education achieved and knowledge of the language regarded as the language of instruction at the given school, is entitled to apply for admittance to a school.

Nevertheless, the right to apply, enacted in this provision, does not constitute any legal entitlement to the actual admittance for study.

2. Scope of application (ratione personae)

In paragraph 2, the Act specifies the criteria for acquiring the legal status of "expatriate Slovak" and defines the forms of its verification. Under the above, the granting of the status can be applied for by any person, who can verify the following:

a) in accordance with the laws of the Slovak Republic, he/she is not its citizen

b) he/she has Slovak nationality or Slovak ethnic origin (i.e. at least one of his/her direct ancestors, up to the third generation, had Slovak nationality)

c) he/she has Slovak cultural and linguistic awareness.

These facts are verified by a public document containing the required data explicitly (e.g. information on the nationality of the relevant person), or by confirmation from an authorised authority or institution of the Slovak Republic or the State of which the person is a citizen (or the State of his permanent residence). When the proof of nationality is presented by an applicant who is not of Slovak nationality, the administrative authority not only requires verification of the ancestor's Slovak nationality, but also verification of clear genealogical link with this person (by presenting registrar's office documents of civilian or church provenance).

3. Role of non-governmental associations registered in another state in the process of acquiring the status

The role of non-governmental organisations is strictly limited to the provision of information regarding facts specified in the Act. Its nature and scope are defined in paragraph 2 (5) and (7) of the relevant Act. In this respect, only organisations (associations, clubs) associating persons who affiliate themselves with Slovak nationality or ethnic origin and operating in the territory and registered in compliance with the laws of the State, of which the applicant is a citizen or in which he has permanent residence, are considered authorised under the Act. In all cases, however, testimony from such an organisation is only a support document (proof) for the decision of the Slovak Republic's administrative authority acting in a given case. Its use is possible and permissible only if the applicant, for objective reasons, not contradicting the essence of the proof, cannot credibly prove his legal entitlement by means of a public document or official confirmation containing information on nationality, or cultural and linguistic awareness required by the law (e.g. in the case of applicants from the third generation of descendants of overseas emigrants from the end of the 19th century, or in the case of applicants – citizens of countries, whose legal system does not allow for acquiring such information (France)). The testimony from a non-governmental organisation on the nationality of the applicant or his ancestors is not compulsory proof. In practice, the administrative authority never uses the testimony separately, but only within the context of other evidence.

4. Procedure for the granting of the status of expatriate Slovak

It is in full compliance with the principles defined in the "Report". The whole process related to the submission of the application, assessment of evidence and decision-making is carried out by authorities of the Slovak Republic, both at home and abroad. If the applicant submits the application outside the territory of the Slovak Republic, it must be at a Diplomatic or Consular Mission of the Slovak Republic, usually in the country of which the applicant is a citizen. This can be done in person or by mail. Only the authorised unit of the Ministry of Foreign Affairs, headquartered in the Slovak Republic, can decide on the application. The procedure connected with the reception of the document on the granting of the legal status is also fully secured by authorities of the above-mentioned ministry, both at home and abroad.

5. Document on the granting of the legal status (Slovak expatriate card)

It is in full compliance with the principles defined in the "Report". The Slovak expatriate card does not replace the identification document of the home country of the person, who has been granted the legal status. As stated in paragraph 4 (2), it can only be used together with a valid passport, or, if allowed for under an international agreement, identification document (ID) of the State of which he/she is a citizen (in the case of the Slovak Republic, this for instance

applies to the Czech Republic, Germany and Switzerland). This means that it is only proof that the holder is authorised to utilise the services under the relevant Act, as defined in the "Report".

6. Nature of the benefits

The benefits, to which the legal status of "expatriate Slovak" entitles the holder thereof, are defined in Article 1, paragraphs 5 and 6 of the relevant Act and, contextually, also in Articles II, IV and V, while their content needs to be interpreted in accordance with later regulations.

All benefits incorporated into the relevant Act by the legislative body are aimed at achieving a legitimate objective (as defined in the "Report"), i.e. the reinforcement of the linguistic and cultural ties between Slovak communities living in the world and the kin-State, the Slovak Republic, or the creation of legal conditions for other specific measures and projects aimed at achieving this goal.

A section of the benefits enacted in Act no. 70/1997 Coll. is of a systemic nature. Therefore, they cannot be assessed alone, without considering their ultimate aim, as occurs in the Report's assessment in some cases. A systemic nature can be, for instance, ascribed to provisions under paragraph 5 (2), providing advantages to the holders of the status in issues of legalisation of residence, as well as legalisation of activities related to securing livelihood, for persons entering the territory of the Slovak Republic with the aim of improving their knowledge of the modern Slovak, acquiring education necessary for the community, or reinforcing their cultural awareness or that of their descendants (provisions of paragraph 6 (1) a) and c) and (2)). The application of the Act has proved that the provisions are appropriate to the legitimate objective pursued by the Slovak Republic with its adoption:

Paragraph 5 (2) - "entitles the holder of the status" to temporarily reside in the territory of the Slovak Republic, under conditions specified by the Act on the residence of foreigners. In practice, its application simplified the conditions for communication and created room for the implementation of collective and individual projects aimed at achieving the objective;

Paragraph 5 (3) – in the analysis of the Act on expatriate Slovaks, contained in the "Report" in the section on domestic legislation... under point "Lack of a permit of permanent stay in the kin-State", there is a clear misinterpretation of this provision, when it is claimed that: "The Slovak law, instead, encourages expatriates to apply for permanent residence in Slovakia (Article 5 paragraph 3 SL)". The only advantage that the provision provides to the holders of the status is that it entitles them to submit the application for permanent residence not only through a Diplomatic Mission of the Slovak Republic in their home states (as required from other foreigners under paragraph 36 (1) of Act no. 48/2002 Coll.), but also at the relevant police unit in the Slovak Republic. This provision only mitigates the strictness of the Act on the residence of foreigners (no. 48/2002 Coll.) in that it does not force the holders of the status to travel to their home country in order to assert this right;

Paragraph 6 (1) a) – this provision was designed to create a framework for the effective implementation of the State's activities targeted at the field of education, related particularly to members of the young generation of the kin-Minority, i.e. measures critical for the preservation of culture and language in this specific social group. Its form was, however, reduced due to its collision with the Constitution of the Slovak Republic. In its current form,

it is not at variance with the principle of non-discrimination, but, at the same time, it has no practical meaning from the standpoint of the objective pursued by the Act. It is therefore expected that this provision will be aligned with the objective and with EU principles.

Paragraph 6 (1) b) – by making it possible, under this provision, to apply for a job without a residence permit and work permit, the legislative body aimed to create flexible conditions for shorter or longer work internships for experts, pedagogues, etc., from the so-called kin-Minority, necessary for their later work in their home country. It was also expected to create conditions and room for educational mobility of university youth, so that, thanks to the provision of governmental scholarships, its opportunities for studying were not restricted by limited economic possibilities. Experience shows that this provision has virtually no discriminatory impact on foreigners from a majority of the States. The number of holders of the status who apply for a job is only exceptionally higher than allowed under bilateral agreements on mutual employment of persons. Over the five years of the Act's validity, no State has raised any objection against this provision within bilateral relations, which implicitly confirms their agreement with it. The issue of how appropriate it is will be assessed by a working group to prepare the new version of the Act, which will adopt a solution that will fully correspond with the principles of European law and the needs related to the achievement of the objective in this area.

Paragraph 6 (1) c) – "are entitled to apply for the granting of citizenship of the Slovak Republic for reasons worthy of special attention". This is a provision, which even the "Report" itself does find discriminatory or exceptional in citizenship laws.

Paragraph 6 (2) - "An expatriate Slovak, in the territory of the Slovak Republic, is entitled to the ownership and acquisition of real estate under conditions specified in a special regulation". The provision had an ethical context, based on a requirement from mostly older repatriates, former citizens of the USA and overseas countries, who requested the creation of stable conditions for the implementation of the provisions under paragraph 5 (2) of the relevant Act, i.e. the possibility for long-term residence in the territory of the Slovak Republic without reliance on State support. The right to ownership was supposed to be adequate to this objective, i.e. restricted to the possibility of acquiring ownership within the scope necessary for the existence and the recreation of a person and his family. This was to be achieved by amending the foreign exchange Act. Yet, the foreign exchange Act was not amended along these lines and in view of the conditions arising from the process of accession to the EU, such an amendment is no longer anticipated. In this respect, the draft amendment approved by the Government in April of this year and submitted for approval to the National Council of the Slovak Republic will ultimately abolish the provision.

Similarly, the draft amendment also abolishes the benefits related to the provision of discounts in rail and State bus transport stipulated in paragraph 6 (3).

Conclusion

As a conclusion, we would like to express our appreciation for the attention paid by the Council of Europe to issues of relations between Europeans abroad and their countries of origin. We agree with the recommendations from its Parliamentary Assembly, which brings attention to the fact that migration within Europe is constantly on the rise, mainly as a result of the introduction of the legislative framework for free movement in the territory of the European Union and the opening of borders subsequent to the end of the Communist system

in the East. We also believe that it is in the interest of countries to ensure that expatriates continue to actively affiliate themselves with their nationality, play an important role of mediation and serve as a bridge between States and cultures in the host countries.

Slovaks minorities abroad demonstrated, in almost three hundred years of existence and life, that they have become loyal and well-integrated elements of their new environment. This experience can serve as a model for non-conflict co-existence between the minority and majority nations for the future unified Europe and, thus, increase mutual understanding between nations.

INFORMATION CONCERNING THE RELATIONS OF THE REPUBLIC OF SLOVENIA WITH SLOVENES ABROAD

The Office of the Republic of Slovenia for Slovenes abroad

A considerable number of Slovenes live outside the borders of the Republic of Slovenia. Slovenia contributes to the preservation of the Slovene identity, language, culture and cultural heritage and encourages cultural growth among Slovenes living outside its borders and enhances their contacts with the homeland.

The policy of the Republic of Slovenia is in accordance with the Recommendation 1410 (1999) of the Parliamentary Assembly of the Council of Europe on Links between Europeans living abroad and their countries of origin and in accordance with other international agreements on this matter, such as the Framework Convention for the Protection of National Minorities. Slovenia respects the principle *pacta sunt servanda* and the principle of friendly neighbourly relations and expects the same from other States.

The **Constitution of the Republic of Slovenia** emphasizes, in its Article 5, responsibility towards Slovene minorities, emigrants and migrant workers:

- In its own territory, the state shall protect human rights and fundamental freedoms. It shall protect and guarantee the rights of the autochthonous Italian and Hungarian national communities. **It shall maintain concern for autochthonous Slovene national minorities in neighbouring countries and for Slovene emigrants and workers abroad and shall foster their contacts with the homeland**. It shall provide for the preservation of the natural wealth and cultural heritage and create opportunities for the harmonious development of society and culture in Slovenia.

- **Slovenes not holding Slovene citizenship may enjoy special rights and privileges in Slovenia. The nature and extent of such rights and privileges shall be regulated by law.**

Different governmental and non-governmental institutions are responsible for the implementation of these provisions. The most important governmental bodies dealing also with Slovenes abroad are the Ministry of Foreign Affairs, the Ministry of Culture and the Ministry of Education, Science and Sport.
The **Ministry of Foreign Affairs** shall, according to the Foreign Affairs Act, maintain concern for to the interests of the Slovene minority in neighbouring countries and of Slovenes abroad, in association with other competent bodies and services. The **Office for Slovenes Abroad**, which is an independent office within the Ministry of Foreign Affairs, was established in accordance with the constitutional obligation to devote special attention to Slovenes abroad. The Office performs tasks relating to the situation of Slovene nationals abroad, their cultural, educational and economic links with their country of origin, and to providing information, counselling and assistance concerning legal protection. The main goals and activities of the Office are:

1. Preservation of the Slovene identity – priority is given to the Slovene language and culture. Slovenes abroad and their descendants are therefore offered the possibility of learning the Slovene language and culture.

2. Equal treatment of all Slovenes – the Office treats the Slovene community living outside their country of origin, both individuals and organisations, equally, regardless of their political views, their place of residence, or the reason for their departure from Slovenia. The basic right of Slovenes abroad is to remain different, their common characteristic being their links to Slovenia.

3. Co-operation between Slovenes abroad – the achievement of the above goals largely depends on the co-operation between Slovenes abroad and on their common action, both in the countries in which they live and in their relation to the Republic of Slovenia. Co-operation should be based on culture, with the common aim of preserving Slovene identity. It is particularly important that the younger generations become aware of the importance of this aim.

4. Co-operation between Slovenes abroad and their country of origin – the Republic of Slovenia provides various forms of possible cooperation with Slovenes abroad, and every individual or organisation abroad can decide how close their contacts with Slovenia will be.

In the area of co-operation with Slovenes beyond the borders of the Republic of Slovenia, the Office is also responsible for monitoring and coordinating the activities of the competent ministries of the Republic of Slovenia.

The responsibilities and activities of **the Ministry of Education, Science and Sport** also relate to the education of the Slovene minorities in Italy, Austria and Hungary, and to supplementary lessons in Slovene language and culture for Slovenes living abroad.

The Ministry of Culture, in the framework of its regular programs, shall concern itself with the cultural activities of Slovenes abroad, the preservation of the common cultural heritage, and of mutual exchange of achievements in this field.

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The **National Assembly of the Republic of Slovenia** has established a special working body for relations with Slovenes living abroad. The Rules of Procedure of the Assembly state that:

Cooperation by the National Assembly with Slovenian minorities, expatriates and emigrant workers

Article 326

In attending to the autochthonous Slovenian national minorities in neighbouring countries, Slovenian expatriates and emigrant workers, and while fostering their ties with their native country, the National Assembly and its standing committees shall, when deliberating on questions which relate to these issues, invite to their sessions representatives of organisations

of Slovenian national minorities, Slovenian expatriates and emigrant workers and individual members of these groups.

Before the National Assembly and its standing committees decide on these questions, they shall request in advance the opinions of organisations of Slovenian national minorities, expatriates and emigrant workers.

Article 327

Organisations of Slovenian national minorities in neighbouring countries and Slovenian expatriates and emigrant workers may forward to the National Assembly initiatives and proposals. The primary standing committee shall debate these initiatives and proposals and may propose to the National Assembly that it adopt an opinion or pass a corresponding act.

The National Assembly has adopted, according to its competences, two Resolutions which define basic policy of the Republic of Slovenia towards Slovenes living abroad:

- Resolution on the position of autochthonous Slovene minorities in neighbouring countries and the related tasks of state and other institutions in the Republic of Slovenia, adopted on 26 June 1996

- Resolution on the relations with Slovenes abroad, adopted on 23 January 2002.

Resolutions are not legally binding acts. According to its Rules of Procedure, the National Assembly use resolutions to evaluate the status of and debate questions from individual fields of civil life and to state its position with respect to policy in these fields.

BULGARIANS ABROAD AND THE LAW OF THE REPUBLIC OF BULGARIA

Mr Valery RADOLOV and Ms Rayna MANDJUKOVA
Experts, Bulgaria

Bulgarians abroad – how many are they? Where are they? What are the reasons for them to leave Bulgaria? What are they outside their natural environment? To what extent their specific national, cultural and historical characteristics reflect on Bulgarians and Bulgarian communities outside the borders of the modern Bulgaria?

These are the questions of existence for the Bulgarian nation as well as for any European nation or every nation with such a diaspora. But only when Bulgaria started to look for its own modern democratic way of development, did we face these questions with all their specifics, chaos, problems and truths kept in secret. Some of these problems are called forth by the fact that Bulgarians outside Bulgaria (they prefer to call themselves "Bulgarians outside Bulgaria" instead of the alienating "Bulgarians abroad") are a "meta-society", probably the most varied, non-homogenic one, as compared with other European nations.

About two million of today's "outer" Bulgarians have never left the Bulgarian ethnic minority area, simply because, since the end of the 19th century, Bulgarian territories were "absorbed" by the neighbours as a result of the ordinance by the Great Powers and historical

changes. A so-called "historical" emigration occurred as well – Bulgarians were looking for an asylum in neighbouring countries following crushed rebellions and wars between Russia and the Ottoman Empire. In fact, Bulgarians abroad have been descendants of and participants in many waves of economic and political emigration for the last few decades. Hundreds of thousands of young people have left Bulgaria since 1990, forming a particular group of emigrants. Another large groups of Bulgarians abroad are those who have become "Macedonians", "Slavic speaking Greeks", "Dobrudjanians", "Gagaouzians" and so on. Besides, Bulgarian non-homogeny not only has its own "multi-state", but also accounts for ethnographic and confessional differences (Catholics, Muslims), as well as various dialects ("Macedonian", "Pavlikenian") and linguistic differences (Turk-speaking Gagaouzians).

All these differences, along with many other details, offer clear evidence that the Bulgarian society abroad is probably one of the most varied in the world. This "outer" Bulgaria now boasts nearly four million people – a number which should not be ignored taking into consideration the alarming demographic tendencies in today's Bulgaria.

Bulgarians abroad have proved their significance for Bulgaria. However, following the Liberation of Bulgaria, in 1878, there has been no state strategy directed towards this part of the Bulgarian nation. For decades, this policy has come down to the question of national union of "San Stefano's Bulgaria", as divided by the Berlin Congress awards. Wars and national catastrophes only complicated the policy towards Bulgarians abroad and accentuated the problems of some Bulgarian communities located in a hostile state and political environment.

Bulgarian policy towards its "outer" communities was a key aspect of the Bulgarian nationalism before World War II, while the "class approach" was a main element in the state's policy right after it.

Bulgaria started to develop more complete initiatives, oriented to Bulgarian communities all over the world, only after beginning democratic changes. Although there is a clear understanding in society that Bulgarians abroad are an inseparable part of the Bulgarian nation, there is a serious delay in uniting all Bulgarians, especially compared with other countries with large communities abroad – Greece, Hungary, Poland and many others. It is impossible to overcome this delay with a single institution, public organization, party etc. The other countries' experience shows that there is no alternative to state-public initiatives, specialized foundations and concrete global and regional programmes. Since the beginning of democratic changes in Bulgaria, several non-governmental organizations and independent associations have been created in order to support Bulgarians abroad. Some of them – like the Union of Banat Bulgarians and "Western Outlying Districts" Union – very soon disappeared from the public stage. Other groups – like the Association of Bessarabian and Taurian Bulgarians ("Rodoliubetz") and the Association of Albanian Bulgarians ("Ognishte") – are still active and very popular among their communities. Moreover, two new non-governmental organizations have been recently established – the Confederation of "Bulgarians" (2001) and the "Bulgarians of the World" Association (2002).

One of the first, and of course logical, steps towards opening the state to Bulgarians abroad was to establish a governmental institution, which "will conduct the state's policy towards Bulgarians abroad". Therefore, decree no. 180/18.09.1992 of the Council of Ministers of the Republic of Bulgaria established the Agency for Bulgarians Abroad (ABA) and decree no. 250/10.12.1992 of the same Council adopted the regulations for the ABA. The above-

mentioned documents detail the main functions of the Agency for Bulgarians Abroad as follows:

- To establish and maintain relations with Bulgarians abroad and their communities;

- To organize, coordinate and finance studies of their problems;

- To support Bulgarians communities abroad and their cultural and educational centres;

- To prepare and to put forward projects for the Council of Ministers;

- To coordinate, support and control the Ministries' activities on problems of Bulgarians abroad.

Because of the financial crisis, as well as insufficient preparation of today's politicians, the policy of the Bulgarian State towards Bulgarians abroad does not correspond to Bulgarian society's expectations and attitudes in that respect.

The main policy of the Bulgarian State towards Bulgarians all over the world could be defined as protection, development and renaissance of Bulgarian intellectual culture and national identity among compatriots outside Bulgaria. It consists of protecting Bulgarian ethnic and cultural areas in the countries where there are compact Bulgarian community areas – a task that responds to both Bulgarian national interests and to international legal and cultural standards. Bulgarians all over the world are supposed to be incorporated in today's Bulgaria life and to further its democratic development. On 29 March 2000, the National Assembly of the Republic of Bulgaria passed the Law for Bulgarians outside the Republic of Bulgaria, which regulates significant issues on the status and rights of our compatriots abroad and their relationship with Bulgaria and Bulgarian legislation. The law contains five chapters:

1. "Common Standings",
2. "Rights of Bulgarians, residents of other countries",
3. "Settling in the country for Bulgarians outside Bulgaria",
4. "National Council on Bulgarians outside Bulgaria",
5. "Programs for Bulgarians outside Bulgaria".

First of all we would like to say that this law is in force "de jure" but not "de facto" because the regulations for its implementing the law have not yet been adopted. That is why the third, fourth and fifth chapters of the law do not work at all. The first chapter contains general conditions as any other law does so we would like to pay more attention to the second chapter, which generalizes cases when Bulgarians abroad can obtain certain benefits. This chapter has been created postfactum, i.e. the matter in it has already been implemented through a particular law or in the absence of any law (according to the principle "what is not forbidden is allowed"). Here are some examples for such a "forestall":

Chapter 6, section 2, regulates the possibility for our compatriots who are not Bulgarian citizens to obtain certain benefits while paying taxes. This section has actually been in force since 19 June 1994, when the ABA put forward a decree to the Council of Ministers for taxing Bulgarians from abroad for obtaining Bulgarian citizenship. The Ministry of Interior later changed taxes for all operations related to the settling in Bulgaria of Bulgarians with foreign citizenship.

Chapter 9 allows Bulgarians from abroad to study in Bulgaria as Bulgarian citizens. Hundreds of young people from Bessarabian Bulgarian communities have graduated from Bulgarian high schools and never been treated as foreigners, but it has never been regulated before the adoption of the above-mentioned law.

Chapter 10 allows Bulgarians from abroad to study in Bulgarian universities on special terms. This chapter has actually been in force since 1990, when 30 Bulgarian students from Ukraine and Moldova were admitted to Bulgarian universities. Later, the acceptance of applicants from abroad has been carried out on the basis of the Minister of Education's orders. In 1992, the Council of Ministers accepted the government's resolution no. 250, which regulated the education of Bulgarians from abroad in Bulgaria as of 31 May 1993. The Council of Ministers also adopted decree no. 103, regulating terms and conditions for education in Bulgaria and "carrying out the educational activities for Bulgarians from abroad".

The specificities in relationship between the Republic of Bulgaria and FYR Macedonia require special terms and conditions for Macedonian students in Bulgaria. Thus, the Council of Ministers adopted decree no. 228/1997 "for terms and conditions for applicants from Macedonia".

These are the main texts which are the basis for "implementing" the law. All of them have been created before the law itself and the educational activities among Bulgarians abroad constitute some of the few things which really work and give results.

The above-mentioned texts give a very rough idea on the state of the Bulgarian legislation as related to the problems of Bulgarians and their communities outside Bulgaria. There are some special clauses for "persons with Bulgarian origin" and "persons of Bulgarian nationality" in the Law for Bulgarian Citizenship and the Law on the sojourn of foreigners in Bulgaria, as well as in the regulation on their implementation. These two laws regulate benefits, in terms and conditions, for persons with foreign citizenship (or without citizenship), but with Bulgarian origin, who would like to obtain Bulgarian citizenship or permanently stay in Bulgaria.

ITALIANS LIVING OUTSIDE THE MOTHERLAND: HISTORICAL RIGHTS AND DEEP HOMESICKNESS

Mr Giovanni POGGESCHI
Researcher, European Academy of Bolzano, Italy

1. A double perspective: the regulation of autochthonous Italians living in neighbouring countries and the question of "immigrant" Italians and their descendants living abroad

This essay aims to cover two different issues, which can be linked a bit artificially: the first is the juridical situation of the Italian community in Slovenia and Croatia, where they constitute a national minority in the sense of the "Framework Convention for the protection of national

minorities"[1] (and, with all the cautions which are necessary, a short mention will be made of the Italian speaking group living traditionally in Switzerland[2] and also of the Corsicans[3]); the second is the question of Italians living abroad, and their descendants[4]. The spirit of the two different aspects of juridical protection is different, because the right to the preservation and development of the identity of the members of a national group traditionally inhabiting one land is stronger than the right of persons who have chosen (or had to emigrate to) a new country in which they live, and whose juridical system they are called to respect.

The term "national minority" is mainly related to central and eastern Europe. In Italy the term "linguistic minority" is used according to Article 6 of the Constitution of 1948, while, more recently, the law 482/1999 regulates the questions affecting "historical minorities"[5]. Both Article 6 of the Italian Constitution and Act 482/1999 regulate the issues of "old" minorities, who traditionally live in a certain territory[6]. The question of "new" minorities[7] has a different nature, which is fundamentally related to the questions of Italians living abroad (except Slovenia and Croatia). It must be remembered that in most cases those Italians living abroad and their descendants are perfectly integrated in the societies of reference, whereas such integration has usually not yet been achieved by new minorities in Europe[8].

For those recently settled communities, especially in the Anglo-Saxon vocabulary, the term "ethnic" is used, and also includes citizens who are fully integrated in the society in which they live (they have often the citizenship of the State they live in) even though they continue to maintain their original features (for instance, the afro-American and the Hispanic communities in USA). In Italy and in Germany the word "ethnic" is not popular, for the misuse of the idea which was made by Fascism and Nazism. In English, the adjective "ethnic" does not, as such, necessarily convey a negative meaning (an "ethnic restaurant", "ethnic music"); on the other hand, the word "race" sounds less politically correct[9].

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1 *See http://www.coe.int . For a comment on it, see Sergio Bartole, Convenzione quadro per le minoranze nazionali, in Sergio Bartole, Nino Olivetti Rason, Lucio Pegoraro (editors), La tutela giuridica delle minoranze, Padova, 1998.*

2 *For the linguistic question inside the recent Constitutional revision in Switzerland, see Susanna Mancini, Il regime linguistico e la tutela delle minoranze, in Antonio Reposo (editor), La revisione della Costituzione svizzera, Torino, 2000.*

3 *Corsican dialects belong to the Italian linguistic area: Carlo Tagliavini, L'origine delle lingue neolatine (sixth edition), Bologna, 1982, p. 395. Corsicans are Italians just from the linguistic point of view, in fact they do not consider themselves as Italians, nevertheless a certain Italian patriotism existed during the second world war: Giulio Vignoli, Gli italiani dimenticati. Minoranze italiane in Europa, Milano, 2000.*

4 *A book covering both issues is Giulio Vignoli, Gli italiani dimenticati, cit.*

5 *About this law (and about connected issued) see two important recent books: Valeria Piergigli, Lingue minoritarie e identità culturali, Milano, 2001; Elisabetta Palici di Suni Prat, Intorno alle minoranze (second edition), Torino, 2002.*

6 *There another question arises: how much time does a linguistic or national minority group have to live in a place to be considered "rooted"? Are the Italians of South Tyrol an "old" or a "new" minority? And what about the Albanians in Kosovo?*

7 *The question of "new minorities" in Italy is regulated by the Act no. 286 of 25th July 1998, "Testo Unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero", now modified by Act n. 189 of 30 July 2002, "Modifica alla normativa in materia di immigrazione e di asilo politico".*

8 *See Christian Joppke, Immigration and the Nation-State, Oxford, 1999.*

9 *Geoffrey Bindman, The right to Racial Equality, in Robert Blackburn (editor), Rights of Citizenship, London, 1993, p. 139; Werner Sollors (editor), The invention of Ethnicity, Oxford, 1989.*

Italians living in Slovenia and Croatia constitute an autochthonous community, while Italians living in other parts of the world have emigrated to find better conditions of life. Nevertheless the two phenomena may be linked, because in both cases the Italians are, nevertheless, numerically a minority, and also because both "emigrated" Italians and "autochthonous" Italians may enjoy a certain juridical protection. Another connection may be easily found in the revival of all features concerning the search for the cultural roots of a people. This has led most of the States to enact laws in favour of linguistic minorities living within their territory and, in another dimension, laws which grant rights to the nationals living abroad[10]. This last kind of protection has been recently forwarded in Italy through a series of norms: notably, the Constitutional Laws no. 1, of 17 January 2000, and no. 1, of 23 January 2001, both aiming to facilitate the electoral rights for Italians living abroad, and the following Acts no. 459, of 27 December 2001, and no. 104, of 27 May 2002.

2. The juridical protection of the Italians in Slovenia and Croatia

The dissolution of the Federation of Yugoslavia was not felt as a good event by the Italian minority living in its soil[11], because it was not clear at all if the new States of Slovenia and Croatia would have a positive attitude towards linguistic diversity, and, for a more practical reason, because the geographical continuity was going to be broken. An Istrian who had emigrated to Trieste needed to cross just one border to see his relatives and friends in Pula: from 1991 he had to cross two borders. Furthermore, the level of protection of the national minorities under the Constitution of 1974 was rather satisfactory, as all people and nationalities composing Yugoslavia were on an equal level. The Italian minority received the protection derived from the Treaty of Osimo of 1975[12], which followed the "Memorandum of Agreement among the Governments of Italy, United Kingdom, United States and Italy regarding the free territory of Trieste". The validity of this Treaty has been inherited, as far as the Italian minority is concerned, by the "Memorandum of Agreement among Croatia, Italy and Slovenia regarding the protection of the Italian minority in Croatia and Slovenia" of 15th January 1992[13].

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[10] *Hungary gives a good example of protecting his co-nationals outside the Hungarian State, with the "Act on Hungarians living abroad" of 2001: but this law has received some criticisms first because, officially, it has not been discussed with the States where the Hungarian minority lives, like Romania, Slovakia, Ukraine, Austria, Croatia, Slovenia and Yugoslavia. The real concern is that this law could interfere with the sphere of sovereignty of those States. It is not only a question of symbolic jealousy and fear of nourishing a certain envy of secession and/or the reunion with the Motherland: what is questioned here is the effective equality of citizens inside those States: if, for instance, a certain kind of Hungarian citizenship is given to Hungarians living in the above mentioned States, when Hungary is a member State of the European Union those persons with this "certificate of magiarity" will enjoy some rights that the other citizens will not able to enjoy. It is not questioned the right to have some right linked to ethnic affiliation, but we should not underestimate the possible consequence of provoking too distant juridical status among persons sharing the same nationality. Among the few controversial provisions of the "Act on Hungarians living abroad" is the risk of "labelling" one person according to his ancestry. In fact Articles 19, 20 and 21 regulate the « Certificate of Hungarian Nationality », condition to get the benefits provided by this law.*

[11] *The number of Italians is around 5.000 in Slovenia and 25.000 in Croatia.*

[12] *Manlio Udina, Gli accordi di Osimo. Lineamenti introduttivi e testi annotati, Trieste, 1979.*

[13] *Giuseppe de Vergottini, La rinegoziazione del Trattato di Osimo, in Rivista di studi internazionali, no.1, 1993, pp. 77-91.*

The first consequences for the Italian minority had not really been too reassuring: Croatia particularly had chosen a kind of ethno-democracy, which was a clear reaction to the former (presumed) universalism of Yugoslavian socialism[14]. Slovenia's path to democracy seemed to be surer, also because of the good economic situation that helped the conflicts not to explode. But there was a certain tension with Italy, the reasons for which were dangerously used as a tool for internal electoral reasons, and didn't help to solve the situation of the Italian minority in Slovenia, such as the problem of the restitution of the properties and the goods which were owned by members of the Italian minority, which, after the exile of around 300.000 people, had been confiscated by Yugoslavia[15].

After ten years, it can be said that the situation, even if improvable, is rather satisfying for the Italian community both in Slovenia and in Croatia, at least from the point of view of the legislation[16]. To implement this legislation, much has yet to be done[17].

2.1 Slovenia

The Constitution of Slovenia contains several provisions regarding national minorities. The bases are the first phrase of Article 5, which states that "Within its own territory, Slovenia shall protect human rights and fundamental freedoms. It shall uphold and guarantee the right of the autochthonous Italian and Hungarian ethnic communities"[18], and Article 7, devoted to "Language", according to which "The official language of Slovenia shall be Slovenian. In those areas where autochthonous Italian or Hungarian ethnic communities reside, the official language shall also be Italian or Hungarian" A long and detailed Constitutional norm, Article 64, regulates the rights of the Italian and Hungarian national minorities[19].

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[14] *The literature about the dissolution of former Yugoslavia is huge: here I quote Sonia Lucarelli, Europe and the Breakup of Yugoslavia, The Hague, 2000; Stefano Bianchini and Paul Shoup (editors), The Yugoslav war, Europe and the Balkans: how to achieve security? Ravenna, 1995; a juridical analysis on the systems of the new States which are the product of the dissolution of the former Federation is Pavle Nikolic, I sistemi costituzionali dei nuovi Stati dell'ex-Jugoslavia, Torino, 2002; an analysis of the minority protection in the States of former Yugoslavia is Joseph Marko, Der Minderheitenschutz in den jugoslawischen Nachfolgestaaten, Bonn, 1996.*

[15] *The question became an obstacle for the candidature of Slovenia to the European Union: the same obstacle has recently showed up regarding the goods of the German speaking (Austrian) community*

[16] *A very useful book is Maurizio Tremul, La Comunità Nazionale in Croazia e Slovenia, Bolzano, 1995.*

[17] *It is necessary to keep in mind that the question of the protection of Italians living in Slovenia and Croatia, and on the other hand, of Slovenes living in Italy, is a highly emotional one, because it brings back the bad memories of the "foibe" (common graves), in which many opponents to the communist regime were killed, and of the exile of 300.000 Italians of Istria and Dalmatia all over the world. A history of this period is Fulvio Molinari, Istria contesa. La Guerra, le foibe, l'esodo, Milano, 1996.*

[18] *Article 5 continues with the prescription of the protection of Slovenians living outside and of the Slovene natural and cultural heritage: "It shall attend to the welfare of the Slovenian minorities in neighbouring countries and of Slovenian emigrants and migrant workers abroad and shall promote their contacts with their homeland. It shall assist the preservation of the natural and cultural heritage of Slovenia in harmony with the creation of opportunities for the development of civilized society and cultural life in Slovenia. Section two prescribes that "Slovenians not holding Slovenian citizenship shall enjoy special rights and privileges in Slovenia. The nature and extent of those rights and privileges shall be determined by statute".*

[19] *Article 64 is devoted to the "Special Rights of the Italian and Hungarian Ethnic Communities in Slovenia". Here is the full text:*

(1) The autochthonous Italian and Hungarian ethnic communities and their members shall be guaranteed the right to freely use their national symbols and, in order to preserve their national identity, the right to establish organizations, to foster economic, cultural, scientific and research activities, as well as activities

The most original feature of Slovenian legislation (which Croatia has followed) with regard to protecting national minorities is the right of the Hungarian and Italian national minority, irrespective of the numbers of the members of these two groups, to have a guaranteed seat in the National Assembly. According to Article 8 of the National Assembly Election Act of 1992 [20], "Members of the Italian and Hungarian national communities who have the voting right shall have the right to vote and to be elected as deputies of these national communities". Only the members belonging to the National Community have the right to vote, and the electoral list must be prepared by the respective self-governing Ethnic Communities.

The legislation, which assures a guaranteed seat for both the Italian and the Hungarian communities, is regarded as a good example of assuring a high level of protection of the (important) linguistic minorities. These two national groups enjoy more rights than the other groups, which are mainly the ones corresponding to the nationalities of former great Yugoslavia, because their rootedness in the Country is recognized. The other minorities are protected through other Articles and the principle of non discrimination (and sometimes through bilateral agreements), but the affirmative actions concern practically only the two rooted national minorities, the Italian and the Hungarian[21].

Some other important norms assuring the protection of the Italian minority can be quoted: the Law on Self-governing Ethnic Communities of 1994[22], the Law on Implementation of Special Rights for Members of the Italian and Hungarian National Minorities in the Field of

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associated with the mass media and publishing. Those two ethnic communities and their members shall have, consistent with statute, the right to education and schooling in their own languages, as well as the right to plan and develop their own curriculArticle The State shall determine by statute those geographical areas in which bilingual education shall be compulsory. The Italian and Hungarian ethnic communities and their members shall enjoy the right to foster contacts with the wider Italian and Hungarian communities living outside Slovenia, and with Italy and Hungary respectively. Slovenia shall give financial support and encouragement to the implementation of these rights.

(2) In those areas where the Italian and Hungarian ethnic communities live, their members shall be entitled to establish autonomous organizations in order to give effect to their rights. At the request of the Italian and Hungarian ethnic communities, the State may authorize their respective autonomous organizations to carry out specific functions which are presently within the jurisdiction of the State, and the State shall ensure the provision of the Means for those functions to be effected.

(3) The Italian and Hungarian ethnic communities shall be directly represented at the local level and shall also be represented in the National Assembly.

(4) The status of the Italian and the Hungarian ethnic communities and the manner in which their rights may be exercised in those areas where the two ethnic communities live, shall be determined by statute. In addition, the obligations of the local self-governing communities which represent the two ethnic communities to promote the exercise of their rights, together with the rights of the members of the two ethnic communities living outside their autonomous areas, shall be determined by statute. The rights of both ethnic communities and of their members shall be guaranteed without regard for the numerical strength of either community.

(5) Statues, regulations and other legislative enactments which exclusively affect the exercise of specific rights enjoyed by the Italian or Hungarian ethnic communities under this Constitution, or affecting the status of these communities, may not be enacted without the consent of the representatives of the ethnic community or communities affected.

[20] *See: http://www.riga.lv/minelres/NationalLegislation/Slovenia/Slovenia_ElecParl_excerpts_English.htm*

[21] *The Constitutional Court of Slovenia confirmed the validity of the provisions regarding the Hungarian community (and indirectly also the Italian one) in a Sentence enacted the 22 of October 1998.*

[22] *See: http://www.riga.lv/minelres/NationalLegislation/Slovenia/Slovenia_EthnicCommun_English.htm*

Education of 1982[23], which has been partially revised by the new "Package (Code) on Education", enacted the 25th April 2001, that regulates the functioning of the Italian schools, and also of the majority schools regarding the learning of Italian. In fact students in Slovenian schools have to learn the Italian language, and students in Italian schools must learn the Slovenian language. Education is certainly the most important area in which minority protection is provided, since it is the condition for having bilingual citizens in other spheres. In Slovenia and in Croatia bilingual education seems assured. It is important to underline that the Italian schools can be attended also by members of the majority[24].

As in Croatia, the statutes of the three municipalities where the Italian community traditionally lives (Capodistria/Koper, Pirano/Piran, Isola/Izola) contain provisions assuring the rights prescribed by the Constitutions and by the ordinary laws.

2.2 Croatia

The Constitution of Croatia of 1990, which stresses in a very emphatic way the identity of the Croatian nation after the regaining of its sovereignty[25] following the breakdown of the Yugoslav Federation, devotes Article 12 to the languages issue:

1. The Croatian language and the Latin script are in official use in the Republic of Croatia.

2. In individual local units, another language and the Cyrillic or some other script may, along with the Croatian language and the Latin script, be introduced into official use under conditions specified by law.

The legislation of the former Socialist Republic of Croatia assured a hypothetical higher degree of linguistic minority protection, according to the Law on the public administration, whose Article 85 allowed the Government to adopt legislative provisions and regulations assuring the equal use of the minority language along with the Croatian language.

It is clear that the best and guaranteeing Constitutional provision may remain void if it is not followed by a strong and effective legislation, regulation and practice. To give a worldwide example of satisfactory protection of linguistic diversity (realised mainly through a strong sub-national self-government), Spain has not only binding constitutional and legislative provisions, but also effective and detailed regulations for the implementation of official

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[23] *See* http://www.riga.lv/minelres/NationalLegislation/Slovenia/Slovenia_MinorEduc excerptsEnglish.htm

[24] *This is very rarely the case in South Tyrol, where education in German is almost only for the members of the respective group. An analysis of the education system in South Tyrol is Günther Rautz, Il sistema scolastico, in Joseph Marko, Sergio Ortino, Francesco Palermo (editors), L'ordinamento speciale della Provincia autonoma di Bolzano, Padova, 2001, pp. 746-760 (an edition in German language is foreseen for the end of 2002)*

[25] *I am referring especially to the text of the preamble of the Constitution, which contains an exhaustive list of all the historical events that have shaped the Croatian national identity. This rhetoric is unavoidable in a Constitution which means to mark the distance from the former Yugoslavian State. What is important to remark here is that this emphasis on the Croatian identity does not create the best framework for the protection of the linguistic and ethnic minorities inside the boundaries of the new State.*

double linguistic use[26] (not to forget the social and historical pre-conditions which facilitate this task).

Now Croatia has a quite strong core of linguistic minority protection, on the path of being effectively implemented, after almost ten years of an authoritarian and ethnic oriented regime which did not respect the provision of Article 12 of the Constitution.

Along with Article 12 of the Constitution, the "Constitutional Law on Human Rights and Freedoms and on the Right of Ethnic and National Communities and Minorities in the Republic of Croatia" of 1991 is the starting point of minority protection. This law, suspended in the most important provisions in 1991, was almost entirely restored in May 2000[27]. Article 7 of this Law prescribes, in section 1, that persons belonging to all ethnic, national and minority communities living in the Republic of Croatia may freely use their language and script in private as well as in public life. Section 2 of the same article states that in the municipalities where persons belonging to the ethnic, national or minority community are majority of the inhabitants, their language and script will also be official.

Also during the year 2000, not surprisingly after the electoral defeat of the Tudjman regime, which had not created a good environment for the spreading of the rights of the minorities, two other important laws on national minorities have been enacted: the "Law on the use of languages and script of national minorities in the Republic of Croatia" (11 May 2000) and the "Law on education in the language and script of national minorities" (16 May 2001).

The first law prescribes the same criteria of the majority within a municipality which was set in the Constitutional Law of 1991 and revised in 2000 (as mentioned above) to trigger the entire mechanism of the linguistic protection.

The condition of the majority is not the only one: there is also the condition of the international agreements to which the Republic of Croatia is a party: this criteria applies to the Italian minority in Croatia, which is also protected through the "Agreement memorandum on the protection of the Italian minority in Croatia and Slovenia" of 1992 and the "Agreement between the Republic of Croatia and the Republic of Italy on the rights of minorities" of 1997.

For the protection of the Italian minority in Croatia, this condition of the international agreements is crucial, since Italians do not attain the threshold of 50% in all municipalities. This condition has been conceived with the Serbian minority in mind, which has highly emotional implications[28]. Anyway, it must be recognized that, once the difficult conditions to

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[26] *See Giovanni Poggeschi, Le nazioni linguistiche della Spagna autonómica, Padova, 2002, which contains a wide bibliography on the subject; a deep analysis, especially centered on the Catalan language process of "normalization", is Antoni Milian i Massana, Público y privado en la normalización lingüística. Cuatro estudios sobre derechos lingüísticos, Madrid, 2000.*

[27] *See: http://www.riga.lv/minelres/NationalLegislation/Croatia/Croatia_MinRights2000 English.htm*

[28] *Nevertheless the condition of the 50% seems very restrictive. In comparative Law a threshold is often prescribed, but in most of the cases it is lower. For instance, the Italian Law on Historical Minorities, no. 482/1999, in its Article 3, prescribes a complex procedure in order to achieve minority protection: the decision is adopted by the Provincial Council, after having "heard" the concerned Municipalities, at the request of at least 15% of the citizens who have the right to vote and who are residents of these Municipalities, or at the request of one third of the Counsellors of the same Municipalities. Article 2 of the Slovak "Law on the Use of Minority Languages" prescribes that a minimum of 20% of a given municipality belong to a national minority*

achieve the minority protection are fulfilled, the level of minority protection expressed by many Articles of this Law is rather good[29].

Regarding the second Law, it is interesting to refer to one provision (Article 9) which also foresees the possibility for members of a national minority to learn the language of another national minority. This is very important for the Italian schools in Croatia, which are actually very popular among the members of the majority linguistic group (this fact assures a higher vitality of the language than the scarce number of members of the linguistic group could show).

Much of the real functioning of the Law will be left to the decisions of the single educational institutes: for instance, which sanctions will be applied if schools do not fulfill their duty?

Italy assures a high percentage of financing for the Italian schools in Croatia: this help is supported, from the juridical point of view, by the Law no. 129 of 23 April which ratifies and ensures execution to the Treaty between Croatia and Italy on the rights on minorities (signed in Zagreb on 5 November 1996). A domestic Law, which provides support for the Italian community both in Slovenia and Croatia, is Law no. 73 of 21 March 2001 regarding "Interventions in favour of the Italian minority in Slovenia and in Croatia".

Political representation of national minorities in Croatia is assured: they have right to five seats in the Sabor, the Parliament of Zagreb.

The Statute of Istria (*Istarska Zupanija/Regione Istriana*) is an important sub-national juridical tool which assures a strong self-government and also a good minority protection [30]. It is not surprising that, of all the regions, only Istria had controversies, because it reflects a multiethnic society with a special story, a "distinct society", to use the vocabulary of the Canadian doctrine and jurisprudence[31] (and above all, that of Québec, which uses it to claim the recognition of its right to stronger self-government, if not to secession[32]).

Thirteen provisions were suspended and referred to the Constitutional Court after their first adoption in 2001, but a political agreement solved the situation and made the Constitutional Court not to decide on the issue. The definitive version of the statute therefore reflects the

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in order to benefit from the right to use their minority language –in addition to the official language of all the State (the exclusive use of the minority language is forbidden, according to Article 1 of the same law) - in official contacts within the municipality. The recent "Law on Protection of Rights and Freedoms of National Minorities" (27 February 2002), at its Article 11, states that "a local self-government unit shall equally introduce the official use of the language and script of a national minority where the percentage of the persons belonging to national minorities in comparison to the total number of population on its territory reaches 15% in accordance with the result of the last census".

[29] *This is also, fundamentally, the conclusion adopted by the Venice Commission, at its 43 Plenary Meeting (Venice, 16 June 2000), on the basis of the Report prepared by Franz Matscher, Hanna Suchocka and Pieter Van Dijk:*
http://www.venice.coe.int/site/interface/english.htm

[30] *The most successful experiences of minority protection (South Tyrol, Catalonia, Åland Islands) normally correspond to experiences of strong regional autonomy.*

[31] *The literature on Canadian federalism is huge: in Italian language a relevant book is Silvio Gambino - Carlo Amirante (editors), Il Canada. Un laboratorio costituzionale. Federalismo, Diritti, Corti, Padova, 2000.*

[32] *See Jacques-Yvan Morin – José Woehrling, Demain, le Québec. Choix politiques et constitutionnels d'un pays en devenir, Sillery (Québec), 1994.*

changes that were adopted at the political level in October 2001. The degree of protection of the Italian minority has diminished a little with this second version: some comparisons between the two different redactions will help to acquire a better understanding.

Originally, Article 6 prescribed that in "the Istrian region the Croatian language and the Italian language have equal status ("*sono paritetiche*" in Italian). The conditions to implement bilinguism are established by this statute and by other provisions". The actual provision now in force only states that "in the Istrian region the Croatian language and the Italian language have equal status in the activity of the regional institutions in the exercise of their self-government jurisdictions. The condition of implementing bilinguism is fostered by this statute and by other provisions. The autochthonous, ethnic and cultural features of Istria are protected according to what is regulated by this statute and by other provisions".

The regional belonging is object of Article 23, which prescribes that "the Istrian region protects istrianity ("*istrianità*" in Italian) as expression of the regional belonging of its multiethnic composition". The former redaction contained the verbal form "recognizes" instead of "protects".

The most relevant provisions about the status of the Italian language in Istria is Article 26: "In part or in the whole territory of the municipalities and towns of the Istrian region, in which the members belonging to the Italian national community live, the Croatian language and the Italian language have equal status, according to what is regulated by the respective statutes".

If the former redaction of the Istrian statute conceded official bilingual status to Croatian and Italian in all the territory of the *Istarska Zupanija*, the actual statute in force gives this linguistic status just to some areas, in which the Italian group lives. Istria is thus not a bilingual region as a whole, but just in some parts of it.

A doubt about the real effectiveness of the Istrian region statute lies in the slow path for the effectiveness of the self-government of the Regions (*Zupanije*) of Croatia. Those "Units of local self-government" (Articles 129 and 130 of the Constitution of the Republic of Croatia) are organized in their responsibilities by their statutes in conformity with the law. A new law on the "Units of self-government" was enacted in 1999, and after that there is also a Second Chamber of the Parliament, which represents the *Zupanije*, the *Zupanski Dom*. But the central State may still exercise its powers (also through a Governor) and break the law of the regions. So much of the quality of the self-government of Istria is left to the political will of the central State, which will decide how far the autonomy of the regions can go[33]. In Istria the regional multiethnic feeling is shown by the presence of the" *Istarski demokratski sabor/Dieta democratica istriana*", a party which is very strong in the region, and whose activities and official documents are bilingual[34].

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[33] *The other regions have not adopted their statute. This shows that the regional feeling in Croatia is popular just in Istria (and in the disputed region of Eastern Slavonia, which has a high number of Serbian inhabitants).*

[34] *The IDS was part of the central government before the crisis of the statute. It had two Ministers, Ivan Jakovcic (president of IDS), Minister of European Integration, and Rajko Ostojic, Minister of Tourism. Since the retreat from the government, IDS has become a "constructive opposition" party, backing many government proposals while not a formal member of the coalition: see Constitution Watch of Croatia, in East European Constitutional Review, no. 4, 2001, pp. 12-13.*

It is also interesting to see the statutes of the municipalities where Italians live: they contain a quite high and demanding variety of provisions connected with the minority, which may seem a bit astonishing if we compare those town Statutes with others. This shows how deep the relation between the presence of the minority and the demand and the existence of a strong autonomy are often linked.

To quote some demanding linguistic provisions of an Istrian town[35], Pula (Pola in Italian), its statute of 29 March 1994 states (Article 24) that "during the session of the City Council the equal (joint) use of the Italian and Croatian languages is guaranteed". Article 98 foresees the freedom to use the Italian language for the members of the community, and Article 100 assures the possibility of education in Italian. The statutes of the other bilingual towns have, more or less, the same provisions assuring a high level of protection for the Italian community.

Indeed, a threat to the Italian linguistic community comes, more than from a certain nationalist tendency of some members of the majority, from the very low birth rate. More than 50% of the Italian population is over fifty years old, and this datum does not allow optimism. On the contrary, the health of the Italian language is excellent, because many members of the majority attend the Italian schools, for economic, cultural and career reasons, which show the high degree of prestige of the language.

A very interesting and original solution which both the Slovenian and the Croatian systems provide is the ascription to the Italian community (as also to the Hungarian ethnic group in Slovenia) of juridical personality. This status is granted to the "Italian National Community" ("Comunità nazionale italiana[36]), which represents the Italian national minority in all the matters in which the community has to deal with the central State in relation to issues interesting it. This concession of the juridical personality is an original solution, which is normally unknown in western democracies, in which the fear of allowing this kind of official representation is explained by the general reluctance of admitting the existence of minority or national associations tightly linked to a certain territory; so tightly that persons who do not belong to the minority or national group (or who do not feel like belonging to it[37]) could be easily discriminated[38]. Another reason lies in the fear of secession by those territories: the attribution of juridical personality to associations representing the minority or the national group could lead to a demand for self-determination.

3. The question of Corsica and Switzerland

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35 *Or: 21 articles of the town statute provide for the rights of the Italian minorities.*

36 *See http://www.cipo.hr*

37 *Article 3 of the "Framework Convention for the Protection of National Minorities" of the Council of Europe states that "Every person belonging to a national minorities shall have the right freely to choose to be treated or not to be treated as such and no disadvantage shall result from this choice or from the exercise of the rights, which are connected to that choice". This Article has recently been the parameter to judge and criticize, by the Advisory Committee of the quoted Framework Convention, some of the provisions regarding the "ethnic census" in South Tyrol: for a comment of this controversial technique, linked to the "proportional quota system" in South Tyrol, see Giovanni Poggeschi, Il censimento e la dichiarazione di appartenenza linguistica, in Joseph Marko, Sergio Ortino, Francesco Palermo (editors), L'ordinamento speciale della Provincia autonoma di Bolzano, cit., pp. 653-681.*

38 *See Alessandro Pizzorusso, Minoranze e maggioranze, Torino, 1993, pp. 125-126.*

From the linguistic point of view Corsica belongs to the Italian area [39]; that is the reason why a short mention about the situation of this island, politically French since 1769, must be made.

A new statute for Corsica has recently been adopted, after having been "cleaned" of some doubtful provisions by the *Conseil Constitutionnel* with a sentence delivered the 17 January 2002 [40]. One of those provisions, which was declared in conformity with the Constitution, was about the possibility, but not the obligation, to learn the Corsican language in public school[41].

The case of the Italian speaking population living in Switzerland must be mentioned, along with the consideration that those Swiss citizens do not feel Italians from the institutional point of view, but just from the cultural one. This attitude is easily understandable in a multi-national country like Switzerland. The linguistic protection of the Italian language is limited to the Canton of Ticino, where it is the only official language, and, to a lesser extent, to the Italian areas of the Grigioni Canton. Many Italians, coming from Italy, live in other areas of the Confederation, but the principle of territoriality does not allow them to enjoy the same linguistic rights that the Italian Swiss of Ticino and Grigioni can enjoy[42].

4. The juridical situation of Italians living abroad and their descendants

The core of the legislation regarding Italians abroad are the new Constitution provisions which allows the existence of some MPs elected among Italians living abroad.

According to the new redaction of Articles 48, 56 and 57 of the Constitution, modified by the Constitutional laws of 17 January 2000, no. 1, and of 23 January 2001, no. 1, twelve deputies and six senators are issued from the electoral circumscriptions of Italians living abroad. This relevant change in the Constitution is the outcome of a debate which was particularly intense in the last twenty years. The most active partisan for the vote of Italians living abroad has been Mirko Tremaglia, an ex member during his youth of the Republic of Salò, who then devoted his political life within democracy struggling for the rights of Italians in the world, and who is now Minister for Italians in the world (the new "*Ministero per gli italiani nel mondo*").

But the Constitutional provisions couldn't provide for an immediate effectiveness of the electoral rights[43]. The norm which follows the above mentioned Constitutional provisions is Act no. 459 of 27 December 2001, "Provisions for the exercise of the electoral right of Italian

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[39] *See supra, note 3.*

[40] *See Costantino Murgia, Prime osservazioni sul progetto di legge dell'Assemblea nazionale francese di modifica dell'ordinamento regionale della Corsica, in Diritto pubblico comparato ed europeo, no. 3, 2001, pp. 1152-1161; about the sentence of the Conseil Constitutionnel, see Giovanni Poggeschi, Le nazioni linguistiche della Spagna autonómica, cit., p. 37.*

[41] *See André Viola, Le Conseil constitutionnel et la langue corse, in Revue française de droit administratif, no. 3, 2002, pp. 474-478.*

[42] *For an analysis of the linguistic rights in Switzerland, see supra, note 2, and Giorgio Malinverni, La protection des minorités en Suisse, in Nicolas Levrat (editor), Minorités et organisation de l'État, Bruxelles, 1998; Alfred Cattani und Alfred A. Häsler (editirs), Minderheiten in der Schweiz, Zürich, 1984.*

[43] *For a critical comment on those provisions, see Fulco Lanchester, L'innovazione costituzionale dilatoria e il voto degli italiani all'estero, in Quaderni costituzionali, no. 1,2000, pp. 123-124.*

citizens living abroad", which contains all the details for getting advantage of this fundamental political right. The provisions of this Act must be linked with the ones deriving from Act no. 91 of 5 February 1992, "New norms on Citizenship". According to Article 4 of this Act, the foreigner or stateless person whose father or mother or a direct ancestor were born as Italian citizens, may obtain the Italian citizenship if he/she: *a)* makes his/her military service for the Italian State; *b)* is a civil servant for the Italian State, also abroad; *c)* once in legal age, is legally resident in Italy since at least two years, and declares, within one year from reaching the legal age, that he/she wants to obtain the Italian citizenship.

Despite of those strict conditions, it is rather easy for children or grandchildren of an Italian citizen to obtain Italian citizenship, even if they don't reside in Italy. Nowadays, the Italian consulates in Argentina are receiving a lot of requests for the Italian citizenship, because many people seek an opportunity in Europe in order to escape to the crisis in Argentina.

Also some regions have enacted laws in order to support the descendants of Italians coming from the same region. Among those laws, I quote the law of the Region Veneto, no. 25, of 18 April 1995, "Regional interventions for Venetians (*Veneti*) in the world", which fosters the relations with Venetians who have emigrated outside Italy, in order to maintain the relations with them and also to help them economically[44]. For instance, this law, and the similar laws of other regions, has been the juridical ground to grant financial aids to Italians living in Argentina during the economical crisis of this Country. This help may include plans for the return of some of those Italians who live abroad, especially in Argentina and Chile.

This financial support for compatriots living hard times is a very noble and useful help, much more understandable, from my point of view, than the concession of electoral rights to those Italians living abroad. Is it admissible that some MPs elected from Italians living abroad among them, who often know Italy just through the (certainly outdated!) memories of their grandparents, who barely say few words of the dialect of the village their ancestors left, share important decisions of the Italian Parliament, like about our education system (which they do not attend!)?

I am not questioning the right of those Italians who are abroad presumably just for a (even long, but determined) period of their life and who maintain an uninterrupted link with Italy and its territory, not just with an "idea" of Italy. I also find reasonable and fair that somebody who has Italian origin may obtain the citizenship, but I am wondering about the logics of the electoral rights of somebody who does not know Italy and who also votes in the State he/she lives. It is true that the assured seats in the Italian Parliament for Italians living abroad are fully justified from the Constitutional point of view: in fact the voters of those MPs have the Italian citizenship, and so they can enjoy the same political rights of Italians who reside in Italy. But the right to vote in one country should be more linked to the condition of residence in it.

The possibility to have identical political rights in two different countries seems unfair, especially with relation to the citizens of Italy who spend all their life and energies within the country and also with relation to the foreign citizens who live in Italy and who give a great contribution to its economy and society through their work, who would deserve at least to

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[44] *See http://www.adnkronos.com/news/prod/italia/main.htm*

vote for the local elections[45]. A solution would be giving a special kind of status to Italian living abroad, lower than the full citizenship, or, at least, a citizenship detached from the right to vote. Of course there would be then the risk of "labelling", like we have observed about the Hungarian Law on Hungarians in neighbouring countries.

I do not mean to underestimate all the spiritual (and material) treasure carried by Italians living abroad and their descendants, the activity carried by associations which assure deep human relations among persons sharing meaningful common experiences. Here I am only questioning the political and electoral rights of Italians living abroad, not the norms and the measures aiming to support them, economically and morally. The Italian State and its Regions have the right and the duty to provide this support, which corresponds to a kind of "compensatory right[46]" to those persons deserving it. But it would be dangerous to let all Italians who live abroad vote for Rome Parliament! Today few (maybe three) millions people have this right, but if all the descendants of Italians would claim for the Italian citizenship, Italy would have more electors living abroad than in Italy! I insist on the opportunity to create different status of Italians: only the ones who permanently live in it, or who are just temporarily outside the Country should have the right to appoint MPs in Rome. The others could, for instance, vote for elected members of a consultative body (a kind of an "outside Chamber", "*Camera esterna*") representing Italians living abroad.

At the end of this essay, in order to link the two different questions which have been tackled, I conclude remarking that both kind of provisions, the ones on autochthones Italians living in neighbouring countries and the others on Italians living in the rest of the world, correspond to the need of giving value to what is local, real, which has deep roots[47]. Also the new citizenship rights, with the obvious diversities of all the different countries, are marked by this conception, which stresses on the ethnic and cultural features[48]. This tendency will presumably increase the weight of sub-national Constitutions, which are the most adequate tools for regulating matters relating to local cultures, hopefully with an open and integrating attitude. Those values of "*italianità*" should also be seen as a way to open Italy to other cultures, not as a way to stress only some cultural and, much worse, ethnic values. They should serve as another tool for strengthening democracy and fostering the links with the countries which have hosted Italian immigrants in hard times.

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[45] *For a general analysis on this question, see Will Kymlicka and Wayne Norman, Citizenship in diverse societies, Oxford, 2000. For the question of possible electoral rights for foreigners in Italy, see Guido Franchi Scarselli, Sulla partecipazione degli stranieri alla vita pubblica, in Quaderni costituzionali, no. 3, 2000, pp. 649-651.*

[46] *"Compensatory rights" are a feature of "affirmative actions": see Michael Rosenfeld, Affirmative Action and Justice. A Philosophical and Constitutional Inquiry, New Haven-London, 1991.*

[47] *In this sense see Sergio Ortino, La tutela delle minoranze nel diritto internazionale: evoluzione o mutamento di prospettiva?, in AA.VV., Studi in onore di Leopoldo Elia, volume 2, Milano, 1999.*

[48] *See Neil Mac Cormick, Questioning Sovereignty. Law, State and practical Reason, Oxford, 1999, p. 169.*

LA PROTECTION DES MINORITES NATIONALES PAR LEUR ETAT-PARENT - CONCLUSIONS -

M. Giorgio MALINVERNI
Professeur à l'Université de Genève
Membre de la Commission de Venise

1. Nous avons débattu, pendant deux jours, d'un problème d'une extrême importance, qui est celui de la mesure dans laquelle un Etat peut veiller aux intérêts de sa "diaspora" à l'étranger dans ses rapports avec sa "mère-patrie".

S'il peut sembler normal que le "kin-State" s'intéresse au sort de ses propres minorités à l'étranger, le problème est relativement nouveau en droit. Il n'a pris une consistance juridique que ces dernières années et pose au juriste des problèmes inédits.

La preuve que ces problèmes sont nouveaux et n'ont pas reçu de réponses définitives aux questions juridiques qu'ils soulèvent, est fournie par le fait que les Nations Unies ne s'en sont guère occupées jusqu'ici: ni les "treaty bodies" qui s'occupent de la mise en œuvre des traités de sauvegarde des droits de l'homme, ni le groupe de travail sur les minorités de la Sous-Commission de la promotion et de la protection des droits de l'homme, ni le Haut-Commissariat aux droits de l'homme. Comme dans d'autres domaines des droits de l'homme et du droit des minorités, c'est au niveau régional européen que le problème semble devoir être résolu en premier lieu. C'est, ici aussi, l'Europe qui sert de laboratoire.

2. Les problèmes dont nous avons discuté durant ce colloque, comme d'ailleurs la plupart de ceux qui sont liés au droit des minorités en général, proviennent de l'absence de coïncidence entre les Etats et les nations.

La protection des minorités nationales à l'étranger implique un rapport triangulaire entre deux Etats, l'Etat d'origine (l'Etat-parent, « kin-State ») et l'Etat de résidence des personnes protégées, et une nation. Les personnes appartenant à la même souche ethnique vivent en effet le plus souvent de part et d'autre de la frontière qui sépare deux Etats.

On a parlé à ce propos, pour désigner cette même souche, de "homoghenis"[1], mais on a vu en même temps les difficultés que l'on rencontre lorsque l'on s'efforce d'identifier et de qualifier au moyen de critères sûrs les groupes qui appartiennent à la même souche: la langue et la religion peuvent être de tels critères, mais ils ne le sont pas toujours.

3. S'agissant des techniques juridiques de protection des minorités à l'étranger, le principe de base doit demeurer celui que la responsabilité première en ce domaine incombe à l'Etat de résidence. C'est le sens et la portée de toutes les règles de droit international assurant une protection des minorités, aussi bien de l'Article 27 du Pacte international relatif aux droits civils et politiques que de la Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales. La philosophie de base de tous ces textes est bien celle de

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[1] *Voir le rapport de Miltos Pavlou, supra, page 195.*

la protection par l'Etat de résidence. Les autres moyens revêtent donc, en droit international, un caractère subsidiaire.

Parmi ces moyens subsidiaires, on rencontre d'abord les traités bilatéraux. L'on constate à ce propos que ces traités ont servi, il n'y a pas encore si longtemps, à résoudre le problème des minorités par des échanges forcés de populations, donc par l'élimination du problème minoritaire. De tels traités seraient considérés aujourd'hui comme contraires à une règle de *jus cogens*, l'interdiction des traitements inhumains. Une expulsion forcée peut en effet sans conteste être considérée comme revêtant un tel caractère.

On peut mesurer à cet égard les progrès accomplis par le droit international en l'espace de quelques décennies.

Si le "nettoyage ethnique" - car les échanges de populations représentaient incontestablement une telle opération - n'a pas disparu, du moins ne s'effectue-t-il plus avec la bénédiction du droit international et de la communauté internationale, comme cela a été le cas avec les accords conclus avant la deuxième guerre mondiale.

L'avantage des solutions bilatérales réside dans le fait que s'ils présentent des caractéristiques communes, les problèmes des minorités sont malgré tout toujours spécifiques, reflétant des particularités locales, et demandent donc à être réglés par la voie bilatérale. Cette voie est d'ailleurs encouragée et préconisée par des traités multilatéraux comme la Convention-cadre, qui demande expressément à être concrétisée par le biais d'accords bilatéraux (Article 18).

S'inscrivant souvent dans le cadre d'accords sur les relations amicales entre les Etats, les clauses relatives à la protection des minorités sont de nature à renforcer ces relations. Ensuite, elles peuvent utilement réduire le risque de sécession et renforcent donc la stabilité et la paix. Sur le plan de la technique juridique enfin, les accords bilatéraux peuvent présenter l'avantage de rendre obligatoires des règles de "*soft law*", comme par exemple la recommandation 1201 du Conseil de l'Europe.

Contrairement aux accords bilatéraux, l'autre technique utilisée, celle des lois internes à effet extraterritorial, soulève des problèmes juridiques beaucoup plus complexes et ne peut être utilisée que dans le respect des principes du droit international que sont celui de la souveraineté territoriale des Etats et celui des relations amicales entre les Etats. Ces lois internes peuvent en effet, selon leur contenu, constituer une ingérence dans les affaires intérieures d'un Etat[2].

4. Que ce soit par la voie d'accords bilatéraux ou par celle de lois, les avantages accordés aux minorités, ou leur traitement préférentiel, touchent deux séries de domaines.

D'abord, celui de la culture, au sens large. C'est bien par là, par la culture, qu'un groupe minoritaire se distingue de la majorité de la population de l'Etat de résidence et qu'il se rapproche de l'Etat-parent.

Les avantages consentis dans ce domaine sont pour cette raison généralement tolérés et ne semblent pas soulever de problèmes particuliers. La globalisation de la société contemporaine

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[2] *Voir à ce propos l'Aricle. 21 de la Convention-cadre pour la protection des minorités nationales.*

a eu pour effet de redonner plus d'importance aux particularismes locaux et il est essentiel que les sociétés étatiques deviennent des sociétés multiculturelles.

Les mesures prises par l'Etat-parent dans les domaines autres que ceux de la culture semblent en revanche être plus problématiques, sous l'angle du principe de non-discrimination fondée sur l'origine ethnique, dès lors que ces avantages concernent des domaines tels que les assurances sociales, le travail, les soins médicaux ou les transports.

5. L'on a également insisté - et avec raison - pendant ces deux jours de débats, sur les devoirs des minorités, et non seulement sur leurs droits. Les rapports privilégiés que l'Etat-parent noue avec sa minorité dans un Etat-tiers ne sauraient bien entendu dispenser les personnes appartenant à cette minorité de leur devoir de loyauté envers l'Etat de résidence. En effet, en dépit des liens que ces personnes entretiennent, sur le plan psychologique, avec l'Etat-parent, elles restent et demeurent citoyennes de l'Etat de résidence.

6. On l'a dit et répété: le point faible du système de protection des minorités par le "kin-State", notamment par la voie d'accords bilatéraux, réside dans le mécanisme de contrôle du respect de ces accords. La solution idéale consisterait à invoquer leur violation devant les tribunaux internes, mais il faut pour cela que leurs dispositions soient incorporées dans l'ordre juridique national et qu'elles soient directement applicables, ce qui n'est pas toujours le cas.

Ce qui existe actuellement, ce sont des commissions intergouvernementales, qui ne sont toutefois pas investies d'un pouvoir juridictionnel, et ne peuvent le plus souvent faire que des recommandations.

On peut se poser la question de savoir si le Comité consultatif de la Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales ne pourrait pas jouer un rôle dans ce domaine, en exigeant par exemple des Etats qu'ils indiquent dans leurs rapports comment ils s'acquittent des obligations qui découlent pour eux des accords bilatéraux. On pourrait également encourager les Etats à saisir, le cas échéant, la Cour de conciliation et d'arbitrage.

7. On l'a relevé, le système de la protection des minorités par l'Etat-parent présente un certain nombre de faiblesses.

D'abord, ce système ne permet pas de protéger les minorités qui ne peuvent se réclamer d'aucun Etat-parent, comme les Roms ou les Sami. Il est donc générateur de discriminations au sein même des minorités qui vivent dans l'Etat de résidence. Cette constatation montre bien que les solutions bilatérales doivent demeurer subsidiaires par rapport à la protection des minorités par l'Etat de résidence, accompagnée d'un contrôle au niveau international.

Ensuite, le système de la protection des minorités par l'Etat-parent lui permet d'opérer des discriminations entre ses propres minorités pour des raisons de politique étrangère. On l'a vu avec la pratique de la Grèce, qui n'adopte pas la même politique vis-à-vis des personnes de souche grecque en provenance de l'ex-Union soviétique et de celles provenant d'Albanie ou de Turquie.

La protection des minorités par le "kin-State" peut également être perçue comme un moyen, pour cet Etat, de se protéger contre un afflux de "réfugiés", constitués de personnes

appartenant à sa minorité ethnique. On a vu, au cours des débats, que certains Etats préfèrent accorder des avantages et un traitement préférentiel à leurs minorités nationales à l'étranger plutôt que de leur accorder leur nationalité.

Enfin, à long terme, la protection des minorités par le "kin-State" peut se heurter au principe de non-discrimination. On l'a relevé à propos de la garantie de ce principe dans le cadre de l'Union européenne, mais sans oublier que ce même principe est désormais garanti par toutes les Constitutions nationales. Au nom du principe de non-discrimination, les minorités autres que celles de l'Etat-parent pourront en effet demander à être traitées de la même manière qu'elles par l'Etat de résidence.

Tout comme le droit du commerce international connaît "la clause de la nation la plus favorisée", "la clause de la minorité la plus favorisée" risque bien, un jour, de faire son entrée dans le droit des minorités. Or il est clair que si le traitement préférentiel est étendu à toutes les minorités, il finira par perdre toute sa substance.

DOMESTIC LEGISLATION CONCERNING THE PROTECTION OF KIN-MINORITIES

LEGISLATION INTERNE CONCERNANT LA PROTECTION DES MINORITES DE SOUCHE EXOCENTREE

AUSTRIA

Federal Law of 25 January 1979 on the equation of South Tyroleans with Austrian citizens in certain administrative areas (BGBl. no. 57/1979)

§ 1.
(1) This federal law applies to persons of German or Ladin language affiliation who were born in the province Bolzano having declared themselves being part of the German or Ladin

language group at the latest census in the province Bolzano and who do not have Austrian citizenship.

(2) This federal law also applies to persons who fulfil the conditions stipulated in paragraph 1 who were not born in the province Bolzano but declared themselves as part of the German or Ladin language group at a census in the province Bolzano and have or had at least one parent of German or Ladin mother tongue.

(3) The conditions set out in paragraphs 1 and 2 have to be shown satisfactorily.

§ 2 (constitutional provision) Persons according to §1 can be appointed as extraordinary university professors and university assistants.

§ 3 (constitutional provision) §21 (3) of the Law on the Organisation of Universities, BGBl. no. 258/1975, is not opposed to the nomination of persons according to §1 as representatives in collegiate bodies.

§ 4
(1) The European Convention on the Equivalence of A-level certificates BGBl. No. 44/1957 and § 7 (6), second sentence, of the General Law on University Studies, BGBl. no. 177/1966 are not to applied to persons according to §1.

(2) Persons according to §1 have the right to take the exam to become a teacher.

(3) Persons according to §1 are held equal to Austrian citizens in respect of university fees according to the Law on University Fees, BGBl. no. 76/1972, in its current version.

(4) Persons according to §1 are held equal to Austrian citizens as university students in the field of application of the Law on the University Students' Representation, BGBl no. 309/1973. They also have the active and passive right to vote at the elections to the University Students' Representation.

§ 5 Persons according to §1 do not need a visa for their stay in the federal territory according to the provisions of the Law on Passports, BGBl. no. 422/1969.

§ 6 The execution of this federal law is entrusted to:

1. the Federal Minister for Science and Research in cooperation with the Federal Minister of the Interior as concerns §2 taken together with §1

2. the Federal Minister for Science and Research as concerns §3 and §4 taken together with §1.

3. the Federal Minister of the Interior as concerns §5 taken together with §1

BULGARIA

LAW ON BULGARIANS LIVING OUTSIDE THE REPUBLIC OF BULGARIA
(Rev OJ No. 30 of 11 April 2001)

Title 1
GENERAL PROVISIONS

Article 1

This Law regulates the relationship of the Bulgarian State with Bulgarians living outside the Republic of Bulgaria.

Article 2

For the purposes of this law, a Bulgarian living outside the Republic of Bulgaria means a person who :

1. has at least one antecedent of Bulgarian origin;

2. feels a sense of being Bulgarian;

3. lives temporarily or permanently in another State.

Article 3

(1) Bulgarian origin is evidenced by a document issued by :

1. Bulgarian or foreign state authorities;

2. Organisations of Bulgarians living outside the Republic of Bulgarian recognised by the competent Bulgarian State authority responsible for maintaining relations with them;

3. The Bulgarian Orthodox Church.

(2) Bulgarian origin may also be evidenced by application under the normal rules.

Article 4

(1) The Bulgarian State shall assist in establishing favourable conditions for the free development of Bulgarians living outside the Republic of Bulgaria, in conformity with the principles of international law and the legislation of the State concerned with the objective of protecting and supporting their rights and legal interests.

(2) The Bulgarian State shall support organisations of Bulgarians living outside the Republic of Bulgaria, whose activity is aimed at the preservation and development of the Bulgarian language, culture and religious tradition.

Article 5

(1) Bulgarians living outside the borders of the Republic of Bulgaria shall enjoy the right of protection of the Bulgarian State which, in conformity with the principles of international law, shall protect such rights and legal interests.

(2) The Council of Ministers shall entrust to the appropriate ministers and heads of government departments the task of implementing national policy concerning Bulgarian living outside the Republic of Bulgaria, and determining arrangements for its implementation and mechanisms for co-ordinating those activities.

(3) In the diplomatic missions of the Republic of Bulgaria in countries where there are Bulgarian communities or Bulgarian national minorities, consultative bodies of Bulgarians living in the State concerned may be established, consisting of representatives, elected from the persons described in Article 2.

Title 2
RIGHTS OF BULGARIANS LIVING OUTSIDE THE REPUBLIC OF BULGARIA

Article 6

(1) The Bulgarian State shall facilitate the exercise by Bulgarians living outside the Republic of Bulgaria, irrespective of their citizenship, of the right to contact the appropriate competent institutions and organisations.

(2) In the case of periods of stay in the national territory, Bulgarians living outside the Republic of Bulgaria, who are not Bulgarian citizens, shall enjoy exemption from payment of national fees connected with rgularisation of their residence or settlement in the Republic of Bulgaria, under conditions and rule determined by the Council of Ministers.

Article 7

Bulgarians living outside the Republic of Bulgaria who are not Bulgarian citizens, may exercise the right to work while living in the country on receipt of a permit under less stringent rules laid down in regulations to be established by law.

Article 8

(1) Bulgarians living outside the Republic of Bulgaria, who do not possess Bulgarian citizenship, may engage in business activities in the Republic of Bulgaria, investment and participation in financing of privatisation, have their right to own property restored and acquire property by inheritance, in accordance with current legislation, under the same conditions and rules as apply to Bulgarian citizenss, except for land.

(2) Whenever a law or international agreement, to which the Republic of Bulgaria is aparty, provides for most favoured nation status for the conduct of business activities and investment, most favoured nation conditions apply.

Article 9

Bulgarians living outside the Republic of Bulgaria, shall have the right to free primary and secondary education in State and public schools in the Republic of Bulgaria under the same conditions and rules as Bulgarian citizens.

Article 10

(1) Bulgarians living outside the Republic of Bulgaria shall have the right to higher education in state higher education institutions in the Republic of Bulgaria under the conditions applicable to Bulgarian citizens.

(2) The Council of Ministers shall fix the annual fee to be paid by students and candidates for doctorates under paragraph 1 for higher education and specialist institutions, as well as the applicable rules for their admission.

(3) Bulgarians living outside the Republic of Bulgaria who cannot afford to pay the cost of their education may apply for assistance under the programme of higher education financed from the State budget, or other sources.

Article 11

(1) Bulgarians living outside the Republic of Bulgaria shall receive assistance from Bulgarian institutes and organisations in the form of teachers, study aids, material resources or other suppport for teaching the Bulgarian language, study of Bulgarian literature, history, geography and other disciplines in accordance with the rules of international alw, local legislation and bilateral agreements and treaties.

(2) The Bulgarian State shall establish conditions for enhancing the qualifications of teachers of Bulgarian as a foreign language and, where necessary, missions by Bulgarian teachers.

(3) Exports of text books and teaching aids referred to in paragraph 1 shall be exempt from customs, customs duties and taxes and they shall be exported through the relevant state institutions.

Article 12

Bulgarians living outside the Republic of Bulgaria shall be granted the opprotunity to lern about the many centuries of Bulgarian culture and science and to share in its development, according to their wishes and interests, for the purposes of which the Republic of Bulgaria shall, through the relevant institutions :

1. publish printed works, containing technical information and other material concering Bulgaria's life, culture and other spheres of its development;

2. organise expert meetings and activities in the areas concerned;

3. promote and support the establishment and implementation of measures to popularise and develop Bulgarian culture and science in the countries concerned;

4. organise cultural, scientific and other exhibitions in the countries concderned or the Republic of Bulgaria, including participation in international organisations and prominent representation in science, arts, cultural and sport;

5. afford, where possible, assistance and equipment for organisations of Bulgarian communities or Bulgarian minorities abroad to provide cultural education, science and other suchlike activities.

Article 13

(1) The Bulgarian State shall support the preservation and expression of the Eastern Orthodox creed as the traditional religious affiliation of Bulgarians and as a factor in the safeguarding of the Bulgarian national identity, for which purpose, jointly with the Bulgarian Orthodox church, it shall support activities among Bulgarians living outside the Republic of Bulgaria, contact religious communities outside the country and support their activities abroad, for the purpose of strengthening natinal and spiritual values.

(2) In conjunction with the States in which Bulgarians live, as well as with the religious institutions concerned in those countries, the Republic of Bulgaria shall assist in establishing religious rights of our compatriots.

Article 14

(1) State bodies, local organs of self-government and local authorities which discover heirs to legacies in the Republic of Bulgaria, who are Bulgarians living outside the Republic of Bulgaria, shall inform them through the appropriate Bulgarian diplomatic and consular missions.

(2) Bulgarians living outside the Republic of Bulgaria, on issue of documents related to registration of their citizenship, shall pay fees at the rate applicable to Bulgarian citizens.

Title 3
SETTLEMENT IN BULGARIA OF BULGARIANS LIVING OUTSIDE THE REPUBLIC OF BULGARIA

Article 15

(1) Bulgarians living outside the Republic of Bulgaria who wish to settle in the Republic of Bulgaria shall be issued with a permanent residence permit in accordance with the established conditions and rules.

(2) State bodies, local organs of self-government and local authorities shall assist persons referred to in paragraph 1 and provide them with material and other help with their arrangements under conditions and rules determined by the Council of Ministers.

Article 16

(1) The Bulgarian State shall establish conditions for needy Bulgarians settling in its territory for the provision of entitlement to free use of land from the State or public land fund for the first three years following the date of their settlement.

(2) The Council of Ministers shall determine the conditions and rules under which the persons referred to in paragraph 1 may obtain credit for the purchase of real estate, housing and stock on preferential terms.

Title 4
NATIONAL COUNCIL FOR BULGARIANS LIVING OUTSIDE BULGARIA

Article 17

(1) The National Council for Bulgarians living outside the Republic of Bulgaria is a state-public body with organisational, co-ordinating and representative functions, administered in accordance with the national interest and the interests of Bulgarians living outside the Republic of Bulgaria.

(2) The National Council shall assist in implementing a uniform state policy for Bulgarians living outside the Republic of Bulgaria, taking into account the Constitution, traditions, national interests and international rules and standards; co-ordination of the activities of public and private Bulgarian institutions relating to Bulgarians living outside the Republic of Bulgaria, and provision of assistance to them and their organisations.l

(3) The National Council shall assist in representing the interests of Bulgarians and Bulgarian communities living outside the Republic of Bulgaria to the Bulgarian Government.

(4) The National Council shall :

1. organise and agree with other state agencies and civil organisations studies on the situation and problemes of Bulgarian communities outside the Republic of Bulgaria and preparation of analyses, forecast and work programmes concerning them;

2. agree, support and consult concerning the activities of ministries, other departments, autonomous local agencies and local authorities on the practical implementation of State policy of Bulgarians living outside the Republic of Bulgaria;

3. support Bulgarians living outside the Republic of Bulgaria, their organisations and cultural-educational resoucres, such as helping them with information material and other matters;

4. in collaboration with Bulgarian patriotic organisations, organise evenets in the spirit of state policy in relation to Bulgarians living outside the Republic of Bulgaria;

5. organise publication and dissemination of activities;

6. prepare through the ministry concerned and members of the National Council draft legislation relating to its functions for review by the Council of Ministers;

7. participate in international activities on issues of national minorities, languages and religious communities, including preparation of international agreements to which the Republic of Bulgaria will become a party;

8. establish and organise communications networks in the service of relations with Bulgarians living outside the Republic of Bulgaria.

(5) The National Council shall prepare an annual report on its activities to the National Assembly.

Article 18

(1) The National Council for Bulgarians living outside the Republic of Bulgaria shall have separate legal personality with a budget from the Government and headquarters in Sofia.

(2) The resources in paragraph 1 shall be fixed annually by law within the State budget of the Republic of Bulgaria.

(3) The National Council shall adopt its own internal rules of procedure and methods of work.

Article 19

(1) The National Council for Bulgarians living outside the Republic of Bulgaria shall consist of nine members.

(2) The National Assembly shall select for a period of five years the President of the National Council and six of its members, five of whom shall be selected from among Bulgarians living outside the Republic of Bulgaria.

(3) The nominations referred to in paragraph 2 shall be made by the President of the National Assembly, who shall take account of the views of Bulgarian communities abroad.

(4) The President of the Republic shall appoint one of the members of the National Council.

(5) The Council of Ministers shall nominate one of the ministers as a member of the National Council.

Article 20

(1) The term of the President of the National Council or a member shall be terminated early in the event of :

1. submission of resignation to the President of the National Assembly;

2. permanent impossibility of participating in the work of the National Council;

3. conviction for a wilful offence;

4. death.

(2) In the cases referred to in paragraphs 1,2 and 3 the term of office is terminated by decision of the National Assembly.

Article 21

The activities of the National Council for Bulgarians living outside the Republic of Bulgaria shall be supported by a secretariat, functioning under the conditions andrules laid down by the law on the administration.

Article 22

(1) The National Council shall exercise its functions in close co-operation with the central and local government bodies responsible for implementing State policy relating to Bulgarians living outside the Republic of Bulgaria, with agencies that established to implement it and shall participate in the co-ordination of such activities.

(2) The National Council shall gather information relating to the activities of the bodies referred to in paragraph 1 in implementing this law.

Title 5
PROGRAMMES FOR BULGARIANS LIVING OUTSIDE THE REPUBLIC OF BULGARIA

Article 23

Support for Bulgarians living outside the Republic of Bulgaria and their organisations shall be provided through government and private programmes.

Article 24

(1) Government programmes shall be prepared by the relevant ministries, endorsed by the National Council and approved by the Council of Ministers.

(2) The programmes referred to in paragraph 1 shall be financed from the state budget following prior examination fo the purposes of the resources.

(3) Programmes may be for any period from one to five years for the purpose of establishing favourable conditions for Bulgarians living outside the Republic of Bulgaria in the spheres of science, culture, education and health. The programme may include measures related to the preservation of foreign assets that form part of the Bulgarian capital and historical heritage.

(4) Programmes shall be implemented through projects approved by the relevant ministry on a competetive basis. Projects shall be financed by the relevant ministry from the resources allocated for the programme concerned.

(5) The conditions and rules for participation in any programme shall be determined by the ministry concerned jointly with the National Council.

Article 25

(1) The National Council shall support the preparation and approval of private programmes for Bulgarians living outside the Republic of Bulgaria.

(2) Private programmes shall be financed through the National Council by private individuals and the resources of the National Council received as donations, legacies, subsidies or other.

(3) The programmes referred to in paragraph 1 shall be implemented through projects approved by the National Council on a competitive basis, jointly with the parties concerned, from the resources allocated to finance the programme concerned.

(4) The conditions and ruls for participation in any of the programmes shall be determined by the National Council.

Article 26

(1) The extra-budgetary resources of the National Council may not be used for purposes other than those set out in Article 25.

(2) The National Council may, subject ot the will of the donor, support foundations or funds with resources and assets received as donations, legacies and subsidies.

(3) The purposes of the foundations and funds referred to in paragraph 2 shall be participation in the financing of private programmes for Bulgarians living outside the Republic of Bulgaria, and control of the implementation of projects approved and financed under these programmes.

Article 27

(1) The Council of Ministers, under its powers, shall propose to the National Assembly tax, customs and other fiscal relief for persons who finance private programmes for Bulgarians living outside the Republic of Bulgaria, related to the level of financing, as well as persons implementing programmes through projects approved under Article 24, paragraph 4 and Article 25, paragraph 3.

(2) Proposals for the exercise of the powers of the Council of Ministers under paragraph 1 may be submitted by the National Council, ministries and government departments engaged in implementing state policy relating to Bulgarians living outside the Republic of Bulgaria.

Transitional and final provisions

§1.(1) The members of the National Council nominated from Bulgarians living outside the Republic of Bulgaria for tis first term shall be decided by lot.

(2) On the expiry of a period of three years from the formation of the National Council under paragraph 1, three of the members shall be renewed under the rules in Article 19, paragraphs 2 qnd 3.

(3) On the renewal of the National Council, and in drawing up nominations for that purpose, the proportion of representatives of various Bulgarian communities shall be respected.

§2. The Council of Ministers shall enact regulations pursuant to this law, regulating the relationships between the Republic of Bulgaria and Bulgarians living outside the Republic of Bulgaria.

§3. The Council of Ministers shall adopt rules for the application of this law.

§4. The Council of Ministers is responsible for the implementation of the law.

The law was adopted at the 38th session of the National Assembly on 29 March 2000 and published in the Official Journal of the National Assembly.

LAW FOR THE BULGARIAN CITIZENSHIP

Prom. SG 136 1998; Amend. and suppl. SG 41 2001;

Chapter I. GENERAL PROVISIONS

Article 1.

This law determines the conditions and the order of acquiring, losing and restoration of Bulgarian citizenship.

Article 2.

The Bulgarian citizenship is settled by the Constitution of the Republic of Bulgaria, by the law and by international agreements, in force for occurrence of the facts or events related to the citizenship.

Article 3.

Bulgarian citizen who is also citizen of another state shall be considered only Bulgarian citizen when applying the Bulgarian legislation, unless a law provides otherwise.

Article 4.

Citizenship cannot be established by court order.

Article 5.

The conclusion or dissolution of the marriage between Bulgarian citizen and a foreign citizen or the change of the citizenship of one of the spouses during the marriage shall not change by right the citizenship of the other spouse.

Article 6.

The adoption shall not change the citizenship of the adopted.

Article 7.

(1) Nobody can be deprived of Bulgarian citizenship except in the cases explicitly stipulated by this law.

(2) Everybody shall have the right to choose his citizenship.

Chapter II. ACQUIRING BULGARIAN CITIZENSHIP

Section I. Acquiring Bulgarian citizenship by origin

Article 8.

Bulgarian citizen by origin is everybody of whom at least one of the parents is Bulgarian citizen.

Article 9.

Bulgarian citizen by origin is also every person who is fathered by a Bulgarian citizen or whose origin from a Bulgarian citizen is established by court decision.

Section II. Acquiring Bulgarian citizenship by place of birth

Article 10.

Bulgarian citizen by a place of birth is every person born on the territory of the Republic of Bulgaria if he does not acquire another citizenship by origin.

Article 11.

Considered born on the territory of the Republic of Bulgaria is a child found on this territory, whose parents are unknown.

Section III. Acquiring Bulgarian citizenship by naturalisation

Article 12.

A person who is not a Bulgarian citizen can acquire Bulgarian citizenship if by the date of filing the application for naturalisation:

1. he has become of age;

2. before no less than 5 years has been given permit for permanent stay in the Republic of Bulgaria;

3. has not been convicted for premeditated crime of general nature by a Bulgarian court and against him criminal prosecution has not been instituted for such crime, unless rehabilitated;

4. (amend, SG 41/01) has income or occupation which enables his support in the Republic of Bulgaria;

5. (amend., SG 41/01) has control of the Bulgarian language which shall be established by an order determined by the Minister of education and science and

6. (New, SG 41/01) who is released from his present citizenship or will be released from it by the moment of acquiring Bulgarian citizenship.

Article 13.

(Amend. and suppl., SG 41/01) A person who is not Bulgarian citizen, meets the requirements of Article 12, item 1, 3, 4, 5 and 6 and, for no less than 3 years by the date of filing the application for naturalisation has obtained permit for permanent stay in the Republic of Bulgaria, can acquire Bulgarian citizenship if he meets one of the following requirements:

1. he has and maintains legally concluded marriage with Bulgarian citizen for a period no less than 3 years;

2. (revoked, SG 41/01)

3. was born in the Republic of Bulgaria;

4. the permit for permanent stay was given before coming of age;

5. (revoked, SG 41/01)

Article 13a.

(New, SG 41/01) A person who has obtained a refugee status not later than three years by the date of filing the application for naturalisation can acquire Bulgarian citizenship if he meets the requirements of Article 12, item 1, 3, 4 and 5.

Article 14.

(Amend., SG 41/01) Person without citizenship can acquire Bulgarian citizenship if he meets the requirements of Article 12, item 1, 3, 4 and 5 and not later than 3 years by the date of filing the application for naturalisation has had a permit for permanent stay in the Republic of Bulgaria.

Article 15.

(Amend., SG 41/01) Person who is not Bulgarian citizen can acquire Bulgarian citizenship by naturalisation, without the presence of the conditions under Article 12, item 2, 4, 5 and 6 if he meets one of the following requirements:

1. to be of Bulgarian origin;

2. (Suppl., SG 41/01) to be adopted by a Bulgarian citizen under the conditions of full adoption;

3. (New, SG 41/01) one of his parent is Bulgarian citizen or deceased as a Bulgarian citizen.

Article 16.

Person who is not a Bulgarian citizen can acquire Bulgarian citizenship without the presence of the conditions under Article 12 if the Republic of Bulgaria has an interest in his naturalisation or if the person has special contributions to the Republic of Bulgaria in the public and economic sphere, in the sphere of science, technology, culture and sport.

Article 17.

The children under 14 years of age shall acquire Bulgarian citizenship if their parents, or living parent, accept Bulgarian citizenship or if only one of the parents does it if the other parent is Bulgarian citizen. Under the same conditions the children from 14 to 18 years of age shall acquire Bulgarian citizenship if they so wish.

Article 18.

(1) Children under 14 years of age, of whom only one of the parents is Bulgarian citizen, if they do not have Bulgarian citizenship, can become Bulgarian citizens without the presence of the conditions under Article 12 if the two parents or the living parent give written consent for this. Consent by a parent who has lost his parental rights shall not be required. Acquired under the same conditions can be Bulgarian citizenship by the children from 14 to 18 years of age if they so wish.

2) (Suppl., SG 41/01) Under the conditions of para 1 persons who are adopted by Bulgarian citizens under the conditions of full adoption can acquire Bulgarian citizenship.

Article 19.

The application of a person who meets the requirements for acquiring Bulgarian citizenship by naturalisation shall be rejected if, in view of his behaviour, there are serious reasons to believe that the applicant is a threat to the public peace, the public ethics, the public health or the national security.

Chapter III. LOSING BULGARIAN CITIZENSHIP

Section I. Release from Bulgarian citizenship

Article 20.

Bulgarian citizen who permanently resides abroad can request release from Bulgarian citizenship if he has acquired foreign citizenship or there is information about opened procedure for acquisition of foreign citizenship.

Article 21.

(1) The release of the parents from Bulgarian citizenship also releases from Bulgarian citizenship their children under 14 years of age only if the request is also made for them. For release of the children from 14 to 18 years of age their consent shall also be required.

(2) If only one of the parents has applied for release from Bulgarian citizenship the children can be released under the conditions of para 1 only if the other parent has given his consent. The consent of the parent shall not be required if he has been deprived of parental rights.

Section II. Revoking the naturalisation

Article 22.

(1) Naturalisation on whose grounds Bulgarian citizenship has been acquired can be revoked if the person:
1. has used data or facts having become grounds for acquiring Bulgarian citizenship for which, by court order, it has been established that are false and/or

2. has concealed data or facts which, should they have been known, would have been grounds for refusal of acquiring Bulgarian citizenship.

(2) The revoking of the naturalisation shall be admissible only by the expiration of 10 years from acquiring Bulgarian citizenship.

Article 23.

The revoking of the naturalisation of one of the spouses shall not revoke the naturalisation of the other spouse and of the children, unless they have acquired Bulgarian citizenship on the grounds of the same false or concealed data or facts.

Section III. Deprivation of Bulgarian citizenship

Article 24.

Person who has acquired Bulgarian citizenship by naturalisation can be deprived of it if he is convicted by enacted sentence for severe crime against the republic, on condition that he is abroad and does not remain without citizenship.

Article 25.

The deprivation of citizenship of one of the spouses shall not change the citizenship of the other spouse and of the children.

Chapter IV. RESTORATION OF BULGARIAN CITIZENSHIP

Article 26.

(1) The citizenship of a person released from Bulgarian citizenship can be restored at his request if:

1. he has not been convicted by enacted sentence for premeditated crime in the country where he lives or in the Republic of Bulgaria and

2. he does not represent a threat to the public peace, the public ethics, the public health or the national security.
3. (New, SG 41/01) before no less than 3 years by the date of filing application for restoration has a permit for permanent residing in the Republic of Bulgaria.

(2) (Amend., SG 41/01) The citizenship of a person of Bulgarian origin, can be restored under the conditions of para 1, item 1 and 2.

Article 27.

The citizenship of a person deprived of Bulgarian citizenship can be restored if it is established that there were no grounds for deprivation or if the grounds have losr their importance.

Article 28.

(1) For restoration of the Bulgarian citizenship of the parents Bulgarian citizens shall also become their children who have not accomplished 14 years of age. The children from 14 to 18 years of age shall become Bulgarian citizens if they also requested it.

(2) When the restoration is requested only by one of the parents the children can acquire Bulgarian citizenship under the conditions of para 1 only if the other parent has given his consent. The consent of the parent shall not be required if he has been deprived of parental rights.

Chapter V. PROCEEDINGS RELATED TO THE BULGARIAN CITIZENSHIP

Article 29.

(1) Acquiring Bulgarian citizenship by naturalisation, release from Bulgarian citizenship and restoration of Bulgarian citizenship shall be carried out against application of the interested person, personally filed, by mail or by explicitly authorised person by notary certification. The applications filed by mail or by a proxy must have a notary certification.

(2) Application for minors shall be filed by their parents or guardians and for those underage it shall be signed by the parents or by the guardians. Consent of a parent shall not be required if he is deprived of parental rights.

Article 30.

Proposal for acquisition of Bulgarian citizenship under Article 16 shall be made by the minister in charge of the respective sphere in which the Republic of Bulgaria has an interest in the naturalisation of the person or in which he has special contributions. The person who will acquire Bulgarian citizenship must have given preliminary consent for it.

Article 31.

(1) Proposal for revoking the naturalisation or for deprivation of Bulgarian citizenship shall be made by the chief prosecutor.

(2) In the presence of the conditions under Article 22 or 24 the Minister of Justice can himself make a proposal for revoking the naturalisation or for deprivation of Bulgarian citizenship.

Article 32.

(1) The application and the proposals under Article 29, 30 and Article 31, para 1 shall be extended to the Minister of Justice.

(2) When the applicant lives abroad the application can be filed through the diplomatic or consular representation of the Republic of Bulgaria which shall give obligatory motivated opinion.

(3) The application and the documents attached to it must be written in Bulgarian language.

Article 33.

(1) (Amend., SG 41/01) Established at the Ministry of justice shall be Citizenship Council which shall consist of chairman - deputy minister of justice and members - one representative each of the Ministry of Justice, the Ministry of interior, the Ministry of foreign affairs, the Ministry of regional development and public works, the Ministry of labour and social policy, the Ministry of health and of the State Agency for the Bulgarians abroad and the Agency for the refugees.

(2) Representative of the President of the Republic can attend the meetings of the Citizenship Council.
(3) The Citizenship Council shall give opinion on the applications and proposals related to the Bulgarian citizenship.

(4) The Minister of Justice shall determine the list of members of the Citizenship Council at the proposal of the heads of the respective administrative bodies under para 1 and shall issue regulations for its activity.

Article 34.

The Minister of Justice shall, on the grounds of the opinion of the Citizenship Council, extend proposal to the President of the Republic of Bulgaria for issuance of edict or refusal to issue edict for acquisition, restoration, release or deprivation of Bulgarian citizenship, as well as for revoking naturalisation.

Article 35.

The Minister of Justice shall extend proposal for the issuance of the edict under Article 34 within:

1. three months - for the applications by persons of Bulgarian origin for acquiring Bulgarian citizenship by naturalisation or for restoration of Bulgarian citizenship;

2. three months - for proposals for acquiring Bulgarian citizenship under Article 16, as well as for revoking naturalisation or for deprivation of Bulgarian citizenship;

3. six months - for the applications for release from Bulgarian citizenship or for restoration of Bulgarian citizenship;

4. twelve months - for the applications for acquiring Bulgarian citizenship by naturalisation.

Article 36.

The acquisition of Bulgarian citizenship by naturalisation, the restoration of Bulgarian citizenship, the release and deprivation of Bulgarian citizenship and the revoking of the naturalisation shall be carried out by an edict of the President of the Republic of Bulgaria. The edict shall come into force on the day of its issuance.

Article 37.

(1) For changes of the citizenship of the persons the Ministry of Justice shall issue certificates.

(2) Upon receipt of the edict under Article 36 the Ministry of Justice shall inform:

1. the municipalities or mayoralties of the permanent address of the person - for entering the changes of the citizenship in the registers for the civil status of the population;

2. The Ministry of interior and the Ministry of foreign affairs - for issuance or withdrawal of Bulgarian identification documents.

Article 38.

The Ministry of Justice shall keep:

1. ledger of the applications and proposals for acquiring Bulgarian citizenship, for revoking naturalisation, for restoring, for release and deprivation of Bulgarian citizenship;

2. register of the persons who have acquired Bulgarian citizenship by naturalisation;

3. register of the persons who have lost their Bulgarian citizenship;

4. register of the persons with restored Bulgarian citizenship.

Article 39.

(1) At the request of the interested person the Ministry of Justice shall issue a certificate for citizenship stating whether the person is or not Bulgarian citizen according to the registers kept in the ministry.

(2) The certificate under para 1 shall be valid for 1 year from its issuance.

Article 40.

(1) Information about the citizenship of the persons can be requested by:

1. the person, whose citizenship data is kept and after his death - his successors;

2. the bodies of the judiciary authority, the ministries and the bodies of the local independent government and local administration within the frames of their competence and in the cases determined by a law.

(2) The Minister of Justice shall provide the protection and keeping of the documents related to the citizenship.

Article 41.

The administrative bodies, municipalities and mayoralties shall be obliged to submit to the Ministry of Justice, upon request, information or opinion related to the proceedings on the Bulgarian citizenship.

Additional provisions

§ 1. In case of disagreement between the parents, as well as disagreement between the underage and parents or their guardians in the cases under Article 18, 21, 28 and 29 the dispute shall be solved by the regional court whose decision shall be final.

§ 2. In the context of this law:

1. "Person of Bulgarian origin" is a person of whom at least one of the ascending is Bulgarian.

3. (New, SG 41/01) The person shall be considered released from his present citizenship when:

1. he has been released upon his request under the conditions and by the order of his fatherland law;

2. loses his citizenship by virtue of the naturalisation according to his fatherland law.

Transitional and concluding provisions

§ 3. Restored with the enactment of this law is the Bulgarian citizenship of those deprived of Bulgarian citizenship by the Law for the Bulgarian citizenship of 1940 and by the Law for the Bulgarian citizenship of 1948.

§ 4. Restored is the Bulgarian citizenship of Bulgarian citizens released from Bulgarian citizenship without having filed request for that and those emigrated to countries with whom Bulgaria has not concluded emigration agreements if, within one year from the enactment of this law they extend a formal request to the Minister of Justice. When the persons live abroad the requests can be extended through the diplomatic or consular representations of the Republic of Bulgaria.

§ 5. The applications filed before the enactment of this law shall be considered and granted under the conditions of the previous order.

§ 6. This law revokes the Law for the Bulgarian citizenship (prom., SG, No 79 of 1968; amend., No 36 of 1979, No 64 of 1968 and No 38 of 1989).

§ 7.

(1) The Minister of Justice shall issue ordinance for the implementation of Chapter Five.

(2) For the activities and the issued documents for the proceedings in connection with the Bulgarian citizenship taxes shall be collected in amounts determined by a tariff of the Council of Ministers.

§ 8.

(1) This law shall come into force within 3 months from its promulgation in the State Gazette.

2) Within the period under para 1 the Minister of Justice and the Minister of education and science shall issue acts for the implementation of the law.

§ 9. The fulfilment of the law is assigned to the Minister of Justice.

The law was adopted by the 38th National Assembly on November 5, 1998 and was affixed with the official seal of the National Assembly.

Transitional Provision SG 41 2001

§ 11. The applications filed before the enactment of this law shall be considered and settled under the previous conditions and order.

GREECE

Min. Dec. no.4000/3/10/1998 about prerequisites, duration and procedures of providing the right of stay and work to Albanian citizens of Greek origin

(Taking under consideration:)

6. The need to assure equal prerequisites for employment of the Albanian citizens of Greek origin, residing in our country, in relation to Greek citizens, aiming at the regular functioning of labor market.

Article 1

1. To Albanian citizens of Greek origin residing in Greece, is given a special homoghenís identity card by the police authorities, which handle foreign citizens' issues, valid for three years, subject to revalidation for equal period of time (…).

2. The same identity card is given to husbands, wives and children of homoghenís, independently of ethnic origin, since the parentage is proven through official documents.

Min.Dec. no. Υ4α/7472/95: Codification and completion of Decisions about providing free medical-sanitary and hospitalization Care to homoghenís from Albania.

(The Minister of Health and Care decides:)

to provide at the homoghenís from Albania free medical-sanitary and hospitalization care by State Hospitals.

(in order to extend this provision to all family members, it is needed:)

5. A certificate from a Greek or other public authority, on the base of which their Greek ethnic origin will be proven.

Min.Dec. n.4864/8/8-γ/26.7.00: Content and procedur Περιεχόμενο και Procedure for providing Special Homoghenís Identity Card to homoghenís from ex USSR countries

Article 1 :

Procedure for providing Special Homoghenís Identity Card.

1. Those who have the right to obtain, according to pArticle 11, Article 1 of Law n.2790/2000, a Special Homoghenís Identity Card, must personally submit a relative application containing the data requested by pArticle 3, Article 1 of the above Lae, to the General Secretary of the Region of residence, if residing in Greece, or to the Greek Consular Authority of their home residence, if residing in ex USSR countries.

Law no. 2790/16-2-00 (as modified by Law no. 2910/2001 on migration): Resettlement of homecoming homoghenís from ex USSR

Article 1

Paragraph 3. The homoghenís quality of the interested person is evaluated after an interview by the committee of the previous pArticle (a committee composed by the Greek Console and two members designated by the Ministry of Foreign Affairs). To this purpose all available data may be taken under consideration in order to found this quality.

4. The application containing all submitted documents and the opinion of the Consular authority on the quality of homoghenís are communicated to the competent regional authority in order to issue a decision by the General Secretary of the Region. Before any decision about providing Greek citizenship, special committees, composed by a common min.dec. by the Ministries of Interior and Foreign Affairs, Public Order and Finance, express their opinion.

pArticle . 11.

(Concerning those that lost their citizenship:)

They may submit an application for Greek citizenship or a Special Homoghenís Identity Card, in case theyr reside in Greece without the prerequisite of the Consular Authority opinion.

Ombudsman's Special Report 2001 - Comment of the Greek Ombudsman on Law n.2910/2001 (pp.12-13)

The Greek Ombudsman has to indicate the differential treatment from the State, (…) of the homoghenís from Albania in relation to those coming from ex USSR countries. Specifically:

a) Obtaining the Greek citizenship and the Special Homoghenís identity Card for the homgenis coming from ex USSR countries is possible even if a person remains resident of an ex USSR country. Instead, for the homoghenís from Albania, the State's care is limited to provide to them with the right of legal stay and employment, which is guaranteed through the provision of a "certificate" to the applicants and of the special homoghenís identity card" to the entitled persons, under the condition that they have already settled in Greece.

b) For the homoghenís coming from ex USSR countries the recognition of the homoghenís status permits them to obtain the Greek citizenship, while this does not happen also for the homoghenís from Albania, who may apply for the Greek citizenship only through the procedure of naturalization (nb.: for which they have to pay a tax of 1467 € as all foreigners).

c) The applications of homoghenís coming from ex USSR countries are examined by the Region, while those submitted by the homoghenís coming from Albania are examined by the competent Police Authorities, a fact which rise a question of inequality, since there is no visible reason for this differentiation.

HUNGARY

ACT LXII OF 2001 ON HUNGARIANS LIVING IN NEIGHBOURING COUNTRIES

Adopted by Parliament on 19 June 2001.

Parliament

- In order to comply with its responsibilities for Hungarians living abroad and to promote the preservation and development of their manifold relations with Hungary prescribed in paragraph (3) of Article 6 of the Constitution of the Republic of Hungary,

- Considering the European integration endeavours of the Republic of Hungary and in-keeping with the basic principles espoused by international organisations, and in particular by the Council of Europe and by the European Union, regarding the respect of human rights and the protection of minority rights;

- Having regard to the generally recognised rules of international law, as well as to the obligations of the Republic of Hungary assumed under international law;

- Having regard to the development of bilateral and multilateral relations of good neighbourhood and regional co-operation in the Central European area and to the strengthening of the stabilising role of Hungary;

- In order to ensure that Hungarians living in neighbouring countries form part of the Hungarian nation as a whole and to promote and preserve their well-being and awareness of national identity within their home country;

- Based on the initiative and proposals of the Hungarian Standing Conference, a co-ordinating body functioning in order to preserve and reinforce the awareness of national self-identity of Hungarian communities living in neighbouring countries;

- Without prejudice to the benefits and assistance provided by law for persons of Hungarian nationality** living outside the Hungarian borders in other parts of the world;

Herewith adopts the following Act:

CHAPTER I
GENERAL PROVISIONS

Scope of the Act

Article 1

(1) This Act shall apply to persons declaring themselves to be of Hungarian nationality who are not Hungarian citizens and who have their residence in the Republic of Croatia, the Federal Republic of Yugoslavia, Romania, the Republic of Slovenia, the Slovak Republic or the Ukraine, and who

a) have lost their Hungarian citizenship for reasons other than voluntary renunciation, and

b) are not in possession of a permit for permanent stay in Hungary.

(2) This Act shall also apply to the spouse living together with the person identified in paragraph (1) and to the children of minor age being raised in their common household even if these persons are not of Hungarian nationality.

(3) This Act shall also apply to co-operation with, and assistance to organisations specified in Articles 13, 17, 18 and 25.

Article 2

(1) Persons falling within the scope of this Act shall be entitled, under the conditions laid down in this Act, to benefits and assistance on the territory of the Republic of Hungary, as well as in their place of residence in the neighbouring countries on the basis of the Certificate specified in Article 19.

(2) The provisions of this Act shall be applied without prejudice to the obligations of the Republic of Hungary undertaken in international agreements.

(3) The benefits and assistance claimable under this Act shall not affect other existing benefits and assistance ensured by legislation in force for non-Hungarian citizens of Hungarian nationality living in other parts of the world.

Article 3

The Republic of Hungary, in order to

a) ensure the maintenance of permanent contacts,

b) provide for the accessibility of benefits and assistance contained in this Act,

c) ensure undisturbed cultural, economic and family relations,

d) ensure the free movement of persons and the free flow of ideas,

and taking into account its international legal obligations, shall provide for the most favoured treatment possible with regard to the entry and stay on its territory for the persons falling within the scope of this Act.

CHAPTER II

BENEFITS AND ASSISTANCE AVAILABLE FOR PERSONS FALLING WITHIN THE SCOPE OF THIS ACT

Education, Culture, Science

Article 4

(1) In the field of culture, persons falling within the scope of this Act shall be entitled in Hungary to rights identical to those of Hungarian citizens. Accordingly, the Republic of Hungary shall ensure for them in particular:

a) the right to use public cultural institutions and the opportunity to use the services they offer,

b) access to cultural goods for the public and for research,

c) access to monuments of historic value and the related documentation,

d) the research for scientific purposes of archive materials containing protected personal data, if the neighbouring state where the Hungarian individual living outside the borders has a permanent residence is a party to the international convention on the protection of personal data.*

* Act VI of 1998 on the promulgation of the Convention on the Protection of Individuals with Regard to Automatic Processing of Personal Data, signed on 28 January 1981 in Strasbourg.

(2) Persons falling within the scope of this Act shall be entitled to use the services of any state-run public library, and to the free of charge use of the following basic services:

a) visit of the library,

b) on-the-spot use of certain collections determined by the library,

c) use of stock-exploring instruments,

d) information on the services of the library and of the library system,

e) in the case of registration, borrowing of printed library material in accordance with the regulations of the library.

(3) Further benefits with respect to the availability of services offered by state-run museums and public cultural institutions to persons falling within the scope of this Act shall be laid down in a separate legal rule.

Article 5

Hungarian scientists falling within the scope of this Act may become external or regular members of the Hungarian Academy of Sciences.

Distinctions and Scholarships

Article 6

(1) The Republic of Hungary shall ensure that persons falling within the scope of this Act, in recognition of their outstanding activities in the service of the Hungarian nation as a

whole and in enriching Hungarian and universal human values, may be awarded distinctions of the Republic of Hungary and may receive titles, prizes or honorary diplomas founded by its Ministers.

(2) In the process of determining conditions for state scholarships, the possibility to receive such scholarships shall be ensured for persons falling within the scope of this Act.

Social Security Provisions and Health Services

Article 7

(1) Persons falling within the scope of this Act who, under Article 15, work on the basis of any type of contract for employment in the territory of the Republic of Hungary shall pay, unless otherwise provided for by international agreements, health insurance and pension contribution of an amount equal to that laid down in the relevant Hungarian social security legislation to the authority designated for this purpose in a separate legal rule. Those contributions shall entitle such persons to health and pension provision specified by a separate legal rule.

(2) Persons falling within the scope of this Act who are not obliged to pay health insurance and pension contributions as stipulated in paragraph (1) shall have the right to apply for reimbursement of the costs of self-pay health care services in advance. Applications shall be submitted to the public benefit organisation established for this purpose.

(3) In cases requiring immediate medical assistance, persons falling within the scope of this Act shall be entitled to such assistance in Hungary according to the provisions of bilateral social security (social policy) agreements.

Travel benefits

Article 8

(1) Persons falling within the scope of this Act shall be entitled to travel benefits in Hungary on scheduled internal local and long-distance lines of public transport. With regard to railways, such benefits shall apply to 2nd class fares.

(2) An unlimited number of journeys shall be provided free of charge for:

a) children up to six years of age,

b) persons over sixty-five years of age.

(3) A 90% travel discount shall be provided on means of internal long-distance public transport for:

a) persons identified in paragraph (1) four times a year,

b) a group of at least ten persons under eighteen years of age travelling as a group and falling within the scope of this Act, and two accompanying adults once a yeArticle

(4) The detailed rules of travel benefits shall be laid down in a separate legal rule.

Education

Article 9

(1) Persons falling within the scope of this Act, in accordance with the relevant provisions of Act LXXX of 1993 on Higher Education applicable to Hungarian citizens, shall be entitled to participate, according to the conditions specified in this Article, in the following programmes of higher education institutions in the Republic of Hungary:

a) undergraduate level college or university education,

b) supplementary undergraduate education,

c) non-degree programmes,

d) Doctor of Philosophy (PhD) or DLA programmes,

e) general and specialised further training,

f) accredited higher education level vocational training in a school-type system.

(2) Students participating in state-financed full-time training programmes specified in paragraph (1), shall be entitled to formula funding on the one hand, and financial and other benefits in kind on the other, both being part of the appropriations of budgetary expenditure for students, as well as to the reimbursement of detailed health insurance contributions provided by Act LXXX of 1993 on Higher Education. The detailed conditions of these forms of assistance and further benefits shall be regulated by the Minister of Education in a separate legal rule.

(3) Persons falling within the scope of this Act may pursue studies in the higher education institutions of the Republic of Hungary in the framework of state-financed training in a fixed number to be determined annually by the Minister of Education.

(4) Students from neighbouring countries participating in education programmes not financed by the state may apply for the partial or full reimbursement of their costs of stay and education in Hungary to the public benefit organisation established to this end.

Student Benefits

Article 10

(1) Registered students of a public education institution in a neighbouring country who are pursuing their studies in Hungarian language, or students of any higher education institution who are subject to this Act are entitled to benefits available under the relevant regulations to Hungarian citizens with student identification documents.

(2) Entitlement to benefits specified in paragraph (1) shall be recorded in the Appendix of the Certificate (Article 19) serving for this purpose. The detailed rules of access to these benefits shall be laid down in a separate legal rule.

Further Training for Hungarian Teachers Living Abroad

Article 11

(1) Hungarian teachers living abroad, teaching in Hungarian in neighbouring countries and falling within the scope of this Act (hereinafter referred to as "Hungarian teachers living abroad") shall be entitled to participate in regular further training in Hungary, as well as to receive the benefits specified in paragraph (2). Further training and the benefits shall be applicable to a fixed number of teachers determined annually by the Minister of Education.

(2) For the duration of further training and to the extent stipulated by a separate legal rule, persons identified in paragraph (1) shall be entitled to request the Hungarian educational institution providing further training to

a) reimburse accommodation costs,

b) reimburse travel expenses, and

c) contribute to the costs of registration.

(3) The detailed rules of further training for Hungarian teachers living abroad shall be regulated by a separate legal rule.

Article 12

(1) Hungarian teachers living abroad, falling within the scope of this Act and those teaching in higher education institutions in neighbouring countries (hereinafter referred to as "Hungarian instructors living abroad") shall be entitled to special benefits.

(2) Benefits available to Hungarian teachers and instructors living abroad shall be identical with the benefits related to Teacher Identity Cards issued to teachers of Hungarian citizenship on the basis of legislation in force.

(3) Entitlement to benefits specified in paragraph (1) shall be recorded in the Appendix of the "Certificate of Hungarian Nationality" serving for this purpose. The detailed rules of access to these benefits shall be regulated in a separate legal rule.

Education Abroad in Affiliated Departments

Article 13

(1) The Republic of Hungary shall promote the preservation of the mother tongue, culture and national identity of Hungarians living abroad also by supporting the establishment, organisation and operation of affiliated Departments of accredited Hungarian higher education institutions in neighbouring countries.

The financial resources necessary for the realisation of these goals shall be set out as targeted appropriations in the budget of the Republic of Hungary. The Minister of Education shall decide on the allocation of the available resources according to a separate legal rule.

(2) The Republic of Hungary supports the establishment, operation and development of higher education institutions (faculties, study programmes, etc.) teaching in Hungarian and seeking accreditation in neighbouring countries. Financial resources required for the realisation of these goals may be applied for at the public benefit organisation established for this purpose.

Educational Assistance Available in the Native Country

Article 14

(1) Parents falling within the scope of this Act and bringing up at least two children of minor age in their own household may apply for educational assistance for each of their children if:

a) the child attends an education institution according to his/her age and receives training or education in Hungarian, and

b) the education institution specified in point a) is in the neighbouring country of residence of the parents.

(2) Parents falling within the scope of this Act may receive assistance for books and learning materials (hereinafter referred to as "assistance for learning materials") if the child of minor age living in their own household attends an educational institution in the neighbouring country of residence of the parents and receives education in Hungarian.

(3) Applications for assistance for education and learning materials may be submitted to the public benefit organisation established for this purpose. In the process of evaluating the applications, the public benefit organisation shall request the position, formulated with the consent of the Hungarian Minister of Education, of the recommending body (Article 20) in the neighbouring country concerned whether instruction and education in Hungarian are ensured in the education institution in question.

(4) Persons falling within the scope of this Act may apply for assistance for their studies at the higher education institutions of neighbouring countries from the public benefit organisation established for this purpose.

Employment

Article 15

(1) Persons falling within the scope of this Act may be employed in the territory of the Republic of Hungary on the basis of a permit. Work permits shall be issued under the general provisions on the authorisation of employment of foreign nationals in Hungary, with the exception that the work permit can be issued for a maximum of three months per calendar year without the prior assessment of the situation in the labour market. A separate legal rule

may allow for the issuing of work permits for longer periods of time under the same conditions.

Article 16

(1) The persons concerned may apply to the public benefit organisation established for this purpose for the reimbursement of expenses related to the fulfilment of the legal conditions for employment. These expenses include, in particular, the costs of proceedings for the prior certification of the necessary level of education, of specialised training and of compliance with occupational health requirements.

(2) The detailed rules of the proceedings for the issuing of work permits and the registration shall be regulated by a separate legal rule.

Duties of the Public Service Media

Article 17

(1) Public service media in Hungary shall provide, on a regular basis, for the gathering and transmission of information on Hungarians living abroad and shall transmit information on Hungary and the Hungarian nation to Hungarians living abroad. The purpose of this information shall be:

a) the transmission of Hungarian and universal spiritual and cultural values,

b) the forming of an unbiased picture of the world, of Hungary and of the Hungarian nation,

c) the preservation of the awareness of national identity, of the mother tongue and culture of the Hungarian minority communities.

(2) The Republic of Hungary shall provide for the production and broadcasting of public service television programmes for the Hungarian communities living abroad through the establishment and operation of an organisation devoted to such purposes. The financial resources necessary for such programmes shall be provided by the state budget.

Assistance to Organisations Operating Abroad

Article 18

(1) The Republic of Hungary shall support organisations operating in neighbouring countries and promoting the goals of the Hungarian national communities living in neighbouring countries.

(2) The organisations specified in paragraph (1) may apply to the public benefit organisation established for this purpose and operating in a lawful manner if their goals include, in particular, the following:

a) the preservation, furtherance and research of Hungarian national traditions,

b) the preservation and fostering of the Hungarian language, literature, culture and folk arts,

c) the promotion of higher education of Hungarians living abroad by facilitating the work of instructors from Hungary as visiting lecturers,

d) the restoration and maintenance of monuments belonging to the Hungarian cultural heritage,

e) the enhancement of the capacity of disadvantaged settlements in areas inhabited by Hungarian national communities living abroad to improve their ability to preserve their population and to develop rural tourism,

f) the establishment and improvement of conditions of infrastructure for maintaining contacts with the Republic of Hungary,

g) the pursuance of other activities promoting the goals specified in paragraph (1).

CHAPTER III

RULES OF PROCEDURE OF APPLICATION FOR BENEFITS AND ASSISTANCE

"Certificate of Hungarian Nationality" and "Certificate for Dependants of Persons of Hungarian Nationality"

Article 19

(1) Benefits and assistance specified in this Act may be received by presenting either the "Certificate of Hungarian Nationality" or the "Certificate for Dependants of Persons of Hungarian Nationality", both of which may be issued under the conditions specified in Article 20 at the request of persons of both Hungarian and non-Hungarian nationality.

(2) From the Hungarian central public administration body (hereinafter referred to as "the evaluating authority") designated by the Government of the Republic of Hungary for this purpose:

a) persons of Hungarian nationality falling within the scope of this Act may request a "Certificate of Hungarian Nationality" with a photo,

b) a "Certificate for Dependants of Persons of Hungarian Nationality" with a photo may be requested by spouses of non-Hungarian nationality living together with persons specified in point a) and children of minor age being brought up in the same household, provided that:

the applicant meets the requirements set out in points a) and b) of paragraph (1) of Article 1 and the recommending authority specified in Article 20 has issued the recommendation; and neither an expulsion order nor a prohibition of entry or stay, issued by the competent Hungarian authorities on the basis of grounds determined in a separate Act, is in effect against the applicant in Hungary; and no criminal proceedings have been instituted against the applicant in Hungary for intentional criminal offence.

(3) In addition to the requirements specified in paragraph (2), the "Certificate for Dependants of Persons of Hungarian Nationality " shall also be conditional upon whether the person of Hungarian nationality entitling the dependants in question to submit an application for the "Certificate for Dependants of Persons of Hungarian Nationality" is already in the possession of, or entitled to, a "Certificate of Hungarian Nationality". The withdrawal of the "Certificate of Hungarian Nationality" shall entail the withdrawal of the "Certificate for Dependants of Persons of Hungarian Nationality ".

Article 20

(1) The evaluating authority shall issue the "Certificate of Hungarian Nationality" if the applicant is in the possession of a recommendation which has been issued by a recommending organisation representing the Hungarian national community in the neighbouring country concerned, and being recognised by the Government of the Republic of Hungary as a recommending organisation, and which:

a) certifies, on the basis of a declaration made by the applicant (or in the case of a minor by his/her statutory agent), that the applicant is of Hungarian nationality,

b) certifies the authenticity of the signature of the applicant and

c) includes the following:

ca) the application, photo and address of the applicant,

cb) the personal data to be recorded in the Certificate (Article 21),

cc) the name and the print of the official seal of the recommending organisation, the name and signature of the person acting on behalf of the recommending organisation,

cd) place and date of issue of the recommendation.

(2) The recommendation required for the issuing of the "Certificate for Dependants of Persons of Hungarian Nationality" shall certify, instead of the information specified in paragraph (1) point a), the family relationship between the applicant and the person of Hungarian nationality falling within the scope of this Act.

(3) The Government of the Republic of Hungary shall recognise an organisation representing the Hungarian community in the given neighbouring country as a recommending organisation if it is capable of:

a) representing the Hungarian community living in the given country in its entirety,

b) providing for the organisational and personnel conditions for receiving and evaluating applications for recommendation.

Article 21

(1) The period of validity of the Certificate

a) shall expire on the day of the eighteenth birthday in the case of minors,

b) shall be five years in the case of persons between 18 and 60 years of age,

c) shall be indefinite in the case of persons over 60 years of age.

(2) If the period of validity of the Certificate expires, the proceedings specified in Articles 19-20 shall be repeated upon request.

(3) The Certificate shall be withdrawn by the evaluating authority if

a) the recommending organisation has withdrawn its recommendation due to the submission of false data by the bearer of the Certificate in the application process,

b) its bearer has been granted an immigration or permanent residence permit,

c) its bearer has acquired Hungarian citizenship,

d) its bearer has been recognised as a refugee or temporarily protected person by the authorities responsible for refugee matters,

e) its bearer has been expelled from the territory of the Republic of Hungary, or a prohibition of entry or stay has been issued against him/her,

f) criminal proceedings have been instituted against the bearer in Hungary,

g) the Certificate has been used in an unauthorised way or has been forged,

h) the family relationship entitling the bearer to use the Certificate for Dependants has ceased to exist,

i) upon request by the bearer of the Certificate.

(4) The recommending organisation shall also be notified of the final decision on the withdrawal of the Certificate.

(5) The Certificate shall contain the following data of the entitled person:

a) family and given name (also the maiden family and given name in the case of women) as it is used officially in the neighbouring country of residence (in Latin script), and in the case of persons of Hungarian nationality in Hungarian as well,

b) name of the place of birth as it is used officially in the neighbouring country and in Hungarian,

c) date of birth and gender,

d) mother's name as it is officially used in the neighbouring country of residence (in Latin script) and in the case of persons of Hungarian nationality in Hungarian as well,

e) passport photo, citizenship or reference to stateless status,

f) signature in the entitled person's own hand, and

g) date of issue, period of validity and number of the document.

(6) Notes and certifications required for access to benefits and assistance available under this Act shall be recorded in the Appendix to the Certificate.

(7) In order to ensure the authenticity of the Certificate and to supervise the granting of benefits, the evaluating authority (for the purpose of the application of these provisions: the data handling organ) shall keep records of the data of the Certificates, the identification marks in the Appendices, the foreign address of the bearers, the family relationship entitling the bearer to the document, the number and period of validity of the permit entitling to stay as well as the data specified in paragraph (3). The data contained in the records may be handled by the data handling organ until the withdrawal or the expiry of the period of validity of the Certificate. The data contained in the records may be forwarded to the Hungarian Central Statistical Office (KSH) for statistical purposes. Bodies responsible for providing and keeping records of benefits and assistance may also receive those data for the purpose of verifying entitlement and preventing abuse, and so may Courts in charge of criminal proceedings, law enforcement bodies, national security services and the alien policing authority.

(8) For the purpose of evaluating applications and examining the existence of reasons for the withdrawal of the Certificate, the evaluating authority may request information from the following organs:

a) the Central Registry of Aliens on whether the applicant is subject to proceedings under the law on aliens, or on any order of expulsion or prohibition on entry to and stay in Hungary against the applicant, as well as on the details of the residence permit entitling the applicant to stay in Hungary,

b) organs responsible for naturalisation on issues related to the acquisition Hungarian citizenship,

c) the Central Registry of Refugees on recognition as a refugee or temporarily protected person,

d) the Criminal Records Office on criminal proceedings in process.

Article 22

(1) Proceedings of the evaluating authority shall be governed by the provisions of Act IV of 1957 on the General Rules of Public Administration Procedures. The costs of public administration procedures shall be covered by the State.

(2) The applicant may institute proceedings in Court against a final administrative decision on the appeal against the first instance decision regarding the issue or withdrawal of a Certificate by the evaluating authority. The Court may alter the administrative decision and its proceedings shall be governed by the provisions of the Code of Civil Procedure.

(3) The detailed rules of procedure of the evaluating authority and the order of registration of the issued Certificates, as well as the data content and form of the Certificates, shall be regulated by a separate legal rule.

Use of Benefits on the Territory of the Republic of Hungary

Article 23

(1) Hungarian persons living abroad shall be entitled to use the benefits set out in Article 4, paragraph (1) of Article 7, Article 8, Article 10, paragraph (2) of Article 11 and Article 12 - under the conditions determined in the aforementioned Articles - by presenting their Certificates (Article 19) during their lawful stay in the Republic of Hungary.

(2) The state-run organisations and institutions granting the benefits specified in paragraph (1) and economic organisations providing travel benefits shall receive the financial resources necessary for granting these benefits out of the central state budget.

Application Procedures for Assistance Available in the Republic of Hungary

Article 24

(1) The Government shall establish public benefit organisation(s) in order to evaluate the applications of and distribute assistance for persons (organisations) falling within the scope of this Act.

(2) The founding document of the public benefit organisation, taking into account the provisions of Act CLVI of 1997 on Public Benefit Organisations, shall contain the goals of the activities and the range of applications to be evaluated by it and shall determine its main decision-making body as well.

(3) Applications for publicly advertised assistance under this Act may be submitted to the respective public benefit organisation competent according to their subject matter.

(4) Data and documents required in the advertisement by the respective public benefit organisation shall be attached to the applications.

(5) In the case of a favourable decision, the applicant and the public benefit organisation shall conclude a civil law contract containing the conditions of assistance and the amount thereof, as well as determining the purpose of the use of assistance and the rules of rendering accounts thereof.

(6) The financial resources required for the activities of such public benefit organisation(s) shall be provided, on an annual basis, in a separate group of appropriations of the central state budget.

Application Procedures for Assistance Available in Neighbouring Countries

Article 25

(1) Requests (applications) for assistance regulated in this Act may be submitted by persons (organisations) falling within the scope of this Act to lawfully operating non-profit organisations established in the neighbouring country of their permanent residence (registered office) for this purpose (hereinafter referred to as "foreign public benefit organisations")

(2) The civil law contract concluded between the public benefit organisation established in Hungary and the foreign public benefit organisation established for the evaluation of applications and the granting of assistance shall contain the required range of data, which are to be supported by documents, declarations, planning or documentation, etc.

(3) The public benefit organisations operating in Hungary shall evaluate the application based on the data specified in the civil law contract as laid down in paragraph (2) and on the opinion of the foreign public benefit organisation.

(4) Assistance shall be granted to applicants by the Hungarian public benefit organisation on the basis of a civil law contract. This contract shall determine the conditions of the assistance and the amount thereof as well as the purpose of the use of such assistance and the rules of rendering accounts thereof.

Central Registration of Assistance

Article 26

(1) For the purpose of co-ordinating the entire system of assistance, a central registry of applications for assistance and the relevant decisions made by public benefit organisations established for their evaluation shall be set up.

(2) The Government shall designate the central public administration organ responsible for managing the records.

(3) The organ managing the records shall handle the following data:

a) name, permanent address (registered office) and document number of those submitting applications for assistance,

b) the type of assistance sought,

c) the amount of assistance granted.

(4) Data specified in paragraph (3) may be handled by the organ managing the records for ten years from the date of the granting of assistance.

(5) Data from the records shall be made available to public benefit organisations established in Hungary and in the neighbouring countries for the purpose of evaluating applications for assistance, as well as to the central public administration organs of Hungary responsible for providing the financial resources for assistance.

CHAPTER IV
FINAL PROVISIONS

Article 27

(1) This Act shall enter into force on 1 January 2002.

(2) From the date of accession of the Republic of Hungary to the European Union, the provisions of this Act shall be applied in accordance with the treaty of accession of the Republic of Hungary and with the law of the European Communities.

Article 28

(1) The Government shall be empowered to regulate by decree:

a) the provisions on the assignment of the national public administration organ entitled to issue, withdraw and register the Certificates, as well as on the assignment of its superior organ, on the definition of their competencies and on the rules of procedure of the issuing, replacement, withdrawal and registration of such Certificates,

b) the detailed rules of travel benefits for persons falling within the scope of this Act,

c) the detailed rules related to the provision and use of student benefits for persons specified in paragraph (1) of Article 10 of this Act.

(2) The Government shall ensure the establishment of Hungarian public benefit organisation(s) evaluating applications and allocating assistance under this Act. The Government shall also ensure the co-ordination of the activities of public benefit organisations already operating for this purpose, the appropriate modification of their founding documents and the reallocation of resources in this framework.

Article 29

(1) The Minister of the Interior and the Minister of Foreign Affairs shall determine in a joint decree, with respect to educational assistance with the consent of the Minister of Education, the detailed rules on registering the Certificates, as well as the requirements of the content and form of the Certificates.

(2) The Minister of Economic Affairs shall:

a) determine, in a joint decree with the Minister for Foreign Affairs, the rules of procedure and registration related to work permits for Hungarians living abroad and designate the public administration organ responsible for carrying out these duties,

b) be empowered to regulate by decree the conditions for issuing work permits for a period longer than the one specified in Article 15 of this Act with regard to employees falling within the scope of this Act, or for a particular group of employees, in consensus with the Minister for Youth and Sports Affairs in cases involving professional sportspersons.

(3) The Minister of Foreign Affairs shall be empowered to substitute his own declaration for the recommendation specified in Article 20 of this Act in cases deserving exceptional treatment on grounds of equity in the course of proceedings of the evaluating authority designated in Article 19, and furthermore in cases where the proceedings specified in paragraph (1) of Article 20 are impeded, to ensure the smooth conduct of administrative proceedings.

(4) The Minister of National Cultural Heritage shall determine by decree the detailed rules of benefits available to Hungarians living abroad with respect to the use of the services provided by museums and public cultural institutions.

(5) The Minister of Education, with the consent of the Minister of Foreign Affairs, shall determine by decree the detailed rules on further training for Hungarian teachers living abroad, as well as detailed rules on the benefits set out in Article 9, Article 11 and 12, paragraph (1) of Article 13 and Article 14 of this Act, including the extent of such assistance.

ITALY

Law of 21 March 2001 no. 73

Measures in favour of the Italian minority in Slovenia and Croatia

Published in the Official Gazette no. 73 of 28 March 2001

Article 1

The provisions of the second paragraph of article 14 of Law 9 January 1991, no. 19, are extended until 31 December 2003. For this purpose, an expenditure of 9,000 millions is authorised for year 2001 and of 10,000 millions for years 2002 and 2003 each.

The budget for the Italian minority in Slovenia and Croatia provided for under article 14 of Law 9 January 1991, no. 19 will be used through a convention to be stipulated by the Ministry of Foreign Affairs, the Italian Union and the University of Trieste, in consultation – to be given within 45 days of the relevant request by the Ministry of Foreign Affairs – with the Federation of the associations of exiles from Istria, Fiume or Dalmatia or, at any rate, with the single associations. The said budget is to be used for measures and activities in the fields of education, culture, information, as well as, up to 20% of the annual budget, in the socio-economic field.

Article 2 (omissis)

Law 9 January 1991 no. 19

Provisions for the development of economic activities and international cooperation of the Region Friuli-Venezia Giulia, the province of Belluno and the neighbouring areas

Published in the Official Gazette no. 17 of 21 January 1991

[Articles 1-13 omissis]

Article 14

§ 1 (omissis)

§2 Awaiting the adoption of a law on the measures in favour of Italian populations in Yugoslavia, an expenditure of 12 billions is authorised for the years 1991-1993, i.e. 4 billions per year, (…) for activites in favour of the Italian minority in Yugoslavia, to be organised in co-operation with the Region Friuli Venezia-Giulia and with other institutions.

§ 3 (omissis)

[Articles 15-16 omissis]

ITALIAN CONSTITUTION

Article 48

All citizens, male and female, who have attained their majority, are electors.

The vote is personal and equal, free and secret. The exercise thereof is a civic duty.

An Act of Parliament shall establish the conditions and the procedures under which Italian nationals resident abroad may exercise their right to vote in Italian elections, and shall guarantee its effectiveness. For this purpose a 'Foreign Constituency' shall be created to which Members to both Houses of Parliament shall be elected. The number of seats shall be established by a constitutional law and comply with the criteria enacted by Act of Parliament.

The right to vote cannot be restricted except for civil incapacity or as a consequence of an irrevocable penal sentence or in cases of moral unworthiness as laid down by law.

Article 56

The Chamber of Deputies is elected by universal and direct suffrage.

The number of Deputies is six hundred and thirty.
All those voters who on the day of elections have attained the age of twenty-five are eligible to be deputies.

The division of seats among the electoral districts is obtained by dividing the number of inhabitants of the Republic, as shown by the latest general census of the population, by six hundred and thirty and distributing the seats in proportion to the population in every electoral district, on the basis of whole shares and the highest remainders.

Article 57

The Senate of the Republic is elected on a regional basis.

The number of Senators to be elected is three hundred and fifteen.

No region may have fewer than seven senators; Molise shall have two, Valle d'Aosta one.

The division of seats among the regions, in accordance with the provisions of the preceding Article, is made in proportion to the population of the regions as revealed in the most recent general census, on the basis of whole shares and the highest remainders.

ROMANIA

THE ROMANIAN PARLIAMENT
THE CHAMBER OF DEPUTIES – THE SENATE

LAW
Regarding the support granted to the Romanian communities from all over the world

The Romanian Parliament passes this law

Article 1

(1) A Fund available to the Prime Minister is constitutted, in order to ensure the financing of the activities supporting the Romanian communities on the territory of other states.

(2) The Fund available to the Prime Minister in order to support the Romanian communities from all over the world is approved by the annual laws of the state budget.

Article 2

Such budgetary resources are mainly used for :

a) activities supporting the schools and education in the Romanian language;

b) cultural and Articleistic activities;

c) activities for youth;

d) individual aid in special medical cases;

e) civic education activities;

f) other cases provided in the collaboration programmes

Article 3

(1) The Inter-Ministry Council for the Support of Romanian Communities from All Over the World is established, with the approval of the Prime Minister. Such council endorses the

activities to be financed with priority out of the fund established according to Article 1. These activities shall be proposed by the institutions initiating such activities, through the ministries in the field.

(2) The Inter-Ministry Council shall meet from time to time and shall comprise representatives of the Ministry of National Education, the Ministry of Foreign Affairs, the Ministry of Culture, the Ministry of Finance, the General Secretariat of the Government and the State Secretariat for Cults. The representative of the Romanican Cultural Foundation has guest status. The endorsement of the inter-Ministry Council of consultative.

Article 4

(1) For the year 1998, the financial resources required for the constitution of the fund shall be ensured by ROL 5 billions out of the state budget, without affecting the relevant ministries involved.

(2) The fund shall be completed with the financial resources which may be allocated by the law regarding the rectification of the state budget for the year 1998.

Article 5

(1) The Centre "Exdoxiu Hurmuzachi" for the Romanians all over the world is established, herinafter called the Centre, a public institution with legal personality, subordinated to the Ministry of National Education, having its principal office in Bucharest.

(2) The duties of the centre refer to the fulfillment of the activities provided herein.

Article 6

(1) The centre is organised and operates according to its own regulation.

(2) The organisation and operation regulation, the number of employees required for the development of the activity, the organisational structure, the position status and the remunerationof the centre's staff shall be approved by order of the Minister of National Culture.

(3) The general managememnt of the centre's activity is ensured by the general manager, who must be a member of the Romanian Academy or a renowned cultural personality or a professor, appointed mby order of the Minister of National Education.

Article 7

The Centre also has the role of drafting and co-ordinating the training programmes for the Romanian youth from all over the world, in order for them to be admitted at all levels of educational institutions in Romania.

Article 8

(1) The Centre's operation and investment costs shall be financed out of the state budget, by the Ministry of National Education.

(2) The funds required by the centre may come out of sponsorships, donations, assistance granted by international bodies, as well as out of incomes resulting from performing scientific research agreements, specialised assistance or consulting agreements and from other legal sources.

(3) In order to cover the expenses required for the appropriate organisation and operation of the centre in 1998, the amount of ROL 2 billions shall be allocated out of the Budgetary Reserve Fund available to the Government.

Article 9

The students and attendants of the Centre may receive scholarships from the Romanian state and may benefit from free accommodation in student hostels, for the duration of their studies in Romania. The Government may also grant other forms of support which are deemed necessary.

Article 10

(1) The local public administration authorities, from the territorial-administrative units where activities organised or co-ordinated by the centre take place, shall grant the necessary assistance in order to freely ensure appropriate areas and equipment for theduration of the respective activities.

(2) In order to carry out the centre's object of activity, the building located in Crevedia village, Dambovita county, which is the public property of the state, managed by the Ministry of National Education and used by the National School of Political and Administrative Studies, together with the land and any other related movable or immovable goods, according to the inventory of 31 December 1997, shall be exclusively used by the centre.

(3) The administrative staff of the real property located in Crevedia village, Dambovita county, may be transferred from the National School of Political and Administrative Studies to the Centre according to Article 6, paragraph (2).

Article 11

Any contrary provisions hereto shall be repealed upon the coming into froce of this law.

This law was passed by the Chamber of Deputies during the meeting of 7 July 1998, in compliance with the provisions of Article 74 paragraph (2) of the Romanian Constitution.

For THE CHAIRMAN OF THE CHAMBER OF DEPUTIES
Vasile LUPU

This law was passed by the Chamber of Deputies during the meeting of 7 July 1998, in compliance with the provisions of Article 74 paragraph (2) of the Romanian Constitution.

For THE CHAIRMAN OF THE SENATE

Cristian Sorin DUMITRESCU

Bucharest, 15 July 1998 no. 150

RUSSIAN FEDERATION

In respect of compatriots abroad

Adopted
by the State Duma
on 5 March 1999

Approved
by the Federation Council
on 17 March 1999

The present Federal Law takes as its premise that:

the Russian Federation is the successor state and cessionary of the Russian state, the Russian republic, the Russian Soviet Federated Socialist Republic (RSFSR) and the Union of Soviet Socialist Republics (USSR);

the institution of Russian citizenship corresponds to the principle of the permanence (continuity) of Russian statehood;

relations with compatriots abroad constitutes an important aspect of the Russian Federation's foreign and domestic policy;

protection of fundamental human and civil rights and freedoms promotes political and social stability, and improves co-operation between peoples and states;

compatriots who are resident abroad are entitled to rely on the Russian Federation's support in exercising their civil, political, social, economic and cultural rights, and in preserving their distinctive identity;

compatriots' councils (committees) shall represent the interests of compatriots abroad within the state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation;

the Russian Federation's activities in respect of relations with compatriots abroad shall be conducted in accordance with the universally recognised principles and standards of international law and the Russian Federation's international treaties, and shall take into account the legislation of the countries in which compatriots are resident.

The present Federal Law establishes the principles and objectives of the Russian Federation's state policy in respect of compatriots abroad and the foundations of the activities of the Russian Federation's state authorities in implementing the above-mentioned policy.

Article 1. Basic concepts

1. Compatriots are individuals who were born in a particular state and who live or have lived in it and share a common language, religion, cultural heritage, traditions and customs, as are their direct descendants.

2. The concept of "compatriots abroad" (hereinafter – compatriots) refers to:

- citizens of the Russian Federation who are resident on a permanent basis outside the Russian Federation (hereinafter – citizens of the Russian Federation living abroad);

- individuals who were citizens of the USSR and live in states that were formerly part of the USSR, who have become citizens of those states or become stateless persons (hereinafter – persons who were citizens of the USSR);

- expatriates (emigrants) from the Russian state, the Russian republic, the RSFSR, the USSR and the Russian Federation, who had the corresponding citizenship and have become citizens of a foreign state, have a residence permit in one of these states or have become stateless persons (hereinafter – expatriates (emigrants);

- the descendants of individuals belonging to the above-mentioned groups, with the exception of descendants of individuals from the titular nation of the foreign state (hereinafter – compatriots' descendants).

Article 2. Other concepts used in the present Federal Law

The following concepts are also used in the present Federal Law:

- abroad – beyond the borders of the Russian Federation's territory;

- civil identity – the fact of being a subject or citizen, respectively, of the Russian state, the Russian republic, the RSFSR, the USSR, the Russian Federation or a foreign state;

- citizen of the Russian Federation resident abroad – an individual who is a citizen of the Russian Federation and is legally resident on the territory of a foreign state;

- stateless person – a person who is not a citizen of the Russian Federation and has no supporting documents to prove citizenship or subject status in a foreign state;

- participants (parties) in the Russian Federation's relations with compatriots – the state authorities of the Russian Federation, the state authorities of the subjects of the Russian Federation;

- nationalities of the Russian Federation – nationalities of individuals whose main settlement areas are within the Russian Federation;

- titular nation – the section of a state's population whose nationality defines the given state's official name;

- distinct identity – native language, traditions and customs of compatriots, the specific features of their cultural heritage and religion.

Article 3. Recognition and confirmation of compatriot status

1. Citizens of the Russian Federation and individuals with dual citizenship, one of which is Russian, who are resident on a permanent basis outside the Russian Federation, shall be considered compatriots on the basis of their civil identity. Documents indicating that they are citizens of the Russian Federation shall serve as documents (certificates) confirming their compatriot status.

2. For individuals who were citizens of the USSR, expatriates (emigrants) and compatriots' descendants, acknowledgement of their compatriot status shall be an act of free choice. Compatriot status shall be confirmed by a special document (certificate), on the basis of a model drawn up by the Russian Federation's Government.

3. Documents (certificates) issued outside the Russian Federation shall be issued within one month by the Russian Federation's diplomatic representations or consular posts under the conditions set out in Article 4 of the present Federal Law, following a written application submitted by the individual concerned; within the Russian Federation, they shall be issued by the bodies of the Russian Federation Interior Ministry in the individual's place of residence.

4. The acts (decisions) of state authorities and officials in connection with the issue of documents (certificates) may be appealed, by submitting an appeal to the state body that is immediately superior or by applying directly to the court in the locality of the relevant federal executive body.

- Should they so wish, compatriots may submit appeals through a member of the council (committee) of compatriots.

Article 4. The bases for confirming compatriots' membership of the groups provided for in the present Federal Law

Compatriots' identity as citizens of the USSR, expatriates (emigrants) and compatriots' descendants shall be established on the basis of possession of documents or other evidence, confirming respectively:

- citizenship of the USSR, civil identity or its absence at the time of submitting the application – for individuals who were citizens of the USSR;

- past residence on the territory of the Russian state, Russian republic, RSFSR, USSR or Russian Federation, the corresponding civil identity when leaving this territory and civil identity, or its absence, when submitting the application – for expatriates (emigrants);

- linear consanguinity with the persons indicated above – for compatriots' descendants;

- residence abroad – for all individuals referred to in this Article.

Article 5. Principles and objectives of the state policy of the Russian Federation in respect of compatriots

1. The Russian Federation's state policy in respect of compatriots is an integral part of the Russian Federation's domestic and foreign policy and constitutes the totality of legal, diplomatic, social, economic, informational, educational, organisational and other measures, implemented by the President of the Russian Federation, the state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation, in accordance with the Russian Federation Constitution, the Russian Federation's international treaties and the Russian Federation's legislation, for applying the principles and objectives established by the present Federal Law.

2. The Russian Federation's state policy in respect of compatriots shall be based on recognition of:

- the inalienability of fundamental human and civil rights and freedoms, and each individual's entitlement to these from birth;

- the obligation on states to observe the universally recognised principles and standards of international law, in full conformity with the principle of non-interference by states in other states' domestic affairs;

- co-operation between states in guaranteeing compatriots' rights and freedoms.

The objectives of the Russian Federation's policy in respect of compatriots are the provision of state support and assistance to compatriots, in accordance with universally recognised principles and standards of international law, the Russian Federation's international treaties and the Russian Federation's legislation, and taking account of foreign states' legislation in implementing and guaranteeing human and civil rights and freedoms, including the right:

- to freely express, preserve and develop one's distinct identity, and to support and develop one's spiritual and intellectual potential;

- to establish and freely support multifaceted links between compatriots and with the Russian Federation, and to receive information from the Russian Federation;

- to establish national-cultural autonomy, public associations and mass media, and to participate in their activities;

- to participate in the work of non-governmental organisations at national and international level;

- to participate in developing mutually-beneficial relations between the state of residence and the Russian Federation;

- to exercise free choice regarding one's place of residence or the right to return to the Russian Federation.

Article 6. The Russian Federation's legislation in respect of relations with compatriots

The Russian Federation's legislation in respect of relations with compatriots shall be based on the universally recognised principles and standards of international law and comprises the Constitution of the Russian Federation, the Russian Federation's international treaties, the present Federal Law and other federal laws and any standard-setting legal texts of the Russian Federation, as well as laws and other standard-setting legal texts of the subjects of the Russian Federation, adopted in accordance with the Constitution and the present Federal Law.

Article 7. The basis of relations with citizens of the Russian Federation living abroad

1. The Russian Federation guarantees protection and patronage to its citizens abroad.

2. Citizens of the Russian Federation who live abroad enjoy rights and have obligations on an equal footing with citizens of the Russian Federation living on the territory of the Russian Federation, except for those cases established by the Russian Federation's international treaties and the Russian Federation's legislation, and in accordance with the legislation of the state of residence.

3. During visits to the territory of the Russian Federation, citizens of the Russian Federation who live abroad shall enjoy the same rights and have the same obligations as citizens of the Russian Federation who are resident on the territory of the Russian Federation, with the exception of cases set out in federal law.

4. Individuals with dual citizenship, one of which is Russian, may not have restrictions placed on their rights and freedoms, and shall not be exempt from the obligations arising from citizenship of the Russian Federation, unless otherwise provided by one of the Russian Federation's international treaties or the legislation of the Russian Federation.

Article 8. Relations with individuals who were citizens of the USSR

1. Relations with individuals who were citizens of the USSR shall be determined by the specific historical features governing the emergence of the states in which they reside, and shall be of prime importance for the Russian Federation.

2. The Russian Federation shall assist individuals who were citizens of the USSR in exercising their fundamental human and civil rights and freedoms, including the right to

citizenship and the right to freely choose that citizenship, and shall provide assistance and support to them on the basis of the present Federal Law and the Russian Federation's international treaties, taking into account the legislation of the states in which they are resident.

3. Relations with persons who were citizens of the USSR and who, in accordance with the legislation of states which were part of the USSR, have acquired citizenship of the Russian Federation, of the state in which they reside or of a third state, or dual citizenship, and relations with stateless persons, shall be determined in accordance with the present Federal Law.

Article 9. Relations with expatriates (emigrants)

1. The Russian Federation favours the preservation by expatriates (emigrants) of links with the Russian Federation in all fields, and the enjoyment of opportunities afforded to compatriots in accordance with the provisions of Articles 14, 15, 16, 17 and 18 of the present Federal Law; it shall also intervene to support them in the event of violation of their fundamental human and civil rights and freedoms.

2. The provisions of Article 8 of the present Federal Law shall be extended to expatriates (emigrants) who were citizens of the USSR and are resident abroad and outside countries formerly making up the USSR.

3. Relations between expatriates (emigrants) and the Russian Federation, based on the fact that these expatriates (emigrants) were previously subjects of the Russian state or citizens of the Russian republic, RSFSR, USSR and Russian Federation, shall be governed by the Russian Federation's international treaties and the Russian Federation's legislation.

Article 10. Relations with compatriots' descendants

1. The scope of Article 7 of the present Federal Law shall extend to the descendants of compatriots who are citizens of the Russian Federation or persons with dual citizenship, one of which is Russian.

2. If, in line with the procedure set out in Article 4 of the present Federal Law, direct consanguinity is confirmed with individuals who were citizens of the USSR and expatriates (emigrants) who are participants (parties) in the Russian Federation's relations with compatriots, then compatriots' descendants shall be entitled to support for their interest in the Russian Federation, and links with it, in accordance with the provisions of Articles 14, 15, 16, 17 and 18 of the present Federal Law.

3. The rights of compatriots' descendants, which may arise from their consanguinity with persons who were citizens of the USSR and expatriates (emigrants), shall be guaranteed in accordance with the Russian Federation's international treaties and the legislation of the Russian Federation.

Article 11. Issues of citizenship in respect of compatriots

1. The citizenship of a citizen of the Russian Federation shall not be terminated should he or she reside abroad.

2. Individuals who are resident abroad and who were stripped of citizenship of the RSFSR or the Russian Federation or who have lost this citizenship against their will, shall be considered to have had their citizenship of the Russian Federation restored unless they formally object to this decision.

Subjects of the Russian state who found themselves outside its borders and were stripped of RSFSR citizenship, or who lost it against their will, and their direct descendants, shall acquire citizenship of the Russian Federation through the registration process.

Expatriates (emigrants) who voluntarily renounced citizenship of the Russian Federation may be granted citizenship of the Russian Federation further to an application by them in accordance with the Russian Federation's legislation.

Persons who were citizens of the USSR, and direct descendants of compatriots who are citizens of a foreign state, may be granted Russian Federation citizenship at their request, subject to the conditions and in line with the procedure set out in the Russian Federation's international treaties and the legislation of the Russian Federation.

3. A citizen of the Russian Federation may be a citizen of a foreign state (dual citizenship) in accordance with the Constitution of the Russian Federation, the Russian Federation's international treaties or federal law.

The civil status of persons who were citizens of the USSR, of expatriates (emigrants) or of compatriots' direct descendants as citizens of a foreign state, or the absence of such status, shall not be an obstacle to their contacting the state authorities of the Russian Federation with responsibility for questions of Russian Federation citizenship and for issuing Russian Federation citizenship in accordance with the Russian Federation's legislation.

4. Individuals who were citizens of the USSR, and their direct descendants, who do not voluntarily and freely declare their wish to assume citizenship of other states shall be recognised as citizens of the Russian Federation.

5. A person who is resident abroad may renounce his or her citizenship of the Russian Federation on the basis of an application or through the registration procedure, provided the aforementioned individual departed to take up residence in a foreign state in accordance with the legislation of the Russian Federation.

6. Indigent persons who were citizens of the USSR and expatriates (emigrants) shall be fully or partially exempt from the payment of state duty when submitting applications and requests in respect of citizenship of the Russian Federation to the state authorities of the Russian Federation responsible for questions of Russian Federation citizenship, in line with the procedure set out in the Russian Federation's legislation.

7. The Russian Federation shall help to reduce the number of stateless persons among compatriots, on the basis of the universally recognised principles and standards of international law.

Article 12. Compatriots' entry to the Russian Federation, movement around the territory of the Russian Federation and exit from the Russian Federation

The procedure governing compatriots' entry to the Russian Federation, movement around the territory of the Russian Federation and exit from the Russian Federation shall be established by the Russian Federation's international treaties and federal laws.

Article 13. The legal status of compatriots who are foreign citizens and of stateless persons within the Russian Federation's territory

During their stay in the territory of the Russian Federation, compatriots who are foreign citizens or stateless persons shall enjoy the same rights and have the same obligations as citizens of the Russian Federation, except as set out in the Constitution of the Russian Federation, the Russian Federation's international treaties, federal constitutional laws and federal laws.

Article 14. The basis for activities for implementing the Russian Federation's state policy in respect of compatriots

1. The main directions of the Russian Federation's state policy in respect of compatriots shall be determined by the President of the Russian Federation in accordance with the Constitution of the Russian Federation and the present Federal Law.

2. Protection of fundamental human and civil rights and freedoms as applicable to compatriots is an inalienable part of the Russian Federation's foreign policy activity.

3. The Russian Federation's co-operation programmes with foreign states shall be prepared, adopted and implemented with reference to observance by one or another state of the universally recognised principles and standards of international law in the field of fundamental human and civil rights and freedoms.

4. Discrimination against citizens of the Russian Federation living abroad may be grounds for reconsideration of the Russian Federation's policy in respect of the foreign state in which such discrimination takes place.

5. Failure by a foreign state to observe universally recognised principles and standards of international law in the field of fundamental human and civil rights and freedoms with regard to compatriots shall be sufficient grounds for the adoption by the Russian Federation's state authorities of those measures provided for in international legal standards to protect compatriots' interests.

Article 15. Support for compatriots in the field of fundamental human and civil rights and freedoms

1. Compatriots shall be entitled to rely on the Russian Federation's support:

- in guaranteeing their fundamental freedoms and civil, political, economic, social, cultural and other rights, as provided for by international covenants on human rights;

- in their actions against instances of discrimination on the grounds of race, sex, language, religion, political or other convictions, national or social origins, status as compatriots, property ownership or any other circumstance;

- in guaranteeing their right to equality before the law.

2. The Russian Federation shall provide support for compatriots in the field of fundamental human and civil rights and freedoms in accordance with the universally recognised principles and standards of international law, the Russian Federation's international treaties and the Russian Federation's legislation, and taking into account the legislation of foreign states and compatriot's membership of the groups provided for in the present Federal Law.

Article 16. Support for compatriots in the economic and social fields

1. In carrying out the Russian Federation's state policy in respect of compatriots, the state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation shall encourage co-operation between Russian organisations and compatriots' economic entities and shall assist in setting up joint organisations, partnerships and associations and with compatriots' participation in investment in the Russian economy, and shall encourage links between Russian organisations, regardless of their form of ownership, with foreign enterprises in which compatriots are primarily employed and the development of mutually beneficial co-operation between them in accordance with the Russian Federation's legislation and the legislation of foreign states.

2. The state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation may provide support in the social field to socially vulnerable categories of compatriots, subject to their membership of the groups of compatriots provided for in the present Federal Law, on the basis of the Russian Federation's international agreements and in accordance with the Russian Federation's legislation.

3. Humanitarian assistance may be provided to compatriots in emergency situations, subject to the conditions and in line with the procedure established by the Government of the Russian Federation.

Article 17. Support for compatriots in the field of culture, language and education

1. The state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation shall support compatriots in preserving and developing their cultural heritage and language, which are inalienable elements of compatriots' distinct identity, and in their efforts to achieve equal access to education at all levels and education in their native language, and shall take the appropriate action for this purpose, in accordance with the Russian Federation's international treaties and the Russian Federation's legislation and taking into account the legislation of foreign states.

2. The state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation shall engage in comprehensive co-operation with compatriots' national and cultural autonomous units in those foreign states in which the aforementioned autonomous units exist.

3. Use of Russian scientific and cultural centres located in foreign states shall be made available to compatriots, in order to satisfy their cultural, scientific and informational requirements.

4. For the purpose of assisting compatriots in preserving and developing their cultural heritage, the state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation shall:

- provide assistance to cultural centres, cultural and educational organisations, libraries, archives, museums, theatres, musical and choreographic ensembles, artistic workshops and other professional and amateur artistic groups of compatriots;

- facilitate the study of compatriots' cultural heritage;

- assist all forms of cultural exchange between the Russian Federation and compatriots.

5. The state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation shall facilitate compatriots' preservation of knowledge of the native languages of the nationalities of the Russian Federation, the creation of conditions for their study and use in education and for receiving information in these languages, in accordance with the Russian Federation's international treaties and the Russian Federation's legislation, and taking account of the legislation of foreign states.

6. The state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation shall, in conformity with the Russian Federation's legislation, help persons who were citizens of the USSR to receive secondary and higher vocational education and in-service training, including doctoral and post-doctoral studies, in educational establishments and research institutes in the Russian Federation, on an equal footing with citizens of the Russian Federation.

Should quotas be established on the intake of foreign citizens for study and in-service training paid for from the federal budget, it is essential that compatriots' interests be taken into account.

The Russian Federation shall assist compatriots in obtaining general education in the native languages of the nationalities of the Russian Federation, including the study of Russian history and Russian cultural heritage.

To this end, measures shall be implemented to train teachers and to develop textbooks, programmes and teaching methodology manuals, with the participation of specialist compatriots, bearing in mind the particular organisational features of the educational system in the states which were part of the USSR, and to supply such textbooks, programmes and manuals to compatriots, to assist in setting up and obtaining official recognition for educational establishments, opening branches of Russian higher educational establishments where teaching is carried out in native languages, and in obtaining recognition of diplomas granted by these educational establishments.

7. For the purpose of developing an educational area in which the rights and interests of compatriots are taken into account, the Russian Federation shall pursue a course of action with respect to states which were part of the USSR aimed at developing an agreed policy in the field of education; shall enter into international treaties on recognition by the Russian Federation of higher vocational diplomas received by compatriots having pursued higher

education in participant states of the Commonwealth of Independent States, in the Latvian Republic, the Lithuanian Republic and the Estonian Republic.

Article 18. Support for compatriots in the field of information

1. The Russian Federation shall support compatriots in obtaining and disseminating information, using information in the native languages of the nationalities of the Russian Federation within the territories of the states in which they are resident, creating information media, and in supporting and developing information links between the states in which they are resident and between compatriots and the Russian Federation;

The state authorities of the Russian Federation shall take measures to disseminate information concerning the implementation of the Russian Federation's state policy in respect of compatriots and about compatriots' situation in the Russian Federation and in the states in which they are resident.

2. The Russian Federation shall create the necessary conditions for transmitting information from the Russian Federation to compatriots, via television and radio broadcasts, the distribution of periodicals and other printed matter, cinematic productions and audio and video materials in compatriots' native languages, and by adopting domestic state measures and concluding international treaties.

The Russian Federation shall provide financial, material and technical resources to the Russian mass media which supply information to compatriots to assist them in fulfilling this task, in accordance with the Russian Federation's legislation.

3. The Russian Federation shall provide support for mass media owned by compatriots, in accordance with the Russian Federation's international treaties, the Russian Federation's legislation and the legislation of the states on whose territory those mass media operate.

Article 19. The Russian Federation's authority in the field of relations with compatriots

The Russian Federation's authority in the field of relations with compatriots shall consist in:

- establishing the basis of the Russian Federation's state policy and activities to implement it;

- adopting and amending federal laws and supervising how these are observed;

- adopting federal programmes;

- concluding international treaties and supervising the fulfilment of obligations arising from them;

- other powers as defined by federal law.

Article 20. Authority of the state authorities of subjects of the Russian Federation in the field of relations with compatriots

The authority of the state authorities of the subjects of the Russian Federation in the field of relations with compatriots shall consist in:

- participating in developing the basic principles underlying the Russian Federation's state policy and in activities to implement it, and also in drawing up federal laws;

- formulating and adopting laws and other standard-setting legal texts of the subjects of the Russian Federation in accordance with federal laws;

- participating in developing and implementing federal programmes;

- developing, adopting and executing regional (territorial) programmes.

Article 21. State administration and supervision in the field of relations with compatriots

State administration and supervision in the field of relations with compatriots shall be implemented:

- at federal level: by the Government of the Russian Federation and the federal executive bodies that have been specially empowered for this task;

- in the subjects of the Russian Federation: by the executive bodies of the subjects of the Russian Federation.

Article 22. The state's obligations in the field of relations with compatriots

The state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation shall:

- formulate and carry out measures to implement the Russian Federation's state policy in accordance with the present Federal Law;

- assist compatriots from all the groups provided for in the present Federal Law in exercising fundamental human and civil rights and freedoms as consolidated in the legislation of the countries in which they are permanently or temporarily resident, the Russian Federation's international treaties and the Russian Federation's legislation, and also take measures to defend and restore them;

- be governed by the present Federal Law in resolving questions concerning compatriots.

Article 23. Financing of the Russian Federation's activities in the field of relations with compatriots

1. The Russian Federation's activities in respect of compatriots shall be funded from the federal budget. The procedure for distributing and using state allocations shall be determined by the Government of the Russian Federation, and the Chamber of Auditors shall be responsible for supervising their use.

2. The state authorities of the subjects of the Russian Federation and local authorities shall determine the scale and procedure of use of own resources channelled towards activities in respect of compatriots.

3. State funds and public foundations may be set up in the Russian Federation, made up of contributions from the state and from legal entities and individuals, to provide financing and material support to compatriots and their organisations. The state authorities of the Russian Federation shall encourage voluntary activities by legal entities and individuals from the Russian Federation in respect of relations with compatriots, in accordance with the Russian Federation's legislation.

Article 24. Granting of benefits and advantages to compatriots and their organisations and to legal entities and individuals in the Russian Federation and foreign individuals and organisations providing support to compatriots

In order to achieve the objectives of the Russian Federation's policy in respect of compatriots abroad, individuals and legal entities from the Russian Federation and foreign individuals and organisations providing material and financial assistance and support to compatriots, may be granted fiscal, customs and other privileges and advantages, on an equal footing with compatriots and their organisations, on the basis of the Russian Federation's legislation.

Article 25. State monitoring of relations with compatriots

State monitoring of relations with compatriots shall be conducted in the Russian Federation, to include the collection, analysis and evaluation of information on compatriots' situation, the creation of a data bank, forecasting of developments and scientific research.

The findings of the state's monitoring shall be brought to the attention of the state authorities of the Russian Federation, the state authorities of the subjects of the Russian Federation, other participants (parties) in the Russian Federation's relations with compatriots, compatriots' organisations, public associations, and Russian and foreign mass media.

The procedure for conducting state monitoring of relations with compatriots shall be established by the Government of the Russian Federation.

Article 26. Representation of compatriots' interests in the state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation

Representative public/consultative bodies/councils (committees) of compatriots may be formed within the state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation. The procedure for forming such compatriots' councils (committees), and their tasks and functions, shall be established by the state authorities of the Russian Federation and the state authorities of the subjects of the Russian Federation, taking due account of the Russian Federation's legislation and the legislation of the subjects of the Russian Federation respectively.

Article 27. Entry into force of the present Federal Law

The present Federal Law shall enter into force from the day of its official publication.

President of the Russian Federation
B. Yeltsin

Moscow, Kremlin
24 May 1999
No. 99 – F3

The text of this document has been checked against the "Collected legislation of the Russian Federation", No. 22, 31.05.99

SLOVAK REPUBLIC

LAW No. 70/1997

from 14. February 1997

on Expatriate Slovaks and changing and complementing some laws

The National council of the Slovak Republic has decided by this law:

Art. I

§ 1

Subject of the law

This law regulates the status of expatriate Slovaks as well as their rights and duties in the territory of the Slovak Republic. It also defines the process for recognizing Expatriate Slovak Status and the competencies of the different state administration central bodies regarding Expatriate Slovaks.

§ 2

Expatriate Slovak

(1) An Expatriate Slovak is a person, to whom expatriate status has been recognized in comformity with this law.

(2) According to this law, Slovak Expatriate Status can be recognized to an individual without Slovak citizenship, if he/she has Slovak nationality or Slovak ethnic origin and Slovak cultural and language awarwness.

(3) For the aim of this law, a person applying for recognition of Slovak Expatriate Status (further on „applicant"), has Slovak ethnic origin, if he/she or any of his direct ancestors up to the third generation had Slovak nationality.

(4) Applicants shall prove his/her Slovak nationality or Slovak ethnic origin presenting a supporting document. The main supporting documents are the applicant`s birth certificate, baptism certificate, registry office statement, proof of nationality or permanent residence permit.

(5) Applicants, who cannot present one of the documents mentioned in chapter 4, can identify themselves by a written testimony from the Slovak countrymen organization in the applicant`s place of residence, or failing him, by the testimony of at leasttwo Slovak Expatriates living in the aapplicant`s country of residence.

(6) For the purpose of this law, an applicant has Slovak cultural and language awareness if he/she has at least passive knowledge of the Slovak language and basic knowledge of Slovak culture or declares himself/herself actively for the Slovak ethnic.

(8) Applicants shall document their Slovak cultural and language awareness by the results of their present activities, by testimony of the Slovak countrymen organization active in the place of residence of the applicant, or failing him, by the testimony of at least two Expatriate Slovaks living in the applicant`s country of residence.

§ 3

Applications for Recognition of Slovak Expatriate Status

(1) Applicants shall submit a written application for recognition of the Slovak Expatriate Status at the Foreign Affairs of the Slovak Republic (further on „MFA“), or abroad at the mission or the consular office of the Slovak Republic (further on „mission“).

(2) Applications for recognition of Slovak Expatriate Status must be supported by documents proving that the applicant meets the requirements specified in § 2 para. 2,5 and 7; that in his/her country of residence, the applicant has not committed any act that is deemed by the laws of the Slovak Republic to be an intentional offense Republic (further on only „intentional offense“)and for which the applicant has been also legally sentenced; and that the applicant does not suffer from any contagious disease, the spread of which is deemed by the law to be an offense.[1]

(3) MFA shall decide on the application within 60 days from submission. In case the application is accepted, MFA, through the respective mission of the Slovak Republic, shall issue the applicant a document (further on „Expatriate card“), identifying him/her as a Slovak Expatriate. No separate decree on the recognition of Slovak Expatriate Status will be issued to accepted applicants.

§ 4

Expatriate card

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[1] *§ 189 of the Criminal code. The law of the National Council of the Slovak Republic No. 272/1994 Coll. on Health Protection of the Population in the wording of the law of the National Council of the Slovak Republic No. 222/1996 Coll.The ordinance of the Ministry of Justice of the Slovak Republic No. 105 1987 Coll., defining the diseases considered to be contagious in the sense of the Criminal code.*

(1) The Expatriate card contains information on the identity of the holder, especially his/her forename, family name, date of birth, citizenship and permanent address. At the applicant`s request it is possible to include in the Expatriate card the forename, family name and date of birth of his/her children (also adopted) under 15 years of age, if this is possible according to international agreements binding the Slovak Republic. The advantages that derive from this law concern also the applicant`s children under 15 years of age included in the Expatriate card of a Slovak Expatriate.

(2) Expatriate cards are valid indefinitely. Expatriate cards are valid only together with one of the person`s valid identification document. The Expatriate card is issued in order to give the holder the possibility to make use of the advantages deriving from this law for an indefinite period of time.

(3) The holder of an Expatriate card is responsible for the accurancy of the information it includes. The holder of the Expatriate card has to give MFA notice of any changes in his forename, family name, citizenship and permanent address, and MFA shall issue him/her a new Expatriate card.

(4) Expatriate cards are not issued to persons:

a) under 15 years of age,

b) who carry out activities which go against the interests of the Slovak Republic and which go present signs of offenses included in the Criminal code,[2]

c) who have committed an international offense.

(5) A person, who in the territory of the Slovak Republic commits an intentional offense for which he/she is deported, loses Slovak Expatriate Status.[3]

§ 5

Entrance and Stay of Expatriates in the Territory of the Slovak Republic

(1) Expatriates entering the territory of the Slovak Republic do not required written invitation nor visa, if this is possible according to bilateral interstate agreements.

(2) Expatriates have the right to stay for a long period in the territory of the Slovak Republic under the conditions defined in the pertinent regulation.[4]

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[2] *The Criminal code in the wording of later regulations.*

[3] *§ 27 letter h) of the Criminal code.*

[4] *§ 6 of the law of the National Council of the Slovak Republic No. 73/1995 Coll. on Stay of Foreigners in the Territory of the Slovak Republic.*

(3) Expatriates shall apply for permanent residence in the territory of the Slovak Republic at the respective Slovak mission abroad or at the competent departement of the Police Forces in the Slovak Republic.

§ 6

Expatriates` Rights in the Territory of the Slovak Republic

(1) During their stay in the territory of the Slovak Republic expatriates have the right to

a) apply for admission[5] at any educational institution in the territory of the Slovak Republic,

b) apply for employment without working permit and without permanent residence status in the territory of the Slovak Republic,[6]

c) apply for state citizenship of the Slovak Republic for outstanding personality reasons,[7]

d) request exception from Social Security payments abroad,[8] if he/she meets the conditions giving him/her the right for their provision in the territory of the Slovak Republic.

(2) Expatriates in the territory of the Slovak Republic have the right to own and acquire real estate under the conditions established in the pertinent regulation.[9]

(3) In conformity with the pertinent regulations[10] the state provides,

a) 50 percent fares reduction in local public transport as well as in regular domestic railroad and bus transport to retired expatriates or expatriates with disability pension,

b) free transportation in local public transport as well as in domestic railroad and bus transport to expatriates of over 70 years of age.

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[5] *Law No. 29/1984 Coll. on Basic and Secondary School System (School Act) in the wording of later regulations. Law No. 172/1990 Coll. on universities in the wording of later regulations.*

[6] *§ 116 para 2 of the law of the National Council of the Slovak Republic No. 387/1996 Coll. on Employment in the wording of later regulations..*

[7] *§ 7 para 3 letter b) of the law of the National Council of the Slovak Republic No. 40/1993 Coll. on State Citizenship of the Slovak Republic*

[8] *§ 103 of Law No. 100/1988 Coll. on Social Security in the wording of later regulations*

[9] *§ 19 of the law of the National Council of the Slovak Republic No. 202/1995 Coll. Foreign Exchange Law and the Law changing and complementing law of the Slovak National Council No. 372/1990 Coll. on Offenses in the wording of later regulations..*

[10] *§ 20 of the law of the National Council of the Slovak Republic No. 258/1993 Coll. on Railroads of the Slovak Republic § 30 of the law of the National Council of the Slovak Republic No. 164/1996 Coll. on Ways and changing law No. 455/1991 Coll. on Self-employment (Self-Employers law) in the wording of later regulations.§ 15 of the law of the National Council of the Slovak Republic No. 168/1996 Coll. on Road Transport.*

Competencies of State Administration Central Bodies

§ 7

The Ministry of Foreign Affairs of the Slovak Republic

a) decides on the recognition of Slovak Expatriate Status and on its cancelation,

b) runs an evidence of Expatriate card holders,

c) directs and coordinates the elaboration and execution of the state foreign policy in relation to Slovak Expatriates,

d) elaborates the long-term state policy conception in relation to Slovak Expatriates in cooperation with the state administration central bodies.

§ 8

The Ministry of Culture of the Slovak Republic

a) coordinates and provides assistance by state and non-state institutions of the Slovak Republic to Slovak Expatriates oriented to maintain their Slovak identity,

b) coordinates and secures documentary activities providing Slovak Expatriates information on the happenings in Slovakia by means of the State Information System.

§ 9

Other State Administration Central Bodies cooperate in the elaboration and execution of the state policy of the Slovak Republic in relation to Slovak Expatriates within their field of competence.[11]

§ 10

Common and Final Resolutions

(1) In case not otherwise established by this law, this law is to be enforced in conformity with the generally valid regulations on administration.[12]

(2) MFA does not apply any fee to applications for recognition of Slovak Expatriate Status.[13]

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[11] *The law of the National Council of the Slovak Republic No. 347/1990 Coll. on the Organization of Ministries and Other State Administration Central Bodies of the Slovak Republic in the wording of later regulations.*

[12] *Law No. 71/1967 Coll. on Administration (Administration Order).*

[13] *§ 4 para. 1 letter c) of the law of the National Council of the Slovak Republic No. 145/1995 Coll. on Adminisration Fees in the wording of later regulations.*

(3) according to § 7 para. 1, applications are to be submitted in official forms issued by MFA.

Article II

The law of the National Council of the Slovak Republic No. 40/1993 Coll. on State Citizenship of the Slovak Republic is complemented as follows:

At the end of § 7 para. 3 letter b) a comma is introduced and the following words added: „or a person to whom Slovak Expatriate Status has been recognized.[4a)]“

The wording of the footnote to reference [4a)] is:

„[4a)] Law No. 70/1997 Coll. on Slovak Expatriates and changing and complementing some laws.“

Article III

The law of the National Council of the Slovak Republic No. 387/1996 Coll. on employment is complemented as follows:

at the end of § 116 para. 2 a comma and the following words are added: „or if it is the case of a Slovak Expatriate.[2a)] “

The wording of the footnote to reference [2a)] is:

„[2a)] Law No. 70/1997 Coll. on Slovak Expatriates and changing and complementing some laws.“

Art. IV

The law of the National Council of the Slovak Republic No. 73/1995 Coll. on the Stay of Foreigners in the Territory of the Slovak Republic is complemented as follows:

at the end of § 6 para. 1 the following sentence is added:

„a person, who has been recognized Slovak Expatriate Status does not require permanent residence permit.[4a)] “

The wording of the footnote to reference [4a)] is:

„[4a)] Law No. 70/1997 Coll. on Slovak Expatriates and changing and complementing some laws.“

Art. V

The law of the National Council of the Slovak Republic No. 145/1995 Coll. on Administration Fees in the wording of the law of the National Council of the Slovak Republic

No. 123/1996 Coll. and of the law of the National Council of the Slovak Republic No. 224/1996 Coll. is complemented as follows:
In § 4 para. 1 letter b) a comma replaces the period and paragraph 1 is complemented by letter c), the wording of which is:
„c) a person, who has been recognized Slovak Expatriate Status. [2a)] *“*

The wording of the footnote to reference [2a)] is:

„ [2a)] *Law No. 70/1997 Coll. on Slovak Expatriate and changing and complementing some laws.“*

Art. VI

This law comes in force July 5, 1997.

Michal Kováč in his own hand

Ivan Gašparovič in his own hand

Vladimír Mečiar in his own hand

SLOVENIA

Resolution on the position of autochthonous Slovene minorities in neighbouring countries and the related tasks of state and other institutions in the Republic of Slovenia (Official Gazette of the Republic of Slovenia, No. 35-2280/1996)

Chapter 1

GENERAL PART

I. The areas of neighbouring countries inhabited by autochthonous Slovene minorities constitute, together with the Republic of Slovenia, a common Slovene cultural area.

Autochthonous minorities are a constituent part of the societies of neighbouring countries but are linked by numerous ties with the state of the Slovene people. The members of autochthonous minorities, Slovenes living across the borders of Slovenia, are citizens of neighbouring countries with all rights and obligations towards those countries and are a valuable bridge for cooperation and good neighbourly relations between the Republic of Slovenia and its neighbouring countries.

II. Autochthonous Slovene minorities live in the Austrian provinces of Carinthia and Styria, the Italian region of Friuli-Venezia Giulia, the Raba basin area of Hungary, and in areas on the Croatian side of the Croatian-Slovenian border, particularly Istria, Gorski Kotar and Medmurje.

III. The Republic of Slovenia stresses the validity of existing international legal documents governing the protection of the rights of autochthonous Slovene minorities in neighbouring countries. These include the Austrian national treaties, the Osimo Accords and the Agreement on the Guaranteeing of the Special Rights of the Slovene National Minority in the Republic of Hungary and of the Hungarian National Minority in the Republic of Slovenia. In accordance with the principles of succession the Republic of Slovenia is sole bearer of the rights and obligations deriving from these international agreements. At the same time it is committed to concluding new bilateral agreements which will determine more precisely the obligations of the signatories towards autochthonous national minorities.

In the international community Slovenia is striving for a general raising of the level of protection of autochthonous national minorities.

The Republic of Slovenia draws attention to the harmfulness of the type of inter-country relations which see countries attempt to settle open questions by putting pressure on autochthonous national minorities.

Chapter 2

ATTITUDE OF THE REPUBLIC OF SLOVENIA TO THE ORGANISATIONS AND ACTIVITIES OF AUTOCHTHONOUS MINORITIES

I. The successful operation of political, economic, cultural and other organisations is an indispensable expression of the existence of the autochthonous minority as a subject and a condition of its development.

The Republic of Slovenia supports Slovene autochthonous minorities in neighbouring countries in their efforts for survival and development as national communities.

The Republic of Slovenia acknowledges the autonomy and political subjecthood of autochthonous Slovene minorities in neighbouring countries. The Republic of Slovenia welcomes the efforts of minority political organisations in individual neighbouring countries for democratically elected group representation. It also supports their efforts to achieve guaranteed representation of autochthonous minorities in legislative bodies and other political and administrative bodies.

II. The method and scale of financial support provided by the Republic of Slovenia to minority organisations is defined by statute and other legal documents.

The Republic of Slovenia supports the activities of cultural, educational, sports, research and other institutions and organisations of civil society in Slovenia which cooperate with autochthonous minorities. These institutions are able to include their projects in the annual programmes of work of state bodies of the Republic of Slovenia.

The Republic of Slovenia supports cooperation between appropriate partners at the local level intended to strengthen Slovene autochthonous minorities.

Chapter 3

BODIES OF THE REPUBLIC OF SLOVENIA RESPONSIBLE FOR COOPERATION WITH SLOVENE AUTOCHTHONOUS MINORITIES IN NEIGHBOURING COUNTRIES

I. The relationship between the Republic of Slovenia and Slovene autochthonous minorities in neighbouring countries is based on the constitutional principle of care of the mother country for autochthonous minorities and equal partnership cooperation. The criterion for the cooperation of the Republic of Slovenia with individuals and organisations in neighbouring countries is their national affiliation and their work for survival and development as an ethnic community.

II The Republic of Slovenia emphasises the need for the planned and coordinated work of state bodies in cooperation with Slovene autochthonous minorities in neighbouring countries.

Parliamentary parties will strive to achieve consensus over the fundamental principles of the policy of the Republic of Slovenia towards Slovene autochthonous minorities in neighbouring countries.

The competent bodies of the Republic of Slovenia should include in cooperation, in an appropriate way, important and representative academic, cultural and economic subjects in Slovenia and from among Slovene autochthonous minorities. To this end a special advisory body is being set up by the Government of the Republic of Slovenia.

III The basic policy of the cooperation of the Republic of Slovenia with Slovene autochthonous minorities in neighbouring countries is determined by the National Assembly. For this reason the National Assembly is setting up a special working body charged with dealing with decisions in this field and proposing them to the National Assembly for adoption.

Its competences shall be regulated by the National Assembly by means of a decree.

IV The implementation of the policy of cooperation of the Republic of Slovenia with Slovene autochthonous minorities in neighbouring countries shall be the responsibility of the Government of the Republic of Slovenia.
To this end a minister without portfolio has been appointed with the responsibility of proposing the policy of cooperation with Slovene autochthonous minorities in neighbouring countries and overseeing its implementation and the coordination of the activities of the competent ministries in this area.

V The Government of the Republic of Slovenia shall submit to the National Assembly an annual report on the activities of the Republic of Slovenia in the area of cooperation with Slovene autochthonous minorities in neighbouring countries. The report shall include a policy proposal for the forthcoming yeArticle The proposal must also contain frameworks of the budget funds needed for its implementation.

Chapter 4

BASIC AREAS OF COOPERATION OF THE REPUBLIC OF SLOVENIA WITH SLOVENE AUTOCHTHONOUS MINORITIES IN NEIGHBOURING COUNTRIES

I The Republic of Slovenia shall ensure the necessary substantive presence of minority issues in the entirety of relations with neighbouring countries and at multilateral, regional and other levels of international cooperation, particularly within the framework of regular diplomatic and state contacts.

It particularly emphasises the importance of the inclusion of the problems of autochthonous minorities into treaty relations with neighbouring countries and at the multilateral level. Priority should go here to bilateral treaty-based regulation of minority protection, as envisaged by the Council of Europe's Framework Convention on the Protection of National Minorities.

The minority issue must be included in the general framework of the presentation of the Republic of Slovenia in the world.

Special attention must be devoted to the appropriate activity of diplomatic and consular missions with competence in areas inhabited by minorities.

II Strengthening the economic position of autochthonous minorities

The permanent and strategic interest of the Republic of Slovenia is the strengthening of the economic position of autochthonous minorities and their members, above all in the areas of their autochthonous settlements. In this sense it is necessary to include a minority economic component in documents on the strategy of economic development of Slovenia, and in projects of interregional and cross-border cooperation co-financed by the European Union or other international institutions or organisations.

The Republic of Slovenia shall achieve these goals by means of various economic policy measures designed to promote business cooperation of minorities with commercial subjects in Slovenia.

The Government of the Republic of Slovenia devotes special attention to the position of the banking and savings institutions of Slovene autochthonous minorities in neighbouring countries and to the preservation of their independent operation.

The employment of members of autochthonous minorities by Slovenian commercial subjects enjoys the special support of the Republic of Slovenia. This also applies to the introduction of a temporary regime for the operations of minority companies in the Republic of Slovenia in the period up to Slovenia's entry into the European Union.

The funds for these activities are provided by the budget of the Republic of Slovenia. The Republic of Slovenia shall set up a special fund for economic cooperation with Slovene autochthonous minorities.

III Education

The members of Slovene autochthonous minorities have the right to education in schools of all types and levels in the Republic of Slovenia. For this reason the Ministry of Education and Sport pays special attention to the concluding of bilateral agreements which regulate the recognition of certificates and degrees, grants for members of autochthonous minorities,

official use of textbooks published in the Republic of Slovenia for minority education in neighbouring countries, the inclusion of knowledge of the culture of the Slovene nation and neighbouring nations in general education programmes, additional training of teaching staff, etc.

The government also devotes special attention to developing independent grants programmes and to encouraging permanent contacts between schools in the Republic of Slovenia and minority educational institutions, student exchanges, and the development of extra-curricular contacts for pupils and students within the framework of interest activities.

The Republic of Slovenia supports sports and general recreational activities or organisations which cooperate with the kindred organisations of Slovene autochthonous minorities in neighbouring countries.
The Republic of Slovenia likewise supports secondary school boarding homes, university halls of residence and private educational institutions in minority communities.

The Republic of Slovenia is adopting appropriate measures to enable a higher enrolment of children in the pre-school institutions of Slovene minorities in neighbouring countries and is providing appropriate teachers and mentors for the special educational activities of autochthonous minorities.

IV Science

The Republic of Slovenia supports the work of the academic/research institutions of autochthonous minorities. In concluding and implementing general agreements on academic cooperation it includes researchers or research institutions from Slovene autochthonous minorities in neighbouring countries.

Notwithstanding the position achieved by the academic institutions of Slovene autochthonous minorities in neighbouring countries, the Republic of Slovenia provides permanent funds for the basic needs of their operation.

The Republic of Slovenia includes the academic and research capabilities of Slovene autochthonous minorities in neighbouring countries in the research activity of Slovenia. This applies in particular to the inclusion of academic institutions in Slovenia and Slovene autochthonous minorities in neighbouring countries which study issues of nationality.

V Culture

It is the Republic of Slovenia's desire that the cultural activity of autochthonous minorities and the mother country should interweave organically and enrich each other as much as possible.

Slovene autochthonous minorities in neighbouring countries are included via their cultural institutions and artists in the cultural programmes of Slovenia and its cultural institutions and are becoming an increasingly important element of the cultural presentation of Slovenia at the international level and a linking factor in the establishing of cultural coexistence in areas where members of Slovene minorities live together with members of the majority nation.

The Government of the Republic of Slovenia should guarantee a suitable system of harmonising the programmes of amateur cultural activity, with which cultural institutions in Slovenia and in Slovene autochthonous minorities in neighbouring countries are involved.

The Republic of Slovenia stresses the importance of the media, particularly the electronic media, for the survival and development of the national consciousness of the members of Slovene autochthonous minorities in neighbouring countries. It is therefore necessary to ensure the reception of television and radio signals from the Republic of Slovenia in areas inhabited by autochthonous minorities. The range and quality of information about the autochthonous minority in the Slovenian media area need to be increased. Special attention needs to be devoted to programmes for children and young people.

The Government of the Republic of Slovenia, more specifically the Ministry of Culture, should support within the framework of its regular activities, the publishing activities of minorities and the circulation of Slovene books, periodicals and musical media in the areas inhabited by autochthonous minorities.

VI Transport and telecommunications

Because unimpeded contacts of the members of autochthonous minorities with the mother country are one of the conditions for the preservation and development of autochthonous minorities, the Republic of Slovenia is promoting, by means of international agreements, bilateral transport, postal and telecommunications connections with the areas inhabited by Slovene autochthonous minorities and is striving for a reduction of tariffs to the internal level.

* * *

Resolution on relations with Slovenes abroad
(Official Gazette of the Republic of Slovenia, No. 7/2002)

Given the fact that that a considerable portion of the Slovene national body lives outside the borders of the Republic of Slovenia;

considering Article 5 of the Constitution of the Republic of Slovenia which emphasizes responsibility toward Slovene emigrants and migrant workers and the enhancement of their contacts with the homeland, and which thereby defines the relationship with Slovenes living outside the Republic of Slovenia as its permanent and active obligation;

with the firm intention that the Republic of Slovenia contribute to the preservation of the Slovene identity, language, culture and cultural heritage and encourage cultural growth among Slovenes living outside its borders;

expressing acknowledgement of all Slovenes outside the Republic of Slovenia who strive to preserve the Slovene identity and who contributed to the international recognition of the Republic of Slovenia after it had achieved independence; and

fully respecting the differences and with a view turned to the future,

on the basis of Article 166 regarding Article 170 of its Rules of Procedure, the National Assembly of the Republic of Slovenia, at its session held on 23 January 2002, adopted the following

RESOLUTION ON THE RELATIONS WITH SLOVENES ABROAD

GENERAL

A considerable portion of the Slovene national body lives outside the borders of the Republic of Slovenia. The relationship between the Republic of Slovenia and Slovenes abroad is based on the constitutional principle of responsibility toward Slovenes living outside the Republic of Slovenia. The goal is the preservation and growth of the Slovene identity, language and culture, and to enable and enhance multilateral cooperation, particularly in cultural, educational, scientific, economic and other fields.

The resolution shall apply to Slovenes living outside the Republic of Slovenia other than those whose status is determined by the Resolution on the status of autochthonous Slovene minorities in neighbouring countries and the hereto related tasks of government and other bodies of the Republic of Slovenia *(Resolucija o položaju avtohtonih slovenskih manjšin v sosednjih državah in s tem povezanimi nalogami državnih in drugih dejavnikov Republike Slovenije)* of 27 June 1996 (Official Gazette of the Republic of Slovenia, No. 35/96).

As regards cooperation and financial support, the Republic of Slovenia shall take into consideration the specific needs of Slovenes or Slovene communities in individual countries, and in this regard particularly encourage their self-initiated activities and fund raising for activities supporting the preservation and development of the Slovene identity.

BODIES IN THE REPUBLIC OF SLOVENIA RESPONSIBLE FOR RELATIONS WITH SLOVENES ABROAD

The fundamental policy on cooperation of the Republic of Slovenia with Slovenes abroad shall be determined by the National Assembly. For dealing with this issue (together with the issue of the Slovenes living in neighbouring countries), a special working body shall be responsible - the Commission for Relations with Slovenes in Neighbouring and Other Countries, which shall deal with and submit proposals on adopting decisions in this field. Its competencies shall be regulated by National Assembly's decree.

Parliamentary parties shall endeavour to reach consensus regarding the basic principles of the policy of the Republic of Slovenia toward Slovenes abroad.

The Government of the Republic of Slovenia shall be responsible for the cooperation of the Republic of Slovenia with Slovenes abroad. The Ministry of Foreign Affairs and the Office for Slovenes Abroad as its constituent body shall undertake, in accordance with the Organization and Competence of Ministries Act, the tasks connected with monitoring and coordinating the activities of the ministries competent in the field of cooperation with Slovenes abroad.

The Government of the Republic of Slovenia shall submit to the National Assembly an annual report on the activities of the Republic of Slovenia in the field of cooperation with

Slovenes abroad together with its proposed program for the following yeArticle The proposed program shall include the budgetary framework for its implementation. The annual report shall be discussed by the National Assembly.

5. In cooperating with Slovenes abroad, it is necessary that government and other bodies act in a planned and harmonised manner. Coordination is necessary:

- between government bodies competent and responsible for cooperation with Slovenes abroad or in any way involved in maintaining contacts with them;

- between the government bodies and other institutions, including civil organizations that maintain contacts with Slovenes abroad and are financed from the budget of the Republic of Slovenia;

- between Slovenia (i.e. bodies and institutions referred to in paragraphs 1 and 2) and Slovenes abroad;

- among Slovenes living in individual countries or regions with the aim of supporting and encouraging the cooperation and joint action of Slovenes in individual countries, as well as joint and harmonized programs in matters that are of fundamental significance for the preservation and growth of the Slovene identity.

6. The competent bodies of the Republic of Slovenia shall in a suitable manner include in this cooperation important and representative factors from the fields of education, science, culture, economy and other areas. For this purpose, within the Government of the Republic of Slovenia a consultative body shall be established or the existing consultative body for Slovenes abroad enlarged.

7. Organizations and associations whose work includes cooperation with Slovenes abroad and that are financed from the budget of the Republic of Slovenia shall act in accordance with the basic policy of the Republic of Slovenia toward Slovenes abroad as determined by the National Assembly and implemented by the Government. Here it is necessary to aim at the rationality and efficiency of the work of these organizations.

FINANCIAL SUPPORT

The Republic of Slovenia shall financially support the activities of Slovenes abroad aimed at the preservation and growth of the Slovene identity, culture and language, and the preservation of cultural heritage. Funds shall be provided in the budget of the Republic of Slovenia through the Office for Slovenes Abroad. Funds intended for cultural cooperation, education and science shall be provided through the Ministry of Culture and the Ministry of Education, Science and Sport, funds for the support of the media activities shall be provided through the Government Public Relations and Media Office and the Ministry of Information Society, whereas funds for the promotion of economic cooperation shall be provided through the Ministry of Economy. Financial support is public.

The funds shall be allocated in accordance with the legal regulations of the Republic of Slovenia. The following principles shall be taken into account:

- the principle of preserving and developing Slovene communities abroad and of strengthening national consciousness – this represents the fundamental basis for assisting Slovenes abroad and therefore the Republic of Slovenia shall support programs that influence the preservation and development of the Slovene identity and strengthen national consciousness;

- the principle of a specific approach to individual Slovene communities – it is necessary to take into consideration the diversity of the actual situation, circumstances, conditions, customs and other factors regarding Slovenes abroad that differ from one place to another;

- the principle of preserving the most important institutions of Slovene communities – institutions that are the pillars of the existence of Slovene communities abroad may have, provided, of course, that the principles and agreements within the Slovene communities are fulfilled, special status with regard to the allocation of financial assistance;

- the principle of preserving activities that have been conducted for a longer period – as a rule, special attention shall be devoted, taking into consideration the other principles and criteria, to activities that have been conducted for a longer period and the cessation of which for even a short period would harm the entire Slovene community (in that area);

- the principle of linkage with Slovenia – for the existence of Slovene communities abroad it is essential to maintain links with the mother country;

- the principle of rational use and supervision of the use of funds, as well as the transparency of all sources of financing – the prerequisite for receiving financial assistance from Slovenia shall be the rational and strictly targeted use of previously allocated funds from the Republic of Slovenia, regular reporting on their use, and the specification of all sources of financing.

4. BASIC FIELDS OF COOPERATION OF THE REPUBLIC OF SLOVENIA WITH SLOVENES ABROAD

1. It is necessary to ensure the inclusion of Slovenes abroad in the cultural, scientific, informational, economic, educational, sport and other fields of activity of the Slovene society. This is the responsibility of the consultative body referred to in section 2.6. The main purpose of this activity is that Slovenes abroad become incorporated in the uniform Slovene area – that they are actively included in the Slovene intellectual, cultural, economic, scientific and social potential or in its development.

2. Slovenia shall support activities that contribute to the preservation and strengthening of the identity of Slovenes abroad, and the programs for teaching the Slovene language and preserving and enhancing the Slovene culture. Particularly necessary are measures for preserving the Slovene language among young people who are losing contact with their Slovene identity, and for the preservation of the archival material and other cultural heritage among Slovenes abroad.

Preservation of the Slovene language and education

The Republic of Slovenia shall strive to preserve and teach Slovene language among Slovenes abroad, both in Europe and other continents, at all levels: from preschool, primary and secondary education to higher and adult education.

The Ministry of Education, Science and Sport, together with the technical services of the Centre for Slovene as a Second/Foreign Language at the Faculty of Arts of Ljubljana, the National Education Institute, the Office for Slovenes Abroad, the two universities, and the research organizations in Slovenia shall:

- provide textbooks for learning Slovene, literary books, in particular juvenile books in Slovene, and other educational resources;

- prepare and implement programmes for distance learning of Slovene (Internet);

- prepare program and tools for independent learning of Slovene (manuals, audio tapes, CDs);

- reconsider, if necessary, the curricula for learning Slovene abroad;

- organize training seminars for teachers;

- provide financial support for teachers;

- provide scholarships for the attendance of Slovenes abroad at summer schools of Slovene and at the all-year school of Slovene in Slovenia, and by conferring scholarships make it possible for them to study in Slovenia;

- support the establishment of Slovene lectureships at universities in the countries where Slovenes live, and the cooperation among the universities also in terms of visiting professors of Slovene language;

- involve Slovene researchers from abroad in the implementation of the national research program.

The Republic of Slovenia shall endeavour to conclude appropriate international agreements on supporting the preservation of the Slovene language and culture and on cooperation of other institutions in this field in the countries where such agreements have not yet been concluded, but the possibilities to do so exist, and to establish implementation programs based on such agreements.
Learning about Slovene emigrants and migrant workers abroad should be included in the appropriate measure in primary and secondary school curricula in the Republic of Slovenia.

4.2. Cultural cooperation and preserving cultural heritage

The Republic of Slovenia shall strive for the preservation of Slovene spiritual independence among Slovenes abroad and for the development of a common Slovene cultural area. In the framework of its regular programs, together with its constituent organs (Cultural Heritage Administration, Archives of the Republic of Slovenia) and the two public funds for the field of culture (Fund of the Republic of Slovenia for Cultural Activities, Film Fund of the

Republic of Slovenia), the Ministry of Culture shall concern itself with the cultural activities of Slovenes abroad, the preservation of the common cultural heritage, and the mutual exchange of achievements in this field.

The Republic of Slovenia shall organize training programs for Slovenes abroad who work in archives and cultural fields (choirmasters, leaders of folklore groups, cultural animators, and others), encourage the inclusion of the cultural and artistic activity of Slovenes abroad in the cultural activity in Slovenia, and provide assistance in the supplement and systematic regulation of the library fund of central Slovene libraries abroad.

The Republic of Slovenia shall endeavour to conclude appropriate international agreements on supporting the preservation of the Slovene culture with countries in which such possibilities exist and to establish implementation programs based on such agreements.

4.3. Economy and science

The Republic of Slovenia shall devote special attention to strengthening economic links and cooperation in the field of science and the development of new technologies between Slovenes abroad and entities in Slovenia. It shall achieve these goals by enhancing economic cooperation through various measures of economic policy and the elimination of barriers.

The Republic of Slovenia shall support the meetings of Slovene economists and Slovene scientists from abroad, and shall endeavour to strengthen the relations and project cooperation with all Slovene scientists abroad, also in terms of their expert involvement in bilateral or multilateral programs initiated by Slovenia. The Government of the Republic of Slovenia shall facilitate and encourage the cooperation of Slovene scientists abroad in national research projects and scientific meetings, and shall prepare a program to attract and involve young scientists of Slovene descent in Slovene scientific institutions or regular cooperation.

4.4. Informing

The Republic of Slovenia shall endeavour to provide access to information and the integration and cooperation in the field of informing, both in providing information to Slovenes abroad regarding the events in the Republic of Slovenia and the information regarding Slovenes abroad in Slovenia. Special attention shall be devoted to the use of modern electronic informing.

Every third year, the Office for Slovenes Abroad in cooperation with the Government Public Relations and Media Office and the Ministry of Information Society shall prepare a seminar for journalists of the Slovene media abroad. Through this it shall encourage the preservation of the Slovene language and the promotion of less expensive and more modern means of communication. The Government of the Republic of Slovenia shall encourage the work of Slovene media abroad according to the efficiency and rationality of their operation and taking into consideration the principles outlined in section 3.2 of this Resolution.

4.5. Repatriation, citizenship and status without citizenship

It is in the interest of the Republic of Slovenia that Slovenes living abroad and their descendants return to Slovenia. Special attention shall be devoted to those who might contribute to the development of Slovenia.

The state bodies of the Republic of Slovenia shall provide Slovenes abroad with appropriate information about returning to the homeland and implement the facilitation prescribed by law. For this purpose, the Office for Slovenes Abroad, the Government Public Relations and Media Office and the Ministry of Information Society shall prepare an informative brochure. This information must also be available at the diplomatic and consular offices of the Republic of Slovenia abroad. Facilitation should include the simplification of procedures such as nostrification of diplomas and others.

The Republic of Slovenia shall facilitate the return of Slovenes living in countries in severe political or economic crisis to the homeland.

It is in the interest of the Republic of Slovenia that persons of Slovene origin who have an active link with Slovenia and wish to acquire Slovene citizenship have the opportunity to do so.

A normative framework regulating the special rights and privileges of Slovenes without Slovene citizenship shall be prepared.

4.6. Participation in elections

The Republic of Slovenia shall enable Slovene citizens with permanent residence abroad to participate in elections and shall endeavour to eliminate difficulties Slovene citizens living abroad have encountered in executing their right to vote.

The National Electoral Commission in cooperation with the Ministry of Foreign Affairs and diplomatic and consular representative offices abroad shall ensure the timely informing of Slovenes abroad and their participation in the elections of the Republic of Slovenia.

4.7. Participation in foreign policy

In arranging bilateral relations with individual countries in which Slovenes live, the Government of the Republic of Slovenia, taking into consideration their needs, shall endeavour to conclude agreements on social and health insurance, as well as other agreements referred to sections 4.1 and 4.2, particularly on the mutual recognition of diplomas and other qualification certificates. The Republic of Slovenia shall endeavour to maintain or establish honorary consulates of the Republic of Slovenia in countries in which Slovenes live, and to involve Slovenes abroad in the work and activities of diplomatic, consular and other representative offices of the Republic of Slovenia.

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According to the policy, defined by the Constitution and further explained in both resolutions, several laws include different provisions conferring special benefits or preferential treatment to the Slovenes living abroad.

The existence and protection of the Slovene minorities in the neighbouring countries is guaranteed in international law. The most significant for the status of the Slovene minority in Italy is Article 8 of Osimo Agreement (bilateral agreement, 1976) and the whole preamble referring to universal and European documents. The Austrian State Treaty (multilateral treaty, 1955), serves as a basis for the comprehensive protection of the Slovene minority in the regions of Carinthia and Styria. The status of Slovenes in the Raba region in Hungary is governed by a Convention on providing special rights for the Slovenian minority living in the Republic of Hungary and for the Hungarian minority living in the Republic of Slovenia (bilateral agreement, 1992).

Activities of the Ministry of Education, Science and Sport in the field of the education of the Slovene national minorities in neighbouring countries are based on the following agreements:

- Agreement on cooperation in the field of education, culture, science and technology between Government of the Republic of Slovenia and Government of the Italian Republic (2000)

- Agreement on cooperation in the field of culture, education and science between the Republic of Slovenia and Republic of Hungary (1992)

- Agreement on cooperation in the field of culture, education and science between the Government of the Republic of Slovenia and Republic of Austria (2001).

Some other bilateral agreements with countries where Slovenes living abroad reside, include different provisions conferring benefits or preferential treatment to them.

The passionate and at times virulent discussions ensuing from the adoption by Hungary, in June 2001, of the Act on Hungarians living in neighbouring countries dramatically revealed that too little attention had been paid until then by the international community to the phenomenon of the concern of certain States for their kin-minorities. The Venice Commission was called upon to fill this gap. After setting out the relevant standards in its report of October 2001 on the preferential treatment of national minorities by their kin-States, the Commission organised a colloquy, in June 2002, with a view to pursuing and developing the study of this matter. In the course of the colloquy, the major experts in the European context of minority protection – including representatives of the Council of Europe's Advisory Committee on the Framework Convention for the Protection of National Minorities and the OSCE High Commissioner on National Minorities – together with national experts discussed and reached their conclusions on this crucial matter. The present volume contains the Venice Commission's report, the reports presented and the conclusions reached at the Colloquy as well as a collection of the existing national legislation on kin-minorities.

Les débats passionnés et parfois virulents, soulevés par l'adoption par la Hongrie de la loi sur les Hongrois vivant dans les pays voisins en juin 2001, avaient montré que la communauté internationale n'avait pas, jusque-là, prêté suffisamment d'attention au phénomène de l'intérêt que certains Etats portent aux minorités de leur souche. La Commission de Venise a été appelé à combler cette lacune. Après avoir fixé les standards en la matière dans son rapport adopté en Octobre 2001 sur le traitement préférentiel des minorités nationales par leur état-parent, la Commission a organisé un colloque en juin 2002, afin de continuer et d'approfondir l'examen de la matière. Lors de ce colloque, les principaux experts de la protection des minorités en Europe – y compris des représentants du Comité consultatif de la Convention-cadre pour la protection des minorités nationales et du Haut Commissaire pour la protection des minorités nationales de l'OSCE - ainsi que des experts nationaux ont discuté et sont parvenus à des conclusions sur ce sujet crucial. Le présent volume contient le rapport de la Commission de Venise, les rapports présentés au colloque et les conclusions auxquelles les participants sont parvenus, ainsi qu'une collection des lois nationales existantes en matière de minorités exocentrées.