proposal did not meet this need inasmuch as it had been interpreted by some as sending a negative message to national authorities that the latter could disregard certain minor violations of the Convention. Such an approach would not be in line with the subsidiarity principle underlying the Convention system, which affirms the primary role of national authorities to respect and protect the Convention rights.[94]

In addition to the reservations expressed by the minority members of the CDDH and some states' delegations, various non-governmental organizations, in particular Amnesty International, but also national institutions for the promotion and protection of human rights, plus scholars and experts, objected that the proposal to add a new admissibility criterion for individual applications was vague, subjective and a clear curtailment of the right of individual petition.[95]

Furthermore, the Parliamentary Assembly of the CoE noted that the proposed changes for admissibility criteria, if accepted, will "change the concept of the Court. It will cease being a 'Court of a Subjective Right' and become a 'Court of Damages'."[96] The Parliamentary Assembly further observed that an additional criterion, when deemed as necessary, should encourage member states to share more of the burden of enforcing the Convention.[97]

In response to these concerns the final text of Protocol No. 14 provides that, in addition to the existing conditions of admissibility, such as the exhaustion of domestic remedies and the six-month time limit, the Court can declare inadmissible applications where the applicant has not suffered a "significant disadvantage" provided that "respect for human rights" does not require the Court to go fully into the case and examine its merits.[98] Furthermore, in order to ensure that applicants even with minor complaints are not left without any judicial remedy, the Court will not be able to reject a case on this ground if there is no such remedy in the country concerned.[99]

It remains to be seen if Protocol No. 14 will effectively improve and speed up the execution of the Court's judgments and accelerate and streamline the processing of applications. Hopefully, this reform will not be detrimental to the credibility and prestige of the Convention as a constitutional instrument of European public order on which the democratic stability of the continent greatly depends.

94 *Ibid.*

95 CoE, Press Release of 28 April 2004; Amnesty International, Press Release of 2 April 2004.

96 PACE, Doc.10147, 23 April 2004, Draft Protocol No. 14 to the ECHR amending the control system of the Convention, Report of the Committee on Legal Affairs and Human Rights, Explanatory memorandum, Art. 13, para.43.

97 PACE, Opinion, No. 251 (2004), adopted by the Assembly on 28 April 2004 (13th Sitting), Draft Protocol No. 14 to the ECHR amending the control system of the Convention (provisional edition), para. 14 (vi) (c). The Parliamentary Assembly also proposed that in cases of alleged mass violations of human rights, the CoE Commissioner for Human Rights should not only be able to submit written comments and take part in hearings but should also bring such cases before the Court. Unfortunately, this proposal has not been included in the final text of Protocol No. 14. See, Art. 13 of Protocol No. 14, adopted on 13 May 2004, not yet in force, CETS No. 194.

98 Art. 12 of Protocol No. 14 adopted on 13 May 2004, not yet in force, CETS No. 194.

99 *Ibid.*

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The Protection of Minority Rights in the Works of the European Commission for Democracy through Law: July 2003 – June 2004

In the course of the period under consideration, the European Commission for Democracy through Law (hereinafter "the Venice Commission") provided expert assessment of legislation on minority protection in three countries: Montenegro,[1] Romania[2] and Ukraine.[3] In its opinions, the Commission particularly addressed the following issues: the position of the legislation relating to minority rights in the hierarchy of domestic norms; the need for a citizenship requirement in the general definition of minorities and the need for judicial protection of minority rights guaranteed by national legislation. In addition, the Commission dealt with the issue of the protection of national minorities by their kin-state.

I. The Position of the Legislation Relating to Minority Rights in the Hierarchy of Norms

The question of the position of the legislation relating to minority rights in the hierarchy of domestic norms, notably its relation with the constitution and other relevant secondary legislation, is a matter to which the Venice Commission attaches particular importance. In all the cases examined last year, the legislation submitted to the Commission's expertise was a *framework* legislation requiring for its implementation further legislative and administrative acts. The Commission emphasized the importance of a

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1 CDL-AD(2004)026, Opinion on the Revised Draft Law on the Exercise of the Rights and Freedoms of National and Ethnic Minorities in Montenegro, adopted on 18-19 June 2004.

2 CDL-AD(2004)020, Opinion on the Draft Law concerning the support to Romanians living abroad of the Republic of Romania, adopted on 18-19 June 2004.

3 CDL-AD(2004)013, Opinion on the Two Draft Laws amending the Law on National Minorities in Ukraine, adopted on 12-13 March 2004; CDL-AD(2004)021, Opinion on the Draft Law on the Conception of the State Ethnic Policy of Ukraine adopted on 18-19 June 2004; CDL-AD(2004)022, Opinion on latest version of the Draft Law amending Law on National Minorities in Ukraine, adopted on 18-19 June 2004.

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clearly defined rank of the law in question within the national legal system in order to ensure an effective protection of minorities.[4]

Such framework legislation needs to take precedence over the relevant implementing acts. The recognition of a 'constitutional' nature of the law is an option in this respect, which has been adopted by a number of countries (such as Croatia, for example). When this is not done, it may be appropriate to grant the framework law a status of *lex specialis* in order to avoid that posterior laws may derogate from its provisions. In its opinion on the draft law on minorities in Ukraine, the Commission noted the intention of the Ukrainian authorities not to give a constitutional status to the law under consideration. It thus invited the Ukrainian authorities to expressly point out in the law its character of *lex specialis* and set out with some detail the guidelines which the secondary legislation would have to respect.[5]

The legal status of the law assumes all its importance when there is a possibility of seeking an abstract review by the Constitutional Court of acts allegedly violating the rights guaranteed by the law in question, as is the case in Montenegro. The Commission praised the fact that the draft law on minorities in Montenegro opened this possibility to "anyone". It noted though that in order for the Constitutional Court to be able to review the compatibility of implementing legislation with the draft law, the latter should state expressly that "as the law aimed at implementing the Constitution, it should be given priority over ordinary legislation as regards minority protection in Montenegro".[6]

II. The Need for a Citizenship Requirement in the General Definition of 'National Minorities'

In the absence of a legally-binding and even generally accepted definition of 'minority', an issue with which the Commission has been regularly faced is whether and to what extent non-citizens should benefit from the specific minority rights guaranteed by minority protection legislation.

Indeed, while it is undisputed that for certain rights, notably certain political participatory rights (to vote and stand for office, CCPR Article 25), and the right to return to one's country (CCPR 12(4)), may be reserved for citizens only, it has been argued that the other rights could and should be granted to non-citizens too. In respect to such rights, the citizenship requirement should then be replaced by a different one, which could be, for example, the long-standing legal residence in the country.

The Commission had originally proposed a definition of 'minority' which explicitly included the citizenship requirement[7] and had thereafter continued to rely on this

4 See CDL-AD (2004)021, para. 8; CDL-AD (2004)026, para. 21 and CDL-AD (2004)013, para. 15.

5 See CDL-AD (2004)013, para. 15.

6 See CDL-AD (2004)026, para. 21.

7 Its "Proposal for a European Convention for the Protection of Minorities" of 1991 contained the following definition of 'minority': "a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that State, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language" (see Article 2 of the proposal). See also Article 1 of Recommendation 1201/1993 of the Council of Europe's Parliamentary Assembly and Article 1 of the European Charter for Regional and Minority Languages.

proposed definition.[8] However, in the light of the position of other international bodies dealing with minority protection such as the UN Human Rights Committee,[9] the OSCE High Commissioner on National Minorities and more recently the Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM)[10] and the Parliamentary Assembly of the Council of Europe,[11] a tendency towards a more dynamic approach, allowing to abandon the citizenship requirement and extend the protection also to non-citizens, emerged within the Commission. The Commission thus started to acknowledge the existence in international law of the tendencies towards extending the application of minority protection to non-citizens[12] without however ever claiming that such requirement would be inconsistent with the international rules of minority protection.[13]

The Commission in fact stressed that non-citizens are entitled to the general human rights protection, in particular the prohibition of discrimination and, when applicable, to the specific protection granted to certain categories of foreigners, such as migrant workers or refugees. Accordingly, the Commission stated that it can accept the citizenship requirement in certain pieces of legislation on minorities, provided that it does not purport to be a general definition of 'national minority' and thus does not prevent the legislator from granting persons belonging to national minorities who are not, or not yet, citizens the rights they are entitled to under international law and in accordance with the relevant constitution. Accordingly, the Commission recommended the inclusion of a specific provision to this end.

8 See, for example, CDL(1995)014, Comments on the Draft Law of the Republic of Moldova on the Rights of Persons belonging to National Minorities.

9 In 1994, the Human Rights Committee of the United Nations, pointed out that Article 27 of the International Covenant on Civil and Political Rights, setting out the minority rights, is not limited to citizens: "The terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2.1 are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone." General Comment No. 23 of 8 April 1994, § 5.

10 The Advisory Committee has expressed the view that it is important to address the issue of citizenship on an article-by-article basis rather than making it a general requirement for the application of laws on national minorities (see for example opinion on Germany, Article 3, para.18; opinion on Serbia and Montenegro, Article 3, paras. 23-4).

11 See the explanatory memorandum attached to Recommendation 1623(2003) on the rights of National Minorities, adopted on 29 September 2003.

12 See, for example, CDL (2001)074, Opinion on the Constitutional Law on the Rights of National Minorities in Croatia, para. 4; CDL (2001)071 rev., Opinion on the Draft Law on Rights of National Minorities of Bosnia and Herzegovina, para. 4.

13 CDL-AD (2004)013, para. 19.

In its opinions on the legislation on minorities currently in preparation in Ukraine, the Commission noted in particular that in the course of a meeting with the Ukrainian authorities the latter did not seem to be against dropping the citizenship requirement. It encouraged them to "omit the reference to citizenship in the general definition of national minorities in the draft legislation under consideration, and add it in the specific clauses relating to rights specifically reserved to citizens, such as certain political rights or access to civil service".[14]

In the case of Montenegro, the Commission gave relevance to the particular political and social context of that country, notably after the dissolution of former Yugoslavia and the Kosovo conflict. It therefore questioned the appropriateness of denying the protection of traditional minority rights such as education, language and cultural rights to individuals who do not (or do not yet) have Montenegrin citizenship.[15]

The issue of whether it is appropriate to have a citizenship requirement in the general definition of 'national minorities' as opposed to inserting it only in those provisions dealing with issues where citizenship is essential, is certainly a sensitive and important one. The Commission has therefore decided to carry out further reflection on the topic in consultation with the other international bodies dealing with minority protection, notably the Advisory Committee on the FCNM; the Working Group on Minorities within the UN Sub-Commission on Human Rights; the Committee of Experts on the European Charter on Regional or Minority Languages; the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe and the OSCE High Commissioner on National Minorities. A study on this matter is in preparation. The Commission has also suggested the setting up of an "international forum" in order to discuss minority issues amongst all major international bodies dealing with minority protection.

III. Judicial Protection of the Minority Rights

The draft law on the exercise of the rights and freedoms of national and ethnic minorities in Montenegro provides for the right of individual complaint for a concrete as well as an abstract constitutional review of acts allegedly violating the rights guaranteed by the law. As it was previously mentioned, this approach was praised by the Commission in its opinion.[16] The Commission nonetheless noted that the draft law lacked clarity as to the conditions under which a constitutional complaint can be introduced. According to Article 45(2) of the draft law, anyone can introduce a constitutional complaint "if no other judicial protection is provided". In the Commission's opinion, such condition could be interpreted as restricting the right of constitutional complaint to cases when there is not *any* possible judiciary protection related to a given matter. This would imply that some rights guaranteed by the constitution or the draft law are deprived of an ordinary judicial protection in the legal order of a state which is a contracting party to both the European Convention on Human Rights and the FCNM. On the other hand, it could also imply that a constitutional complaint is a purely theoretical remedy, as in

14 CDL-AD (2004)013, paras. 16-22.

15 CDL-AD (2004)026, para. 36.

practice it will always be possible to seek ordinary judicial protection. The Commission therefore invited the Montenegrin authorities to clarify this important issue, suggesting to specify that the Constitutional Court can be approached only after all legal remedies provided for by law have been exhausted (as it is the case in other European countries that allow for individual complaints).

IV. The Protection of National Minorities by their Kin-State

For the first time after the adoption of its famous report on the preferential treatment of national minorities by their kin-state,[17] the Commission had the opportunity, at its Plenary Session of June 2004, to examine a piece of legislation specifically dealing with this matter (the Romanian draft law concerning the support to Romanians living abroad[18]), at the same time as another one dealing with it only indirectly (the draft law on the conception of the state ethnic policy of Ukraine[19]).

The Romanian draft was generally a very good one, clearly inspired by the four principles governing the role of kin-states in minority protection.

These four principles which need to be respected by kin-states when adopting unilateral measures granting benefits to the persons belonging to their kin-minorities had been codified by the Commission in its report on the preferential treatment of national minorities by their kin-state, and are the following: territorial sovereignty, *pacta sunt servanda*, friendly neighbourly relations and respect for human rights and fundamental freedoms, in particular non-discrimination.

As regards the discrimination issue, the Commission had found that the acceptability of the ethnic targeting of certain legislation depended on the aim pursued by such legislation. The Commission had expressed the view that benefits relating to education and culture could be viewed as justified by the legitimate aim of fostering the cultural links of the targeted population with population of the kin-state but needed to be "genuinely linked with the culture of the State, and proportionate". The Commission had also indicated, by way of example, that "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 had considered that preferential treatment might only be granted in exceptional cases, and when it was 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).

The practical application of these guidelines – indeed pretty vague - was likely to raise certain problems. Indeed, the Romanian draft did contain provisions granting benefits to kin-Romanians for training "at all levels and forms of education". Can the teaching of physics in Romania be considered to be part of the Romanian culture and

17 CDL-INF(2001)019.

18 CDL-AD(2004)020.

history? There is no unanimous reply to this question. And indeed the Commission left the question open, referring nonetheless to the fact that "the link to the Romanian language and culture should be underlined to justify the preferential treatment".

In addition, the provision in the draft law for financial and accommodation benefits for those Romanians living abroad who wish to study or obtain training in Romania was found by the Commission to be at risk of leading to discriminatory practices in respect of ordinary Romanian students, to the extent that no low-income condition was required of kin-minorities, while it was required for Romanian students in Romania. The Commission therefore recommended to subject the benefits for kin-minority students to the same condition of low-income as it applied in respect of ordinary Romanian students.

The Ukrainian draft law included among the objects of the state ethnic policy of Ukraine "Ukrainians who live abroad". The draft indeed aimed also "to provide cooperation with foreign Ukrainians legally (...) by executive bodies of Ukraine and public organizations of Ukrainians that have been created in the country and abroad". Thus, the draft law was intended to have external effects in relation to persons who only in a very limited sense are under the Ukrainian jurisdiction. While the law contained a reference to "establishing relations with countries which have related ethnic minorities" and to the "realization of (...) international agreements and intergovernmental mixed commissions regarding the rights of national minorities", the Commission stressed that the implementation of the principles and objects of the state ethnic policy in respect of Ukrainians who live abroad, be carried out through international cooperation and multilateral or bilateral agreements with the states concerned. It is indeed unanimously accepted that responsibility for minority protection lies primarily with the home-states and that the role of kin-states must be exercised mainly through multilateral or bilateral agreements.

*Sally Holt**

The Activities of the OSCE High Commissioner on National Minorities: July 2003 – June 2004

I. Introduction

This period was a significant one for the OSCE High Commissioner on National Minorities (HCNM) in the context of the European Union (EU) enlargement process, which saw the accession of the first wave of candidate countries to the Union on 1 May 2004. The High Commissioner has often been described as a 'gatekeeper' to economic and military alliances such as the EU and NATO – encouraging and supporting newly emerging states in the European area to comply with international standards of minority protection as part of their preparation for their eventual membership.[1] While EU accession does not affect the commitments of new member states, the High Commissioner has continued to express his concern for the continuation of adherence to minority standards with the enlarged EU. In this respect he has stressed that minority issues should not fall off the agenda in *any* EU member State – old or new.[2]

Of course, the accession process continues to provide leverage in candidate countries and among other aspiring members. Extensive legislative reform in Turkey is clearly linked to the Turkish ambition of joining the EU and the settling of interethnic problems appears to be a prerequisite for EU membership.[3] Since the first official HCNM visit to the country in January 2003, where agreement was reached for a continuation of dialogue between the HCNM and Ankara, the High Commissioner has been examining avenues for continuing cooperation with the Turkish government on issues of concern to him.[4]

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1 See, for example, Michael Ignatieff, "Foreword", in Walter Kemp (ed.), *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (The Hague, 2001).

2 See further below under Section II.B.

3 Rolf Ekéus, "International Conflict and Majorities", Lecture at the Schweizerische Institut für Auslandsforschung, Universitat Zürich, 2 July 2003, at http://www.osce.org/hcnm/documents/speeches/2003/.

4 Annual Report on OSCE Activities, 2003, 140.