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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

PREFERENTIAL TREATMENT OF NATIONAL MINORITIES BY THEIR KIN-STATE

DRAFT REPORT

On the basis of comments by:

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Mr F. Luchaire (member, Andorra)
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A. Historical background[1]

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

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

[2] *In the pieces of legislation which 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..*

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. 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 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*".

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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) which can be relevant for its conclusions.

[8] *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).*

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*."

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 with Poland, Bulgaria, Hungary and Romania[8]. Hungary concluded similar agreements with three of its neighbouring countries: Ukraine, Croatia and Slovenia[9].

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[10]. 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.

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[9] *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).*

[10] *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*

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 ("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"[11]. 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[12].

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

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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[13].

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[14]) minorities[15]. In the context of these bilateral

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[11] *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.*

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

[13] *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).*

[14] *When both parties are at the same time home- and kin-States, the relevant treaty contains mutual obligations;*

agreements, kin-States attempt to secure a high level of protection to their minorities, whereas home-States aim at achieving an equal treatment and integration of the minorities within their borders, thus preserving the integrity of the latter.

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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. 1203 (1993) and the CSCE Copenhagen Document (1990), and, by doing so, give them binding effect in their mutual relations.

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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.

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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.

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otherwise, the treaty contains obligations for the home-State only (see, as examples of the latter, the German-Polish Treaty on Good Neighbourly Relations and Friendly Co-operation of 1991 and the Treaty between the Republic of Croatia and the Italian Republic concerning minority rights of 5 November 1996).

[15] *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.*

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[16]. 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; it appears however that States have rarely – if at all- raised any such issues 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).

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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

[16] 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 27 April 1957 on the pacific settlement of conflicts.

with the principles and rules of friendly neighbourly relations which must guide their action at international level, particularly in the local and regional context"[17].

C. Domestic legislation on the protection of kin-minorities: analysis[18]

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[19].

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)

- 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 compatriots abroad*, March 1999 (Russian Federation) (hereinafter: "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:

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[17] *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.*

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

[19] Sometimes, certain benefits, concerning matters which 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).

- The *Resolution* 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)

- 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).

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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[20] 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[21].

- 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 skills

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

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[20] *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.*

[21] *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).*

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)

- 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). To the extent that it is not linked with any other identity document issued by the home-State, and in the light of the exhaustiveness of the data contained, this certificate could amount to an identity card in Hungary. The same is true for the "Certificate for Dependants of Persons of Hungarian Nationality" (article 19 § 2 (b) 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 only 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, no certificate can be issued; 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 unclear.

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).

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 thier rights on Slovak territory (article 6 § 1 (d)).

- Travelling benefits

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).

- 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, inherite 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 © 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 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 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, certain practices, which pursue obvious cultural aims, have developed and have been followed by numerous States. It is mostly 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

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

through incentives to be granted to foreign students, independently of their national background. In these fields, where the consent of the home-States can be presumed in the light of the existing practices and possibly also of international agreements such as the European Cultural Convention[24], it is possible for a State to take unilateral legislative or administrative measures[25].

In other fields, instead, the consent of the other States affected by a 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.

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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-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.

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[24] *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"

The Cultural Convention was ratified 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 constroversial.

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

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 stress that the Framework Convention, while it enshrines 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.

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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 issue statements 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 could 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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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 unambigously - accepted it, by not raising objections.

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[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."*

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 which deserve close examination: the issuing by the kin-State of a document which proves that its holder belongs to the kin-minority, and, in particular, the modalities of the issuing of the relevant documents.

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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 which 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.

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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 would not need contain any reference to the national background of its holder. Furthermore, in order to avoid being used for purposes other than the legitimate one of granting access to the benefits provided for under the law[32] (which would create political bonds), it should not contain all the personal data of its holder, but only that which would allow the identification of its bearer in respect of a valid identification document issued by the home-State (the document which the individual would

[32] *For example, a request by a kin-foreigner for diplomatic protection from the authorities of the kin-States.*

at any rate need to carry with him when travelling to the kin-State), which the individual should necessarily show together with the document.

Finally, the Commission only sees the *ratio* of a limited temporal validity of the document as regards the respect of the formal requirements for its issuing (such as, for example, the lack of criminal convictions or the lack of permanent residence in the kin-State, where applicable) and not also in respect of the belonging to a national minority. As to the possible concern of allowing possible changes in the available benefits and preferences, the Commission considers that the problem would be overcome if the document became, as it has suggested, a mere "proof of entitlement to the benefits provided for under the applicable laws and regulations".

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[33] and by the International Covenant on Civil and Political rights[34].

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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.

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The legislation and regulations which 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. It thus creates 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.

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[33] *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."*

[34] *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."*

[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 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.

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 which 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, 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. Indeed, the ethnic targeting is commonly done, for example, in laws on citizenship[38]. 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 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.

As regards the other benefits, such as travelling, work permits, health coverage etc., the Commission finds that insofar as what is provided is a mere simplification of access to

Deleted: However, it must be said in this respect that it is hard to predict whether it would be possible to refer an arguable claim based on the legislation in question to the European Court of Human Rights: the latter, in fact, never examines the compatibility with the Convention provisions of a piece of legislation as such, but takes into account the particular circumstances of the case in relation to the concrete situation of the applicant

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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 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."*

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benefits which are at any rate available to other foreign citizens who do not have the national background of the kin-State (under the applicable bilateral agreements), the preferential treatment can be justified, provided that it is proportionate, in the genuine pursuit of the aim of maintaining cultural links with the kin-State. Should they concern the substance of the benefits, instead, their conformity with the principle of non-discrimination would be more problematic.

E. Conclusion

The Commission notes that the kin-States play a role in the protection and preservation of their kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong. Europe has developed as a cultural unity based on a diversity of interconnected languages and cultural traditions; cultural diversity constitutes a richness, and the acceptance of this diversity is a precondition to peace and stability in Europe.

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The Commission considers, however, that respect for the existing framework of minority protection must be held as an absolute priority. In this field, 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 neighbourhood 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 a sufficient *diuturnitas* to have become an international custom[39], is only legitimate if the principles of territorial sovereignty of States, *pacta sunt servanda*, the already recalled principle of friendly relations amongst States and the respect of human rights and fundamental freedoms are respected.

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Respect for these principles requires a certain number of amendments to the practice which the Commission has observed, in particular:

- A State can only issue unilateral acts concerning foreign citizens inasmuch as the effects of these acts are to take place within its national borders. When these acts deploy their effects on foreign citizens abroad, in the absence of international customs allowing the State to assume the consent of the other States affected or of bilateral treaties, such consent must be explicitly sought prior to the adoption 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 statements concerning these criteria in the absence of formal supporting documents.

- Unilateral measures on the preferential treatment of kin-minorities should not touch upon areas already covered by bilateral treaties without the express consent or implicit

[39] *Indeed, with the exception of the Austrian law, which must be seen in the peculiar political context of the Italo-Austrian relations of those years, the laws and regulations under consideration have been enacted between 1996 and 2001.*

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 unilateral measures can only be taken by the kin-State if and after these procedures prove ineffective.

- Kin-States may issue an administrative document proving the entitlement of its bearer to the benefits provided for under the applicable laws and regulations. This document, however, should not contain any reference to the national background of its holder, and should refer to and be used in conjunction with a valid identification document issued by the authorities of the home-State. Its periodical renewal, where applicable, should imply a control of the formal requirements for its issuing only, and not also of the belonging to the kin-minority.

- Preferences may be legitimately granted to persons belonging to kin-minorities in the fields of education and culture, but only insofar as they pursue the legitimate aim of fostering the cultural links existing between the kin-State and its kin-minority and are proportionate to that aim.

- Preferences may be granted in fields other than education and culture only to the extent that they aim at simplifying the procedures for having access to benefits which are at any rate available to all foreigners and that they do not cause discrimination between foreigners with and without the national background of the kin-State.

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INDEX

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

E. Conclusion