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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

PAPER CONTAINING THE POSITION OF THE HUNGARIAN GOVERNMENT IN RELATION TO THE ACT ON HUNGARIANS LIVING IN NEIGHBOURING COUNTRIES

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1. Background

1.1. Since the systemic change in 1990, Hungary and its foreign policy have always been stabilising factors in the region. Hungary has been able to enshrine the positive effects of its successful social, political and economic transformation through its regional policy. Successive Hungarian governments have all recognised the importance and the indispensable nature of bilateral and regional co-operation, in which they not only took part but often played an initiating role. NATO membership and the good progress made in Hungary's accession negotiations with the EU acknowledge these endeavours and achievements.

1.2. The Republic of Hungary attaches great importance to the protection of national minorities. Without elaborating too much on the historical background – which is, no doubt, well known to the Commission – it should be pointed out that Hungary has accumulated significant experience relating to national minorities regardless of whether they live inside or outside its borders. These communities have always played a considerable role in Hungarian history, their different cultures have contributed to the cultural diversity of the country – even before this notion existed. Preservation and integration of this diversity have been a continuous challenge for Hungarian society, as Hungary has always been, throughout its thousand-year history, a country receiving immigrants from across the region. Hungary will continue on this track, taking as a point of departure the same values: preservation of identity, no forced assimilation but rather promotion of cultural diversity and active participation of the State in their realisation (see paras. 2.5-2.12 of the present Paper).

1.3. This dedication of Hungary is proven not only by its efforts in bilateral relations and active participation in the recent or ongoing multilateral standard-setting and other related international activities, but also by its internationally-recognised achievements in protecting national minorities living in Hungary. The preservation and promotion of the identity of national minorities contribute decisively to the stability of the Central European region and – contrary to some sporadic, but still existing arguments – do not undermine it. It is maintained that the contemporary history of Europe and the Central European region in particular has justified the conviction and approach of Hungary.

1.4. In this endeavour of Hungary, the political organisations of Hungarians living in the neighbouring countries have acted as responsible partners. In the Central European region, Hungarians constitute the most numerous national minority communities although their numbers in the neighbouring countries have been constantly diminishing for the last 80 years or so (see Annex No. 1 of the present Paper). These persons or communities have never moved away from their place of birth but due to historical changes, they have found themselves separated from Hungary and confronted with the option of the peace treaties: either to leave their place of birth or to be deprived of their Hungarian citizenship. While those persons, staying in their country of birth, lost their citizenship because of the peace treaties, Hungarians emigrating and settling down in countries all over the world remained

Hungarian citizens or retained the possibility of claiming it. This is why the Act does not apply to these persons. (Since the overwhelming majority of Hungarians living in Austria falls within the second category, this was a reason why the Act is not applicable in relation to Austria.) The will of the Hungarian minority communities to preserve their linguistic-cultural identity must be interpreted against this factual and historic background.

1.5. Without going into a deeper politico-strategical analysis of the past decade in Central Europe, a simple but still very important fact is worth mentioning. Hungarian minority communities have never resorted to violence; they have always remained faithful to constitutional and political tools. Political organisations of Hungarian communities have always played a constructive role in the political life of their home countries either in opposition or – as it was the case until recently in Romania and still is in Slovakia – as a responsible party of the governing coalition. They have been looking for legal, constitutional solutions and remedies to their special situations. The Act on Hungarians living in neighbouring countries tries to contribute to this approach, the only feasible one in the long term. This is why persons belonging to the Hungarian national minorities, their communities and political organisations were inspired by the existing laws of similar purpose of some of their home countries – mainly Slovakia and Romania (see paras. 3.5-3.8) – to encourage the Hungarian Government to enact similar legislation in their respect. The stimulus for the Hungarian Act arose from a proposal of the Hungarian Standing Conference, the co-ordinating body between the Hungarian government and the political organisations of Hungarians living outside the borders. As a common initiative with the Hungarian government, these political organisations actively participated in the preparation of the Act and welcomed its adoption.

1.6. The international and bilateral standard-setting – with the active participation of Hungary – in the field of the protection of national minorities created the necessary framework for Hungary's consistent co-operative policy. Hungarian governments recognised very early on that only this approach would lead to longstanding stability in the region. Hungary is proud to be among the initiators as well as the beneficiaries of the relevant achievements of the Council of Europe, OSCE, CEI, UN and other bodies. These instruments have inspired not only bilateral treaties concluded with its neighbours, but also its domestic legislation.

1.7. The co-operation between Hungary and the neighbouring states in the field of minority protection is mainly governed by relevant bilateral treaties and agreements. In these instruments, the parties reconfirm their determination to respect the related principles of international law, such as the respect for territorial integrity and the protection and promotion of human rights including the rights of national minorities. Bilateral co-operation is indispensable for the implementation of these treaties. Hungary stands ready – as it has always been – to undertake its share, be it either its participation in the relevant joint committees or the bona fide acceptance of the implementation of certain legislation of neighbouring states – i.e. holding of Slovak identity cards by Hungarian citizens belonging to the Slovak national minority or the issue of certificates by Romanian national minority self-governments in Hungary testifying to the Romanian origin of the applicant in order to obtain certain scholarships in Romania.[1] Since the protection of national minorities falls within the scope of international and bilateral co-operation, the Hungarian Government not only undertook a series of international and bilateral consultations and supplied information even

[1] See the interview with Mr. Tibor Juhasz, Chief of Bureau of the Romanian National Minority Self-Government in Hungary in *Népszabadsag*, 28 July 2001, p. 3.

before the adoption of the Act (see Annex No. 2), but is ready to continue these consultations and – where necessary – conclude bilateral agreements concerning certain questions relating to the implementation of the Act.

1.8. When drawing up this piece of legislation, the Hungarian Government – and indeed the Parliament which adopted the Act by a 92% majority – set aside all aspirations for any kind of dual citizenship for persons belonging to Hungarian national minorities and living in the neighbouring countries, and instead preferred a system based on co-operation (see paras. 2.1-2.4). The Act is designed to encourage persons belonging to national minorities to stay in their home countries, thus preserving the cultural diversity of the region: in this way the Act provides secondary measures and benefits to support this aim. Contrary to some accusations, the aim is not to inspire persons belonging to national minorities to leave their home countries, but to reinforce their special identity and their relations with the kin state, Hungary. Hungary is convinced that this Act confirms the most apparent way the refutation of any kind of territorial revision as a "solution" for questions raised by national minorities.

1.9. As far as the minorities living in Hungary are concerned, the comprehensive legislation adopted in this field as early as 1993 codified the newest achievements of the relevant international theory and standard-setting. The establishment of self-governments of national minorities reflects Hungary's intention to set up a permanent structure, since it considers the protection of national minorities as a continuous, renewing task. Hungary continues to welcome any assistance for these efforts, especially from those states, which share a common identity with one of the autochthon minorities. The aim of the Act is to ensure nothing more than the same assistance for persons belonging to Hungarian minorities living in the neighbouring countries that Hungary, a home state of a number of minority communities, welcomes from other states.

2. The basic purpose and features of the Act

a) Recognition of the territorial integrity of neighbouring states: definite refusal of territorial revision and rejection of dual citizenship

2.1. The starting point for this discussion is Article 6(3) of the Hungarian Constitution which provides: "The Republic of Hungary recognises its responsibilities toward Hungarians living outside the borders of the country and shall assist them in fostering their relations with Hungary."

2.2. This provision sets a general framework for Hungarian policy towards Hungarians abroad of which the current Act is a more considered expression. The Act, like the whole of Hungarian law, recognises the territorial integrity of the neighbouring states: it contains no recognition either of the idea of territorial revision or of the concept of dual citizenship (see also para. 1.8).

2.3. In fact, the Act recognises that Hungarians abroad are citizens of the relevant states and clearly rejects the idea that the self-identification as Hungarians can be based on dual citizenship. The Hungarian assistance to Hungarians abroad has always been and will continue to be carried out according to the practice of other European states, taking European norms into consideration in good faith and giving due attention to the spirit of co-operation between neighbouring states. In the expression of its kin-state role, Hungary has always acknowledged that it has no citizen-like relationship whatsoever with Hungarians living in the neighbouring countries when dealing with them.

2.4. In fact, as laid down in the legal bases justifying the passing of the Hungarian Act, the aims are, on the one hand, to promote and facilitate the remaining of the Hungarian minorities in the neighbouring countries by preventing their possible emigration to Hungary; and, on the other hand, to contribute to the conservation of the common cultural patrimony between Hungary and their kin minorities in those countries. Consequently, the Act is evidence of the Hungarian intention to put paid – once and for all – to any alleged irredentist claims over areas outside the country populated by persons of Hungarian national origin or the need to grant dual citizenship to such persons. The tenor and construction of the Act aim to keep persons of Hungarian national origin linked to each other through cultural and educational ties.

b) Promotion of cultural identity and contribution to cultural diversity

2.5. The maintenance and promotion of cultural diversity is the main point of principle of the Act. Cultural rights have long been recognised in international and particularly European law. Hungary wishes to contribute positively to the development of cultural diversity, a fundamental European value without which Europe could not exist. “No diversity without identity” as it has been put before.

2.6. As a starting point, the 1954 European Cultural Convention of the Council of Europe recognised the need not only to promote the common heritage of the continent but also to foster among nationals of the contracting parties "the study of the languages, history and civilisation of the others." By the time of the 1995 Framework Convention for the Protection of National Minorities, cultural diversity had become to be expressly regarded as playing a fundamental role in underpinning a free, democratic Europe, as stated in the Preamble:

> "Considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity;
>
> Considering that the creation of a climate of tolerance and dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society…."

2.7. Reference can also be had to several *soft law*-type instruments of the Committee of Ministers which seek to support the rich cultural diversity of Europe, e.g., Recommendation (99)2 *on secondary education* which states:

> "Among such activities, the following should be started or developed: language teaching, which plays a central role in this connection, not only by assisting mobility and mutual understanding but also by highlighting Europe's treasures and diversity, in particular as regards minority languages."

2.8. In 1999, the Council of Europe launched the campaign entitled "Europe, a common heritage" which translated into action the declarations of the Heads of State and Government who, at the two Council of Europe Summits,[2] stressed the contribution of "a common cultural heritage enriched by its diversity" in the construction "of a vast area of democratic security in Europe" and the importance attached to "the protection of our European cultural and natural heritage and to the promotion of awareness of this heritage." The campaign aimed to make all Europeans "more aware of the wealth and importance of heritage as a vector of tolerance, knowledge and mutual recognition."

2.9. Turning more particularly to the process of European integration as regards the European Union, this has historically been concerned with economic and commercial benefits. Increasingly, however, the aim has been to take it further, starting with a broader base capable of involving citizens to a greater degree and strengthening the feeling of belonging to the European Union, while respecting the diversity of national and regional traditions and cultures.

2.10. Cultural co-operation is recognised under Article 3 of the EC Treaty as one of the objectives of Community action, to make "a contribution to education and training of quality and to the flowering of the cultures of the Member States". The specific aims and fields of intervention listed in EC Article 151 cover all aspects of culture and include the objective of contributing "to the flowering of the cultures of the Member States, while respecting their

[2] Vienna 1993 and Strasbourg 1997.

national and regional diversity." Thus Community action is based on co-operation and respects and promotes cultural diversity and the principle of subsidiarity.

2.11. Finally, the EU recognises that enlargement will enhance cultural and linguistic variety and diversity within the EU. This will give rise to new requirements in terms of promoting and respecting linguistic and cultural identity, a common heritage of cultural values and a common European identity. The protection of cultural minorities will also become more important in an enlarged Union. As President of the European Commission, Romano Prodi, said at the inauguration of the EMCR in Vienna 7 April 2000: "We must never forget that Europe is all about diversity. Therefore it needs us to respect and reap the rewards of diversity. European integration has always been about diverse peoples with varied cultures…Diversity is one of Europe's greatest treasures."

2.12. This respect for cultural diversity has been clearly recognised as a fundamental right by the European Union in Article 22 of the EU Charter of Fundamental Rights which states: "The Union shall respect cultural, religious and linguistic diversity." Consequently, within this broad European context, it is the aim of the Hungarian Act to support cultural diversity, and in so doing promote one of the fundamental principles underpinning the continuing process of European integration.

c) The Act does not use ethnicity as a basis for eligibility for claiming benefits under it

2.13. The Hungarian Act does not have any direct or indirect/implied reference to "*ethnie*" as a basis for receiving benefits from the Hungarian state. Ethnic ties are based blood relationship (*ius sanguinis*) and on association with a "homeland" and on the myths of the past. In contrast, the aim of the present Act is to promote and preserve the well-being and awareness of the national (language, cultural) identity of Hungarians within their home (neighbouring) country (see Preamble to the Act).

2.14. Paragraph 32 of the Document of the Copenhagen Meeting on the Human Dimension of CSCE and Article 3(1) of the Framework Convention guarantee the right of an individual the freedom to choose to belong to a national minority. The Hungarian Act is in full harmony with this fundamental right because, according to sections 1 and 20 of the Act, the two documents (beneficiary card and card on the basis of family relationship) depend on three conditions: the basic condition is the personal declaration of a person having no Hungarian citizenship and living in Romania, Ukraine, Slovakia, Yugoslavia, Croatia and Slovenia on his belonging to the Hungarian community. This declaration can be conceived as the manifestation of the free choice of national identity, enshrined in Copenhagen, UN and Council of Europe documents. The document is issued by Hungarian authorities upon the recommendation of Hungarian community organs, established and legally recognised in the respective countries. The card issued on the basis of family relationship is issued to an applicant of non-Hungarian national origin if his/her husband (wife) is entitled to the beneficiary card.

2.15. The documents are not based on *any* ethnic consideration: not only the existence of the *card issued on the basis of family relationship* proves it but the fact that the personal declaration is only registered by the so-called recommendatory organ which is not entitled to challenge the content of the declaration. The requirement of the declaration on the belonging to the Hungarian community is conceived as a condition because all the basic facilities and

services granted by the Act are linked to the use of Hungarian language and the promotion of Hungarian culture.

2.16. A further evidence is a letter written by Dr. Zsolt Németh State Secretary of the Hungarian Ministry for Foreign Affairs to Mr. József Krasznai, a Hungarian Roma leader (see Annex No. 3). According to this letter, Romanian citizens of Roma ethnic background but of Hungarian cultural and linguistic identity, are entitled to claim benefits and assistance as provided for by the Act.

2.17. This also reinforces the idea that one person is not bound to one identity: persons may therefore variously consider themselves as having two or more identities at the same time: a person is free to choose whether he or she identifies him- or herself as English or British or European or a combination of any or all of them. The concept of the Act accepts the existence of dual identity and, in this way, recognition of one identity does not exclude a second identity or other identity. Such combination of identities does not confuse an individual of the sense of where he or she belongs, nor does it engender a feeling of being deprived of a "homeland."[3] In the culturally pluralistic Europe which is emerging, people are assuming differentiated levels of identity without rejecting the country of their home.

2.18. It thus remains the free choice of the individuals concerned whether or not to claim the use of the facilities provided by the Act. The so-called "certificate" is not an "ethnicity-certificate", but a materialisation of the will of the interested persons to require the benefits guaranteed by the Act. It has a limited validity, it cannot serve as a basis for a request to Hungarian citizenship or refusal of legal duties as citizens of their states of origin. As noted above, under certain conditions provided by the Act, persons who do not consider themselves as Hungarians, can be granted such a certificate upon request.

[3] For the contrary view, reference is made to the remarks of Mr. Vasile Dancu, Romanian Minister of Information, as reported in certain Romanian papers (*Ziua*, 28 July 2001; *Adevarul*, 30 July 2001; *Cotidianul*, 28 July 2001; *Cronica romana*, 30 July 2001) in which he expresses his fear for Hungarians becoming "confused," getting into a situation "sans patrie entre deux patries" as a consequence of the Act.

d) Secondary nature of the Act and the rejection of Schutzmacht principle

2.19. Furthermore, Hungary recognises the primary role to be played by the home states themselves together with the legitimate role played by the international community. This is evidenced by its own legislation in Act LXXVII of 1993 on the Rights of National and Ethnic Minorities, section 56 which states that "domestic and foreign organisations, foundations, and individuals may contribute to the aid provided to minorities." Thus Hungary's primary role in protecting and providing for national minorities within its territories does not deprive the relevant kin state of playing a subsidiary role in providing for the minority. The Hungarian behaviour is in harmony with the academic recommendations for a kin state.[4]

2.20. Throughout international instruments concerned with minority rights protection, the protection afforded by the home state of the minority or the person belonging to the minority is naturally paramount. The pre-eminent responsibility of the neighbouring countries in addressing minority rights, through the provisions of their respective Constitutions and laws, is not impinged upon by the Act.

2.21. The Hungarian Act can be considered as a legitimate way as to how, post-Cold War, the emerging concept of kin state is put into practice. This concept is far removed from being a reincarnation of the old theory of protecting power or "Schutzmacht." A protecting power irrespective of whether it was self-appointed or agreed upon, tried to provide a guarantee that the mother state respects its legal obligations on the protection of that minority which has common national origin with its majority population. A kin state, by contrast, recognises the primary role to be played by home state (and the international community) in minority protection. Further, the kin state regards mutual co-operation in the field of minority protection as a pre-requisite for friendship and co-operation and provides additional infrastructural assistance to the minority, which enjoys common origins with its majority population, in order to preserve their language and culture identity.

2.22. The kin state may indicate its role in constitutions like those of Hungary, Slovenia, Croatia or Romania[5] or in its policy statements as France has done. French Foreign Minister Hervé de Charette stated in the French Parliament: "(We) have cared for the fate of Quebec for generations and generations, and I can assure we will keep maintaining and developing

[4] Konrad Huber and Robert W. Mickey, "Defining the Kin-State: An Analyses of its Role and Prescriptions for Moderating its Impact" in Arie Bloed and Pieter van Dijk (eds), *Protection of Minority Rights through Bilateral Treaties. The Case of Central and Eastern Europe* (1999), p. 147.

[5] Constitutions: *Hungary,* Article 6(3): "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"; *Slovenia,* Article 5(1): "[Slovenia] shall attend to the welfare of the Slovenian minorities in neighbouring countries and of Slovenian emigrants and migrant workers abroad and shall promote their contacts with their homeland"; *Croatia,* Article 10: "(1) The Republic of Croatia protects the rights and interests of its citizens living or staying abroad, and promotes their links with the homeland. (2) Parts of the Croatian nation in other states are guaranteed special concern and protection by the Republic of Croatia"; and *Romania,* Article 7: "The State shall support the strengthening of links with the 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."

the very warm ties we enjoy with Quebec."[6] The practice of acting as a kin state in post-Cold War Europe is evidenced by other types of state behaviour, e.g., the conclusion of bilateral treaties, issuing joint declarations having a section or at least a reference to the minority issue as a legitimate subject of common interests.

2.23. As a result it is not possible, according to its international commitments and this Act, to term the relationship between Hungary and the minorities of Hungarian national origin in the neighbouring countries as one as between Schutzmacht and protected minority.

3. The non-unique nature of the Hungarian Act: laws and practices of other countries.

3.1. It is not the purpose of this present submission to provide an analysis of all laws and practices of European states regarding relations between kin states and their kin minority living in neighbouring countries. However, it is necessary to refer to certain aspects of some of these laws and practices in order to provide the context within which the Hungarian law was formulated and drafted. The various measures taken by the countries described below are states which are – in the main – bound by the same provisions of international and European treaties for the protection of minority rights as the Republic of Hungary. Such measures of kin states for their kin minority in neighbouring countries were therefore designed and put into effect within the same international minority rights protection matrix as their Hungarian counterpart.

3.2. One of the most striking examples is the Parliamentary Resolution of the Slovene National Assembly, adopted on 27 June 1996, on the situation of native Slovenian minorities living in neighbouring countries, and on the duties relating thereto of the national and other agents of the republic of Slovenia. Under Section 1(III), Slovenia recognises that, in respect of its national minority in the neighbouring countries, its actions are bound by the relevant international treaties.

3.3. Under Section 4(II), Slovenia identifies a lasting and strategic interest in bolstering the economic position of Slovene nationals in the neighbouring states. The minority economic component has to be built into the strategic documents of Slovenian economic development and into inter-regional and transfrontier co-operation projects, co-funded, inter alia, by the European Union. Slovenia provides special assistance to the employment in Slovene companies of members of the Slovene national minority from the neighbouring states. This also applies to the introduction of a temporary regime to subsist until EU accession, allowing minority enterprises to carry out services in Slovenia. These benefits are much broader in scope than those provided for under the Hungarian Act.

3.4. In respect of education and culture, under Section 4(III), the Slovene Government acknowledges that the Slovene national minority from abroad has the right to carry out studies – at all levels – in all the schools in Slovenia and devotes special attention among others to developing autonomous scholarship programmes. Moreover, irrespective of the situation that academic institutions of the Slovene minorities have achieved in the neighbouring countries, Slovenia shall furnish constant funding for the basic functioning of these establishments. In this way, as with Hungary, Slovenia intends to play a secondary or

[6] "France Reassures Both Sides," *International Herald Tribune*, 1 November 1995, p. 6.

subsidiary role to the home state in supporting the maintenance of educating Slovene nationals, either in Slovenia or abroad. Moreover, the aim of the Parliamentary Resolution is similar to that of the Hungarian Act – the promotion of culture and educational matters, the support and maintenance of cultural diversity, and the acceptance of this instrument as being legally permitted by international treaties in this field.

3.5. Turning now to the Slovak law regulating the field of the status of foreign Slovaks, their rights and duties in Slovakia, Law 70/1997. This Law determines, under section 2(2), a "foreign Slovak" as being a person who is not a citizen of the Slovak Republic, but who possesses Slovak nationality or ethnic origin and Slovak cultural and linguistic awareness. Under section 2(5), in the absence of relevant documentation, a person applying for the status of a foreign Slovak may prove his nationality by the written testimony of an ethnic organisation acting at the place of residence or, if no such organisation exists, then by the written testimony of two foreign Slovaks living with him in the same state. Further, under section 3, the applicant for status as a foreign Slovak is to submit the application, accompanied by the necessary documents confirming his status as a Slovak national, to the Slovak Ministry of Foreign Affairs or to a Slovak embassy or consulate abroad. The certificate of foreign Slovak is valid indefinitely but only if presented with the holder's passport or identity card.

3.6. In addition, the Slovak law (under section 5) provides visa-free entry for foreign Slovaks to the Slovak Republic together with the right to long-term stay there. Under section 6, the foreign Slovak has the right to education, to apply for employment without the usually required permits, to an old-age pension as well as the right to buy and own property and to receive certain travel benefits. Finally it should also be noted that the Slovak Ministry of Foreign Affairs is empowered to grant or withdraw the status of foreign Slovak (section 7).

3.7. These two countries are not the only ones which provide preferential treatment or positive action for their kin minority abroad. One may refer to a Common Ministerial Decree 4000/3/2001 of 6 June 2001 on the procedure and the conditions of stay and employment of Albanian citizens having Greek national origin and on the length of the validity of permission to stay and work. According to paragraph 3 of the Decree, the length of such validity is three years compared to the three months under section 15 of the Hungarian Act.

3.8. Romania has also passed a statute in 1998 on Giving Assistance to Romanians of the World. According to section 1 of the Romanian law, Romanian nationals abroad should receive financial assistance from Romania. In order to secure this, a fund is to be established at the disposal of the Prime Minister. Further, under section 2, Romanian budgetary resources are to be used in such a way so as to give priority to assist schools or teaching in Romanian; to cultural, artistic, or youth actions; to individuals in exceptional situations regarding health; to help Romanian nationals abroad in their civic education; and in addition to other assistance agreed upon in co-operative programmes. In order to give an opinion on the actions to be financed in order to achieve such goals, an interministerial committee is to be set up (section 3). The executing body of such actions – which has the duty to put the agreed upon actions into practical effect – is a new centre set up under the auspices of the Ministry of National Education (section 5). The centre is able to assist Romanian national students from abroad in Romania with certain types of free accommodation and services, depending on the action concerned (sections 7-10). Under section 9, the Government is empowered to make decisions on other types of assistance. It can be seen therefore that the Romanian law provides for a plenitude of rights regarding education as well as a social right (to health care in certain

circumstances) and specifically allows the Government to expand the area of support without recourse to Parliament, something which is absent from the Hungarian Act.

3.9. There are further examples of ways in which other countries variously support their kin minority living outside the kin state (*inter alia* Germany, Italy, Spain, Portugal and Ireland), e.g., in the field of education through scholarships as well as other benefits and facilities, or in the social and economic fields. While on the one hand recognising that differences exist between the Hungarian Act and the law and practices of these other states, nevertheless, on the other hand, it seems to be an accepted kin-state practice to legislate domestically in favour of granting certain benefits to the kin minority living abroad.

4. Preferential or differential treatment of minorities in international law

4.1. Criticism has been put forward by certain political actors claiming that a "preference linked to ethnic criteria" is in itself illegal or at most only admissible on a temporary basis. According to these critics, as a political consequence of such positive discrimination, the emergence of social or inter-ethnic tensions will be the eventual result.

a) Preferential treatment and international law

4.2. One of the greatest achievements of today's international minority-related law-making is the acceptance of the so-called concept of positive or affirmative action, even if the concept was already admitted by the Permanent Court of International Justice in the case of minority schools in Albania and the European Court of Human Rights in the famous Belgian Linguistics case.

4.3. The PCIJ proclaimed that the equality of persons belonging to a minority is not guaranteed if they do not have "moyens appropriés pour la conservation des caractères ethniques, des traditions et de la physionomie nationales (…) ce qui constitue l'essence même de sa vie en tant que minorités."[7]

4.4. As regards the latter case, the ECtHR underlined in the same style that "l'article 14 n'interdit pas toute distinction de traitement dans l'exercice des droits et libertés reconnus, mais l'égalité de traitement est violée si la distinction manque de justification objective est raisonnable (…) L'existence d'une pareille justification doit s'apprécier par rapport au but et aux effets de la mesure considérée eu égard aux principes qui prévalent généralement dans les sociétés démocratiques. (…) Une distinction de traitement dans l'exercice d'un droit consacré par la Convention ne doit pas seulement poursuivre un but légitime: l'article 14 est également violé lorsqu'il est clairement établi qu'il n'existe pas de rapport raisonnable entre les moyens employés et le but visé."[8]

4.5. These *dicta* emphasised the admittance of the affirmative action concept, proposed also by the draft European Convention for the Protection of Minorities, elaborated by the Venice

[7] 6 April 1935, série A/B n°64, p.17.

[8] 23 July 1968, § 10.

Commission.[9] The concept was later also confirmed by UN General Assembly Resolution 47/135 and the European Charter for Regional or Minority Languages.

4.6. Resolution 47/135 is clear and short in article 8(3): "Measures taken by States to ensure the effective enjoyment of the rights set forth in the present Declaration shall not *prima facie* be considered contrary to the principle of equality contained in the Universal Declaration of Human Rights."

4.7. In article 7(2), the Charter provides: "The Parties undertake to eliminate, if they have not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of a regional or minority language and intended to discourage or endanger the maintenance or development of it. The adoption of special measures in favour of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users or more widely-used languages."

4.8. Confirmation of this non-discriminatory aspect of the provisions of the Hungarian Act can be adduced from the Framework Convention which will be further analysed below. Further jurisprudence from the ECtHR supports this contention. As Judge Pettiti explained it in his dissenting opinion in the case *Buckley v. United Kingdom* (25.9.1996) "the only acceptable discrimination under Article 14 is positive discrimination which implies that in order to achieve equality of rights through equality of opportunity it is necessary in certain cases to grant additional rights to the deprived members of the population such as the underclass of developed countries and the Gypsy and Jenische communities." Further in *Chassagnou v. France*,[10] the ECtHR held in relation to what was necessary in a democratic society that "a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."

4.9. Referring to the international treaties for the protection of human rights, even the European Court of Justice has never excluded the possibility of minority rights being declared to be general principles of European Community law. In the *Bickel/Franz* case the ECJ upheld the position that the protection of a minority might constitute a legitimate aim for the state behaviour. Furthermore, and more importantly for the present argument the ECJ seemed to consider the possibility of accepting the protection of minorities as a ground for the justification of an infringement of a principle of non-discrimination on the grounds of nationality.[11]

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[9] As the explanatory report of the Venice Commission emphasised: "the fact is that while non-discrimination may appear to be sufficient to resolve many of the problems of minorities, the very nature of minorities implies that special measures should be taken in favour of persons belonging to them. Therefore, non-discrimination within the meaning of the proposal does not denote formal equality between individuals belonging to the minority and the rest of the population but rather substantive equality."

Matscher (ed): *The protection of minorities*, Collected texts of the European Commission for Democracy through Law, Collection Science and technique of democracy n°9 Council of Europe 1994 Strasbourg.

[10] Judgment passed by the European Court of Human Rights, 29 April 1999, §112.

[11] However, it would be possible to conclude that minority protection is not yet part of the *acquis* even if developments are currently moving in this direction. Toggenburg, Gabriel: *A Rough Orientation Through a Delicate Relationship: The European Union's Endeavours for (its) Minorities*, European Integration Online Papers (EIOP) Vol.4 (2000) n°16, p.18-19.

4.10. Asbjørn Eide, rapporteur of the sub-committee for the protection of national minorities and the prevention of discrimination, produced a report in 1993 on "Possible ways and means of facilitating the peaceful and constructive solution of problems, involving minorities." On the issue of *affirmative actions*, he stated:[12]

> "§ 172. Affirmative action is preference, by way of special measures, for certain groups or members of such groups (typically defined by race, ethnic identity or sex) for the purpose of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms….
>
> § 178. There are 'soft' and 'strong' versions of affirmative action. The 'soft' versions are extensions of the principle of non-discrimination: latent social discrimination creates obstacles to members of groups affected by such discrimination. In evaluating their qualifications, some preference shall be given in order to compensate for such latent discriminatory attitudes.
>
> § 179 Stronger versions of affirmative action are aimed at an accelerated creation of a balanced society. (…) Such approaches to affirmative action suspend or modify traditional criteria of merit as a basis for access but can be justified when there were, in the past, discriminatory practices which deprived members of those groups of equal opportunity and blocked for them the application of criteria of merit.
>
> § 193 Affirmative action shall not lead to the maintenance of separate rights for different racial groups. (…) It is therefore different from those kinds of positive action which are intended to ensure, for minority groups, on a basis of equality with other groups, the preservation of their separate identity, if they so wish.
>
> § 210. Transfrontier ethnic, religious and linguistic groups need close contacts in order to preserve and develop their language, culture and spiritual concerns. An essential counterbalance to respect for territorial integrity is the right of members of minorities to have as free and unimpeded contacts as possible with related populations on the other side of the border."

4.11. More recently, the European Union, in Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, has recognised the concept of positive action. Article 5 of the Directive states: "With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent Member States from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin."[13]

4.12. The Hungarian Act, in providing the possibility for persons of Hungarian national origin in the neighbouring countries to claim certain benefits, falls within the remit of the

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[12] E/CN.4/Sub.2/1993/34, 10 August 1993, pages 35-42.

[13] The legitimacy of positive action to redress discrimination was also recognised in article 7 of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

general standards of international law related to minorities protection. The benefits granted by the Act are exclusively aimed at the protection, the development and the transmission to the off-spring of the identity of the individuals concerned, as members of Hungarian minorities living abroad. These benefits have no effect on their citizenship, or on their belonging to the minorities concerned. In other words, the Act has no legal effect on their existing rights and duties as members of these minorities, and as citizens of the respective states. Therefore, the positive measures provided by the Act cannot be regarded as discriminating against either Hungarian citizens, or the citizens of the states concerned. The Framework Convention, to be discussed below (see paras. 5.1.-5.14.), represents an even more clear affirmation both of the particular benefits claimable under the Hungarian Act as well as the general non-impugnability of the Act according to international law.

b) Preferential treatment not ground for invalidity under international law because of putative negative consequences

4.13. It is completely unfounded to claim that whatever difference of treatment may subsist should be *a priori* banned in order not to provoke eventual tensions.

4.14. The proper attitude of a state was recently expressed by the famous judgement of the European Court of Human Rights delivered in the case *Serif v. Greece*: [14]

> "Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism but to ensure that competing groups tolerate each other."

4.15. This need to promote pluralism and cultural diversity in Europe (as noted above at paras. 2.5.-2.12.), has been acknowledged and pursued by a publication of the Venice Commission itself:

> "Plus que les règles sur le partage des compétences ou la représentation des minorités au sein de l'État central, c'est l'acceptation, par l'ensemble de la population, de la réalité plurinationale, plurilinguistique et pluriculturelle d'un pays qui permettra la coexistence pacifique de plusieurs communautés au sein d'un même État. Accepter des cultures diverses, et admettre que leur existence constitue une source d'enrichissement réciproque; respecter les différentes langues. Telles sont les conditions de la coexistence de groupes différents sur un même territoire."[15]

[14] 14 December 1999, § 53. (The judgment confirmed in a minority affair the *dictum* proclaimed *inter alia* in the case *Plattform "Arzte für das Leben" v. Austria*, 21 June 1988).

[15] Malinverni, Giorgio: "Autonomies locales, intégrité territoriale et protection des minorités – rapport final" in: *Autonomies locales, intégrité territoriale et protection des minorités*, Colloque de Lausanne 25-27 avril 1996, Commission européenne pour la démocratie par le droit, Collection Science et technique de la démocratie n°16, Conseil de l'Europe 1997 Strasbourg, p.339.

4.16. Fears of conflict between the majority and minority as grounds for justifying a particular course if action by the home state are not unfamiliar in the region. In late 1995, Romania's National Audio-Visual Council, responsible for media licensing in the country, threatened to withhold authorisation for certain cable TV companies to broadcast Hungary's Duna TV. It was alleged that such broadcasts "foment suspicion among ethnic groups and promote the creation of artificial tensions."[16] Although the decision was later reconsidered, the original evaluation was later shown to lack real justification in the first place when, a few years later, Duna TV received UNESCO's Best Cultural Television of the World Prize in 1999.

c) For human rights violation, legal system itself must be discriminatory not merely one act

4.17. It is also a generally recognised principle in modern countries that this is the general legal system as such which should manifest the correct balance between different obligations of the state. Individual acts and other judicial instruments can contain preferences, differently formulated target groups, different ways to achieve the aims: the balance should be realised on the level of the system and not forcibly in each individual act.

4.18. Both the International Court of Justice or the European Court of Human Rights consistently refuse to adopt the so-called "abstract interpretation." The latter tribunal, in its jurisprudence, has always followed the line that its jurisdiction does not consist of judging a given domestic legal act; its duty is to decide whether or not the applicant's particular right enshrined in the ECHR and its protocols was violated. (Incidentally, the very few interstate applications concerned particular cases and not abstract problems.) In order to decide a case, the European Court of Human Rights has very often had to examine an application in the context and in the interaction of several acts and other normative instruments.[17]

4.19. There is thus the need for a complex analysis of all the factors involved. This means that one cannot artificially separate the Hungarian Act from the whole matrix of domestic constitutional and legal provisions as well as the contents of international and bilateral treaties which bind it, in this case on the protection of national minorities. More particularly, within its bilateral relations, Romania and Slovakia have so-called Basic Treaties with Hungary which include clauses concerning minority rights. In addition to these international treaty provisions, both countries have seen fit to promote the rights of their kin minorities further with various benefits and concessions provided by domestic legislation of the kin state (see above at paras. 3.1.-3.9.).

d) Claims of discrimination against majority in neighbouring state unsustainable

[16] See "National Audio-Visual Council Rejects Request for Cable TV Companies to Broadcast Duna TV's Hungarian Language Programme", press release for the DAHR, Bucharest, 10 November 1995.

[17] See e.g. the judgment *Rekvényi v. Hungary*, 20 May 1999: "§ 35: The Court notes (…) that Article 40/B § 4 of the Constitution, which contains the generic term 'political activities', is subject to interpretation and is to be read in conjunction with complementary provisions contained in the various laws cited and the 1990 Regulations…"

4.20. The case for discrimination against the majority is *per se* difficult to construct (although not impossible). The *travaux préparatoires* of the Framework Convention confirm that the actual intention of the drafters was not to exclude special measures destined to minorities. The issue was discussed at the 5th meeting of the CAHMIN committee:[18]

> "The Committee agreed on a change in the wording of paragraph 1 as compared to that in CAHMIN (94)16 Appendix III, in order to make clearer what is meant by 'equality' and 'non-discrimination'. This change does not intend to realign this provision with article 14 ECHR. Some linguistic changes were made to paragraph 2 of this Article…. The Committee retained the text of Article 4 which is reproduced in Appendix IV. A proposal for an additional fourth paragraph (protection against discrimination of persons who do not belong to a national minority), was not retained. [The above mentioned stylistic change was due to a UK proposal. The referred rejected proposal was submitted by Bulgaria and backed by Romania – ed.]"

4.21. This shows that neither the letter, nor the spirit of the Framework Convention require a mechanical equality between minority and majority. The aim is the achievement of effective equality. The proposal for Article 4(4) was apparently rejected because it could not be considered operational – it would have created an exceptional situation with the burden of proof put on those who alleged discrimination against the majority. Since the aim of provision was the prohibition of discrimination on minority, the proposed fourth paragraph was rejected because it would have shifted the balance in the whole of Article 4.

4.22. Moreover, its reason was recently explained by the European Court of Human Rights, *inter alia* in the case *Beard v. United Kingdom*: "The Court observes that there may said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community."[19]

[18] 27 June-1 July 1994, Meeting report CAHMIN (94)19, at paragraph 5.

[19] *Beard v. United Kingdom* 18 January 2001 § 104,; cf. In the same sense the dictum in *Chapman v. United Kingdom*, 18 January 2001.

5. Framework Convention on the Rights of National Minorities

a) Introductory remarks

5.1. The focus of the discussion in this section concerns the obligations provided for in Article 4 of the Framework Convention, which states in its relevant paragraphs:

> "(2) The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities.
> (3) The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination."

5.2. The interpretation of these two paragraphs is crucial to the Hungarian argument in the present matter. Guidance on interpretation was provided by the Explanatory Report annexed to the Framework Convention which states in the relevant parts:

> "38. The purpose of this article is to ensure the applicability of the principles of equality and non-discrimination for persons belonging to national minorities. The provisions of this article are to be understood in the context of this framework Convention.
>
> 39. Paragraph 1 takes the classic approach to these principles. Paragraph 2 stresses that the promotion of full and effective equality between persons belonging to a national minority and those belonging to the majority may require the Parties to adopt special measures that take into account the specific conditions of persons concerned. Such measure need to be 'adequate', that is in conformity with the proportionality principle, in order to avoid violation of the rights of others as well as discrimination against others. The principle requires, among other things, that such measures do not extend, in time or in scope, beyond what is necessary in order to achieve the aim of full and effective equality.
>
> 40. No separate provision dealing specifically with the principle of equal opportunities has been included in the framework Convention. Such an inclusion was considered unnecessary as the principle is already implied in paragraph 2 of this article. Given the principle of non-discrimination set out in paragraph 1 the same was considered true for the freedom of movement.
>
> 41. The purpose of paragraph 3 is to make clear that the measures referred in paragraph 2 are not to be regarded as contravening the principles of equality and non-discrimination. Its aim is to ensure to persons belonging to national minorities effective equality along with persons belonging to the majority."

5.3. It is submitted that the wording of the Framework Convention allowed for the passing of the Hungarian Act in its current form. Although the term "the Parties" in a mere grammatical interpretation should cover all Parties and not only home states, the word "undertake" is commonly understood to refer to home states: it would be considered unreasonable to impose obligations on states other than home states. However, what can be drawn from this, is that the concept of giving is a legitimate concept for all states under the Framework Convention:

it would be wrong that "giving" could only be fulfilled by some Parties (i.e. home states) vis-à-vis persons of national minorities while other Parties (i.e. kin states) are prohibited from giving. The duty of the home state under the Framework Convention does not accordingly exclude the legally-secured possibility of kin states to support their kin minorities in the home state. Sufficient scope still remains in the wording and aims of the Framework Convention to allow kin states to enact legislation such as the Hungarian Act. Indeed, it would appear that several states have already passed legally-binding measures similar to the Hungarian Act on that basis (see paras. 3.1.-3.9.).

b) The conditions to be fulfilled for the provisions of the Act to amount to adequate measures under the Framework Convention

5.4. It is clear from the Framework Convention, Article 4 and the case-law of the ECtHR, that three conditions must be fulfilled by the Hungarian Act in order for its provisions to amount to adequate measures in accordance with the Convention. These are: (1) the existence of a legitimate goal; (2) the measure can be objectively and reasonably justified; and (3) the existence of proportionality between the goal and the means used.

(1) Legitimate goal

5.5. By legislating to assist in the preservation of the linguistic and cultural self-identity of the Hungarian minorities living in the neighbouring states, the Hungarian Act attempts to contribute to the accomplishment of the general and collective goals of the Framework Convention of Council of Europe. As the main purpose of this Convention (and other international instruments on minorities) is, according to the Preamble, the creation of the appropriate conditions to enable each person belonging to a national minority to express, preserve and develop *inter alia* their cultural and linguistic identity, the Hungarian legislation consequently pursues a legitimate goal.

(2) Objective and reasonable justification

5.6. The European Court of Human Rights comes to the following conclusion in its decision in the Belgian Linguistic Case: "the principle of equality of treatment is violated if the distinction has no objective and reasonable justification"[20]. As far as the objective and reasonable nature of the justification is concerned in this context, it is generally accepted that living in a minority – regardless to the minority policy of the home state – limits the cultural-educational possibilities to preserve the self-identity of the individual in comparison with possibilities existing in that state where the population having the same linguistic-cultural origin lives in majority.

5.7. Thus, although the primary role in minority issues is taken by the home state and the international community, as observed above (see paras. 5.1.-5.3.), the kin state may contribute to the realisation of those rights which are recognised and protected in international agreements in order to promote the full and effective equality demanded by the

[20] Judgment of 23 July, 1968, at 34.

Framework Convention. The differentiated treatment under the Act is reasonable as it contributes to the achievement of the goal of preserving the cultural and linguistic identity of the Hungarian minority in the neighbouring states, and renders the protection of their rights to language, education and culture effective.

(3) Proportionality

5.8. The European Court on Human Rights goes on the following way in Belgian Linguistic Case: "A difference of treatment (…) must not only pursue a legitimate aim" but there should be "a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[21] Consequently, an objective balance is to be struck between the means embodied in the Hungarian Act and the otherwise legitimate goal to assist the preservation of the linguistic-cultural identity of Hungarians in the neighbouring countries.

5.9. By looking through the content of the Hungarian Act, one could easily accept that the Hungarian side simply tries to contribute to and support the preservation of the linguistic-cultural identity of Hungarian minorities in the neighbouring states and it leaves the main responsibility of the home states as it comes from domestic and international law (see above at para. 5.3.). The UN Committee on Economic, Social and Cultural Rights in its definition of discrimination speaks of the effect "nullifying or impairing the recognition, enjoyment or exercise of equality of opportunity."[22] It cannot be argued that the Hungarian Act discriminates against the majority populations in the home states since it does not nullify or impair the equality of opportunities of the majority population to preserve its linguistic-cultural self-identity.

5.10. If one looks at the provisions of the Hungarian Act on the benefits and assistance for persons falling within its scope, it is clear that the entitlements are proportionate to achieving the cultural, linguistic and educational goals contained in the Framework Convention and which form the fundamental aim of the Act. Such matters as using libraries (section 4) and assigning limited travel benefits (section 8), as well as allowing attendance at higher educational institutions in Hungary (sections 9 and 10), and cross-border training for Hungarian teachers (sections 11-12) clearly aim at ensuring free communication between the kin state and persons of Hungarian national origin in the neighbouring countries and represent an expression of cultural and linguistic identity.

[21] Ibid.

[22] *Reporting Guidelines*, UN Doc. E/1991/23, Annex IV. at 91, para 3, UN ESCOR, Supp. (No.3) 1991.

5.11. Further, the provisions on social security and health services (section 7) and on employment (section 15) do not give a disproportionate advantage to the putative beneficiaries under the Act. Section 7 is subject to rules under relevant international treaties and section 15 workers are treated like any other foreign nationals in Hungary except that their work permit can be issued for a maximum three months without prior assessment of the situation in the labour market. In effect – for a maximum of three months – a person of Hungarian national origin from a neighbouring country, fulfilling all the other criteria under the laws relating to the authorisation of employment of foreign nationals, can work in Hungary: the result is that the employee will be engaged in seasonal work of a temporary nature, which possibility may only be permitted once a year (the limited nature of this employment reinforces Hungary's intention that such employee is to have "contact" with the kin state, the encouragement of which is one of the main aims of the Hungarian Act). In other words, while the Act enables a persons of Hungarian national origin to come to Hungary for a short period of time, it does not represent the opening up of the labour market to persons of Hungarian national origin based in the neighbouring states or a free movement for workers benefiting under the Act. The advantages in practical reality are circumscribed by international treaty and domestic legislation: the general quotas granted by Hungary to citizens of neighbouring countries seeking jobs in Hungary are independent from the present Act. In this sense the facilitated work permit is proportionate to the goal to be achieved.

5.12. Also in proportion to the goal is the educational assistance of pupils in their native countries (section 14 of the Act). This payment for the education of children in neighbouring states needs to be applied for: no one has a right to claim this benefit or assistance. The only purpose of this provision is to help children to be educated in their mother tongue, and to compensate for any handicaps or inconveniences stemming from such situation. This is not to suggest that the Act implicitly denigrates the support already received by the Hungarian minorities abroad from their home state: as already observed elsewhere, the role of the kin states is secondary, and this provision is also secondary to any support already provided by the home state in the education field.

5.13. The proportionality of the Hungarian Act's provisions for the facilitated work permit and educational assistance must also be viewed in the context of measures already described as being in force in other European states vis-à-vis their kin minorities in other countries. In Greece, for example, the law and practice there is apparently accepted by the European Union: the Greek Decree provides very clear positive action and a three-year validity period while the Hungarian Act only facilitates the possibility of employment and provides a maximum three months' permit before the person of Hungarian national origin from a neighbouring state has to comply with the full rigour of Hungarian law and procedure. Moreover, any economic effect is mitigated by the fact that the quotas continue to exist regarding other countries' citizens.

5.14. The provisions of the Slovak law in respect of employment in Slovakia of foreign Slovaks is also of a broader scope and effectiveness than the provisions of the Hungarian Act. However, the extraterritorial effect of the Slovak legislation has not been challenged by Romania (where there is a Slovak national minority) and from this silence it must be concluded that the Romanian Government accepts as proportionate the measures taken by Slovakia under its domestic legislation in order to secure the cultural, educational, social and economic well-being of its kin minority in Romania: for example, the certificates issued in accordance with the Slovak law have been accepted by Romanian authorities. From the foregoing, then, the Hungarian Act may be said to be more circumscribed both in its procedural and substantive provisions than those of other states (e.g. the countries identified above).

6. Conclusion

6.1. In conclusion, then, the Hungarian Act recognises the territorial integrity of neighbouring states and amounts to a definite refusal of territorial revision and a rejection of dual citizenship (paras. 2.1-2.4.). In its tenor and construction, the Act aims at promoting cultural identity and represents a positive contribution to the principle of cultural diversity, regarded as fundamental to the stability and prosperity of Europe by both the Council of Europe and the European Union (paras. 2.5.-2.12.). Moreover, the Act does not use ethnicity as a basis for eligibility for claiming benefits under it, it being left to the free choice of individuals whether or not to claim the facilities so provided (paras. 2.13.-2.18.). Hungary recognises its kin state role in respect of Hungarian minorities living in neighbouring countries as being secondary or subsidiary to that of the home state and thus rejects as inapplicable the Schutzmacht theory to the present situation. In fact, the Hungarian Act cannot be understood as a kind of criticism of the treatment of the Hungarian minorities in the neighbouring states – it simply assists the realisation of the generally accepted goals of international minority protection in case of persons of Hungarian national origin in neighbouring states standing beside those of the home states and the international community (paras. 2.19.-2.23.).

6.2. The Hungarian Act is not unique: it is one of a number of domestic laws and practices existing throughout Europe. While on the one hand recognising that differences exist between the Hungarian Act and the law and practices of these other states, nevertheless, on the other hand, it seems to be an accepted kin-state practice to legislate domestically in favour of granting certain benefits to the kin minority living abroad (paras. 3.1.-3.9.). Moreover, the positive action or preferential treatment promoted by the Act is permissible under the general standards of international law related to minorities rights protection and does not amount to discrimination against the majority of a neighbouring state (paras. 4.1.-4.22.).

6.3. Hungary reiterates that the main responsibility for minority protection lies with the home state and that Hungary does not attempt to take over such responsibility but rather plays a contributory or secondary role. While measures following from the responsibility of the home state are expressly provided for by international law, i.e., they are obligations, this type of additional contribution of the kin state set out in the Hungarian Act is a legitimate possibility (see paras. 5.1.-5.3.). Nothing prevents kin states taking such measures which meet the three criteria of legitimate goal, objective and reasonable justification, and proportionality. The aim of the Act, in promoting linguistic and cultural identity and diversity, thereby seeks the creation of full and effective equality between persons belonging to minority and to the majority, without using methods which are disproportionate to achieving these goals (paras. 5.4.-5.14.).

7. No intention to give extraterritorial effect to Hungarian Act

a) Introduction

7.1. Some observers consider that the Hungarian Act shows the characteristics of extraterritorial legislation because:

a. it concerns foreign citizens; and
b. in the issue of the document entitling the beneficiary to certain services and facilities, organisations representing Hungarian communities are to play a certain role. Even if this role is of recommendatory nature, these observers consider this transborder co-operation as analogous to central and delocalised branches of the administrative structure a foreign state.

b) The issue of facilities and services proposed outside Hungary

7.2. While most provisions of the Hungarian Act apply *ex lege* in an evident and exclusive way in the territory of the Republic of Hungary, some provisions are partly realised in the home state (the country of citizenship): promotion and delocalisation of branches of Hungarian institutions of higher education (section 13), financial help for parents of pupils studying in institutions where the teaching language is Hungarian (section 14), promotion of media contacts (section 17) and promotion of cultural institutions of the Hungarian language (section 18).

7.3. Since the persons entitled to the benefits granted by the Hungarian Act are citizens of certain neighbouring countries, it is therefore inevitable that the Act has some transboundary aspects. Similar transboundary aspects are unavoidable in each and every case when a kin state provides any assistance to its kin minorities living abroad, whether in the form of financial or cultural assistance, including radio or TV broadcast, scholarships, bursaries etc. This is a fact of life, and a consequence of the globalising world.

7.4. To reject this type of imminent transboundary aspect would mean to reject as unlawful any assistance, facilities, etc. granted by states to foreign citizens, whether in matters of identity protection, or other issues. For instance recommendations requested by foreign educational institutions for those applying for scholarships, or granting of awards, etc.)

d) The status and the role of the recommendatory board

7.5. The fact, however, that organisations registered in neighbouring countries, set up and run by their citizens, are delegated by the Hungarian Act to assess the real needs and recommend the persons entitled to benefits granted under the law, is a positive aspect and demonstrate the openness of the Hungarian government and its will to cooperate with the states concerned and involve them in the implementation of the Act. There is no basis to regard these recommending organisations as agencies of the Hungarian government:

1) because the government itself does not regard them as such,
2) these organisations are constituted in accordance with the law of the respective state, and

3) they have full autonomy of action in achieving their goals, while their recommendations are not binding in any way on either government.

7.6. We can find a number of international and national instruments based partially on the participation of a foreigner (or several foreigners) in the decision-making procedure of a given state or another subject of international law.

a) the procedure of nomination of Nobel Prize, Charles the Great (*Carolus Magnus*) Prize etc. when different prominent personalities and especially former winners become habilitated to nominee: up till now, nobody considered these persons as being "agents" of the country issuing the prize.

b) the functioning of different mixed committees of selection of scholarships: e.g. the scholarships of the French government for Hungarian is attributed for years on the proposal of mixed committees composed of two French scholars, two Hungarian scientists and the representative of the French embassy.

c) the Romanian practice referred to earlier (para. 1.7.) the issue of certificates by Romanian national minority self-governments in Hungary testifying to the Romanian origin of the applicant in order to obtain certain scholarships in Romania.[23]

7.8. In summary, it is clear that in the world of science, it is admitted by states to allow their citizens to co-operate in the distribution of different awards, scholarships, etc. Such co-operation is considered neither as felony, nor as a *de facto* status of agent of the state administration of another country. Certain forms of such co-operation are backed by an interstate agreement, but most of them function by tacit consent or even by custom in certain cases.

7.9. This means that it would be an unjustified exaggeration to claim that the express approval of the home state is needed for a kin state to have such a contact of co-operation with a foreign citizen. Today's transboundary co-operation cannot be limited to classic interstate co-operation. The acceptance of this phenomenon is certainly facilitated by background treaties – but this does not exclude the possible existence of a direct relationship of kin state to kin minority.

7.10. The Hungarian Act is in conformity with the scope and the provisions of both international treaties and acts on minorities rights protection as well as the bilateral treaties signed by Hungary and her neighbours in the nineties, which provide for co-operation and recognise as legitimate the mutual interests of the parties in protecting their kin minorities living on the territory of the other party.

[23] See the interview with Mr. Tibor Juhasz, Chief of Bureau of the Romanian National Minority Self-Government in Hungary in *Népszabadság*, 28 July 2001, p. 3.

***Annex No. 1*:** Kin states and kin minorities in home states of the Carpathian Basin (around 1990)

Hungarians in Slovakia	567.296 (653.000)	Slovaks in Hungary	10.459 (80.000)
Hungarians in Ukraine	163.111 (200.000)	Ukrainians in Hungary	657 (1000)
Hungarians in Romania	1.627.021 (2.000.000)	Romanians in Hungary	10.740 (15.000)
Hungarians in Serbia	343.942 (365.000)	Serbs in Hungary	2.905 (5.000)
Hungarians in Croatia	22.355 (40.000)	Croats in Hungary	13.570 (40.000)
Hungarians in Slovenia	8.499 (12.000)	Slovenes in Hungary	1.930 (5.000)
Hungarians in Burgenland	6.763 (7.000)	Germans in West-Hungary	1.531 (17.000)

Source: Census data /Ukraine 1989, Hungary 1990, Slovakia, Serbia, Croatia, Slovenia, Austria 1991, Romania 1992/ according to the ethnicity (in Austria: everyday language). In parentheses are the estimates – according to the language knowledge and ethnic origin – of the organisations of the minorities and the calculations of K. Kocsis (1988). Hungarians in Transylvania include the Székely- and Csángó-Hungarians

Annex No. 2

Consultations with the neighbouring countries

1) Multilateral consultations

On 11 December 2000, Political State Secretary Zsolt Németh informs the ambassadors accredited to Budapest of the EU member states and the countries adjacent to Hungary on the concept of the projected legislation.

On 5 April 2001, Foreign Minister János Martonyi informs the ambassadors of the EU member states and the countries adjacent to Hungary on the draft legislation submitted to Parliament by the Government.

2) Hungarian-Romanian consultations

On 5-6 February 2001, Deputy State Secretary of the Foreign Ministry Csaba Lőrincz holds discussions in Bucharest with Foreign Minister Mircea Geoana, State Secretary Cristian Diaconescu and General Director of the Foreign Ministry Mihail Dobre.

On 20-21 February 2001, Political State Secretary Zsolt Németh holds discussions in Bucharest with Foreign Minister Mircea Geoana, State Secretary Cristian Diaconescu, Minister for European Integration Hildegard Puwak and Vasile Puscas, the EU Chief Negotiator of Romania.

On 2 March 2001, Tibor Szabó, the President of the Office for Cross-Border Hungarians, Co-Chairman of the Hungarian-Romanian Expert Committee for Minorities, sends to the Romanian side - at the request of his Romanian partner - the draft of the legislation.

On 4 April 2001, Romanian Foreign Minister Mircea Geoana holds talks in Budapest with Prime Minister Viktor Orbán and Foreign Minister János Martonyi.

On 2 May 2001, Ambassador István Íjgyártó holds consultations in the Romanian Ministry of Foreign Affairs.

On 24 May 2001, a consultation of experts is held in Budapest. The Romanian delegation is led by Bogdan Aurescu, the head of the Department for International Law of the Romanian Ministry of Foreign Affairs; the Hungarian delegation is led by Mátyás Szilágyi, the General Director of the relevant regional department.

On 30 May 2001, as part of the Budapest meeting of NATO foreign ministers, Foreign Minister János Martonyi and Foreign Minister Mircea Geoana hold bilateral discussions.

On 22 June 2001, Foreign Minister János Martonyi and Foreign Minister Mircea Geoana meet in Milan, at the foreign ministers' conference of the CEI.

On 12-13 July 2001, János Martonyi holds talks in Bucharest with Prime Minister Adrian Nastase and Foreign Minister Mircea Geoana.

On 28 July 2001, Prime Minister Viktor Orbán meets the Romanian Prime Minister Adrian Nastase.

In September 2001, the Hungarian-Romanian Inter-Governmental Joint Commission and its expert committees meet in Budapest.

3) Hungarian-Yugoslav consultations

On 7-8 May 2001, the Yugoslav Federal Minister for Minority Affairs Rasim Ljajic holds talks in Budapest with Foreign Minister János Martonyi, Political State Secretary Zsolt Németh, János Báthory, President of the Office for National and Ethnic Minorities, and Kinga Gál, the Deputy President of the Office for Cross-Border Hungarians.

On 15-16 May 2001, Political State Secretary of the Foreign Ministry Zsolt Németh holds talks in Belgrade with President of the Republic Vojislav Kostunica and Federal Minister for Minority Affairs Rasim Ljajic.

On 20 June 2001, President of the Republic Ferenc Mádl and his (Yugoslav) counterpart Vojislav Kostunica hold talks in Budapest. On the initiative of Foreign Minister Goran Svilanovic, separate bilateral discussions are held with Foreign Minister János Martonyi.

On 5 July 2001, Administrative State Secretary Iván Bába holds talks in Belgrade with Foreign Minister Goran Svilanovic.

4) Hungarian-Ukrainian consultations

On 18-19 January 2001, a Hungaraian-Ukrainian consultation of Foreign Ministry General Directors is held in Budapest.

On 3-4 April 2001, the 10th session of the Hungarian-Ukrainian Joint Commission for Minorities is held in Kiev.

On 18 June 2001, Tibor Szabó. President of the Office for Cross-Border Hungarians, holds consultations in Ungvár with Grigoriy Sereda, the Director of the Office for Minorities and Ethnic Groups of the Ukrainian Ministry of Justice.

On 27 July 2001, Deputy State Secretary Lőrincz Csaba holds talks in Kiev on question to do with the application of the Act.

5) Hungarian-Croatian consultations

On 28 May 2001, György Csóti, Hungary’s ambassador to Zagreb, briefs the Croatian Deputy Foreign Minister Nenad Prelog.

On 10 July 2001, Deputy State Secretary Lőrincz Csaba and Deputy Foreign Minister Nenad Prelog hold consultations in Budapest.

6) Hungarian-Slovak consultations

On 23 April 2001, Prime Minister Viktor Orbán and his (Slovak) counterpart Mikulas Dzurinda hold talks in Budapest.

On 15 May 2001, Administrative State Secretary Iván Bába holds talks with State Secretary of the Slovak Ministry of Foreign Affairs Ján Fígel at the 3rd session of the joint commission dealing with integration affairs and other foreign-policy questions, held in Bratislava.

On 5 June 2001, the Hungarian Ambassador to Bratislava Miklós Boros holds talks with Milan Sloth, the General Director of the Department responsible for bilateral relations of the Slovak Ministry of Foreign Affairs.

On 15 June 2001, Foreign Minister János Martonyi and Political State Secretary Zsolt Németh hold talks in Budapest with State Secretary of the Slovak Ministry of Foreign Affairs Jaroslav Chlebo.

Annex No. 3

Mr József Krasznai
Deputy Chairman

Roma Parliament of Hungary
Budapest

Dear Mr Krasznai:

I hereby gratefully acknowledge your 25 April 2001 telefax message asking about the relationship between the draft legislation on Hungarians living in neighbouring countries and Hungarian Roma living beyond the borders. I was genuinely delighted to learn that the Roma communities of Hungary, as well as those living in neighbouring states, are giving serious consideration to the bill prepared by the civic Government, which - according to our plans - will be enacted yet before the end of the year.

The draft legislation - the parliamentary debate on which is currently underway - is of an inclusive nature: it says he is Hungarian who describes himself as being Hungarian.

Those who wish to avail themselves of the benefits and assistance provided by the Act should have the so-called "Hungarian Certificate", which will be issued on the basis of the recommendation of an organization operating in a neighbouring state and recognized by the Hungarian Government. According to the plans, for the recommendation to be issued, one will have to provide a written declaration stating that he belongs to the Hungarian nation, an application for the recommendation, with a knowledge of the Hungarian language as another prerequisite. Provided certain supplementary conditions are present, an exemption may be granted from this latter condition. If the applicant meets these criteria, the recommendation must be granted regardless of origin, religion or political affiliation.

Given that the parliamentary debate on the legislation has not been completed yet, any assistance can, for the moment, be regarded only as a draft. The grants recommended for adoption - including the educational assistance which may be granted in the birth-place - will, naturally, apply to all those who come under the ruling of the Act and meet the conditions for the awarding of the assistance concerned, i.e. ensure that their underage child or children living in their own household are educated, and receive instruction, in a Hungarian-language kindergarten or Hungarian-language educational establishment located in a neighbouring state of their domicile. But the grants - the amounts of which depend on the country's ability to shoulder burdens - will not be due automatically, - an application will, invariably, have to be submitted for them.

The Act currently under preparation deals with Hungarian communities living beyond the frontiers, which naturally include, also, the Roma communities living in neighbouring states which define themselves as Hungarian. Thus the bill might serve as a model also in the sense that it has an inclusive character; it does not discriminate, on the contrary: it endeavours, by all possible means, to advance the minorities' sense of belonging together, helping ensure that they have a chance for a decent life.

Should you need any further detailed information, I will be glad to be of help in future as well.

Budapest, 9 May 2001

Yours sincerely,
Zsolt Németh