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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

PREFERENTIAL TREATMENT OF NATIONAL MINORITIES BY THEIR KIN-STATE

HUNGARIAN MATERIAL

presented at the Meeting in Paris, 18 September 2001

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Responses of the Hungarian Ministry for Foreign Affairs to the supplementary questions of the Venice Commission of the Council of Europe

1. *What is the scope of application of the Act? Does it only apply to those who have lost their citizenship directly under the peace accords?*

The scope of the Act is laid down in its Article 1. Conditions specified in para. 1. are the following:

a. having no Hungarian citizenship;
b. residence in one of the countries specified in this Article;
c. a declaration stating the Hungarian nationality;
d. having no permit for permanent stay in Hungary.

In addition, the reason of the loss of citizenship has to be other than voluntary renunciation – if the person, making the declaration under 'c', lost the Hungarian citizenship. If a person never had this citizenship – because, for example, their ascendants lost it as a result of the peace treaties – this condition is obviously met. Therefore, the answer to the second question is negative.

Para. 2. of Article 1. is self-explanatory. The scope is also extended to family members specified in this para.

Those, fulfilling these criteria shall be entitled, under the conditions laid down in the Act, to benefits and assistance.

2. *Is there any instrument concerning the treatment of ethnic Hungarians who are citizens of countries other than those listed in the Act? If so, are the benefits identical or different (if they are different why?) If not, why would foreign Hungarians of other countries be excluded?*

The overwhelming majority of persons of Hungarian national identity living in other countries than those listed in Article 1. para 1. of the Act, are Hungarian citizens. They preserved and inherited this citizenship to their descendants. Therefore, in Hungary, in many respect, they are enjoying the same rights as a Hungarian citizen living in Hungary. This is why, in these fields, they do not need any specific instruments.

The situation of persons of Hungarian nationality living in other countries than those listed in the Act is not comparable in this respect. The overwhelming majority of them are living in countries, where they are fully equipped to create all conditions for the preservation of their identity – if they so wish. These persons – or their ascendants – left Hungary, after all, as a result of their own decision, while those living in the neighbouring states did not leave their place of residence. As a result of this decision, they lost their citizenship. While, on the one hand there is a voluntary element in leaving the country, there is a constraint on the other.

This is the reason why, on the fora of the Standing Conference of Hungarians, those living in countries listed in the Act, have been continuously claiming a kind of preferential treatment, contrary to the others. This political situation is reflected in the decision of the Government to leave aside the 'Western emigration' when drafting this Act, and this is the reason why these persons are subject to partly different regulations.

Nevertheless, Hungarians living in other countries than listed in the Act are also subjects of regulations taking into account their specific situation. These regulations are following the relevant patterns in force in almost all countries. In this context see Art. 2 para. 3. of the Act. Without the intention to give a comprehensive overview of all the relevant regulations in force, the following fields should be highlighted: a simplified procedure for the regain of Hungarian citizenship, custom benefits and alleviation in case of resettlement in Hungary, differential treatment in the field of social security (pensions and allowances), etc.

3. *What is the exact role of the recommending associations? Shall they merely certify of the identity of the claimant and of the relevant declaration? Can the Hungarian authorities refuse to issue the ID besides for the objective reasons stated in Art? 19. para.2? On what basis?*

The role of the recommendatory boards, in legal terms, is defined in Art. 20. of the Act. There are two elements of the recommendation issued by these boards:
- those listed in Art. 20. para.1. points a., b., and c., i.e. the formal elements, and
- the attestation, which is, in a certain sense, the verification of the substantive content of the declaration as specified in Art. 20 para. 1 (a).

Therefore the answer to the second sub-question is negative. The recommendatory boards will not only certify certain data, but, in the substantive part of the document, will attest the existence of the 'objective criteria' of the identity of the claimant. (In this regard see Art. 5 of the Framework Convention and its Explanatory Report.) Recommendatory boards on the spot, composed of the representatives of the minority itself, are better qualified to undertake this task, than any Hungarian Government agencies.

As far as the other reasons for the refusal of the certificate's issue are concerned (third sub-question), see para.3. of Article 19. If conditions laid down in Articles 19 and 20 are met, the Evaluating Authority will issue the certificate.

Although the question does not relate to the withdrawal of the certificate, a short reference is made to the provisions of Art. 21.

4. *Why would it be necessary to empower associations or organisations to issue recommendations with a view to obtaining the IDs? Could a consulate not do that? Could the procedure not take place on the Hungarian territory?*

Maybe not surprisingly, the Government of Hungary is sharing the underlying philosophy of the Framework Convention concerning the necessity of an 'objective criteria' when confessing the existence of a given identity, and through this, the belonging to a given national minority. The question is the following: How best the authorities could 'verify' the existence of such a criterion? The answer is, of course, somehow arbitrary. If the recommendation is meant simply to be the verification of certain data, this could obviously be done by any state authorities, e.g. consulates, as suggested in the question, and, in fact, is done by certain states. But if the recommendation is meant to attest the criteria referred to by the

drafters of the Framework Convention, a board, composed of the representatives of the minority itself, could better serve this purpose. Hungary opted for the second solution. In this case, Hungarian authorities will have to examine exclusively conditions defined in Art. 19 and 20, while the examination of the belonging/or not belonging to the minority, remains to the minority, see Art. 20 para 1.(a). By this solution the rebirth of certain bad memories can be avoided, when state authorities decided, rather arbitrarily, the belonging of individuals to certain ethnic groups.

As to the third sub-question, due attention should be drawn to the fact that only a part of the procedure will not take place in Hungary. Administrative acts will exclusively take place in Hungary. The main reasons why the recommendatory phase will not be located in Hungary, are the followings:
Firstly, because it was the wish of the minorities to establish their boards where they live. And because it is possible with the full respect of the legal system of the countries concerned. The operation of similar boards is legal in Hungary, see the necessary recommendation for certain Romanian scholarships, issued by the competent minority self-government in Hungary, or the possibility under the relevant Slovak law to acquire a "written testimony of an ethnic organisation" operating outside of Slovakia.
Secondly, because of practical reasons. Approximately 15-20% of the potential subjects do not have a passport, they simply cannot finance a trip to Hungary(!), the mobility of elderly persons are limited – especially, where the necessary infrastructure is not there -, any request for additional information from the Hungarian authorities would necessitate another trip, etc.

5. *Explain Article 21 para 5 (a): doesn't the Act apply to persons declaring themselves to be of Hungarian nationality (Art. 1 of the Act)?*

The answer is negative. The explanation of the provision in Art. 21 para.5 (a) can be found in Art. 1 para 2. According to this, the Act can be applied to family members, being not necessarily of Hungarian origin. This is explicitly stated in Art. 19 para 1, too.

Due to the inclusive nature of the Act, and also to the conviction that the family is the basic unit of the preservation of identity, the scope of the Act is extended to the family members.

6. *Would the services listed in Article 4 para. 2 of the Act be free of charge for Hungarian citizens? And for foreigners?*

The answer to the first sub-question is affirmative.
The legal situation of foreigners in this respect is complex. There are foreigners – e.g. students, having scholarships in Hungary or having permanent resident status – who enjoy the same rights as Hungarian citizens. (Nota bene, the 'Western emigration' did not loose the citizenship.) For others these services are not for free of charge.

7. *Does Article 6 para. 2 of the Act provide for the right of ethnic Hungarians to obtain scholarships or merely for possibility to apply for them? In the first case, will be a special fund?*

This provision provides for merely the possibility to obtain scholarships. The misunderstanding may be based on the difference between the Hungarian text and its English translation: while the translation mentions the "possibility to receive...scholarships", the original text refers to the "possibility to <u>award</u>...scholarships to persons falling within the

scope of the Act". With other words, conditions of scholarships should be drawn up in a way, that persons falling within the scope of the Act could apply for them.

8. *As regards education, will there be a special fund for the financial benefits to be granted to ethnic Hungarians?*

a/. Studies in the state-financed full time education system will be financed by the same chapter of the state budget than those of Hungarian citizens.
b/. Studies (and related costs) conducted in the non-state-financed education system may be reimbursed by the public benefit organisations established to this end. See Art. 9 para. 4 of the Act.

Governmental decrees and decisions on the implementation of the above provisions are still to be drafted and adopted. We will be in a position to supply further details only after their adoption.

9. *In Article 10 of the Act, by studies "in Hungarian language" is it meant any studies in accordance with the ordinary curricula, but in Hungarian or studies of Hungarian language? Are there, in the neighbouring countries, ordinary schools, where the teaching language is Hungarian? If so, are they financed by the State? Does Hungary contribute to their finance?*

In Art. 10 para. 1, reference is made to studies conducted in Hungarian language according to the curricula in force in the given country.
The answer to the second sub-question is affirmative. In all countries mentioned in Art. 1 of the Act, there are ordinary schools, or at least classes, where the teaching language is Hungarian. Since the students – or rather their parents – are taxpayers in the given countries, and the schools form part of the ordinary system, the burden of financing these schools is on the State of citizenship. Nevertheless Hungary, through foundations, teachers' associations and other legitimate sources, contribute to this activity.

Beside the 'ordinary schools', there are denominational or foundation schools in the neighbouring countries, taking active part in the education of students belonging to the Hungarian national minority. Hungary contributes largely to the financing of these schools as well.

10. *Are the student benefits in Article 10 available to ethnic Hungarians who attend ordinary schools? If so, what is the ratio of this provision?*

Student benefits specified in Art. 10 para 1. of the Act are applicable to those persons, who are subjects of the Act and are:
a/. registered students of a public education institution in a neighbouring country, pursuing their studies in Hungarian language or
b/. students of any higher educational institutions.

Since 'public education institutions' and 'higher educational institutions' are ordinary schools, the answer is affirmative. Nevertheless, there is an additional condition – at least concerning point a/. -; studies pursued in Hungarian language. This solution is in harmony with the underlying philosophy of the Act, namely, to support those, who wish to preserve and develop their identity.

In order to give a complete picture, it should be noted that 'student benefits' referred to in this Article are hardly more extensive than those available for any subject of this Act.

11. *What is the exact difference between teacher and instructor (higher education)? Is the further training not available to instructors as well?*

According to the relevant Hungarian terminology, instructors are employed in the higher education, while teachers are employed on any other levels of education.
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Responses of the Hungarian Ministry for Foreign Affairs to the Questions of the Venice Commission of the Council of Europe

1.Does it correspond to your Government's practice to provide for a preferential treatment of foreigners with its national background through bilateral agreements? Are multilateral agreements also a practice in this field? (Please provide texts of the relevant agreements)

1.1. The bilateral treaties concluded in the field of the protection of national minorities[1] and the so-

[1] Agreements concluded with neighbouring States on the protection of minorities:

- Agreement done at Eszék, on 5 April 1995, between the Republic of Hungary and the Republic of Croatia, on Protection of the Rights of the Hungarian Minority Living in the Republic of Croatia and of the Croatian Minority Living in Hungary (promulgated by Act XVI of 1997).
- Agreement done at Liubliana, on 6 November 1992, between the Republic of Hungary and the Republic of Slovenia, on the Assurance of Special Rights to the Hungarian National Community Living in the Republic of Slovenia and to the Slovenian National Minority Living in Hungary (promulgated by Act VI of 1996).

These Agreements have as their subject matter the mutual protection of the rights of the minorities being of the same nationality as citizens of one of the Contracting Parties, and living in the territory of the other Contracting Party.
The Agreements provide for the mutual protection of the culture, language, religion and national identity of the minorities concerned. Both State Parties shall monitor with distinguished attention the fulfillment of the cultural, educational and religious needs of the minorities in the areas populated by the minorities concerned both in Hungary and the other State Party. They encourage the foundation of cultural and educational centres, the operation of institutions and foundations, as well as the assurance of the functioning of existing institutions and organizations. For this purpose, in particular they support the sending, free of customs and charges, of books, periodicals, audiovisual means, the exchange of students, educators and professionals, the own publishing activity of minorities, the guest performance of artistic ensembles, as well as the organization of cultural and art events.
Under these Agreements the State Parties support all forms of trans-boundary co-operation in the interest of the minorities, especially with regard to the economic and commercial co-operation. The Contracting Parties ensure for the minorities the possibility of having multilateral, free and direct relations with the nation that speaks the same language and professes the same culture, with its citizens, as well as state and public institutions.
The Agreements explicitly allow the governments, organizations and citizens of the Parties to grant assistance, for the realization of the objectives of the Agreement, to the organizations of the minority living in the other Party's territory, and those are entitled to the reception of the assistance.
Under both Agreements special intergovernmental mixed committees on the minorities shall be set up in order to monitor the implementation of the provisions of the Agreements.

called basic treaties[2] contain provisions on unimpeded contacts between a country and the respective /kin/ minority in an other country. See Hungarian-Romanian Treaty in Article 15 (7); the Hungarian-Croatian Agreement: in Articles 2,3,6,7,8; Hungarian-Slovenian Agreement: in Articles 2,3,5,6,7; Hungarian-Slovak Treaty: in Articles15(4/a); Hungarian-Ukrainian Treaty: in Articles 10, 14;. the Framework Convention for the Protection of National Minorities contains the same rule in Article 17, and the European Charter for Regional or Minority Languages in Articles 7(1/e), 7(1/i) and 14/b).

According to this type of provision, in the context of regional and bilateral treaties (where most of

[2] Treaties (the so called Basic Treaties) concluded with neighbouring States on co-operation of a general character:

- Treaty done at Timisoara, on 16 September 1996, between the Republic of Hungary and Romania, on Understanding, Co-operation and Good-neighbourliness (promulgated by Act XLIV of 1997).
- Treaty done at Paris, on 19 March 1995, between the Republic of Hungary and the Republic of Slovakia, on Good-neighbourly Relations and Friendly Co-operation (promulgated by Act XLIII of 1997).
- Treaty done at Budapest, on 16 December 1992, between the Republic of Hungary and the Republic of Croatia, on Friendly Relations and Co-operation (promulgated by Act XLVII of 1995).
- Treaty done at Kiev, on 6 December 1991, between the Republic of Hungary and the Ukraine, on The Bases of Good-neighbourliness and Co-operation (promulgated by Act XLV of 1995).

These Treaties set out detailed provisions regarding the protection of any national minorities living in their respective territories. The significance of these Treaties is that, with the exception of the Treaty with the Ukraine, they also contain specific reference to, and special rights of those minorities that live in the territory of one Contracting Party, but have the same nationality as the other Contracting Party.
Although the Treaties do not provide for measures that would have effect on the territory of one Contracting Party to be taken by the other Contracting Party in the interest of the minority being of the same nationality as the latter's citizens, but taken duly account of the dispositions on the promotion of unimpeded contacts, the Treaties do set out that the Parties shall facilitate for each other the monitoring of the implementation of provisions that concern the protection of minorities. To this end the Parties shall set up an intergovernmental expert committee vested with powers to make recommendations to the Governments of the Parties. Moreover, the Parties shall hold regular consultations to examine the issues of their bilateral cooperation relating to the national minorities. Such control mechanisms make it possible for one Party to assert more effectively the fulfillment by the other Party of its obligations undertaken under the Treaty with regard to the minority living in the latter's territory, but being of the same nationality as the citizens of the former.
The Treaty with the Ukraine refers to the Declaration made on 31 May 1991, on the Principles of Co-operation between the Republic of Hungary and the Ukraine in the Field of Protection of the Rights of National Minorities. This Declaration contains some progressive provisions: the Parties shall respect their citizens' right to decide freely which nationality they consider themselves to belong to, whether they wish to exercise their rights arising therefrom, and the Parties shall guarantee that such a decision will not entail any disadvantageous consequence for them. The minorities can form and operate their own organizations in the territory of the Parties. These organizations can in turn establish and maintain relations with organizations of other countries with which they share a common ethnic or national origin, cultural heritage or religion. They can even ask for volunteer support and state subvention. The Treaty explicitly provides for the possibility that persons belonging to a national minority and living in the territory of one Contracting Party could study in a higher educational institution in the other Contracting State. The Parties shall seek to respect the principle of equivalence on each level of education, and they acknowledge the fact of registration and studying of their own citizens in educational institutions situated in the territory of the other Party.

the obligations concern the state of citizenship vis-a-vis the minorities who live there) contracting parties give their consent to the establishment, maintenance and promotion of special (mainly cultural-type) links between a country and her kin-minorities living abroad, which is indeed a kind of "preferential treatment of foreigners with its national background".

There are bilateral agreements on cultural co-operation where a special chapter is generally devoted to the training, extension training and other assistance for teachers and instructors involved in the education of national minorities.[3] According to these agreements (often implemented and complemented by inter-ministerial agreements, which do not have *stricto sensu* international legal nature) special care, special programs and special scholarships are granted corresponding *de facto* and *de jure* to a "preferential treatment of foreigners with its national background". In Hungarian - German, - Romanian, - Slovak dimensions, such clauses contribute to the preservation and development of the minority education. These agreements (or these parts of agreements with a larger scope) correspond to the appropriate wording of paragraph 87 of the Explanatory Report to the Framework Convention: "arrangements specifically tailored to the wishes and needs of the persons concerned." (The same rule is contained by Article 2(5) of the United Nations General Assembly Res. 47/135).

1.2. There are special programs in the framework of the European Union and the Council of Europe aiming at a more advanced social integration of the Roma community. For the time being, these programs are based on *soft law* type instruments and not on international treaties. When a special

[3] Agreements on co-operation in the fields of culture, education and science:

- Agreement done at Kiev, on 4 April 1995, between the Government of the Republic of Hungary and the Government of the Ukraine, on Cultural, Educational and Scientific Co-operation (promulgated by Government Decree 25/1996 (II. 14.)).

  This Agreement sets out the details of the co-operation between Hungary and the Ukraine in the fields of culture, education and science, on the basis of the above mentioned Treaty and Declaration of 1991. Under this Agreement the Parties explicitly acknowledge the right of social and cultural organizations of national minorities to accept any aid arriving from the other country.

- Agreement done at Budapest, on 2 September 1992, between the Republic of Hungary and the Republic of Slovenia, on Cultural, Educational and Scientific Co-operation (promulgated by Government Decree 91/1994 (VI. 10.)).
  This Agreement aims at the multi-dimensional development of the Slovenian minority living in Hungary and the Hungarian Minority living in Slovenia. The Parties shall ensure to each other's national minorities the conditions for the realization of the special rights in the field of preservation and development of the education and cultural identity.

- Agreement done at Budapest, on 13 October 1992, between the Government of the Republic of Hungary and the Government of Poland, on Cultural and Scientific Co-operation (promulgated by Government Decree 123/1993 (IX. 21.)).
  The Parties shall support the initiatives and various forms of co-operation by public, social and private institutions, organizations and private persons, as well as the exchange programs in the relevant fields. They shall co-operate in satisfying the educational and cultural needs of the Polish ethnic group living in Hungary and the Hungarian ethnic group living in Poland.

multilateral treaty will be adopted (proposal submitted often by NGO-s), a "preferential treatment of foreigners with its national background" will emerge in the course of its implementation, from the side of donator countries. At present, the donator countries' policy is the same.

1.3. In the regional and transborder co-operation inhabitants of a definite geographical region enjoy certain preferences (visa-free or passport-free entry into the territory etc.) If the geographical patterns of a linguistic minority correspond to the borders defined in these bilateral agreements, the minorities *de facto* will be the beneficiaries of these rules (e.g. Northern Voivodina, Sub-Carpathia (in the Ukraine))[4] .
Similar situation appeared in the relationship of Austria with South-Tyrol's inhabitants of Italy, on the basis of the Gruber-de Gasperi Agreement of 1946.

2. Does it correspond to your Government's practice to supplement the provisions of bilateral agreements in this field through domestic legislation?

2.1. Hungary's attitude towards such type of agreements can not be different from her general attitude vis-a-vis international treaties. The status of treaties in the Hungarian law is based on Article 7(1) of the Constitution: "The legal system of the Republic of Hungary shall adopt the generally accepted rules of international law and shall ensure harmony between the assumed international law obligations and domestic law." It is generally interpreted as a manifestation of the "dualism" even if in the jurisprudence of the Constitutional Court dualistic and monistic type considerations appear.

According to traditional dualistic approach, a domestic legislative act is needed in order to implement the assumed commitments.

2.2. The Hungarian legal system (especially the practice) is reticent towards the institution of the so-called self-implementing norms not only in the implementation of international commitments but also in simple legislative obligations. That is the reason why the average implementation of a treaty is done in the following way: *i.* existence of a ratified treaty *ii.* promulgation *iii.* adoption of an act of enforcement by the Parliament and *iv.* adoption of a governmental (or ministerial) order for the enforcement. The implementation of an Act is done in the following way: *i.* adoption of the Act by the Parliament and *ii.* adoption of a governmental (or ministerial order) for the enforcement. According to this practice, treaty obligation and obligations flowing from acts of implementation may exist paralelly.

2.3. We can find also a case in the jurisprudence of the Constitutional Court where the legislative default of the Parliament was condemned: lack of adoption of an act necessary for the proper implementation of a treaty. [37/1996 (IX.4.)AB concerning certain compensational dispositions of the 1947 Peace Treaty] This *dictum* shows that care should be taken not only of the administrative but also of the legislative implementation of international treaty commitments.

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[4] These agreements were concluded with Czechoslovakia (1962), the Soviet Union (1965, 1969), Romania (1969), Yugoslavia (1965, 1967, 1975) and they covered 10-15 km large zones at both sides of the border with enumeration of the localities concerned and max. 12 entries per year. Their vocation concerned the promotion of trans-boundary family ties and small purchase facility. With the issuing of passports with world-wide validity, the changing of the regime, the effective content of these agreements is doubtful. With the dissolution of Czechoslovakia and the Soviet Union, even the question of abrogation emerged. Formerly, these agreements are shown in the documentation as being valid.

2.4. There are examples for the *a posteriori* adoption of internal pieces of legislation concerning the bilateral or multilateral agreements concluded in this field, i.e. the Act LXXVII of 1993 on the Rights of National and Ethnic Minorities and the Act LXII of 2001 on the Hungarians living in neighbouring/bordering States. The Act on the Rights of National and Ethnic Minorities, in a certain sense, can be conceived as implementation of the agreements concluded with the Ukraine (in 1991) and Slovenia (1992) containing quite general references on minority self-governments which are stipulated in details in the above mentioned Act of 1993. For the same reasons, this Act also contributes to the implementation of the European Charter for Regional or Minority Languages (1992) the general clauses of which are granted appropriately clear and operational formulation for the staff of the public administration.

2.5. Joint committees established by the bilateral treaties are granted the right to supervise the proper implementation of the "basic treaties" during their regular stocktaking meetings. These meetings adopt proposals of nature *"de lege ferenda"*.[5] The initiation of the adoption of an Act or the modification of an existing Act (e.g. taxation facilities or exemptions, etc.) can be considered as an affirmative answer to question no.2. This could be plainly appropriate where the given articles of the treaties are of general or sometimes of programmatic nature.

3. Does it correspond to your Government's practice to grant benefits (for example in the field of education) to foreigners in their country of citizenship and residence?

3.1. According to the letter and spirit of bilateral conventions concluded with our neighbouring countries (i.e. the so-called basic treaties)the contracting parties accepted that following the principle of the unimpeded contacts between minority and the country using the same language, institutional, infrastructural, intellectual and also financial assistance can be given. Contracting parties inform each other on the main lines of this assistance in the so-called bilateral mixed committees, charged with the observance of the implementation of the obligations. Such transfers concerned *inter alia* the renovation of the Hungarian church of Korod (Croatia), gravely damaged during the armed conflict of Croatia with Serbian insurgency. Croatia consented to this assistance, and Romania did not challenge the existence and functioning of the Public Foundation "Illyés"[6] and of similar other

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  It was established by the Hungarian Government. (See Government Decision 1040/1994. (V. 31.).) In order to ensure the continuous fulfillment of the public task encumbent upon the Hungarian State pursuant

institutions[7], charged by the succeeding Hungarian governments with the management of these assistance programs, based on evaluation of submitted projects. These countries granted the same type of assistance in cultural and educational fields vis-a-vis the minorities living in Hungary.

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to the responsibility that it bears for the fortune of the Hungarians living beyond its borders, under Paragraph 3 of Article 6 in the Constitution, the Foundation's objective is to support the Hungarian communities living beyond our borders and the Hungarians living in diaspore, as well as to facilitate the resolution of their special concerns. The Foundation wishes to support:

a) the initiatives for the preservation, development and strengthening of the self-identity of the Hungarians living beyond our borders;
b) the initiatives for the cultivation and development of the mother language;
c) the improvement of the conditions of practising religion in the mother language;
d) the domestic cultural exhibitions of the Hungarian minorities living abroad.

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The Institution was founded by the Minister for Culture and Public Education. (See Directive 5/1994 (Műv. K. 19.).). The Institution ensures as its principal activity the preparation of foreigners admitted to Hungarian higher-education, in the field of Hungarian language, the special subject and information technology. It takes part in the re-training and language training of Hungarian educators and other professionals living beyond Hungary's borders. It organizes courses on minority issues and human rights.

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It was established in 1995 (see Government Decision 1021/1995.(III.8.)) with the following scope: improvement of the economic situation and promotion of solving the specific problems of the Hungarians living beyond our borders and the Hungarians living in diaspore, through the improvement of the economic co-operation between the border regions inhabited by Hungarians and Hungary.

- Foreign Affairs Appropriation for Aid:

This Appropriation was created by the Hungarian Government. (See Government Decision 1096/1995 (X. 4.).) It shall serve for the financing of any extraordinary and urgent aid of a humanitarian nature directed to – among others – neighbouring countries where a Hungarian national minority of a significant number lives.

19

Responses of the Hungarian Ministry for Foreign Affairs to the Questions of the Venice Commission of the Council of Europe

1.Does it correspond to your Government's practice to provide for a preferential treatment of foreigners with its national background through bilateral agreements? Are multilateral agreements also a practice in this field? (Please provide texts of the relevant agreements)

1.1. The bilateral treaties concluded in the field of the protection of national minorities[1] and the so-

[1] Agreements concluded with neighbouring States on the protection of minorities:

- Agreement done at Eszék, on 5 April 1995, between the Republic of Hungary and the Republic of Croatia, on Protection of the Rights of the Hungarian Minority Living in the Republic of Croatia and of the Croatian Minority Living in Hungary (promulgated by Act XVI of 1997).
- Agreement done at Liubliana, on 6 November 1992, between the Republic of Hungary and the Republic of Slovenia, on the Assurance of Special Rights to the Hungarian National Community Living in the Republic of Slovenia and to the Slovenian National Minority Living in Hungary (promulgated by Act VI of 1996).

These Agreements have as their subject matter the mutual protection of the rights of the minorities being of the same nationality as citizens of one of the Contracting Parties, and living in the territory of the other Contracting Party.
The Agreements provide for the mutual protection of the culture, language, religion and national identity of the minorities concerned. Both State Parties shall monitor with distinguished attention the fulfillment of the cultural, educational and religious needs of the minorities in the areas populated by the minorities concerned both in Hungary and the other State Party. They encourage the foundation of cultural and educational centres, the operation of institutions and foundations, as well as the assurance of the functioning of existing institutions and organizations. For this purpose, in particular they support the sending, free of customs and charges, of books, periodicals, audiovisual means, the exchange of students, educators and professionals, the own publishing activity of minorities, the guest performance of artistic ensembles, as well as the organization of cultural and art events.
Under these Agreements the State Parties support all forms of trans-boundary co-operation in the interest of the minorities, especially with regard to the economic and commercial co-operation. The Contracting Parties ensure for the minorities the possibility of having multilateral, free and direct relations with the nation that speaks the same language and professes the same culture, with its citizens, as well as state and public institutions.
The Agreements explicitly allow the governments, organizations and citizens of the Parties to grant assistance, for the realization of the objectives of the Agreement, to the organizations of the minority living in the other Party's territory, and those are entitled to the reception of the assistance.
Under both Agreements special intergovernmental mixed committees on the minorities shall be set up in order to monitor the implementation of the provisions of the Agreements.

called basic treaties[2] contain provisions on unimpeded contacts between a country and the respective /kin/ minority in an other country. See Hungarian-Romanian Treaty in Article 15 (7); the Hungarian-Croatian Agreement: in Articles 2,3,6,7,8; Hungarian-Slovenian Agreement: in Articles 2,3,5,6,7; Hungarian-Slovak Treaty: in Articles15(4/a); Hungarian-Ukrainian Treaty: in Articles 10, 14;. the Framework Convention for the Protection of National Minorities contains the same rule in Article 17, and the European Charter for Regional or Minority Languages in Articles 7(1/e), 7(1/i) and 14/b).

According to this type of provision, in the context of regional and bilateral treaties (where most of

[2] Treaties (the so called Basic Treaties) concluded with neighbouring States on co-operation of a general character:

- Treaty done at Timisoara, on 16 September 1996, between the Republic of Hungary and Romania, on Understanding, Co-operation and Good-neighbourliness (promulgated by Act XLIV of 1997).
- Treaty done at Paris, on 19 March 1995, between the Republic of Hungary and the Republic of Slovakia, on Good-neighbourly Relations and Friendly Co-operation (promulgated by Act XLIII of 1997).
- Treaty done at Budapest, on 16 December 1992, between the Republic of Hungary and the Republic of Croatia, on Friendly Relations and Co-operation (promulgated by Act XLVII of 1995).
- Treaty done at Kiev, on 6 December 1991, between the Republic of Hungary and the Ukraine, on The Bases of Good-neighbourliness and Co-operation (promulgated by Act XLV of 1995).

These Treaties set out detailed provisions regarding the protection of any national minorities living in their respective territories. The significance of these Treaties is that, with the exception of the Treaty with the Ukraine, they also contain specific reference to, and special rights of those minorities that live in the territory of one Contracting Party, but have the same nationality as the other Contracting Party.
Although the Treaties do not provide for measures that would have effect on the territory of one Contracting Party to be taken by the other Contracting Party in the interest of the minority being of the same nationality as the latter's citizens, but taken duly account of the dispositions on the promotion of unimpeded contacts, the Treaties do set out that the Parties shall facilitate for each other the monitoring of the implementation of provisions that concern the protection of minorities. To this end the Parties shall set up an intergovernmental expert committee vested with powers to make recommendations to the Governments of the Parties. Moreover, the Parties shall hold regular consultations to examine the issues of their bilateral cooperation relating to the national minorities. Such control mechanisms make it possible for one Party to assert more effectively the fulfillment by the other Party of its obligations undertaken under the Treaty with regard to the minority living in the latter's territory, but being of the same nationality as the citizens of the former.
The Treaty with the Ukraine refers to the Declaration made on 31 May 1991, on the Principles of Co-operation between the Republic of Hungary and the Ukraine in the Field of Protection of the Rights of National Minorities. This Declaration contains some progressive provisions: the Parties shall respect their citizens' right to decide freely which nationality they consider themselves to belong to, whether they wish to exercise their rights arising therefrom, and the Parties shall guarantee that such a decision will not entail any disadvantageous consequence for them. The minorities can form and operate their own organizations in the territory of the Parties. These organizations can in turn establish and maintain relations with organizations of other countries with which they share a common ethnic or national origin, cultural heritage or religion. They can even ask for volunteer support and state subvention. The Treaty explicitly provides for the possibility that persons belonging to a national minority and living in the territory of one Contracting Party could study in a higher educational institution in the other Contracting State. The Parties shall seek to respect the principle of equivalence on each level of education, and they acknowledge the fact of registration and studying of their own citizens in educational institutions situated in the territory of the other Party.

the obligations concern the state of citizenship vis-a-vis the minorities who live there) contracting parties give their consent to the establishment, maintenance and promotion of special (mainly cultural-type) links between a country and her kin-minorities living abroad, which is indeed a kind of "preferential treatment of foreigners with its national background".

There are bilateral agreements on cultural co-operation where a special chapter is generally devoted to the training, extension training and other assistance for teachers and instructors involved in the education of national minorities.[3] According to these agreements (often implemented and complemented by inter-ministerial agreements, which do not have *stricto sensu* international legal nature) special care, special programs and special scholarships are granted corresponding *de facto* and *de jure* to a "preferential treatment of foreigners with its national background". In Hungarian - German, - Romanian, - Slovak dimensions, such clauses contribute to the preservation and development of the minority education. These agreements (or these parts of agreements with a larger scope) correspond to the appropriate wording of paragraph 87 of the Explanatory Report to the Framework Convention: "arrangements specifically tailored to the wishes and needs of the persons concerned." (The same rule is contained by Article 2(5) of the United Nations General Assembly Res. 47/135).

1.2. There are special programs in the framework of the European Union and the Council of Europe aiming at a more advanced social integration of the Roma community. For the time being, these programs are based on *soft law* type instruments and not on international treaties. When a special

[3] Agreements on co-operation in the fields of culture, education and science:

- Agreement done at Kiev, on 4 April 1995, between the Government of the Republic of Hungary and the Government of the Ukraine, on Cultural, Educational and Scientific Co-operation (promulgated by Government Decree 25/1996 (II. 14.)).

  This Agreement sets out the details of the co-operation between Hungary and the Ukraine in the fields of culture, education and science, on the basis of the above mentioned Treaty and Declaration of 1991. Under this Agreement the Parties explicitly acknowledge the right of social and cultural organizations of national minorities to accept any aid arriving from the other country.

- Agreement done at Budapest, on 2 September 1992, between the Republic of Hungary and the Republic of Slovenia, on Cultural, Educational and Scientific Co-operation (promulgated by Government Decree 91/1994 (VI. 10.)).
  This Agreement aims at the multi-dimensional development of the Slovenian minority living in Hungary and the Hungarian Minority living in Slovenia. The Parties shall ensure to each other's national minorities the conditions for the realization of the special rights in the field of preservation and development of the education and cultural identity.

- Agreement done at Budapest, on 13 October 1992, between the Government of the Republic of Hungary and the Government of Poland, on Cultural and Scientific Co-operation (promulgated by Government Decree 123/1993 (IX. 21.)).
  The Parties shall support the initiatives and various forms of co-operation by public, social and private institutions, organizations and private persons, as well as the exchange programs in the relevant fields. They shall co-operate in satisfying the educational and cultural needs of the Polish ethnic group living in Hungary and the Hungarian ethnic group living in Poland.

multilateral treaty will be adopted (proposal submitted often by NGO-s), a "preferential treatment of foreigners with its national background" will emerge in the course of its implementation, from the side of donator countries. At present, the donator countries' policy is the same.

1.3. In the regional and transborder co-operation inhabitants of a definite geographical region enjoy certain preferences (visa-free or passport-free entry into the territory etc.) If the geographical patterns of a linguistic minority correspond to the borders defined in these bilateral agreements, the minorities *de facto* will be the beneficiaries of these rules (e.g. Northern Voivodina, Sub-Carpathia (in the Ukraine))[4] .
Similar situation appeared in the relationship of Austria with South-Tyrol's inhabitants of Italy, on the basis of the Gruber-de Gasperi Agreement of 1946.

2. Does it correspond to your Government's practice to supplement the provisions of bilateral agreements in this field through domestic legislation?

2.1. Hungary's attitude towards such type of agreements can not be different from her general attitude vis-a-vis international treaties. The status of treaties in the Hungarian law is based on Article 7(1) of the Constitution: "The legal system of the Republic of Hungary shall adopt the generally accepted rules of international law and shall ensure harmony between the assumed international law obligations and domestic law." It is generally interpreted as a manifestation of the "dualism" even if in the jurisprudence of the Constitutional Court dualistic and monistic type considerations appear.

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institutions[7], charged by the succeeding Hungarian governments with the management of these assistance programs, based on evaluation of submitted projects. These countries granted the same type of assistance in cultural and educational fields vis-a-vis the minorities living in Hungary.

3.2. At the beginning of the 90's, Hungary adopted a number of acts and bills within the legislative program of "historical compensation". Among these pieces of legislation, different acts on compensation were adopted *inter alia* for persons deported during World War II because of their religion or origin. The scope of application of this law embraced people who lived as Hungarian citizens on the territory of Hungary in 1944-1945. As a consequence of this, persons of Romanian, Slovak, Serb or Israeli citizenship were also concerned by this legislation. Hungary has adopted similar compensation acts for ex-members of the Hungarian army in WW II, having suffered unduly long war imprisonment in the Soviet Union. Once again, actual citizens of neighbouring countries were also concerned by these acts, where the compensation contained some financial benefits, realized by shares, obligations having a certain value at the Hungarian stock-exchange.(*Nota bene*: Germany has recently also introduced a very important compensation policy, for victims of the Shoa; Switzerland adopted a similar law, and the beneficiaries of these compensation programs are foreigners, living outside of Switzerland.)

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to the responsibility that it bears for the fortune of the Hungarians living beyond its borders, under Paragraph 3 of Article 6 in the Constitution, the Foundation's objective is to support the Hungarian communities living beyond our borders and the Hungarians living in diaspore, as well as to facilitate the resolution of their special concerns. The Foundation wishes to support:

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25

Comments of the Hungarian Ministry for Foreign Affairs on the „*Official position of the Romanian Government on the Law on Hungarians living in the neighbouring countries*" submitted to the Venice Commission of the Council of Europe

General remarks:

When submitting its position, the Hungarian party took as a basis the terms of reference of the Venice Commission as contained in the letter of President La Pergola of July 13, 2001, i.e. „ *a study, based on the legislation and practices existing in certain Council of Europe Member States...*". In order to contribute appropriately to the work of the Commission, the Hungarian Government supplied information mainly on its own relevant regulation. The Hungarian Government is not considering this procedure as a contentious procedure or as litigation, aiming at a 'judgement' on one particular piece of legislation.

Apparently the Romanian party does not share this concept, since it focused its argumentation almost exclusively on the Hungarian Act, neglecting the general character of the study.

In this context we cannot but reiterate our previous position – contained in the letter of Foreign Minister János Martonyi on 14th of August, 2001 - : „*It is our understanding that the Commission, in line with its well-established practice, will draw up an expert opinion of a general and comparative nature. This would give useful orientation not only for us but also for other countries having or preparing similar legislation.*"

Although in the paragraphs bellow short comments will be made on a number of allegations of the Romanian position paper following its logical order[1], one remark must be made immediately: we firmly reject any qualifications of the Act as having a "racial character".

Comments on particular points of the Romanian paper (from now on the numbering of the Romanian paper will be followed, so this paper should be read in conjunction with it):

1. Under this point the Romanian paper states that: „*...the situation of the Hungarian minority is not singular...*". It is a fact of life that each and every situation involving national minorities is different and, in this sense, specific (historically, sociologically, quantitatively, etc.) See Hungarian position paper, para 1.4.

- As to the „*problem of the international public order*", see para. 1.5. of the Hungarian position paper on the responsible political behaviour of Hungarian minorities: "*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*

[1] Since the „Introduction" is a kind of summary of the arguments to come in the Romanian paper, we will concentrate our comments on the substantive parts (paras. 1.2. and 3. of the Romanian paper)

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."

- Concerning the reference to European legislation in this context, it is submitted that:

a/. Different/specific situations require different/specific reactions and solutions, and specific measures. This is why each relevant legislation is unique and each international instrument in this field is unique (their nature, their scope: declarations, framework instruments, recommendations, etc.) depending for example on the international organisation in the framework of which it was adopted;

b/. There are legislation in force in Europe containing even more elements contested by the Romanian party, i.e. economic, social rights.

1.1. As stated in para. 2.19. of the Hungarian position paper, „*...Hungary recognises the primary role to be played by the home states themselves together with the legitimate role played by the international community.*" Therefore no basic difference exists between the two approaches. However:

- we firmly believe that human rights – including the rights of national minorities – are not „*...granted to the citizens by virtue of the State's authority*". No further comments are needed.

- instead of the notion of „*obligation of fidelity*" we would prefer the use of „civic allegiance, or loyalty of the citizens". In our view, the loyalty of citizens means the respect of the constitution and the law; relations with persons or organisations abroad cannot be considered iloyal, insofar as they are in accordance with the articles 20, 21 and 22 of the Framework Convention:

- the Romanian paper suggests – wrongly so - that the Act applies the „*ethnic criterion*". How then, this criterion would depend on the „*free choice*" of the individual? In its Article 1 para. 1. the Act stipulates that it shall apply to persons declaring themselves to Hungarian origin. Term like 'ethnic origin' is not mentioned in the Act.

1.1.3. - When stating that „*(I)n the Contemporary Public International Law, the so-called theory of the „kin/mother State" is not accepted(.)*", the Romanian position paper refers to international law in a restrictive sense. As we put it in the Hungarian position paper (see paras. 2.19 – 2.23.), the kin state practice is manifested rather through state practices than through theoretical approaches. These practices take the form of bilateral treaties and declarations, constitutional provisions and policy statements, domestic laws and regulations. No affirmation can be found in our paper on any "theory of the kin state".

- Our interpretation of the „*principle of subsidiarity*" in the field of minority protection does not coincide with that of Romania. In our view, subsidiarity is one the basic principles of the emerging united Europe: decisions are to be taken – as far as possible – by those, directly concerned. Protection of national minorities is not an issue of either/or. It is the legitimate concern of individual states and of the international community at the same time. Therefore the subsidiarity cannot be conceived as a mutually exclusive relationship between the state and the international community. Departing from this interpretation the Hungarian position paper states in para. 6.1.: „*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.*"

- Commenting on a - not quoted - public statement of Foreign Minister János Martonyi, the Romanian side states: „*Yet, no European document provides the possibility for another State than the State of citizenship to grant protection to persons belonging to national minorities.*" Two comments are necessary in this regard:

a/. The Hungarian viewpoint is clearly defined in para. 6.3. of the Hungarian position paper as follows: „*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.*"

b/. The use of the word „*protection*" in this context is misleading. As it was stated earlier, Hungary does not intend to protect by this Act, but to give, to assist, to promote and to contribute, as it is stated *inter alia* in the Preamble of the Act. There is nothing in this intention which would challenge the primarily responsibility of the State of citizenship.

1.2.1. The Romanian argumentation refers to the „*reciprocity*" in conjunction with the protection of national minorities. While this principle is, no doubt, an important element of the international law, its automatic and direct application in the context of human rights protection raises some questions. Although many references could be made to international judicial or academic viewpoints, we would restrict ourselves to the following comments:

a/. In the Hungarian-Romanian bilateral treaty and in other similar treaties concluded in the framework of the „Balladur Plan"[2], a mutual or reciprocal interest with regard to the protection of national minorities and persons belonging to them in general is mentioned, either explicitly or implicitly.

b/. As stated by the European Court of Human Rights in the Ireland v. United Kingdom case[3], the obligation to implement human rights in international law has an objective character, it does not depend on the behaviour of other states.

c/. The view that multilateral treaties do not have a synalligmatic character is generally shared in the international science of human rights. This approach is followed not only in the universal and multilateral standard setting, but also in the Vienna Convention of 1969 on the Law of Treaties. It stipulates in Art. 60., that the rule of termination or suspension of the operation of a treaty as a consequence of its material breach does „*not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.*" The European Court of Human Rights referred to this instrument in its judgement when rejecting the arguments of one party, aiming at to justify a violation *inter alia* by a precedent violation, as follows:"*It is recalled that the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties*"[4]

d/. Since each situation involving national minorities is unique or specific, it is exactly the automatic and direct application of the reciprocity that would lead to differentiation and discrimination among persons belonging to different national minorities in a country. We strongly believe, and are guided by this belief in our internal practice, that the same approach should be followed towards the different minorities living in Hungary, irrespectively to the state policy pursued by the kin states of these minorities in relation to the Hungarian national minorities living in these countries. (Hungarian governments never pursued different policies

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towards the German national minority on the one hand and – say - the Armenian national minority on the other, in spite of the obviously different contribution of their kin states. This can be interpreted as an – affirmative - answer to the question of the Romanian paper in its para. 1.2.3., asking whether „... *a State (*is*) allowed to undertake more obligations that those provided in a bilateral Agreement if the field regulated is the same?")*

In conclusion, we do not regard the „*principle of reciprocity*" as a relevant principle in the field of human rights and minority protection.[5]

1.2.2. On the „*redundancy of the provisions of the Law in relation to those of the bilateral Treaty*" it is submitted that:

a/. from the perspective of Hungary the subjects of the two instruments are different; persons belonging to the Hungarian national minority living *inter alia* in Romania on the one hand, and persons belonging to the Romanian national minority living in Hungary, on the other. This is, by the way, acknowledged in the last sentence of para. 1.2.3. of the Romanian position paper itself. Therefore, the personal scope of the two instruments is different.

b/. the affirmation of redundancy shows that the provisions of the Act cannot be unlawful in terms of international law.

1.2.3. Apart from the answer to the question put in this para of the Romanian position paper (see. 1.2.1. d/. above), a short reference has to made to the Intergovernmental Committee structure established by the bilateral Basic Treaty in 1997. The most relevant expert committees – where the bulk of the work should have been carried out – could not operate due to the lack of co-operation on the side of Romania. Examples:

a/. The expert committee on minority protection has not been operative since 1999, in spite of a number of Hungarian initiatives aiming at its revitalisation.[6] The "Recommendations", signed at this last meeting have not been promulgated by the Romanian Government as yet. (According to the agreement reached at this meeting, the Hungarian party submitted for discussion its experiences on the implementation of these recommendations, but no substantive response came from the other party, apart form the fact that the representative, who signed the "Recommendations" on behalf of Romania, had been removed from the Committee.)

b/. Similarly, the expert committee on transfrontier co-operation and self-governments could not undertake any substantive work since the Romanian side did not participate at the last two plenary sessions, in spite of the presence of their Hungarian counterparts. (The Romanian co-chairman did not participate, but the first plenary meeting. The last meeting of the expert committee in Bucharest could not take place, since the Romanian experts did not show up due to the absence of an interpreter!)

c/. The expert committee on culture, education, science and mass media held its last meeting in September 1999. Recently the Romanian party annulled its participation at the meeting in July this year. (It is to be noted that educational experts never took part in the work of this expert committee from Romanian side.)

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[5] Even if we accepted that the „principle of reciprocity" is applicable in this context, we could invoke the existing similar (but not identical) Romanian legislation. Or, if we accepted that this reciprocity applies, nothing would prevent the Romanian party to enact similar legislation.

[6] After two years, the activity of this expert committee has just been restarted on 11 September 2001, on the invitation of the Hungarian Party, in Budapest.

1.3.2. The information in this para, that the process of ratification of the European Charter for Regional or Minority Languages is „*close to the end*" is most welcome, taking into consideration the date of the Romanian signature (17. 07. 1995).

2. As far as the considerations on the alleged „*discriminatory character*" of the Act are concerned, the following comments are offered to the attention of the Commission:

- Under para. 2. of the Romanian paper reference is made to the „*same rights and civic obligations*" as stipulated by the bilateral treaty. It is obvious that this provision is to be read in the context of the treaty as a whole, bearing in mind the „*full and effective equality between persons belonging to a national minority and those belonging to the majority*."[7]
Nevertheless a direct application of this provision would immediately justify claims from the minorities for equal educational possibilities in the mother tongue, right to use the mother tongue in all areas of administration and economic life, etc. These rights are by nature enjoyed by the majority population. Therefore contributions to the achievement of the effective equality cannot be considered as discrimination.

- As a general consideration in the context of the principle of discrimination due attention should be paid to the principle that it „*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." ..." 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" (Hungarian position paper paras. 4.17. and 4.19.)*

2.1. Under this para. the Romanian paper intends to prove that „*the internationally recognised protection of rights for persons belonging to national minorities*" covers only and exclusively the field of culture and education, while „*granting of socio-economic rights for all its citizens is the task of the State of citizenship and has no connection with the protection of the cultural identity*".
Hungary, *in contrario,* submits that there is no such an exclusive approach either in international theory, or in practice. Given the complex sociological and psychological nature of the 'identity', it is obvious that some of its elements should be emphasised, but this fact does not lead to an exclusive interpretation.
As to the Framework Convention for the Protection of National Minorities, in its articles 4. and 15. explicit references can be found to the economic and social aspect of the protection of minorities. Moreover, a brief analyses of the *travaux préparatoires* of the Framework

[7] Framework Convention for the Protection of National Minorities, Strasbourg, 1. II. 1995. Hereinafter referred as 'ETS 157'.

Convention and its Explanatory Report[8] proves that its Art 5 para 1. is also not meant to be exclusive.
And finally, despite the rather arbitrarily Romanian interpretation of the notion „*in particular*", this is not an exclusive notion, like this is not exclusive *in concreto* in the context of the referred CSCE document.

2.2.1. As far as the alleged „*discrimination among members of the Hungarian community*" is concerned, a simple reference is made to para. 1.4. of the Hungarian position paper.

2.2.2. On the alleged discrimination between persons belonging to the Hungarian national minority in Romania and the Romanian national minority living in Hungary, see arguments developed in relation to the „*principle of reciprocity*" in this paper. In addition to this, one has to note that:

a/. as stated also in the Romanian position paper, Romania unilaterally enacted a similar (but, of course, not identical) legislation as early as 1998, having effect on persons belonging to the Romanian national minority in Hungary. The Hungarian Government never complained about this Law and will not do so in the future…;

b/. …like the Romanian side, to our knowledge, never complained about the similar Slovak law, effecting also Romanian citizens belonging to the Slovak national minority, living in Romania. Even the system of Slovak identity cards did not provoke any reactions;

c/. the list of Romanian laws and regulations aiming at the codification of those benefits that Moldavian citizens may – and those speaking the Romanian language, definitely can – enjoy in the fields of education, travel, culture, social assistance, for instance, is very impressive.

2.2.3. As to the discrimination between national minorities in a given country, it is submitted that due to different kin state policies in relation to the relevant national minorities, it is obvious that - from this perspective - situations of national minorities are different from each other. (See also the above example of German and Armenian minorities living in Hungary.)

2.2.4. In relation to the alleged discrimination between persons belonging to the Hungarian national minority in Romania and the majority population of this state, the Hungarian position is developed in paras. 4.20. – 4.22. and in para. 5.3. It is composed of the following essential elements:

a/. adequate or special measures or preferential treatments are not necessarily considered to be an act of discrimination in the context of minority protection;

b/. there is no requirement for a mechanical equality between minority and majority;

c/. states other than the state of citizenship are not prohibited from 'giving' through assistance, benefits, etc.

- As to the preferential or differential treatment of minorities in international law, see point 4. of the Hungarian position paper in its entirety.

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[8] See Meeting reports of the CAHMIN committee on its meeting of 6-10 June 1994, and of 27 June–1 July 1994, doc CAHMIN (94)16 p23 and doc CAHMIN (94) 19 p.4 and 23. Explanatory Report para 43.
These documents show that 1. by adding the notion of cultural heritage the member states did not want to restrict the identity exclusively to religion and language, and 2. „Art.5. lists four essential elements of the identity." *Nota bene*: 'four' and not 'the four'.

- It is to be noted that when quoting the text of the Framework Convention on the top of page 18. of the Romanian position paper, the real content of this instrument would have been better reflected if the quotation didn't omit arbitrarily the word '*effective*' before the „*equality between the persons belonging to the minority and the ...majority*" see. art. 4. para 2. of the Framework Convention.

- The Romanian arguments state the necessary „*time-limited application of positive discrimination measures*". In this regard it is recalled that the overall aim, the finality of any minority protection is the preservation – if appropriate, the development - of the identity, which is, by definition, different form that of the majority. (See *inter alia* art. 5. para 1. of the Framework Convention.) The question is the following: How a measure, aiming at the preservation and development of something, could be limited in time? While the character, the scope of such measure could be adjusted to the changing situation, its existence is indispensable as long as the minorities are there. Following the principle of „*time-limited application*", these measures could be withdrawn when the event, what we wanted to avoid by these measures, takes place. Is there a time limit in the Constitution of Finland relating to the second official language? Is there a time limit in the Hungarian law establishing the minority self-governments?

- Under this point the Romanian paper states: „*The positive discrimination, by definition, means granting larger rights to a category of persons, aiming thus at compensating a situation of inferiority(sic!).*" Although the use of this latter word is revealing in itself, the situation is obviously 'different' and not 'inferior'.

- The question of the relatives and family members as subjects of the Act, turned out to be a real dilemma for the drafters. Contrary to any allegations, the Act is not based on ethnic criterion, but on the voluntary declaration of identity. Since the choice of identity should be linked to objective criteria[9], the Act established the recommendatory boards in order to verify the latter. The Act, of course, does not enumerate any criteria in this regard; it is up to the recommendatory boards to decide on the issue of a recommendation. *Nota bene*, the right to issue the certificates is reserved to the Hungarian authorities, on the territory of the Republic of Hungary! Since the family is perceived as the basic 'cultural unit', as an indispensable element of the preservation of identity, family members belonging to the majority population are entitled to the same benefits and assistance. In addition, this solution is flowing also from the inclusive character of the Act.

- As to the consequences of the above decision, that the Romanian party "*do not wish to comment*", we are of the opinion, that the possession of a Hungarian certificate will not change the 'nationality' of a family member, the more so, that before Romanian authorities this certificate will not have any legal nature. Therefore, the certificate is not able to provoke the effect attributed to it, it is not able *to "artificially modify the national proportions on the Romanian territory.*" Nota bene, neither the Slovak certificates, nor the special Romanian certificate resulted in the 'artificial modification of the national proportions' on the Hungarian territory.

- The Romanian paper states, that through the Act, Hungary is implementing a kind of „*ethnic proselytism*". As it has been pointed out several times in our submissions, the Act is not based on the ethnicity. Since the aim of this Act is to help to preserve and not to create the identity –

[9] Explanatory report of the Framework Convention para 35.

i.e. to preserve something that already exists! –, any reference to "proselytism" is completely unfounded. In order to illustrate the real tendencies of the region, it is enough to make a reference to the decreasing proportion of Hungarians living in the neighbouring countries.[10]

2.3. As to the exclusion of Austria, see para. 1.4. of the Hungarian position paper: *"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 to this country.)"*

2.3.1. Although the scope of the present procedure should not be extended to the compliance with EU standards[11], it is to be mentioned that the competent EU Commissioner noted the conformity of Act with the Europe Agreement concluded between Hungary and the European Union. The Act complies with provisions on 'positive action' in the EU Council directives 2000/43/EC Art. 5, and 2000/78/EC Art. 7. In addition, see Article 27 para. 2 of the Act.

2.3.2. - As far as the provisions relating to the employment are concerned, it should be noted that the unemployment rate has never been around 20% since the early 1990s. According to the latest data available[12], the unemployment rate in this year decreased from 6% (March) to 5.6% (June).
- The Romanian position paper does not mention the quota of 8,000 work permits per year, provided for Romanian citizens in Hungary under the relevant bilateral agreement. It has to be noted that this quota has never been filled, although employment conditions under this bilateral agreement are more favourable than that reserved for the beneficiaries of the Act. At the last meeting of Prime Ministers, the Hungarian side proposed the increase of this quota up to 17,000. See also para **2.4.6.** of the Romanian position paper.

2.3.3. In this context it should be repeated that the Act is not based on ethnic criterion, but on the voluntary declaration of identity. (see Art.20 para (1) a) of the Act)

2.4. The Hungarian Government is conducting regular consultations on the different aspects of the implementation of the Act. Drafts of government and ministerial implementation decrees of the Act had been put at the disposal of the neighbouring countries recently.

2.4.1. Provisions analysed in this para of the Romanian position paper are obviously not exclusive. For example, neither Academy awards, nor State awards or distinctions are restricted to persons belonging to the Hungarian national minorities. Any other interpretation may be based on misunderstandings. Nevertheless it should be noted, that the Romanian paper acknowledges that:" *...in the cultural field...in essence, the Republic of Hungary is entitled to promote effective measures in order (...) to preserve their cultural identity..."* Nota bene,

[10] The proportion of Hungarians living in /Czech/Slovakia in 1920-21 was 22%, while in 1991-92 it was 11,5%. Serbia (Vojvodina): 1920-21 – 23.8%, while in 1991-92 – 16.9%. Ukraine (Transcarpathian region): in 1921 – 18.1%, while in 1989-91 – 13.4%. Croatioa: in 1921 – 2.4%, while in 1989-91 – 0.5%. Slovenia: in 1921 – 15.2%, while in 1989-91 – 3.1%. Romania (Transsylvania) in 1920 – 25.5%, while in 1991-92 – 21%.
[11] In its Resolution on Hungary's application for membership of the EU and the state of negotiations (COM(2000) 705 – C5-0605/2000 – 1997/2175(COS)) of 5 September 2001, the European Parliament „...asks the Commission to present an evaluation of this type of law in general, with regard to its compatibility with the acquis, as well as with the spirit of good neighbourhood and co-operation among Member States."
[12] Source: OECD and Hungarian Central Statistical Office (KSH).

similar statements can be found later in the Romanian position paper, see e.g. **2.4.5**. on the *„less obvious type of discrimination*".

2.4.3. As to the presumption of any *„general principle*" evoked in this para, see our arguments in para. **2.1.** of this paper.

3. As to the extraterritoriality is concerned, see para 7. of the Hungarian position paper.

3.1.1. - As it has been stated above several times, the Act is based on the free choice of identity. As far as the *„objective criteria*" requirement is concerned, this is the *'raison d'être'* of the recommendatory boards, on the recommendation of which, the certificate is issued in Hungary. To reverse this logic, as it is done by the Romanian position paper, attests the misunderstanding of the whole concept.
- Any artificial endeavour to define an *„objective criterion*" would necessarily be exclusive, while the philosophy behind the Act is inclusive. Nota bene, *„objective criteria*" shouldn't attest the *„ethnic origin*" as it is suggested by the Romanian position paper, but the existence of an identity shared by other members of a given community.

3.1.2. - Contrary to the Statement of the Romanian position paper, none of the *„segments*" of the Hungarian administrative procedure will be *„located on the territory of the Neighbouring States"*.

- At this point a repeated short reference has to be made to the practice followed by a number of states – *inter alia* Romania and Slovakia -, issuing certificates, Identification Cards or other documents for official use for citizens of other states. In addition, several countries operate ethnic registers based on, of course, the free choice of identity and the free consent of the individual.

The 'warning' in the last para. of the **"Conclusions"** of the Romanian position paper is obviously unfounded. As each minority situation is specific, solutions cannot be automatically copied from each other. This is why the Hungarian Act is different from that of the earlier Romanian and Slovak legislation. The existence of similar Romanian or Slovak legislation and regulations did not increase at all the instability of the region, just the contrary, through their beneficial effects they contributed to the stability. And we are confident that this will happen in the present case.

The Act on Hungarians living in the neighbouring countries is therefore a specific answer given to a specific situation and not an "*atypical*" answer given to a typical situation as suggested by the Romanian position paper.

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Further comments, including those relating to the **ANNEXES** of the Romanian position paper, will be submitted to the Commission at the hearing on the 18th September 2001. It is to be noted however, that information contained in the comparative part of the Romanian

ANNEXES seem to be rather selective – at least comparing to the information we have in the subject of legislation in force in European countries. This selectivity may be inspired by the intention to show the 'atypical', or even non-European character of the Hungarian Act. Although Hungary does not intend to submit comparative lists on the legislation of other countries, not running thereby the risk to be inexact, some comments will be offered into the attention of the Commission in this regard.

Comments of the Hungarian Ministry for Foreign Affairs on the „*Official position of the Romanian Government on the Law on Hungarians living in the neighbouring countries*" submitted to the Venice Commission of the Council of Europe

General remarks:

When submitting its position, the Hungarian party took as a basis the terms of reference of the Venice Commission as contained in the letter of President La Pergola of July 13, 2001, i.e. „ *a study, based on the legislation and practices existing in certain Council of Europe Member States...*". In order to contribute appropriately to the work of the Commission, the Hungarian Government supplied information mainly on its own relevant regulation. The Hungarian Government is not considering this procedure as a contentious procedure or as litigation, aiming at a 'judgement' on one particular piece of legislation.

Apparently the Romanian party does not share this concept, since it focused its argumentation almost exclusively on the Hungarian Act, neglecting the general character of the study.

In this context we cannot but reiterate our previous position – contained in the letter of Foreign Minister János Martonyi on 14th of August, 2001 - : „*It is our understanding that the Commission, in line with its well-established practice, will draw up an expert opinion of a general and comparative nature. This would give useful orientation not only for us but also for other countries having or preparing similar legislation.*"

Although in the paragraphs bellow short comments will be made on a number of allegations of the Romanian position paper following its logical order[1], one remark must be made immediately: we firmly reject any qualifications of the Act as having a "racial character".

Comments on particular points of the Romanian paper (from now on the numbering of the Romanian paper will be followed, so this paper should be read in conjunction with it):

1. Under this point the Romanian paper states that: „*...the situation of the Hungarian minority is not singular...*". It is a fact of life that each and every situation involving national minorities is different and, in this sense, specific (historically, sociologically, quantitatively, etc.) See Hungarian position paper, para 1.4.

- As to the „*problem of the international public order*", see para. 1.5. of the Hungarian position paper on the responsible political behaviour of Hungarian minorities: "*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*

[1] Since the „Introduction" is a kind of summary of the arguments to come in the Romanian paper, we will concentrate our comments on the substantive parts (paras. 1.2. and 3. of the Romanian paper)

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."

- Concerning the reference to European legislation in this context, it is submitted that:

a/. Different/specific situations require different/specific reactions and solutions, and specific measures. This is why each relevant legislation is unique and each international instrument in this field is unique (their nature, their scope: declarations, framework instruments, recommendations, etc.) depending for example on the international organisation in the framework of which it was adopted;

b/. There are legislation in force in Europe containing even more elements contested by the Romanian party, i.e. economic, social rights.

1.1. As stated in para. 2.19. of the Hungarian position paper, „*...Hungary recognises the primary role to be played by the home states themselves together with the legitimate role played by the international community.*" Therefore no basic difference exists between the two approaches. However:

- we firmly believe that human rights – including the rights of national minorities – are not „*...granted to the citizens by virtue of the State's authority*". No further comments are needed.

- instead of the notion of „*obligation of fidelity*" we would prefer the use of „civic allegiance, or loyalty of the citizens". In our view, the loyalty of citizens means the respect of the constitution and the law; relations with persons or organisations abroad cannot be considered iloyal, insofar as they are in accordance with the articles 20, 21 and 22 of the Framework Convention:

- the Romanian paper suggests – wrongly so - that the Act applies the „*ethnic criterion*". How then, this criterion would depend on the „*free choice*" of the individual? In its Article 1 para. 1. the Act stipulates that it shall apply to persons declaring themselves to Hungarian origin. Term like 'ethnic origin' is not mentioned in the Act.

1.1.3. - When stating that „*(I)n the Contemporary Public International Law, the so-called theory of the „kin/mother State" is not accepted(.)*", the Romanian position paper refers to international law in a restrictive sense. As we put it in the Hungarian position paper (see paras. 2.19 – 2.23.), the kin state practice is manifested rather through state practices than through theoretical approaches. These practices take the form of bilateral treaties and declarations, constitutional provisions and policy statements, domestic laws and regulations. No affirmation can be found in our paper on any "theory of the kin state".

- Our interpretation of the „*principle of subsidiarity*" in the field of minority protection does not coincide with that of Romania. In our view, subsidiarity is one the basic principles of the emerging united Europe: decisions are to be taken – as far as possible – by those, directly concerned. Protection of national minorities is not an issue of either/or. It is the legitimate concern of individual states and of the international community at the same time. Therefore the subsidiarity cannot be conceived as a mutually exclusive relationship between the state and the international community. Departing from this interpretation the Hungarian position paper states in para. 6.1.: „*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.*"

- Commenting on a - not quoted - public statement of Foreign Minister János Martonyi, the Romanian side states: „*Yet, no European document provides the possibility for another State than the State of citizenship to grant protection to persons belonging to national minorities.*" Two comments are necessary in this regard:

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a/. In the Hungarian-Romanian bilateral treaty and in other similar treaties concluded in the framework of the „Balladur Plan"[2], a mutual or reciprocal interest with regard to the protection of national minorities and persons belonging to them in general is mentioned, either explicitly or implicitly.

b/. As stated by the European Court of Human Rights in the Ireland v. United Kingdom case[3], the obligation to implement human rights in international law has an objective character, it does not depend on the behaviour of other states.

c/. The view that multilateral treaties do not have a synalligmatic character is generally shared in the international science of human rights. This approach is followed not only in the universal and multilateral standard setting, but also in the Vienna Convention of 1969 on the Law of Treaties. It stipulates in Art. 60., that the rule of termination or suspension of the operation of a treaty as a consequence of its material breach does „*not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.*" The European Court of Human Rights referred to this instrument in its judgement when rejecting the arguments of one party, aiming at to justify a violation *inter alia* by a precedent violation, as follows:"*It is recalled that the Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties*"[4]

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1.2.3. Apart from the answer to the question put in this para of the Romanian position paper (see. 1.2.1. d/. above), a short reference has to made to the Intergovernmental Committee structure established by the bilateral Basic Treaty in 1997. The most relevant expert committees – where the bulk of the work should have been carried out – could not operate due to the lack of co-operation on the side of Romania. Examples:

a/. The expert committee on minority protection has not been operative since 1999, in spite of a number of Hungarian initiatives aiming at its revitalisation.[6] The "Recommendations", signed at this last meeting have not been promulgated by the Romanian Government as yet. (According to the agreement reached at this meeting, the Hungarian party submitted for discussion its experiences on the implementation of these recommendations, but no substantive response came from the other party, apart form the fact that the representative, who signed the "Recommendations" on behalf of Romania, had been removed from the Committee.)

b/. Similarly, the expert committee on transfrontier co-operation and self-governments could not undertake any substantive work since the Romanian side did not participate at the last two plenary sessions, in spite of the presence of their Hungarian counterparts. (The Romanian co-chairman did not participate, but the first plenary meeting. The last meeting of the expert committee in Bucharest could not take place, since the Romanian experts did not show up due to the absence of an interpreter!)

c/. The expert committee on culture, education, science and mass media held its last meeting in September 1999. Recently the Romanian party annulled its participation at the meeting in July this year. (It is to be noted that educational experts never took part in the work of this expert committee from Romanian side.)

[5] Even if we accepted that the „principle of reciprocity" is applicable in this context, we could invoke the existing similar (but not identical) Romanian legislation. Or, if we accepted that this reciprocity applies, nothing would prevent the Romanian party to enact similar legislation.

[6] After two years, the activity of this expert committee has just been restarted on 11 September 2001, on the invitation of the Hungarian Party, in Budapest.

1.3.2. The information in this para, that the process of ratification of the European Charter for Regional or Minority Languages is „*close to the end*" is most welcome, taking into consideration the date of the Romanian signature (17. 07. 1995).

2. As far as the considerations on the alleged „*discriminatory character*" of the Act are concerned, the following comments are offered to the attention of the Commission:

- Under para. 2. of the Romanian paper reference is made to the „*same rights and civic obligations*" as stipulated by the bilateral treaty. It is obvious that this provision is to be read in the context of the treaty as a whole, bearing in mind the „*full and effective equality between persons belonging to a national minority and those belonging to the majority.*"[7]
Nevertheless a direct application of this provision would immediately justify claims from the minorities for equal educational possibilities in the mother tongue, right to use the mother tongue in all areas of administration and economic life, etc. These rights are by nature enjoyed by the majority population. Therefore contributions to the achievement of the effective equality cannot be considered as discrimination.

- As a general consideration in the context of the principle of discrimination due attention should be paid to the principle that it „*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." ... " 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" (Hungarian position paper paras. 4.17. and 4.19.)*

2.1. Under this para. the Romanian paper intends to prove that „*the internationally recognised protection of rights for persons belonging to national minorities*" covers only and exclusively the field of culture and education, while „*granting of socio-economic rights for all its citizens is the task of the State of citizenship and has no connection with the protection of the cultural identity*".
Hungary, *in contrario,* submits that there is no such an exclusive approach either in international theory, or in practice. Given the complex sociological and psychological nature of the 'identity', it is obvious that some of its elements should be emphasised, but this fact does not lead to an exclusive interpretation.
As to the Framework Convention for the Protection of National Minorities, in its articles 4. and 15. explicit references can be found to the economic and social aspect of the protection of minorities. Moreover, a brief analyses of the *travaux préparatoires* of the Framework

[7] Framework Convention for the Protection of National Minorities, Strasbourg, 1. II. 1995. Hereinafter referred as 'ETS 157'.

Convention and its Explanatory Report[8] proves that its Art 5 para 1. is also not meant to be exclusive.
And finally, despite the rather arbitrarily Romanian interpretation of the notion „*in particular*", this is not an exclusive notion, like this is not exclusive *in concreto* in the context of the referred CSCE document.

2.2.1. As far as the alleged „*discrimination among members of the Hungarian community*" is concerned, a simple reference is made to para. 1.4. of the Hungarian position paper.

2.2.2. On the alleged discrimination between persons belonging to the Hungarian national minority in Romania and the Romanian national minority living in Hungary, see arguments developed in relation to the „*principle of reciprocity*" in this paper. In addition to this, one has to note that:

a/. as stated also in the Romanian position paper, Romania unilaterally enacted a similar (but, of course, not identical) legislation as early as 1998, having effect on persons belonging to the Romanian national minority in Hungary. The Hungarian Government never complained about this Law and will not do so in the future…;

b/. …like the Romanian side, to our knowledge, never complained about the similar Slovak law, effecting also Romanian citizens belonging to the Slovak national minority, living in Romania. Even the system of Slovak identity cards did not provoke any reactions;

c/. the list of Romanian laws and regulations aiming at the codification of those benefits that Moldavian citizens may – and those speaking the Romanian language, definitely can – enjoy in the fields of education, travel, culture, social assistance, for instance, is very impressive.

2.2.3. As to the discrimination between national minorities in a given country, it is submitted that due to different kin state policies in relation to the relevant national minorities, it is obvious that - from this perspective - situations of national minorities are different from each other. (See also the above example of German and Armenian minorities living in Hungary.)

2.2.4. In relation to the alleged discrimination between persons belonging to the Hungarian national minority in Romania and the majority population of this state, the Hungarian position is developed in paras. 4.20. – 4.22. and in para. 5.3. It is composed of the following essential elements:

a/. adequate or special measures or preferential treatments are not necessarily considered to be an act of discrimination in the context of minority protection;

b/. there is no requirement for a mechanical equality between minority and majority;

c/. states other than the state of citizenship are not prohibited from 'giving' through assistance, benefits, etc.

- As to the preferential or differential treatment of minorities in international law, see point 4. of the Hungarian position paper in its entirety.

[8] See Meeting reports of the CAHMIN committee on its meeting of 6-10 June 1994, and of 27 June–1 July 1994, doc CAHMIN (94)16 p23 and doc CAHMIN (94) 19 p.4 and 23. Explanatory Report para 43.
These documents show that 1. by adding the notion of cultural heritage the member states did not want to restrict the identity exclusively to religion and language, and 2. „Art.5. lists four essential elements of the identity." *Nota bene*: 'four' and not 'the four'.

- It is to be noted that when quoting the text of the Framework Convention on the top of page 18. of the Romanian position paper, the real content of this instrument would have been better reflected if the quotation didn't omit arbitrarily the word *'effective'* before the *„equality between the persons belonging to the minority and the ...majority"* see. art. 4. para 2. of the Framework Convention.

- The Romanian arguments state the necessary *„time–limited application of positive discrimination measures"*. In this regard it is recalled that the overall aim, the finality of any minority protection is the preservation – if appropriate, the development - of the identity, which is, by definition, different form that of the majority. (See *inter alia* art. 5. para 1. of the Framework Convention.) The question is the following: How a measure, aiming at the preservation and development of something, could be limited in time? While the character, the scope of such measure could be adjusted to the changing situation, its existence is indispensable as long as the minorities are there. Following the principle of *„time-limited application"*, these measures could be withdrawn when the event, what we wanted to avoid by these measures, takes place. Is there a time limit in the Constitution of Finland relating to the second official language? Is there a time limit in the Hungarian law establishing the minority self-governments?

- Under this point the Romanian paper states: *„The positive discrimination, by definition, means granting larger rights to a category of persons, aiming thus at compensating a situation of inferiority(sic!)."* Although the use of this latter word is revealing in itself, the situation is obviously 'different' and not 'inferior'.

- The question of the relatives and family members as subjects of the Act, turned out to be a real dilemma for the drafters. Contrary to any allegations, the Act is not based on ethnic criterion, but on the voluntary declaration of identity. Since the choice of identity should be linked to objective criteria[9], the Act established the recommendatory boards in order to verify the latter. The Act, of course, does not enumerate any criteria in this regard; it is up to the recommendatory boards to decide on the issue of a recommendation. *Nota bene*, the right to issue the certificates is reserved to the Hungarian authorities, on the territory of the Republic of Hungary! Since the family is perceived as the basic 'cultural unit', as an indispensable element of the preservation of identity, family members belonging to the majority population are entitled to the same benefits and assistance. In addition, this solution is flowing also from the inclusive character of the Act.

- As to the consequences of the above decision, that the Romanian party "*do not wish to comment*", we are of the opinion, that the possession of a Hungarian certificate will not change the 'nationality' of a family member, the more so, that before Romanian authorities this certificate will not have any legal nature. Therefore, the certificate is not able to provoke the effect attributed to it, it is not able *to "artificially modify the national proportions on the Romanian territory."* Nota bene, neither the Slovak certificates, nor the special Romanian certificate resulted in the 'artificial modification of the national proportions' on the Hungarian territory.

- The Romanian paper states, that through the Act, Hungary is implementing a kind of *„ethnic proselytism"*. As it has been pointed out several times in our submissions, the Act is not based on the ethnicity. Since the aim of this Act is to help to preserve and not to create the identity –

[9] Explanatory report of the Framework Convention para 35.

i.e. to preserve something that already exists! –, any reference to "proselytism" is completely unfounded. In order to illustrate the real tendencies of the region, it is enough to make a reference to the decreasing proportion of Hungarians living in the neighbouring countries.[10]

2.3. As to the exclusion of Austria, see para. 1.4. of the Hungarian position paper: *"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 to this country.)"*

2.3.1. Although the scope of the present procedure should not be extended to the compliance with EU standards[11], it is to be mentioned that the competent EU Commissioner noted the conformity of Act with the Europe Agreement concluded between Hungary and the European Union. The Act complies with provisions on 'positive action' in the EU Council directives 2000/43/EC Art. 5, and 2000/78/EC Art. 7. In addition, see Article 27 para. 2 of the Act.

2.3.2. - As far as the provisions relating to the employment are concerned, it should be noted that the unemployment rate has never been around 20% since the early 1990s. According to the latest data available[12], the unemployment rate in this year decreased from 6% (March) to 5.6% (June).

- The Romanian position paper does not mention the quota of 8,000 work permits per year, provided for Romanian citizens in Hungary under the relevant bilateral agreement. It has to be noted that this quota has never been filled, although employment conditions under this bilateral agreement are more favourable than that reserved for the beneficiaries of the Act. At the last meeting of Prime Ministers, the Hungarian side proposed the increase of this quota up to 17,000. See also para **2.4.6.** of the Romanian position paper.

2.3.3. In this context it should be repeated that the Act is not based on ethnic criterion, but on the voluntary declaration of identity. (see Art.20 para (1) a) of the Act)

2.4. The Hungarian Government is conducting regular consultations on the different aspects of the implementation of the Act. Drafts of government and ministerial implementation decrees of the Act had been put at the disposal of the neighbouring countries recently.

2.4.1. Provisions analysed in this para of the Romanian position paper are obviously not exclusive. For example, neither Academy awards, nor State awards or distinctions are restricted to persons belonging to the Hungarian national minorities. Any other interpretation may be based on misunderstandings. Nevertheless it should be noted, that the Romanian paper acknowledges that:" *...in the cultural field...in essence, the Republic of Hungary is entitled to promote effective measures in order (...) to preserve their cultural identity...*" Nota bene,

[10] The proportion of Hungarians living in /Czech/Slovakia in 1920-21 was 22%, while in 1991-92 it was 11,5%. Serbia (Vojvodina): 1920-21 – 23.8%, while in 1991-92 – 16.9%. Ukraine (Transcarpathian region): in 1921 – 18.1%, while in 1989-91 – 13.4%. Croatioa: in 1921 – 2.4%, while in 1989-91 – 0.5%. Slovenia: in 1921 – 15.2%, while in 1989-91 – 3.1%. Romania (Transsylvania) in 1920 – 25.5%, while in 1991-92 – 21%.

[11] In its Resolution on Hungary's application for membership of the EU and the state of negotiations (COM(2000) 705 – C5-0605/2000 – 1997/2175(COS)) of 5 September 2001, the European Parliament „...asks the Commission to present an evaluation of this type of law in general, with regard to its compatibility with the acquis, as well as with the spirit of good neighbourhood and co-operation among Member States."

[12] Source: OECD and Hungarian Central Statistical Office (KSH).

similar statements can be found later in the Romanian position paper, see e.g. **2.4.5.** on the *„less obvious type of discrimination*".

2.4.3. As to the presumption of any *„general principle*" evoked in this para, see our arguments in para. **2.1.** of this paper.

3. As to the extraterritoriality is concerned, see para 7. of the Hungarian position paper.

3.1.1. - As it has been stated above several times, the Act is based on the free choice of identity. As far as the *„objective criteria*" requirement is concerned, this is the *'raison d'être'* of the recommendatory boards, on the recommendation of which, the certificate is issued in Hungary. To reverse this logic, as it is done by the Romanian position paper, attests the misunderstanding of the whole concept.
- Any artificial endeavour to define an *„objective criterion*" would necessarily be exclusive, while the philosophy behind the Act is inclusive. Nota bene, *„objective criteria*" shouldn't attest the *„ethnic origin*" as it is suggested by the Romanian position paper, but the existence of an identity shared by other members of a given community.

3.1.2. - Contrary to the Statement of the Romanian position paper, none of the *„segments*" of the Hungarian administrative procedure will be *„located on the territory of the Neighbouring States*".

- At this point a repeated short reference has to be made to the practice followed by a number of states – *inter alia* Romania and Slovakia -, issuing certificates, Identification Cards or other documents for official use for citizens of other states. In addition, several countries operate ethnic registers based on, of course, the free choice of identity and the free consent of the individual.

The 'warning' in the last para. of the **"Conclusions"** of the Romanian position paper is obviously unfounded. As each minority situation is specific, solutions cannot be automatically copied from each other. This is why the Hungarian Act is different from that of the earlier Romanian and Slovak legislation. The existence of similar Romanian or Slovak legislation and regulations did not increase at all the instability of the region, just the contrary, through their beneficial effects they contributed to the stability. And we are confident that this will happen in the present case.

The Act on Hungarians living in the neighbouring countries is therefore a specific answer given to a specific situation and not an "*atypical*" answer given to a typical situation as suggested by the Romanian position paper.

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Further comments, including those relating to the **ANNEXES** of the Romanian position paper, will be submitted to the Commission at the hearing on the 18th September 2001. It is to be noted however, that information contained in the comparative part of the Romanian

ANNEXES seem to be rather selective – at least comparing to the information we have in the subject of legislation in force in European countries. This selectivity may be inspired by the intention to show the 'atypical', or even non-European character of the Hungarian Act. Although Hungary does not intend to submit comparative lists on the legislation of other countries, not running thereby the risk to be inexact, some comments will be offered into the attention of the Commission in this regard.