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**Ethnic Groups and the “Concept of State National Policy” in the Republic of Moldova -
The National Identity and the European Concept of Nation**

Report by

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I. Introductory remarks

The quest for a specific, unique *State identity* – and consequently for a specific, unique *national identity* – is a common feature for all newly established States. In the '60's, this phenomenon was highly visible due to the massive process of decolonization which determined the creation of an impressive number of new States. The situation was the same for the successor States of USSR, after the dissolution of the latter. For instance, Ukraine is an interesting case of defining a State identity of its own. The case of the Republic of Moldova is also no exception in this regard.

Starting from the premise that any new State building process has inherent difficulties, a few *general considerations* are necessary.

According to the theory of public international law, State is defined by *four* main elements – territory, population, real and effective government authority over the previous two elements and the capacity to maintain international relations – as well as by sovereignty, seen as a feature of the State power. The effective and clear *consolidation* of these four elements is a *sine-qua-non* condition for shaping the State identity.

Regarding *territory*, it is important that State borders and their regime have a clear definition. In this context, the distinction between the international borders of the former State to which the new State is a successor, and the borders with other successor States is very relevant. In the first case, according to the applicable international law, there is no need to define the border again, as international borders have an objective status – it is only a matter of succession of the new State to those international borders and of establishing, together with the neighbours concerned, an updated border regime. In the second case, because it is about former internal administrative borders, it is a matter of defining both the borders and their regime, if the *uti possidetis juris* principle is not found applicable (as in the situation of the African States emerged in the decolonization process).

Concerning *population*, it is important, *inter alia*, for the State to define with clarity, especially in the Constitution, the relation State – citizens, who form the civic nation; the social cohesion should be based on the respect of the cultural and ethnic identities of both majority and minorities, thus ensuring a national society with no inter-ethnic or other kind of domestic confrontations. It is also necessary to gather and put together all human resources, including strong intellectual elites, by attracting back those who studied or worked abroad.

Regarding *government authority*, it is important for the State to create sustainable institutions, to establish sound and healthy bases for the national economy, including avoiding dependency of foreign resources or of limited number of foreign markets, and also to avoid that certain parts of the national territory are not subject to the exercise of that State's sovereignty.

Concerning the *capacity to maintain international relations*, which is a direct effect of international recognition of the new State, it is important to define with clarity the relations with the neighbours as well as with the remains (sometimes still powerful or willing to maintain their influence) of the former State where it belonged, and in general to define and pursue predictably its foreign policy's directions.

When for various reasons the accomplishment of these objectives can not be realized, *the State under discussion is weak and State identity issues come inevitably into picture*. It is, of course, preferable that these identity issues be solved – with long term benefits – by addressing responsibly the above mentioned objectives – even if the effort required is

important and the measures to be taken are complex. Otherwise, the risk of various forms of nationalism and/or of excessive nationalistic ideology grows and might generate adverse effects both at domestic, and at international level.

Having regard to the above mentioned, let me remind you that the purpose of this presentation is *to consider the national/State identity issue in the Republic of Moldova*, as stemming out of the **“Concept of State National Policy”** adopted in 2003, by taking into account the very recent debates regarding the European concept of nation.

To this purpose, *two* documents are to be mainly examined:

One is the **“Concept of State National Policy”**, adopted by Organic Law by the Parliament of the Republic of Moldova (the Law No. 546/XV of the 19th of December 2003, published in the Official Journal No.1-5 of the 1st of January 2004). It is to mention at this point of my presentation that the Republic of Moldova was, fortunately, among the newly established States after 1990 that witnessed no inter-ethnic conflicts whatsoever, which is remarkable if taking into account the proportions of ethnic groups in the population and the ethnic diversity of the country. Despite the fact that the “Concept...” is not a legal document, yet it was adopted by the means of a Law – and not an ordinary, but an organic one. The “Concept...” was transmitted for an opinion to the Venice Commission, and a number of observations and suggestions were made by the two rapporteurs (Mr. Grabenwarter, substitute member, Austria and Mr. Hamilton, substitute member, Ireland).

The other document is the **Recommendation No. 1735 (2006) on “the concept of ‘nation’”** adopted on the 26th of January 2006 by the Parliamentary Assembly of the Council of Europe (PACE)¹. It occasioned a new re-start of the debate regarding the ‘best concept’ of nation in Europe – starting from the analysis of the “classic” concepts: the cultural and the civic one. Formally, the adoption of this document was proposed by another PACE text – the Resolution No. 1335 (2003) on the “Preferential treatment of national minorities by the kin-state: the case of the Hungarian Law on Hungarians living in neighbouring countries (“Magyars”)” of the 19th of June 2001, adopted by PACE on the 25th of June 2003². On substance, it was one effect of the European dispute regarding the Law on Hungarians living in neighbouring countries, adopted in June 2001 by the Hungarian Parliament³, piece of legislation which raised a number of legal and political concerns, in particular with regard to its potential discriminatory and extraterritorial consequences.

But before presenting the particular context of this debate, I will first remind a few synthetic elements regarding the two understandings of the concept of nation – as Recommendation No. 1735 deals specifically with them, and with the connection between them.

¹ For the text of this Recommendation, see <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1735.htm>

² For the text of this Resolution, see <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta03/eres1335.htm>

³ Act LXII of the 19th of June 2001 on Hungarians living in neighbouring countries, amended on the 23rd of June 2003. For the text of the law and related documents, see <http://www.htmh.hu/act.htm>. Hereinafter “the Hungarian law”.

The “dispute” between *cultural or ethnic nation* and *civic nation* is quite old and therefore it has a history of its own.

It is well-known that the concept of *civic nation* was the product of the end of the 18th century and of the French Revolution, on the basis of the theory of the “social contract” of Rousseau, Abbot Gregoire and Abbot Sieyes⁴. According to Abbot Gregoire, the whole corpus of *citizens* forms a single and indivisible nation⁵. In his turn, Sieyes defined “nation” as the people who live under the same law and are represented by the same legislative assembly; in his view, the quintessence of the nation-State is the following: a voluntary association (because it is a contractual one), a fusion by integration within a homogenous nation, in the mathematical sense, of its individualities, and manifesting its will in a representative way.⁶ He considered the nation as a legal/moral person exercising sovereignty, which gathered in one entity all citizens of the state without any distinction on the basis of ethnicity. The concept will be later consecrated in article 3 of the Declaration on Human and Citizen’s Rights of 26th of August 1789.⁷

According to this concept, the people-nation of the French Revolution is characterised not by language, territory or a common ethnicity, but by the fact that it represents the general interest and the common well-being against all forms of privileges and particular interests⁸; it is a “convened nation”, founded on the “political choice of its potential citizens”⁹ and on the assimilation of nationality with citizenship¹⁰.

The concept was crystallized by the famous Ernest Renan in his well-known conference “What is a nation?” held on the 11th of March 1882: “A nation is a soul, a spiritual principle. Two things which in reality are only one constitute this soul, this spiritual principle. The first one is the possession of a rich heritage of memories, the other one is the commitment, the will to live together. [...] *The existence of a nation is a [...] plebiscite of every day* [...]”¹¹. The man is not the slave of his race, or of his language, or of his religion, or of the flow of the rivers, or of the direction of the chain of the mountains.”¹² In his view, the nation has no natural basis; it is the result of a collective will, of a social consensus, of a contractual link.

⁴ A. Năstase, R.M. Beșteliu, B. Aurescu, I. Donciu, *Protecting Minorities in the Future Europe – Between Political Interest and International Law*, RAMO (Bucharest, 2002), 19

⁵ J. Laroche, *Politique internationale*, LGDJ (Paris, 1998), 83

⁶ S. Pierré-Caps, *Les figures constitutionnelles de L’Etat-nation*, Séminaire UniDem “Les mutations de l’Etat-nation en Europe a l’aube du XXIe siècle“ (Nancy, France, 6-8 Novembre 1997), Venice Commission, 3-4

⁷ “Le principe de toute souveraineté réside essentiellement dans la Nation.”

⁸ B. Krulic, *La Nation. Une idée moderne*, Ellipses (1999), 72

⁹ P. Nora, *Les lieux de mémoire. La Nation*, Gallimard (1986), 363

¹⁰ E. Hobsbawm, *Nations et nationalismes depuis 1780*, Gallimard (1992), 114. That is why in 1792 the French Legislative Assembly granted the title of “honorary citizens” to Friedrich Schiller, Thomas Paine, George Washington etc, by virtue of their free acceptance of the universal values of the Revolution. In 1795, Tallien stated that “the only foreigners in France are the bad citizens”.

¹¹ Emphasis added.

¹² E. Renan, *Qu’est-ce qu’une nation?*, Presses Poquet (1992), 54-56

The French concept of nation was at the basis of the right of self-determination in international law: “a nation exists only when it succeeds in throwing off the yoke of oppression, despotism and absolute monarchy, when it becomes an independent State based on the common political will of the people”¹³.

The concept of *ethnic/cultural nation* was, on its turn, the result of two political movements. On one hand, the critical reaction of the French counter-revolutionary doctrine, concerned by the civic concept of nation and by the probability of it to be “exported” along with the other “dangerous” ideas of the Revolution. For instance, Joseph de Maistre considered nation as being characterized by “an organic peculiarity of the individual people, cemented by its language and a mythical history”; for him, nations have a soul and a real moral unity “in particular announced by language”¹⁴.

At the same time, on the other hand, it was the German political doctrine – motivated by a patriotic reaction to French domination.¹⁵ Johann Gottfried Herder and Heinrich von Treitschke imagined an organic, biological and romantic vision of nation, based on culture, language, religion and *Volksgeist* (The soul of the People) – a vision founded on *ius sanguinis*¹⁶. Another important contribution was brought by Johann Gotlieb Fichte in his famous fourteen “Discourses to the German Nation” (1807-1808): the State, in his view, is hierarchically *subordinated* to the nation, seen as the “superior, last and independent forum”¹⁷; the nation is inborn and eternal. In his turn, the German sociologist Ferdinand Tönnies wrote that the community acts towards individual and particular groups like the body towards its organs.¹⁸ So, in this view, the nation was not a sum of individuals, the result of a social contract, but a collective entity with a specific language and culture and specific historical traditions.¹⁹

Both concepts of nation influenced together the historic development and the different moments of the state-building in Europe. An interesting example of such mixed influence in Central and Eastern Europe is the shaping of the modern Romanian State. The 1848 Romanian revolutionaries were clearly influenced in their proclamations and programmes by the French concept of State and nation, as the most prominent leaders of the 1848 Romanian Revolution – which was one important step in the creation of modern Romania – studied in Collège de France

¹³ See para. 14 of the Explanatory memorandum by Mr. Frunda, rapporteur, to the Recommendation No. 1735 (2006) of the Parliamentary Assembly of the Council of Europe “The concept of ‘nation’”. For the text of the Explanatory memorandum, see <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10762.htm>. See also D. Alland, *Droit international public*, PUF (2000), 49-50; A. Cassese, *International Law*, Oxford University Press (2002), 105; N. Quoc Dinh, P. Daillier, A. Pellet, *Droit international public*, L.G.D.J. (1999), 407; P.-M. Dupuy, *Droit international public*, Dalloz (2000), 127

¹⁴ S. Pierré-Caps, op. cit., p.4

¹⁵ See para. 16 of the Explanatory memorandum by Mr. Frunda, rapporteur, to the Recommendation No. 1735 (2006) of the Parliamentary Assembly of the Council of Europe “The concept of ‘nation’”

¹⁶ P. de Senarclens, *Mondialisation, souveraineté et théories des relations internationales*, Dalloz, Armand Collin (Paris, 1998), 13

¹⁷ B. Krulic, op. cit., 35

¹⁸ J. Laroche, op. cit., 83

¹⁹ See para. 16 of the Explanatory memorandum by Mr. Frunda, rapporteur, to the Recommendation No. 1735 (2006) of the Parliamentary Assembly of the Council of Europe “The concept of ‘nation’”

in the 1840's with professors like Edgar Quinet and Jules Michelet (as, for instance, Nicolae Bălcescu and the Brătianu brothers). The famous work of Michelet "The People" had a considerable influence both in Romania and in the Romanian elite living in Paris. So, one of the first proclamations of the Romanian Revolution (Islaz, June 1848) stated as objectives of the movement, *inter alia*, "equality of political rights", "equal and full education for all Romanians", "emancipation of Jews and political rights for all compatriots having another religion". At the same time, the political theses of Nicolae Bălcescu, the most prominent leader of the Romanian Revolution, who wrote in 1850 a text titled "The March of the Revolution in the History of Romanians", were inspired by the stream of cultural historicism, as they referred to a cultural and linguistic continuity of the nation since the times of the Dacians and Romans, the forebears of the Romanians: "The 1848 Romanian Revolution was not an accidental phenomenon [...]. Its origin is lost in the centuries of the centuries [...]. There are eighteen centuries of evil, of sufferance, and of work of the Romanian people over itself." This reference expresses, in fact, the influence of Herder, a promoter of the cultural concept of nation, but which matched with the specificity of the region.²⁰ The Romanian case could serve as example of how the civic concept of nation integrated the cultural approach in the Central and Eastern Europe.²¹

But why this theoretical/doctrinal "dispute" regarding the two concepts, never won by one or the other "camp", is reemerging now? (It is, probably, of use to remind you, at this point of my presentation, that the Treaty establishing a Constitution for Europe set forth in article I-5 that "[t]he Union shall respect [...] their national identities (of the member States) [...]" ; this wording, already existent in the Maastricht Treaty, might be seen as a certain confirmation of the civic concept, even if not necessarily in its "pure" form. But the Constitution is far from coming into force, for the time being.)

As already mentioned, in January 2006, the Parliamentary Assembly of the Council of Europe adopted the Recommendation No. 1735 (2006) on "the concept of 'nation'". *So, the debate restarted.*

In order to understand the implications of this newly fresh debate, it is important to learn about the *context* that generated the initiative of the PACE. As mentioned in the beginning, it was, in fact, the "secondary" or "collateral" effect of a much larger (and involving a lot of passion) debate at European level – the dispute regarding the Law on Hungarians living in neighbouring countries. This dispute²² lasted for three years (2001-2003). It was finalized with both concrete results – the modification of the said piece of legislation by the Hungarian Parliament and the conclusion of agreements between Hungary and Romania²³ (and Slovakia) aimed at "filtering" the non-Euro-conform provisions of the Law – and with the adoption of general European standards. These standards regulate the parameters of the involvement of the "kin-State" (concept that replaced definitively the formula "mother-State" from the legal science) in protecting its kin-minority living in another State. In other words, the mentioned debate ended with "codifying" what is allowed and what is not in the conduct of the kin-State towards its kin-minority.

²⁰ A. Năstase, R.M. Beșteliu, B. Aurescu, I. Donciu, *Protecting Minorities in the Future Europe – Between Political Interest and International Law*, RAMO (Bucharest, 2002), 23

²¹ B. Krulic, *op. cit.*, 49-50

²² In which I was involved in my former capacity of director general for legal affairs in the Romanian MFA.

²³ See for details and for the full texts of these agreements B. Aurescu, "Bilateral Agreements as a Means of Solving Minority Issues: The Case of the Hungarian Status Law", in *"European Yearbook of Minority Issues"*, Volume 3 (2003-2004), Martinus Nijhoff Publishers, 509-530

The conclusion of this codification was that, on the basis of the *interest* of this State, it is allowed to maintain cultural links with the kin-minority and to provide for assistance in the cultural field, while several principles and rules are to be observed: the primary responsibility for minority protection belongs to the home-State; the respect of the territorial sovereignty of the home-State; the respect of the *pacta sunt servanda* principle; the respect of the friendly relations amongst States; the preferential treatment may be granted by the kin - State in the education and cultural field, with the condition of the existence of the legitimate aim of fostering cultural links and with the respect of the principle of proportionality; the respect for human rights and fundamental freedoms – in particular the prohibition of discrimination.²⁴

These rules were included in the famous *Report on the preferential treatment of national minorities by their kin - State, adopted by the Venice Commission* (19-20 of October 2001)²⁵. As substitute member of the Venice Commission since 2002, I witnessed for many times the memorable impression of this debate – which was not only a bilateral, but also a European one – regarding the regime of the involvement of the kin-State in minority protection, upon the members of the Commission.²⁶ The 2001 Venice Commission's report, despite its quite detailed character, carefully avoided any reference to the classic dichotomy “*ethnic/cultural nation versus civic/political nation*”.

Starting from the findings of the “Jurgens Report”, the Resolution No. 1335 made the said proposal for the PACE to draft and adopt a document with the purpose to clarify the concept of nation. This document is Recommendation No. 1735 (2006) on “The concept of ‘nation’”. It is clear that this Recommendation cannot be separated from the context that stimulated its birth (the very complex debate regarding the kin-State and the limits of its actions).

I will present now a short analysis of the “Concept of State National Policy” of the Republic of Moldova, *based on the comments of the two rapporteurs of the Venice Commission*.

II. A Short Analysis of the “Concept of State National Policy” of the Republic of Moldova

As already mentioned, the “Concept...” is a political document with ideological elements. The political features of the “Concept...” were noticed by both rapporteurs of the Venice Commission.²⁷ Why such a document was adopted by Law, moreover – an organic one? The explanation can be found in the text of the Law: “[t]he Concept *will serve as guidelines for public authorities of all levels to promote the economic, social and cultural policy, aiming their activity to strengthen the statality (sic!), unite the multinational people of Moldova and establish*

²⁴ See Chapter E “Conclusions”, Report on the preferential treatment of national minorities by their kin - state, adopted by the Venice Commission at its 48th session (Venice, 19-20 of October 2001), CDL-INF (2001) 19. For the full text of this Report in English, see [http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)019-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)019-e.asp)

²⁵ Hereinafter “the Venice Commission’s report”.

²⁶ See, for a broader picture of the context and implications, B. Aurescu (ed.), *Kin-State Involvement in Minority Protection. Lessons Learned*, edited by the International Law Section of the Romanian Association for International Law and International Relations and the Venice Commission, RAMO, (Bucharest, 2005)

²⁷ Opinion No. 254, COMMENTS ON “The Draft Concept ON THE STATE NATIONAL POLICY OF THE REPUBLIC OF MOLDOVA” by Mr. Christoph Grabenwarter (Substitute Member, Austria), para. 1; Opinion No. 254, COMMENTS ON “The Draft Concept ON THE STATE NATIONAL POLICY OF THE REPUBLIC OF MOLDOVA” by Mr. James Hamilton (Substitute Member, Ireland), para. 1. For the full text of the two comments, see http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E&OID=254.

civil society.”²⁸ (emphasis added). So, in order to be compulsory for the public officials and for the citizens of the Republic of Moldova, the “Concept...” was approved by Law. But also because it was considered important for the strengthening of the statehood of the Moldovan State and for shaping its specific national identity: the “Concept...” also mentions that it has the goal to “ensure strengthening of the independence of the Moldovan State”.

As mentioned above, Republic of Moldova witnessed no inter-ethnic conflicts and the inter-ethnic climate is good. It is important to underline that the Transnistrian conflict has no ethnic dimension. On the other hand, the Republic of Moldova already adopted in July 2001 a *Law regarding the rights of ethnic minorities and the legal status of their organizations*. It is, thus, clear that the purpose of the “Concept...” is not only to solve problems related to the inter-ethnic relations in the Moldovan society or to regulate them, but also to help shaping a State/national identity of its own for the Republic of Moldova.

In this sense, one of the leading promoters of the “Concept...”, Mr. Victor Stepaniuc²⁹ underlined, with reference to its adoption, in his recently published book (2005), “The Statehood of the Moldovan People: Historic, Politico-Juridical Aspects”, that “[f]or the first time in the political history of the Moldovan State the continuity of the statehood of the Moldovan people, the legitimacy of the Republic of Moldova are solidly motivated and consecrated by organic law.”³⁰ and that “[f]or the first time in the political history of the Moldovan State, in the ethnology and ethno-demography of Moldova the components of the Moldovan multinational community are established and nominated in an organic law. The Concept of national policy remarks: ‘The Republic of Moldova is a political and legal continuity of the uninterrupted multiage process of the Moldovan people statehood [...]. The Moldovans as a founding nation of the State, along with the representatives of other nationalities – Ukrainians, Russians, Gagauzians, Bulgarians, Jews, Romanians, Byelorussians, Gypsies (Romany), Poles etc, – are the people of Moldova, for which the Republic of Moldova is their common motherland.’”³¹

This purpose of the said Law is also confirmed by the Section III of the “Concept...” which lists *inter alia* the following “main goals” of the State National Policy:

- to enhance multinational civil society *as a condition for consolidation of political, legal, historical and cultural basis of the Moldovan state;*
- to strengthen the political, legal, historical and cultural basis of the Republic of Moldova territorial integrity;
- [...]
- to keep historical memory of the Moldovan people, to further affirm and develop its national and cultural identity

[...]” (emphasis added). Even clearer in this sense is the objective mentioned in Section IV.3: “to provide effective development of Moldovan national culture, Moldovan language and history

²⁸Opinion No. 254, “The Draft Concept ON THE STATE NATIONAL POLICY OF THE REPUBLIC OF MOLDOVA”. For the full text of the document in English translation, as provided by the Moldovan authorities to the Venice Commission, see [http://www.venice.coe.int/docs/2003/CDL\(2003\)049-e.asp](http://www.venice.coe.int/docs/2003/CDL(2003)049-e.asp).

²⁹ Former President of the parliamentary fraction of the Communists’ Party of the Republic of Moldova and currently president of the Parliamentary Commission for Culture, Science, Education and Mass-media, member of the Permanent Bureau of the Parliament.

³⁰ Victor Stepaniuc, *Statalitatea poporului moldovenesc: Aspecte istorice, politico-juridice (The Statehood of the Moldovan People: Historical, Politico-Juridical Aspects)*, Intreprinderea de Stat, Firma Editorial-Poligrafica “Tipografia Centrala”, Ministerul Culturii si Turismului (2005), 410

³¹ Ibid., 414

study as a basis for Moldovan national identity and for civic self-consciousness of all representatives of ethnic communities from Moldova;” (emphasis added).

In this respect, one of the rapporteurs of the Venice Commission, Mr. Hamilton, noticed in his comments: “The document therefore adopts the standpoint that if Moldova is to survive as a State with its present boundaries it can only do so on the basis of creating a multi-national identity [...]”³² He also criticised the reference in Section II, headed “Principles of the State National Policy”, to “the priority of the State interests and values”, which could be read as prioritising the rights of the State over the citizen.³³ The other rapporteur, Mr. Grabenwarter, is in the same line: “To ‘strengthen the statality’ may be misunderstood. If it is meant to limit the sphere of freedom of individual it is from the European perspective only admissible within the limits of human rights.”³⁴ “The ‘priority of State interests and values’ must not interfere with individual rights in an excessive manner. The constitution must leave enough room for individual interests and values which are not fully in line with the State’s interests and values or even contrary to them (see also IV.3: unique system of values ...).”³⁵

Also, the rapporteurs of the Venice Commission seem to be reserved as to certain objectives of the “Concept...”, defined by the document as “key challenges”³⁶, such as “to eradicate multiple attempts of demoldovenization, negation of existence of the Moldovan nation and Moldovan statality, discrediting of the Moldovan history, ignoring of the ethnonym ‘Moldovans’ and ‘Moldovan language’;” or “to not admit the narrowing of the usage sphere of the Russian language in spite of provisions of the legislation in force” . The comments of Mr. Grabenwarter note that “[t]he fight against “demoldovanization” must be subject to freedoms under the Convention on Human Rights. It is hard to see how a legal provision can influence the factual use of Russian language.”³⁷ Also, the objectives mentioned in Section IV of the “Concept...” – “to unify public authorities of all levels, social and political organizations, mass-media [...]”, “to affirm the system of State values on the basis of civic patriotism [...]” – are not considered “in line with the concept of a ‘democratic society’ within the meaning of the ECHR”^{38,39}. The other rapporteur, Mr. Hamilton, considers that “the reference to ‘unifying’ public authorities and mass-media is not appropriate and seems to hark back to former times. If the objective was to seek the support of public authorities and in the mass-media for the policy I

³² Opinion No. 254, COMMENTS ON “The Draft Concept ON THE STATE NATIONAL POLICY OF THE REPUBLIC OF MOLDOVA” by Mr. James Hamilton (Substitute Member, Ireland), para.2.

³³ Ibid., para. 3.

³⁴ Opinion No. 254, COMMENTS ON “The Draft Concept ON THE STATE NATIONAL POLICY OF THE REPUBLIC OF MOLDOVA” by Mr. Christoph Grabenwarter (Substitute Member, Austria), para. 1.

³⁵ Ibid., para. 4

³⁶ See the end of Section I “General Provisions” of the Concept.

³⁷ Opinion No. 254, COMMENTS ON “The Draft Concept ON THE STATE NATIONAL POLICY OF THE REPUBLIC OF MOLDOVA” by Mr. Christoph Grabenwarter (Substitute Member, Austria), para. 3.

³⁸ The European Convention on Human Rights

³⁹ Opinion No. 254, COMMENTS ON “The Draft Concept ON THE STATE NATIONAL POLICY OF THE REPUBLIC OF MOLDOVA” by Mr. Christoph Grabenwarter (Substitute Member, Austria), para. 6.

would see no difficulty provided that the right of the media to comment on and criticize State policy is respected.”⁴⁰

Nevertheless, only some of the observations of the Venice Commission were taken into account when the “Concept...” was finalized and adopted.

I will turn now to a short presentation of the PACE Recommendation No. 1735 (2006) on “The Concept of ‘Nation’”.

III. An Analysis of Recommendation No. 1735 (2006)

Recommendation No. 1735 was, of course, the fruit of the compromise in the Parliamentary Assembly. In my view, it succeeded to clarify some elements of the debate on nation, while other aspects were not. According to the Council of Europe’s procedures, all these aspects will receive a motivated answer of the Committee of Ministers.

I will focus only on those provisions of the PACE document which are of *direct* relevance for the topic of this presentation.

Firstly, I will bring to your kind attention certain provisions of the Recommendation which I consider correct from the legal point of view:

- Paragraph 6: “[a] nation in its cultural understanding becomes a subject of law (see international law) only if it organizes itself as a State which is internationally recognized”.
- At the same time, paragraph 7 of the Recommendation rightfully acknowledges the historical-political sequence of the two concepts of nation: “[...] the general trend of the nation-state’s evolution is towards its transformation depending on the case, from a purely ethnic or ethnocentric State into a civic state and from a purely civic State into a multicultural State [...]”.
- Paragraph 10 provides that “[...] since national minorities as such do not have legal personality they cannot be legal subjects and therefore they cannot be parties to contracts or covenants.” and that “[...] the cultural rights [...] are not territorial or connected to territory and their recognition and protection must be legally organized both at the level of each nation-State concerned and at transnational (international) level”.
- The text also reiterates and reinforces, in paragraph 11, the thesis of the Venice Commission regarding the primary role of the state of citizenship in minority protection, the obligation to respect the principles set forth by the report of October 2001 (territorial sovereignty, *pacta sunt servanda*, friendly relations amongst States and respect for human rights and fundamental freedoms – in particular the prohibition of discrimination), and, in paragraph 13, the imperative obligation of the kin-State to observe the home-State legislation, as well as to negotiate beforehand any unilateral action.

Secondly, it is to note that *the Recommendation on the concept of nation did not provide for a (generally accepted) definition of the European concept of nation.*⁴¹ Paragraph

⁴⁰ Opinion No. 254, COMMENTS ON “The Draft Concept ON THE STATE NATIONAL POLICY OF THE REPUBLIC OF MOLDOVA” by Mr. James Hamilton (Substitute Member, Ireland), para. 5.

103 of the “Conclusions” of the Explanatory memorandum by Mr. Frunda, rapporteur, to the Recommendation No. 1735 clearly stated: “I do not think it is important to formulate a new concept of nation. The real issue behind this debate about a possible ‘21st century concept of nation’ is not the definition itself [...]”. So, the Recommendation did not find such definition. (Which is not surprising: the document tried to define nation by indirectly defining the national minority. Or, because of connecting the two aspects, the well-known failure to define, at international and European level, the concept of national minority attracted the impossibility to find a unique acceptable definition of the nation.)

Another problem is *the way the Recommendation sees the national minority as “constitutive part and a co-founding entity of the nation-State of which their members are subjects as citizens”* (paragraph 9). I think this idea is not entirely correct or accurate from the theoretical perspective as it mixes in the same equation terms belonging to different categories: the corresponding term for national minority is nation (civic nation, in the sense of the text just quoted), and not the State, which is an institution *based on* nation (which the fundament of the State). The persons belonging to national minorities, as citizens of the State where they live, belong to the civic nation, which is the foundation of the (nation-)State.

There are also other provisions in the Recommendation that might face criticism: *the residual persistence of a certain wording which implies the idea of collective rights for minorities* while the intention of the PACE was clearly not to accept such formulations⁴²; or the recommendation (see para. 16.2) for the member States of the Council of Europe to promote in their domestic legislation the recognition of the cultural rights of national minorities “*inter alia*, on the basis of Recommendation 43 (1998) on territorial autonomy and national minorities and Recommendation 70 (1999) on local law/special status of the Congress of Local and Regional Authorities of the Council of Europe”.⁴³ But I will not focus on these issues, as they are not of direct interest for the subject of this presentation.

⁴¹ It is to note that both the PACE Resolution No. 1335 and its Explanatory memorandum by Mr. Jurgens, rapporteur, dealt to large extent with the different interpretations of the concept of nation. The Explanatory memorandum devotes to this issue paras. 4-9, 19-30 47-48 and mentions at least twice (in paras. 26 and 48) that this calls for a further report of the PACE. The Resolution mentions in para. 10 that “[t]he Assembly notes that up until now there is no common European legal definition of the concept of ‘nation’”. That is why the PACE Recommendation No. 1735 on “The Concept of ‘Nation’” (as “effect” of Resolution No. 1335) was expected to provide for such a common definition.

⁴² The text excluded from its previous versions the express mentions in this regard. For instance, the text still kept in paras. 7 and 10 the expressions “specific rights [...] recognised with regard not only to physical persons *but also to cultural or national communities*” and the recommendation that “they must be the object of *collective protection*” (Emphasis added.)

⁴³ The question is: does this text intend to stimulate a certain consolidated practice for States to promote in their national legislation the various forms of autonomy (cultural, territorial) for minorities – based on a *legal obligation* in this regard? From the legal point of view of the existing standards, the answer is that *it can not*.

First, because no form of autonomy is currently included in the recognized standards for national minorities, and, consequently, neither in the category of cultural rights for minorities. In its Opinion on the draft Romanian law on national minorities, issued in October 2005, the Venice Commission clearly stated that “there is no internationally accepted model of cultural autonomy for national minorities” and that “international standards and principles are somewhat missing in this matter”; “the main feature of a system of cultural autonomy is that it goes beyond the mere recognition of rights to persons belonging to national minorities”. That is why the references to various forms of autonomy, present in previous versions of the draft Recommendation, were no longer included in the adopted text. Furthermore, the mentions regarding the two Recommendations of the Congress of Local and Regional Authorities are at least surprising, let alone their total lack of normative effectiveness: Recommendation No. 43 (1998) on territorial autonomy and national minorities was entirely rejected by the Committee of Ministers of the Council of Europe in 2002, on the ground that “territorial autonomy” is not defined by international law⁴³; Recommendation No. 70 (1999) on local law/special status

Another interesting question that I would like to tackle is related to one of the conclusions of the Recommendation: para.16.4. “invite(s) the member States to bring into line their constitutions with the contemporary democratic European standards which call on each State to integrate all its citizens, irrespective of their ethno-cultural background, *within a civic and multicultural entity and to stop defining and organizing themselves as exclusively ethnic or exclusively civic States*”(emphasis added). Thus, the PACE defines the ultimate goal of the European State’s evolution – *the multicultural State society*. In my view, the statement is correct, even if incomplete. The following arguments will show why.

Indeed, the historic reality shows that the formation of the modern European nation-States took place starting from a certain ethnic/cultural nation, which – by exercising what later on will be defined as the right to self-determination – transformed itself into a State, thus becoming, by a process of instant, but natural transformation, a civic nation. Once the modern theories regarding minority protection appeared, along with the trend of consolidation of the culture of respect and social, ethnic and cultural tolerance for each other, these civic nations become – naturally – multicultural. Of course, the multiculturalism is a positive tendency. It allows the coexistence of identities – the identity of majority with the identities of the minorities and the identities of the minorities amongst themselves. It also allows the preservation of these identities; it works against their dilution or their assimilation or disappearance. In comparison with the initial “pure” civism of nation-States, multiculturalism is certainly a progress.

But it can not constitute the final goal or point of progress, the terminus point in the contemporary state’s evolution. The simple coexistence of various identities cannot be satisfactory as such. I think the true finality is the *intercultural* one, the result of the complex *interaction* between the culture of majority and the one of minority, *which put into value and enrich each other, but without “dissolving” or fading away the cultural (including the ethnic, linguistic etc.) specificities of either the majority or of the minorities of a certain country*. The *separate* cultural diversity may be an interesting theoretical concept, but is practically impossible and socially undesirable. Those cultures which isolate themselves cannot progress at all. On the other hand, *the interculturalism does not determine the loss of specificities and the minority integration in the society of their home-State does not imply their assimilation. And neither the loss of majority’s historic cultural features*.

The idea that cultural diversity is a source of enrichment for the society where majority and minorities live together and the necessity to encourage the intercultural dialogue were already included in many international instruments on the matter.

received an answer by the same Committee of Ministers of the Council of Europe, also in 2002, according to which the suggestions of the Congress of Local and Regional Authorities contained in the said document are to be applied in accordance with the existing principles and methods provided for in Council of Europe’s instruments, and to be circumscribed to the domestic normative frame of each member state.

Moreover, the recommendation of para. 16.2 regarding the territorial form of autonomy at national level is contradicted by the very next recommendation of para. 16.3, which asks the member States “to reject any attempt to promote the ethnic purity of the state or to organise the territory and the administration of the State on an ethnic basis”, which is equivalent to a prohibition of the territorial autonomy on ethnic basis. The exception provided for by the same paragraph (“affirmative measures which aim to achieve a fair representation of the national minorities in their country’s administration, at central and local level”) is a natural measure, already implemented by many European States; it cannot be interpreted as permitting territorial autonomy on ethnic basis.

Take for instance article 6.1 of the Framework Convention for the Protection of National Minorities: “The Parties shall encourage *a spirit of tolerance and intercultural dialogue* and take effective measures to promote *mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity*, in particular in the fields of education, culture and the media”⁴⁴. The Explanatory Report of this Convention is even clearer: “In order to strengthen *social cohesion*, the aim of this paragraph is, *inter alia*, to promote *tolerance and intercultural dialogue*, by eliminating barriers between persons belonging to ethnic, cultural, linguistic and religious groups through the encouragement of *intercultural* organizations and movements which seek to promote mutual respect and understanding and to *integrate* these persons into society whilst preserving their identity”⁴⁵. Another example (out of many) is the Central European Initiative Instrument for the Protection of Minority Rights: “[The Member States of the Central European Initiative signatory hereto are] convinced that *national minorities form an integral part of the society of the States in which they live and that they are a factor of enrichment of each respective State and society, [...]*” (Preamble)⁴⁶. The OSCE High Commissioner on National Minorities shares the same approach: “*The principle of integration with respect for diversity*, which I consider a cornerstone of the OSCE approach to international security, should be the basis for any proposed solution. As I have pointed out already, integration does not mean involuntary assimilation. It means living together, with tolerance and mutual respect for difference as regards culture, religion, language and historic perceptions. *Integration in a multiethnic society of such differences is difficult and challenging. But is a necessity if the forces for separation and conflict are not to win out*”⁴⁷.

I will invoke now, in order to be clearer, a model – *the model of the can*. The can could be perfectly benefic for conserving a certain product, for instance a certain identity. But in order to value the taste of that specific identity the only way is to open it. If you want to cook food according to a recipe, it is not enough to boil vegetables and an unopened can conserving inside, in perfect conditions, a juicy piece of the best meat. The final taste of the recipe will be reached and valued only by the true interaction of all its ingredients. “While maintaining their identity, a minority should be *integrated in harmony* with others *within a State as part of society at large*.”⁴⁸

My proposal is to complete the evolution sequence “*ethnic nation* (before the exercise of self-determination and creation of the State) – *pure civic nation* (in the next period to State creation) – *multicultural civic nation*” with its natural finality – “*the intercultural civic nation*” (after the multicultural phase). Therefore, the contemporary European States should fix as objective to overpass the multicultural goal to the intercultural one, which is able to determine the true progress of the societies of the respective States. It is normal and natural. In fact, the minorities and majority of a certain State build together, through their cultural

⁴⁴ Emphasis added.

⁴⁵ Emphasis added.

⁴⁶ Emphasis added.

⁴⁷ Statement “Effective Participation of National Minorities in Public Life – Developing and Concretizing Practical Forms of Participation Drawing on the Lund Recommendations”, HDIM Working Session on Tolerance and Non-Discrimination II, Warsaw, the 28th of September 2005. Emphasis added. For the text of this statement, see http://www.osce.org/documents/odhr/2005/09/16460_en.pdf.

⁴⁸ Statement “Sovereignty, Responsibility, and National Minorities” of the OSCE High Commissioner on National Minorities (the 26th of October 2001). Emphasis added. For the text, see http://www.osce.org/hcnm/item_1_6352.html.

interaction, a real cultural nation *in* the civic State, where they live together. *Of course, without the possibility for the majority or for these minorities to lose their own identity or to exclude the links with their kin-States. It is a sole common space – social, economic, political, and cultural – to whom both majority and minority belong and which belongs to both majority and minority, equally and with equal legitimacy.*

Last, but not least, it is interesting to note that the Recommendation *considers the ethnic/cultural nation as the very basis of the kin-State actions in the favor of the kin-minority.* The PACE text mentions in paragraph 7 that “the general trend of the nation-State’s evolution is towards its transformation depending on the case, from a purely ethnic or ethnocentric State into a civic state and from a purely civic State into a multicultural State”; in the same paragraph, it states that “the modern European States founded their legitimacy either on the civic meaning of the concept of ‘nation’ or on the cultural meaning of the concept”, thus putting the two concepts *on the same level of timing and legitimacy.* Continuing this line of thinking, paragraph 8 of the Recommendation shows that “on the territories of almost all the Council of Europe member States there live various groups of people who are at the same time citizens of the same State or civic nation, but who belong to and are part of different cultural nations. Concluding, paragraph 12 provides that it is necessary “to allow any individual to define himself as a member of a cultural ‘nation’ irrespective of his country of citizenship or the civic nation to which he belongs as a citizen, and, more specifically, to satisfy the growing aspirations of minorities which have a heightened sense of belonging to a certain cultural nation”, this becoming the basis “of relations between the State and national minorities, culminating in genuine acceptance of the right of all individuals to belong to the nation which they feel they belong to, whether in terms of citizenship or in terms of language, culture and traditions.”

While fully accepting the legitimate interest of the kin-State to “play a role in the protection and preservation of (its) kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong”⁴⁹, *such foundation – proposed above – of the relationship kin-state/kin-minority offers another, alternative basis for the kin-State involvement in favour of their kin-minorities living in other States.* Indeed, the standards created as a result of, and the lessons learned following the debate on the Hungarian Law, including the document which generated and mandated the study of the concept of nation in Recommendation No. 1735 (the PACE Resolution No. 1335 (2003)) indicated as basis of the kin-State action and of its relationship with the kin-minority this natural interest of preserving the cultural and linguistic links, with the observance, of course, of the principles already mentioned above.

It is not the purpose of this presentation to analyze which of these two bases – the one proposed by the Venice Commission or the one put forward by the PACE in Recommendation No. 1735 – is preferable for justifying the involvement of kin-State in granting preferential treatment *to its kin-minority* living in another State.⁵⁰

But, certainly, according to the PACE Recommendation No. 1735, *the cultural nation* can be the basis for defining *an exceptional situation which is not covered by the standards created by the Venice Commission in 2001.* I have to remind you that Venice Commission

⁴⁹ See Chapter E “Conclusions”, Report on the preferential treatment of national minorities by their kin - state, adopted by the Venice Commission at its 48th session (Venice, 19-20 of October 2001), CDL-INF (2001) 19.

⁵⁰ As member of the Venice Commission, but not only because of this, I favour the Venice Commission’s approach.

“codified” *the standards regulating the relation kin-State / kin-minority*. It did not explicitly regulate the situation of the relations between a kin-State and another kin-State (to the first one), *i.e.* between two States whose majority populations are kin to each other. It did not do so because of the fact that the subject matter of the Report, as it was initiated during the debate regarding the Hungarian Law, was *the relation kin-State / kin-minority* and because such situations are relatively seldom. Of course, the rules of the Venice Commission Report can be applied to this kind of relationship by *analogy*. But the exceptional situation of the link between a “kin-majority” and another “kin-majority” (between a kin-State and another kin-State or, in other words, between two States kin to each other) might be founded on the close relationship of two components of the (previous) cultural/ethnic nation.

It was the situation of West Germany and German “Democratic” Republic before 1990⁵¹, and still is the situation of the relationship between Turkey and Azerbaijan⁵², between Greece and Cyprus (to a certain extent⁵³) or, outside the European continent, between South and North Korea. It is also the case of the actual situation of Romania and the Republic of Moldova⁵⁴.

⁵¹ See for example the constant position expressed by West Germany including on the occasion of the conclusion, on the 21st of December 1972, of the Basic Treaty with the German Democratic Republic:

“The Federal Minister Without Portfolio in the Office of the Federal Chancellor, Bonn, December 21, 1972
To the State Secretary of the Council of Ministers of the German Democratic Republic, Dr. Michael Kohl, Berlin

Dear Herr Kohl,

In connection with today's signing of the Treaty concerning the Basis of Relations between the Federal Republic of Germany and the German Democratic Republic, the Government of the Federal Republic of Germany has the honor to state that this Treaty does not conflict with the political aim of the Federal Republic of Germany to work for a state of peace in Europe in which the German nation will regain its unity through free self-determination. Very respectfully yours, Bahr”. See http://germanhistorydocs.ghi-dc.org/print_document.cfm?document_id=172.

⁵² In a speech delivered on the 12th of July 2006, in Istanbul, the President of Azerbaijan, Ilham Aliyev, mentioned, that the “[...] saying ‘*Turkey and Azerbaijan are one nation, two states*’ is very dear to all us. This expression, this saying comes from the heart. At the same time, these words have great sense, they have historical value, great value for strengthening, development of the Turkey-Azerbaijan unity, and today both in Turkey, and in Azerbaijan these words live in hearts of people. We try and we shall try to achieve henceforth the further progress, greater strengthening of these remarkable fraternal relations, enrich it with new forms. Much depends on our unity.” Emphasis added. For the full text of this speech, see http://www.president.az/s09_speeches/speech_e.?sptmleech_229_e.html.

⁵³ For instance, the following presentation of Cyprus (*Geographical and Historical Background*) can be read on the official site of the Greek MFA: “Throughout history, however, the island's character remained essentially Greek, since neither the disadvantage of its geographical position (distance from mainland Greece), nor the incessant raids and occupations, nor the introduction of foreign languages, religions and civilizations it underwent for centuries on end, were able to alter the religion, the culture, the language and the Greek consciousness of the great majority of its people. Greek Cypriots played an active part in the wider 1821-1830 struggle for the liberation of the Greek nation from the Ottoman yoke, although the island itself could not join the revolt against the Ottoman Empire, due to its geographic position. Despite the fact that the situation was calm, the Ottoman governor of the island asked for the authorization of the Sultan to execute 486 persons prominent in the Greek Cypriot community, in order to eliminate its leadership. When he received authorization, they were arrested and their executions were carried out during July 1821. Among those hanged on July 9 were Archbishop Cyprianos, leader of the Cypriot Orthodox Church, and three bishops. According to some estimates, over 20,000 Greek Cypriots emigrated in order to escape from the repression that followed. Despite the desires of the Greek Cypriots, Cyprus was not included in the new, independent Greek state in 1830.” For the full text of this presentation, see http://old.mfa.gr/english/foreign_policy/europe_southeastern/cyprus/background.html.

⁵⁴ According to Romania’s “National Security Strategy” (2006), page 22, “On the basis of the special relations between Romania and the Republic of Moldova, and *in consensus with the natural responsibilities stemming out*

IV. Conclusions

A few conclusions can be drawn:

First. The search for State identity of the newly established States is a normal and inherent process.

Second. The multicultural and intercultural approach in building a sustainable civil society is in line with the current European trends. Multiculturalism and interculturalism are assets of the contemporary European standards, as resulting from the applicable European instruments.

Third. In some cases, at a certain early stage of State identity building process, some States prefer to adopt pieces of legislation in order to set forth the multicultural (and/or the intercultural) approach or to promote and implement the features of a certain State identity.

What is needed, in my view, is a set of concrete measures in order to ensure the implementation of the international and European provisions regarding the promotion and protection of rights of persons belonging to national minorities and to promote their integration in harmony within the society of the respective State, without assimilating the minorities or “dissolving” or fading away the historic cultural (including the ethnic, linguistic etc.) specificities of either the majority or of the minorities of that country, without the possibility for the majority or for these minorities to lose their own identity or to exclude the links with their kin-States.

Forth. In the process of shaping a State identity, the risk of various forms of nationalism and of excessive nationalistic ideology should be carefully avoided. Otherwise, such conduct might generate adverse effects both at domestic and at international level.

Fifth. The cultural diversity is a value to be used, including in the process of building a true State identity. According to the contemporary European trends, as clearly evidenced by the recent standings of the Parliamentary Assembly of the Council of Europe included in the Recommendation No. 1735 of January 2006 on “the concept of ‘nation’”, the existence of common cultural features of the minorities or/and of the majority with the national culture of other States is no threat to the process of building a sustainable State identity⁵⁵.

Sixth. The true State identity can be shaped in a durable way by creating sustainable State institutions, by establishing sound and healthy bases for the national economy, by putting together all available human resources, including the intellectual elites, by ensuring a national society with no domestic confrontations, by clearly defining the relations with the neighbouring States and with the other influential States of the region on the basis of the national interest, and in general to define the State’s foreign policy priority directions.

Because this conference is dedicated to the 15th anniversary of the Republic of Moldova, I would note that as far as Republic of Moldova is concerned, there are already good premises: there are no inter-ethnic conflicts in the country and the relations with the

of the community of history, language and culture, with the principle ‘one nation, two states’ and the spirit of the European Neighbourhood Policy, we will pay particular attention to the cooperation with the Republic of Moldova.” (unofficial translation from the original text in Romanian). Emphasis added. For the original text in Romanian, see <http://www.presidentcy.ro/static/ordine/SSNR/SSNR.pdf>.

⁵⁵ In conformity with this Recommendation, the cultural nation can serve as a basis for the relationship between a “kin-majority” and another “kin-majority”.

direct neighbours are normal⁵⁶. At present, European integration is defined as Republic of Moldova's first priority and this objective is supported by almost 80% of its citizens. With 1st of January 2007, the date of Romania's *de jure* accession to EU, the Republic of Moldova will become the direct neighbour of the Union. The best way for Republic of Moldova's future is to pursue the very difficult, challenging, but rewarding task, already assumed, of reforming itself according to the requirements of European integration: to create European State institutions, to promote the European economic models and to orient the largest part of its economic exchanges towards the EU market, to promote the coming back of its human resources already trained in the West or who have already worked in the West, to promote education at European standards, to continue to align itself to the common positions and actions of the EU Common Foreign and Security Policy, to implement fully the provisions of the EU – Republic of Moldova Action Plan in the framework of ENP, to implement in the domestic legislation the *acquis communautaire*⁵⁷. Of course, this “to do list” can continue. A final and sustainable settlement of the Transnistrian conflict, together with the European and other western partners and the relevant international and European organizations involved, is equally important.

The pursuit and the accomplishment, with responsibility and seriousness, of these objectives will have as its natural consequence *the shaping of the specific State identity of Republic of Moldova*.

⁵⁶ A border treaty was concluded with Ukraine in 2001 and the border regime treaty with Romania is in a very advanced stage. However, Romania was the first State in the world that recognized the Republic of Moldova, immediately after the proclamation of the independence of the Republic of Moldova.

⁵⁷ Romania already extended its offer to help in this endeavors, taking into account the recent experience of Romania's accession process, as well as the fact that the whole corpus of the *acquis communautaire* is already translated into Romanian. Romania also proposed the conclusion of a General Agreement on the European Strategic Partnership between the two countries, currently under negotiation.