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## **International Organizations**

*Council of Europe*

### **13. Report on the Preferential Treatment of National Minorities by Their Kin-state [CDL-INF (2001) 19, English only]**

**(Strasbourg, 22 October 2001)**

#### **Adopted by the (European Commission for Democracy Through Law) Venice Commission at its 48th Plenary Meeting, Venice, 19-20 October 2001**

##### **Introduction**

*On 21 June 2001, Romania's Prime Minister, Mr. A. Năstase, requested the Venice Commission to examine the compatibility of the Act on Hungarians living in neighbouring countries, adopted by the Hungarian Parliament on 19 June 2001, with the European standards and the norms and principles of contemporary public international law.*

*On 2 July 2001, the Hungarian Minister of Foreign Affairs, Mr. J. Martonyi, requested the Venice Commission to carry out a comparative study of the recent tendencies of the legislations in Europe concerning the preferential treatment of persons belonging to national minorities living outside the borders of their country of citizenship.*

*At its plenary session of 6-7 July 2001, the Venice Commission decided to undertake a study, based on the legislation and practice of certain member States of the Council of Europe, on the preferential treatment by a State of its kin-minorities abroad. The aim of the study would be to establish whether such treatment could be said to be compatible with the standards of the Council of Europe and with the principles of international law.*

*A working group was thereafter formed, consisting of Messrs Franz Matscher, François Luchaire, Giorgio Malinverni and Pieter Van Dijk. A meeting was held in Paris on 18 September 2001. The Rapporteurs met with representatives of the Romanian and the Hungarian Governments respectively, in order to obtain certain clarifications following the information, which both parties had submitted, at the Commission's request, in August.*

*The present report was prepared on the basis of comments by Messrs. Matscher, Luchaire, Malinverni and Van Dijk; it was discussed within the Sub-Commission for the Protection of Minorities on 18 October 2001, and was subsequently adopted by the Commission at its 48th Plenary Meeting held in Venice on 19-20 October 2001.*

##### **A. Historical Background<sup>1</sup>**

The concern of the 'kin-States' for the fate of the persons belonging to their national communities<sup>2</sup> (hereinafter referred to as 'kin minorities') who are citizens of other countries ('the home-States') and reside abroad is not a new phenomenon in international law.

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

2 In the pieces of legislation that will be examined hereinafter, the term 'nationality' is at times found with the meaning of 'citizenship'. For the purposes of this study, however, 'nationality' means the legal bond between a person and the State and does not indicate the person's ethnic origin (see Article 2 of the European Convention on Nationality).

Besides some few general principles of customary international law, the pertinent international agreements entrust home-States with the task of securing to everybody within their jurisdiction the enjoyment of fundamental human rights, including minority rights, and assign to the international community as a whole a role of supervision of the home-States' obligations<sup>3</sup>. Kin-States, however, have shown their wish to intervene more significantly, and directly, i.e. parallel to the *fora* provided in the framework of international co-operation in this field<sup>4</sup>, in favour of their kin-minorities.

The main tool which kin-States dispose of in this respect is the negotiation of multilateral or bilateral agreements aiming at the protection of their kin minority, with the relevant home-States.

The bilateral approach to minority protection was first attempted after the collapse of the Russian, Austro-Hungarian and Ottoman empires after the First World War, under the aegis of the League of Nations<sup>5</sup>. It was adopted again after World War II. The experience of South Tyrol is particularly interesting. Following the peace treaty of Saint-Germain en Laye (1919), South Tyrol had been annexed to Italy against the will of the local population (a few thousands Italians and 280,000 South-Tyrolese – the latter acquired Italian citizenship). No protection had been afforded to this minority during the fascist years. In 1945, the South-Tyrolese claimed a right to self-determination. As a measure of compensation, the Allies urged Italy and Austria to find a solution through a bilateral agreement, which was reached on 4 September 1946 (the Gruber-de Gasperi Agreement, later annexed to the Peace Treaty between the Allied Powers and Italy of 10 February 1947). The region was thereby given limited autonomy. After the Vienna Treaty of 15 May 1955 re-establishing the full independence of Austria, the latter sought a better implementation of the Agreement, and requested further bilateral negotiations, which Italy, between 1958 and 1961, refused. In 1959, Austria brought the case before the General Assembly of the United Nations, which, through two resolutions of 1960 and 1961 respectively, prompted Italy and Austria to engage in negotiations, thus ratifying implicitly the right of Austria to care for the fate of the South-Tyrolese on the basis of the Treaty of Paris. The conflict escalated into terrorist attacks. In 1969, the 'package agreements' ('pacchetto') in favour of the South-Tyrolese minority were agreed upon. In summer 1992 the Austrian Government issued a statement that the Italian Government had finally implemented the package. In 1996, Austria and Italy informed the United Nations that a mutually satisfactory solution had been found. Nowadays, Austria continues to supervise the implementation of the 'package', and, in the light of the good relations which now exist between the two countries, Italy does not challenge Austria's right to do so.

In the 1990s, subsequent to the end of the Cold War and the collapse of communism, the issue of the protection of minorities became a prominent one, and the wish of the countries of Central and Eastern Europe to play a decisive role in the protection of their kin-minorities became even more apparent<sup>6</sup>.

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3 See Article 1 of the Framework Convention for the Protection of National Minorities (hereinafter: 'the Framework Convention').

4 There are various procedures for minority protection in Europe. In primis, the mechanism foreseen by the European Convention on Human Rights (individual as well as inter-state applications). Further, the monitoring of the Framework Convention by the Committee of Ministers of the Council of Europe and by the Advisory Committee on the basis of reports by the States concerned. The activities of the OSCE High Commissioner on National Minorities and of the United Nations Working Group on Minorities must also be recalled.

5 The settlement of the Aland Islands dispute in 1920 was a success, while the main minority problems originating from the Peace treaties remained unresolved.

6 The present report deals primarily with the protection of minorities in the context of Central and Eastern Europe in the last decade. Indeed, there are numerous other examples (the protection of the Slovenian and the Croatian minorities in Austria by virtue of Article 7 of the Austrian State Treaty of 1955) that can

Provisions to the extent that the kin-State cares for its kin-minorities abroad and fosters its links with them were indeed included in a number of new Constitutions dating back to those years<sup>7</sup>.

For example, Article 6 of the Hungarian Constitution (revised in 1989) provides:

*'The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary'.*

Article 7 of the Romanian Constitution (1991) reads:

*'The State shall support the strengthening of links with Romanians living abroad and shall act accordingly for the preservation, development and expression of their ethnic, cultural, linguistic, and religious identity under observance of the legislation of the State of which they are citizens'.*

Article 5 of the Slovenian Constitution (1991) provides, *inter alia*, that:

*'Slovenia shall maintain concern for autochthonous Slovene national minorities in neighbouring countries and shall foster their contacts with the homeland. (...) Slovenes not holding Slovene citizenship may enjoy special rights and privileges in Slovenia. The nature and extent of such rights and privileges shall be regulated by law'.*

Article 49 of the Constitution of the 'Former Yugoslav Republic of Macedonia' (1991) stipulates that:

*'The Republic cares for the status and rights of those persons belonging to the Macedonian people in neighbouring countries (...), assists their cultural development and promotes links with them'.*

Article 10 of the Croatian Constitution (1991) provides that:

*'Parts of the Croatian nation in other states are guaranteed special concern and protection by the Republic of Croatia'.*

Article 12 of the Ukrainian Constitution (1996) similarly provides that

*'Ukraine provides for the satisfaction of national and cultural, and linguistic needs of Ukrainians residing beyond the borders of the State'.*

Article 6 of the 1997 Polish Constitution provides:

*'The Republic of Poland shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage'.*

Article 7a of the Slovak Constitution (amended in 2001) provides:

*'The Slovak Republic shall support national awareness and cultural identity of Slovaks living abroad and their institutions for achieving these goals as well as their relationships with their homeland'.*

In the same period, the treaty approach to minority protection re-emerged – and on a large scale. Germany, in order to secure its borders and to afford protection to its kin-minorities which after World War II had been placed under the rule of central and eastern European states, concluded agreements on friendly co-operation and partnership, notably with Poland, Bulgaria, Hungary and Romania<sup>8</sup>. Hungary concluded similar agreements with three of its neighbouring countries: Ukraine, Croatia and Slovenia<sup>9</sup>.

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be relevant for its conclusions.

7 The Hungarian Constitution of 1949 also provided, in Article 6, as follows: 'The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary'.

8 Treaty between the Federal Republic of Germany and the Republic of Poland on Good Neighbourly Relations and Friendly Co-operation (17 June 1991); Treaty between the Federal Republic of Germany and Bulgaria on Friendly Relations and Partnership in Europe (9 October 1991); Treaty between the Federal Republic of Germany and Hungary concerning Friendly Co-operation and Partnership in Europe (6 February 1992); Treaty between the Federal Republic of Germany and Romania concerning Friendly Co-operation and Partnership in Europe (21 April 1992).

9 Treaty between the Republic of Hungary and Ukraine on the Foundations of Good Neighbourly Relations

The potentialities of bilateral treaties in respect of reducing tensions between kin-states and home-states appeared to be significant, to the extent that they can procure specified commitments on sensitive issues, while multilateral agreements can only provide for an indirect approach to those issues<sup>10</sup>. Furthermore, they allow for the specific characteristics and needs of each national minority as well as of the peculiar historical, political and social context to be taken into direct consideration.

Thus, the European Union regarded bilateral treaties as an attractive tool for guaranteeing stability in Central and Eastern Europe. In 1993, it endorsed and launched a French initiative ('the Balladur initiative') towards concluding a Pact on Stability in Europe. It aimed at achieving 'stability through the promotion of good neighbourly relations, including questions related to frontiers and minorities, as well as regional co-operation and the strengthening of democratic institutions through co-operation arrangements to be established in the different fields that can contribute to the objective'<sup>11</sup>. The Pact, which was signed by 52 States and was adopted in 1995, concerned Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia, all of which had expressed an interest in joining the European Union. These States were called upon 'intensifying their good-neighbourly relations in all their aspects, including those related to the rights of persons belonging to national minorities'; this intensification was deemed to require the effective implementation of the principles of sovereign equality, respect of the rights inherent in sovereignty, refraining from the threat or use of force, inviolability of frontiers, peaceful settlement of disputes, non-intervention in internal affairs, respect for human rights, including the rights of persons belonging to national minorities, and fundamental freedoms, including freedom of thought, conscience, religion or belief, equal rights and self-determination of peoples, cooperation amongst States and fulfilment in good faith of obligations under international law<sup>12</sup>.

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

The States participating in the Pact committed themselves, in the Final Declaration, to compliance with the principles of the OSCE. In the event of problems over observance of the agreements, they would rely on the existing OSCE institutions and procedures for preventing conflict and settling disputes peacefully. These include the possibility of consulting the High Commissioner on National Minorities (Article 15 of the Final Declaration) and that of referring disputes concerning the interpretation or implementation of the treaties to the International Conciliation and Arbitration Court (Article 16 of the Final Declaration).

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and Co-operation (6 December 1991); Treaty between the Republic of Hungary and Slovenia on Friendship and Co-operation (1 December 1992); Treaty between the Republic of Hungary and Croatia on Friendly Relations and Co-operation (16 December 1992).

10 The signature of bilateral agreements on the protection of minorities 'in order to promote tolerance, prosperity, stability and peace' (see the Explanatory Report to the Framework Convention) is foreseen in Article 18 § 1 of the Framework Convention, according to which States 'endeavour to conclude, where necessary, bilateral and multilateral agreements with other States, in particular neighbouring States, in order to ensure the protection of persons belonging to the national minorities concerned'. The same is encouraged under the Stability Pact for South Eastern Europe (1999). The United Nations also promotes the stipulation of bilateral and multilateral treaties: see resolution of the Human Rights Commission of 22 February 1995, UN Doc. E/CN. 4/1995 L. 32.

11 See the 'Concluding document of the inaugural conference for a Pact on Stability in Europe' in 94/367/CFSP: Council Decision of 14 June 1994 on the continuation of the joint action adopted by the Council on the basis of Article J. 3 of the Treaty on European Union on the inaugural conference on the Stability Pact.

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

Under the auspices of the Pact, two further bilateral treaties on cooperation were signed, between Hungary and Slovakia (1995) and between Hungary and Romania (1996) respectively<sup>13</sup>.

## **B. The Bilateral Approach to Minority Protection**

Stability and peace, it is well known, cannot be achieved without a satisfactory protection of national minorities. Thus, all the bilateral treaties on friendly relations in question contain provisions on the protection of the (respective<sup>14</sup>) minorities<sup>15</sup>. In the context of these bilateral agreements, kin-States attempt to secure a high level of protection to their minorities, whereas home-States aim at achieving an equal treatment and integration of the minorities within their borders, thus preserving the integrity of the latter.

In certain cases, the friendship treaties refer to pre-existing bilateral instruments specifically concerning minorities (for example, the co-operation Treaty between Hungary and Slovenia follows the *Convention on providing special rights for the Slovenian minority living in the Republic of Hungary and for the Hungarian minority living in the Republic of Slovenia* of 6 November 1992, and the *Treaty between Hungary and Ukraine on the Foundations of Good Neighbourly Relations and Co-operation* follows the *Declaration on the principles of co-operation between the Republic of Hungary and the Ukrainian Soviet Socialist Republic in guaranteeing the rights of national minorities* of 31 May 1991.)

In other cases, a specific instrument on minorities follows in time the bilateral treaty; the Treaty between Hungary and Croatia on Friendly Relations and Cooperation, for instance, was later complemented by a *Convention on the protection of the Hungarian minority in the Republic of Croatia and the Croatian minority in the Republic of Hungary* (5 April 1995). Similarly, the *Declaration on the principles guiding the co-operation between the Republic of Hungary and the Russian Federation regarding the guarantee of the rights of national minorities* of 11 November 1992 follows and refers to the *Treaty between the Republic of Hungary and the Russian Soviet Federative Socialist Republic on friendly relations and co-operation* of 6 December 1991.

These treaties and conventions usually contain mutual commitments to respect international norms and principles regarding national minorities. They often incorporate soft law provisions, such as the Council of Europe's Parliamentary Assembly's Recommendation no. 1201 (1993) and the CSCE Copenhagen Document (1990), and, by doing so, give them binding effect in their mutual relations.

A detailed comparative analysis of the content of these treaties goes far beyond the object of the present document. It is sufficient for our purposes to point out that they provide for certain 'classic' core rights (right to identity; linguistic rights; cultural rights; education rights; rights related to the use of the media; freedom of expression and association; freedom of religion; right to participate in decision-making processes). Sometimes, more rarely, other rights such as that to trans-frontier contacts and preservation of the architectural heritage are included. Certain treaties grant collective rights or certain forms of autonomy. Further, some of them emphasise the duties of the persons belonging to the minorities in respect of their home-States.

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13 Treaty between the Republic of Hungary and Slovakia on Good Neighbourliness and Friendly Co-operation (19 March 1995); Treaty between the Republic of Hungary and Romania on Understanding, Co-operation and Good-neighbourly Relations (16 September 1996).

14 When both parties are at the same time home- and kin-States, the relevant treaty contains mutual obligations; otherwise, the treaty contains obligations for the home-State only (see, as an example of the latter, the German-Polish Treaty on Good Neighbourly Relations and Friendly Co-operation of 1991).

15 It is common practice for States to sign bilateral agreements on cultural co-operation where certain provisions are specifically devoted to the training of and other assistance to teachers involved in the education of national minorities. These agreements are normally implemented and complemented by inter-ministerial agreements.

These treaties are, to a greater or lesser degree, framework treaties: they need to be implemented through specific pieces of legislation or through intergovernmental agreements on specific matters.

The implementation of the treaties involves two distinct questions: on the one hand, the parties must respect the obligations which they have reciprocally undertaken; on the other hand, they must pursue bilateral talks on the matters which are the object of the treaties with a view to committing themselves to new or different obligations. The effective and correct implementation of the treaties, however, is generally not subjected to any legal control: indeed, none of these treaties sets up a jurisdictional or legal mechanism of control<sup>16</sup>. Their implementation is rather vested in joint intergovernmental commissions (normally, representatives of the minorities sit in each governmental delegation, but they do not have a veto power). These commissions are to be convened at regular intervals, or whenever it is deemed necessary, and are normally empowered with making recommendations to their respective governments as regards the execution or even the modification of the treaties.

There is no explicit sanction for the failure by one Party to co-operate in implementing a treaty.

Insofar as most of these treaties have been included in the Pact on Stability, any State could apply to the International Conciliation and Arbitration Court, seeking the solution to a dispute or the interpretation of a provision of the bilateral treaty in question. In practice, however, this has never been attempted. Furthermore, the assistance of the OSCE High Commissioner on National Minorities could be sought in pursuance of Article 15 of the Final Declaration of the Pact on Stability, but never was.

In addition, inasmuch as the treaties in question embody provisions of the Framework Convention, their implementation falls, if only indirectly, within the scope of competence of the relevant Advisory Committee and of the Committee of Ministers of the Council of Europe; indeed, States have submitted, though only indirectly, detailed information on these matters in their reports.

As regards domestic remedies, the theoretical possibility, in countries whose constitutional system allows treaty rules to be directly applicable in domestic law, of bringing before a domestic court the matter of the failure to respect a self-executing treaty has not been used so far (and does not appear very likely, due in particular to the little awareness of this possibility amongst the legal practitioners).

It follows that, as things stand nowadays, if a party refuses to participate in bilateral talks on the implementation of a treaty, only political pressure coming from either the other party or the international community can persuade it to do so.

Yet, this refusal would be in breach not only of the specific obligation, undertaken in the treaty, to conduct negotiations on the measures of implementation of the said treaty (a breach, therefore, of the principle *pacta sunt servanda*), but also of the general principle of international law according to which 'in their mutual relations, States shall act in accordance with the principles and rules of friendly neighbourly relations which must guide their action at international level, particularly in the local and regional context'<sup>17</sup>.

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16 See, however, the Agreement between Austria and Italy of 17 July 1971 (concluded in accordance with the 'operational time-table' – 'calendario operativo' of 1969) submitting disputes concerning the implementation of the Gruber-de Gasperi agreement of 1947 to the mechanism provided for by the European Convention of 29 April 1957 on the Pacific Settlement of Disputes.

17 See European Commission for Democracy through Law, Law and foreign policy, Collection 'Science and technique of democracy', No. 24, p. 14. See Article 2 of the Framework Convention.

### C. Domestic Legislation on the Protection of Kin-minorities: Analysis<sup>18</sup>

In addition to the bilateral agreements and to the domestic legislation and regulations implementing them, a number of European States have enacted specific pieces of legislation or regulations, conferring special benefits, thus a preferential treatment, to the persons belonging to their kin-minorities<sup>19</sup>.

The following laws are worth remembering in this context:

- The *Law on the equation of the South-Tyrolese with the Austrian citizens in particular administrative fields*, 25 January 1979 (Austria) (hereinafter: ‘the Austrian law’, or AL)<sup>20</sup>
- The *Act on Expatriate Slovaks and changing and complementing some laws* – no. 70 of 14 February 1997 (Slovakia) (hereinafter: ‘the Slovak Law’ or SL)
- The *Law regarding the support granted to the Romanian communities from all over the world*, 15 July 1998 (Romania) (hereinafter: ‘the Romanian Law’ or RL)
- The *Federal Law on the State policy of the Russian Federation in respect of the compatriots abroad*, March 1999 (Russian Federation) (hereinafter: ‘the Russian Law’ or RuL)
- The *Law for the Bulgarians living outside the Republic of Bulgaria*, 11 April 2000 (Bulgaria) (hereinafter: ‘the Bulgarian law’ or BL)
- The *Law on the Measures in favour of the Italian Minority in Slovenia and Croatia*, 21 March 2001 no. 73 (extending the validity of Article 14 § 2 of the *Provisions for the development of economic activities and international cooperation of the Region Friuli-Venezia Giulia, the province of Belluno and the neighbouring areas*, 9 January 1991, no. 19) (Italy) (hereinafter: ‘the Italian law’ or IL)
- The *Act on Hungarians living in neighbouring countries*, 19 June 2001 (to enter into force on 1 January 2002) (Hungary) (hereinafter: ‘the Hungarian law’ or HL)

The following are also worth noticing:

- The *Resolution of the Slovenian Parliament on the status and situation of the Slovenian minorities living in neighbouring countries and the duties of the Slovenian State and other bodies in this respect*, of 27 June 1996)
- The *Joint Ministerial Decision* no. 4000/3/10/e of the Ministers of the Interior, of Defence, of Foreign Affairs, of Labour and of Public Order of 15-29 April 1998 on the *Conditions, Duration and Procedure for the delivery of a Special Identity Card to Albanian citizens of Greek origin* (Greece) (hereinafter: ‘the Greek ministerial decision’ or GMD)

#### ■ Scope of Application *Ratione Personae*

The Romanian and Italian laws confine themselves to referring to their ‘communities’ or ‘minorities’ living outside of their respective territories. The other laws under examination, instead, set out in detail the criteria that are to be met in order for an individual to fall within their ambit of application. These criteria are as follows:

##### • Foreign Citizenship

This criterion flows from the very same *ratio* of these laws and is therefore common to them all (with the partial exception of the Russian one). It is not always explicitly set out (see the already mentioned Romanian and Italian laws; the Bulgarian law does not specify this in its Article 2, but

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18 This analysis is based on the material that has been brought to the attention of the Commission Secretariat.

19 Sometimes, certain benefits, concerning matters that are not directly envisaged by the bilateral agreements, e.g. concerning health care or other questions, are regulated by informal (private law) agreements between the regional bodies of the kin-State and the home-State. The beneficiaries of such preferential treatment are not necessarily the members of the minority but all the persons residing in the region where the minority is settled (see, e.g., the relations between Tyrol and South-Tyrol).

20 This law was amended in 1997. Nowadays, South Tyroleans may enrol in Austrian universities if they have attended a German-speaking high school, and not any more if they belong to the German or Ladin linguistic minorities.

it does so in the second chapter). The Hungarian act specifies that Hungarian nationality must have been lost for reasons other than by voluntary renunciation.

- **Belonging to the specific national background**

While the Italian and Romanian laws do not explicitly set out any criteria for establishing the national background, the other laws do, in greater or lesser detail.

Under the Slovak law, the Slovak ‘ethnic origin’ derives from a ‘direct ancestor up to the third generation’ (Article 2 § 3 SL). For the Bulgarian law, it is necessary to have at least one ascendant of Bulgarian origin (Article 2 BL). Under the Hungarian law, it is a Hungarian ‘national’ he or she who so declares (Article 1 HL). For the Russians, the compatriots are ‘those who share a common language, religion, culture, traditions and customs, as well as their direct descendants’ (Article 1 RuL).

As to the proof of the national background, the Slovak law requires a ‘supporting document’ which may consist of a birth certificate, a baptism certificate, a statement by the registry office, a ‘proof of nationality’ or a permanent residence permit; failing these, a written testimony of a Slovak countryman organisation abroad or the testimony of at least two fellow Slovak expatriates is required (Article 2 § 4 SL). The Bulgarian law requires a document issued by a foreign authority or by an association of Bulgarians abroad or by the Bulgarian Orthodox Church; failing this, the Bulgarian background can be proved through judicial means (Article 3 BL). The Russian law requires, besides the ‘free choice’ of the individual, ‘supporting documents’ of the previous Soviet or Russian citizenship or of the previous residence on the territory of Russia/URSS/RFSFR/FdR, or of the direct descent from immigrants (Article 4 RuL).

The proof of the Hungarian background is more complex; if the wording of Article 1 § 1 of the Hungarian law seems to suggest that the mere declaration by the applicant suffices, it appears<sup>21</sup> that the organisations representing the Hungarian national community in the neighbouring countries will have to investigate the applicant’s national background before issuing – or refusing – the relevant recommendation. However, it is not specified in the law what criteria they will be applying.

- **Residence Abroad**

The Bulgarian and the Russian laws require that the person concerned reside on the territory of a foreign country (Articles 2 and 1 respectively), as does the Romanian law (Article 1). The Hungarian law prescribes that only those who reside in one of its neighbouring countries (with the exception of Austria) are entitled to the benefits in question (Article 1 § 1 HL). The Italian law is limited to the Italian minorities in Croatia and Slovenia<sup>22</sup>.

- **Lack of a Permit of Permanent Stay in the Kin-State**

This requirement is contained in the Hungarian Law (Article 1 § 1). In fact, the obtainment of a permit of permanent stay in Hungary constitutes a ground for withdrawing the ‘Certificate of Hungarian Nationality’ (Article 21 § 3 (b) HL). The Slovak law, instead, encourages expatriates to apply for permanent residence in Slovakia (Article 5 § 3 SL). The Greek special identity card amounts to a permit of stay of three years (Article 3 GMD).

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21 The wording of Article 20 of the Law does not clarify the role of the recommending organisations; the Hungarian Ministry of Foreign Affairs, however, has pointed out in its submissions of 14 September 2001 (CDL (2001) 93) that they will be entrusted with the task of verifying the existence of the objective criteria as to belonging to the Hungarian minority.

22 In this respect, it is worth noticing that the provisions in the Slovenian and Macedonian Constitutions concerning the wish of those countries to be concerned with the fate of their kin-minorities, refer to national minorities ‘in neighbouring countries’ (see above, Articles 5 and 49 of the Slovenian and Macedonian Constitution respectively).



- **Language Awareness**

Under the Slovak law, the ‘expatriate’ must have at least a passive knowledge of the Slovak language, which must be certified by the results of his/her activities, or by the testimony of the Slovak organisation of his/her place of residence or the testimony of at least two fellow expatriates (Article 2 §§ 6, 7 SL).

- **Cultural Awareness**

The Slovak law requires a basic knowledge of the Slovak culture, to be proved in the same way as the linguistic knowledge (see above). The Bulgarian law requires a ‘Bulgarian national awareness’ (Article 2 BL).

- **Spouses and Minor Children**

Under the Hungarian law, cohabiting spouses and minor children are entitled to receive the benefits under the Act (Article 1 § 2 HL). The Greek ministerial decision extends the benefits for the Albanians of Greek origin to their spouses and descendants who can prove their kinship through official documents (Article 1 § 2 GMD). The benefits under the Slovak law are extended to the Expatriate’s children under the age of 15 who are mentioned in the Expatriate Card (Article 4 § 1 SL)

- **The Document Proving Entitlement to the Benefits under the Law**

The Hungarian, Slovak and Russian laws subordinate entitlement to specific benefits to the holding of a particular document. So does the Greek ministerial decision.

The nature of this document is not always the same.

Under the Greek regulation, it is (and is called) an identity card (bearing a photograph and the fingerprints of its holder), issued for a period of three years (renewable); it also functions as a permit of stay and a work permit (see the relevant statement/circular of the Greek Ministry of Public Order).

The Slovak ‘Expatriate Card’, which is issued for an indefinite period of time, contains the personal data of the holder, as well as his permanent address (the data of minor children can also be included, at the request of the person concerned, insofar as this is compatible with the applicable international treaties). This card does not amount to an identity card in that it is only valid when used together with a valid identification document (Article 4 § 2 SL) issued in the home-State. The holder of the card, however, is admitted to the Slovak territory without written invitation, visa and permit of stay.

The ‘Certificate of Hungarian Nationality’ – which is issued for a period of five years or until the holder turns 18, or for an indefinite time if the holder is over sixty – bears a photograph of its holder and contains all his personal data (Article 21 § 5 HL).

The Russian law prescribes that belonging to the category of ‘compatriots’ can be proved – as well as through a Russian passport for Russian citizens or those holding a double nationality – through a certificate issued by the diplomatic or consular representations of the Russian Federation or by the Russian competent authorities (Article 3 RuL). This certificate, unaccompanied by a photograph of its holder, does not amount to an identity card.

As regards the procedure for issuing the documents in question, they are issued by the authorities of the kin-State: a central public administration body designated by the Hungarian Government (Article 19 § 2 HL); the Slovak Ministry of Foreign Affairs (Article 3 § 1 SL); the ‘competent authorities’ or the Russian diplomatic missions or consulates abroad (Article 3 RuL); the police department responsible for foreigners (Article 1 GMD).

The kin-States' consulates or embassies on the territories of the home-States may have a role in the procedure. Under Article 1 of the Slovak law, the Slovak missions or consular offices may receive applications for the Expatriate Card, which they forward to the Ministry of Foreign Affairs for decision. Russian diplomatic missions or consulates can issue the certificate proving Russian origin (Article 3 RuL). The Greek consular authorities do not and cannot play any role, given that the Greek special identity card can only be delivered to those who find themselves on the Greek territory (Article 1 § 1 GMD).

The Hungarian law does not assign any role to the Hungarian consulates or diplomatic missions, but provides for a constitutive role of the organisations of Hungarians abroad in the procedure. The Certificate of Hungarian Nationality, in fact, is issued by the Hungarian authorities if the applicant has been 'recommended' by one of these organisations, which have to verify the declaration made by the applicant about his/her belonging to the Hungarian minority, to certify the authenticity of his/her signature and provide, *inter alia*, the applicant's photograph and personal data (Article 20 § 1 HL). In the absence of such recommendation, the certificate cannot be issued<sup>23</sup>; no remedy is available against the refusal by an organisation to provide the recommendation. It has been noted above that the criteria, which the organisations are to use, are unclear.

A quite different role is assigned to such organisations under the Slovak law. Pursuant to Article 2 § 5 SL, they can testify that an individual belongs to the Slovak minority in case he or she cannot provide the formal documents listed in Article 2 § 4 SL. It must be remembered in this context that the Slovak law provides for a clear criterion for assessing national origin. Similarly, the Bulgarian law (Article 3 BL) provides for the possibility of proving one's Bulgarian origin through a statement of an association of Bulgarians abroad; the law, however, specifies what needs to be proved, i.e. to have at least one Bulgarian ascendant.

## ■ Nature of the Benefits

### • Benefits relating to Education and Culture

These benefits usually consist of: scholarships to students for the pursuit of their studies in the kin-State; reduction or exemption from fees for the use of cultural and educational facilities (such as museums, libraries and archives); support to educational institutions teaching in the kin-language in the home-States; training for teachers in the kin-language in the home-States (Article 6 § 1 SL; Article 17 RuL; Articles 9 and 10 BL; Article 7 BL; Articles 4 and 9-14 HL), mutual recognition of academic diplomas (see the numerous agreements between Austria and Italy); access to academic career (Articles 2 and 4 § 2 AL).

Article 10 § 1 of the Hungarian Law further provides for the granting of scholarships to students belonging to the kin minority pursuing any kind of studies in institutions for higher education – irrespective of the language or curriculum – in the home-States.

Article 18 of the Hungarian Law sets out the bases for the assistance by Hungary of organisations operating abroad and promoting the knowledge and preservation of the Hungarian language, literature and cultural heritage.

### • Social Security and Health Coverage

Under Article 7 of the Hungarian Law, workers holding the Certificate of Hungarian Nationality are allowed to contribute to the health insurance and pension schemes. They are also entitled to immediate medical assistance in Hungary on the basis of bilateral social security agreements.

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23 Pursuant to article 29 § 2(3) of the Hungarian Law, however, the Minister of Foreign Affairs may substitute his own declaration for the recommendation of the organisations 'in cases deserving exceptional treatment on ground of equity' and 'in cases where the proceedings ... are impeded to ensure the smooth conduct of administrative proceedings'.

Article 2 of the Romanian law refers to the possibility for members of Romanian communities to receive individual aid in special medical cases. Slovak expatriates may request exemption from Social Security payments abroad if they meet the conditions for receiving their rights on Slovak territory (Article 6 § 1 (d)).

- **Travelling Benefits**

They consist of special rates for those who travel to or within the territory of the kin-State (see Article 8 HL; see also Article 6 § 3 SL which provides for special rates for retired, disabled or elderly expatriates).

- **Work Permits**

Under the Slovak law, job-seekers holding a Slovak Expatriate Card are not required to apply for a work permit or for permanent residence in Slovakia (Article 6 (b) SL). Under the Hungarian law, work permits can exceptionally be granted to kin-foreigners for a duration of three months without prior assessment of the needs of the labour market (Article 15 HL). More, kin-foreigners may apply for reimbursement of the costs incurred for meeting the legal conditions for employment (Article 16 HL).

- **Exemption from Visas**

Under the Slovak law, holders of an Expatriate Card wishing to enter the territory of Slovakia do not need any visa or invitation, insofar as this is possible under the applicable international agreements (Article 5 § 1 SL). Under Article 5 of the Austrian Law, South Tyroleans as defined in the law do not need visas in order to stay in Austria.

- **Exemption from Permits of Stay and Reimbursement Of/exemption from Costs Incurred for the Stay**

Slovak expatriates are admitted to stay for a long period on Slovak territory by virtue of their Expatriate Cards (Article 5 § 2 SL). The Greek Special Identity Card amounts to a permit of stay for the duration of its validity (up to three years, renewable) (Articles 1 and 3 GMD).

Bulgarians are entitled to a special regime of costs relating to their stay or settling down on the Bulgarian territory (Article 6 § 2 BL). The Romanian law provides the possibility for students wishing to pursue their studies in Romania to benefit from free accommodation in student hostels for the duration of their stay (other forms of support may be granted from the Government) (Article 9 RL).

- **Acquisition of Property**

Under Article 6 § 2 of the Slovak law, expatriates have the right to own and acquire real estate. Under the Bulgarian Law, kin-foreigners can participate in privatisation, be reinstated in their property, inherit real estate (Article 8 BL).

- **Acquisition of Citizenship**

Under the Russian law (Article 11 RuL), ‘compatriots’ may be promptly granted Russian citizenship upon a simple request. Under the Slovak law, ‘expatriates’ may apply for Slovak citizenship for outstanding personality reasons (Article 6 § 1 c) SL).

### ■ **Scope of Application *Ratione Loci***

Benefits are normally granted to kin-foreigners when they find themselves on the territory of the kin-State.

Under the Hungarian law, certain benefits are available in the home-State (see Article 10 HL on benefits for students of public education institutions teaching in Hungarian in the neighbouring countries or of ‘any higher education institution’; Article 12 HL on benefits to Hungarian teachers

living abroad; Article 13 HL: Education abroad in affiliated departments'; Article 14 HL on 'Educational assistance available in the native country'; Article 18 HL on assistance to organisations operating abroad).

#### **D. Assessment of the Compatibility of the Protection of Minorities by Their Kin-State through Domestic Legislation with European Standards and with the Norms and Principles of International Law<sup>24</sup>**

The paramount importance of an adequate and effective protection of national minorities as a particular aspect of the protection of human rights and fundamental freedoms and also in order to promote stability, democratic security and peace in Europe has been repeatedly underlined and emphasised. The full implementation of the international agreements on this matter – *in primis* the Framework Convention for the Protection of National Minorities, and also the Charter for Regional or Minority Languages as well as, be it less specifically, the European Convention on Human Rights – has become a priority for all the member States of the Council of Europe.

Against this background, the emerging of new and original forms of minority protection, particularly by the kin-States, constitutes a positive trend insofar as they can contribute to the realisation of this goal.

The practice of stipulating bilateral treaties on friendly co-operation or on minority protection is already the object of encouragement and assistance as well as of close scrutiny by the international community.

The more recent tendency of kin-States to enact domestic legislation or regulations conferring special rights to their kin-minorities had not, until very recently, attracted particular attention, nor aroused much, if any at all, interest in the international community. No supervision or co-ordination of the laws and regulations in question has so far been sought or attempted. Yet, the campaign surrounding the adoption of the Hungarian *Act on Hungarians living in neighbouring countries* shows the impellent necessity of addressing the question of the compatibility of such laws and regulations with international law and with the European standards on minority protection.

In the Commission's opinion, the possibility for States to adopt unilateral measures on the protection of their kin-minorities, irrespective of whether they live in neighbouring or in other countries, is conditional upon the respect of the following principles: a) the territorial sovereignty of States; b) *pacta sunt servanda*; c) friendly relations amongst States, and d) the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination.

##### **a. The Principle of Territorial Sovereignty of States**

States enjoy exclusive sovereignty, hence jurisdiction, over their national territory<sup>25</sup> This implies, in principle, jurisdiction over all persons, property and activities in their territory, and in their internal waters, territorial sea and the air space above their national territory. No other State or international organisation can exercise jurisdiction in the territory of a State without the latter's

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24 Further to the European Parliament's resolution of 5 September 2001 (Resolution on Hungary's application for membership of the European Union and the state of negotiations (COM (2000) 705–C5-0605/2000-1997/2175 (COS)), an evaluation by the European Commission of the compatibility of the legislation on special regulations and privileges granted to persons belonging to national minorities by their kin-States with the *acquis communautaire* as well as with the spirit of good neighbourhood and co-operation amongst EU Member States is currently in progress. For this reason, it will not be the object of the present study.

25 This principle of international law has been codified, in particular, in Article 21 of the Framework Convention.

consent. Public international law however confers specific powers to States as regards laws related to their embassies, ships or nationals abroad.

Legislative and administrative acts (as well as judicial ones) are emanations of that sovereign jurisdiction: their natural addressees are therefore the relevant inhabitants, and the natural place of application is the national territory.

A first question arises in this context: can the mere adoption of legislation with extraterritorial effects, *per se*, be seen as an interference with the internal affairs of the other State or States concerned and therefore an infringement of the principle of territorial sovereignty of states?

In order to provide an exhaustive answer, it is necessary to make a distinction, as regards the meaning of 'extraterritoriality', between the effects of a State's legislation on foreign citizens, within that State's territory or abroad, and the exercise of a State's powers outside that State's borders.

#### **a-i. The Effects of a State's Legislation on Foreign Citizens**

The mere fact that the addressees of a piece of legislation are foreign citizens does not, in the Commission's opinion, constitute an infringement of the principle of territorial sovereignty. Indeed, there are numerous examples of legislative acts which consider foreign citizenship, not of a specific State but in general (for instance in private international law, regarding the penal jurisdiction of the State etc.), as 'connecting points'. All these acts are in conformity with the general principles of international law.

A State can legitimately issue laws or regulations concerning foreign citizens without seeking the prior consent of the relevant States of citizenship, as long as the effects of these laws or regulations are to take place within its borders only. For example, a State can unilaterally decide to grant a certain number of scholarships to meritorious foreign students who wish to pursue their studies in the universities of that State.

When the law specifically aims at deploying its effects on foreign citizens in a foreign country, its legitimacy is not so straightforward. It is not conceivable, in fact, that the home-State of the individuals concerned should not have a word to say on the matter.

In certain fields such as education and culture, certain practices, which pursue obvious cultural aims<sup>26</sup>, have developed and have been followed by numerous States. It is mostly accepted, for instance, at least between States, which have friendly relations, that States grant scholarships to foreign students of their kin-minorities for their studies in the kin-language in educational institutions abroad. These institutions, on the other hand, are often financed by the kin-States. Similarly, it is common for States to promote the study of their language and culture also through incentives to be granted to foreign students, independently of their national background.

In these fields, if there exists an international custom, the consent of the home-State can be presumed and kin-States may take unilateral administrative or legislative measures<sup>27</sup>. Further, when a kin-State takes unilateral measures on the preferential treatment of its kin-minorities in a par-

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26 See Article 2 § 2 of the Cultural Convention reads: 'Each Contracting Party shall, insofar as may be possible, (...) endeavour to promote the study of its language or languages, history and civilisation in the territory of the other Contracting Parties and grant facilities to the nationals of those Parties to pursue such studies in its territories'.

The Cultural Convention was ratified, inter alia, by Bulgaria on 2 September 1991; by Greece on 10 January 1962; by Hungary on 16 November 1989; by Italy on 15 May 1957; by Romania on 19 December 1991; by Russia on 21 February 1991; by Slovakia on 10 May 1990 and by Slovenia on 2 July 1992.

27 However, these measures are often taken within the framework of intergovernmental agreements.

ticular home-State, the latter may presume the consent of the said kin-State to similar measures concerning its citizens.

In fields, which are not covered by treaties or international customs, instead, the consent of the home-States affected by the kin-State's measures should be explicit. So, to cite an example, if a State unilaterally decided to grant scholarships to foreign students of its kin-minorities irrespective of the link of their studies with the kin-State itself, this decision might be considered as interfering with the relevant home-States' internal affairs (their educational policies, for example).

#### **a-ii. The Exercise of State Powers outside the National Borders**

In the absence of a permissive rule to the contrary – either an international custom<sup>28</sup> or a convention – a State cannot exercise its powers, in any form, on the territory of other States<sup>29</sup>.

The grant by a State of administrative, quasi-official functions to non-governmental associations registered in another country constitutes an indirect form of state power: as such, it is not permissible unless specifically allowed.

This grant appears to be particularly problematic when these functions are neither allowed nor regulated under the law of the home-State. Under these circumstances, in fact, in performing them the associations in question would not be subjected to any effective legal control: the authorities of the home-State would have jurisdiction but might not recognise the bases for these acts, for the above-stated reason that the latter are not foreseen in that legal system; the kin-State, despite having provided for the bases for issuing the acts in question, would lack jurisdiction thereover, given that the associations are registered and operate abroad. This is even more applicable, when the conditions and limits of the exercise of this power are not clearly enunciated in the originating law.

Should a kin-State require any kind of certification *in situ*, in the Commission's opinion the natural 'actors' would be the consular authorities: which are duly authorised by the home-State, in conformity with international law<sup>30</sup>, to perform official acts on its territory. It is understood that these official acts must be of an ordinary nature, and the consulates must not be vested with tasks going beyond what is generally practiced and admitted.

In the latter respect, and with reference to the need expressed in various of the laws under examination to obtain proof of the national background of foreigners seeking access to the benefits provided to kin-minorities, the Commission considers that it is preferable (even if it is not required by international law) that the relevant legislation set out the exact criteria that must be employed in the assessment of the national background. This indication, in fact, would prevent consulates from being given discretionary power that, being exempted from any substantial, not merely formal judicial review, would risk becoming arbitrary. In this respect, the Commission wishes to refer, *mutatis mutandis*, to the Framework Convention, which, while enshrining the principle of the individual's free choice as to affiliation to a minority, does not prevent States from requiring the fulfilment of certain criteria when it comes to granting privileges to the persons belonging to that minority. In other words, the personal choice of the individual is a necessary element, but not a sufficient one for entitlement to specific privileges.

Similar considerations pertain as concerns the associations of kin-minorities abroad. In the Commission's view, a role of these associations cannot be excluded, if they are only required by

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28 See, for example, the common consular conventions.

29 In this respect, the extraterritorial jurisdiction in civil matters even on foreign citizens residing in their home-country or elsewhere exercised by the United States is largely controversial.

30 See for instance Article 5 of the Vienna Convention of 1963 on consular relations.

the kin-States to provide information on precise, legally determined facts, in the absence of other supporting documents or material or if they are only entrusted with giving a non-binding informal recommendation for the consular authorities of the kin-State. For example, they may provide a statement about the circumstance that the grandfather of an individual was a citizen of the kin-State, in a case where any formal documents were missing.

#### **b. The Principle That *Pacta Sunt Servanda***

Treaties must be respected and performed in good faith<sup>31</sup>. When a State is party to bilateral treaties concerning, or containing provisions, on minority protection<sup>32</sup>, it must duly fulfil all the obligations contained therein, including that of pursuing bilateral talks with a view to assessing the state of implementation of the treaty and to addressing the possible enlargement or modification of the rights granted to the respective minorities.

Should possible difficulties in holding these bilateral talks lead to alternative, unilateral forms of intervention in the matters pre-empted by the treaty, this would be in breach of the obligation to perform treaties in good faith, at least unless all the existing procedures for settling the dispute (including requests for intervention of the OSCE High Commissioner for National Minorities and of the International Conciliation and Arbitration Court) had been used in good faith<sup>33</sup>, and had proved ineffective.

Legislation or regulations on the preferential treatment of kin-minorities should therefore not touch upon areas demonstrably pre-empted by existing bilateral treaties, unless of course the home-State concerned had been consulted and had approved of this step or had implicitly – but unambiguously – accepted it, by not raising objections.

Similar considerations are valid in the case that a given area is not covered by specific rules of an existing treaty.

#### **c. The Principle of Friendly Neighbourly Relations**

The framework of bilateral treaties connecting Central and Eastern European States draws from the principle of good neighbourliness and holds it as the main purpose of the treaties themselves.

The obligation for States to work towards the achievement of friendly inter-state relations derives also from a more general principle; Article 2 of the Framework Convention promotes the principles of good neighbourliness, friendly relations and co-operation among States. Friendly inter-state relations are indeed nowadays unanimously considered as a precondition for peace and stability in Europe.

States should accordingly abstain from taking unilateral measures, which would risk compromising the climate of co-operation with other States.

The legislation under examination touches upon sensitive areas for the reasons analysed above. One specific aspect thereof raises issues that deserve close examination: the issuing by the kin-State of a document that proves that its holder belongs to the kin minority, and, in particular, the modalities of the issuing of the relevant documents.

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31 See article 26 of the 1969 Vienna Convention on the Law of Treaties.

32 It has to be stressed that the adoption of preferential treatment rules is not necessarily conditioned by the existence of a bilateral agreement between the States concerned. However, if such an agreement exists, the measures in question and the procedure of their application must be in conformity with that agreement.

33 See article 31 of the Vienna Convention, according to which ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose’.

This document, in its different forms (see above), has been justified by the States that have introduced it as a means to simplify of the administrative steps that the individual needs to take in order to have access to the benefits provided for by the legislation concerned.

To the extent that it allows easier access to these benefits, the Commission finds that this document can prove useful. However, it observes that in a number of countries this document has the characteristics of an identity document: it contains a photograph of its holder and all of his/her personal data. It makes reference to the national background of its holder. It is highly likely that the holders of these documents will use them as identity cards at least on the territory of the kin-State.

In such form, this document therefore creates a political bond between these foreigners and their kin-State. Such a bond has been an understandable cause of concern for the home-States, which, in the Commission's opinion, should have been consulted prior to the adoption of any measure aimed at creating the documents in question.

In order to be used solely as a tool of administrative simplification, the Commission considers that the document should be a mere proof of entitlement to the services provided for under a specified law or regulation. It should not aim at establishing a political bond between its holder and the kin-State and should not substitute for an identity document issued by the authorities of the home-State.

#### **d. The Respect of Human Rights and Fundamental Freedoms. The Prohibition of Discrimination**

States are bound to respect the international agreements on human rights to which they are parties. Accordingly, in exercising their powers, they must at all times respect human rights and fundamental freedoms. Amongst these, the prohibition of discrimination, provided for, *inter alia*, by the UN Charter, by the Universal Declaration of Human Rights<sup>34</sup>, by the International Covenant on Civil and Political rights<sup>35</sup> and by the Framework Convention<sup>36</sup>.

In particular, States that are parties to the European Convention on Human Rights (hereinafter 'the Convention' or ECHR) must secure the non-discriminatory enjoyment of the rights enshrined therein to everyone who is within their jurisdiction<sup>37</sup>. A State is held accountable under Article 1

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34 Article 7 of the Universal Declaration of Human Rights reads: 'All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against discrimination in violation of this Declaration and against any incitement to such discrimination'.

35 Article 26 ICCPR reads: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

36 Article 4 of the Framework Convention provides: '(1) The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited. (2) The Parties undertake to adopt, where necessary, adequate measures in order to promote, in all areas of economic, social, political and cultural life, full and effective equality between persons belonging to a national minority and those belonging to the majority. In this respect, they shall take due account of the specific conditions of the persons belonging to national minorities. (3) The measures adopted in accordance with paragraph 2 shall not be considered to be an act of discrimination'.

37 See Article 1 and Article 14 ECHR. The latter reads as follows: 'The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. If Article 14 prohibits discrimination only in respect of the rights and freedoms set out elsewhere in the Convention, a Protocol thereto, the twelfth, containing a general clause against discrimination, has been drafted and opened to signature on 4 November 2000.



of the Convention also for its acts with extraterritorial effects: all the individuals affected thereby, be they foreigners or nationals, may fall within the jurisdiction of that State.

The legislation and regulations that are the object of the present study aim at conferring a preferential treatment to certain individuals, i.e. foreign citizens with a specific national background. They thus create a difference in treatment (between these individuals and the citizens of the kin-State; between them and the other citizens of the home-State; between them and foreigners belonging to other minorities), which could constitute discrimination – based on essentially ethnic reasons – and be in breach of the principle of non-discrimination outlined above.

The discrimination must be invoked in relation to a right guaranteed by the Convention. Not all the benefits granted by the legislation under consideration refer, at least *prima facie*, to guaranteed rights. Some ECHR provisions could be pertinent: *in primis* Article 2 of the First Protocol; possibly, Article 8 of the Convention and Article 1 of the First Protocol.

The Strasbourg established case-law<sup>38</sup> shows that different treatment of persons in similar situations<sup>39</sup> is not always forbidden: this is not the case when the difference in treatment can be objectively and reasonably justified having regard to the applicable margin of appreciation. The existence of a justification must be assessed in relation to the aims pursued (which must be legitimate) and the effects that the measure in question causes, regard being had to the general principles prevailing in democratic societies (there must be a reasonable relation of proportionality between the legitimate aim pursued and the means employed to obtain it).

Article 14 prohibits discrimination between individuals based on their personal status; it contains an open-ended list of examples of banned grounds for discrimination, which includes language, religion, and national origin. As regards the basis for the difference in treatment under the laws and regulations in question, in the Commission's opinion the circumstance that part of the population is given a less favourable treatment on the basis of their not belonging to a specific ethnic group is not, of itself, discriminatory, nor contrary to the principles of international law<sup>40</sup>. Indeed, the ethnic targeting is commonly done, for example, in laws on citizenship<sup>41</sup>. The acceptability of this criterion will depend of course on the aim pursued.

In this respect, the Commission finds it appropriate to distinguish, as regards the nature of the benefits granted by the legislation in question, between those relating to education and culture and the others.

Insofar as the first are concerned, the differential treatment they engender may be justified by the legitimate aim of fostering the cultural links of the targeted population with population of the kin-State. However, in order to be acceptable, the preferences accorded must be genuinely linked with the culture of the State, and proportionate. In the Commission's view, for instance,

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38 See the leading case on the meaning of 'discrimination' within the meaning of Article 14 of the Convention: European Court of Human Rights, Belgian linguistics judgment of 9 February 1967, Series A, no. 6.

39 A claim of discrimination is meaningful only where the applicant seeks to compare his situation to that of those who are in the same or analogous, or 'relevantly similar' situation.

40 See, in particular, paragraph 3 of Article 4 of the Framework Convention.

41 See Article 116 of the German Grundgesetz, which provides: 'Unless otherwise provided by Statute, a German within the meaning of this Constitution is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendent of such person. (2) Former German citizens who, between 30 January 1933 and 8 May 1945 were deprived of their citizenship on political, racial or religious grounds, and their descendants, are re-granted German citizenship on application. They are considered as not having been deprived of their German citizenship where they have established their residence in Germany after 8 May 1945 and have not expressed a contrary intention'.

the justification of a grant of educational benefits on the basis of purely ethnic criteria, independent of the nature of the studies pursued by the individual in question, would not be straightforward.

In fields other than education and culture, the Commission considers that preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of maintaining the links with the kin-States and to be proportionate to that aim (for example, when the preference concerns access to benefits which are at any rate available to other foreign citizens who do not have the national background of the kin-State).

### **E. Conclusions**

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

The Commission considers, however, that respect for the existing framework of minority protection must be held as a priority. In this field, multilateral and bilateral treaties have been stipulated under the umbrella of European initiatives. The effectiveness of the treaty approach could be undermined, if these treaties were not interpreted and implemented in good faith in the light of the principle of good neighbourly relations between States.

The adoption by States of unilateral measures granting benefits to the persons belonging to their kin-minorities, which in the Commission's opinion does not have sufficient *diuturnitas* to have become an international custom, is only legitimate if the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected.

Respect for these principles would seem to require that certain features of the measures in question be respected, in particular:

- A State may issue acts concerning foreign citizens inasmuch as the effects of these acts are to take place within its borders.

- When these acts aim at deploying their effects on foreign citizens abroad, in fields that are not covered by treaties or international customs allowing the kin-State to assume the consent of the relevant home-states, such consent should be sought prior to the implementation of any measure.

- No quasi-official function may be assigned by a State to non-governmental associations registered in another State. Any form of certification *in situ* should be obtained through the consular authorities within the limits of their commonly accepted attributions. The laws or regulations in question should preferably list the exact criteria for falling within their scope of application. Associations could provide information concerning these criteria in the absence of formal supporting documents.

- Unilateral measures on the preferential treatment of kin-minorities should not touch upon areas demonstrably pre-empted by bilateral treaties without the express consent or the implicit but unambiguous acceptance of the home-State. In case of disputes on the implementation or interpretation of bilateral treaties, all the existing procedures for settling the dispute must be used in good faith, and such unilateral measures can only be taken by the kin-State if and after these procedures prove ineffective.

- An administrative document issued by the kin-State may only certify the entitlement of its bearer to the benefits provided for under the applicable laws and regulations.

-Preferential treatment may be granted to persons belonging to kin-minorities in the fields of education and culture, insofar as it pursues the legitimate aim of fostering cultural links and is proportionate to that aim.

-Preferential treatment can not be granted in fields other than education and culture, save in exceptional cases and if it is shown to pursue a legitimate aim and to be proportionate to that aim.

#### **14. Council of Europe Parliamentary Assembly: Preferential Treatment of National Minorities by the Kin-state: The Case of the Hungarian Law of 19 June 2001 on Hungarians Living in Neighbouring Countries ('Magyars') [Doc. 9813]**

(22 May 2003)

##### **Opinion**

Political Affairs Committee

Rapporteur: Mr. Latchezar Toshev, Bulgaria, Group of the European People's Party

##### **1. Conclusions of the Committee**

1. The Political Affairs Committee supports on the whole the conclusions of the report by the Committee on Legal Affairs and Human Rights concerning the situation which has arisen following the adoption, in Hungary, of the Law on Hungarians living in neighbouring countries.

2. It is fully aware of the specific historical circumstances responsible for the presence of the large Hungarian minorities in the neighbouring countries to Hungary created by the break-up of the former Austro-Hungarian Empire.

3. It also understands the wish to preserve the linguistic and cultural identity of these minorities and to foster their social and economic well-being and their links with the kin-state which guided the Hungarian authorities in enacting this law.

4. At the same time, it notes that the adoption of the law has aroused concerns and negative reactions by Romania and Slovakia.

5. It further notes that many Council of Europe member countries have already completed, or are engaged in, the enactment of laws securing preferential treatment to foreign citizens who have ethnic, linguistic or cultural bonds of kinship with them.

6. The Committee therefore deems it most important that the Council of Europe should lay down the common principles to be observed in this area. It accordingly welcomes the Venice Commission's report which establishes the groundwork of such principles.

7. It wholeheartedly endorses the assertion that the prime responsibility for protecting the minorities rests with the home-states. Likewise, the protection of persons belonging to the national minorities is a subject of the international community's concern. In this respect, the international community is expected to act, whenever necessary, in a multilateral way and by such measures which should not substitute or harm the citizenship relations between the members of national minorities and their home-states.

8. The kin-states can contribute to this by fulfilling certain conditions, the first of which is the acceptance of their contribution by the home-state. Such assistance should preserve the balance between protection of the minority's identity and the sovereignty of the home-state, and should in no circumstances be intended to weaken the minority's links with its state, much less fuel separatist sentiments.

9. In several Council of Europe countries, the issue of national minorities assumes an extremely delicate quality and readily lends itself to political exploitation or even to abuse for nationalistic and populist ends. It thus demands exemplary prudence on the part of political leaders.

10. The Committee regrets that the Law of 19 June 2001 was adopted without sufficient acceptance by the governments of the countries whose citizens are concerned by the Law in question of extra-territorial measures to be applied to their territories and joins in the invitation to the Hungarian Government and Parliament to continue dialogue with the states concerned in order to find

mutually acceptable solutions and to amend the Law in a manner acknowledging the criticisms of the international organisations.

11. The Committee welcomes the commitment by the Hungarian authorities to amend the Law in accordance with the recommendations of the Venice Commission. It regrets, however, that this commitment has not been implemented so far.

12. The Committee welcomes the memorandum of understanding between Hungary and Romania on this issue as it is a positive step towards the desirable bilateral approach in this respect.

## **Proposals for Amendments to the Draft Resolution**

### **Amendment 1**

Replace paragraph 8 with the following text:

‘On the basis of the aforementioned report by the Venice Commission, the possibility for States to adopt unilateral measures on the protection of their kin-minorities, irrespective of whether they live in neighbouring or in other countries, is only conditional upon the respect of the following principles: territorial sovereignty, *pacta sunt servanda*, friendly relations amongst states and respect for human rights and fundamental freedoms – in particular the prohibition of discrimination. States should abstain from taking unilateral measures, which would risk compromising the climate of co-operation with other states’.

### **Amendment 2**

Delete paragraph 10, with the exception of the last sentence.

## **2. Explanatory Memorandum by the Rapporteur**

### **Introduction**

1. On 25 and 26 November 2002, I visited Budapest in connection with the drafting of this Opinion. Since the report for which a reference was made to the Committee on Legal Affairs and Human Rights (Rapporteur M. Jürgens) had not yet been adopted, the purpose of my contacts was to examine the situation of the minorities in Hungary and that of the ethnic Hungarians living in the neighbouring countries, and to form an idea of the circumstances which prompted the Hungarian authorities to enact the controversial law at issue, as well as its implications. The programme of the visit is set out in Appendix I.

2. On 3 March 2003 the Committee on Legal Affairs and Human Rights adopted the report by Mr. Jürgens (Doc. 9744).

3. On 5 March 2003 the Political Affairs Committee discussed the preliminary draft opinion that I proposed and postponed its adoption to enable it to take account of the final version of the report by the Committee on Legal Affairs and Human Rights. On that occasion the representatives of Romania and Slovakia regretted that their views had not been taken into account.

4. On 11 March 2003 the Head of the Romanian Delegation invited me to visit Bucharest. The visit took place on 20 and 21 March 2003 and the programme is set out in Appendix II.

5. On 9 April 2003 the Head of the Slovakian Delegation in turn invited me to visit Bratislava before the meeting of the Political Affairs Committee scheduled for 29 April 2003. However, due to the lack of time and bearing in mind the need to make the draft Opinion available to the members of the Political Affairs Committee at least one week ahead of the meeting, I was unable to honour this kind invitation.

6. My intention is not to produce a counter-report designed to compete with the sound and indeed remarkable work done by the Committee on Legal Affairs and Human Rights, but to help reconcile the parties on the basis of a mutually acceptable compromise, respecting the dignity and promoting a good will of all parties involved in this case in the European spirit of co-operation.

### **Background to the Problem**

7. As a result of the redrawing of frontiers at the end of the First World War (Treaty of Trianon), territories with significant Hungarian population became parts of the neighbouring States. While being full citizens of these states, the descendants of the population in question retain the language, culture and traditions of their old kin-state. The number of citizens of Hungarian

origin is particularly large in Romania (more than 1.5 million) and in Slovakia (500 000, constituting 10% of the population).

8. The Hungarian minorities are well organised socially and politically and play a significant part in their national political life (several ministers in Slovakia's present cabinet belong to the Hungarian Party). However, since the reforms of the 1990s, many Hungarians abroad contemplate leaving their countries to settle in Hungary, and this process is likely to grow as the country's accession to the EU approaches. This trend, however, is not valid relating to the Slovak Republic.

9. The Hungarian authorities have therefore embarked on a policy of support to the Hungarian minorities living in the neighbouring countries, with the dual goal of fostering their links and the sense of belonging to the 'Hungarian nation' and at the same time ensuring that they 'feel happy where they live' without wishing to move to Hungary. The law of 19 June 2001 introduced a series of economic, social, cultural and educational measures from which Hungarians living in the neighbouring countries to Hungary (Austria excepted) may benefit provided that their status as such is recognised.

10 Although this law does not constitute (in the region any more than elsewhere) a novel instance of preferential treatment granted by a state to individuals who have links of 'kinship', it has aroused a great deal of anxiety in Romania and Slovakia where the Hungarian authorities have been suspected of interference in domestic affairs and of wishing to recreate Hungary within its former borders.

11. As the minorities question remains too sensitive throughout South-East Europe not to be exploited for political gains, the nationalist parties in Romania and Slovakia could hardly hope for more in the run-up to elections.

12. The moderate political forces of these two countries have likewise taken the field. Romanian members (Mr. Prisacaru and others) tabled in the Assembly a motion for a recommendation on *the Law on Hungarians living in neighbouring countries, passed on 19 June 2001 by the Hungarian Parliament* (Doc. 9153). Concurrently, a motion for a recommendation seeking a general approach to the issue was tabled by Mr. van der Linden (Doc. 9163, motion for a recommendation on *Trans-frontier co-operation in preserving the identity of national minorities*).

13. On 21 June 2001 the Romanian Prime Minister, Mr. Nastase, requested the Venice Commission to examine the conformity of the law in question with the provisions of international law. On 2 July 2001, the Hungarian Government, for its part, asked the Venice Commission to make a comparative study of European legislation on the subject.

14. On 20 October 2001 the Venice Commission adopted a report on *the preferential treatment of national minorities by their kin-state*, setting out the basic principles of international law which should guide states when they wish to assist their kin-minorities living abroad. The rapporteur shares the view of the Committee on Legal Affairs and Human Rights that some of these principles were not complied with when Hungary adopted the law in question.

15. The matter was also laid before the OSCE High Commissioner for Minorities. On 26 October 2001 he pointed out unilateral measures taken by states to protect national minorities living outside their jurisdiction could cause tension and should be avoided.

16. In its *2001 regular report on Hungary's progress towards accession*, published on 13 November 2001, the European Commission considered that some provisions of the Hungarian law in question conflicted with the conception of the protection of minorities prevailing in Europe.

17. In the face of international criticism, the Hungarian authorities embarked on consultations with neighbouring states on the implementation of the law. On 22 December 2001 the Hungarian and Romanian Governments signed a memorandum of understanding establishing a system for derogating from the implementation of the law in respect of Romanian citizens, thus meeting the immediate concerns of the Romanian side. In addition, the Hungarian Government undertook to revise the law and make the necessary amendments to it no later than six months after the signature of the memorandum of agreement.

18. Unlike the talks between Romania and Hungary, the negotiations between Slovakia and Hungary did not bring the parties' positions closer together. However, the memorandum of under-

standing between Hungary and Romania is a positive step towards the desirable bilateral approach in this respect.

19. The new Hungarian Government formed by Mr. Medgyessy as a result of the elections held in April 2002 has acknowledged the expediency of amending the law so as to reformulate those of its elements that alarm the neighbouring states while preserving its spirit and the machinery put in place. All the political parties in the country have agreed that they would support amendments proposed by the government which have also received the approval of the 'standing committee' of the Hungarian parties (including those in other countries). To date, however, these amendments have still not been adopted.

## **Positions of the Parties**

### **a. Hungary**

20. At the time of my visit, most of my Hungarian informants seemed to agree that the law would have to be amended to comply with the principles laid down by the Venice Commission. However, they emphasised the soundness of the law, its appeal to the Hungarian minorities abroad, and their firm resolve to preserve its essentials.

21. Regarding the draft report by the Rapporteur for the Committee on Legal Affairs and Human Rights, the Hungarian side has expressed many criticisms, the substance of which can be summed up as follows:

- The report deals expressly with Hungary's case and thus gives the country bad publicity, whereas the issue is of a general nature and requires European standards to be laid down regarding it. The report by the Venice Commission, which the Hungarian talking-partners have said they accept in its entirety, analyses the problem of preferential treatment in a number of European countries and, in their view, should form the basis for such European standards. The report by Mr. Jürgens relies on the Venice Commission's document but uses it only in part and above all with partiality;

- The stance adopted in the report is allegedly contrary to the spirit of Assembly Recommendation 1201 on *an additional protocol on the rights of national minorities to the European Convention on Human Rights*, and in effect constitutes a disavowal of it;

- Upon the adoption of the amendments to the law and the resultant elimination of the causes of bilateral tensions, the rapport would merely be a critical study of past errors (which they were ready to acknowledge) and would become devoid of immediacy or even purpose;

- At the procedural level, Mr. Prisacaru's proposal was referred by the Bureau to the Standing Committee for discussion, and Mr. van der Linden's for a plenary debate. Yet the Legal Affairs Committee's Rapporteur would seem to have placed his own construction on the Bureau's decisions by selecting for his report the subject-matter of the first proposal while at the same time presenting it for discussion in plenary session. To submit to public opinion a dispute involving several states would be contrary to the spirit of the Assembly, according to the Hungarians.

22. However, it would seem that the final version of Mr. Jürgens' report amounts to a compromise acceptable to all the interested parties. The Committee on Legal Affairs and Human Rights decided that Mr. Jürgens' report should deal only with the Hungarian Law and not to be extended to cover wider aspects.

### **b. Romania**

23. The Romanian side stressed the excellent bilateral relations between Romania and Hungary, notably regarding the protection of minorities. These relations are based on sound legal foundations and effective machinery – the joint intergovernmental commission which meets regularly to discuss all the practical aspects of bilateral relations. It is all the more regrettable that Hungary did not consider it advisable to make use of this body to consult its Romanian partners before adopting the controversial law.

24. Romania accepts the Hungarian authorities' wish to assist their kin-minorities, but points out that this assistance must be provided in a spirit of respect for the jurisdiction of the home-state, bilateral agreements, European rules (including the Framework Convention for the Protection of National Minorities) and the principles laid down by the Venice Commission. All unilateral or extraterritorial action must be ruled out.

25. Although the memorandum of understanding alleviated a few concerns, Romania still takes the view that only a revision of the law with a view to repealing a number of unacceptable provisions (particularly extraterritoriality, discriminatory privileges, provisions likely to fuel nationalism and social and economic measures) will settle the dispute. This revision must take place after genuine consultations between the interested parties, rather than on a unilateral basis.

26. The Romanian side considers that the draft resolution adopted by the Committee on Legal Affairs and Human Rights is an acceptable compromise for all the parties concerned and that it should not be amended further in case this disrupts the balance achieved. It is aware that amending the law remains a delicate issue for the Hungarian authorities, but it is convinced that the issues addressed in Mr. Jürgens' report are of European significance and insists that the report be discussed at the Assembly session in June 2003.

### **c. Slovakia**

27. I wish to thank the Slovakian delegation for inviting me to visit Bratislava while preparing this opinion and I regret that I was unable to comply with this invitation on account of my timetable. I therefore refer to a memorandum provided by the Slovakian Permanent Delegation to the Council of Europe to present the Slovakian viewpoint on the law in question.

28. Slovakia considers that all the provisions of the law which are of an extraterritorial nature are unacceptable and contrary to international law, and insists that they be repealed. By and large, the implementation of the law must be confined to Hungarian territory, except as regards the privileges granted on the territory of foreign states with their prior agreement. Such privileges must meet the criteria of international law, ie concern only the cultural and linguistic fields and apply on a non-discriminatory basis. Social and economic advantages must be ruled out.

29. The Slovakian side has some objections to the tasks assigned by the law, for the purposes of its implementation, to Hungarian organisations representing minorities. It is also of the opinion that the form and content of the 'Hungarian certificate' may cause confusion and should be altered so that the certificate does not resemble an identity document.

30. In Slovakia's view, a number of expressions used in the law such as 'the Hungarian nation as a whole' and 'the Hungarian national community' may give rise to misinterpretation and should be amended. The Slovaks also point out that the term 'nationality' used in the law to mean national identity is equivalent, in international law to the term 'citizenship'.

31. Slovakia has specific objections to the extension of the law's privileges to non-Hungarian family members, to the measures to promote rural tourism and assist disadvantaged areas, to the travel facilities and to a number of other provisions.

32. The Slovakian Delegation likewise regards the draft resolution adopted by the Committee on Legal Affairs and Human Rights as an acceptable compromise and insists that the report be presented at the Assembly's plenary session in June 2003.

### **Position of the Rapporteur**

33. The Hungarian case is specific but not an isolated one in Europe. Many European countries, including the neighbouring states which are the most critical of Hungary, confer privileged treatment on 'their' kin-minorities abroad. The Assembly should make a political reading of the Venice Commission's report and draw up a statement of guiding principles to which states would have to adhere.

34. The prime responsibility for the protection of minorities rests with the home-states. Kin-states can contribute to it by fulfilling certain conditions, the first of which is that the home-state does not object to their contribution. This assistance should preserve the balance between protection of the minority's identity and the sovereignty of the home-state, and should in

no circumstances be intended to weaken the minority's links with its state, much less fuel separatist sentiments.

35. In several Council of Europe countries, the issue of national minorities assumes an extremely delicate quality, and readily lends itself to political exploitation or even to abuse for nationalistic and populist ends. It thus demands exemplary prudence on the part of political leaders.

36. It is regrettable that the enactment of the Law of 19 June 2001 was effected, forgoing prior consultation with the governments of the countries whose citizens are concerned by the law, and has thus created problems in relations between Council of Europe member states.

37. The solution should be sought through the channel of dialogue and conciliation between the authorities of the states concerned, following which the Hungarian Government and Parliament should amend the law in line with the report of Venice Commission, and in a manner acknowledging the criticisms of their European partners and the international organisations.

38. It will be noted that to date there is no common European definition of the concept of 'nation', which might often create misunderstandings.

### **15. Council of Europe Parliamentary Assembly**

#### **Resolution 1335 (2003): Preferential Treatment of National Minorities by the Kin-state: The Case of the Hungarian Law on Hungarians Living in Neighbouring Countries ('Magyars') of 19 June 2001**

**(25 June 2003)**

1. The Parliamentary Assembly, in principle, welcomes assistance given by kin-states to their kin-minorities in other states in order to help these kin-minorities to preserve their cultural, linguistic and ethnic identity. However, the Assembly wishes to stress that such kin-states must be careful that the form and substance of the assistance given are also accepted by the states of which the members of the kin-minorities are citizens, and to which the basic rules contained in the Framework Convention on National Minorities (ETS No. 157) are applicable.

2. The Assembly considers that responsibility for minority protection lies primarily with the home states. It stipulates that the existing multilateral and bilateral framework of minority protection, including European norms, must be held as a priority. Kin-states can also play a legitimate and important role in the protection and preservation of kin-minorities, aimed at ensuring that their genuine linguistic and cultural links remain strong. The emergence of new and original forms of minority protection, particularly by their kin-states, constitutes a positive trend in so far as they can contribute to the realisation of this goal within the framework of international co-operation.

3. On 19 June 2001, the Hungarian Parliament passed the Law on Hungarians Living in Neighbouring Countries which aims to give such assistance, in this case to people of Hungarian identity who are citizens of neighbouring countries and who consider themselves as persons belonging to the Hungarian 'national' cultural and linguistic community.

4. Under the law, preferential treatment is granted to citizens of Magyar 'nationality' living in the following neighbouring countries: Croatia, Serbia and Montenegro, Romania, Slovenia, Slovakia and Ukraine. Magyars living in Austria are excluded from the scope of the law.

5. Several of these member states of the Council of Europe have previously adopted legislation based on the principle of preferential treatment of national minorities by the kin-state.

6. On 22 December 2001, in light of the report by the European Commission for Democracy through Law (Venice Commission) on the preferential treatment of national minorities by the kin-state, the governments of Hungary and Romania signed a memorandum of understanding which – *inter alia* – extends the conditions and treatment applicable in Hungary in respect of employment to all Romanian citizens, irrespective of their 'national' identity.

7. Preferential treatment is subject to possession of a certificate which can be issued only by a Hungarian public authority, as concluded in the opinion of the Venice Commission.

8. On the basis of the aforementioned report by the Venice Commission, the possibility for states to adopt unilateral measures on the protection of their kin-minorities abroad, irrespective of



whether they live in neighbouring or other countries, is conditional upon the respect of the following principles: territorial sovereignty, *pacta sunt servanda*, friendly relations amongst states and respect for human rights and fundamental freedoms – in particular the prohibition of discrimination. States should abstain from taking unilateral measures, which would risk compromising the climate of co-operation with other states.

9. The Assembly notes that some neighbouring countries have criticised the Hungarian law for failing to respect these principles. Their main objection to it concerns the unilateral approach adopted.

10. Furthermore, there is a feeling that in these neighbouring countries the definition of the concept of ‘nation’ in the preamble to the law could under certain circumstances be interpreted – though this interpretation is not correct – as non-acceptance of the state borders which divide the members of the ‘nation’, notwithstanding the fact that Hungary has ratified several multi- and bilateral instruments containing the principle of respect for the territorial integrity of states, in particular the basic treaties which have entered into force between Hungary and Romania and Slovakia. The Assembly notes that up until now there is no common European legal definition of the concept of ‘nation’.

11. The Assembly is convinced that the other points at issue, namely the inclusion in the scope of the law of family members who are not of Magyar identity, the exclusion of other citizens from neighbouring countries from access to economic and social privileges, and the role played by minority organisations in implementing the law, could possibly have been accepted or modified had they been preceded by bilateral discussions and agreements, such as the Memorandum of Understanding between Hungary and Romania.

12. The Assembly refers also to the statement made by the Organisation for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities on 26 October 2001, in which he expressed his general concern that laws such as this Hungarian law called into question earlier advances in the protection of minorities and allowed for discriminatory treatment of the majority in that state – a situation that could have a negative effect on the position of the minority itself, and on inter-state relations across Europe. The Assembly welcomes several consultations held between the Hungarian Government and the OSCE High Commissioner on National Minorities.

13. The Assembly notes with satisfaction that on 23 June 2003, the Parliament of Hungary amended the law in question on several points, thus responding in part to the critical comments that have been made; these amendments are, however, not based on bilateral agreements with the neighbouring countries concerned.

14. The Assembly therefore urges the Government and Parliament of Hungary to find ways to make further amendments to the Hungarian Law on Hungarians Living in Neighbouring Countries of 19 June 2001 in such a way that it is based on bilateral discussions and agreements with the neighbouring countries and meets the proposals of the Venice Commission and the criticism of the existing law by the OSCE High Commissioner on National Minorities and the Parliamentary Assembly itself. Furthermore, the Assembly calls on all governments concerned to enter into or to continue substantial negotiations.

## **16. Explanatory Memorandum to Resolution 1335 by Erik Jürgens**

**(2003)**

### **A. Introduction**

1. The motion for resolution was tabled on 28 June 2001 on the law regarding the (ethnic) Hungarians (whom I will consistently call ‘Magyars’ in this report, because the noun ‘Hungarian’ in English and French means ‘citizen of Hungary’, and the adjective means ‘pertaining to the state of Hungary’) living in neighbouring countries, adopted on 19 June 2001 (hereafter ‘the Law’) (see Appendix I) by the Hungarian Parliament.

2. This motion, tabled by Mr Prisacaru and others (Doc. 9153), and the motion for a resolution of 3 July 2001 on trans-frontier co-operation in preserving the identity of national minorities, tabled by Mr Van der Linden and others (Doc. 9163), both, under different titles, asked the Assembly to pronounce itself on trans-frontier cooperation preserving the identity of national minorities in general, and the Hungarian Law on Magyar minorities in neighbouring states in particular. For the title of my report I have adopted the more general phrasing used by the Venice Commission. This enables me to take the report of the Venice Commission of that title of 22 October 2001 (168/2001) as my basis, and to then apply it to the case of the Hungarian law, a law to which at least two neighbouring states, Romania and Slovakia, have taken exception. I first visited Budapest on 11-12 March 2002 and Bratislava on 12-13 March 2002. At the request of the Legal Committee – which had been confronted with statements that amendments to the law were being prepared – I again visited Bratislava and Budapest, and now also Bucharest, on 4-6 December 2002. The programmes of these visits are reproduced in Appendix II.
3. The report of the Venice Commission is reproduced in Appendix IV to this report. It would be doubling the excellent work done by the Venice Commission if I were to again explain which principles of international public law and custom apply to the relation between neighbouring states, when a minority in one state is a majority in the other. The Venice Commission has used the term ‘national minority’ as it is known and used especially in the Framework Convention of that name. It has coined the term ‘kin-state’, so as to indicate the country where the identity of that national minority is that of the dominant culture. The word ‘kin’ is clearly more neutral than the word ‘mother-state’ which is common in some texts, but suggests wrongly that such a state has formal relations with citizens of other states.
4. It is important to note that there are big differences in the way the word ‘nation’ is employed in different parts of Europe and in different European languages. The word nation in many countries and languages denotes a state, or the totality of the citizens of a state. The word nationality is used as a synonym for ‘citizenship of a state’.
5. In many countries the word nation is however used in a completely different way. The original meaning of the word is derived from the Latin word ‘nation’, which means ‘the entity into which one is born’. Historically the word was used to denote groups of which the members identify themselves as culturally, ethnically or linguistically as belonging to that group (i.e. the Franks, the Germans, the Italians). This was in an era when states, as we know them since the 19th and 20th century, did not yet exist. There existed only territories which were bound together by the fact that they had the same lord, prince or king. The members of a nation were often dispersed among a plurality of territories. The German ‘empire’ before 1806, the Holy Roman Empire of the German Nation (das Heilige Römische Reich Deutscher Nation), was an expression of this situation. The drive that led to the unification of Germany, and of Italy, in 1870/1 was based on this concept of nation. It has an old tradition and is a reality in many parts of Europe. In the 19th and in the first half of the 20th century, especially in Western Europe, governments tried to make the ‘nation’ coincide with the state, hence the fact that these words have become synonymous. In English and French, the official languages of the Council of Europe, the word ‘nation’ has now to be put between inverted commas if the old meaning is meant. Hence the linguistic problems involved when writing on this subject!
6. There are, therefore, situations where the existence of different ‘nations’ or ‘nationalities’ within a state is recognized as a positive contribution to that society (Spain and Russia for example). Then again, some ‘nations’ which lived together within the same borders were broken up during the 19th and 20th centuries, but the feeling of ‘nationhood’ has remained strong, even if the members of that nation regard themselves as loyal citizens of the states in which they are a ‘national’ minority, i.e. a minority composed of a different ‘nation’ than that of the majority (such as the Magyar ‘nation’). This report deals with a specific case in this category. Thirdly there is a group of states that do not give any legal effect to the older concept of nationhood. Indeed, they formally do not even know this concept (such as France, Britain, the Netherlands).
7. The feeling of identity as a member of a ‘nation’, as opposed to identity as citizen of a state, is a normal and wide spread phenomenon in Europe. In many countries it has found recognition in

the constitution of the state and is seen as a positive contribution to a pluri-cultural and tolerant society. It can however also be the cause of fundamental conflicts and frustrations within a state if insufficiently recognized in constitutions of states, or if exacerbated by populism and nationalistic rhetoric (here I use the word nationalistic in both the older and the newer the new meaning!). This can also be the case if the members of a 'nation' live separated by state boundaries and are the citizens of different states. Because of this, kin-states need to be careful in which way they lend cultural and linguistic support to kin-minorities in neighbouring states. This should preferably be done on the basis of bi-lateral agreements, and not on the basis of unilateral acts.

8. The terminology used to cover the phenomenon of ethnic, linguistic and cultural ties between groups of citizens within separate states can therefore be very important. The use of the word 'nation' in official documents of kin-states especially, such as constitutions or laws, should be carefully screened so as to avoid possibly wrong impression or possible misuse.

9. The terminology 'kin minority' and 'kin-state' is more neutral. It does no more than state a fact, i.e. that of ethnic, linguistic and cultural ties. It does not evoke deeper-lying, historically or politically motivated feelings that are often associated with the word 'nation', and with the political aim of creating a 'nation state' within the boundaries of which the whole nation is brought together, as happened in Germany and Italy in the 1870's – but which is not consistent with modern ideas about relations between civilized states.

10. If the terminology 'kin-state' and 'kin minority' is used consistently, the policy of a kin-state that aims at no more than helping a kin minority to preserve its identity can more easily be seen for what it is, i.e. not motivated by deeper lying nationalistic or irredentist objectives.

11. The Venice Commission – after giving an historical background – describes the obligation on states to approach minority protection in a bilateral way. It also analyses the present domestic legislation of some European states as to protection of kin-minorities. In chapter D, it then formulates the four principles on which such domestic legislation should be based, i.e.:

- a. territorial sovereignty and non-intervention
- b. *pacta sunt servanda*
- c. friendly relations with neighbouring states
- d. respect of human rights, especially non-discrimination.

12. The Venice Commission argues these principles forcefully, and ends its report by enumerating six criteria along which domestic legislation about kin-minorities in another state should be measured.

13. Without committing myself to exact wording, or to the supposition that these are the only possible criteria, I can concur with these conclusions. Thus, for the general analysis I may refer to the report of the Venice Commission itself. This allows me, in this report, to concentrate on the following question: Is the Hungarian Law of 19 June 2001 compatible with the general principles and with the criteria outlined by the Venice Commission?

## **B. Points of Criticism**

14. It is clear that if there are strong protests from neighbouring states, there must be a problem with at least the principle mentioned under c) above. I have thus chosen to list the complaints made by Slovakia and Romania, under the surmise that probably this list will cover all the elements of the Hungarian law which could possibly not measure up to the criteria formulated by the Venice Commission.

15. These complaints are:

- a. Existing bi-lateral cooperation agreements have not been utilized, and the law has been unilaterally proclaimed by the kin-state.
- b. The concept of 'nation' in the preamble of the law is based on too broad a definition of that term.
- c. The reduction of the application of the law to kin-minorities in neighbouring countries (with the exception of Austria), and therefore not to all Magyars suggests deeper lying motives of territorial aggrandizement of the kin-state.

- d. Spouses and children of members of the kin minority who have no Magyar kinship are included.
- e. Privileges in the social and economic field (working permits, participation in social security benefits) within Hungary for the kin minority are discriminatory, because other citizens of the neighbouring country, not belonging to the kin minority are excluded.
- f. In neighbouring states organisations of kin-minorities are, by the law of the kin-state, involved – thus giving an unacceptable extra-territorial element in the law of the kin-state.

### **C. Comments on the Points of Criticism**

#### **C-a. Unilateral Procedures**

16. Basically this is the strongest point of criticism. It is based on the principle of good neighbourly relations. In theory the other five points may have been acceptable, with modifications, if they had been the result of bi-lateral discussions and agreements. This is especially the case if these had been held within the framework of existing treaties, such as the ‘Treaty on Good Neighbourly Relations and Friendly Cooperation’ of 1995 agreed upon between Hungary and Slovakia. Spokesmen on the Hungarian side recalled the position of the Venice Commission that – when a kin-state takes unilateral measures on the preferential treatment of its kin-minorities in a particular home-state, the latter may presume the consent of the said kin-states to similar measures concerning its citizens. My comment was that this of course only holds until home-states have taken a contrary position.

17. When I publicly commented on the Hungarian Law during my visit to Budapest on 12 March that I regard the non-bilateral way in which the law had been enacted to be ‘unwise’, it is clear that I meant that much of the present conflict about the law could have been prevented.

18. The Memorandum of Understanding signed between Hungary and Romania on 23 December 2001 (see Appendix V) has belatedly but wisely tried to correct this procedure. The Memorandum in fact accepts that the points of criticism under the points d) to f) above should lead to some sort of correction of the Law. My Hungarian contacts differed of opinion as to how these corrections would come about. In fact, as of yet, they have not led to changes in the law, only to rulings that bring the implementation of the law into conformity with the Memorandum of Understanding. Besides this, the Memorandum of Understanding was concluded already year ago, and also no such agreement with Slovakia has been made.

#### **C-b. The Concept of ‘Nation’**

19. As described above, the concept of ‘nation’ can in its consequences sometimes be positive and sometimes relatively innocuous. But it can on the other side carry a suggestion of non-acceptation of those state borders which in fact divide the members of the ‘nation’. This suggestion can have a negative effect if it causes unrest in the states in which the kin-minorities live, negative also for the position in that state of the kin-minorities concerned. Thus the Law provoked reactions in Slovakia during March 2002 directed against the now entrenched position of the Magyar minority in Slovakia. This works clearly to the detriment of that minority and to harmonious relations within the state.

20. This is the reason why the first paragraph in the Preamble of the Law is in my view hardly reassuring:

‘In order to ensure that Hungarians living in neighbouring countries form part of the Hungarian nation as a whole, and to promote and preserve their well-being and awareness of national identity within their home country ...’.

21. This part of the Preamble seems to be in contradiction with other parts of the Preamble which rightly stress rules of international law and of European integration. Besides, the membership of the Magyar ‘nation’ as a whole does not restrict itself to inhabitants of Hungary and its neighbouring states.

22. The Council of Europe should in my view take a further look at the concept of ‘nation’ as it is employed in many parts of Europe on the basis of traditions that precede the 19th century concept of the nation-state. The Council of Europe, and public international law in general, is based on

the concept of 'state' and 'citizenship'. This leaves no room for the concept of 'nation'. This was done on purpose after World War II, because nationalist ideologies were root causes of that war (nationalist here used both in the sense of excessive state patriotism, and in the sense of proclaiming one's own 'nation' to be superior). Where claims are made on the citizens of other states by virtually 'enrolling' them as members of that 'nation' which the kin-state seeks to bring together and to represent, this nation-concept which is too strong could endanger the traditions of the Council of Europe.

23. Thus the Council of Europe should be willing to speak out against such misuse of the concept of nationhood. The position of the Council of Europe in favour of the protection of minorities has as its corollary the rejection of forms of support to kin-minorities that are in fact (disguised) claims to territories outside the kin-state where the kin-minorities are a majority.

24. On the other hand we have seen that the concept of 'nation' can also have very positive elements, which in the present tradition of the Council of Europe are maybe insufficiently recognised. We do not have to abide by the concepts created in the past that now do not – in a Europe united by the principles of the Council of Europe – always fit into the consciousness of the peoples of Europe and into the *de facto* situation in some parts of Europe. In a paper for the Centre for Russian and East European Studies of the University of Birmingham (United Kingdom), Ms Brigid Fowler argues that 'in a broad European context ... notions and practices of citizenship, sovereignty and territoriality are in a state of flux... The status law and similar legislation (institutionalise) a relationship between states and individuals who are neither their citizens nor their residents. Inasmuch as status-law-type legislation creates rights claimable by particular individuals against specific states, it creates a form of citizenship, but a form of "fuzzy citizenship", since it is not a full citizenship, it does not coincide with any existing relationship between states and individuals, and its terms are often unclear'.

25. The paper explores this hypothesis and concludes that 'the conceptual separation of state and nation in Central and Eastern Europe opens the way at least implicitly to kin-state relationships which challenge "modern" principles of both territoriality and citizenship, and which admit "post-modern" notions of multiple identities, non-citizen relationships between states and individuals, and attenuated state sovereignty'.

26. If this is the case – and within the European Union this is clearly so, as national sovereignty is being pooled together in the EU, and a citizenship of the EU is being developed – then it obliges the Council of Europe to recognize this fact, to make an in-depth study of this phenomenon, and to formulate new principles governing it. This calls for a further report to the

27. Assembly. In no way, however, would this put aside the necessity of good neighbourly relations between states and of regulating possible 'fuzzy citizenship' on the basis of bi-lateral or multi-lateral (Council of Europe) agreements, and not unilaterally.

28. Even if the concept of fuzzy citizenship would go too far, yet some sort of answer must be given to them who regard themselves in the first place as part of a 'nation', and only in the second place as a loyal citizen of the country where they are living. Neglect of such basic feelings can lead to political strife.

29. For example: if Holland plays football against Turkey, a large part of the immigrant Turkish ethnic minority in Holland makes it quite clear that it wants Turkey to win. In this case Turkish Dutchmen have to choose between their two identities. Would Holland be playing against any other country than Turkey, they would hope Holland wins.

30. In my discussions with the Slovak authorities I pointed out that Slovakia also gives rise to concern about the way it describes itself and its citizens in constitutional texts, i.e. 'We, the Slovak people, together with the members of the national minorities and ethnic groups' and also 'We, the citizens of the Slovak Republic'. These texts stress that members of the national minorities do not belong to 'the Slovak people', although they are Slovak citizens. Thus a division is made between 'Slovaks' and other citizens which is discriminatory and can fuel the same sort of nationalistic sentiments that I described above when speaking of the concept of the 'Hungarian nation'. Similar citations could be made from Romanian texts.

### **C-c. The Exclusion of Austria**

31. It is not consistent that the law excludes ethnic Hungarians living in neighbouring Austria. However this does recognize the fact that Austria is a member of the European Union and therefore cannot accept preferential treatment of some of its citizens above others. Conversely, neither can Hungary treat some Austrian citizens differently from others, considering its association agreement with the EU. Hungary will therefore have to change this discriminatory element in its Law as soon as it accedes to the European Union. During my discussions in Hungary it was suggested that the exclusion of Austria had to do with the fact that the Magyar community in that country is small and that Hungarians living in Austria are not covered by the law, due to the fact that the overwhelming majority of them preserved their Hungarian citizenship. But if this is the case, why was Slovenia not also excluded?

32. This leads to a further question: why is the Hungarian law limited to Magyars living in neighbouring states? If it is a law that aims at no more than strengthening the cultural identity of Magyars abroad, why does it not apply to all Magyars, wherever they live? Such a larger scope could certainly help taking away suspicions, in the neighbouring countries – however unjustified they may be – that the law has a deeper layer of an irredentist nature.

### **C-d. The Inclusion within the Working of the Law of Family Members Having no Magyar Kinship**

33. This argument for such an inclusion can be found in the aim of keeping families together by not discriminating between family members of mixed ethnic background. But it is clear that it can also be regarded as a form of proselytising non-Hungarian family members, an aim which the neighbouring state could well regard as unfriendly (certain Hungarian politicians did indeed suggest that such proselytising was one of the aims of the law). Thus this provision needs careful consideration, and should be based on total agreement about the matter with the neighbouring states.

### **C-e. The Exclusion of Other Citizens of the Neighbouring States as Regards Privileges of a Social and Economic Nature**

34. This also runs contrary to the principle of non-discrimination which the EU applies. Besides, these privileges (working permits, inclusion in the system of social security) cannot reasonably be regarded only as a form of assistance to a kin minority to preserve its identity. It is a form of selection of workers from a foreign country which clearly serves the preferential social-economic treatment of co-members of the 'nation'. This form of claim on non-citizens belonging to the nation of the kin-state can be very detrimental to good neighbourly relations, as has been shown in the case of the Hungarian law.

### **C-f. Involvement of Organisations of Kin-minorities in the Implementation of the Hungarian Law**

35. This has turned out to be an especially sensitive matter. The Venice Commission singles it out as an example of extra-territorial application of the Law which infringes the sovereignty of the neighbouring state. The Hungarian-Romanian understanding of 23 December 2001 solves the matter by giving only diplomatic representatives of Hungary the role of registering nationals of the neighbouring state who wish to be regarded as Magyars, and who wish to make use of the possibilities extended to them by the Law. This solution precludes that organisations of Magyars in neighbouring states themselves coordinate the registration of citizens who wish to apply. That would make them agents of the kin-state and this would infringe the sovereignty of the neighbouring state.

36. It can of course not be reasonably forbidden that these diplomatic representatives, when *in dubio* over the question whether or not a citizen is a Magyar also ask the opinion of organisations of such ethnic Hungarians. But that is something different than giving the organisations an executive role in the matter.

37. The problem is exacerbated by the appearance of the certificate which Magyars in neighbouring countries can receive, and which gives the bearer the rights enunciated in the Law. The certificate is a booklet of stiff pages bearing the crown of Hungary on the outside, with the personal data of the person concerned on the first page, making it look somewhat like a passport.

38. The Hungarian delegation has put forward arguments that many of the points of criticism have already been met. It points especially to the agreement reached on 23 December 2001 between the governments of Romania and Hungary (see Appendix V), and that the new government of Hungary – which was installed after the elections of April 2002 – is implementing the provisions of this agreement. Indeed, some of the points of criticism have been met, although it is not clear if this has led to changes in the law itself, or only to delegated legislation which implements the law by interpreting it in a way that conforms with the Memorandum of Understanding (these rulings therefore are *contra legem*). It would seem that a change of the law itself is indicated.

39. Furthermore, discussions with the Slovak side have not yet led to an agreement comparable with the Romanian-Hungarian understanding. Perhaps that agreement has been postponed because of the imminence of the recent elections in Slovakia. It would seem that now, even considering the paper from the Slovak delegation, an understanding should be expected on the basis of the existing treaty of co-operation between the two countries.

40. During my visit on 4, 5 and 6 December 2002 to Bratislava, Budapest and Bucharest I received assurances that amendments to the Law were being prepared by Hungary. But I also heard that these amendments, although forming – in the view of the Rumanians and the Slovaks – a positive development, did not yet meet all the points of criticism put forward by these governments. Meanwhile the law has already been in force for a year. A half-a-million certificates have been issued, and the ongoing discussion between the three governments has a tendency to force the three governments into uncomfortable public positions after each round of bi-lateral talks between Hungary and its two critical neighbours. At the same time I was assured that, apart from this problem, the relations between the three states were excellent.

41. I have postponed presenting my definite report to the Legal Committee from June, via September and December 2002 and the part-session of the Assembly in January 2003 to 3 March 2003, although interim reports were debated in the committee in the meanwhile. I have done this because a solution arrived at by the three governments concerned would give a positive accent to this report. On the other hand, the continuing procrastination in the matter of the drafting of amendments now makes it necessary for the Council of Europe to take a position, like the European Union has done, and like the OSCE High Commissioner is doing. I do not think that a further postponement would be beneficial.

42. If however, draft amendments are introduced in the Hungarian parliament before the present report is presented to the Assembly, I will add a chapter to this report commenting those amendments in the light of this report.

#### **D. Conclusions**

43. Criticism of the Hungarian Law has not only been voiced by two neighbouring states, i.e. Romania and Slovakia. The OSCE High Commissioner on National Minorities, Rolf Ekeus, has also voiced a general concern about laws of this nature. His statement of 26 October 2001 is reproduced in Appendix VI to this report.

44. It is clear that I, as your Rapporteur, would think it wise if the new Hungarian government would see fit to make such amendments to the Law, that the new text will be based on bi-lateral discussions with all neighbouring states, including Austria, and will leave out or modify such elements of the existing Law as have been criticised by the Venice Commission, by the OSCE and, if this report is accepted, by the Parliamentary Assembly of the Council of Europe.

45. This would clear the air between Hungary and its neighbours after the unilateral way the Hungarian law was introduced, and would make room for an effort to look more deeply into the underlying problems. For nobody would wish to gainsay that it is in the interest of national minorities if an existing kin-state helps citizens belonging to those minorities to be conscious of their identity and to develop it, within the national identity of the state of which they are citizens.

46. But a clash is in some cases clearly possible between the existing rules of public international law – which are based on concepts such as ‘state’, ‘territoriality’, ‘citizen’ and ‘national minority’ on the one hand, and the time-honoured use – at the same time – of the word ‘nation’ by some member states of the Council of Europe, denoting ethnic, cultural or linguistic groups which transcend state frontiers.

47. So as to counter possible developments of a negative ‘nationalistic’ or ‘irredentist’ nature in the relations between States based on a specific concept of ‘nation’, the Council of Europe could – in the study envisaged in paragraph 22 above – consider the possibility of trying to incorporate a positive concept of ‘nation’ into the traditional concepts of public international law mentioned above, by accepting – under strict conditions of sovereignty and statehood – the formulation of a sort of part-citizenship which Ms Brigid Fowler’s report, mentioned under paragraph 21, has coined ‘fuzzy citizenship’. The outcome could also be that the existing situation – where ‘national’ communities can freely be formed and maintained within our open societies – in fact gives enough possibilities.

48. This report on the Hungarian law of 19 June 2001 tries to contribute to the solution of a specific issue round a specific Law. The general concept of ‘nation’ underlying this issue should therefore be elaborated on in a separate report tackling the question put forward in a more general way in the Motion for Resolution tabled by Mr Van der Linden and others on ‘Trans-frontier co-operation in preserving the identity of national minorities’, Doc. 9163 of 3 July 2001.

*Organization for Security and Cooperation in Europe (OSCE)*

**17. Sovereignty, Responsibility, and National Minorities: Statement by Rolf Ekéus, OSCE High Commissioner on National Minorities**

**(Hague, 26 October 2001)**

Violent inter-ethnic conflicts of the past decade, indeed the last century, have demonstrated the danger of extreme nationalism. National minorities have frequently suffered in these conflicts. The lessons of the past have underlined the necessity of respect for the rights of persons belonging to national minorities freely to express, preserve and develop their cultural, linguistic or religious identity free of any attempts at assimilation. While maintaining their identity, a minority should be integrated in harmony with others within a State as part of society at large. This is fundamental to international peace, security and prosperity.

Protection of minority rights is the obligation of the State where the minority resides. History shows that when States take unilateral steps on the basis of national kinship to protect national minorities living outside of the jurisdiction of the State, this sometimes leads to tensions and frictions, even violent conflict. I am therefore obliged to focus special attention on situations where similar steps, without the consent of the State of residence, are contemplated.

Since the Second World War, a legal regime has been developed following the principle that protection of human rights and fundamental freedoms, including for persons belonging to national minorities, is the responsibility of the State having jurisdiction with regard to the persons concerned. This is not only a cornerstone of contemporary international law and a requisite for peace, it is necessary for good governance, particularly in multi-ethnic States.

National and State boundaries seldom overlap; in fact there are few pure ‘nation-States’. National groups are therefore often divided by borders. It is a basic principle of international law that the State can act only within its jurisdiction which extends to its territory and citizenry. Although a State with a titular majority population may have an interest in persons of the same ethnicity living abroad, this does not entitle or imply, in any way, a right under international law to exercise jurisdiction over these persons. At the same time it does not preclude a State from granting certain preferences within its jurisdiction, on a non-discriminatory basis. Nor does it



preclude persons belonging to a national minority from maintaining unimpeded contacts across frontiers with citizens of other States with whom they share common ethnic or national origins.

Within the last decade there has been substantial progress by OSCE participating States in protecting persons belonging to national minorities. Through multilateral instruments norms have been developed and mechanisms created in support of the implementation of international standards relating to minorities.

Bilateral treaties can serve a useful function in respect of national minorities in the sense that they offer a vehicle through which States can legitimately share information and concerns, pursue interests and ideas, and further protect particular minorities on the basis of the consent of the state in whose jurisdiction the minority falls. However, the bilateral approach should not undercut the fundamental principles laid down in multilateral instruments. In addition, States should be careful not to create such privileges for particular groups which could have disintegrative effects in the States where they live.

In order to prevent conflict, protect minorities, integrate ethnic diversity and foster friendly relations between States, we must not erode the principles, standards and mechanisms that have been carefully developed in the past half-century. Indeed, States should not only ensure that policy and practice guarantee the minimum of minority rights, but they should promote full and effective equality between persons belonging to national minorities and those belonging to the majority.

#### **18. High Commissioner Warns of Hungarian 'Status Law' Precedent: Statement by Rolf Ekéus, OSCE High Commissioner on National Minorities**

**(Hague, 24 June 2003)**

I understand that the Hungarian National Assembly has now concluded the process of amending the Act on Hungarians Living in Neighbouring Countries (sometimes referred to as the 'Status Law') which was first adopted on 19 June 2001. I appreciate the efforts of the Hungarian Government over the past year to follow recommendations designed to bring the law in line with minimum international standards and to reduce tensions, caused by the law, between Hungary and some of its neighbours. The scope of the amended law seems to be limited to support for education and culture, and intended benefits appear not to be restricted to ethnic Hungarians.

Implementation of the Act will depend in large part on secondary legislation. Any elements of this legislation that have effects in neighbouring States will need the support of the State concerned. As I noted in my statement of 26 October 2001 on 'Sovereignty, Responsibility, and National Minorities', it is a basic principle of international law that a State may only act within its jurisdiction which extends to its territory and citizenry. At the same time, the State of territorial jurisdiction should be positively disposed to agree to arrangements within the framework of its obligations to ensure full respect for the rights of persons belonging to national minorities. It is now vital that specific terms of such agreements should be worked out through the normal conduct of bilateral relations.

I note that the Act on Hungarians Living in Neighbouring Countries has tended to strain otherwise good relations between Hungary and some of its neighbours. In the spirit of friendly relations, earlier and fuller consultations and better use of existing bilateral instruments and mechanisms might have reduced misunderstandings about the intentions behind the Act.

One can conclude that the deliberations in relation to the Act have demonstrated the importance of the principle that protection of human rights and fundamental freedoms, including for persons

belonging to national minorities, is the responsibility of the State having jurisdiction with regard to the persons concerned.

*European Union*

**19. Report on Hungary's Application for Membership of the European Union and the State of Negotiations (European Parliament Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy) [COM (2000) 705 – C5-0605/2000 – 1997/2175 (COS)] PE 302.015/DEF (extracts)**

**(9 July 2001)**

Part 1: Motion for a resolution and explanatory statement

Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy

Rapporteur: Luis Queiró

[...]

Explanatory Statement: Political Criteria

[...]

p. 14.

Finally, particular attention should continue to be paid by the Hungarian political authorities to the policy pursued concerning the Hungarian minorities abroad. The policy adopted should be conducive to political stability in the region and to good relations between the countries concerned. Your rapporteur awaits a detailed analysis of the new law on Hungarian minorities abroad (especially in the neighbouring countries), while stressing that this law must not be contrary to Community law. He calls on the Hungarian government to engage in bilateral talks with the neighbouring countries on the interpretation and application of this law.

[...]

Part 2: Committee Opinions – Opinions on Hungary

[...]

9 July 2001

Opinion of the Committee on Legal Affairs and the Internal Market for the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy on Hungary's application for membership of the European Union and the state of negotiations (COM (2000) 705 – C5-0605/2000 – 1997/2175 (COS))

Draftsman: Willi Rothley

[...]

p. 32.

11. Notes with concern the discriminatory special treatment given to persons of Hungarian origin in neighbouring countries in respect of temporary work permits and urges Hungary to reconsider its plans;

**20. European Parliament Resolution on Hungary's Application for Membership of the European Union and the State of Negotiations [COM (2000) 705 – C5-0605/2000 – 1997/2175 (COS)] (extracts)**

**(5 September 2001)**

8. Urges Hungary to decide on and work with all special regulations and privileges for foreign citizens of Hungarian origin in compliance with the *acquis communautaire* and with respect to the neighbouring countries;

9. Takes note of the adoption of the law on Hungarians living in neighbouring countries, as well as of the concerns expressed about it by the Governments of Romania and Slovakia; calls on 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 cooperation among Member States;

## **21. European Commission Regular Report on Hungary's Progress towards Accession 2001 (extracts)**

### **1. 2. Human rights and the protection of minorities**

*Minority rights and the protection of minorities*

p. 21-22.

Over the reference period, Hungary further strengthened policy instruments and measures to improve the rights of minorities, with particular emphasis on the situation of the Roma.

In a separate development, in June 2001, Parliament adopted the Law on Hungarians living in neighbouring countries, with the objective of supporting Hungarian minorities in neighbouring countries and to maintain their cultural heritage (*see Chapter 27 – Common foreign and security policy*).

[...]

### **3. 1. The chapters of the *acquis***

*Chapter 27 – Common Foreign and Security Policy*

p. 91.

Hungary has continued to develop good-neighbourly relations with surrounding countries and promoted regional co-operation.

However, the Law on Hungarians living in neighbouring countries raised controversies with some of these neighbouring countries as it was adopted by Parliament in June 2001 without due consultations. While the objective of the Law is to support Hungarian minorities in neighbouring countries and to maintain their cultural heritage, some of the provisions laid down in this Law apparently conflict with the prevailing European standard of minority protection, as determined in a Report adopted on 19 October 2001 by the Council of Europe's Commission for Democracy through Law (Venice Commission). According to this Report, unilateral measures granting benefits to kin-minorities living in and citizens of other States are only legitimate if the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations among States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected. Also, as foreseen in its Article 27 (2), the Law will need to be aligned with the *acquis* at the latest upon accession, since it is currently not in line with the principle of non-discrimination laid down in the Treaty (articles 6, 7, 12 and 13).

As the Law itself represents framework legislation, it will not be applicable without the adoption of implementing decrees. Hungary will therefore need to comply with the above principles and hold the necessary consultations in order to agree with its neighbours also as regards future implementing legislation. Consultations with the Romanian and Slovakian Governments started in summer 2001, so far without concrete results. Following the adoption of the Venice Commission's Report, including by Hungary itself, Hungary has however committed itself to comply with the Report's findings.

## **22. European Commission Regular Report on Hungary's Progress towards Accession 2002 (extracts)**

(5 December 2002)

### **1. 2. Human rights and the protection of minorities**

*Minority rights and the protection of minorities*

p. 30.

The Law on the Hungarian Minorities living in Neighbouring Countries ('status law') entered into force in January 2002 and created some political concern in the region, notably in Slovakia and

Romania. The law was designed to foster the position of the Hungarian minorities abroad and granted them, on the basis of registration, in Hungary, certain rights and privileges in the areas of education and culture. Following the recommendations of the Council of Europe's Commission for Democracy through Law (Venice Commission) on the roles and tasks of kin-states and home-states in minority protection, Hungary adopted in December 2001 and January 2002 legislation implementing the status law, which is broadly compatible with these recommendations. As agreed in a Memorandum of Understanding between Hungary and Romania, the law should have been revised in certain points in June 2002, but no progress can be reported in this respect. As regards Slovakia an agreement on the application of the law is still pending. Hungary committed itself to repeal before accession any provision which would not be compatible with EC law (*see Chapter 27 – Common Foreign and Security Policy*).

[...]

### **3. 1. The chapters of the *acquis***

#### ***Chapter 27 – Common Foreign and Security Policy***

*Progress since the last Regular Report*

p. 122.

As of June 2001, Hungary assumed the rotating presidency of the Visegrád Group, but dialogue was limited due to disputes on the Hungarian iustatus lawla and the Czechoslovak Presidential Decrees of 1945. A meeting of the Prime Ministers, planned to take place in Budapest in March 2002, was cancelled, but the dialogue was re-established by the new Hungarian government in May 2002. At this occasion, the Hungarian Government expressed its willingness to further enhance the dialogue with the neighbouring countries. In this respect, the new ieVisegrád Scholarship programmelp will give a new impetus.

[...]

Bilateral relations remained equally constructive with most of its neighbours. However, some political tensions arose with Romania and Slovakia concerning the Law on Hungarians living in Neighbouring Countries ('status law'), which entered into force in January 2002. This law had been adopted in June 2001 without due consultation of Hungary's neighbours. It was designed to foster the position of the Hungarian minorities abroad and granted them, on the basis of registration, in Hungary, certain rights and privileges in the areas of education and culture. Following the recommendations of the Council of Europe's Commission for Democracy through Law ('Venice Commission') on the roles and tasks of kin-states and home-states in minority protection, Hungary adopted in December 2001 and January 2002 legislation implementing the status law, which is broadly compatible with these recommendations. As agreed in a Memorandum of Understanding between Hungary and Romania, the law should have been revised in certain points in June 2002, but no progress can be reported in this respect. As regards Slovakia, an agreement on the application of the law is still pending. Hungary committed itself to repeal before accession any provision, which would not be compatible with EC law (*see Chapter 27 – Common Foreign and Security Policy*).

[...]

### **3. 3. General evaluation**

p. 131.

In the area of *common foreign and security policy*, Hungary still needs to find an agreement with Slovakia and Romania on the implementation of the Law on Hungarian minorities living in neighbouring countries. Also, the law needs to be aligned with the *acquis* upon accession.

## **23. Günter Verheugen's Letter to Hungarian Prime Minister Péter Medgyessy**

**(5 December 2002)**

Assessment of the compatibility of the revised draft 'Law on Hungarians living in neighbouring States' with European standards and with the norms and principles of international law (findings of the Council of Europe's Venice Commission) and With EU law.

## **Main Observations**

### **(1) The Risk to Create a ‘Political Bond’**

In the context of support given by Home-States (*sic*) to their minorities in Kin-States and the issuing of supporting documentation, the Venice Commission drew the attention to the risk of creating a possible political bond between this Home-State (*sic*) and its minorities in a kin-State (*sic*) (neighbouring State).

In the revised Hungarian law, the reference in the preamble and in Articles 6, 17, 18, 20 to the ‘Hungarian nation as a whole’, the national identity of Hungarians and Hungarian national communities, living in neighbouring countries could be understood in such a way that Hungary is striving for establishing special political links, an aim which conflicts with the sovereignty and jurisdiction of the neighbouring states. Therefore, such terms should be replaced by more culturally oriented ones.

In addition, the Hungarian ‘Dependent Certificate’ (which identifies the potential beneficiaries to the Law) has the characteristics of an identity card/passport, with the Stephens crown in gold on the cover. In such form, this document also risks to create a political bond, although its utilisation as an identity card is explicitly excluded. Moreover, the modalities of its utilisation should be agreed with the neighbouring countries.

### **(2) Extra-territorial and Discriminatory Effects of the Law**

According to the Venice Commission, the adoption by States of unilateral measures granting benefits to the persons belonging to their kin-minorities, is only legitimate if the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected.

The new Hungarian draft law contains measures having a clear extra-territorial effect in the fields of education (articles 13, 14, 14/A) and culture (articles 19, 29).

(a) Assistance in the area of education that will be provided as direct support to establishments and organisations of accredited Hungarian higher education institutions in neighbouring countries needs the formal consent of the Home-State. It could however be expected that such consent should not present any particular difficulty, as the respective institutions have already been accredited in the Kin-State.

(b) Benefits granted to children being educated in Hungarian/respectively to parents’ or teachers’ organisations could be considered as discriminatory if linked to the ethnic origin of the individuals. It would therefore, apart from the home-State’s consent, be recommendable to open such support in general to the promotion of the Hungarian language and culture.

c) Economic activities as those foreseen under article 18 c) of the law aiming at assistance to disadvantaged settlements and rural tourism should remain outside the scope of the law. This type of support could eventually be discussed in the framework of the bilateral treaties.

### **(3) Compatibility with EU law**

Upon Hungary’s accession to the EU, the revised law would need to ensure full compatibility with EU law. According to articles 12 and 13 of the Treaty, those provisions of the Hungarian law, which would give rise to discrimination between nationals of EU Member States and on basis of ethnic origin, will have to be annulled. This applies in particular to articles 4, 8, 9, 10, 11, 12, 14 of the revised law, because the benefits thereby provided for, are in fact restricted to the nationals of certain Member States and/ or given on the basis of ethnic origin.

According to article 27 (2) of the current draft Hungary is committed to repeal all relevant provisions.

## **24. European Commission Comprehensive Monitoring Report on Hungary's Preparations for Membership 2003 (extracts)**

### **C. Commitments and Requirements Arising from the Accession Negotiations**

#### **2. The chapters of the *acquis***

##### ***Chapter 27 – Common Foreign and Security Policy***

p. 51.

The *acquis* related to common foreign and security policy (CFSP) is essentially based either on legally binding international agreements or on political agreements to conduct political dialogue in the framework of CFSP, to align with EU statements, and to apply sanctions and restrictive measures where required.

The administrative structures in this area in Hungary are in place and satisfactory. With regard to participation in **political dialogue**, Hungary has continued its successful co-operation. Concerning the Law on Hungarians living in Neighbouring Countries, the modifications to the law adopted by Parliament in June 2003 appear to have brought the framework legislation in line with the *acquis*. However, given that the law still contains extraterritorial elements, prior agreement has to be sought with the neighbouring countries concerned on the application of these elements in these countries. Also, attention must be paid to ensuring that the implementing legislation will be in full conformity with the *acquis*.

[...]

##### *Conclusion*

p. 52.

Hungary is essentially meeting the commitments and requirements arising from the accession negotiations in the chapter on the **common foreign and security policy** and is expected to be able to participate in the political dialogue and to align with EU statements, sanctions and restrictive measures by accession. Hungary has to adopt legislation on economic sanctions. Furthermore, attention must be paid to ensuring that the implementing legislation of the Law on Hungarians living in Neighbouring Countries will be fully in line with the *acquis*. Also, any extraterritorial benefits provided for by the law have to be agreed in advance with the neighbouring countries concerned.

### **Status Laws of Neighbouring Countries**

## **25. Resolution on the Position of Autochthonous Slovene Minorities in Neighbouring Countries and the Related Tasks of State and Other Institutions in the Republic of Slovenia (Official Gazette of the Republic of Slovenia, No. 35-2280/1996)**

### **Chapter 1**

#### **General Part**

##### **I**

The areas of neighbouring countries inhabited by autochthonous Slovene minorities constitute, together with the Republic of Slovenia, a common Slovene cultural area.

Autochthonous minorities are a constituent part of the societies of neighbouring countries but are linked by numerous ties with the state of the Slovene people. The members of autochthonous minorities, Slovenes living across the borders of Slovenia, are citizens of neighbouring countries with all rights and obligations towards those countries and are a valuable bridge for cooperation and good neighbourly relations between the Republic of Slovenia and its neighbouring countries.