

## Chapter 18

# The Characteristics of Cultural Minority Rights in International Law: With Special Reference to the Hungarian Status Law

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*Unius linguae uniusque moris regnum imbecille et fragile est.*  
King Stephen of Hungary, 10th C.

### Introduction

The conceptual definition of a ‘minority’ is not unambiguous in international law. But this does not prevent states from trying to provide certain domestic rights for the national minorities living beyond their borders. These efforts are often defined in terms of the mother country’s obligation to protect. The concern of the kin-state for the fate of persons belonging to its national communities (referred to hereafter as co-ethnics<sup>1</sup>) who are citizens of other countries (the home-state) and reside abroad is not a new phenomenon. But the right to protection in these general terms is not recognised in international law, because there is no international agreement to this effect. Although not in existence as written law, however, it has been established state practice for a long time. The generally valid principle embodied in international legal documents is that cultural support for minorities does not qualify as discrimination and that it is not restricted to the relationship between a given state and its internal minorities. The principle therefore does not exclude support, including support supplied from beyond national borders, aimed at establishing minorities’ real equality before the law.<sup>2</sup> This proposition is confirmed by European practice whereby the mother country provides financial support for the preservation and development of minority groups by

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1 This term refers to individual members of external national minority communities, not just minorities as such. The expression used by the Council of Europe Venice Commission is ‘kin minorities’, while in other literature ‘kin-foreigners’ or ‘co-nationals’ are also commonly used. No single term has yet gained general acceptance. Similarly, for kin-state other terms such as ‘mother country’ are used.

2 This right is covered by several international instruments, e.g. Article 2 of the UN *Declaration on Minorities*, Article 4 paragraph 2 of the Council of Europe’s *Framework Convention for the Protection of National Minorities* and Article 14 of the *European Charter for Regional or Minority Languages*.

financing cultural and educational programmes which may extend over several years.<sup>3</sup> Access to a neighbouring kin-state is clearly more useful to co-ethnics who speak the language than to citizens who do not; language ability is also important in promoting contact with families and the national culture. It is for these reasons that cross-border contact with the kin-state is protected in a number of international minority rights instruments. In domestic legislation the norms pertaining to citizens living abroad on the one hand and to members of national minorities on the other can overlap or be distinct and separate. Provided the effect of any measures taken does not extend beyond the borders and does not conflict with the territorial and personal sovereignty of the state of citizenship, these norms have no effect on international law.

Minority protection is centred on identity and gives special emphasis to national, ethnic, cultural and religious self-identity. Measures of minority protection are intended to actively promote the preservation, expression and development of identity. We should not lose sight of the fact that a supportive economic and social context must exist if the preservation and development of identity are to be ensured. The ‘Act on Hungarians Living in Neighbouring Countries’ (Status Law, Preference Law, Act LXII of 2001) indicates from the outset (in its preamble) that its main purpose is to strengthen the Hungarian minorities’ attachment to the kin-state through the enhancement of their national identity,<sup>4</sup> especially in the spheres of education, culture and science. This is the proclaimed principal objective of the act both in its original (2001) and in its amended version (2003) Several amendments to the act, some of which are highly significant, were adopted by the Hungarian Parliament on 23 June 2003 (Act LVII of 2003 entering into force on 27 July 2003). This was the result of pressure on the Hungarian government from neighbouring countries and also from international organisations dealing with human rights and minority rights.<sup>5</sup> The present article considers

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3 For example, the establishment and development of bilingual (Croatian, Slovenian etc.) radio and TV programmes in Austria, the publication of books on history and geography in Catalan in France, and Roma projects in Hungary, Romania and Czech Republic.

4 The full text of the Status Law is reproduced in this volume. The wording of the Preamble should be noted, however: ‘Parliament [...] In order to ensure the well being of Hungarians living in neighbouring states in their home-state, to promote their ties to Hungary, to support their Hungarian identity and their links to the Hungarian cultural heritage as an expression of their belonging to the Hungarian nation; [owing to the international pressure the phrase “in order to ensure that Hungarians living in neighbouring countries form part of the Hungarian nation as a whole” – emphasis added – was dropped from the preamble] [...] Upon the initiative and based on the proposals of the Hungarian Standing Conference, as the consultative body working to preserve and reinforce the identity of Hungarian communities living in neighbouring states; [...] Herewith adopts the following Act [...]’.

5 The majority of the neighbouring countries were neutral with regard to approval of the Act.

the educational and cultural benefits in their amended forms, referring where necessary to the original wording but without detailed analysis.

The Status Law makes reference to a number of international treaties to which Hungary is party and which it applies in pursuit of the aims stated in its preamble. But education and culture are the two areas in which international law has assembled a network of multilateral and bilateral treaties which explicitly and implicitly provide for minorities' kin-states to take legal and financial steps in support of their minorities. The Council of Europe Venice Commission carried out a comparative study of legislation on kin minorities and analysed the Hungarian act from the point of view of its compliance with the rules of international law.<sup>6</sup> This led to the Commission enunciating the basic principle that in the field of culture and education the kin-state may provide preferential treatment to the members of kin minorities subject to the restriction that it is lawful and 'in so far as it pursues the legitimate aim of fostering cultural links and is proportionate to that aim'.

The first section of this article addresses the social and legal definitions of certain concepts which play a crucial role in the development of minority policies, among them the right to identity and the concept of culture. The next section surveys the various international legal instruments relating to minority rights in the context of their relationship to cultural and educational rights. The final section of the paper addresses the question of kin-state policy and its problems by examining the approach that Hungary has adopted towards the Hungarian minorities living outside its borders. Through the examination of existing universal, regional and bilateral international legal instruments relevant to the protection of minorities, the article seeks to evaluate the effectiveness of these instruments and related measures and to establish a consistent theoretical and practical framework for future developments in this area with special regard to kin-state policy.

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Croatia and the Ukraine have expressed their agreement with the objectives of the Act. On the other hand, in Romania and Slovakia, the two countries with the largest Hungarian minority populations, some views opposed to the theoretical basis and objectives of the Act were voiced. Both countries launched internal as well as Europe-wide diplomatic attacks against the Hungarian legislation, which they claimed was a discriminatory and disruptive interference in their domestic affairs, and had been imposed unilaterally and without appropriate consultation. It was in fact Romania that originally initiated the Venice Commission's evaluation on the Hungarian Status Law.

6 Report of the European Commission for Democracy through Law (Venice Commission) on the preferential treatment of national minorities by their kin-state (CDL-INF [2001], October 2001). See the full text reproduced in this volume.

## I. The Right to National and Cultural Identity

In any attempt to understand multicultural societies it has to be admitted that it is far from clear what constitutes ‘culture’ or what makes up the ‘identities’ that are said to require recognition. Etymologically speaking, identity has its root in the Latin word *idem* which means ‘the same’; however, in our modern understanding it defines what makes each of us different – different from any other human being. Identities provide a basis for both conflict and cohesion. Despite attempts to idealise them as unchanging and immutable they are subject to a constant process of adjustment and adaptation. The subject of identity<sup>7</sup> is thus a very complex issue; it encompasses the totality of social experience, much of which is influenced by history. What constitutes the identity of a group is not always easy to determine, given differences in the way individuals are socialised during the course of their lives. Core values are often based on religion, language, race, colour or an assumed common culture. The importance of membership of a minority group for individual identity is arguably mainly determined by the strength of the individual’s psychological and emotional attachment to the group.

‘The *right to identity* can usually be perceived as the right to exercise a freedom on a continuous basis. Identity is nursed, developed and preserved essentially through culture.’<sup>8</sup> In multinational countries, collective or group identity is generally a function of the majority-minority relationship, and group cultural rights become ethnic, minority rights. Belonging to a cultural community is both an individual cultural and a political right.<sup>9</sup> The fundamental nature of the right to identity is especially apparent in view of the argument that cultural degradation is an irreversible process.<sup>10</sup>

The UNESCO *Draft Declaration on Cultural Rights*<sup>11</sup> defines ‘cultural identity’ as the complex of factors on the basis of which an individual or a group exercises self-determination, manifests itself and can be recognised; it

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7 On identity, see S. Cornell and D. Hartmann, eds., *Ethnicity and Race: Making Identities in a Changing World* (London, 1998); J.R. Campbell and A. Rew, *Identity and Affect: Experiences of Identity in a Globalising World* (London, 1999); G. Soledad, *Europe’s Fragmented Identities and the Frontiers of Citizenship* (London, 1992); N. Berman, ‘The International Law of Nationalism: Group Identity and Legal History’ in D. Wippman, ed., *International Law and Ethnic Conflict* (Ithaca NY, 1998), pp. 25-58.

8 Á. Kartag-Ódri, ‘A csoportidentitás és a kisebbségi kulturális jogok’, *Regio* 9:1, (1998), p. 151.

9 G. Bíró, *Az identitásválasztás szabadsága* (Budapest, 1995), p. 217.

10 I. Brownlie, ‘Considerations of Public International Law Concerning the Rights of the Dene and Inuit as the Indigenous Peoples of the Northwest Territories of Canada’, Opinion presented to the MacKenzie Valley Pipeline Inquiry, 17 September 1976, cited in P. Thornberry, *International Law and the Rights of Minorities* (Oxford, 1991), p. 220.

11 P. Meyer-Bisch, *Les Droits culturels: une catégorie sous-développée des droits de l’homme* (Fribourg, 1998), p. 49.

comprises the individual's freedom and dignity, and at the same time his/her incorporation into various individual or general, historical and future-oriented cultural processes. The choice of cultural identity includes the freedom to choose a community identity; participation in the community's group cultural rights is therefore also to be seen as an individual human right.

In everyday life, the definition of cultural community often merges into that of the ethnic community, although it is a much wider category from a sociological and cultural-historical point of view. When that happens, the issue of culture and cultural rights inevitably becomes politicised. This is especially so in multi-ethnic states where the existence of a majority and minority is presumed, in which case group cultural rights turn into national minority rights. In this way the concept of collective cultural rights becomes expressed as a function of the relationship between the majority and the minority: a potential and latent source of conflicting interests in itself. It becomes more difficult for the minority to make its interests heard, and this creates the sense of being endangered.<sup>12</sup>

Too often, policies of national cultural development actually imply a policy of ethnocide, that is, the wilful destruction of cultural groups.<sup>13</sup> Linguistic genocide may take the active form of 'killing' the language without murdering its speakers or it may be committed passively, by letting the language die out. Cobarrubias<sup>14</sup> considers the following strategies adopted by the state against minority languages: (i) attempting to kill a language; (ii) letting a language die out; (iii) unsupported co-existence; (iv) partial support for specific language functions. ((v) Adoption as an official language deserves separate consideration as a further possible approach on the part of the state.) Even co-existence without support usually leads to the dying out of minority languages.

The use of minority languages can be prohibited in an open and direct manner by means of laws and imprisonment. But concealed, indirect prohibition using ideological and organisational methods achieves the same result.<sup>15</sup> In most Western countries this is the preferred strategy. The con-

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12 G. Bíró, 'Minority Rights in Eastern and Central Europe and the Role of the International Institutions' in J. Laurenti, ed., *Searching for Moorings: East Central Europe in the International System* (New York, 1994), p. 97.

13 R. Stavenhagen, 'Cultural Rights and Universal Human Rights' in A. Eide, C. Krause and A. Rosas, eds., *Economic, Social and Cultural Rights: A Textbook* (Dordrecht, 1995), p. 77.

14 J. Cobarrubias, 'Ethical issues in status planning' in J. Cobarrubias and J.A. Fishman, eds., *Progress in Language Planning: International Perspectives* (Berlin, 1983), pp. 71-73.

15 This is the situation of most of the immigrants and refugees throughout the world, as education in their language is not provided and they cannot use their mother tongue in everyday public life. In consequence, according to the UN definition, linguistic genocide can be observed as taking place even in the most developed democracies: T. Skutnabb-Kangas, 'Ok-tatásügy és nyelv', *Regio* 9:3(1998), p. 8, and in more detail, *idem*, *Linguistic Genocide in*

verse, namely the provision of certain linguistic and cultural rights for minorities accompanied by the denial of economic and political rights, was adopted as the strategy of most of the communist countries in Eastern Europe. The intention was that these languages and cultures would assimilate voluntarily, the minority elite and then the whole community blending into the majority nation, if for no other reason than that in so doing they would obtain more political power and greater access to financial resources. Both methods were/are intended to reduce the potential for minorities to develop political representation within the state.<sup>16</sup>

The cultural and linguistic identities of a person are intrinsically linked with each other. While maintenance of language is not sufficient in itself to keep a culture alive, the survival of a culture is virtually impossible without it. Important fields for the protection of the identity and language of minorities are names, religion, community life, economy, media, administration and legal practice. The question is always to what extent states are obliged to support minority languages.<sup>17</sup> The use of minority languages in education is pivotal to the maintenance and development of the linguistic identity of minorities, since education is fundamental to the preservation of a culture, or more broadly, a group identity.<sup>18</sup>

What does define a minority cultural community? All attempts to stipulate necessary and sufficient conditions have been unsuccessful. 'Any definition will contain two components: (1) an objective component dealing with such things as a common heritage and language; (2) a subjective component dealing with self-identification with the group. But that by itself is much too vague. No definition can be devised yet the phenomenon has existed and exists.'<sup>19</sup> However, internal standards of collective solidarity are not the concern of politics or law as such; the individual will make a conditional choice as to whether he/she wishes to participate in a given culture or not.

*Education: or Worldwide Diversity and Human Rights?* (London, 2000).

- 16 Within two to four generations, minority languages will have fewer speakers in countries using concealed linguistic oppression than in countries openly 'killing' the language, e.g. Kurds still speak Kurdish and resist linguistic oppression, whereas previous Spanish speakers in the USA and the speakers of the Finnish and Sami languages in Sweden have been assimilated to a considerable extent: T. Skutnabb-Kangas, 'Oktatásügy,' p. 10.
- 17 See *inter alia* M. Lundberg and A. Eide, 'Accommodating Difference: a Legal Human Rights Perspective' (CMI-NIHR Research Project Accommodating Differences – Approaches and applications, Working Paper 2001/1); E. Allardt, 'Qu'est-ce qu'une minorité linguistique?' in H. Giordan, ed., *Les Minorités en Europe: Droits linguistiques et droits de l'homme* (Paris, 1992), pp. 46-54.
- 18 See *inter alia* H. Hannum, 'Contemporary Developments in the International Protection of the Rights of Minorities', *Notre Dame Law Review* 66 (1991), pp. 1431-1448; Thornberry, *International Law*, p. 294.
- 19 W. Kymlicka, *Liberalism, Community and Culture* (Oxford, 1989), p. 179.

The concept of culture can be defined in relation to various fields of scientific research, and hundreds of definitions are available. With respect to law, according to the latest international instrument on culture, the Preamble to the UNESCO *Universal Declaration on Cultural Diversity*, ‘...culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society and a social group and it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs’.<sup>20</sup> The definition embraces a broad number of media (in the broad sense) through which individuals or groups express themselves and develop. Since the seventies, all forms of mass culture (from newspapers to fashion and lifestyle, and even extending to ‘information culture’) have been regarded as falling within the concept of culture, and consequently it is assumed that everybody – in theory at least – is able to choose and express their own culture and ought to be able to realise this ability as a matter of human right.<sup>21</sup>

The importance of the protection and promotion of the right to identity has been acknowledged in a number of international instruments, although only quite recently. The general protection of the right to identity of minorities was first envisaged by Article 27 of the *International Covenant on Civil and Political Rights (ICCPR)*,<sup>22</sup> even though this specific right is not named as such.<sup>23</sup> The explicit affirmation of the right to identity is apparent *inter alia* in Article 1 of the 1992 UN *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*.<sup>24</sup> Article 1 of the UNESCO *Declaration on Race and Racial Prejudice*<sup>25</sup> also addresses the question of identity. Generally a clear trend can be noticed in the direction of protecting and promoting cultural diversity, justifying the conclusion

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20 UNESCO *Universal Declaration on Cultural Diversity*, adopted by the 31st session of the General Conference of UNESCO, Paris, 2 November 2001: [http://www.unesco.org/culture/pluralism/diversity/html\\_eng/index\\_en.shtml](http://www.unesco.org/culture/pluralism/diversity/html_eng/index_en.shtml).

21 For examples from the activity of the Council of Europe: *Final declaration of the symposium on the future of cultural development* (Document adopted on 11th April 1972, Arc et Senans/France); *European Declaration on Cultural Objectives* (Conference of Ministers responsible for Cultural Affairs, Berlin, 25 May 1984): [http://www.coe.int/T/E/Cultural\\_Co-operation/Commun/40CCeng.asp#TopOfPage](http://www.coe.int/T/E/Cultural_Co-operation/Commun/40CCeng.asp#TopOfPage).

22 *ICCPR* – adopted 16 December 1966, entered into force 3 January 1976, G.A. Res. 2200A (XXI), UN. Doc. A/6316 (1966), 999 UNTS 171 (1967).

23 P. Thornberry, ‘The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis, Observations and an Update’ in A. Phillips and A. Rosas, eds., *Universal Minority Rights* (Abo, 1995), p. 20; Y. Dinstein, ‘The Degree of Self Rule of Minorities in Unitarian and Federal States’ in C. Brölmann, R. Lefeber and M. Zieck, eds., *Peoples and Minorities in International Law* (Dordrecht, 1993), p. 227.

24 Adopted 15 December 1992, G.A. Res. 47/135, 14 HRLJ 54 (1993).

25 Adopted 27 November 1978, E/CN.4/Sub.2/1982/Add.1, annex V, 1982.

that ‘the right to identity has secured a prominent place in the discourse of human rights’.<sup>26</sup> Furthermore, it is argued that ‘two collective rights are accorded by general international law to every minority anywhere: the right to physical existence and the right to preserve a separate identity’.<sup>27</sup> The Badinter Commission established in 1991 by the European Union in the wake of the break-up of Yugoslavia went so far as to explicitly recognise minorities’ right to identity as one of the ‘peremptory norms of general international law’.<sup>28</sup>

Cultural rights are among the internationally acknowledged human rights of the so-called second generation, together with economic and social rights.<sup>29</sup> These rights have certain specific characteristics compared both to the human rights of the first generation, the civil and political rights (such as the right to life, personal freedom, freedom of speech, etc.), and to those of the third generation (e.g. the right to peace, development, healthy environment).<sup>30</sup> The characteristics of these rights compared to traditional fundamental human rights are as follows:<sup>31</sup>

- In addition to the state refraining or abstaining from acting (which applies almost exclusively to the sphere of political rights), an obligation which is capable of immediate implementation by all states,

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26 Thornberry, ‘UN Declaration’, p. 41; A. Eide, *Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Document for the UN Working Group on Minorities, UN Doc. E/CN.4/Sub.2/AC5/1998/WP.1, p. 3.

27 See *inter alia* D.M. Johnston, ‘Native Rights as Collective Rights: a Question of Group Self-Preservation’ in W. Kymlicka, ed., *The Rights of Minority Cultures* (Oxford, 1995), p. 187; Dienstein, ‘Degree of Self Rule’, p. 227; Capotorti names non-discrimination and the right to identity as the two international norms on which the protection of minorities is based: F. Capotorti, ‘Are Minorities Entitled to Collective International Rights?’ in Y. Dienstein and M. Tabor, eds., *The Protection of Minorities and Human Rights* (Dordrecht, 1992), p. 508.

28 Badinter Arbitration Commission, Opinion No. 2, 20 November 1991, §2. With reference to Opinion No 1, §1, see also P. Vandernoot, ‘Les Aspects linguistiques du droit des minorités’, *Revue Trimestrielle des Droits de l’Homme* [Rev.Trim.Dr.h.] 30(1997), pp. 309-341, here p. 341.

29 The main international instrument at the universal level is the *International Covenant on Economic, Social and Cultural Rights (ICESC)*, adopted 16 December 1966, entered into force 3 March 1976, G.A. Res. 2200A (XXI), UN. Doc. A/6316 (1966), 993 UNTS 3 (1967); with the ‘Limburg Principles on the Implementation of the ICESC’ (1987) 9 H.R.Q. 121.

30 It is a widely accepted view that distinctions among various categories of human rights are often misleading. Indeed, the most common reason for identifying such categories is to deny the status of ‘right’ to one or more of them, rather to expand international or national protections.

31 For more see I. Szabo, *Cultural Rights* (Stijjhof, 1974); C. Van Boven, ‘Distinguishing Criteria of Human Rights’ in K. Vasak and P. Alston, eds., *The International Dimensions of Human Rights* (Paris, 1982), pp. 43-60; M.C.R. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford, 1995); L. Prott, ‘Cultural Rights as People’s Rights in International Law’ in J. Crawford, ed., *The Rights of Peoples* (Oxford, 1992), pp. 93-106.

- the enforcement of second-generation rights necessitates *intervention and active behaviour on the part of the state*.
- While political rights and freedoms function as rights due to the individual, social, economic, and cultural rights constitute collective rights; they are mainly due not to the individual but to a community. The characteristic of third generation human rights is that their subjects are primarily specific groups. In practice the second-generation rights can be considered as an ‘intermediate generation’, with *the entitled parties being communities and individuals at the same time*.
  - The content of civil rights can be defined precisely, while social and cultural rights in most cases are *loosely defined*, a feature which impedes their enforcement.
  - Most first generation human rights are expressed as general rights, while in the case of the second generation, the *possibility of related rights* is the natural consequence of the entitlement to these rights.
  - The international promotion of these rights has intensified because, while traditional human rights have been incorporated into states’ domestic legal systems, in the case of the second generation, the aim was to leave domestic systems of the administration of justice untouched and instead establish *minimum standards of protection at the international level*. This approach is based on the fact that the state is the guarantor for the protection of rights as well as being the party obliged to act to invoke these rights in the first place.
  - Civil and political rights operate as restrictions on the power of the state for the protection of the individual, whereas rights of the second generation aim to protect the entitled communities, which requires *legislative activity* on the part of the state. These rights are not protected merely by their inclusion in the constitution - which is in fact a rare exception – but the content of each right, its subjects and the means for their protection must be established *by passing separate laws*.
  - On the other hand, legislation alone is not sufficient to realise these rights; their enforcement is susceptible only of progressive and differential compliance as far as each state’s economy permits. *The provision of these rights is extremely expensive* in practice.
  - It follows from the above that these rights *are realised continuously and gradually*; states assume the obligation only to ‘make efforts’ and to ‘strive’ to provide them.
  - The provision of second-generation rights can be *internationally supervised only by means of a reporting mechanism*, owing to their programmatic and conditional nature. In the case of civil rights, in-

dividual enforcement is possible through recourse to judicial or quasi-judicial bodies. By contrast, political (i.e. second-generation) rights are interpreted by the national and international courts in the light of economic and similar rights, and this constitutes *indirect judicial application*.

Economic, social and cultural rights cannot be interpreted on an objective, value-free basis; they are relative and relational.<sup>32</sup> The ambivalent character of cultural rights follows from the nature of the terms in which they are conceived. Cultural rights are characterised by the right to be both specific and universal at the same time. Therefore, both the individual and the group are implicated in the concept, and cultural rights extend from the specific to the general and *vice versa*.<sup>33</sup>

One of the greatest dilemmas in the legal approach to second-generation rights is the fact that they can be guaranteed only to the extent that the obligations are undertaken by the state. The *International Covenant on Economic, Social and Cultural Rights* does no more than oblige participating states to use all the resources available to ensure the progressive exercise of the rights (para. 1 of Article 2). This, however, cannot be interpreted as postulating that states are entitled to postpone their efforts to provide full rights indefinitely.<sup>34</sup> Certain rights are only acknowledged by states on the basis of the Covenant. This is true for example of the right to education (Articles 13 to 14) and the right to culture (Article 15). In the case of cultural rights, their characterisation as freedoms is dominant and emphasis is therefore laid on the non-interference of the state. Also, the enforcement of these rights may be subject to restrictions only to the extent that such restrictions can be reconciled with the nature of the rights and are imposed exclusively for the purpose of enhancing the general welfare of democratic society, as laid down in law.

Education is thus intrinsically related to the minorities' right to preserve their identities. Education is a matter of techniques, mechanisms and institutions, and is of crucial importance to maintaining a distinct identity, which applies not only to the minority culture but also to its component parts, language and religion. Indeed, 'next to the family, education is the single most important agency for cultural reproduction, socialisation and identity formation',<sup>35</sup> (although 'it appears to be clear that the right to education [as a general, individual human right] was never intended to include the right to educa-

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32 K. Szamel, 'A gazdasági, szociális és kulturális jogok értéke (Emberi jog, állampolgári jog, alanyi jog, szabadság vagy valami más?)', *Acta Humana* 1993/11, p. 27.

33 Meyer-Bisch, *Les Droits culturels*, p. 131.

34 'Limburg Principles', Art. 21.

35 C.H. Williams, 'The Cultural Rights of Minorities: Recognition and Implementation' in J. Plichtova, ed., *Minorities in Politics: Cultural and Language Rights* (Bratislava, 1992), p. 114.

tion in one's own language'<sup>36</sup>). Another component of education which has relevance for (members of) minorities is the content of the curriculum generally, including the so-called hidden curriculum.<sup>37</sup> It should also be noted that education raises certain questions regarding actual access to education, including higher education, for members of minorities, which is related to the principle of substantive equality.

## II. The Relationship of Cultural and Educational Rights to Minority Rights

Minority protection appeared much earlier than the principle of non-discrimination, originally emerging in treaties addressing religious minorities in the seventeenth century. The principles underpinning this and later bilateral and multilateral treaties on minority protection were clear: minority rights amounted to special privileges granted to particular groups who, for certain historical, religious or political reasons, were of particular importance to contracting parties. The 'minority treaties' system established under the League of Nations in the first half of the twentieth century was the culmination of this trend.<sup>38</sup> The consequences of this exclusively 'state-centred' approach to minorities are still with us today.<sup>39</sup> The 'minority treaties' system established under the League of Nations proved insufficient to prevent the outbreak of a second World War. As a result, not only was this system discredited, but the very notion of minority rights was brought into disrepute. The United Nations subsequently stopped short of including provisions on minority rights in its primary documents, choosing rather to focus on the principle of non-discrimination.

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36 F. De Varennes, *Language Minorities and Human Rights* (Maastricht, 1996), p. 189.

37 A. Eide, 'The Hague Recommendations Regarding the Education Rights of National Minorities: Their Objectives,' *International Journal on Group and Minority Rights [I.J.G.R.]* 4 (1996/1997), No. 2 (Special Issue on the Education Rights of National Minorities), pp. 163-170, here p. 169. Article 4 of the UN Declaration on Minorities, article 34 of the OSCE Copenhagen Document and article 12 of the Framework Convention on the Protection of National Minorities create the requirements upon states to make space in the school curriculum for the teaching of the history and traditions of the various national minorities living within their borders.

38 The victorious states did not undertake any obligations in this respect. The system of minority protection was limited to Central and Eastern Europe. Treaties concerning minorities were concluded with Poland, Yugoslavia, Czechoslovakia, Romania and Greece. Provisions on minority protection were included in the Peace Treaties with Bulgaria, Hungary, Turkey and Austria. The treaties did not guarantee rights to individuals, but laid down state obligations.

39 The situation of Roma minorities is a salient example; in the absence of a kin-state to defend their interests, little has been done to confront widespread discrimination against Roma until very recently.

The absolute dominance of the non-discrimination principle in the fifties and sixties gradually shifted towards increasing recognition of the right to identity and the preservation of diversity. The occurrence of numerous violent ethnic conflicts after the collapse of the communist system indicated the necessity for clear rules for the effective handling of minority problems. In the nineties, a number of politically and legally binding instruments on minority rights were adopted by various international bodies.

In these documents, general norms are often not formulated with minorities as the named right-holders. Thus, whenever minority rights are set out in international instruments, they are additional to, and not instead of, human rights; only the joint exercise of these rights enables persons belonging to a national minority to preserve their identity.<sup>40</sup> In the protection of human rights, the emphasis thus shifted from group protection to the protection of individual rights and freedoms, almost exclusively. The new approach envisaged that, whenever a person's rights were violated because of a group characteristic – race, religion, ethnic or national origin or culture – the matter could be remedied by protecting the rights of the individual mainly through application of the principle of non-discrimination.

The United Nations Charter contains no provision specifically addressing the issue of minority rights. Similarly, the *Universal Declaration of Human Rights* (1948),<sup>41</sup> makes no specific mention of minority rights. The UN was nevertheless actively involved in minority issues during the 1950s (the UN Commission on Human Rights soon established a Sub-Commission on Prevention of Discrimination and Protection of Minorities). At the universal level of international law, minority rights were viewed as indistinguishable from human rights. If states behaved according to the principle of pluralism, the different groups would have no particular difficulty. For example the freedom of expression would make it possible for groups to use their own language as a basis for communication; freedom of association would make it possible to organise cultural and political associations along ethnic lines if they so wished, and so on.<sup>42</sup>

It was not until the *International Covenant on Civil and Political Rights (ICCPR)* was adopted in 1966 that the rights of persons belonging to minorities were included in the human rights framework. The *ICCPR* Article 27 states: 'In those States in which ethnic, religious or linguistic minorities exist,

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40 P. Thornberry, 'Is there a Phoenix in the Ashes?: International Law and Minority Rights', *Texas International Law Journal* [*Tex.Int'l.L.J.*] 15 (1980), p. 447.

41 Adopted on 10th December 1948, GA Res. 217A (III), UN Doc.A/810, p. 71 (1948).

42 A. Eide; 'Ethnic conflicts and minority protection: Roles for the international community' in K. Rupesinghe and V.A. Tishkov, eds., *Ethnicity and Power in the Contemporary World* (New York, 1996), available on the web at <http://www.unu.edu/unupress/unupbooks/uu12ee/uu12ee0q.htm>.

persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language'. According to this wording, linguistic, religious and cultural rights are the basic rights which must be afforded to minorities. The article is an inevitable point of reference for the protection of these aspects of minority rights. It is the only expression of the right to identity in any human rights convention which is intended to have universal application. Article 27 does not contain any explicit reference to positive measures to which a minority might be entitled.<sup>43</sup> On the other hand, the function of Article 27 is to go beyond a guarantee of non-discrimination towards a more positive notion of conservation of linguistic identity. Thus, where preventing members of minorities from acquiring knowledge of a national language would constitute discrimination, failure to allow minority languages to be taught in schools when so desired would, *prima facie*, be a breach of Article 27.<sup>44</sup>

The related point must be made that the right set out in Article 27 bears some resemblance to economic and social rights, even though it is set out in the *Covenant on Civil and Political Rights*. Economic and cultural rights require the state to act positively on behalf of the right-holders. The resemblance to these second-generation rights is clearest, Capotorti suggests, in the field of culture. Thus, the 'right of members of minorities to enjoy their own culture in community with the other members of their group' seems to involve not merely freedom of expression, but also the right to education and the right to take part in cultural life, rights that are provided for under the *Covenant on Economic, Social and Cultural Rights* (Articles 13 to 15). Capotorti's conclusion is that 'at least in the field of culture, the States are under a duty to adopt specific measures to implement Article 27 in the same way as they are in the case of the provision on cultural rights under the Covenant guaranteeing

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43 Capotorti remains the most comprehensive analyst of the implications of Article 27: F. Capotorti, 'Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities', UN Doc. E/CN.4/Suh.2/384/Rev.1, 1991. See also C. Tomuschat, 'Protection of Minorities under Article 27 of the International Covenant on Civil and Political Rights' in R. Bernhardt, ed., *Festschrift für Hermann Mosler* (Berlin, 1983), pp. 949-979; G. Melander, 'Article 27', in A. Eide *et al.*, eds., *The Universal Declaration of Human Rights: A Commentary* (Oslo, 1992), p. 429; Thornberry, *International Law*, pp. 149-213; L.B. Sohn, 'The Rights of Minorities' in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, 1981), p. 270. In general on the UN minority rights system, see I.O. Bokatorla, *L'Organisation des Nations Unies et la protection des minorités* (Brussels, 1992); F. Ermacora, 'The Protection of Minorities Before the United Nations', *Recueil des Cours* 183 (1984), pp. 247-370, here p. 251; P. Alston, ed., *The United Nations and Human Rights: A Critical Appraisal* (Oxford, 1995).

44 Thornberry, *International Law*, p. 179.

them'.<sup>45</sup> Article 27, therefore, contains a programmatic element, a goal to be achieved.

The issue of minority rights has been continuously monitored within the UN by the Sub-Committee on Prevention of Discrimination and Protection of Minorities for decades, but a general convention on minority rights has not yet been adopted. A recommendation was adopted by the UN General Assembly in 1992 entitled *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, which is essentially the publication in a separate document of the principles that can be inferred from the concise and less than explicit text of Article 27.<sup>46</sup> The Declaration is the only universally applicable instrument devoted to minority rights and was adopted by the UN Assembly without a dissenting vote. As far as linguistic, educational and cultural minority rights are concerned, the essential point is that the territorial state protects the existence and identity of various minority rights, including national and cultural rights among others, and supports the conditions necessary for the preservation of such rights.

Within their mandate the UN bodies and agencies are also responsible for the promotion and protection of human rights. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) undertakes a wide range of studies, projects, technical assistance activities and other initiatives that may be relevant for the protection of minority culture and education.<sup>47</sup> Although it was not adopted with a view to minority protection, the UNESCO *Convention on the Elimination of Discrimination in Education*<sup>48</sup> means in theory much more to minority education than the UN human rights Covenants.<sup>49</sup> Article 2(b) states that the establishment of separate educational

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45 F. Capotorti, 'The Protection of Minorities under Multinational Agreements on Human Rights', *Italian Yearbook of International Law* 1976, p. 22.

46 For details see Thornberry, 'UN Declaration'; A. Phillips and A. Rosas, eds., *The UN Minority Rights Declaration* (Turku/Abo, 1993). The Declaration goes somewhat further in a few aspects than the binding Article 27 of the *ICCPR*. In Article 2 (1), it replaces 'shall not be denied' from Article 27 with 'have the right' and adds that these rights apply 'in private and in public, freely and without any form of discrimination', and there is a further enhancement in that the Declaration prompts states to actively promote the enjoyment of minority rights.

47 For details, see S. Marks, 'UNESCO and Human Rights: The Implementation of Rights relating to Education, Science, Culture, and Communication', *Tex.Int'l.L.J.* 13 (1977), pp. 35-67; P. Thornberry and D. Gibbons, 'Education and Minority Rights: a Short Survey of International Standards', *I.J.G.R.* 4 (1996/1997), No. 2 (Special Issue on the Education Rights of National Minorities), pp. 115-135; P. Alston, *Making and Breaking Human Rights: The UN's Specialised Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights* (London, 1979).

48 Adopted on 14th December 1960, entered into force 22nd May 1962, 429 UNTS 93 (1960).

49 Adopted on 4th November 1950, entered into force 3rd September 1953, 213 UNTS 22, ETS 5 (1953); H. Saba, 'La Convention et la recommandation concernant la lutte contre la discrimination dans le domaine de l'enseignement', *Annuaire Français de Droit International* 6 (1960), pp. 646-652; P. Merens, 'L'application de la Convention et la recommandation de

institutions on linguistic grounds does not amount to discrimination. The prohibition of discrimination encompasses teachers' education as well, specially emphasised in the Convention (Article 4[d]). These provisions imply that states can maintain separate educational institutions but do not oblige them to do so. In Article 5(1)(c) however, the contracting states do agree to allow members of national minorities to establish and maintain, in certain circumstances and under certain conditions, their own educational institutions. Neither provision, though, takes an explicit stance regarding potential positive state obligations, including financial obligations, in this regard.

At the European regional level the Council of Europe has a crucial role with regard to the development and safeguarding of human rights in general. The *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)* inaugurated the first regional human rights system in the world.<sup>50</sup> The ECHR has been revised several times through a series of protocols. At present, the only specific reference to minorities is to be found in Article 14 of the ECHR, which lists 'association with a national minority' among examples of prohibited grounds for discrimination. Nevertheless, a number of rights guaranteed by the *ECHR* are relevant to minorities; e.g. refusing to approve schoolbooks written in the minority's kin-state might be a breach of the right to freedom of expression. It would be for the respondent government to show that the censorship measures were necessary in a democratic society (e.g. prevention of disorder). Another measure of protecting the minority's identity is through the education of children belonging to the minority group (Protocol 1, Article 2).

The *European Charter for Regional or Minority Languages*, created in the framework of the Council of Europe, protects the existence, culture and mother tongue rights of national minorities without defining the concept of minority.<sup>51</sup> Accordingly, mother tongue minorities are not provided with individual or collective minority rights; the focus is on the languages themselves. The field of application of the Charter is limited to indigenous languages only (Article 1). In the case of European minorities, language is the major guarantee of preserving identity.<sup>52</sup>

l'UNESCO concernant la lutte contre la discrimination dans le domaine de l'enseignement: un bilan provisoire', *Rev. Trim. Dr. h.* 1(1968), pp. 91-108.

50 C. Hillgruber and M. Jestaedt, *The European Convention on Human Rights and the Protection of National Minorities* (Köln, 1994); A. Gilbert, 'The Council of Europe and Minority Rights', *Human Rights Quarterly* 18(1996), pp. 160-190; D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (London, 1995); P. Thornberry and M. Estebanez, 'The Council of Europe and Minorities' (Council of Europe, Document/COEMIN, Strasbourg, 1994); P. Van Dyke and G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (London, 1998).

51 Adopted 5 November 1992, entered into force 1 March 1998, ETS 148.

52 See *inter alia* P. Kovács, 'La Protection des langues des minorités ou la nouvelle approche

The *Framework Convention for the Protection of National Minorities* is the first ever legally binding multilateral instrument devoted to the protection of minorities and is regarded as the most comprehensive international standard in the field of minority rights to date.<sup>53</sup> It sets forth a number of principles according to which states are to develop specific policies to protect the rights of minorities. Several articles take up individual human rights which are of special relevance to minorities (Articles 7, 8, 9, 12 §3). The Convention is largely constructed as a series of state obligations, through ‘programmatic’ provisions including several escape clauses, rather than as a detailed list of rights of persons belonging to national minorities.

These Council of Europe instruments have been supplemented by a Protocol on non-discrimination (No. 12) to the *European Convention on Human Rights*.<sup>54</sup> The Council of Europe Parliamentary Assembly was more active, compared with the so-called governmental sphere (the Committee of Ministers and its subordinate bodies) and issued several recommendations on the rights of national minorities.<sup>55</sup> It would also be useful to add a further protocol to the ECHR on the rights of minorities, drawing on the principles of the recommendations and attempting to include a definition of national minority. This was acknowledged by the 1993 Vienna Summit of Heads of State and Government of the Council of Europe, which decided to instruct the Committee of Ministers to draft a framework convention on minorities as well as ‘to begin work on drafting a protocol complementing the *European Convention on Human Rights* in the cultural field by provisions guaranteeing individual

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de la protection des minorités?’, *Revue Générale de Droit International Public* 97 (1993), pp. 411-418; P. Blair, *The Protection of Regional or Minority Languages in Europe* (Fribourg, 1994), pp. 50-60. For a strong critique of the flexible approach of the European Charter, on the grounds that it leaves too much choice to states, see F. De Varennes, ‘Ethnic Conflicts and Language in Eastern European and Central Asian States: Can Human Rights Help Prevent Them?’ *I.J.G.R.* 4 (1996/1997), No. 2 (Special Issue on the Education Rights of National Minorities), pp. 135-174.

- 53 Adopted 10 November 1994, entered into force 1 February 1998, ETS 157: See *inter alia* Wheatley, ‘The Framework Convention for the Protection of National Minorities’, *European Human Rights Law Review* 6 (1996), pp. 583-590; H. Klebes, ‘La Convention Cadre du Conseil de l’Europe pour la Protection des Minorités Nationales’, *Rev.Trim.dr.h.* 30 (1997), pp. 205-227; F. Benoit-Rohmer, ‘Le Conseil de l’Europe et les minorités nationales’ in K. Malfliet and R. Laenen, eds., *Minority Policy in Central and Eastern Europe: The Link Between Domestic Policy, Foreign Policy and European Integration* (Leuven, 1998), pp. 128-148.
- 54 Protocol No. 12, adopted 26 June 2000 by the Committee of Ministers of the Council of Europe, opened for signature and ratification by the member states on 4 November 2000, ETS 177. Its entry into force requires 10 ratifications; as of 1 July 2003 the number of signatures was 27, the number of ratifications 5.
- 55 E.g. 1201/1993, a protocol on the rights of national minorities additional to the ECHR. Other important recommendations are 1134/1990, 1177/1992, 1255/1995, 1492/2000 Rights of National Minorities etc.

rights, in particular for persons belonging to national minorities'.<sup>56</sup> This work has commenced but not been completed, due to far-reaching disagreements among member states regarding the nature and scope of the rights to be guaranteed.

Within the mission of the Organisation for Security and Co-operation in Europe (OSCE), respect for human rights is acknowledged as a fundamental element of security, and this has provided a context for the elaboration of new standards.<sup>57</sup> The OSCE often takes a progressive stance, which can be explained by the fact that OSCE commitments are not legally binding in respect of minority protection, and regularly serves as a source of inspiration for the development of standards by other international organisations.

The *Helsinki Final Act* (1975) does not specifically contain concrete provisions on human contact for national minorities.<sup>58</sup> The Chapters dealing respectively with 'Co-operation and Exchanges in the Field of Culture' and 'Co-operation and Exchanges in the Field of Education' conclude with a vaguely formulated paragraph. The procedures under the so-called 'human dimensions' of CSCE/OSCE contain considerable potential for further development. These emerged out of the Vienna follow-up meeting during the crucial years of the end of the Cold War (1986-89). In contrast to previous documents, extensive, far-reaching and boldly conceived provisions on the rights of minorities were included in the Concluding Document of the Vienna Meeting of Representatives of the Participating States of the CSCE.<sup>59</sup> The Vienna provisions regarding cross-border contact for minorities represent an innovative conceptual extension of heretofore accepted minority right; the traditional view is that minority rights are self-contained within the territory of a given state. Paragraph 31 legitimises contact in all forms between members of a minority, as individuals and as a group, and their co-nationals everywhere, with whom they 'share a common national origin' as well as a cultural heritage, for the purpose of maintaining their own unique characteristics.

Progress on minority issues in Europe greatly accelerated after the political changes that took place in 1989. The *Copenhagen Document on Hu-*

56 Vienna Declaration of 9 October 1993, Appendix II.

57 A. Bloed, 'The OSCE and the issue of national minorities' in Phillips and Rosas, *Universal Minority Rights*, pp. 113-122; M. Tabory, 'Minority Rights in the CSCE Context' in Dienstein and Tabory, *Protection of Minorities*, pp. 187-211; R. Dalton, 'The Role of the CSCE' in H. Miall, ed., *Minority Rights in Europe: The Scope for a Transnational Regime* (London, 1994), pp. 99-111.

58 Final Act of the Conference on Security and Co-operation in Europe, adopted 1 August 1975, reprinted in 14 ILM 1292 (1975). Cf. for example T. Buergenthal, ed., *Human Rights, International Law, and the Helsinki Accord* (New York, 1977).

59 Adopted 15 January 1989, reprinted in 10 H.R.L.J. 270 (1989). For details, see A. Bloed and P. Van Dijk, eds., *The Human Dimension of the Helsinki Process: The Vienna Follow-Up Meeting and its Aftermath* (Dordrecht, 1991).

*man Dimension* is still regarded as the fundamental OSCE instrument setting standards for minority rights.<sup>60</sup> Its provisions went well beyond existing guarantees, addressing, in particular, language use, education and political participation. Subsequent OSCE documents reintegrating these minorities provisions include the 1990 *Charter of Paris for a New Europe*, 1991 *Geneva Report on National Minorities*, the 1991 *Moscow Document*, the 1992 *Helsinki Document*, and the 1994 *Budapest Document*.

The OSCE High Commissioner (HCNM), whose office was created in 1992, was not intended to act as a promoter of minorities' interests nor as an investigator of rights violations, but rather as an initiator of early action in situations in Europe where peace and stability might eventually be under threat.<sup>61</sup> But in fact the Commissioner's practice has already led to further development of the OSCE instruments. In response to gaps in the wording, and in order to assist policy- and law-makers generally, the HCNM has on three occasions sought the assistance of internationally recognised experts to clarify the content of minority rights in specific areas. These sets of recommendations provide OSCE member states with guidance in formulating policies for minorities within their jurisdiction in the following spheres:

- the Hague Recommendations regarding the Education Rights of National Minorities;<sup>62</sup>
- the Oslo Recommendations regarding the Linguistic Rights of National Minorities<sup>63</sup> and
- the Lund Recommendations on the Effective Participation of National Minorities in Public Life.<sup>64</sup>

Apart from the universal and regional international instruments mentioned above, there are several others that, while not specifically dealing with minorities, nevertheless imply protection for them. The *International Convention on the Elimination of all Forms of Racial Discrimination* (1966) uses a very broad definition of 'racial' discrimination and 'race' in that it includes ethnic and national origin (see Article 1). The UNESCO *Declaration on Race and Racial Prejudice* (1978) affirms the right to be different and the right to cultural identity; it forbids forced assimilation; and it stresses the need

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60 Adopted 29 June 1990, reprinted in 29 ILM 1305 (1990), 11 H.R.L.J. 232 (1990).

61 Helsinki Declaration, 13 H.R.L.J. 284 (1992) (appointment of the High Commissioner on National Minorities, Decision 23, at 288). Cf. for example W.A.Kemp, ed., *Quiet Diplomacy in Action: The OSCE High Commissioner on National Minorities* (London, 2001).

62 Reproduced and discussed in *I.J.G.R.* 4 (1996/1997), No. 2 (Special Issue on the Education Rights of National Minorities).

63 Reprinted in *I.J.G.R.* 6 (1999), pp. 319-328.

64 Reproduced in J. Packer, 'The Origin and Nature of the Lund Recommendations on the Effective Participation of National Minorities in Public Life', *Helsinki Monitor* 11:4 (2000), pp. 29-61.

for affirmative action for groups subject to disadvantage or discrimination. Although the UN *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) and the *Universal Declaration on the Rights of Peoples* (1976) are not legally binding documents, they have a certain authority, especially as they were broadly supported and adopted by acclamation. Furthermore, they can contribute to the development of standards for minority protection by setting and/or confirming certain trends.

At the level of the European Union (EU), minority protection not yet extensively developed.<sup>65</sup> So far, at least, principles of non-discrimination and equal treatment are much 'harder' in the EU's legal regime than any principles of minority rights. In the Treaty of Amsterdam (1997), a new Article 6 paragraph 1 includes as founding principles of the EU all the Copenhagen criteria with the exception of a single clause: the 'respect for and protection of minorities'.<sup>66</sup> The *Charter of Fundamental Rights* of the European Union, as accepted at the summit in Nice in December 2000, does not tackle the question of minority rights and limits itself to declaring in its Article 22 that 'the Union shall respect cultural, religious and linguistic diversity'.

There are only a very limited number of EU internal initiatives. In the present 15 countries of the EU some 40 million of the 377 million citizens speak a language other than the main or official language of the state in which they live. Pressure from these speakers of the 'Lesser Used Languages' led to both the founding of the European Bureau for Lesser Used Languages (EBLUL) in 1982 and the passing of several European Parliament resolutions aimed at guaranteeing linguistic and cultural rights to speakers of such 'minority' languages within the EU.<sup>67</sup> The protection of minorities focuses therefore more on languages, and then only indigenous languages, rather than on their speakers.

In general, it can be said that the latest international initiatives have placed cultural and linguistic rights at the forefront of the development of minority rights at the international level on the grounds that, in situations of conflict, categories outside law, such as culture and language, should also be

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65 See *inter alia* G. Pentassuglia, 'The EU and the Protection of Minorities: the Case of Eastern Europe', *European Journal of International Law* 12 (2001), pp. 3-39; B. De Witte, 'The European Community and its Minorities' in Brölmann, Lefeber and Zieck, *Peoples and Minorities*, pp. 167-185.

66 For detailed analyses of the question see G. Toggenburg, 'Linguistic diversity: Pearl or stumbling block of EU-Law?', Conference Paper 2001, The European Academy Bozen/Bolzano, Italy.

67 See *inter alia* Resolution on a community charter of regional languages and cultures and on a charter of rights of ethnic minorities, O.J. No C 287/106-107; Resolution on the languages and cultures of minorities in the EC, O.J. No C 61/110-113.

given legal expression and protection. Today there is no compulsory universal or regional international document setting out the special rights of minorities and/or persons belonging to minorities and none devoted exclusively to culture and cultural rights themselves. Only a few major conventions refer to the necessity of preserving the characteristics of minorities with state assistance. There is no international obligation to acknowledge of the collective rights of minorities, not even in a restricted form (e.g. as cultural autonomy). Under the present framework of regulations it is the principle of positive distinction that can reconcile the individual and collective sides of human rights and harmonise the principle of equality of citizens with the right to be different.

### **III. Hungary and the Hungarian Minorities Living Outside Its Borders**

The number of Hungarians living outside Hungary's borders stagnated during the twentieth century and their proportion to the majority population in those other states shrank.<sup>68</sup> With the enactment of the Status Law – in an attempt to redress what was felt to be a historical injustice – the government hoped to support the ethnic Hungarians while also restraining mass migration of Hungarians from the neighbouring countries to the mother country during the period leading up to Hungary's accession to the European Union in 2004.<sup>69</sup> At that point in time, Romania will not be ready for EU membership; neither will Serbia and Montenegro, Croatia or Ukraine.

After World War II, treaties concluded simultaneously by several states became more frequent, as did interstate treaties which, in addition to settling disputes, outlined specific forms of cooperation. Following the collapse of the communist regimes, the previous so-called 'friendship and co-operation' agreements lost their validity. From the beginning of the 1990s, in conformity with the spirit of the messages issued by the European Union and NATO, almost all of the countries in this region concluded bilateral agreements as a part of the so-called 'good neighbour' policy. At the end of the Cold War, the protection of ethnic minorities was viewed afresh.

As far as Hungary is concerned, negotiations with neighbouring states to conclude new agreements commenced at the beginning of the 1990s. In negotiations where no separate minorities agreement was signed, a so-called 'basic treaty' would include provisions for protection of the identity of the

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68 On the historical events and statistical background to the situation of the Hungarian diaspora abroad see other articles in this volume.

69 A recent survey indicated that a quarter of Hungarians planned to move to Hungary once it has joined the EU. The government insists the Status Law will reduce this number by half, but that would still mean a heavy influx of around 375,000.

minority.<sup>70</sup> A treaty is ‘basic’ when it contains articles obliging the two parties to make concessions with respect to their own national interests (strictly interpreted).

The bilateral agreements contain soft law provisions especially with respect to minority issues.<sup>71</sup> This reflects the importance of political considerations. The common characteristic of the articles is that the rights of the minority as such are guaranteed and obligations are imposed on governments. The provisions concerning minorities usually consist of one or two articles in the basic treaties, which themselves contain an entire ‘Act on Minorities’. A detailed comparative analysis of the content of these treaties goes far beyond the scope of this paper. It is sufficient for present purposes to point out that the minority provisions in bilateral agreements can be grouped around certain fundamental rights such as the right of expression; the right to preserve and develop ethnic, cultural, linguistic or religious identity, with special respect for linguistic and educational rights; the right to practice religion; and the right to establish organisations and to participate effectively in the decision-making process. More rarely, in addition to these ‘classic’ core rights, there may be included such rights as cross-border contact and the preservation of architectural heritage.

The bilateral treaties contain provisions concerning unrestricted contact between the country and the minorities living in the territory of the other state. The wording of these articles corresponds to the wording of regional agreements in which the state of citizenship undertakes obligations with respect to minorities living in its territory; the contracting parties agree to establish, maintain and promote special – for the most part cultural – relationships between the mother country and the minority living outside its borders. These basic treaties are, to a greater or lesser degree, framework treaties; they need to be implemented through specific legislative acts or through intergovernmental

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70 Governments have made efforts to extend the zone of friendly relationships within the wider environs of Hungary. Nineteen agreements of this type were concluded up to the year 2000. Bilateral treaties on minorities were signed with Ukraine (1991), Slovenia (1992), Croatia (1995). The so-called ‘basic treaties’ are in force with Slovakia (1995), Romania (1996). Their official English translations can be found at <http://www.meh.hu/nek/>. For detailed analyses of the basic treaties, see among others G. Herczegh, ‘Les accords récents conclus entre la Hongrie et ses voisins, stabilité territoriale et protection des minorités’, *Annuaire FDI* 42 (1996), pp. 255-272, here p. 255; G. Bíró, ‘Bilateral Treaties between Hungary and its Neighbours after 1989’ in I. Romsics and B. Király, eds., *Geopolitics in the Danube Region: Hungarian Reconciliation Efforts 1948-1998* (Budapest, 1999); E. Lantschner and R. Medda-Windischer, ‘Protection of National Minorities through Bilateral Agreements in South Eastern Europe’, *European Yearbook of Minority Issues* 2001/2002.

71 See K. Nagy, ‘Les règles de caractère soft law dans les traités bilatéraux de la Hongrie conclus sur la protection des minorités’ in P. Kovács, ed., *Le Droit international au tournant du millénaire: l’approche hongroise* (Budapest, 2000), pp. 12–27.

agreements on specific matters. The implementation of the treaties involves two distinct considerations: first, the parties must respect the obligations which they have reciprocally undertaken; second, they must pursue bilateral talks on the objects of the treaties with a view to committing themselves to new or further obligations. The effective and correct implementation of the treaties, however, is generally not subject to legal control; there is no explicit sanction for the failure by one party to cooperate in implementing a treaty.

In addition to basic treaties and minority agreements, there are other bilateral agreements which, although concluded without the express aim of minority protection, nevertheless refer directly or indirectly to Hungarians living beyond the borders. It is common practice for states to sign bilateral agreements on cultural cooperation where certain provisions are specifically devoted to the provision of training and other assistance to teachers involved in the education of national minorities, although mainly in soft law wording. There are bilateral agreements with most of Hungary's neighbouring countries on cultural and/or educational cooperation, with special provisions on the education, further training and other support for teachers participating in the education of minorities (these, too, mainly in soft law wording).<sup>72</sup> These agreements are often supplemented by or executed through ministerial decrees which, *stricto sensu*, are not of an international legal character.

Typically, consideration is given to the need for both parties to support the teaching of the language of the other country, to promote the exchange of visiting lecturers, teachers and professional materials, and to facilitate participation in language and professional training courses. The parties make it possible for their respective citizens to study in the educational institutions of the other country at all levels and they support direct cooperation between local government authorities which, in the spirit of the agreement, aim to promote, facilitate, extend and strengthen their relationships in the fields of culture, education and science. Scholarships and other forms of financial help are provided to the citizens of the other country for this purpose, within the resources available. School certificates, university diplomas and scientific degrees are also subject to mutual recognition. They provide the conditions for each other's minorities to exercise special rights in order to preserve and develop education, schooling and cultural identity, and the parties also cooperate in satisfying the cultural needs of citizens of different national identity. The activities of the social and cultural organisations of national mi-

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72 On these bilateral treaties, on the basic treaties and on the provisions of the Status Law relating to culture and education see the author's 'A határon túli magyarok oktatási és kulturális kedvezményeinek jogi jellegéről' in K. Tóth, ed., *In memoriam Nagy Károly egyetemi tanár: 1932-2000* (=Acta Universitatis Szegediensis. Acta juridica et politica: Tom. 61. fasc. 10, SZTE ÁJK, 2002) (Szeged, 2002), pp. 143-173.

norities are promoted, including the right to accept help from the kin-state in accordance with the regulations in force.

There are references to minorities living outside the countries' borders not only in treaties, but also in domestic legislation. The newly worded constitutional rules of Central European countries usually contain provisions on minorities,<sup>73</sup> just like the fundamental laws of some Western European states, but they have a different emphasis and are of a somewhat different character.<sup>74</sup> The Hungarian constitution mentions national minorities living in the country and, through the so-called 'responsibility clause',<sup>75</sup> also refers to Hungarians living as minorities. The wording of this constitutional provision offers ample scope for interpretation in practice, and thus far it has produced around 150 different and currently valid legal regulations regarding Hungarians who are not citizens of the Hungarian Republic. Several pieces of domestic legislation contain provisions about co-nationals, but almost none of these laws mentions minority Hungarians openly in its title. Moreover, the number of entitlements accruing to Hungarians in the diaspora is quite insignificant, because two-thirds of them have been promulgated in the form of ministerial decrees, and only one-third as Parliamentary legislation.<sup>76</sup>

There are also examples of state practice not expressly related to minorities but which may have a significant impact on their communities. These can be called indirect measures of minority policy. Thus, for example, the promotion of cooperation between local governments across borders or the opening of new frontier crossing points may have a positive influence on the minority's ability to exercise its right to maintain contact with the kin-state. The inhabitants of a particular geographical area may enjoy certain advantages in the framework of regional and borderland cooperation.

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73 Kin-state clauses are included in the constitutions of Albania, Croatia, Slovenia, Macedonia, Romania and Serbia. The Czech, Bulgarian and Baltic States' constitutions do not mention kin-state responsibility. Bulgaria and Slovakia thus developed kin-state legislation in the absence of a kin-state clause in their constitutions at the time. Provisions asserting a link with co-ethnics abroad were wholly absent from communist-era constitutions; the question of national minorities living abroad was taboo.

74 On the constitutions of Eastern European countries, see P. Kovács, 'Le Statut des langues minoritaires dans neuf pays de l'Europe central et oriental (à la lumière des rapports nationaux de la Convention-cadre pour la protection des minorités nationales en Europe)', paper presented to the colloquium 'Langue(s) et Constitution(s)', Rennes, December 2000. On the Western European constitutions see K. Nagy, 'A kisebbségek jogi helyzetének szabályozása egyes európai alkotmányokban' in L. Bodnár, ed., *EU-csatlakozás és alkotmányozás* (Szeged, 2001), pp. 163–209.

75 Hungary 'bears a sense of responsibility for the fate of Hungarians living outside its borders and promotes the fostering of their relations with Hungary' (Para. 3 Article 6).

76 For details, see J. Tóth, 'Diaspora in Legal Regulations 1989-1999' in I. Kiss and C. McGovern, eds., *New Diaspora in Hungary, Russia and Ukraine: Legal Regulations and Current Politics* (Budapest, 2000), pp. 42-95.

On the whole, the basic treaties have improved Hungary's relationship with its neighbours, a view endorsed by external observers. The potential of bilateral treaties to reduce tensions between kin-states and home-states appears to be significant, inasmuch as they can procure straightforward specific commitments on sensitive issues, where multilateral agreements only allow for an indirect approach. Furthermore, they can take into account the specific characteristics and needs of each national minority and the specific historical, political and social context within which the treaties operate. By invoking internationally adopted standards, they provide a framework by which to assess the performance of governments in conducting their internal affairs, and Hungary can take this into account in the formation of bilateral relationships with particular states, including policy development issues. The most important aim, the settlement of the minority issue and the promotion of internal stability, has not been fully achieved. As far as the execution and application of these agreements is concerned, the situation leaves some room for improvement. In fact, the existing system and practice of minority protection has not been significantly changed by these treaties. However, these agreements contribute to the establishment of a new interstate framework for minority protection, which should result in a more flexible approach by and between the national and international levels of law.

The Status Law guarantees a number of privileges exclusively to ethnic Hungarians living in certain neighbouring countries who are in possession of a special identification card, among others in the fields of education (e.g. benefits for students and teachers to enable them to take advantage of improved rights to study, to post-graduate training or to receive scholarships, prizes and diplomas – Articles 6, 9, 11, 12) and culture (e.g. free admission to museums and archives – Article 4)<sup>77</sup>. Benefits are usually granted to kin-foreigners when they find themselves on the territory of the kin-state. Under the Hungarian act, certain benefits are available even in the homeland, one of the objectives of the law being that this assistance and these benefits can be utilised in the beneficiaries' land of birth. These benefits include the promotion of Hungarian-language education in neighbouring countries by providing school equipment and materials for teaching and education (Article 13), and support for ethnic organisations operating in neighbouring countries and dealing with the preservation and promotion of Hungarian language and traditions (Article 18). There are also benefits for students of public education institutions teaching in Hungarian in the neighbouring countries or of 'any higher education institution' (Article 10). Educational assistance is available in the native country for parents of minors (the original version provided the grant only for families of which at least two minors attending schools) pursuing their studies

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77 For details of other benefits and the history of the Act, see other articles in this volume.

in the Hungarian language or in the subject of Hungarian culture in an institution of primary, secondary and tertiary education in their home country (Section 14) (before the amendment, the paragraph referred to ‘Hungarian language school’ only, irrespective of the subject of education, and this was highly criticised by the neighbouring countries’ governments). Hungary provides this aid in the same way as the national minorities living on Hungarian territory receive such assistance from their kin-states.<sup>78</sup>

Support for schools and the educational system, as well as various practices which pursue obvious cultural and artistic aims beyond the borders, have become customary in the past decade all over Europe. The kin-state role is predicated on the idea of the nation as a cultural collectivity. In these fields, if there exists any established international custom, the consent of the home-state can be presumed and kin-states may take unilateral administrative or legislative measures. Further, 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-state to similar measures concerning its citizens. Conversely, in fields which are not covered by international treaties and customs, the consent of the home-state affected by the kin-state measure should be explicit. To cite an example, if a state unilaterally decides to grant scholarships to foreign students of its kin minorities irrespective of any link between their studies and the kin-state itself, this decision might be considered to interfere with the relevant home-states’ ‘internal affairs’ (e.g. their educational policies). This was in fact partly the case with the Hungarian Status Law before the changes made to its Section 14. Thus, as the Venice Commission stated, regulations on the preferential treatment of kin minorities should not touch upon areas demonstrably pre-empted or already covered by existing bilateral treaties, unless the home-state concerned has been consulted and has either approved of this step or has implicitly – but unambiguously – accepted it and not raised any objections.

I agree with the suggestion that the Status Law

is of rather more symbolic than practical importance, as the majority of the special treatment provisions and support measures included in it already existed prior to the act. The act itself provides only a frame-

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78 For detailed analysis of the Status Law in comparison to other similar legislation see *inter alia* M. Breuer, ‘The Act on Hungarians Living in Neighbouring Countries: Challenging Hungary’s Obligations under Public International Law and European Community Law’, *Zeitschrift für Europarechtliche Studien* 2 (2002) pp. 255–281; Z. Kántor, ‘Hungary and the Hungarians abroad: Homeland Politics and the “Status Law”’, Paper presented to the ‘Conference on National Identity and Citizenship in Post-Communist Europe’, Institute d’Études Politiques de Paris, July 2001; Council of Europe, *The Protection of National Minorities by their Kin-State* (Science and technique of democracy No. 32) (Strasbourg, 2002) and also several articles in this volume.

work and is restricted to the declaration of the principles of dealing with people living beyond the borders, rather than specifying any concrete provisions. As far as their legal character is concerned, framework acts are more like the incomplete, soft law-type rules of international law, which cannot be executed in themselves.<sup>79</sup>

As mentioned above, in addition to the basic treaties and the unilateral domestic measures, these issues are regulated in other specific bilateral agreements concentrating specifically on particular questions (e.g. mutual recognition of diplomas; cooperation in education). The Status Law aims to bring these laws together into a coherent framework and introduce new laws. Whether or not it will succeed is a question for the next few years. It is also questionable whether the 'right' method of giving more rights to Hungarians living abroad is to enact a new framework law instead of 'hardening' the soft law provisions of the existing bilateral treaties through negotiations.

Given the substantive and procedural stipulations of the existing body of EU law, it may be that the Status Law, even in its amended form, has to be abandoned in its entirety upon Hungary's accession, or so substantially amended as to undermine its purpose.<sup>80</sup> The problem will be limited to Hungarians in Croatia, Serbia and particularly those across the Schengen border in Ukraine and Romania (currently citizens of Romania, Ukraine and Yugoslavia require visas to enter the EU, and Hungary is about introduce the visa requirements for these countries from autumn 2003).<sup>81</sup> The desire of Central and Eastern European countries to maintain and strengthen relationships with external minorities is likely to affect their positions on a wide range of issues once they are EU members, ranging from foreign, single market and

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79 B. Majtényi, 'A szomszédos államokban élő magyarokról szóló törvény vitás jogi kérdései', *Magyar Kisebbség* 2001/3, pp. 47-79; cf. also J. Tóth, 'Pulling the wool over Hungarians' eyes', *Regio Yearbook* 2002, pp. 129-150.

80 The Status Law itself states: 'From the date of entry into force of the Act on the promulgation of the international treaty on the accession of the Republic of Hungary to the European Union, the provisions of this Act shall be applied in accordance with the *acquis communautaire* of the European Union'. The 2001 version of the Act was phrased '... the provisions of this Act shall be applied in accordance with the treaty of accession of the Republic of Hungary and with the law of the European Communities'(Article 27 paragraph 2). But what Hungary's membership in the EU will mean to the practical implementation of the act itself depends on the outcome of future negotiations both between Hungary and the EU and between Hungary's neighbours and the EU. See more details on the consequences in Bridgid Fowler's article in this volume; J. Tóth, 'The Consequences of Accepting EU Identity: The Case of Hungary and Ethnic Minorities' in K. Groenendijk, E. Guild and P. Minderhoud, eds., *In Search of Europe's Borders* (Dordrecht, 2002), pp. 251-272; *idem*, 'The Application of JHA and the Position of Minorities: the case of Hungary', *CEPS Policy*, Brief No. 18 (March 2002).

81 J. Lövenhardt, 'European Spaces: The Eastern Schengen Border and the Societies "In-between"', Paper delivered to the British Association for Soviet and Eastern European Studies annual Conference, Cambridge, 6-8 April 2002.

cultural policies to justice and home affairs and the further enlargement and development of the EU itself. Putting into practice the vision of preserving all languages, cultures and nationalities irrespective of size and state borders is a great challenge, to both old and new EU states.<sup>82</sup>

Interest in institutionalising the kin-state relationship is thus widespread across Central and Eastern Europe and appears to be increasing. The Hungarian law has drawn attention to the number of states in the region which similarly assert their kin-state role and have passed legislation similar to that of Hungary. Until the Hungarian legislation threatened to disturb the *status quo* in regional relations, the existence and significance of such body of law seems barely have been recognised within the context of international policy or by the academic world. The Venice Commission's report, with its non-binding guidelines, represents the first step towards the development of international norms governing kin-state policy towards co-ethnics abroad. It has also been proposed that the Parliament and the Commission of the European Union should examine the Hungarian law. Additionally, a Council of Europe investigation is underway and the issue has already come up in UN bodies.<sup>83</sup> As a result of a decision adopted by the European Parliament, the EU Commission is also due to compare the practice amongst member states of the Union and the countries which have concluded an Association Agreement with the EU.<sup>84</sup> These investigations of the Hungarian law are likely to raise

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82 The case of Hungary and its minorities is without precedent within the EU. Hungary will be the member state of the Union with the highest number of minorities in bordering countries whose identity and existence are endangered and the first with kin minorities whose countries of citizenship will remain outside of the EU borders for an uncertain period. One of the nearest equivalents to the Hungarian Status Law appears to be the legislation approved by Greece giving special rights to members of Albania's Greek community (see Venice Commission Report), and other EU states (Austria, Italy) have similar legislation. The kin-state question also seems likely to become increasingly relevant to the immigration issue, both in the Central and Eastern European states, as they become targets for non-European as well as co-ethnic immigration, and at the EU level.

83 In a session of the UN Working Group on Minorities, a debate was held on the Hungarian Status Law and kin-state issues. It was stated that non-binding guidelines on the issue would be helpful because international law failed to address all aspects of the issue. While many countries failed to protect minorities, the interference of the kin-state should be seen as problematic. The Cahriman-Rapporteur (A. Eide) concluded that 'guidelines were necessary, but work should start in Europe where the problem was most topical' and recommended that 'the OSCE High Commissioner for Minorities should take the initiative in drafting guidelines': *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities, Report of the Working Group on Minorities (Commission on Human Rights)*, Geneva 27-31 May 2002, E/CN.4/Sub.2/2002/19.

84 Research on the same topic from a different point of view is already underway in the EU; see European Parliament Directorate-General for Research, *Working Paper on Lesser-used Languages in States applying for EU Membership, Education and Culture Services* (EDUC 106A EN, July 2001).

international awareness of the external minority issue and encourage its consideration as part of the ongoing debate on changing notions of sovereignty, citizenship, nation and identity.

## Conclusions

International minorities law has made great strides in recent years, but even these can be considered to be at best a slow reaction to the rapidly changing situation in relation to minority protection. It seems beyond dispute that within the present scope of the various international agreements on minorities, repetition and duplication are frequent at both the bilateral and multilateral levels. At the same time, some regulations are contradictory, imperfect and reminiscent of soft law either because of their vague content or because they are not incorporated into binding international law instruments. Moreover, the place of minority rights itself within the international system of human rights is unclear. For these reasons, various forms of regulation have evolved and there are ongoing attempts to help minorities living outside national borders.

In theory, the parties to international agreements intend to execute them in good faith. This is the basic principle of international law, but it also constitutes one of its fundamental problems: With respect to the application and supervision of bilateral agreements it can be said that as these agreements are strongly motivated by political considerations, the political aspects of the application mechanisms are given priority over the opportunity for effective law-making.

As Péter Kovács stated, with regard to the basic problems of codification of minority protection:<sup>85</sup>

The value of a particular solution can be determined in the light of the following: (a) to what extent does it correspond to the real and lawful needs of the minority concerned; (b) does it form an organic whole within the constitutional, legal, institutional and budgetary system of the member state; (c) to what extent does it correspond to positive international law; and (d) is it in harmony with the precepts of universal and regional codification?

In my opinion, these criteria can also be applied to unilateral domestic measures which provide for the conferral or withdrawal of special rights for foreign citizens of the same ethnic origin as that of the country issuing the relevant legislation. The Venice Commission's report examined the Hungarian Status Law in the light of the last two points in the above list and identified certain deficiencies and contradictions. In view of the matters raised in

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85 P. Kovács, *Az európai kisebbségvédelem a '90-es években* (Miskolc, 1995), p. 87.

the present article, the same statement can be made about the first two of the above considerations.

The paramount importance of ensuring adequate and effective protection for national minorities, as a particular aspect of the protection of human rights and fundamental freedoms and in order to promote stability, democratic security and peace in Europe, has been repeatedly underlined and emphasised. Europe has developed as a cultural entity based on a diversity of interconnected languages and cultural traditions. Against this background, the emergence of new and original forms of minority protection, particularly on the part of kin-states, constitutes a positive trend in so far as these forms of protection can contribute to the realisation of satisfactory solutions to this key problem within the framework of international cooperation.

Responsibility for minority protection lies primarily with the home-state. The Venice Commission notes that kin-states also play a role in the protection and preservation of their kin minorities and may endeavour to ensure that their genuine linguistic and cultural ties remain strong. However, respect for the existing framework for minority protection must be identified as a priority concern. The practice of establishing bilateral treaties in the field of minority protection has proved effective and deserves continuing effort and attention. Treaties on friendly cooperation and minority protection are already encouraged and promoted by the international community, as well as being subject to its close scrutiny.

The adoption by states of unilateral measures granting benefits to 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 among states and respect for human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected. If a bilateral agreement between the states concerned exists, the adoption of preferential rules and procedures for their application must be in conformity with that agreement. It seems that the act in its present form (following the first, but probably not the last, amendment) confines itself to cultural and educational benefits and grants. The planned benefits are not limited only to Hungarian nationals of a given neighbouring country but open to every citizen of that country who, for example, pursues their studies in Hungarian in their home country. The implementation of the provisions of the act will depend heavily on the secondary legislation to be enacted according to its terms. This will necessarily follow separate negotiations with each neighbouring country.<sup>86</sup> With continuous bilateral consultations and with

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86 There has already been an agreement concluded between Hungary and Romania on the implementation of the amended benefit law in Romania (it was signed on 18 July 2003, before

better use of the existing bilateral instruments and mechanisms, misunderstandings about the intentions of the act could have been and should be reduced to a minimum.

The Venice Commission finds it appropriate to distinguish, as regards the nature of the benefits granted by the legislation in question, between those benefits relating to education and culture and other benefits. As far as the former are concerned, the differential treatment of citizens that they imply may be justified by the legitimate aim of fostering the cultural links of the targeted population with the population of the kin-state. However, in order to be acceptable, the preferences accorded must be genuinely linked to the culture of the state, and be proportionate.<sup>87</sup> Through the amendment of the Status Law, Hungary seems to have substantially met this international standard.

The more recent tendency of kin-states to enact domestic legislation conferring special rights on their kin minorities has not, until very recently, attracted particular attention; the international community and academic scholarship have hitherto shown very little interest in the question. No supervision or co-ordination of the laws in question has so far been sought or attempted. Nonetheless, the controversy surrounding the adoption of the Hungarian Status Law reveals the pressing need to address the question of the compatibility of such laws with international law and with European standards of minority protection.

The right to identity of (members of) minorities and the principle of substantive equality act as limitations on, as well as objectives of, minority protection. Minority rights cannot be used to support measures which would institute certain privileges for minority groups that cannot be justified by the demands of substantive equality; the minorities must not be given privileges which create new inequalities. 'Globalisation and a related sense of powerlessness have probably contributed to a longing for identity, and a fear of losing one's identity. People want to be recognised with their identity. While this is an understandable reaction, it is not without risks. An obsession with identity, narrowly defined, could indeed bring us back to aggressive national-

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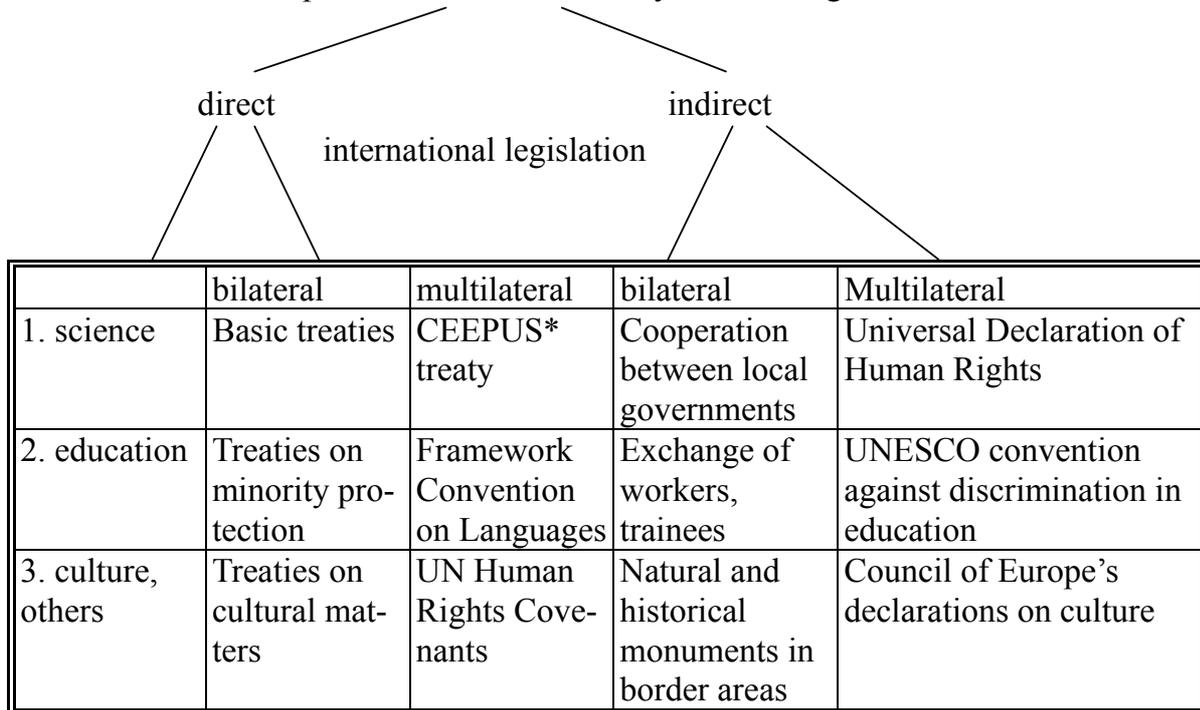
the entry into force of the new act itself); the original English text is available at <http://hirek.mti.hu/doc2.asp?newsid=113220&pub=147>. According to the new agreement the 'Memorandum of Understanding between the Government of Romania and the Government of the Republic of Hungary concerning the Law on Hungarians living in Neighbouring Countries and Issues of Bilateral Co-operation' of December 2001 shall cease to be valid. An additional paragraph is going to be added to the agreement stating that if, in the future, Romania passes a law similar to the Hungarian benefit law, it would be applied in Hungary under principles identical to those set forth in this agreement. Presently there are similar ongoing negotiations with Slovakia.

87 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 aim of maintaining links with the kin-states and to be proportionate to that aim.

ism and ethnocentrism'.<sup>88</sup> The preservation of language, religion and culture can be effected only if group identity is preserved. However, there is a danger that the glorification of group identity might lead to the sacrifice of individual rights, and in the end minority group identity can only be protected through the protection of individual rights. In the future development of minority rights protection it must be seriously considered whether and to what extent individual rights and group rights can be reconciled. They can be complementary to each other, but they may also conflict or be mutually exclusive.

As far as minorities are concerned, it is surprising to note that the importance of economic and social rights is largely overlooked. Cultural rights, which unfortunately remain an underdeveloped category of human rights, are of particular importance for minorities. The denial of the cultural identity of minorities is often a source of violent conflicts. Opinions are divided on the question of whether the protection of cultural identity requires the recognition of a new right, the right to cultural identity, and in particular a new collective human right.<sup>89</sup> The right to cultural identity should be considered as the real life demand of certain social groups in the world.

Measures for the preservation of the identity of the Hungarian minorities abroad



\*Central European Exchange Programme for University Studies

88 P. Leuprecht, 'Minority Rights Revised' in P. Alston, ed., *Peoples' Rights* (Oxford, 2001), p. 118.

89 J. Berting et al., eds., *Human Rights in a Pluralist World: Individuals and Collectivities* (Roosevelt Study Center Publications No. 10) (Westport and London, 1990); Middelburg Conference on Human Rights as Individual Rights and Rights of Collectivities, June 1988: discussion on the right to cultural identity summarised by J.H. Burgers, pp. 251-253.