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The concept of “nation”

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr György Frunda, Romania, Group of the European People's Party

Summary

Aware of the need to clarify the terminology used in constitutions and legislation in force to cover the phenomenon of ethnic, linguistic and cultural links between groups of citizens living in different states, in particular the use of the word "nation" as well as the correlation with a specific historical or political context, the Parliamentary Assembly has considered whether, and how, the concept of “nation” can help to address the question of national minorities and their rights in 21st-century Europe.

I. Draft recommendation

1. In 2003, the Parliamentary Assembly debated the question of preferential treatment of national minorities by the kin-state in the light of the Hungarian law of 19 June 2001 concerning Hungarians living in neighbouring countries ("Magyars"). In Resolution 1335 (2003), the Assembly noted in connection with the Hungarian law, which defined the concept of "nation" in its preamble, that to date there was "no common European legal definition of the concept of 'nation'."

2. The Assembly, aware of the need to clarify the terminology used in constitutions and legislations in force to cover the phenomenon of ethnic, linguistic and cultural links between groups of citizens living in different states, in particular the use of the word "nation" as well as the correlation with a specific historical or political context, has considered whether, and how, the concept of nation – where applicable, a rethought and modernised concept – can help to address the question of national minorities and their rights in 21st-century Europe.

3. The Committee on Legal Affairs and Human Rights, in a study of the concept of nation and its use in Europe based on data gathered from questionnaire replies from 35 national parliamentary delegations and on statements by experts in law and political science at a hearing it had organised in Berlin on 7 June 2004, concluded that it was difficult, not to say impossible, to arrive at a common definition of the concept of nation.

4. The term "nation" is deeply rooted in peoples' culture and history and incorporates fundamental elements of their identity. It is also closely linked to political ideologies, which have exploited it and adulterated its original meaning. Furthermore, in view of the diversity of languages spoken in European countries, a concept such as nation is quite simply untranslatable in many countries where, at best, only rough translations are to be found in certain national languages. Conversely, the words used in certain national languages have no adequate translation in English or French, the two official languages of the Council of Europe.

5. The Assembly has acknowledged that in some Council of Europe member states, the concept of nation is used to indicate citizenship, which is a legal link (relation) between a state and an individual, irrespective of the latter's ethno-cultural origin, while in some other member states the same term is used in order to indicate an organic community speaking a certain language and characterised by a set of similar cultural and historic traditions, by similar perceptions of its past, similar aspirations for its present and similar visions of its future. In some member states both understandings are used simultaneously to indicate citizenship and national (ethno-cultural) origin respectively. To this end, the term "nation" is sometimes used with a double meaning and at other times two different words are used to express each of those meanings.

6. The Assembly also acknowledges that whenever the concept of nation means citizenship it designates some kind of a contractual relation between a physical person and a state, while when the concept of nation means an ethno-cultural community it designates a cultural reality (a cultural fact or a cultural status) which is based on the free and unilateral association of a physical person to that community and involves only the relations among the members of that community. A nation in its cultural understanding becomes a subject of law (see international law) only if it organises itself as a state which is internationally recognised.

7. The Assembly notes that within the very complex process of nation building and of the nation-states' birth, the modern European states founded their legitimacy either on the civic meaning of the concept of nation or on the cultural meaning of the concept of nation. However, while the distinction between those two meanings is still to be identified in some of the Council of Europe member states' constitutions, the general trend of the nation-state's evolution is towards its transformation depending on the case, from a purely ethnic or ethnocentric state into a civic state and from a purely civic state into a multicultural state where specific rights are recognised not only to physical persons but also to cultural or national communities.

8. The Assembly also notes that because of the way in which the nation-states were formed during the 19th century and the first part of the 20th century, as well as because of nation-states' border changes at the end of the Second World War and of the Cold War, on the territories of almost all the Council of Europe member states there live various groups of people who are at the same time citizens of the same state or civic nation, but who belong to and are part of different cultural nations. As compared with the biggest group of citizens having the same ethno-cultural background, those groups, who are relatively smaller, constitute and are called national minorities.

9. These national minorities or communities – often created as a result of changes in state borders –, which represent a constitutive part and a co-founding entity of the nation-state of which their members are subjects as citizens, enjoy their rights in order to preserve, express and foster their national identity, as provided for in Assembly Recommendations 1201 (1993) and 1623 (2003) and the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.

10. The Assembly also notes that since national minorities as such do not have legal personality they cannot be legal subjects and therefore they cannot be parties to contracts or covenants. However, they must be the object of collective protection and their members must enjoy the capacity to act, either as individual legal subjects or associated in various entities with legal personality, in defence of the respective national minorities' identity and cultural rights. These rights are not territorial or territorially connected and their recognition and protection must be legally organised both at the level of each nation-state concerned and at the transnational (international) level.

11. The Assembly acknowledges that the most important role in preserving the identity of national minorities falls to the state of which the national minority members are citizens. Consequently, it invites member states to adopt legislation and regulatory acts recognising the traditional national minorities and apply them in good faith. Where representation in political institutions is concerned, it recommends that the states apply the principle of positive discrimination to members of national minorities, especially as regards proportional representation in central and decentralised institutions (including executive bodies) in particular in the regions where those minorities live.

12. The Assembly believes it necessary to strengthen recognition of every European citizen's links with his identity, culture, traditions and history, to allow any individual to define himself as a member of a cultural "nation" irrespective of his country of citizenship or the civic nation to which he belongs as a citizen, and, more specifically, to satisfy the growing aspirations of minorities which have a heightened sense of belonging to a certain cultural nation. What is important, from both a political and a legal standpoint, is to encourage a more tolerant approach to the issue of relations between the State and national minorities, culminating in genuine acceptance of every individual's right to belong to the nation which he feels he belongs to, whether in terms of citizenship or in terms of language, culture and traditions.

13. The Assembly recalls that, in its Resolution 1335 (2003), it stated that "the emergence of new and original forms of minority protection, particularly by their kin-states, constitutes a positive trend (...)". It considered that the possibility for states to adopt unilateral measures for the protection of the kin-minorities abroad, irrespective of whether they lived in neighbouring or other countries, was conditional upon respect of the following principles: territorial sovereignty, *pacta sunt servanda*, friendly relations amongst states and respect for human rights and fundamental freedoms – in particular the prohibition of discrimination. While kin-states may legitimately play an important role in upholding national minority rights by taking an interest in what happens to their kinspeople living in other countries, it is imperative that this support respects the legislation of the states where the minorities concerned live and any regulatory act must be negotiated beforehand with the governments of those states. The same rights and obligations should be recognised for or observed by all states who intend to adopt unilateral measures regarding the protection of the identity of cultural and national minorities living in different states and being formed by the latter states' citizens.

14. The Assembly considers that, where the upholding of national minority rights is concerned, the Congress of Local and Regional Authorities of the Council of Europe has a major role to play, through work helping to guarantee application of the relevant European rules. It believes that Recommendation 43 (1998) on territorial autonomy and national minorities and Recommendation 70 (1999) on local law/special status should be re-examined to identify concrete follow-up.

15. Taking note of the Warsaw Declaration and the Action Plan adopted on 16 and 17 May 2005 by the Heads of State and Government of the member states of the Council of Europe, the Assembly calls on the Committee of Ministers to initiate discussion without delay with a view to swiftly implementing the decisions taken. In particular, the Action Plan points out that "Europe's chequered history has shown that the protection of national minorities is essential for the maintenance of peace and the development of democratic stability. A society that considers itself pluralist must allow the identities of its minorities, which are a source of enrichment for our societies, to be preserved and to flourish. (...)".

16. Consequently, the Assembly recommends that the Committee of Ministers:

16.1. invite the member states not yet having done so to sign and ratify the Framework Convention for the protection of national minorities, the European Charter for regional or minority languages and the European Charter of local self-government, which are fundamental instruments for maintaining the national identity of national minorities or communities, and step up its efforts in this respect;

16.2. invite the member states to promote in their national legislation the recognition of the cultural rights of minorities, inter alia on the basis of Recommendation 43 (1998) on territorial autonomy and national minorities and Recommendation 70 (1999) on local law/special status of the Congress of Local and Regional Authorities of the Council of Europe;

16.3. take the appropriate measures in order to make sure that the member states reject any attempt to promote the ethnic purity of the state or to organise the territory and the administration of the state on an ethnic basis, with the exception of the affirmative measures which aim to achieve a fair representation of the national minorities in their country's administration, at the central and the local level;

16.4. invite the member states to bring into line their constitutions with the contemporary democratic European standards which call on each state to integrate all its citizens, irrespective of their ethno-cultural background, within a civic and multicultural entity and to stop defining and organising themselves as exclusively ethnic or exclusively civic states;

16.5. draw up guidelines on procedures for developing relations between a state and the minorities residing in a different state – mainly in its neighbourhood –, bearing in mind the criteria identified by the Venice Commission in its 2001 report, in the light of its analysis of existing legislations, as well as the pertinent Assembly resolutions and recommendations.

17. The Assembly recalls that, in its Recommendation 1623 (2003) on rights of national minorities, it urged the Committee of Ministers to "take the necessary measures to continue co-operation with the European Union, with a view to achieving common policies in the field of the protection of national minorities". It observes that the reply from the Committee of Ministers to this recommendation was terse, to say the least. It therefore requests the Committee of Ministers to ask Mr Jean-Claude Juncker to focus in depth on the question of complementarity of policies on protection of national minorities and recognition of their rights in his forthcoming report on relations between the Council of Europe and the European Union.

II. Explanatory memorandum

by Mr Frunda, Rapporteur

*“The nation is a daily plebiscite”
Ernest Renan*

1. Introduction

1. In June 2003, the Parliamentary Assembly discussed the issue of the preferential treatment of national minorities by the kin-state with reference to the case of the Hungarian law of 19 June 2001 on Hungarians living in neighbouring countries (“Magyars”), on the basis of a report presented by the Committee on Legal Affairs and Human Rights¹. The report itself was largely based on a report issued by the Venice Commission in October 2001 on the preferential treatment of national minorities by the kin-state.

2. In Resolution 1335 (2003), the Assembly noted the lack of any common European legal definition of the concept of nation. It observed in connection with the Hungarian law that *“the definition of the concept of ‘nation’ in the preamble to the law could under certain circumstances be interpreted – though this interpretation is not correct – as non-acceptance of the state borders which divided the members of the ‘nation’, notwithstanding the fact that Hungary has ratified several multi- and bilateral instruments containing the principle of respect for the territorial integrity of states, in particular the basic treaties which have entered into force between Hungary and Romania and Slovakia. The Assembly notes that up until now there is no common European legal definition of the concept of ‘nation’.”*

3. In May 2003, a motion for an order presented by Mr Jurgens and others² was referred to the Committee on Legal Affairs and Human Rights. The motion called for clarification of the use of the terms “nation” and “people” and the concept of “national minority” in constitutional and legislative texts and of the relationship between these terms and the definition of citizenship for cultural, linguistic or ethnic minorities in kin-states.

4. On 5 June 2003, the Committee on legal Affairs and Human Rights appointed me as rapporteur.

5. To collect information on the legal situation in the member states, the committee decided to draw up a questionnaire and send it to the national parliamentary delegations. Thirty-five delegations³ replied to the questionnaire and I wish to express my sincere thanks to them. The data gathered by this means is intended to provide an overview of the situation in Europe from the legal standpoint, although this does not rule out a subsequent political analysis by the committee.

6. There have of course been very many studies on the question by both lawyers and political scientists. The committee therefore decided to organise a hearing and to invite academics representing different scientific cultures and different tendencies. The hearing took place in Berlin on 7 June 2004⁴.

7. Lastly, although it has never dealt explicitly with the concept of “nation” the Venice Commission has done a great deal of work on the subject of nationality. In particular, it has addressed the issue from the angle of nationality and state succession (see the proceedings of the colloquy held in Vilnius on 16-17 May 1997) and in its 2012 opinion on the protection of national minorities by their kin-state, at the committee’s request.

8. The issue raised here is by no means irrelevant to the present day. Neither is this a purely academic exercise. The aim is to determine whether, and to what extent, the concept of nation – a rethought, modernised and revitalised concept – can help to address the question of national minorities in 21st century Europe. Such a concept evidently comprises a political dimension and an equally important legal dimension. It is obvious, however, that the political dimension has been overlooked, in the debate on the rights and obligations of national minorities, and has been for decades.

¹ See Resolution 1335 (2003) and Doc 9744 rev (Rapporteur: Mr Erik Jurgens, Netherlands, SOC).

² Doc 9787.

³ Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia”, Turkey, Ukraine and the United Kingdom.

⁴ The programme appears in Appendix II. The minutes of the hearing (AS/Jur (2004) 27) have been declassified and are obtainable from the committee Secretariat upon request.

9. Within the scope of this report, I intend first to set out the findings and conclusions of the hearing organised by the committee and the answers to the questionnaire sent to national delegations. I intend, thereafter, to answer several questions: is there an overall, common definition of “nation”? Is there more than one definition? Is there an agreed definition on the basis of which thinking on recognition of the rights of national minorities can move forward? Is it necessary to adopt a new definition or do the existing definitions suffice? How does Council of Europe and European Union enlargement affect relations between the kin-state and national minorities living outside its borders?

2. Defining “nation”

10. As Mr Jurgens, rapporteur on the preferential treatment of national minorities by the kin-state, observed, there are major differences in the way the word “nation” is used in the different parts of Europe and in the different European languages. In many countries and languages, the word “nation” is synonymous with “state” or the totality of a state’s citizens. The word “nationality” is used as a synonym of “citizenship of a state”. It is possible that the question asked – is there an overall, common definition of the concept of nation? – might not have an answer, or might have a negative answer, since the concept is understood differently from one country to another: the same word quite simply has different meanings.

2.1. *Origin and metamorphosis of a concept*

11. The meaning which is given nowadays to the word “nation” in many countries is far removed from the original meaning.

12. Historically, it would seem that use of the word dates back to the Middle Ages; it comes from the Latin *natio*, a substantive derived from the verb *nascere* (to be born), and denotes origin, membership of a community, a relationship to an entity within which one was born. In mediaeval universities, firstly Bologna and Padua, Paris and Prague also, *natio* referred to a community of students from a particular religion.

13. The political connotation appeared later in Europe, from the 14th century onwards. *Natio* came to mean the Notables, the community of those who shared political power with the king (*Natio Hungarica*, *Natio Polonica*), and more specifically those whose origin, rank or duties conferred the right to participate in the affairs of the state. A person who lived under the authority of the Polish king, for example, whatever his language, culture, traditions or religion, was automatically a Polish subject. If, following a war, the same individual found himself under the authority of the German sovereign, the Polish subject became a German subject.

14. It was undoubtedly the late 18th century that saw the emergence of the concept of nation, thanks to the 1776 Declaration of Independence of the United States and the 1787 American Constitution, which begins with the words “*We, the people of the United States*”, and the French Revolution, which drew inspiration from the ideas of Rousseau and Abbé Sieyès. It was Enlightenment France which, by coining the concept of the nation-state, gave substance to the concept of nation. The French conception of nation is that of the “community of all citizens enjoying equal rights”, a community of individuals enjoying the same political rights, whatever their origins. It is a legal concept expressing the unity of the social basis of the state, which is viewed as a given, not a construct. In adopting their founding text, the United States did not consider the question of who the *people* were, and whether the Indians or the Blacks were included or excluded. In France, the nation was a concept of struggle – the struggle for freedom and against divine-right monarchy. The nation was the new concept on which the Revolution built the democratic legitimacy of the new regime, the new political system: the nation was seen as a unified and uniform community of citizens. The French conception led to recognition of the right of self-determination; a nation exists only when it succeeds in throwing off the yoke of oppression, despotism and absolute monarchy, when it becomes an independent state based on the common political will of the people. The French conception maintained the idea that the state was the legal personification of the nation, of all its citizens.

15. At the end of the 18th century, however, this approach was of interest only to the few states which had thrown off the yoke of monarchy. It was of no concern to most European countries, which belonged to the great dynastic empires – Austro-Hungarian, German or Russian – and were multinational.

16. This period therefore saw the emergence of a very different conception, the German concept of nation, that of Herder, a kind of patriotic German reaction to French domination. In this view, the nation was not a sum of individuals but a collective entity with a specific language and culture and specific historical traditions. This concept, that of the linguistic nation, confers legitimacy on the aspirations to political unity of a distinct linguistic community divided by frontiers whose members are bound together by the feeling of belonging to the same national community, by a common destiny and a common will to belong to a real

linguistic nation. The term “linguistic nation” accordingly denotes the totality of individuals belonging to the same nation by virtue of the fact that they speak the same language and share the same culture and traditions.

17. Alongside the French conception of nation, the different idea of a cultural nation was gaining ground. These two conceptions emerged in a particular political context, and were determined by political considerations, but they were not mutually exclusive and existed in parallel.

18. The emergence of the nations in Europe dates back to the 19th century. In keeping with the French model, starting in the 19th century and in the first half of the 20th century, especially in Western Europe, the “nation” was equated with the state, which explains why these two terms became synonyms. The First World War and the ensuing peace treaties altered the geography of some nations. Some countries lost territory but kept their old cultural and linguistic roots, without confining them within the new borders of the new nation state. These “nations” which lived united within common borders were divided in the course of the 19th and 20th centuries, but their feeling of belonging to a “nation” remained very strong, even if the members of the “nation” regarded themselves as loyal citizens of the states within which they now formed a “national” minority, ie a minority belonging to a different “nation” from that of the majority in the country. In the 20th century, therefore, the nation taken in the French sense of “community of citizens having the same rights” became the “community” full stop. In Europe after the Second World War, several states lost not only territory but also large parts of their nations – people who became citizens of the states which occupied the territories where they lived. Hence the story told by the old farmer to his nephews: without ever having left the village in which he was born, he had been first a Hungarian citizen, then a Soviet citizen, and was now a Ukrainian citizen.

19. The two traditional definitions of the concept of “nation” – the French and the German – existed side by side for two centuries, each remaining stable within its sphere of influence.

20. After the fall of the Berlin Wall, kin-states began to show increased concern about the members of their minorities living in neighbouring countries. This was essentially a cultural response expressing a right to preserve, foster and express the four key components of a nation’s identity: language, culture, traditions and ethnic origins.

21. This explains why countries such as Hungary, Romania, Croatia, Slovakia and others have adopted and implemented legislation encouraging members of their nations to preserve their national identity, both collectively and individually.

22. I consider that both definitions of “nation” are still valid today. A new definition is therefore unnecessary. What is important, from both a political and a legal standpoint, is genuine acceptance of every individual’s right to belong to the nation which he feels he belongs to, whether in terms of citizenship or in terms of language, culture and traditions.

2.2. *Terminology: a very relative meaning*

23. Another major obstacle facing us is the untranslatability of certain concepts. There are many countries in which the word “nation” is not understood in the French or German sense of the term. We must therefore be careful not to force meaning on words in order to make them coincide perfectly with a political concept. Simple translation mistakes cause misunderstandings. In view of the number of languages spoken in European countries and their diversity, certain words or concepts – such as nation and people– are quite simply untranslatable. At best, only rough translations are to be found in certain national languages. Conversely, the words used in certain national languages have no suitable translation in English or French, the two official languages of the Council of Europe.

2.3. *Attempted definitions*

24. According to Professor Kovacs, who was heard by the committee, it is impossible to give a common definition of the concept of nation. This is because the term “nation” is deeply rooted in peoples’ culture and history and incorporates basic elements of their identity. Furthermore, the problems of translating the term into different languages and those linked to the existence of different legal systems in different countries, in particular the French and English systems, are difficult to resolve. Lastly, the concept is closely linked to political ideologies, which have exploited it and adulterated its original meaning.

25. In contrast, Mr Nick, who was also given a hearing by the committee, believes that definitions can always be found, but that they will never be universal or eternal. Anything can be defined at a given moment, in a given context and for a certain purpose. He therefore proposed the following definition of nation: “*A nation is a specific political, social, economic and cultural community, often with a common language, culture and history, living in neighbouring territories, with ‘independent’ political institutions and social organisations; it presupposes a politically sovereign people, master of its own territory, with its own economic life and its state or, failing this, which aspires strongly to these things.*”

26. It should also be noted that, in his report on the *establishment of a European remembrance Centre for victims of forced population movements and ethnic cleansing* (Doc. 10378), Mr Einarsson adopts the following definition of *nation/nationality*: “a group of persons sharing the same language, culture and ethnic origins”.

27. The question which remains to be answered is whether there is any need for a common definition. The experts consulted were sceptical on this subject. For his part, Professor Kovacs noted that there is no need for a definition of nation to give substance to the existing legal instruments, international treaties and bilateral treaties governing the sovereignty, the territorial integrity and the rights of states, or minority rights. One solution therefore lies in applying the existing treaties and conventions, particularly the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages. The concept of nation is more a matter of political ideology. There is no guarantee that a common definition will help to solve any problems. The real question is whether it is possible to satisfy the legitimate interests of states on the one hand and the legitimate interests of ethnic and linguistic minorities on the other, and if so, how. I consider that the definition of nation should be flexible enough to allow any individual to define himself as a member of a nation even if he is a citizen of a country other than the kin-state.

3. The use of the concept of nation in law in present-day Europe

3.1. Nation and people

28. Surprisingly, the answers to the questionnaire sent to national parliamentary delegations show that the word “nation”, in the sense of an identity, is in fact used very little in the member states’ constitutions. The word “people” is unquestionably more widespread. A more delicate issue is the definition of the terms used, which, as a rule, is not to be found anywhere in the constitutions. The following analysis is therefore subject to this reservation.

29. Five groups of states may be identified:

3.1.1. States whose constitution refers explicitly or exclusively to the concept of “**nation**”, in the sense of a **civic nation**:

30. **Belgium**: Article 33 of its constitution provides that “all power emanates from the nation”.

31. The Constitution of **France** is strongly influenced by the concept of nation, although it refers to “the people”. Article 3 provides that “*national sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendums*” and that the guiding principle of the public is “*government of the people, by the people and for the people*”. However, the 1789 Declaration of the Rights of Man states that “*the principle of all sovereignty resides essentially in the nation*”. There is an underlying logic to this: the people build the nation, the nation founds the republic, the republic determines the outlines and functioning of the state⁵. The words “nation” and “national” recur throughout the Constitution: “national emblem”, “national anthem”, the President of the Republic “shall be the guarantor of national independence”, “the government shall determine and conduct the nation’s policy”, etc.

⁵ Here we should refer to the key decision of 9 May 1991 (Decision 91-290) on the law governing the status of the territorial community of Corsica, in which the Constitutional Council held that “*France is (...) an indivisible, secular, democratic and social republic which ensures the equality before the law of all citizens, whatever their origin; that, accordingly, the reference by the legislature to the ‘Corsican people, a component of the French people’ is contrary to the Constitution, which recognises only the French people, composed of all French citizens regardless of origin, race or religion*”.

32. **Poland:** the preamble to the Constitution begins with the words “*We, the Polish Nation*” and Article 4 provides that “*supreme power in the Republic of Poland shall be vested in the Nation*”. However, the concept is used within its civic meaning (as the entirety of citizens of the State irrespective of their nationality or ethnic origin).

33. **Slovakia** has similar provisions in the preamble to her Constitution (« *We, the Slovak nation*»).

34. **Romania:** Article 1 of the constitution provides that « *Romania is a (...) indivisible Nation State (...)*; Article 2 provides that « *National sovereignty resides with the Romanian people, who shall exercise it through its representative bodies and by referendum.*» and Article 4 that « *The State foundation is laid on the unity of the Romanian people. (2) Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property, or social origin* ». The constitution of Romania enshrines clearly the concept of the civic nation, composed of all Romanian citizens.

35. The constitution of **Turkey** is also very strongly influenced by the concept of nation, particularly its preamble, which lays down the fundamental principles governing the Turkish state: “*In line with the concept of nationalism and the reforms and principles introduced by the founder of the Republic of Turkey, Atatürk, (...) this Constitution, which affirms the eternal existence of the Turkish nation and motherland and the indivisible unity of the Turkish state, embodies; The understanding of the absolute supremacy of the will of the nation and of the fact that sovereignty is vested fully and unconditionally in the Turkish nation (...). This constitution is entrusted by the Turkish nation to the patriotism and nationalism of its democracy-loving sons and daughters.*” Article 3 provides that: “*The Turkish state, with its territory and nation, is an indivisible entity*”; Article 5 that: “*The fundamental aims and duties of the state are; to safeguard the independence and integrity of the Turkish Nation, the indivisibility of the country, the Republic and democracy*”; and Article 6 that: “*Sovereignty is vested fully and unconditionally in the nation. The Turkish Nation shall exercise its sovereignty through the authorised organs as prescribed by the principles laid down in the Constitution*”.

3.1.2. *States whose constitution refers explicitly or exclusively to the concept of “nation”, in the sense of an ethnic nation:*

36. The sense of identity as a member of a “nation”, as distinct from the sense of citizenship of a state, is clearly reflected in the constitutions of certain countries:

37. **Croatia:** The preamble to the Croatian Constitution (entitled “*historical foundations*”), a lengthy declaration on the foundations, origins and continuity of the Croatian nation, is no doubt the most outstanding example of the use of the concept: “*the Republic of Croatia is established as the national state of the Croatian nation and the state of the members of autochthonous national minorities (...)*. Moreover, the Croatian constitution differentiates between the “Croatian nation” and “citizens”.

38. **Lithuania:** the Preamble of the Constitution is a proclamation on the Lithuanian nation (“*The Lithuanian Nation- having created the State of Lithuania many centuries ago,- having based its legal foundations on the Lithuanian Statutes and the Constitutions of the Republic of Lithuania,- having for centuries persistently defended its freedom and independence,- having preserved its spirit, native language, writing, and customs,- embodying the innate right of the human being and the Nation to live and create freely in the land of their fathers and forefathers in the independent State of Lithuania,- fostering national concord in the land of Lithuania (...)*”). Article 2 lays down the principle that “*The State of Lithuania shall be created by the Nation. Sovereignty shall belong to the Nation*”, and Article 4 adds that “*The Nation shall execute its supreme sovereign power either directly or through its democratically elected representatives*”. Article 14 provides that “*Lithuanian shall be the State language.*”

39. Articles 1 to 3 of the Constitution of **Ireland** are devoted to the “nation”. Article 1: *The Irish nation hereby affirms its inalienable, indefeasible, and sovereign right to choose its own form of Government, to determine its relations with other nations, and to develop its life, political, economic and cultural, in accordance with its own genius and traditions*. Article 2: “*It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation*”. Article 3: “*It is the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions (...)*”. Lastly, Article 8 provides that the Irish language shall be the country’s national language (and its first official language, the second being English). The Irish delegation’s answer to the questionnaire stresses the fact that the term “Irish nation” should be understood as meaning “Irish people”.

40. Article 11 of the Constitution of **Ukraine** provides that "*The State promotes the consolidation and development of the Ukrainian nation, of its historical consciousness, traditions and culture, and also the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine.*"

41. **Albania**: the Albanian Constitution distinguishes between the "Albanian people" (understood as including persons living outside the frontiers of the state) and "citizens of Albania". With reference to the foundations of the Albanian state, Article 3 provides as follows: "*national identity and inheritance, religious coexistence, as well as coexistence with, and understanding of Albanians for, minorities are the bases of this state*".

42. The constitutions of other member states also distinguish between the "people" or "nation", on the one hand, in the sense of ethnic identity, and citizens, on the other, but in a specific way: the preamble to the 1995 Constitution of **Bosnia and Herzegovina** draws a distinction between the three "constituent peoples" and the citizens of Bosnia and Herzegovina.

3.1.3. *States in which the concepts of "nation", as an entity that gives identity, and "people", as a sovereign entity (democratic foundation of the state), exist side by side:*

43. **Spain**, whose Constitution sets forth in Article 1 the following principle: "*National sovereignty belongs to the Spanish people, from whom emanate the powers of the state*"; moreover, it is "the Spanish people" who ratify the Constitution. Article 2 provides, on the other hand, that "*the Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to autonomy of the nationalities which make it up (...)*". In the Spanish Constitution, therefore, the "nation" is equated with the homeland. Moreover the Constitution of **Spain** makes a distinction between the "Spaniards" and the "peoples of Spain".

44. **Estonia**, where the preamble to the Constitution mentions that the state "*is established on the inextinguishable right of the Estonian people to national self-determination*" and "*shall guarantee the preservation of the Estonian nation and its culture throughout the ages*". Article 1 lays down the principle of sovereignty vested in the people ("*supreme power of the state is held by the people*"), and Article 56 stipulates that "*the people shall exercise their supreme power through citizens who have the right to vote by electing the Parliament; participating in referenda*". Estonian constitutional lawyers agree that their Constitution is inspired more by the concept of nation than by other notions. The concept in fact underlies the Constitution: Estonian is the state's official language; Article 49 recognises everyone's right to preserve their national identity, etc.

45. The constitution of **Hungary** refers extensively to the "people" (Article 2: "*in the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives*". Article 5: "*The State of the Republic of Hungary shall defend the freedom and sovereignty of the people.*" Article 68: "*The national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State*". The term "nation", however, appears only once, in Article 29: "*The head of State of Hungary is the President of the Republic, who represents the unity of the nation and guards the democratic operation of the State*".

46. The constitution of **Italy** lays down the same principle that "*The sovereignty belongs to the people who exercise it in the forms and limits of the constitution*". However, the word "nation" recur throughout the Constitution: "*Members of parliament represent the nation (..)*" (Article 67) ; "*The president is head of state and represents the unity of the nation*" (Article 87).

47. The constitution of **Slovenia** provides in Article 3 that "*Slovenia is a state of all its citizens and is founded on the permanent and inalienable right of the Slovene nation to self-determination. In Slovenia power is vested in the people.*" The concept of "nation" also appears in the preamble: "*Proceeding from (...) the fundamental and permanent right of the Slovene nation to self-determination, and from the historical fact that in a centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood, (...)*".

48. Article 1 of the Constitution of **Greece** provides that "*Popular sovereignty is the foundation of government. All powers derive from the People and exist for the People and the Nation; (...)*".

3.1.4. *States whose constitution makes no mention of the word or concept of "nation" but refers solely to the "people" as the holder of sovereignty:*

49. This applies to **Andorra, Austria, the Czech Republic, Finland, Portugal and Sweden**.

50. In the Constitution of **Germany**, the term “German people” refers to persons of German citizenship living in the Federal Republic of Germany. The distinction people/citizens does not appear.

51. According to the constitution of **Switzerland**, the Swiss people and the cantons together form the Swiss Confederation (Federation) and have together adopted the constitution. State power must be legitimised by the people through votes and elections. In exercising the functions conferred on it by the constitution, the people – ie individuals with civil capacity – is the highest state body.

3.1.5. *Lastly, states where neither the concept of “nation” nor that of “people” appears in the Constitution:*

52. **Bosnia and Herzegovina, Cyprus, Denmark, Iceland, Liechtenstein, Luxembourg** (he constitution uses the words « Luxembourger / non-Luxembourger »), **Norway, the Netherlands** and “**the former Yugoslav Republic of Macedonia**”.

3.2. *Nation and structure of the state*

53. It is interesting to note, on the basis of the answers to our questionnaire, firstly that many constitutions do not take the trouble to define the state other than from the point of view of the political regime (constitutional monarchy, republic). Secondly, it may be seen that there is no direct correlation between the structure of the state – unitary or federal – and the attribution of sovereignty, and in particular the promotion of the idea of the nation.

54. One might expect the unitary structure of a state to be linked to the promotion of the idea of a single indivisible nation. Some unitary states, such as Estonia, France, Lithuania, Poland, Romania and Turkey establish a clear link between unity and indivisibility of the State with the nation; this link is particularly marked in the case of Croatia. Other countries, such as Albania or Portugal, make no mention of it.

55. On the other hand, the choice of a federal structure would seem at first sight to be determined by the need to reflect a complex historical heritage in institutional terms and to make allowance for the state’s ethnic, linguistic, religious and cultural diversity. This would apply to the Russian Federation, for example.

56. **Belgium** is a perfect illustration of this because its state structure is founded on a linguistic basis: it is a federal state which comprises three communities (French, Flemish and German-speaking), three regions (Walloon, Flemish and Brussels) and four linguistic regions (three monolingual – the French-speaking region, the Dutch-speaking region and the German-speaking region – and the bilingual region of Brussels-Capital).

57. Similarly, **Switzerland**, a federal state, is composed of four linguistic and cultural communities.

58. The only Council of Europe member state which is genuinely, and constitutionally, multiethnic is **Bosnia and Herzegovina**. It is composed of three “constituent peoples”, the Bosnians, the Croats and the Serbs. They are identified by their religion: Muslims, Roman Catholics and Orthodox Christians. Croats and Serbs from the neighbouring states are considered as members of the constituent peoples of Bosnia and Herzegovina.

59. **Cyprus** has adopted a similar model, since the republic is based on two constitutionally recognised communities: the Greek community – which comprises citizens of Greek origin, whose mother tongue is Greek and who share Greek cultural traditions or are members of the Greek orthodox Church – and the Turkish community – which comprises citizens of Turkish origin whose mother tongue is Turkish and who share Turkish cultural traditions or are Muslim. Other citizens, in particular those belonging to other religious groups, must declare their membership of one community or the other.

60. Conversely, the federal structure of the state is not necessarily founded on an ethno-national or linguistic basis. **Germany** is the best example of this.

4. **Nation and national minorities**

61. As regards national minorities, it is obvious, therefore, that their members are necessarily citizens of the country in which they are resident.

4.1. Recognition of national minorities and their rights

62. It seems unnecessary in this report to give a detailed description of the situation in each member state. In this connection, reference can be made to the state reports on implementation of the Framework Convention for the Protection of National Minorities and the opinions adopted by the Advisory Committee on the Framework Convention⁶.

63. Several states do not recognise in their constitution or legislation the presence of national minorities within their territory:

- **Andorra** (see also para 101) does not recognise the existence of any minorities within its territory and, consequently, its constitution and legislation do not confer any specific rights on national minorities and make no provision for such rights. The same applies to **Liechtenstein**, as well as to **Iceland**, the latter in consideration of a homogenous population.

- The same applies to **Denmark, France, Spain, Ireland, Luxembourg and the Netherlands**, in whose constitution or legislation there is no formal recognition or definition of ethnic or national minorities. These states do not confer any specific collective rights on minority groups. However, the constitution and legislation of these countries ensure the equality of all citizens, without any distinction, and provide for appropriate and sufficient protection of citizens, on an individual basis, and the enjoyment of universal human rights, including rights related to culture, education, language and traditions.

64. **Cyprus** is an interesting case in so far as its constitution refers only to the two constituent "communities" and to "religious groups". There is no legislation on national minorities. In accordance with the constitution, religious groups have opted for membership of one of the two communities: the Armenians, Maronites and Latins have declared their membership of the Greek community. As a result, they enjoy the same rights as the Greek Cypriot community. Each religious group elects a representative to Parliament. Their members enjoy positive discrimination in access to the civil service.

65. On the other hand, many member states do recognise the existence of national minorities either in their constitution or in their legislation and provide for collective protection of their rights.

66. Some constitutions explicitly recognise the existence of national or ethnic or linguistic minorities without mentioning the groups concerned and simply lay down the principle of recognition of their rights (enjoyment of the rights and fundamental freedoms recognised in the constitution; right to promote their ethnic, cultural, linguistic and religious identity; the right to education; recognition of the "national" language; setting up of representative local self-government bodies, etc). This applies to **Albania, Austria, Estonia, Hungary, Italy, Lithuania, Poland, Romania** and "**the former Yugoslav Republic of Macedonia**". Most of the time constitutional provisions are completed with specific and detailed laws on the rights of minorities.

67. Other states go further and expressly identify these minority groups by listing them either in the constitution or in legislation:

- This applies to **Croatia**, which includes a list of this kind not only in its constitution ("*the Republic of Croatia is established as the national state of the Croatian nation and the state of the members of autochthonous national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians and Ruthenians and the others who are citizens and who are guaranteed equality with citizens of Croatian nationality and the realisation of national rights in accordance with the democratic norms of the United Nations Organisation and the countries of the free world*"), but also in its legislation, which gives rise to certain problems⁷.

⁶ http://www.coe.int/T/F/Droits_de_l%27Homme/minorites/.

⁷ This provision was discussed and criticised both by the Venice Commission, which, at the time, examined not only the draft amendments to the constitution but also all the drafts of the law on national minorities and the draft amendments thereto, and by the Advisory Committee on the Framework Convention for the Protection of National Minorities. The Venice Commission noted, inter alia, that the list of national minorities which appears in the preamble to the constitution constitutes a practice which runs counter to that generally advocated by both the Council of Europe and the OSCE High Commissioner on National Minorities, as it tends to create legal problems related to the protection of minorities (in particular, those that may exist in fact but do not appear on the list). Echoing the previous remark, the Advisory Committee noted in its opinion of 6 April 2001 that "the most recent normative listing of national minorities, contained in the amendments to the Constitutional Law of Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities, adopted in May 2000, includes 22 minorities and envisaged the inclusion of 'others' in this list. In contrast, the preamble to the constitution as amended on 12 December 1997, suggests a more selective approach as it enlists only 10 national minorities, referred to in the constitution as 'autochthonous', as well as a general category 'others'. The Advisory Committee considers that no undue differentiations should be made between various national

- The same also applies to **Finland**, whose constitution recognises in Article 17.3 that “the Sami as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture”. The Sami also enjoy a right to local self-government.

- The same applies to **Norway** with a similar provision to the benefit of the same minority, the Sami, as an indigenous people (Article 110 of the Constitution, Law on the Sami).

68. Other member states have recognised national minorities in the context of their accession to the Framework Convention for the Protection of National Minorities:

- **Germany** recognises as national minorities Danes with German citizenship, Sorbians with German citizenship and Sinti and Roma with German citizenship, and recognises that the Framework Convention will also be applied to the ethnic group of Frisians with German citizenship. It is interesting to note that Germany distinguishes between “national minorities” and “ethnic groups”;

- **Ireland** recognises the special position held in Ireland by the traveller community, which benefits from a whole range of legislative, administrative and institutional provisions;

- **Poland** recognises thirteen national and ethnic minorities: Armenians, Belarusians, Czechs, Germans, Gypsies, Jews, Karaites, Lemks, Lithuanians, Russians, Slovaks, Tatars, Ukrainians;

- **Slovenia** has declared that the Framework Convention applies to the autochthonous Italian and Hungarian national minorities. In accordance with the constitution and the domestic law of the Republic of Slovenia, the provisions of the Framework Convention will also apply to the members of the Roma community of the Republic of Slovenia;

- **Sweden** recognises that the national minorities in Sweden are the Sami, Swedish Finns, Tornedalers, Roma and Jews;

- “**the former Yugoslav Republic of Macedonia**” recognises that the Framework Convention applies to citizens of “the former Yugoslav Republic of Macedonia” living within its borders who are part of the Albanian, Turkish, Vlach, Serbian, Roma and Bosniac peoples.

69. The recognition of minorities may also be included in an international treaty or a bilateral agreement:

- In the case of **Greece**, the only officially recognised national minority is the Muslim minority, under the 1923 Treaty of Lausanne;

- It was by virtue of the same treaty that **Turkey** officially recognised the rights of all non-Muslim communities living in the country;

- Following an exchange of declarations with Germany in 1955, **Denmark**⁸ recognised the German minority living in Denmark as a traditional minority and allowed it to retain its national identity, its language and its culture. It is the sole minority officially recognised in Denmark.

- The protection of German and Ladin linguistic minorities in **Italy** is included in the Special Statute of Trentino-Alto Adige which stems from the 1946 Agreement between Italy and Austria.

70. It is interesting to note, on the basis of an analysis of the replies to the questionnaire, that a number of national parliamentary delegations – Germany, Croatia, “the former Yugoslav Republic of Macedonia” in particular – consider that minorities enjoy sufficient protection in present day Europe.

minorities and therefore finds it regrettable that the preamble to the constitution does not mention explicitly other minorities listed in the above-mentioned Constitutional Law, such as Bosniacs, Roma and Slovenes.”

⁸ Denmark also recognised minority groups by virtue of its accession to the Framework Convention; Denmark wished to restrict such recognition to the German minority of southern Jutland. The Advisory Committee on the Framework Convention noted in its September 2000 opinion that “persons belonging to groups with long historic ties to Denmark such as Faroese and Greenlanders appear to have been excluded a priori from protection under the Framework Convention. Similarly, despite the historic presence of Roma in Denmark, they appear to have been a priori excluded from the protection of the Convention. This approach is not compatible with the Framework Convention.”

71. As a rule, these ethnic minorities or groups enjoy the rights and fundamental freedoms guaranteed by the constitution of the country, as well as specific rights, both collective and individual, provided for by legislation:

- In **Bosnia and Herzegovina, Croatia, Estonia and Hungary**, the protection of national minorities is guaranteed by a specific law on the protection of the rights of persons belonging to national minorities.
- In the **Czech Republic**, this protection is afforded by the Charter of Fundamental Rights and Freedoms, which lists the rights enjoyed by persons belonging to national or ethnic minorities.
- In **Germany, Austria**, and in the **Netherlands**, these rights (particularly educational, cultural and linguistic rights) are provided for by the constitutions or the legislation on minorities in force in the regions / *Länder* where these minorities are resident.
- In **Poland**, national and ethnic minorities benefit from specific rights stemming from legislations and regulations in specific fields (education, media, election, culture, use of names, etc).

4.2. *Recognition of the nation's links with the kin-state*

72. The 2003 report on the issue of the *preferential treatment of national minorities by the kin-state: the case of the Hungarian law of 19 June 2001 on Hungarians living in neighbouring countries ("Magyars")* looked at the terminology used in constitutions and laws to cover the phenomenon of ethnic, linguistic and cultural ties between groups of citizens within separate states, in particular the use of the word "nation" and the correlation with a specific historical or political context.

73. Following on from this report, I felt that it would be interesting to study the member states' constitutional and legislative provisions governing their relations with their "nationals" resident in other countries. It should be pointed out that what we are talking about here is not a state's relations with its expatriate citizens, residing on a temporary or permanent basis in another country, but the legal ties between a state and its "nationals" who are citizens of other countries.

74. In actual fact, few member states have such provisions. References are to be found, however, for obvious historical reasons, in the constitutions of numerous central and eastern European states which have minorities within their territory: Albania, Croatia, Hungary, Poland, Romania, Slovenia, Slovakia, Ukraine, and "the former Yugoslav Republic of Macedonia", ie a total of 9 states out of the 35 who replied to our questionnaire:

- **Albania:** Article 8 of the constitution provides as follows: "*The Republic of Albania protects the national rights of the Albanian people who live outside its borders. The Republic of Albania protects the rights of its citizens with a temporary or permanent residence outside its borders. The Republic of Albania assures assistance for Albanians who live and work abroad in order to preserve and develop their ties with the national cultural inheritance.*"
- **Croatia:** Article 10 of the constitution also provides that "*the Republic of Croatia shall protect the rights and interests of its citizens living or residing abroad, and shall promote their links with the homeland. Parts of the Croatian nation in other states shall be guaranteed special concern and protection by the Republic of Croatia.*"
- **Hungary:** Article 6 of the constitution provides that "*the Republic of Hungary shall sense its responsibility for the fate of Hungarians living outside its borders and shall promote the fostering of their links with Hungary.*"
- **Poland :** Article 52 of the constitution provides that "*Anyone whose Polish origin has been confirmed in accordance with statute may settle permanently in Poland*". The Repatriation Act of November 2000 enables Poles (persons who have proved their Polish origin) and persons closely related to them to return to Poland. This concerns, in particular, persons who have been deported or persecuted on national and political grounds.
- Article 7 of the Constitution of **Romania** is devoted to Romanians abroad: "*The State shall support the strengthening of links with the Romanians living abroad and shall act accordingly for the preservation, development and expression of their ethnic, cultural, linguistic, and religious identity under observance of the legislation of the State of which they are citizens.*"

- According to Article 7a of the Constitution of **Slovakia**, the State shall provide support to the national identity of Slovaks living abroad, to their institutions and to their relationships towards their home country.
- Article 5 of the Constitution of **Slovenia** also provides that the State “*shall maintain concern for autochthonous Slovene national minorities in neighbouring countries and for Slovene emigrants and workers abroad and shall foster their contacts with the homeland. (...) Slovenes not holding Slovene citizenship may enjoy special rights and privileges in Slovenia.*”
- Articles 12 and 25 of the Constitution of **Ukraine**: “*Ukraine provides for the satisfaction of national and cultural, and linguistic needs of Ukrainians residing beyond the borders of the State*”; “*Ukraine guarantees care and protection to its citizens who are beyond its borders*”.

75. The constitutions of other states, all in Western Europe, contain similar declarations of principle. Given the lack of detail in the replies to the questionnaire, it is difficult to ascertain what these mean in practice and whether they apply to the citizens of the states concerned or to their “nationals”:

- Article 108 of the constitution of **Greece** provides that “*the State must take care for emigrant Greeks and for the maintenance of their ties with the Fatherland. The State shall also attend to the education, the social and professional advancement of Greeks working outside the State.*”
- Article 2 of the constitution of **Ireland** is equally cryptic: “*(...) the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.*”
- Article 40 of the constitution of **Switzerland** requires the Confederation to “*encourage links amongst Swiss citizens domiciled abroad, and their links with Switzerland. It may support organisations which pursue this goal.*”

76. These, once again, are provisions concerning relations with “nationals” (persons of the same ethnic identity) who are citizens of other countries. It is interesting to point out, however, that some states seek to maintain relations with their “nationals” in other countries precisely by allowing them to retain citizenship. In the case of **Spain**, Spanish nationality (and, by extension, the right to vote) may be retained by persons living in other countries, even on a permanent basis, in the event of the acquisition of another nationality⁹.

77. **Estonia** mentions the possibility for European Union and European Economic Area nationals to obtain a residence permit and to settle in Estonia. This possibility has been used in the last few years by persons of Estonian origin whose forebears had left Estonia at various times, emigrated and settled in western countries, to rediscover their roots and contribute to the country’s economic and commercial development.

78. Similarly, the kin-states have an important role in the process of upholding national minority rights as they must take an interest in what happens to their kinsmen living in other countries. It is imperative that this support respects the legislation of the States where the minorities concerned live and it is to be recommended that any regulatory act must be negotiated beforehand with the governments of those States.

5. National minorities and new minorities

79. I also felt that it would be interesting to know whether member states had any constitutional or legislative provisions drawing a distinction between national (or “traditional”) minorities and the new minorities.

5.1. Definition of the concept of “national minorities”

80. The Framework Convention for the Protection of National Minorities contains no definition of the term “national minority”, and neither do the other international instruments for the protection of minority rights.

81. Nevertheless, several member states have sought to give a detailed definition of the term, either in their constitution or in their legislation, or in declarations made upon acceding to the Framework Convention.

⁹ Article 11.2: “No one of Spanish birth may be deprived of his nationality”.

Article 11.3: “The state may make dual nationality treaties with the Ibero-American countries and with those which may have had, or have, a special bond with Spain. In these countries, even when they do not grant their own citizens a reciprocal right, Spaniards may become naturalised without losing their nationality of origin”.

Article 68.5: “(...) the law recognises, and the state shall facilitate, the exercise of the right to vote of Spaniards who are outside the territory of Spain”.

82. **Germany** considers that national minorities are population groups of German citizenship who possess their own identity, based on language, culture and history, who are traditionally resident in Germany and live there in traditional settlement areas. Consequently, Germany does not recognise the existence of minorities other than national minorities and ethnic groups of German citizenship.

83. The same applies to **Austria**, whose Minorities Act (*Volksgruppengesetz*) defines national minorities (*Volkgruppen*) as “groups of Austrian nationals living and residing in parts of the federal territory whose mother tongue is not German and who have their own ethnic cultures, traditions and folklore.”

84. In **Croatia**, the Constitutional Act on the Rights of National Minorities defines national minorities as “a group of Croatian citizens whose members traditionally inhabit the territory of the Republic of Croatia, and whose members have ethnic, linguistic, cultural and/or religious characteristics different from other citizens and who are driven by the wish to preserve these characteristics.”

85. In **Estonia**, for the purposes of the Framework Convention, the term “national minority” is understood as follows: citizens of Estonia who reside on the territory of Estonia; maintain long standing, firm and lasting ties with Estonia; are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics; are motivated by concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity”.

86. **Luxembourg**, defines a national minority as “a group of persons who have been settled on its territory for many generations, who have Luxembourg nationality and who have retained distinct characteristics from the ethnic and linguistic point of view”.

87. **Poland** makes a distinction between national minorities, defined as those which have their own nation states (state minorities), and ethnic minorities, defined as groups which have not their own nation states (stateless minorities).

88. For the purposes of the Framework Convention, **Switzerland** identifies national minorities as “groups of individuals numerically inferior to the rest of the population of the country or of a canton, whose members are Swiss nationals, have longstanding, firm and lasting ties with Switzerland and are guided by the will to safeguard together what constitutes their common identity, in particular, their culture, their traditions, their religion or their language.”

89. In **Hungary**, Article 1.2 of the Law on the Rights of National and Ethnic Minorities gives the following definition: “A national or ethnic minority is an ethnic group which has been living on the territory of the Republic of Hungary for at least one century, which represents a numerical minority among the citizens of the state, the members of which are Hungarian citizens, and are distinguished from the rest of the citizens by their own language, culture and traditions, and at the same time demonstrate a sense of belonging together, which is aimed at the preservation of all these, and the expression and protection of the interests of their communities, which have been formed in the course of history.”

90. This analysis would not be complete without a reminder of the following definition, given by the Assembly in its Recommendation 1201(1993): “the expression “national minority” refers to a group of persons in a state who :

- a. reside on the territory of that state and are citizens thereof ;
- b. maintain longstanding, firm and lasting ties with that state ;
- c. display distinctive ethnic, cultural, religious or linguistic characteristics ;
- d. are sufficiently representative, although smaller in number than the rest of the population of that state or of a region of that state ;
- e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language.”

91. Lastly, mention should be made of Recommendation 1623 (2003) on rights of national minorities, in which the Assembly goes further, recommending that “the Committee of Ministers take the necessary measures to continue co-operation with the European Union, with a view to achieving common policies in the field of the protection of national minorities”.

5.2. *The distinction between national and new minorities*

92. A distinction should be drawn between traditional national minorities and the new minorities resulting from immigration. Traditional national minorities must enjoy all the collective and individual rights recognised in international instruments and the case-law of the European Court of Human Rights. Clearly, a state cannot expect loyalty from a minority unless it recognises it as having rights, and as having rights equal to those of the majority.

93. New minorities are those known as migrant or immigrant minorities. Persons belonging to these minorities, which result from recent immigration, do not possess the citizenship of the states in which they are living, be it permanently (for example Russian-speaking persons in Estonia or Latvia) or temporarily (for example refugees or asylum seekers). The replies to the question on whether the law of the member states draws a distinction between so-called traditional minorities and new minorities are instructive. In the current state of positive law in Europe, this is generally not the case.

94. Only **Sweden**, **Slovenia** and the **Czech Republic** said that they make a distinction between their national minorities or autochthonous national communities, which enjoy a special status under the constitution or the law, and any other national group or community, particularly of immigrant origin. Under Article 61 of the Slovenian constitution : “*Everyone has the right to freely express affiliation with his nation or national community, to foster and give expression to his culture and to use his language and script.*”, and under Article 62: “*Everyone has the right to use his language and script in a manner provided by law in the exercise of his rights and duties and in procedures before state and other bodies performing a public function.*”

95. In **Estonia**, for example, over half of those belonging to minorities settled in the country in the 1960s and 70s, and therefore do not constitute a “traditional” minority.

96. But we have yet to agree a clear definition of “new minorities”, which is all the more problematical in that there is no common definition of “national minorities”.

97. It is then interesting to note that **Belgium** guarantees in its constitution “*the rights and freedoms of ideological and philosophical minorities*”. But could they be considered as new minorities?

5.3. *Are the existing European instruments sufficient to promote the rights of minorities?*

98. The experts questioned concluded that it was difficult, not to say impossible, to arrive at a common definition of the concept of nation. They stressed, however, that a definition was only of limited interest if the aim is to promote the rights of so-called national minorities. Effective machinery for the protection of the rights of minorities has been set up at both national and international level. Only effective legal instruments can have the impact required to further the rights of minorities.

99. The Council of Europe can pride itself on three relevant instruments in the area of the protection of minority rights: the Framework Convention for the Protection of National Minorities (opened for signature in 1995), the European Charter for Regional or Minority Languages (opened for signature in 1992), both of which came into force in 1998, and the European Charter of Local Self-Government (opened for signature in 1985, came into force in 1988).

100. At present, 37 member states are parties to the **Framework Convention for the Protection of National Minorities** and another 5 have signed it. Andorra, France, Monaco and Turkey have not yet signed it. Belgium, Georgia, Greece, Iceland and Luxembourg have not yet ratified it.

101. At present, 19 member states are parties to the **European Charter for Regional or Minority Languages** and another 13 have signed it. Albania, Andorra, Belgium, Bulgaria, the Czech Republic, Estonia, Georgia, Greece, Ireland, Latvia, Lithuania, Monaco, Portugal, San Marino and Turkey have neither signed nor ratified it. Azerbaijan, Bosnia and Herzegovina, France, Iceland, Italy, Malta, Moldova, Poland, Romania, Russia, Serbia and Montenegro and “the former Yugoslav Republic of Macedonia” have not yet ratified it.

102. The Committee thought that it would be useful to ask states about their reasons for not signing and/or ratifying these fundamental instruments for the protection of minority rights. **Andorra**, which is a party to none of the above three conventions, said that the matter was under consideration but was highly complex in view of the fact that “*the population of Andorran nationality is in a numerical minority compared with the other inhabitants*”. **Albania** and the **Czech Republic** replied that it intended to ratify the European Charter

for Regional or Minority Languages. **Ireland, Italy, Luxembourg, Poland** and **Romania** also indicated that the procedure as to the European Charter was on going, either at the governmental level, or at the parliamentary level. **Iceland** indicated that both conventions were being studied by the government. **France, Greece, Portugal, “the former Yugoslav Republic of Macedonia”** and **Turkey gave no explanation to the absence of signature and/or ratification.** In the case of **Belgium**, the signing and ratification of these instruments is known to be a sensitive issue¹⁰, as it is for **Estonia** (which has not ratified the Charter for Regional or Minority Languages).

6. Conclusions

103. I do not think it is important to formulate a new concept of nation. The real issue behind the debate about a possible “21st century concept of nation” is not the definition itself, but the acceptance of a new way of thinking, of rethinking the nation, and specifically the transversality of the nation across boundaries – a nation often, but not always, deeply rooted in history. Following the two world wars in the 20th century, national borders were redrawn and, as a result, parts of the kin-state now live in the territory of one of the neighbouring states, where they represent “national minorities or communities”.

104. It is important that the Council of Europe member states incorporate into their national legislation provisions accepting national communities (minorities) on their territory, and that they apply them in good faith. These national communities (minorities) created as a result of changes in national borders – and not by migratory movements – represent traditional national minorities (communities). They must enjoy collective and individual rights in order to preserve, express and foster their national identity, as provided for in Assembly Recommendations 1201 (1993) and 1623 (2003) and the Framework Convention for the Protection of National Minorities. According to Recommendation 1623 (2003), *“the Assembly considers that the states parties do not have an unconditional right to decide which groups within their territories qualify as national minorities in the sense of the framework convention. Any decision of the kind must respect the principle of non-discrimination and comply with the letter and spirit of the framework convention.”*

105. Likewise, the Council of Europe member states are invited to sign and ratify – if they have not yet done so – the Framework Convention for the Protection of National Minorities, the European Charter for Regional or Minority Languages and the European Charter of Local Self-Government, which can become important instruments in preserving the national identity of national communities (minorities).

106. The most important role in preserving the identity of national communities (minorities) falls to the state of which the persons belonging to national minorities are citizens. These states should apply the principle of positive discrimination to national minorities, especially with regard to national identity and proportional representation in decentralised institutions (including executive-level bodies) in the regions where those minorities live.

107. The Assembly must once again clearly reiterate its recommendation to the Committee of Ministers to draft an additional protocol to the European Convention on Human Rights setting minimum standards with regard to the rights of national communities, which would be binding on all the member states. This is an old request, repeatedly reaffirmed by the Assembly in its Recommendations 1201 (1993), 1255 (1995), 1285 (1996), 1345 (1997) and 1492 (2001).

108. In its latest recommendation on the question of the rights of national minorities, however, the Assembly favoured a slightly different approach, asking the Committee of Ministers, in Recommendation 1623 (2003) to *“draft an additional protocol to the framework convention conferring on the European Court of Human Rights the power to give advisory opinions on its interpretation of the framework convention”*.

109. The Congress of Local and Regional Authorities of Europe has a major role to play in upholding the rights of national minorities. Through its resolutions, it can be a decisive factor in guaranteeing the application of the relevant European rules.

110. Similarly, the European Court of Human Rights can play a very important role in securing recognition of the collective and individual rights of national communities (minorities). Through its case-law, the Court can influence national judicial practice.

111. The purpose of all these recommendations is to ensure that the concepts of “nation” and “national community (minority)” are interpreted flexibly and in good faith and to foster a peaceful and tolerant climate between the majority and national minorities in every Council of Europe member state.

¹⁰ See Resolution 1301 (2002) on the protection of minorities in Belgium and Resolution 1172 (1998) on the situation of the French-speaking population living in the Brussels periphery.

APPENDIX I

Questionnaire addressed to national delegations

1.
 - a. Does your Constitution give a definition or refer to the nature of your state (national, federal, multinational, etc.)?
 - b. Does your Constitution make a distinction between the concepts of "State" and "people"?
 - c. Does your Constitution refer to the concept of "nation"? Does it give a definition?
2. Does your Constitution include provisions on the rights of kin-citizens living abroad?
3. Does your national legislation acknowledge the existence of national minorities (communities) on the territory of your country?
4. Does your national legislation provide rights to national minorities (communities) living in your country? If so, what rights?
5. Does your national legislation make any distinction between traditional minorities and new minorities?
6. If your country has not ratified:
 - i. the Framework Convention for the Protection of National Minorities
 - ii. the European Charter for Regional and Minority Languages
 - iii. the European Charter of Local Self-Government

Does it intend to do so? If not, please indicate the reasons why.

APPENDIX II

Programme of the Hearing held in Berlin on Tuesday 8 June 2004

- 9 h 30 **Opening of the Hearing** by Mr Eduard Lintner, Chairperson of the Committee on Legal Affairs and Human Rights
- 9 h 35 **Introduction** by the Rapporteur, Mr György Frunda
- Presentations** by:
- **Professor Peter Kovacs**, University of Miskolc, Hungary
- Questions and discussion*
- **Professor Stéphane Pierré-Caps**, University of Nancy, France
- Questions and discussion*
- **Mr Stanko Nick**, member of the Venice Commission on behalf of Croatia, Ambassador of the Republic of Croatia to Hungary
- Questions and discussion*
- 12 h 00 **Closing of the hearing** by the Rapporteur, Mr György Frunda

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10177, Reference No 2972 of 21 June 2004

Draft recommendation adopted by the Committee on 7 November 2005 with 14 votes in favour, 5 votes against and no abstentions

Members of the Committee : Mr Dick **Marty** (Chairperson), Mr Jerzy Jaskiernia, Mr Erik **Jurgens**, Mr Eduard Lintner (Vice-Chairpersons), Mrs Birgitta Almqvist, Mr Athanasios **Alevras**, Mr Gulamhuseyn Alibeyli, Mr Rafis Aliti, Mr Alexander **Arabadjiev**, Mr Miguel Arias, Mr Birgir Ármannsson, Mr José Luis Arnaut, Mr Giorgi Arveladzé, Mr Abdülkadir Ateş, Mrs Doris Barnett, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise Bemelmans-Videc, Mr Sali Berisha, Mr Rudolf **Bindig**, Mr Erol Aslan **Cebeci**, Mrs Pia Christmas-Møller, Mr Boriss **Cilevičs**, Mr András **Csáky**, Mr Marcello **Dell'Utri**, Mr Martin Engeset, Mrs Lydie **Err**, Mr Jan Ertsborn, Mr Václav Exner, Mr Valeriy Fedorov, Mr György **Frunđa**, Mr Jean-Charles **Gardetto**, Mr József Gedei (alternate: Mr Attila **Gruber**), Mr Stef Goris, Mr Valery **Grebennikov**, Ms Gultakin Hajiyeva, Mrs Karin Hakl, Mr Nick Harvey, Mr Serhiy Holovaty, Mr Michel Hunault, Mrs Fatme Ilyaz, Mr Sergei Ivanov, Mr Tomáš Jirsa, Mr Antti **Kaikkonen**, Mr Hans Kaufmann, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Jean-Pierre Kucheida, Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony Lloyd, Mr Humfrey Malins, Mr Andrea Manzella, Mr Tito Masi, Mr Andrew **McIntosh**, Mr Murat **Mercan**, Mr Philippe Monfils, Mr Philippe Nachbar, Mr Tomislav Nikolić, Ms Ann **Ormonde**, Ms Agnieszka Pasternak, Mr Piero Pellicini, Mr Rino Piscitello (alternate: Mr Milos **Budin**), Mr Petro Poroshenko, Mrs Maria Postoico, Mr Christos Pourgourides, Mr Jeffrey Pullicino Orlando, Mr Martin Raguž, Mr François Rochebloine, Mr Armen Rustamyan, Mr Adrian **Severin**, Mr Michael Spindelegger, Mrs Rodica Mihaela **Stănoiu**, Mr Petro Symonenko, Mr Vojtech **Tkáč**, Mr Egidijus Vareikis, Mr Miltiadis Varvitsiotis, Mr José Vera Jardim, Mrs Renate **Wohlwend**, Mr Vladimir Zhirinovskiy (alternate: Mrs Natalia **Narochnitskaya**), Mr Zoran Žižić, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the Committee: Mr Drzemczewski, Mr Schirmer, Mrs Clamer