The Effect of Member States' Declarations Defining "National Minorities" upon Signature or Ratification of the Council of Europe's Framework Convention

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I. Introduction

During the drafting process of the Framework Convention for the Protection of National Minorities[1] which has been drawn up under the auspices of the Council of Europe it proved impossible to agree on a certain definition of the term "national minorities". The stalemate in this crucial question led to the compromise of adopting a Convention for the protection of minorities without defining its potential beneficiaries.

The question what constitutes a national minority remained open and – not surprisingly – led to several States parties adopting their own interpretation of the term for the purpose of the Convention. Upon signature or ratification, numerous member states of the Framework Convention have made declarations containing a definition of the term "national minorities" either by establishing abstract criteria or by enumerating those national minorities which are understood to fall within the scope of the Convention in the State party concerned. Since the definition of the Convention's scope by each member state provides obvious opportunities for arbitrarily excluding certain minorities from the protection of the Convention the question of validity of such declarations arises.

In order to answer these questions, after having outlined the content of the declarations made (II) their legal status has to be examined, i.e., it has to be determined whether they constitute "reservations" in the meaning of the Vienna Convention on the Law of Treaties or rather have to be qualified as "interpretative declarations" (III). Subsequently, it will be possible to reflect on the admissibility of the declarations (IV). Finally, as far as these declarations are inadmissible the legal consequences have to be exposed (V). With regard to the latter it will have to be examined, in particular, whether the Advisory Committee assisting the Committee of Ministers in fulfilling its task may determine the inadmissibility of the declarations or remain bound by them all the same.

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[1] For an analysis of the Convention see R. Hofmann, Minderheitenschutz in Europa. Völker- und staatsrechtliche Lage im Überblick, 1995, 199ff.; H. Klebes, Introduction to the Council of Europe Framework Convention for the Protection of National Minorities, HRLJ 16 (1995), 92ff.; S.Bartole, La Convenzione-quadro del Consiglio d'Europa per la protezione delle minoranze nationali, Rivista Italiana di diritto e procedura penale 39 (1997), 567–580.

II. Content of the Declarations

As of August 1999, ten States Parties to the Framework Convention have made declarations pertaining to the definition of "national minority" upon ratification. These declarations may be divided into three different types: The first type is characterised by setting out abstract criteria for the definition of "national minorities" in the declaring country either by reference to national law or by explicitly enlisting such criteria. Another approach is represented by type 2: the declarations specify those national minorities to which the Convention shall apply. Finally, certain states declare the absence of national minorities in their country (type 3).

1. Abstract criteria for defining a "national minority" (type 1)

The term "national minorities" is interpreted in accordance with certain provisions of national law (Austria[2]) or with specified abstract criteria according to which "national minorities" shall be determined in the respective member State (Estonia[3], Luxembourg,[4] Switzerland[5]). Criteria enlisted in the declarations for

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[2] Declaration contained in the instrument of ratification deposited on 31 March 1998 – Or. Engl.: "The Republic of Austria declares that, for itself, the term 'national minorities' within the meaning of the Framework Convention for the Protection of National Minorities is understood to designate those groups which come within the scope of application of the Law on Ethnic Groups (*Volksgruppengesetz*, Federal Law Gazette No. 396/1976) and which live and traditionally have had their home in parts of the territory of the Republic of Austria and which are composed of Austrian citizens with non-German mother tongues and with their own ethnic cultures."

[3] Declaration contained in the instrument of ratification, deposited on 6 January 1997 – Or. Est./Engl.: "The Republic of Estonia understands the term 'national minorities', which is not defined in the Framework Convention for the Protection of National Minorities, as follows: are considered as 'national minority' those citizens of Estonia who

– reside on the territory of Estonia;

– maintain longstanding, firm and lasting ties with Estonia;

– are distinct from Estonians on the basis of their ethnic, cultural, religious or linguistic characteristics;

– are motivated by a concern to preserve together their cultural traditions, their religion or their language, which constitute the basis of their common identity."

[4] Declaration contained in a letter from the Permanent Representative of Luxembourg, dated 18 July 1995, handed to the Secretary General at the time of signature, on 20 July 1995 – Or. Fr.: "The Grand Duchy of Luxembourg understands by 'national minority' in the meaning of the Framework Convention, a group of people settled for numerous generations on its territory, having the Luxembourg nationality and having kept distinctive characteristics in an ethnic and linguistic way. On the basis of this definition, the Grand Duchy of Luxembourg is induced to establish that there is no 'national minority' on its territory."

[5] Declarations contained in the instrument of ratification deposited on 21 October 1998 – Or. Fr.: "Switzerland declares that in Switzerland national minorities in the sense of the framework Convention are groups of individuals numerically inferior to the rest of the population of the country or of a canton, whose members are Swiss nationals, have long-standing, 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. Switzerland declares that the provisions of the framework Convention governing the use of the language in relations between individuals and administrative authorities are applicable without prejudice to the principles observed by the Confederation and the cantons in the determination of official languages."

establishing that a certain group of individuals constitutes a "national minority" include the following:

– the group must be numerically inferior to the rest of the population (Switzerland),

– members must be resident in the country (Estonia, Luxembourg, Austria[6]),

– members must maintain longstanding, firm and lasting ties with the country (Estonia, Luxembourg: "settled for numerous generations", Austria: "die (...) beheimateten Gruppen"),

– members must be citizens of the State concerned (Estonia, Luxembourg),

– members of the group must have a distinct ethnic, cultural, religious or linguistic identity (Estonia, Luxembourg: ethnic or linguistic characteristics, Austria: linguistic and cultural characteristics),

– members must be motivated by concern to maintain the common culture (Estonia).

2. Specified groups are designated as national minorities (type 2)

Under this group fall those declarations in which the respective State party specifies those national minorities to which the Convention shall apply (Denmark,[7] Germany,[8] Slovenia ["in accordance with the Constitution and internal

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[6] According to Austria's declaration, the term "national minority" is defined in the so-called "Volksgruppengesetz" (Bundesgesetzblatt für die Republik Österreich 1976 No. 396) which reads as follows: "§ 1 (2) Volksgruppen im Sinne dieses Bundesgesetzes sind die in Teilen des Bundesgebietes wohnhaften und beheimateten Gruppen österreichischer Staatsbürger mit nichtdeutscher Muttersprache und eigenem Volkstum." (engl. Translation: "*Volksgruppen* for the purpose of this Federal Act are those groups of traditionally resident Austrian citizens of non-German mother-tongue and their own ethnic cultures [*Volkstum*].")

[7] Declaration contained in a Note Verbale dated 22 September 1997, handed to the Secretary General at the time of deposit of the instrument of ratification, on 22 September 1997 – Or. Engl.: "In connection with the deposit of the instrument of ratification by Denmark of the Framework Convention for the Protection of National Minorities, it is hereby declared that the Framework Convention shall apply to the German minority in South Jutland of the Kingdom of Denmark."

[8] Declaration contained in a letter from the Permanent Representative of Germany, dated 11 May 1995, handed to the Secretary General at the time of signature, on 11 May 1995 – Or. Ger./Engl. – and renewed in the instrument of ratification, deposited on 10 September 1997 – Or. Ger./Engl.: "The Framework Convention contains no definition of the notion of national minorities. It is therefore up to the individual Contracting Parties to determine the groups to which it shall apply after ratification. National Minorities in the Federal Republic of Germany are the Danes of German citizenship and the members of the Sorbian people with German citizenship. The Framework Convention will also be applied to members of the ethnic groups traditionally resident in Germany, the Friesians of German citizenship and the Sinti and Roma of German citizenship."

legislation"],[9] and Macedonia[10]). Moreover, the German (with regard to Friesians as well as to Sinti and Roma) and the Slovenian declarations (with regard to Roma) designate certain groups as not constituting national minorities but at the same time declare that the Convention shall be applied to them all the same. The Slovenian declaration contains a passage according to which the Convention will be applied to members of the Roma community "in accordance with the Constitution and internal legislation".

3. No minorities existing in the declaring State (type 3)

Finally, certain States have declared that there are no minorities whatsoever on their territory according to their interpretation. Such statements are contained in the declarations made by Liechtenstein,[11] Luxembourg,[12] and Malta.[13]

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[9] Declaration contained in a Note Verbale from the Permanent Representative of Slovenia, dated 23 March 1998, handed to the Secretary General at the time of deposit of the instrument of ratification, on 25 March 1998 – Or. Engl.: "Considering that the Framework Convention for the Protection of National Minorities does not contain a definition of the notion of national minorities and it is therefore up to the individual Contracting Party to determine the groups which it shall consider as national minorities, the Government of the Republic of Slovenia, in accordance with the Constitution and internal legislation of the Republic of Slovenia, declares that these are the autochthonous Italian and Hungarian National Minorities. In accordance with the Constitution and internal legislation of the Republic of Slovenia, the provisions of the Framework Convention shall apply also to the members of the Roma community, who live in the Republic of Slovenia."

[10] Declarations contained in the instrument of ratification, deposited on 10 April 1997 – Or. Engl.: "The Republic of Macedonia declares that: 1. The term 'national minorities' used in the Framework Convention for the Protection of National Minorities is considered to be identical to the term 'nationalities' which is used in the Constitution and the laws of the Republic of Macedonia. 2. The provisions of the Framework Convention for the Protection of National Minorities will be applied to the Albanian, Turkish, Vlach, Roma and Serbian national minorities living on the territory of the Republic of Macedonia."

The Constitution of the Republic of Macedonia which is referred to in para. 1 of the declaration does not establish any abstract criteria for the term "nationalities" but only confers rights on members of "nationalities" and guarantees the protection of the ethnic, cultural, linguistic and religious identity (Art. 48). Moreover, in the Preamble, Albanians, Turks, Vlachs, Romanies "and other nationalities" are mentioned.

[11] Declaration contained in the instrument of ratification deposited on 18 November 1997 – Or. Fr.: "The Principality of Liechtenstein declares that Articles 24 and 25, in particular, of the Framework Convention for the Protection of National Minorities of 1 February 1995 are to be understood having regard to the fact that no national minorities in the sense of the Framework Convention exist in the territory of the Principality of Liechtenstein. The Principality of Liechtenstein considers its ratification of the Framework Convention as an act of solidarity in the view of the objectives of the Convention."

[12] Luxembourg is mentioned twice (groups 1 and 3). The respective declaration contains elements pertaining to different groups.

[13] Reservation and Declarations contained in the instrument of ratification, deposited on 10 February 1998 – Or. Engl.: "The Government of Malta reserves the right not to be bound by the provisions of Article 15 insofar as these entail the right to vote or to stand for election either for the House of Representatives of for Local Councils. The Government of Malta declares that Articles 24 and 25, in particular, of the Framework Convention for the Protection of National Minorities of 1 February 1995 are to be understood having regard to the fact that no national minorities in the sense of the

4. Further declarations

The declaration of Russia opposes explicitly the right of member States to define the term "national minority"; moreover, it states the exclusion of permanent residents which have been arbitrarily deprived of their citizenship.[14]

Switzerland declares the provisions of the Convention regarding the use of languages in public administration may not affect existing principles as applied by the Confederation or the Cantons in the determination of official languages. It therefore relates to an important question of minority protection but is irrelevant with a view to definitions of "national minority".

III. Legal Status of the Declarations: Reservations or Interpretative Declarations

As a next step the legal status of the declarations has to be established, since the regime for admissibility and validity of such declarations depends on the question whether they must be interpreted as reservations or as interpretative declarations which do not modify the legal effect of a treaty for the State party. Moreover, the distinction is also crucial for the work of the bodies entrusted with the monitoring of the implementation by member States: these bodies must strictly respect valid "reservations" declared by a member State whereas "interpretative declarations" may be taken into account when pondering on questions of interpretation without binding the monitoring bodies in any respect.

The term "reservation" is defined in Article 2 (1) (d) Vienna Convention on the Law of Treaties (VCLT):

> "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."

The different elements of the definition will now be examined with regard to the declarations in question. First of all, those declarations setting out specific criteria for determining whether a group constitutes a "national minority" or naming those groups to which the Convention shall be applied will be analysed. In a

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Framework Convention exist in the territory of the Government of Malta. The Government of Malta considers its ratification of the Framework Convention as an act of solidarity in the view of the objectives of the Convention."

[14] Declaration contained in the instrument of ratification deposited on 21 August 1998 – Or. Rus./Engl./Fr.: "The Russian Federation considers that none is entitled to include unilaterally in reservations or declarations, made while signing or ratifying the Framework Convention for the Protection of National Minorities, a definition of the term 'national minority', which is not contained in the Framework Convention. In the opinion of the Russian Federation, attempts to exclude from the scope of the Framework Convention the persons who permanently reside in the territory of States Parties to the Framework Convention and previously had a citizenship but have been arbitrarily deprived of it, contradict the purpose of the Framework Convention for the Protection of National Minorities."

second step those declarations rejecting the existence of any national minority on the territory of a ratifying State will be reviewed as to whether they fall within the concept of "reservations". Finally, those parts of declarations which determine certain groups to which the Convention shall apply although they do not constitute a "national minority" in the view of the declaring State will be examined with a view to their legal status.

1. Declarations pertaining to the application of the treaty to specified groups or setting out certain criteria for definition

a) Absence of designation as "reservation"

None of the States making a declaration related to the definition of "national minorities" named it a "reservation". This, however, does not allow for any conclusions since the definition of "reservations" explicitly renders the naming of the declaration irrelevant ("however phrased or named").

b) Must reservations always be related to "certain provisions of the treaty"?

The declarations designating certain groups as national minorities or stating specific criteria for a group to be recognised as a "national minority" in the sense of the Framework Convention (declarations type 1 and 2) are not related to certain individual provisions of the treaty but rather pertain to the treaty as a whole. The question arises whether such contents of declarations can be subsumed under the definition of reservations which states that a reservation is related to "certain provisions of the treaty".

Usually a reservation would declare that a certain provision does not apply to the State party. For instance, Malta declared upon ratification of the Framework Convention that Art. 15 (right to vote and stand for elections) would not apply to Malta. In contrast, the declarations in question here do not address the application of a specified provision of the treaty to a State party but rather positively state those groups or define criteria for such groups whose members may benefit from the protection enshrined in the Convention.

However, if such a positive definition is to be conclusive it may lead to an exclusion from the benefits of another group at the same time. Excluding from protection an entire group which may fall under the scope of the Convention by its object and purpose may as well be considered an extremely far-reaching or most comprehensive reservation: a reservation which is not limited to certain articles but is related to all provisions of a convention with regard to a certain group of potential beneficiaries. Such a reservation could also be equated to formulating a specific reservation for each article of the Convention.

Indeed, the wording of VCLT is misleading in that there are numerous examples in international practice of reservations concerning not single provisions but

the entire text of a treaty.[15] This practice of "across-the-board" reservations which may pertain to an exclusion or limitation of the application of a treaty to certain categories of objects, certain situations, certain circumstances etc. has not raised any particular objection.[16] In addition, certain treaties such as the European Convention on Human Rights in Art. 57 para.1, explicitly prohibit the use of general reservations which may be defined as reservations not related to a specific provision or formulated in a way not clearly describing its meaning and scope.[17] Clauses such as Art. 57 para. 1 ECHR would be superfluous if declarations aiming at a general modification of the treaty's effects did not constitute reservations.[18]

Moreover, it is widely acknowledged that a declaration limiting the geographical scope of application in a certain member state constitutes a reservation. These kind of reservations display a striking similarity in character with the exclusion of an entire group. Consequently, a declaration pertaining to the application of a treaty to certain categories of persons has been acknowledged by the International Law Commission as falling within the definition of a "reservation".[19] By positively defining those groups recognised as "national minorities" or by enlisting the necessary requirements for recognition the declarations under examination may have the effect of excluding certain other groups from this definition and thereby from the application of the Convention. The fact that they are not formulated specifically addressing the application of "certain provisions" does not constitute an obstacle to their interpretation as reservations.

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[15] Cf. Report of the International Law Commission on the work of its fiftieth session 20 April to 12 June, 27 July to 14 August 1998, General Assembly Official Records Doc.No. A/53/10, Chapter IX: Reservations to treaties, C.2 (Text of the draft guidelines with commentaries thereto): "1.1.1 [1.1.4] Object of reservations – A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which a State or an international organization intends to implement the treaty as a whole." For examples in State practice see notes to the Commentary to the above report.

[16] Ibid., Commentary (5).

[17] European Commission of Human Rights, *Temeltasch* v. *Switzerland*, Decisions and Reports 31, 120.

[18] Report of the International Law Commission (see note 15), Commentary (7).

[19] Ibid., Commentary (5). As an example cf. the United Kingdom's reservation concerning the application of the International Covenant on Civil and Political Rights to members of the armed forces and prisoners, Declaration upon ratification on 20.5.1976: "The Government of the United Kingdom reserve the right to apply to members of and persons serving with the armed forces of the Crown and to persons lawfully detained in penal establishments of whatever character such laws and procedures as they may from time to time deem to be necessary for the preservation of service and custodial discipline and their acceptance of the provisions of the Covenant is subject to such restrictions as may for these purposes from time to time be authorized by law", printed in M. Nowak, CCPR Commentary, 1993, 769.

c) Declarations purporting to "exclude or modify the legal effect"

aa) Positive definition of beneficiaries

The declarations examined here do not contain any explicit exclusions but define positively which groups of people are to benefit from protection under the Convention in a certain state either by explicitly naming these groups or by setting out abstract criteria. However, as has been indicated above, this may imply the exclusion of one or more certain groups which may fall within the Convention's scope of application.

bb) Discretion of member States to determine beneficiaries?

If the determination of those groups who may benefit from the Convention is at least within a certain margin up to the member States the declarations made could not be said to "exclude or modify" an otherwise (in absence of such a declaration) given legal effect but establish or determine such a legal effect.

Indeed, this view is supported by several considerations. In particular, certain writers have concluded from the absence of a definition in the Convention that member States may determine those national minorities to which the Convention is applied.[20] Moreover, this interpretation seems to be underpinned by the guidelines for the submission of State reports on the implementation of the Convention adopted by the Committee of Ministers[21]: with regard to Art. 3 member States are asked to submit information on any linguistic or ethnic group which is "not considered a national minority". In addition, member States are requested to address the question whether the notion of national minority is defined under domestic law or whether there is any enumeration of recognised minorities.[22] While emphasising the relevance of other groups for the reporting procedure, these provisions seem to indicate that the definition of national minorities is left to the discretion of member States.

However, stronger arguments support the opposite view. A comparison with the European Charter for Regional or Minority Languages – another treaty which has been adopted under the auspices of the Council of Europe in order to support minorities – may serve to outline that the idea of leaving the scope of application of a convention up to the member States pertains to another type of treaty. The possibility to apply a convention only to certain minorities to be specified by each State party is explicitly provided for under the European Charter for Regional or

[20] S. Oeter, Überlegungen zum Minderheitenbegriff und zur Frage der "neuen Minderheiten", in: F. Matscher (ed.), Vienna International Encounter on Some Current Issues Regarding the Situation of National Minorities, 1997, 229 (233); F. Ermacora, Nationale Minderheiten – das Definitionsproblem, in: K. Müller, Minderheiten im Konflikt, 1993, 34 (36).

[21] Outline for reports to be submitted pursuant to article 25 paragraph 1 of the Framework Convention for the Protection of National Minorities (Adopted by the Committee of Ministers on 30 September 1998 at the 642nd meeting of the Ministers' Deputies), Doc.No. ACFC/INF (98)1, p. 6.

[22] Ibid.

Minority Languages (Art. 2 [2], 3). This provision, however, is related to a part of the Language Charter which consists of a catalogue of obligations from which the member States may choose a certain minimum number of provisions *à la carte.* The combination of a catalogue of material obligations with the possibility to choose those minorities who may benefit from these obligations reflects practical limitations on member States' potential and political will for providing eventually required services in order to secure the effective implementation on the domestic level. The optional character of this part of the Language Charter aims at promoting the preservance of minority languages as far as possible. This approach fundamentally differs from that inherent in the Framework Convention which aims at affording a minimum protection. The notion of "minimum protection" cannot easily be reconciled with granting member States full discretion as to what constitutes a national minority. The human rights character of the Framework Convention as it is emphasised, in particular, in the Preamble and in Art. 1 of the Convention clarifies that the protection of national minorities "does not fall within the reserved domain of States."[23] It would run contrary to these fundamental underpinnings to leave the decision determining the beneficiaries of a human rights convention up to the member States.

The view that member States do not enjoy full discretion in their interpretation of the term "national minority" is also supported by an analysis of Art. 3 para. 1 of the Framework Convention. This provision pertains to the right of members of a national minority to decide by themselves whether they wish to be treated as belonging to a minority or not. It is clear that the subjective choice of individuals in this respect is limited by the objective criterion of belonging to a national minority. The Explanatory Report in fact emphasises that "this paragraph does not imply a right for an individual to choose arbitrarily to belong to any national minority" but that the choice is linked to "objective criteria relevant to the person's identity".[24] But the provision would be devoid of purpose if member States could freely impose objective criteria: the provision does not only aim at giving a negative ("not to be treated as such") but also a positive choice ("freely to choose to be treated ... as such"). The latter choice could be comprehensively undermined by member States imposing unreasonable objective criteria.

Finally, it is clear that the legal effects of the Convention for a member State do not depend on a specification or definition of the minorities falling within the Convention's scope of application by each member State. A majority of States parties to the Convention did not declare any definition of beneficiaries upon ratification. Convention obligations incumbent on a member State pertain to the protection of all national minorities present in the respective state. Any definition declared upon ratification potentially could seek to limit these legal effects to members of specific groups or to groups fulfilling certain criteria.

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[23] Framework Convention for the Protection of National Minorities and Explanatory Report, 1995, Council of Europe Doc. No. H (95) 10, para. 30.

[24] Ibid., para. 35.

cc) Reservations or conditional interpretative declarations?

According to the Court of Arbitration in the *Continental Shelf* case between the United Kingdom and France, an interpretative declaration constitutes a reservation, if the declaring State regards the consent of the other States parties as a condition for its being bound by the respective provision.[25] In cases of doubt it has to be examined, whether at the time of the declaration the declaring State was not ready to accept as binding any interpretation of the respective provision other than its own.[26]

Complicating matters even further, the notion of "conditional" or "qualified" interpretative declarations has been introduced whereby the declaring state makes its acceptance of the treaty conditional on the acceptance of its understanding of it.[27] This type of interpretative declarations is perceived to constitute merely a unilateral interpretation until an authentic interpretation has been established, either through diplomatic negotiations which lead to a consistent practice or a respective declaration by the member States or through a judicial settlement of a dispute binding on all parties. Until this moment, it will be impossible to tell whether a specific interpretation has modifying effects and therefore has to be treated as a reservation. According to this view, only if the interpretation contradicts the authentic interpretation and a conditional element prevails in the respective declaration may it equate to a reservation.[28]

At first sight, this latter approach seems to match perfectly the declarations made with regard to the definition of national minorities in the Framework Convention: a certain term in a treaty is interpreted by States parties through declarations made upon signature or ratification in absence of a definition in the treaty or an authentic interpretation. In so far as these declarations are to be understood as imposing a condition on the ratification, they would constitute "conditional interpretative declarations" with an uncertain future until an authentic interpretation is achieved.

However, the concept of "conditional interpretative declarations" as outlined above does not provide a viable concept at all. As already indicated, an authentic interpretation through judicial settlement of a dispute which is binding on all parties will be very rare. Moreover, practices and agreements which may lead to an

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[25] Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf, Decision of the Court of Arbitration dated 30 June 1977 and 14 March 1978, ILM 18 (1979), 397 (418, para. 55).

[26] R. Kühner, Vorbehalte zu multilateralen völkerrechtlichen Verträgen, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Vol. 91, 1986, 41.

[27] For an analysis of the literature see F. Horn, Reservations and Interpretative Declarations to Multilateral Treaties, 1988, 238 et seq. Most recently see J. Polakiewicz, Treaty-making in the Council of Europe, Chapter 7 (forthcoming).

[28] Horn (note 27), 239. Similarly C. Tomuschat, Admissibility and Legal Effects of Reservations to Multilateral Treaties – Comments on Arts. 16 and 17 of the ILC's 1966 Draft Articles on the Law of Treaties, ZaöRV 27 (1967), 463 (465).

authentic interpretation are reflected in Art. 31 para.3 *lit.*a and b VCLT[29] – but they constitute an expression of consensus[30] which can only be achieved if the conditional interpretative declaration is withdrawn. Therefore, a conditional interpretative interpretation and an authentic interpretation based on the consensus of the States parties to a treaty cannot exist at the same time.[31]

dd) Decisive criteria

The decisive factor to differentiate between non-binding declarations and binding reservations is to be found in subjective criteria. This is plainly clear for the definition of a "reservation" in the VCLT: the definition is not limited to those cases where the declaration made objectively leads to the exclusion of certain groups from the benefits of the Convention. Rather, the definition relates the exclusion or modification of the legal effect of certain provisions to the subjective intention of the State party ("... whereby it purports to exclude or modify the legal effect ...", Art. 2 (1) (d) VCLT, emphasis added).[32]

There may be a situation where a declaration by a member State actually does not exclude any minority group from the potential scope of the Convention since all minorities existing in the State concerned are covered by the declaration. While the basic distinction between "reservation" and "interpretative declaration" – whether or not the declaration seeks to impose a condition on the ratification – remains applicable to this case as well, it is clear that the fact that a declaration objectively does not exclude any beneficiaries provides an indication for the subjective intentions of the declaring State: without any evidence pointing to the contrary it is not possible to assume that it was the State's intention to exclude or modify the legal effect of the treaty by a declaration not containing any element

[29] Whereas examples of subsequent interpretative agreements are rare, the relevance of practice in the interpretation of treaties is underpinned by ample evidence, cf. I. Sinclair, The Vienna Convention on the Law of Treaties, 1984, 136 et seq.

[30] W. Heintschell v. Heinegg, in: K. Ipsen, Völkerrecht, 1990, 121.

[31] Further criticism on the viability of the concept of "qualified interpretative declarations" is voiced by Sinclair (note 29), 53 et seq. The International Law Commission addressed the issue in its latest report. While admitting that conditional interpretative declarations are closer to reservations than to ordinary interpretative declarations regarding the constitutive elements the Commission insisted that there is an "enormous difference" between interpretation and the application of treaty provisions to the declaring State. However, the Commission concludes that "it seems highly probable that the legal regime of conditional interpretative declarations would be infinitely closer to that of reservations" although it leaves open the specific consequences. Report of the International Law Commission on the work of its fifty-first session, 3 May – 23 July 1999, General Assembly Official Records, Fifty-fourth Session, Supplement No. 10, A/54/10 (preliminary print out), 243 et seq.

[32] Kühner (note 26), 22. The International Law Commission (note 31), 250, emphasises that the subjective test must not be applied alone: "only an analysis of the potential – and objective – effects of the statement can determine the purpose sought." Irrespective whether it is logically possible to draw conclusions from the objective effect to the subjective intentions the weakness of the argumentation can be demonstrated by the case under consideration. It is obvious that the objective contents of the declarations could be either interpretative or limiting the legal effect. Therefore, at least in cases where the objective effect is ambiguous the subjective criterion must be the decisive factor.

which could in fact impinge on the legal effect. This is indeed the situation which could apply to the declarations under consideration: at first sight – without prejudice to an in-depth analysis of the national situation –, none of the declarations seems to exclude any "minority" which is generally recognised as such.

It therefore must be assumed that the declaring States aimed not at limiting the application of the treaty but at clarifying its scope. This indicates that they wished to declare their understanding of the Convention by specifying those groups to which they intended to apply the Convention without, however, aiming at the exclusion of any other group from the outset. Member States have an interest in clarifying to which groups national efforts for implementing the Convention shall apply according to their understanding of the Convention. Therefore, it is to be assumed that the declarations pertaining to the definition of national minorities must be interpreted as "interpretative declarations".

ee) Conclusion

On the basis of the information available, it must be assumed that member States wanted to clarify their understanding of the Convention's scope of application when establishing abstract criteria defining the term "national minority" for the respective member State (type 1) or by specifying those groups to which they intend to apply the Convention (type 2). For as long as there is no information indicating the contrary, it cannot be assumed that they intended to limit the legal effect of the Convention in order to exclude its application to any groups within its potential scope of protection. Consequently, the respective declarations must be qualified as "interpretative declarations".

2. Declarations stating the absence of national minorities (type 3)

The declarations mentioned above under Group 3 submitted by Liechtenstein, Luxembourg and Malta state that there are no national minorities in the sense of the Convention existing in the ratifying State. It may seem odd to ratify a treaty while at the same time declaring the absence of any beneficiaries in the ratifying State. While there may be some doubt whether such declarations may be subsumed under the definition of reservations at all[33] an application of the principles outlined above as well as certain elements in the wording of these declarations show that they constitute "interpretative declarations".

[33] The declarations by Liechtenstein, Luxembourg and Malta give rise to some complex questions under international treaty law, which deserve some consideration although they might be of a rather theoretical nature in the cases under examination here. If these declarations can be interpreted in a way that they purport to exclude any legal effect of the Convention such an effect can hardly be covered by the term "exclude or modify the legal effect of certain provisions of the treaty" as a constitutive element for a reservation. Even if it is possible to interpret "certain provisions" broadly it does not make any sense to extend the definition to situations where any legal effect whatsoever is excluded by the declaration. Therefore, the declarations submitted by Liechtenstein, Luxembourg and Malta in so far by definition do not fall under the term "reservation".

While once again not intending to predict the outcome of an in-depth analysis of the national situations, these declarations do not seem to exclude any recognised minority in the respective States and therefore seemingly do not pose any practical problems. Therefore, the objective situation indicates that an excluding or modifying effect was not intended by submitting the respective declarations.

Several other factors inherent in the declarations support this interpretation. Liechtenstein and Malta use the same wording for their declarations on this issue, stating that "Articles 24 and 25, in particular, of the Framework Convention (...) are to be understood having regard to the fact that no national minorities in the sense of the Framework Convention exist in the territory". The reference to

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By ratification of a treaty a State declares that it wishes to be bound under international law by the treaty in question. If the State at the same time declares that it does not regard itself to be bound by the treaty this results in a situation of confusion: the ratification and the additional declaration contradict each other in a way that cannot be reconciled. It seems very difficult to determine the States' true intentions when ratifying the treaty under the condition not to be bound by it. However, certain guidelines can be derived from the practice concerning the relationship between the ratification of human rights treaties and inadmissible reservations.

One possible consequence is that the ratification and the declaration are to be regarded as null and void in a case of contradiction between ratification and additional declaration. However, such a conclusion would be extremely far-reaching and would give rise to severe uncertainty, for instance, regarding the entering into force of a treaty. In the case of the Framework Convention this would not have posed any problems since the ratifications of Liechtenstein, Luxembourg and Malta did not count among the 12 first ratifications which were necessary for the general entering into force of the Convention. But this would obviously be a potential problem for any new treaty and therefore must be taken into consideration as a general element speaking against the invalidity of the ratification.

Moreover, there is an increasing tendency to "save" the ratification of a human rights treaty by considering an inadmissible reservation as null and void (J.A. Frowein, Reservations and the International *Ordre Public*, in: J. Makraczyk, Theory of International Law at the Threshold of the 21st Century – Essays in honour of Krysztof Skubiszewski, 1996, 403–412 [411]). In particular, the judgments of the European Court of Human Rights in the cases of *Belilos*, *Loizidou* and several other cases have confirmed this tendency by declaring the respective reservations invalid while retaining the validity of the ratification. However, the argument in both cases was linked to the fact that the States parties concerned had clearly shown their general will to be bound by the treaty irrespective of the validity of the declaration. While these cases related to reservations pertaining to specific articles (*Belilos*) or to territorial restrictions attached to declarations recognising the competence of the European Commission and Court of Human Rights (*Loizidou*) and it was therefore evident that the States parties concerned had generally subscribed to the *ordre public* enshrined in the treaty the situation is less clear if the respective declaration puts into question the acceptance of obligations under a treaty as a whole. A general criterion to be drawn from the decisions all the same is that other factors can indicate that the State party wishes to be bound irrespective of the validity of the reservation. In other words, factors beyond the wording and interpretation of the declaration may prove that the declaration is not strictly imposing a condition on the ratification. Consequently, declarations of the type submitted by Liechtenstein, Luxembourg and Malta must be very carefully interpreted and only in plainly clear cases the ratification can be considered invalid. That means that only where a declaration submitted upon ratification unequivocally makes the ratification conditional on not being bound by the entire treaty without any indications for the prevalence of the ratification it may be concluded that the ratification is null and void.

Applying these principles to the declarations of Liechtenstein, Luxembourg and Malta, the fact that none of these States has displayed any tendency not to regard itself as a State party to the Convention ever since its ratification confirms the conclusion that these declarations constitute "interpretative declarations".

Art. 24 and 25 of the Convention pertaining to the monitoring procedure through the Committee of Ministers and States Parties' obligation to submit reports on the implementation and, in particular, the soft formulation "are to be understood having regard" to a certain fact suggest the interpretation that these two states wish to indicate that their reports will be rather short due to the absence of groups which would require implementation. This interpretation expressed by the governments of Malta and Liechtenstein with a view to the situation in their countries does not rule out the possibility of submitting state reports all the same. Such state reports could discuss the situation with a view to groups which are not considered a "national minority" in the understanding of these States parties. Indeed, information of this kind has been requested by the Committee of Ministers in its guidelines for the submission of state reports.[34] It therefore seems most convincing to regard these passages as an interpretation of their reporting obligations by the respective States.

The Maltese declaration contains another section which clearly contains a reservation with regard to a specific article:

> "The Government of Malta reserves the right not to be bound by the provisions of Article 15 insofar as these entail the right to vote or to stand for election either for the House of Representatives or for Local Councils."

The contrasting wording in the two parts of the declaration may serve as a certain indication of the declaring State's intention: while the first part of the declaration – excluding a right to vote and stand for elections eventually to be derived from Art. 15 of the Framework Convention – is explicitly designated a reservation the second part on the definition of "national minority" is phrased as a "declaration". However, given the definition of a "reservation" in the VCLT, the wording in so far cannot constitute more than an indication for the legal character of the declaration. A more telling observation lies in the fact that this part of the declaration would be entirely superfluous if the remainder of the Maltese declaration was to be interpreted as legally excluding the application of the treaty to any beneficiaries. The additional expression of a true reservation to a specific article plainly shows that Malta regards itself to be bound by the ratification with regard to the treaty as a whole and merely intends to give an interpretation of the Convention by stating the absence of minorities on its territory.

The Luxembourg declaration first designates certain abstract criteria for a definition of the term "national minority" in the meaning of the Convention according to the understanding of Luxembourg. To that extent, the declaration would fall under the same category as those submitted by Estonia and Switzerland. The second sentence of the Luxembourg declaration, however, is of a different quality since it establishes the absence of national minorities in application of the abstract criteria set out in the foregoing part of the declaration. Of course, the application of a certain definition even if in line with international standards may trigger the result that in practice there are no minorities in a specific member State. In the

[34] Committee of Ministers, Outline for reports (note 21), 6.

absence of evidence indicating the contrary, this can only be regarded as an "interpretative declaration".

Consequently, the declarations of Liechtenstein, Luxembourg and Malta regarding the absence of minorities only constitute "interpretative declarations".

3. Declarations stating the application of the Convention to certain groups not designated as "national minorities"

Special considerations apply to German and Slovenian declarations in as far as they contain references to groups not considered as constituting a "national minority". The German declaration expressly designates the German Danes and Sorbs as national minorities but additionally mentions the Friesians and the Sinti and Roma as groups to which the Convention shall be applied. Similarly, the Slovenian declaration establishes the Italian and Hungarian minorities as "national minorities" in the meaning of the Convention while declaring that the Convention shall also apply to the members of the Roma community living in Slovenia.

The question arises whether the mentioning of those groups which are implicitly excluded from the notion of the term "national minorities" can be interpreted as a reservation. Since Germany and Slovenia have expressed their will to apply the Convention all the same with regard to these groups the declaration can only constitute a reservation in this regard if the legal effect under international law is modified. This is not the case if Germany and Slovenia are bound to implement the Convention also with regard to the two groups mentioned.

The passage in question indeed produces legally binding effects: the declaration shows the intention of the State to be bound accordingly and the undertaking was given publicly.[35] Therefore, the requirements for a unilateral declaration or commitment within the context of a treaty binding under international law are fulfilled. A situation is thereby created where Germany and Slovenia would be estopped to argue that with relation to these groups no protection under the treaty would apply or they would be free from any reporting obligations. The wording of the respective declarations leaves no doubt that it relates to the application of the entire treaty and including procedural provisions.[36] The effect of this part of Germany's declaration is limited to the statement that Friesians and Sinti and Roma do not fall under the term "national minority" in the eyes of the German Government without drawing the consequence that they would be excluded from protection under the treaty. The same considerations apply with regard to the declaration of Slovenia to apply the Convention also to the members of the Roma community which are not designated a "national minority". Consequently, the

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[35] These are the two criteria for binding effects of a unilateral declaration to be derived from the practice of the ICJ, cf. I. Brownlie, Principles of Public International Law, 1998, 643 et seq.

[36] The German declaration says that "the Framework Convention will also be applied to ...", the Slovenian declaration reads: "the provision of the Framework Convention shall apply also to ...". Obviously, both declarations do not contain any limitation regarding the scope of provisions to be applied.

legal effect of the Convention obligations is not modified and the declarations to that extent do not amount to reservations.

The Slovenian declaration contains the further speciality that it limits the application of the Framework Convention to members of the Roma community in accordance with national law. Since this general reference to the prevalence of national law raises particular questions with a view to the human rights character of the treaty it shall be discussed in that context later on.[37]

IV. The Alternative Status of the Declarations as "Reservations"

It has been assumed above that all declarations examined here constitute interpretative declarations which do not produce any legally binding effects with regard to member States' obligations flowing from the Framework Convention. This, however, was due to an interpretation of the declarations assuming that no "minority" falling within the Convention's scope of application is actually excluded. It is not impossible that in the course of time it becomes clear that, in fact, minorities existing in one of the countries have been excluded by one of the declarations. Under such circumstances the respective declaration would most probably have to be interpreted as a reservation in the proper sense. Therefore, the admissibility and validity of such reservations must be clarified.

1. General admissibility of reservations to the Framework Convention

Having regard to the contribution to the establishment and further elaboration of an "international *ordre public*" by human rights treaties the extensive use of reservations may be considered one major obstacle in promoting this process. Addressing this problem the Council of Europe's Parliamentary Assembly recommended to include in new conventions a clause specifying whether and under which conditions reservations be admissible.[38] Despite numerous efforts to do so it was finally decided not to adopt any clauses explicitly excluding or limiting the admissibility of reservations to the Framework Convention.[39] Consequently, there can be no doubt that reservations to the Framework Convention are admissible in accordance with the international law of treaties. This is also expressly recognised in the Explanatory Report.[40]

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[37] See IV. 3. b).

[38] Council of Europe, Parliamentary Assembly, Recommendation 1223 (1993) on reservations made by member states to Council of Europe conventions, adopted on 1 October 1993 (51st sitting).

[39] Cf. Ad hoc Committee for the Protection of National Minorities (CAHMIN), 6th Meeting, 12–16 September 1994, Doc.No. CAHMIN (94) 28, 5.

[40] "(...) reservations are allowed in as far as they are permitted by international law", Explanatory Report (note 23), para. 98.

2. Compatibility with object and purpose of the Convention (Art. 19 *lit.*c VCLT)

The most important condition for the admissibility of reservations is stated in Art. 19 *lit.*c VCLT: reservations are only admissible in so far as they are compatible with the object and purpose of the respective convention.

a) General considerations

Object and purpose of the Convention are indicated in its Preamble. It is stated that States are "resolved to protect within their respective territories the existence of national minorities" and recognise that "the protection of national minorities is essential to stability, democratic security and peace in this continent." Moreover, States have adopted the Framework Convention "considering that a pluralist and genuinely democratic society should not only respect the ethnic, cultural, linguistic and religious identity of each person belonging to a national minority, but also create appropriate conditions enabling them to express, preserve and develop this identity." Finally, in the last but one paragraph of the Preamble the aim of guaranteeing an effective protection is emphasised once again: "being resolved to define the principles to be respected (...) in order to ensure (...) the effective protection of national minorities and of the rights and freedoms of persons belonging to those minorities (...)."

It would be contrary to the aim of ensuring an effective protection of groups with a view to their existence, their role for the stability of a region and the promotion of the identity of its members if an existing minority group would fall outside the scope of the Convention's application. Therefore, reservations which arbitrarily exclude existing national minorities from the benefits of the Convention by limiting its application to other groups would violate its object and purpose. This would appear also to violate Art. 2 of the Framework Convention which requires to apply the provisions of the Convention in good faith. For example, it would be quite clear if Germany had not mentioned the minority of German Danes in its declaration thereby excluding it from the application of the Convention that it would have violated the principle mentioned in Art. 19 *lit.*c VCLT.

The problem is how to determine whether a certain minority has been arbitrarily excluded given the absence of criteria in the Convention for establishing what constitutes a national minority. In the situation referred to above – an exclusion of the Danes as a minority in Germany – reference could be made to the long established recognition of the German Danes as a national minority in domestic law and political practice. This criterion could be generalised in a way that the recognition of a minority in national law and practice would render the exclusion of the same minority from the benefits of the Framework Convention inadmissible.

The same applies to international law and practice. This notion should, in principle, also include bilateral treaties in which minorities with roots in the partner

State are recognised reciprocally and sometimes granted most comprehensive protection, including by way of reference to international human rights treaties and even political documents such as the CSCE Copenhagen Document. For instance, the German-Polish Treaty on good neighbourhood and friendly cooperation explicitly recognises a German minority in Poland, consisting of persons with Polish citizenship which are of German origin or want to live according to their German identity.[41] However, each bilateral treaty has to be carefully examined as the example of the German-Polish Treaty shows. Whereas a German minority is explicitly recognised in the Treaty, the same is not true for a Polish minority in Germany. In this respect, the treaty only recognises the right of persons who are of Polish origin or who want to live according to their Polish identity to express, maintain and further develop this identity without using the term "Polish minority". Actually, this was done since there is no distinguishable group of Germans of Polish origin: the Germans with Polish origin who are referred to in the Treaty live in Germany since several generations and are perfectly assimilated.

Although attempts to arrive at a general definition of "national minorities" were given up at some point in the drafting process certain elements remain which – if fulfilled – suffice to prove the qualification of a group as a "national minority". It is difficult, however, to pinpoint those elements which in this sense constitute undisputedly sufficient criteria. An indication of two elements is to be derived from Art. 5 of the Framework Convention which obliges member States "to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage." This indicates that a national minority is constituted by members with a common identity based on religion, language or culture and a common will to maintain this identity. Other criteria remain uncertain. However, it may be argued that the exclusion of a group fulfilling all criteria enlisted in international definitions (in particular, that contained in the Draft additional protocol to the ECHR as adopted by the Parliamentary Assembly of the Council of Europe)[42] such as having firm and long lasting ties to the State or being traditionally resident, having citizenship and being sufficiently representative while only consisting of members numerically inferior to the rest of the population would be arbitrary. To that end, it may be possible to

[41] Vertrag zwischen der Bundesrepublik Deutschland und der Republik Polen über gute Nachbarschaft und freundschaftliche Zusammenarbeit vom 17. Juni 1991, BGBl 1991 II, 1315, Art. 20 para. 1: "Die Angehörigen der deutschen Minderheit in der Republik Polen, das heißt Personen polnischer Staatsangehörigkeit, die deutscher Abstammung sind oder die sich zur deutschen Sprache, Kultur oder Tradition bekennen, sowie Personen deutscher Staatsangehörigkeit in der Bundesrepublik Deutschland, die polnischer Abstammung sind oder die sich zur polnischen Sprache, Kultur oder Tradition bekennen, haben das Recht, einzeln oder in Gemeinschaft mit anderen Mitgliedern ihrer Gruppe ihre ethnische, kulturelle, sprachliche und religiöse Identität zum Ausdruck zu bringen, zu bewahren und weiterzuentwickeln; (...)."

[42] Art. 1 *lit.*a Text of the proposal for an additional protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning persons belonging to national minorities, Parliamentary Assembly of the Council of Europe, Recommendation 1201 (1993).

go back to the definition adopted at earlier stages that those groups fulfilling the criteria mentioned there are beyond doubt to be considered a "national minority" in the sense of the Framework Convention.

Another element which may lead to the conclusion that a certain group cannot be denied the status of a "national minority" in the sense of the Framework Convention is international practice. Those groups which have been treated in international practice as national minorities, e.g. by the OSCE High Commissioner on National Minorities or by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, without objection on part of the State concerned cannot be excluded by member States from the protection of the Framework Convention.

In view of the absence of a definition of the term "national minority" in the Framework Convention it should be emphasised that only in plainly clear cases in which the existence of a minority according to the criteria set out above a reservation could be said to be inadmissible. Therefore, the practice regarding the term "national minorities" for the purpose of establishing the admissibility of a reservation must be distinguished from the practice of the Advisory Committee regarding the discussion of State reports. In this respect, it is important to note that member States have been requested expressly to submit information also on groups not considered a national minority (with regard to Article 3) or on "ethnic, linguistic, cultural and religious communities" (with regard to Article 6, emphasis added).[43] Therefore, the discussion of State reports leaves room for manoeuvre with a view to cautiously enlarging the traditional scope of definition of a "national minority".

b) The argument in the Russian declaration: the case of recently founded or restored States

The Russian declaration contains two claims: first, the right of member States to define the term "national minority" unilaterally is rejected in general; and, second, a denial of minority status based on an allegedly arbitrary deprivation of citizenship is designated to constitute a violation of the purpose of the Convention.

As to the first of these contentions, it is clear from what has been said so far that a definition of the term national minority by a State Party by way of a reservation cannot be excluded in general. The question is rather whether the individual reservation is admissible or not and what may be the criteria for establishing those cases in which an existing minority is arbitrarily excluded from the benefits of the Convention.

In this respect, the second contention in the Russian declaration is interesting. Citizenship is one of the criteria which usually have been mentioned when trying to define the term "national minorities" in the framework of the Council of Europe. The European Charter for Regional or Minority Languages refers to the

[43] Committee of Ministers, Outline for reports (note 21), 6, 9.

citizenship of the users of a language in order to define the scope of languages to be protected.[44] Similarly, the proposal by the Council of Europe's Parliamentary Assembly for an additional protocol to the European Convention on Human Rights concerning persons belonging to national minorities defined citizenship as a component for membership in a national minority.[45] Whereas it therefore will be difficult to deny the possibility of linking the term "national minority" to citizenship of its members, deprivation or denial of citizenship is another matter. While deprivation of citizenship seems rather unlikely a denial of citizenship to groups which have long established links to the territory in newly emerged or restored States is an obvious problem. In such circumstances, the exclusion of a minority group from the Framework Convention's scope of application by way of limiting treaty obligations to citizens may amount to an arbitrary reservation contrary to the purpose of the Convention. This observation is without prejudice to the situation in Estonia as it is – obviously though not expressly – addressed by the Russian declaration.

More generally, the dispute between Russia and Estonia on this question can serve to highlight another aspect with regard to newly emerging or restored States. The criterion of "firm and long standing ties to the State" cannot be fulfilled by any group if the State itself has only recently been founded or was part of another state for a prolonged period. In such new or restored States, the criterion mentioned therefore does not make any sense but rather invites for arbitrary application. The requirement of "firm and long standing ties" has to be modified for new States in a way as to be related to the territory and not to the State.

c) Geographical limitations

Another potential problem regarding the compatibility of an eventual reservation with the object and purpose of the Framework Convention may be seen in the geographical limitation of the application. The only declaration so far containing a geographical element is the Danish declaration: it is declared that the Convention shall apply to the "German minority in South Jutland". If the Danish declaration proved to constitute a reservation according to the true intentions of the Danish government this geographical element would require consideration under the object and purpose test. However, it is not clear whether by linking the recognition of the German minority to their traditional area of settlement is meant to constitute a geographical limitation with the result that the Convention shall be applied exclusively in the area mentioned. Such a limitation would plainly violate object and purpose of the Convention: the aim to respect the identity of each person belonging to a national minority and to foster tolerance and non-discrimination cannot be limited to members of a national minority living in the tra-

[44] Art. 1 *lit.*a European Charter for Regional or Minority Languages.

[45] Art. 1 *lit.*a Text of the proposal for an additional protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (note 42).

ditional area. Whereas certain provisions of the Convention only demand implementation in areas inhabited traditionally or in substantial numbers by persons belonging to the national minority (for instance Art. 14 (2)) the principal concept of protection underpinning the Framework Convention is to afford rights and support to the individual members of a national minority. This protection and the aims behind it do not end if a person belonging to a national minority leaves the traditional area and moves elsewhere in the country. In the absence of evidence showing the contrary it must be assumed that the Danish declaration does not aim at imposing such a geographical limitation on the application of the Convention.

d) Application of the above criteria to the declarations in question

The abstract criteria enlisted in the declarations for constituting a "national minority" grouped under type 1 (traditionally resident in the country, citizen of the State concerned, distinct ethnic, linguistic, cultural identity, motivated by concern to maintain the common culture etc.) do not indicate any arbitrary elements which are not reflected in the traditional definitions. The only exception in this respect can be seen in the Austrian definition which requires the elements of non-German mother tongue and an own ethnic culture as constitutive elements for a recognition as a national minority. This would mean that a group which is ethnically but not linguistically distinct from the rest of the population would not fall under the definition. This could be said not to be in congruence with recognised international standards.[46] However, it can only constitute an inadmissible reservation if it in fact leads to the exclusion of a group which according to general standards would be covered by the scope of the Framework Convention.

Moreover, the possibility of an arbitrary application of recognised principles has to be kept in mind. For instance, the criterion of citizenship is a well recognised element in the existing definitions of national minorities but may prove problematic in the case of recently founded or restored states. As it has been demonstrated above, the condition of citizenship may become an impermissible element in the definition of "national minority" if a certain group fulfilling all the criteria generally recognised is denied citizenship in an arbitrary manner and thereby excluded from the status of a "national minority". Once again, the question of admissibility depends on the actual situation in the respective member State.

The same observation pertains to the admissibility of reservations explicitly naming those minorities recognised by the State party to be covered by the Convention's scope. Only where an individual declaration actually leads to the exclusion of a group from the benefits of the Convention in the State party concerned, and this group would reasonably, according to criteria which can be generalised, constitute a national minority, it would run contrary to object and

[46] For instance, one of the criteria mentioned in Art. 1 of the proposal for an additional protocol to the European Convention of Human Rights is that the group must "display distinctive ethnic, cultural, religious or linguistic characteristics", Parliamentary Assembly of the Council of Europe, Recommendation 1201 (1993).

purpose of the Convention. Therefore, it can only be decided on the basis of a factual evaluation of the situation in each State having defined its own notion of "national minority" whether the reservation in question is inadmissible. An in-depth analysis of the national situation with a view to deciding which of the individual reservations is inadmissible would go beyond the scope of this paper.

3. Further criteria to be derived from the human rights character of the treaty

a) General considerations

A special regime with a view to reservations has been proposed for human rights treaties. In particular, due to the character of human rights treaties establishing a minimum protection for individuals and the obligation of States parties to strive to achieve the full level endorsed in the treaty, further requirements must be met for a reservation to be admissible according to this doctrine. It is therefore suggested that permanent reservations,[47] general reservations in favour of prevailing national law, or by virtue of which the declaring State seeks to maintain the possibility to determine its contractual obligations according to its own (changeable) political will are inadmissible.[48]

It has to be asked, however, in how far these criteria can be applied to a treaty such as the Framework Convention which is a treaty determined by its framework character of vague obligations for member States instead of concrete rights for individuals let alone groups. The provisions of the Framework Convention are formulated throughout as obligations of States parties to "undertake not to interfere with", "undertake to guarantee", or "ensure respect for" pre-existing rights. As an exception may be regarded Art. 3 (1) pertaining to the freedom to choose whether to be treated as member of a minority which according to its wording could possibly confer rights on individuals. Moreover, Art. 9 (3) stating that the "Parties shall not hinder the creation and the use of printed media by persons belonging to national minorities" imposes a clear prohibition on member States. However, with regard to the two latter provisions, it remains doubtful whether they may be applied directly since the Preamble limits the effect of the Convention to the obligation to implement the principles "through national legislation and appropriate governmental policies".[49]

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[47] Frowein (note 33), 412.

[48] T. Giegerich, Vorbehalte zu Menschenrechtsabkommen: Zulässigkeit, Gültigkeit und Prüfungskompetenzen von Vertragsgremien. Ein konstitutioneller Ansatz, ZaöRV 55 (1995), 713 (772). A special regime for reservations to human rights treaties is also recognised by P. Hilpold, Das Vorbehaltsregime der Wiener Vertragskonvention – Notwendigkeit und Ansatzpunkt möglicher Reformen unter besonderer Berücksichtigung der Vorbehaltsproblematik bei menschenrechtlichen Verträgen, Archiv des Völkerrechts 34 (1996), 376–425.

[49] This is also underlined by the Explanatory Report (note 23), para. 29.

However, although even if no individual rights were conferred by the Convention a human rights character would prevail. The treaty is not intended to serve the reciprocal advantages of its member States but imposes obligations on States to grant certain human rights in order to improve the protection of individuals belonging to minorities. Moreover, Art. 1 of the Framework Convention explicitly emphasises that the treaty "forms an integral part of the international protection of human rights".

b) Application of these considerations to the declarations in question

If such a doctrine of a special regime for reservations to human rights treaties is applied, the "prohibition" of general reservations in favour of national law is the criterion which deserves particular consideration with a view to the declarations submitted upon signature of the Framework Convention.

The references to national law (Austria, Macedonia, Slovenia) usually are made for the purpose of applying the national standard for a definition of "national minorities". In this respect, such references have to meet the same test as those reservations setting out abstract criteria or designating the national minorities benefiting from the Convention – in so far, it makes no difference whether such criteria or groups are established by national law or only in the text of the reservation. The designation of groups as national minorities "in accordance with national law" does not constitute a general reservation in favour of national law.

The only problematic declaration containing a general reservation in favour of national law is the Slovenian declaration regarding the Roma community. Slovenia declares that "in accordance with the Constitution and internal legislation of the Republic of Slovenia, the provisions of the Framework Convention shall apply also to the members of the Roma community". As outlined above, this part of the Slovenian declaration constitutes a binding unilateral declaration.[50] However, by reference to the Constitution and internal legislation Slovenia reserves the prevalence of national law with a view to the application of all provisions of the Convention to members of the Roma community. Problems as to the admissibility of the reservation in favour of national law may only arise if the Roma community indeed does constitute a "national minority" in the sense of the Framework Convention: if it does not, the Slovenian declaration would in so far go beyond the obligations imposed by the Framework Convention and the government would be free to impose any restrictions on such non-obligatory commitments it deems appropriate. Whether the Roma community is to be regarded as a "national minority" or not can only be decided on the basis of an evaluation of the situation prevailing in Slovenia. If after an examination of the facts this question is answered in the affirmative the declaration would contain an inadmissible general reservation in favour of national law.

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[50] Cf. II. 3.

V. Legal Consequences of Inadmissible Reservations

The inadmissibility of a reservation does not necessarily mean that the respective state did not become a member of the treaty as it was demonstrated by the European Court of Human Rights in the *Belilos* case. The ratification remains valid and only the reservation is null and void if regarding the entire ratification as invalid would run contrary to the nature of the treaty, the "international *ordre public*" and a fair evaluation of the State's behaviour.[51] In the case of the Framework Convention and declarations pertaining to the definition of "national minorities" – should it be shown that they qualify as reservations – the human rights character of the treaty and the comprehensive reference to the European Convention of Human Rights and the aims of the Council of Europe contained in its text show that the principles applied by the European Court of Human Rights also apply to the Framework Convention. This view is reinforced by the observation that the Framework Convention not only refers to the European Convention of Human Rights but also has incorporated some of its material provisions with a view to open their application also to States non-members to the Council of Europe.[52] Therefore, the fate of a reservation to the Framework Convention may be severed from that of the ratification.

The question remains who has the authority to determine the validity or invalidity of a reservation. It is argued that, unless the treaty provides otherwise (such as the Convention on the Elimination of all Forms of Racial Discrimination, which provides in its Art. 20 para. 2 that a reservation will be regarded as contrary to the object and purpose of the treaty if at least two-thirds of the States parties to the convention object to the reservation), whether or not a reservation is impermissible is a determination to be made by the States parties to the treaty themselves.[53] Indeed, there is ample evidence for States parties objecting to specific reservations and declaring them null and void.[54]

The reservations under examination here have been objected to only by Russia: the declaration submitted upon ratification by the Russian Federation is denying the right of any member State to unilaterally define "national minorities" or to exclude a certain group from the benefits of the Convention by an arbitrary deprivation of citizenship.[55] However, legal consequences of both aspects contained in the declaration are difficult to determine for two reasons. First, the Russian declaration does not contain any indication of what conclusions shall be drawn from

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[51] Frowein (note 33), 411 et seq.; Giegerich (note 48), 774 et seq.

[52] Explanatory Report (note 23), para. 25.

[53] M.N. Shaw, International Law, 4th edition, 1997, 647.

[54] Cf. for an analysis of the State practice Frowein (note 33), 408 et seq. See also B. Simma, Reservations to Human Rights Treaties – Some Recent Developments, in: G. Hafner a.o. (eds.), Liber Amicorum: Professor Ignaz Seidl-Hohenveldern in honour of his 80th birthday, 1998, 659–682 (664 et seq.) who emphasises the fact that objections by individual States are submitted in uncoordinated ways and are lacking any persistent follow-up.

[55] Without expressly saying so the latter part of the Russian declaration obviously aims at the situation of the Russian minority in Estonia.

the practice objected to. Second, the human rights character of the treaty speaks against a bilaterally split regime in which a reservation is valid in relation to one member State but not in relation to another.[56] Moreover, reactions of States parties to reservations do not guarantee the objectivity necessary to decide on the admissibility and validity of reservations. This is plainly demonstrated in States' practice which has been characterised by R. Higgins as "one might almost say that there is a collusion to allow penetrating and disturbing reservations to go unchallenged".[57]

These shortcomings lead to the conclusion that with regard to human rights treaties, the treaty bodies composed of independent experts must have the power to express an opinion on the validity of reservations. This power is deduced from their mandate to monitor member States' compliance with the treaty obligations,[58] and has also been recognised by the International Law Commission which represents a rather cautious approach to the question of reservations to human rights treaties.[59]

In the case of the Framework Convention, the responsibility for monitoring States' performance in implementing the Convention finally rests with the Committee of Ministers which is assisted by the Advisory Committee. However, due to its composition of independent experts, the Advisory Committee is in a better position to interpret the treaty and determine the validity of reservations without being influenced by political calculations.

The position of other human rights bodies to decide on the fate of a reservation is derived from their power to provide at least leading interpretations of the provisions of the respective conventions and to issue statements as to whether a cer-

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[56] Giegerich (note 48), 774.

[57] R. Higgins, Human Rights: Some Questions of Integrity, Modern Law Review 53 (1998) [due to an editorial error entitled "The United Nations: Still a Force for Peace"], 12. See also Simma (note 54), 664 et seq.

[58] Giegerich (note 48), 758 et seq. For a differentiated analysis of the role of supervisory organs in reviewing reservations see also L. Lijnzaad, Reservations to UN-Human Rights Treaties – Ratify and Ruin?, 1995, 412–420. The Human Rights Committee has expressed the following opinion in its General Comment 24 of 4 November 1994 on Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, para. 18: "It necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the Covenant. This is in part because (...) it is an inappropriate task for States parties in relation to human rights treaties, and in part because it is a task that the Committee cannot avoid in the performance of its functions." For an analysis of this General Comment, see C.J. Redgwell, Reservations to Treaties and Human Rights Committee General Comment No. 24 (52), ICLQ 46 (1997), 390–412.

[59] Report of the International Law Commission on the work of its forty-nineth session, 12 May-18 July 1997, General Assembly Official Records, Fifty-second session, Supplement No. 10 (A/52/10), Chapter V: Reservations to Treaties, C: Preliminary Conclusions of the International Law Commission on Reservations to Normative Multilateral Treaties Including Human Rights Treaties, para. 5: "The Commission also considers that where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them."

tain conduct of a member State violates the respective convention. These powers are absent in the Advisory Committee. Nevertheless, having regard to its character as an expert committee, this body may express its opinion and advise the Committee of Ministers also on questions pertaining to the validity of reservations. Without this implied functional power of determination the Advisory Committee could not properly advise the Committee of Ministers as a political organ.

VI. Conclusions

1. Those declarations setting out criteria for a definition of "national minorities", explicitly designating certain groups as beneficiaries of the Convention or stating the absence of "national minorities" would have to be regarded as reservations in those cases where a State aims at limiting the legal effect of the Convention to an application to those minorities qualified in the declaration. In the absence of evidence supporting such a conclusion, it must be assumed that the declarations constitute "interpretative declarations" stating the respective State's understanding to which groups the Convention shall apply without expressing a legal limitation to that end.

2. If it should become evident that the legal effects of the obligations under the Convention have been limited by a declaration, the respective declaration must be qualified as a reservation. In general, reservations to the Framework Convention are possible and may set out certain criteria for the definition of a "national minority" or define those groups qualifying for an application of the Convention. Only those reservations which as a matter of fact exclude from the application of the Convention such groups which are clearly recognised as minorities according to national or international law or practice are impermissible since they fail the object and purpose test. Whether this is the case is a question of an evaluation of the situation in the country having made a reservation which cannot be carried out here.

3. It should be emphasised that reservations can only be regarded as inadmissible in very clear cases. In other words, the question of inadmissibility of reservations is not a field where progressive interpretations of the definition of "national minorities" can be applied. In contrast to that, the State reporting procedure is not limited to a restrictive interpretation of the term "national minority" and the Advisory Committee may discuss issues pertaining to a certain "grey area".

4. The declarations of Germany and Slovenia to apply the Convention also to specified groups which do not fall within the respective State's concept of a "national minority" constitute unilateral commitments. Thereby, both States are bound to implement the entire Convention also with regard to the respective groups. This also entails reporting obligations. The prevalence of national law declared in the Slovenian declaration with respect to its application to the Roma community may amount to a reservation if the Roma community constitutes a "national minority" in the sense of the Framework Convention in contrast to

what is claimed in the Slovenian declaration. If an evaluation of the situation in Slovenia applying the test of national and international law and practice leads to the conclusion that the Roma community falls within the Convention's scope of application the declaration would constitute an impermissible general reservation in favour of national law.

5. In case of inadmissible reservations only the reservation is invalid whereas the State party remains bound by the treaty without restrictions according to the standards which have been developed under the European Convention of Human Rights. The Advisory Committee has the competence to determine the invalidity since it otherwise could not properly fulfill its advisory functions towards the Committee of Ministers.