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CONFORMITY OF THE ACT ON THE POLISH CARD WITH INTERNATIONAL LAW FROM THE PERSPECTIVE OF THE CONSTITUTIONAL COURT OF BELARUS

Abstract: *With the Act on the Polish Card Poland followed the pattern of some European states (mostly Central and Eastern European ones) of enacting specific domestic legislation conferring special treatment and benefits to persons who are recognized as its kin-minorities. The most important analysis of this phenomenon from the perspective of international law was the 2001 Venice Commission's report entitled "Report on the Protection of National Minorities by their Kin-State." The Polish legislation was adopted in 2007, so for obvious reasons it was not considered by the Venice Commission. However, a rather unexpected and unusual examination of the Polish kin-state legislation from the perspective of international law came from Belarus. The Constitutional Court of the Republic of Belarus (CCRB) conducted a comprehensive examination of the Act on the Polish Card in 2011.*

The main aim of this article is to present and comment on the reasoning of the CCRB. Beginning with the broader context, this article starts with a presentation of the origins and a short description of the Act on the Polish Card, followed by a discussion of why the Polish Card and other kin-state legislation instruments are topics of concern in international law. The main part of the article is devoted to the presentation and assessment of the 2011 CCRB decision on the Act on the Polish Card. The author's assessment confirms at least some of the concerns put forward by the CCRB, i.e., that both the Act on the Polish Card and the practice based on it contradict some norms and principles of international law, namely the principle of territorial sovereignty, the norms of consular law, and several bilateral treaties in force between these two states. Bearing in mind that despite those concerns more than a quarter-million Polish Cards (also sometimes called Pole's Cards) have been issued so far by the Polish authorities, the article ends with a discussion of why such a prolonged non-conformity with international law is possible.

Keywords: Constitutional Court of Belarus, consular law, kin-minorities, Pole's Card, Polish Card, Venice Commission

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INTRODUCTION

With its enactment of the Act on the Polish Card[1] Poland followed the pattern of some European states (mostly Central and Eastern European ones) of enacting specific domestic legislation conferring special treatment and benefits to persons who are recognized as its kin-minorities.

As regards the term "kin-minorities", it should be noted that the term "kin" is added to differentiate between more traditional relations/policies of the states where minorities live (state minority policies/policies regarding ethnic minorities) and the relations/policies of the countries of origin/the motherlands and their diasporas. In consequence, the motherland/country of origin is called a "kin-state", and its diaspora is sometimes designated as a "kin-minority'.[2] These terms were popularized by the European Commission for Democracy through Law, better known as the Venice Commission, which used them in its 2001 "Report on the Protection of National Minorities by their Kin-State." The Venice Commission had taken up this topic on the initial request of Romania, concerned at that time by newly adopted Hungarian legislation on Hungarians living abroad. The Venice Commission was asked to examine the compatibility of this legislation "with European standards and the norms and principles of contemporary public international law." But the final product deals with the topic in a broader way, i.e. it contains an overall assessment of the compatibility of the protection of minorities by their kin-State through domestic legislation with European standards and with the norms and principles of international law.[3]

The Venice Commission based its report on an examination of kin-state legislation of nine states (Austria, Bulgaria, Greece, Hungary, Italy, Romania, the Russian Federation, the Slovak Republic, and Slovenia). Since the Polish legislation was not adopted until 2007, for obvious reasons it was not considered by the Venice Commission. However, a rather unexpected and unusual examination of the Polish kin-state legislation from the perspective of international law came from Belarus. In 2011 the Constitutional Court of the Republic of Belarus (also referred to as the CCRB) conducted a comprehensive examination of the Act on the Polish Card (referred to by the CCRB as the Act of the Republic of Poland on the Pole's Card).[4]

Aside from the rather controversial practice of the Constitutional Court of one state examining a foreign act by another state, the main aim of this article is to present and comment on the reasoning of the CCRB. This examination will also enable me to make

[1] Journal of Laws 2019, item 1598 (the Act or the Act on the Polish Card).

[2] In French "État-parent" and "minorité exocentrée" respectively.

[3] Report on the Protection of National Minorities by their Kin-State adopted by the Venice Commission at its 48th Plenary Session (Venice, 19-20 October 2001), *Science and technique of democracy. No. 32*, CDL-STD(2002)032, Council of Europe 2002, p. 10, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2002)032-bil (accessed 30 June 2020).

[4] Decision of the Constitutional Court of the Republic of Belarus (7 April 2011, No P-258/11) on the position of the Constitutional Court of the Republic of Belarus on the Act of the Republic of Poland on the Pole's Card, available at: http://www.kc.gov.by/en/document-23293 (accessed 30 June 2020).

my own assessment of the Act on the Polish Card from the perspective of international law. My assessment confirms at least some of the concerns put forward by the CCRB, i.e., that the Act on the Polish Card and the practice based on it contradict some norms and principles of international law, namely the principle of territorial sovereignty, the norms of consular law, and several bilateral treaties in force between these two states.

Beginning with the broader context, this article starts with a presentation of the origins and a short description of the Act on the Polish Card, followed by a discussion of why the Polish Card and other kin-state legislative instruments are topics of concern in international law. Its main part is devoted to the presentation and assessment of the 2011 CCRB decision on the Act on the Polish Card. Echoing at least some of the international law concerns raised by the CCRB, and bearing in mind that despite those concerns more than a quarter-million Polish Cards have been issued so far by the Polish authorities, this article ends with a discussion of why and how such a prolonged non-conformity is possible.

1. THE ACT ON THE POLISH CARD – ITS ORIGIN AND A BRIEF CHARACTERISATION

The political breakthrough of 1989, and its consequent beginnings of the construction of a new system involved a change in the attitude of the Polish state towards Poles and people of Polish origin living abroad. At the end of the 1990s work was commenced on three laws, i.e. an act on repatriation, which

> was meant to enable the return to Poland of exiles and their descendants from the places of transportation and deportation (the Asian part of the former USSR, and Armenia, Georgia and Azerbaijan); a new act on Polish citizenship, which was meant to restore Polish citizenship to those who had lost it in the post-war period; and an act on the Polish Card [which was meant – W.B.] to strengthen the bonds between the homeland and those Poles who stayed on in the Eastern Borderlands of the Second Polish Republic.[5]

The work on the regulations enabling repatriation to the territory of the Republic of Poland was completed first, and the Act on Repatriation was passed in 2000.[6] It took the longest time to complete work on the new Polish Citizenship Act of 2009[7] which, *inter alia*, provides for the option of "restoring citizenship" to individuals (or their descendants) who were forced to emigrate during the communist period.[8]

[5] M. Sora, *Repatriacja do Polski po 1990 r. – uwarunkowania prawne, skala przyjazdów, obszar osiedlenia* [The repatriation to Poland after 1990 – legal determinants, scale of arrivals, area of settlement], 2 (34) Studia Bas 9 (2013), p. 10.

[6] Act of 9 November 2000 on Repatriation, Journal of Laws of 2018, item 609 as amended.

[7] Act of 2 April 2019 on Polish Citizenship, Journal of Laws of 2018, item 1829 as amended.

[8] *Cf.* A. Górny, D. Pudzianowska, *EUDO Citizenship Observatory. Country Report: Poland*, RSCAS/EUDO-CIT-CR 2013/26, p. 12, available at: https://bit.ly/2VIsFgO (accessed 30 June 2020).

And in 2007 work on a regulation aimed at enabling the confirmation of belonging to the Polish nation and thus strengthening the national bonds of the diaspora with the homeland/motherland was completed. It was modelled after the regulations adopted in the 1990s and early 2000s in several other Central and Eastern European countries.[9] The first draft, which was proposed by the Senate in 1998, referred in its explanatory memorandum to the Slovak legislation on the Foreign Slovak's Certificate.[10] After nearly three years of legislative work, the parliamentary committees dealing with the Senate draft put forward an almost completely reworked draft in 2001.[11] The next proposal appeared first in 2006. Finally, work on the governmental draft was submitted in 2007 – it was handled at full speed and was successfully completed.[12] With the adoption of the Act on the Polish Card in the same year, a new legal institution appeared in the Polish legal system, setting out the legal framework for Poland's relations and policy with regard to the diaspora. This legislation has a constitutional basis. The Polish Constitution of 1997, similarly to the constitutions of several other Central and Eastern European states[13] establishes the obligation of public authorities to "provide assistance to Poles living abroad to maintain their links with national cultural heritage" (Art. 6(2)).[14]

The Polish Card (*Karta Polaka* in Polish, also sometimes translated as the Pole's Card[15]) is a document certifying a holder's belonging to the Polish nation. It should be noted that such "belonging" does not, however, replace and is not the same as Polish citizenship (hence a Polish Card does not entitle its owner to vote in Polish elections). In light of the latest amendment, it may be applied for by persons who do not have Polish citizenship or a right to permanent residence in Poland. The main criterion for granting it is the ethnic origin of the applicant, i.e. proving that one has Polish roots. However, the Act allows for the possibility of obtaining the Polish Card based on cultural criterion, i.e. by proving that the person concerned cultivated Polish traditions and culture, actively promoted them, and also promoted the Polish language and Polish minority rights for at least three years prior to submitting the application. Proceedings and decisions on granting the Polish/Pole's Card are conducted and issued either by a territorially competent consul (for applications submitted outside Poland), or in excep-

[9] *See e.g.* the legislation of: Slovakia (Zákon 70/1997 o zahraničných Slovákoch); Hungary (2001. évi LXII. Törvény a szomszédos államokban élő magyarokról, Magyar Közlöny 2003/84); and Romania (Legea nr. 299/2007 privind Sprijinul Acordat Românilor din Străinătate).

[10] *See* Sejm Paper No. 1206, 3rd Term.

[11] *See* Sejm Paper No. 2641, 3rd Term.

[12] For more on the course of the parliamentary work on this and previous draft laws, *see* A. Madera, *Karta Polaka w Parlamencie RP* [The Polish Card in the Polish Parliament], 13 Rocznik Wschodni 7 (2007/2008). For a broader background, including the regional context, *see* D. Pudzianowska, *Karta Polaka – Old Wine in New Bottle,* 19 Ethnopolitics (2020, forthcoming).

[13] *See e.g.* J. Jagielski, D. Pudzianowska, *Ustawa o Karcie Polaka. Komentarz* [The Act on the Polish Card. A Commentary], Wolters Kluwer, Warszawa: 2008, pp. 12-15; Pudzianowska, *supra* note 12.

[14] Journal of Laws of 1997, No. 78, item 483 as amended.

[15] Especially when citing or referring to the discussed decision of the Constitutional Court of the Republic of Belarus as official translations of the Court's decision used the term "Pole's Card."

tional situations by a territorially competent voivode, i.e. the governor of a province (for applications submitted within the territory of Poland). A holder of the Polish Card may be entitled to various privileges which are effective primarily in the territory of Poland. These include, *inter alia*, full access to the labour market and to free education, the possibility of conducting a business activity in Poland, transportation discounts, free access to museums and cultural institutions. Additionally, the Pole's Card gives an exemption from the fee for the national visa and entitles its holder to consular assistance from the Polish consular service in cases of threats to his or her life or health.

Pursuant to Art. 2(2) in the original wording of the Act, which was in force until 13 July 2019, the Pole's Card could only be applied for by citizens of fifteen countries, listed exhaustively in this provision. They were exclusively the states created after the dissolution of the Soviet Union. The reasoning behind this restriction was linked to financial conditions, as the drafters had come to the conclusion that this form of compensation should be offered to those who had suffered the most in the course of history, many of whom are now living in severe conditions. There was a common understanding that these conditions were common to a multitude of Poles living in states created after the dissolution of the Soviet Union. The other argument put forward in this context was that many of the potential beneficiaries of the Act could not, under their home state's legislation, hold dual citizenship.[16] Such a significant subjective limitation of the Polish Card raised reasonable concerns of both a legal and non-legal nature. As regards those of a legal nature, they included the compliance of the Act with the Polish Constitution (the anti-discrimination clause, the obligation to "help Poles living abroad to preserve their links with the national cultural heritage") as well as with EU law (the principle of non-discrimination on grounds of nationality [Art. 18 TFEU], due to the fact that the benefits under the Pole's Card were potentially available to citizens of only three EU member states, i.e. the Baltic republics). As regards the concerns of a non-legal nature, they concerned mainly the unjustified exclusion from the scope of the Act of those persons of Polish origin living in other countries of the world. At the beginning of April 2019, during the course of the publication process, the Sejm received a governmental bill to amend, among others, the Act on the Pole's Card, which provided for "widening the scope *ratione personae* of the Act on the Pole's Card to cover the whole world and thus to include all persons of Polish origin and all Polish diaspora communities." The Act was amended on 6 May 2019 and the amendment entered into force on 14 July 2019. Since then, the Polish Card can be applied for by both citizens and stateless persons residing in any country in the world.

In a report summarising the first eight years of the Act being in force, it was indicated that 162,218 Cards had been issued during that period, of which over 47% were to citizens of Belarus and over 43% to citizens of Ukraine.[17] Currently, this number has

[16] *See* Jagielski, Pudzianowska, *supra* note 13, pp. 83-86.

[17] M. Kowalski, *Raport z badań na temat posiadaczy Karty Polaka,* in: *Odkryte karty historii. Podsumowanie ustawy o Karcie Polaka* [The research report on the holders of the Polish Card], Fundacja Wolność i Demokracja, Warszawa: 2015, p. 27.

increased to approx. 250,000.[18] It is worth noting in this context that Polish diaspora organisations and Polish diplomatic missions abroad estimate the number of Poles living in the post-Soviet territories at about 2.6 million. However, the opening of the Act to all countries of the world significantly increases the number of its potential beneficiaries.

2. THE POLISH CARD AS AN ISSUE OF INTERNATIONAL LAW

From the point of view of national law, the matters covered by the Act on the Polish Card as set forth in its Article 1 i.e. "the rights of such person to whom the Polish Card has been granted (…) the principles of granting, expiry and invalidation of the Polish Card and the jurisdiction and procedure of the authorities in these matters" are of interest primarily in terms of administrative law. As indicated above, the Polish Card is not synonymous with Polish citizenship, so international law considerations concerning citizenship will not be applicable to it.[19] Nevertheless, the content of the Act – both directly and indirectly (as well as potentially) – either refers to international law or opens the way to analyses from the point of view of international law (including EU law). Direct references to international law include:[20]

[18] A. Nogal, *Niepotrzebne obostrzenia w ustawie o Karcie Polaka* [Unreasonable restrictions on the Act on the Polish Card], 10 February 2018, available at: http://www.lex.pl/czytaj/-/artykul/niepotrzebne-obostrzenia-w-ustawie-o-karcie-polaka. In August 2018 the Supreme Chamber of Control published information on the results of the audit of the granting of the Polish Card in 2015-2017, which shows that in 2015 and 2016 a total of more than 45,000 decisions were issued in cases of granting the Polish Card – *see Materiały kontrolne NIK: Przyznawania Kart Polaka osobom zamieszkałym za wschodnią granicą RP. Lata 2015-2017, Najwyższa Izba Kontroli*, August 2018, available at: https://www.nik.gov.pl/plik/id,17959,v,artykul_17003.pdf (both accessed 30 June 2020). These data confirm the number of approx. 250,000 Polish Cards having been issued as of that time.

[19] Although states continue to enjoy a certain degree of freedom to regulate issues related to nationality, numerous international agreements in this area, as well as rulings by international courts and the relevant international practice, constitute certain limitations to this freedom and consequently confirm that issues related to nationality are also a matter of concern under international law – *see, inter alia,* R. Clerici, *Freedom of States to Regulate Nationality: European Versus International Court of Justice?*, in: N. Boschiero et al. (eds.), *International Courts and the Development of International Law*: *Essays in Honour of Tullio Treves*, Springer, The Hague: 2013, pp. 839-862. In other words, "under international law, matters of nationality fall within the exclusive competence of each state but because of the international legitimacy of nationality, the freedom of a state is limited to a certain extent" (W. Ramus, *Instytucje prawa o obywatelstwie polskim* [The institutions of the law on Polish citizenship], PWN, Warszawa: 1980, p. 25). The very process of internationalisation of citizenship law began in practice first in the 20th century, with the decade 1920-1930 being particularly important in this regard – *see* G. Matias, *Citizenship as a Human Right: The Fundamental Right to a Specific Citizenship,* Palgrave Macmillan, London: 2016, pp. 41 et seq.

[20] A very extensive and multifaceted reference to international law (its individual parts will be analysed later in the study while discussing specific issues) was included in the Preamble to the 2006 draft, namely: "...with regard to the accession of the Republic of Poland to the European Union and in accordance with the fundamental principles adopted by international organisations, and in particular by the Council of Europe, as regards respect for human rights and the protection of minorities, while respecting generally accepted principles of international law, as well as the commitments of the Republic of Poland adopted under

- numerous references to the activities of the consul of the Republic of Poland as the competent authority in matters relating to the Polish Card (*inter alia*, Art. 2(1)(2), Art. 4(2)) and the consular protection for card holders (Art. 6(1)(8) of the Act). The status of the consul in the host country and the basis and limits of the consular functions performed are determined by the norms of international law;
- the requirement introduced by one of the latest amendments to the Act that a person applying for the Polish Card should submit "a declaration that neither they nor their ancestors or descendants have been repatriated from the territory of the Republic of Poland or the People's Republic of Poland under the repatriation agreements concluded in 1944-1957 by either the Republic of Poland or the People's Republic of Poland with the Belarusian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Lithuanian Soviet Socialist Republic and the Union of Soviet Socialist Republics, to any of the States being a party to those agreements" (Art. 2(1)(4) and Art. 19(3) of the Act). Thus the Act directly refers to several international agreements.

Indirect and/or potential links with international law, including EU law, are connected with the very fact that the potential beneficiaries of the Polish Card are not Polish citizens but citizens of other countries (or stateless persons permanently residing in those countries). With regard to Poland's neighbouring countries, provisions such as those in the Act on the Polish Card may also thus be analysed in the light of the concept of the so-called "good neighbourhood." As W. Czapliński and A. Wyrozumska point out, although "the regime of cooperation with respect to the border is not clearly defined in law … it is usually assumed that this obligation goes further than with respect to other areas of international law' and 'the norms related to the concept of 'good neighbourhood', derived from the transfer of certain constructs of private law to international law, are of particular importance."[21]

Another indirect link between the Act on the Polish Card and international law can be found in its provisions concerning the role that may be played by Polish diaspora organisations operating in the home-state of the applicants in the procedure for applying for this document. Art. 2(1)(3) of the Act indicates that an alternative to proving one's Polish nationality is to present a certificate from a "Polish or Polish diaspora organisation confirming active involvement in activities for the advancement of the Polish language and culture or Polish national minority for at least the last three years." The list of organisations authorised for this purpose is published in the *Monitor Polski* by the Minister of Foreign Affairs (Art. 13(4) of the Act). In this way, the Polish legislator also includes entities operating in the territory and on the basis of the law of a third-

international law, with due respect for the development of bilateral and multilateral good neighbourly relations, partnership and cooperation in the region of Central and Eastern Europe, in particular taking into account the bilateral treaties concluded by the Republic of Poland with neighbouring countries on maintaining good neighbourly relations and cooperation and guaranteeing minority rights..."

[21] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [Public international law. The systemic aspects], C.H. Beck, Warszawa: 2014, p. 232.

party country in the procedure for issuing the Polish Card, which also opens the way for analyses concerning the compliance of such a solution with the applicable international law.

That the Polish Card and the national cards introduced by other states involve a number of important issues of public international law is also confirmed by the fact that, as already mentioned, in 2001 the Venice Commission addressed this issue in detail in its assessment of the compliance of the legislative solutions and practices in question with the "Council of Europe standards and principles of international law." At the same time, in the main part of the report the assessment pattern is slightly different, i.e. it indicates that compliance with "European standards and norms and principles of international law" will be examined. As a result, the report addresses a number of issues of international law, with a particular focus on four issues:

- the principle of territorial sovereignty of states (Part D, item a of the Report);
- the principle of *pacta sunt servanda* (Part D, item b of the Report);
- the principle of friendly neighbourly relations (Part D, item c of the Report);
- the principle of respect for human rights and fundamental freedoms and the prohibition of discrimination (Part D, item d of the Report).

The outcome of the Venice Commission's work became the basis for the assessment presented by the Belarusian Constitutional Court, so a more detailed presentation of the above issues identified by the Venice Commission will take place when discussing the decision of this particular constitutional court.

References to international and EU law also appeared, with varying degrees of effect, during the legislative work on the individual drafts of the Act on the Polish Card. For example, the Sejm Office for Studies and Expert Opinions decided that the Senate draft of 1999 "does not fall within the scope of the applicable Community law and the adjustment obligation,"[22] and this despite the fact that e.g. in the original draft there was already a provision stating that the Card entitles its holder to a "nationality visa" (Art. 3(1) of the 1999 draft).

However, two years later, when giving his opinion[23] on the 2001 draft, the Secretary of the Committee for European Integration noted that "it also regulates issues related to the entry and stay in the territory of the Republic of Poland of third-party nationals (Article 1) including issues related to the issuance of visas" and thus, in consequence, it also concerns EU law, including the Schengen *acquis*. Later on, the Secretary found the provisions of the Act concerning visas to be vague and therefore requiring amendment in order to be considered as compliant with EU law. Additionally, this opinion referred to general public international law by indicating that the privileged treatment of a certain group of foreigners as a result of the proposed act raises doubts as to the compatibility of these solutions with the aforementioned provisions of international documents in the field of human rights protection (e.g. the Universal Declaration of Human Rights

[22] Opinion by the Sejm Office for Studies and Expert Opinions – Annex to Sejm Paper No. 1206, 3rd Term.

[23] Annex to Sejm Paper No. 2641, 3rd Term

of 1948[24] and the International Covenant on Economic, Social and Cultural Rights of 1966[25] were indicated).

The above arguments were also shared by the Polish Council of Ministers (Government), which in its opinion[26] additionally pointed out two other problems in the field of international law. It was noted that in light of international standards (e.g. the Framework Convention for the Protection of National Minorities of 1994[27] and non-designated "bilateral treaties signed by Poland"), "nationality is a state of consciousness of every person and the resulting identification with a given ethnic group", and consequently should not be "decreed" by a state official, in this case the Consul of Poland. In addition, Art. 55 of the 1963 Vienna Convention on Consular Relations,[28] which obliges members of the consular post to respect the internal law of the host country, was also indicated. The opinion points out that, in principle, all states have rules in their internal laws requiring equal treatment of their citizens, also regardless of their nationality. In this context, it was noted that the activities of the consuls of the Republic of Poland in the area of the Polish Card result in *de facto* unjustified differentiation between the citizens of the host country based on their declared nationality.

On the other hand, in the legislative process of the 2007 draft – which after minor amendments was finally adopted – the draft was assessed negatively from the perspective of EU law by the Office of the Committee for European Integration (UKIE), which, until its merger with the Ministry of Foreign Affairs in 2010, gave its opinion on proposed legal acts with regard to their compliance with EU law. In its opinions,[29] the UKIE focused on the fact that three EU Member States (the Baltic republics) are among the countries listed therein. In the UKIE's opinion, the fact that citizens of the other Member States cannot apply for the Polish Card, even if the other statutory conditions are met, is contrary to one of the fundamental principles of EU law, i.e. the principle of non-discrimination on grounds of nationality, reflected today in Art. 18 of the Treaty on the Functioning of the European Union (TFEU).[30]

It should be noted with regret that none of the official expert opinions presented at the various stages of work on the law which took place after the adoption of the report by the Venice Commission actually referred to the Commission's report or made any attempt to assess the planned solutions with respect to the guidelines included in the report.

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[24] UN Doc. A/RES/3/217 A.

[25] The International Covenant on Economic, Social and Cultural Rights of 16 December 1966, 993 UNTS 3 (ICESCR).

[26] Prime Minister's letter of 19 June 2001, DSPR-140-109/01.

[27] ETS, No. 157.

[28] The Vienna Convention on Consular Relations of 24 April 1963, 596 UNTS 261 (VCCR).

[29] One opinion (of 12 June 2007) was attached to the government's draft (Sejm Paper No. 1957, 5th Term), and another one (of 31 August 2007) was submitted by the UKIE to the Sejm Committee for Liaison with Poles Abroad (Sejm Paper No. 2097, 5th Term).

[30] OJ EU C 202 of 2016, p. 47

3. THE 2011 DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BELARUS ON ITS POSITION ON THE ACT OF THE REPUBLIC OF POLAND ON THE POLISH CARD

The CCRB's competence, which provides for "stating the position (…) on conformity of the document adopted (issued) by foreign states, international organisations and (or) their bodies and affecting the interests of the Republic of Belarus to generally recognised principles and rules of international law" (Art. 147) is currently based on the 2014 Law of the Republic of Belarus on Constitutional Proceedings (Chapter 22, Articles 147-152).[31] Similar provisions existed under the former constitutional regulations in Belarus.[32]

According to the official census of 2009 there are around 295,000 persons of Polish origin in Belarus (3.1% of the population), and they constitute the second largest (after Russians) minority in Belarus. However, unofficial estimates range from 500,000 to even 1.2 million persons of Polish origin.[33] Nevertheless, whether using official or unofficial data, Belarus is one of the states with the largest number of potential beneficiaries of the Act on the Polish Card. While this context was not mentioned in the CCRB's decision, it must have played an important role in terms of why the Act on the Polish Card met with such great political and legal interest in Belarus.

The CCRB rendered its decision regarding the motion of the House of Representatives of the National Assembly of the Republic of Belarus, a motion which contained their opinion that the Act of the Republic of Poland on the Polish Card "contradicts the rules of international law and the principle of good neighbourhood." The MEPs stated that:

1) by granting benefits to the holders of the Pole's Card, Poland discriminates against other foreign nationals (including Belarusians without a Polish Card) and this alone "contradicts such basic international documents in the field of human rights such as the Universal Declaration of Human Rights of December 10, 1948, the International Convention on the Elimination of All Forms of Racial Discrimination of December 21, 1965[34] and the Convention concerning Discrimination in Respect of Employment and Occupation of June 25, 1958[35] as well as the Treaty between the Republic of Belarus and the Republic of Poland on Good Neighbourly Relations and Friendly Co-operation of June 23, 1992;"[36]

[31] National Legal Internet Portal of the Republic of Belarus, 16 January 2014, 2/2122, English translation available on the website of the CCRB http://www.kc.gov.by/en/document-5273 (accessed 30 June 2020).

[32] Subpoint 1.5 of point 1 of the Decree of the President of the Republic of Belarus of 26 June 2008, no. 14 "On Certain Measures to Improve the Activities of the Constitutional Court of the Republic of Belarus."

[33] Previous censuses had revealed a much higher number of Poles, for example around 540,000 in 1959, and around 395,000 in 1999 – *see* P. Eberhardt, *Polacy na Białorusi i Ukrainie* [Poles in Belarus and Ukraine], 1 Wspólnota Polska 3 (2003).

[34] 660 UNTS 195.

[35] 362 UNTS 31.

[36] Journal of Laws 1993, No. 118, item 527 (the Treaty on Good Neighbourly Relations).

2) the power of the Consuls of the Republic of Poland to process and grant the Polish Card on the territory the Republic of Belarus contradicts "point 'm' of article 5 of the Vienna Convention on Consular Relations of April 24, 1963,[37] and articles 26 and 29 of the Consular Convention between the Republic of Belarus and the Republic of Poland of March 2, 1992;"[38]
3) the Act as a whole provides rules other than those embodied in several bilateral treaties between both states (i.a., the Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Employment of Citizens of 27 September 1995[39] and the Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Trips of Citizens, concluded by the exchange of notes on 20 December 2007[40]), and especially contradicts article 1 of the Treaty between the Republic of Belarus and the Republic of Poland on Good Neighbourly Relations and Friendly Co-operation of 23 June 1992.

The Constitutional Court of the Republic of Belarus started its analysis (point 1) by providing a detailed list of the legal bases from which the Court derives the generally recognized principles and rules of international law used in its analysis, i.e., the 1945 UN Charter,[41] the 1970 Declaration on International Law Principles,[42] The 1975 Final Act of the Conference on Security and Co-operation in Europe,[43] the 1966 International Covenant on Civil and Political Rights,[44] the ICESCR, the 1963 Vienna Convention on Consular Relations,[45] the Treaty on Good Neighbourly Relations, and "other bilateral international treaties between the Republic of Belarus and the Republic of Poland."

The CCRB subsequently (point 2) differentiated between two situations – kin-state policy towards a country's own nationals living abroad, and kin-state policy towards foreign nationals. Regarding the first situation, the Court observed that under generally recognized principles and rules of international law, which derive from the above-mentioned acts and also, *inter alia*, from documents and treaties on minorities (e.g. the 1994 Framework Convention for the Protection of National Minorities),

[37] 500 UNTS 95.

[38] Journal of Laws 1994, No. 50, item 197 (the Consular Convention).

[39] Not promulgated. Text available on the "Internet Treaty Base" website, established by the Polish Ministry of Foreign Affairs.

[40] Polish Monitor 2008, No 83, item 733.

[41] The Charter of the United Nations, 1 UNTS, XVI (the UN Charter).

[42] The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations adopted by the resolution of the General Assembly of the United Nations of October 24, 1970 no. 2625 (XXV), UN Doc. A/C.6/SR.1180 (1970)

[43] The Final Act of the Conference on Security and Co-operation in Europe of August 1, 1975, ILM, vol. 14, 1292 (1975 Final Act).

[44] The International Covenant on Civil and Political Rights of December 16, 1966, 999 UNTS 171 (ICCPR).

[45] The Vienna Convention on Consular Relations of April 24, 1963, 596 UNTS 261 (VCCR).

"the adoption of legislation by a kin-state, entitling its nationals living abroad to any privileges is consistent with the rules of international law and represents a fairly common international practice."

Regarding the situation wherein benefits and privileges of a kin-state are offered to foreign nationals (as is the case of the Act on the Polish Card), the CCRB started by referencing the above-mentioned Report of the Venice Commission. Indirect referral to the report occurred when the Court noted that such a policy requires "respect for the principles of sovereign equality of states, implementation in good faith of international obligations, respect for friendly interstate relations, human rights and fundamental freedoms, and prohibition of discrimination"[46] (all these aspects were discussed in the report). The CCRB also directly referred to the Venice Commission's Report and focused on the part of the report in which it stated that, in principle, preferential treatment "may be granted to persons belonging to kin-minorities in the fields of education and culture, in so far as it pursues the legitimate aim of fostering cultural links and is proportionate to that aim," and only in exceptional cases (and again subject to respecting the proportionality test) in other fields.

The following part of the CCRB decision lacks clarity, is rather puzzling, and is far from persuasive. The CCRB concentrated on the fact that the Polish Card can be also granted to citizens of the Republic of Belarus who do not have Polish roots (under the cultural criterion, confirmed by a Polish or Polonian organization – e.g. Art. 2(1), point 3 *in fine*; Art. 13(4)) and also on provisions of the Act stipulating when the Card cannot be granted or should be annulled (if the applicant's behaviour is detrimental to the basic interests of Poland – Art. 19 point 6; and if the behaviour of the Card's holder "discredits Poland and Poles" – Art. 20(1), point 1, respectively. The Court concluded with the observation that these provisions of the Act "are inconsistent with the generally recognised principles of the respect for human rights and fundamental freedoms and non-discrimination." The weakness of this argument is confirmed by the fact that in the closing parts of its decision the CCRB omitted this point and reiterated other points of incompatibility of the Act with "generally recognised principles and rules of international law." The fact that in the following paragraphs the Court came back to the previously-repeated argument of the Venice Commission that preferential treatment of kin-minorities should be, in general, restricted to education and culture, confirms that this part of the decision is also not well-structured and, as such, a bit puzzling.

As regards preferential treatment based on the Act, the Court focused on the exemptions of card holders from visa fees (Art. 5) and their rights concerning employment and entrepreneurial activity in Poland (Art. 6(1), points 1 and 2), stating that none of these benefits are related to education and culture. As a supplementary argument, the CCRB added that these benefits are in contradiction with the provisions of two bila-

[46] In the Venice Commission's opinion, kin-state legislation on the protection of their kin-minorities "is conditional upon the respect of the following principles: a) the territorial sovereignty of States; b) *pacta sunt servanda*; c) friendly relations amongst States, and d) the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination" – *see* part. D of its Report.

teral treaties between Belarus and Poland (i.e. the 1995 Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Employment of Citizens, and the Agreement between the Government of the Republic of Belarus and the 2007 Government of the Republic of Poland on Mutual Trips of Citizens), which do not recognize exemptions similar to the ones stipulated in the Act.

The following two arguments are better structured. The first concentrates on the role of "public associations registered and operating in the territory of the Republic of Belarus" in the procedure of granting the Polish Card. As mentioned above, under Art. 2(1), point 3 *in fine* the Polish Card can also be granted when a cultural condition is met, i.e. when a Polish or Polonian organization operating in the applicant's country of origin confirms his/her "engagement in activities in favour of the Polish language and culture or national minority for at least three years prior to the application for the card." Furthermore, the Polish Prime Minister published in the official bulletin (Monitor Polski) the list of recognized organizations which are authorized to issue those certificates (Art. 13). The CCRB, referring once again to the Venice Commission's report, observed that these provisions "are not consistent with such generally recognised principles of international law as the principle of sovereign equality of states and the principle of non-interference in affairs within the internal jurisdiction of any other state."

Another argument was built upon one of the points raised by the MEPs in their motion to the CCRB – that consuls of the Republic of Poland can only perform functions other than those directly listed in the VCCR and the Consular Convention "which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State" (Art. 5(m) of the VCCR). Neither the crucial role of the consuls in the whole procedure, nor the fact that granting documents such as the Polish Card is not included in the non-exhaustive lists of consular functions of the VCCR or the Consular Convention, is disputable. After noting that, the CCRB referred to the above-mentioned provision of the VCCR and also to, *inter alia*, Art. 26(1) of the 1992 Consular Convention, confirming this rule. Thereafter the Court noted that the Republic of Belarus on several official occasions objected that the Act is applied to citizens of the Republic of Belarus and "(h)ence the issuance by the consul of the Republic of Poland in the territory of the Republic of Belarus of any documents entitling some Belarusian citizens to privileges and benefits is not properly sanctioned by the Republic of Belarus." In the opinion of the Court, it also contradicts the Treaty on Good Neighbourly Relations "that provided for bilateral co-operation."

In concluding its reasoning, the CCRB listed only three arguments supporting its assessment that "the Act of the Republic of Poland on the Pole's Card affects the interests of the Republic of Belarus, and some of its provisions do not conform to certain generally recognised principles and rules of international law." It referred to the role of certain Belarusian public associations, the functions of the Polish consuls, and the fact that at least some of the benefits of having the Pole's Card "being established unilaterally without the consent of the Republic of Belarus, do not conform to the

provisions" of the above-mentioned bilateral agreements and "violate the generally recognised principle of the fulfilment in good faith of the obligations assumed by states." The argument based on the alleged discrimination was omitted in the concluding part of the decision.

4. THE ASSESSMENT OF THE CCRB DECISION

Despite the rather wide legal basis of its decision and arguments presented in the opinion attached to the motion of the House of Representatives of the National Assembly of the Republic of Belarus, the Court in its reasoning focused only on four issues, namely:

- the discriminatory effect of the Polish Card on other foreign nationals not entitled to this document, and as such, the alleged breach of several human rights treaties;
- unilaterally, and without permission of the Republic of Belarus, the established benefits and privileges resulting from the possession of the Polish Card go beyond the field of education and culture and, as such, are neither justified nor proportional. Furthermore, they violate several bilateral agreements in force between Belarus and Poland;
- in accordance with official statements from the Republic of Belarus, the Polish consuls' functions related to the Polish Card contradict the rules of international consular law (namely the VCCR and the Consular Convention);
- the authorization of certain Belarusian associations to play a role in the procedure of granting the Polish Cards contradicts the principle of the sovereign equality of states and the principle of non-interference in affairs within the internal jurisdiction of any other state.

The first point is presented in a very puzzling and unconvincing way. It seems that the Court was not itself convinced by this argument as provided (but similarly not reasoned) by the MEPs, or at least neglected its obligation to be persuasive and to justify its findings. The Court mixed several points (i.e., a preferential treatment which goes beyond education and culture, the fact that citizens of Belarus without Polish origin are also entitled to a Polish Card under the cultural condition, and its discussion on the provisions of the Act, which require a certain behaviour – loyal to the interests of Poland – on the applicants and holders of this document). Instead, it only bluntly confirmed that the discussed provisions "are inconsistent with the generally recognised principles of the respect for human rights and fundamental freedoms and non-discrimination." The CCRB's alleged hesitation to make this argument was seemingly confirmed by the fact that this accusation was not repeated in the final part of the decision, wherein the Court summed up its findings. Bearing that in mind and considering the weakness of this argument, one can only posit the rhetorical question of why this part is included in the decision at all.

Expanding the assessment of the decision from the perspective of the clarity of the argumentation and standards of legal craft, other serious concerns could be expressed

regarding the fact that the CCRB invoked a number of legal bases, but later on only directly referenced some of them; while others were omitted (e.g. the UN Charter or the 1975 Final Act). It seems that such a practice was part of a strategy to make the reasoning look more serious and legitimate than it actually was. A vigilant peer reviewer of a draft document like this should have suggested deleting these parts to make the final version more coherent and transparent.

Turning now to the three main arguments which were summarized in the final parts of the decision, the latter two are the most convincing and for this reason are discussed first.

The findings of the Court are correct that processing the Polish Card is outside the consuls' list of directly authorized functions, and in consequence the performance of these functions can be perceived as permitted only when not in contradiction to the laws of the receiving state or when no objection is made by the receiving state. The CCRB came to this conclusion, citing Art. 5 of the VCCR and Art. 26 of the Consular Convention. Only one comment in the context of consistent references by the CCRB to both treaties is justified. Bearing in mind Art. 73 of the VCCR (the Convention 'shall not affect other international agreements in force as between States party to them'), the generally recognized rules on conflicting laws (e.g. *lex posterior derogat legi priori*), and the wording of recital 3 of the Preamble to the Consular Convention (the provisions of the VCCR 'shall be applied only to issues not directly regulated in this convention'), the Court should have limited its reasoning to the Consular Convention only. The extensive citing of the VCCR was not necessary, as the only basis of the assessment is (and was) a bilateral treaty between Belarus and Poland. The above-mentioned statement is true regardless of the fact that adequate provisions of both treaties are the same.

As to the required conditions for legally performing functions connected to the Polish Card, there is nothing in the decision of the CCRB that shows that these functions contradict internal laws of the Republic of Belarus. However, the Court quoted examples of the official statements against granting the Polish Cards to the citizens of Belarus, namely:

- "the draft memorandum on results of consultations between the Ministry of Foreign Affairs of the Republic of Belarus and the Ministry of Foreign Affairs of the Republic of Poland with regard to the Act of the Republic of Poland on the Pole's Card that was submitted to the Republic of Poland in May 2008";
- "proposals of the Ministry of Foreign Affairs of the Republic of Belarus to impose a moratorium on the application of the Act to Belarusian citizens."

I was unable to inspect these documents, and in consequence it is difficult to assess whether or not they included a direct objection to the functions of the Polish consuls concerning the Polish Card. However, regardless of the factual circumstances it is difficult to support the extremely formalistic approach that until an explicit objection is presented to the Polish authorities, the general voices of dissatisfaction with the whole Act do not meet the criteria derived from consular law. The quoted statements should be treated as an official position of the Republic of Belarus and, as such, should also

bring to an end all activities of the Polish consuls on the Polish Card in the territory of the Republic of Belarus.

One should also accept the reasoning and conclusion of the CCRB concerning the fact that the Act refers to "public associations registered and operating in the territory of the Republic of Belarus." This part of the decision echoes appropriate paragraphs of the Venice Commission report and their initial assumption that states

> can legitimately issue laws or regulations concerning foreign citizens without seeking the prior consent of the relevant States of citizenship, as long as the effects of these laws or regulations are to take place within its borders only'. However, '(w)hen the law specifically aims at deploying its effects on foreign citizens in a foreign country, its legitimacy is not so straightforward.[47]

The CCRB repeated, no more and no less, what the Venice Commission stated, but using other words, namely that the "grant by a State of administrative, quasi-official functions to non-governmental associations registered in another country constitutes an indirect form of state power: as such, it is not permissible unless specifically allowed."[48] However, what is missing in the CCRB's decision is the repetition of the supporting argument presented by the Venice Commission, namely that "[t]his grant appears to be particularly problematic when these functions are neither allowed nor regulated under the law of the home-State. Under these circumstances, in fact, in performing them the associations in question would not be subjected to any effective legal control."[49] One can assume that that is the case in most or even all of the states of origin of applicants for the Polish Card who base their application on cultural reasons and therefore require a special certificate *in situ*.

Finally, the CCRB also put forward the argument that by virtue of the Act Poland, unilaterally and without permission from Belarus, also gives privileges and benefits which are outside the fields of education and culture. This argument is reasoned in a two-fold way. Firstly, combined with only a sweeping reference to the Venice Commission's report, and secondly by regarding bilateral treaties in force between both states.

The Venice Commission touched upon the question of what kind of preferential treatment is allowed while considering two different issues – the question of the territorial sovereignty of the state, and the question of human rights and the prohibition of discrimination. Discussing the rather uncontroversial practice (at least in the case of friendly relations between the given states) of some states to take actions which have effects on the territories of different states, the Venice Commission presented examples from the field of education and culture (e.g. granting scholarships to kin-minorities to study kin-language in their home-states). The Venice Commission referred to this again while discussing the problem of human rights and the prohibition of discrimination and made a distinction "as regards the nature of the benefits granted by the legislation

[47] The Venice Commission's report, part D, point a(i).
[48] *Ibidem.*
[49] *Ibidem.*

in question, between those relating to education and culture and the others." Without issuing a comprehensive justification, the Venice Commission took the view that in the first situation "the differential treatment they engender may be justified by the legitimate aim of fostering the cultural links of the targeted population with the population of the kin-State," while as regards the second (others) "preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of maintaining the links with the kin-States and to be proportionate to that aim."[50] No further justification was presented, nor was the legal basis therefore. Consequently, and noting that the Venice Commission's report cannot be treated as a stand-alone source of law, the simple repetition by the CCRB of an insufficiently justified opinion of the Venice Commission is not convincing.

Justification based on bilateral treaties seems more promising. Again citing the Venice Commission, one can agree with their argument based on the principle of *pacta sunt servanda*, that

> [l]egislation or regulations on the preferential treatment of kin-minorities should (…) not touch upon areas demonstrably pre-empted by existing bilateral treaties, unless of course the home-State concerned had been consulted and had approved of this step or had implicitly – but unambiguously - accepted it, by not raising objections. Similar considerations are valid in the case that a given area is not covered by specific rules of an existing treaty.[51]

Apart from the Consular Convention, the CCRB referred to three bilateral treaties.

The 1995 Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Employment of Citizens determines the conditions of entry and stay of workers from one contracting party for the purpose of employment in the territory of the second contracting party, and defines the basic rights of the workers. Art. 15 is of particular importance in this context. It contains the prohibition of employing workers referred to in Art. 1 (workers from both states, commencing work in another state party to this agreement and so-called "contracted workers" performing work under contracts between companies from both states) under rules other than those stipulated in this treaty. There is also nothing in the treaty on the recognition of more favourable provisions which could be adopted or retained by parties to the agreement. The 1995 Agreement sets out several conditions (*inter alia*, obtaining special authorization prior to commencing work), which contradict the simple rule that the holders of the Polish Card are fully entitled to work in the territory of Poland without any formalities whatsoever. The treaty was established for an initial period of three years, with automatic prolongation for subsequent periods of a year until either party to the treaty issued a note of its objection (Art. 18(2)). It seems that no such notifications have ever occurred, and consequently this agreement was in force when the CCRB decision was delivered, and it is still in force. It should be noted that the Internet

[50] *Ibidem*, part D, point d.
[51] *Ibidem*, part D, point b.

Treaty Base, established by the Polish Ministry of Foreign Affairs, tagged this treaty as being in force. The wording of the above-mentioned Art. 15 raises doubts not only about the benefits granted to the holders of the Polish Card, but also about several other internal provisions in the field of immigration laws (primarily the Act on foreigners[52] and the Act on employment promotion and labour market institutions[53]), which in many cases establishes rules on employment of third-country nationals (including the citizens of Belarus) which differ from the provisions of the 1995 Act.

The 2007 Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Trips of Citizens deals with the conditions of entry, re-entry, temporary stays, and transit and transfers of the nationals of one state in/through another state. Apart from the provisions on the visa fees (Arts. 14 and 15), there are no direct links between the content of the agreement and the benefits granted under the Act. Article 15 contains an exhaustive list of situations of visa exemptions, and the holders of national cards or similar documents are not included.

And finally one must touch upon the treaty on Good Neighbourly Relations. In Arts. 13 through 17 thereof, the obligations of each state towards minorities are stipulated. However, the wording of these provisions confirms that the contracting parties had in mind the traditional relations/policies of the states where minorities live regarding their own ethnic minorities. There is nothing in the treaty which can be interpreted as a legal basis for acts of the contracting state towards its kin-minorities with an effect in another contracting state (the home-state of the minorities). Furthermore, Art. 16(1) can be interpreted as a obligation to closely co-operate in all issues concerning minorities, as it reads: "The contracting parties shall develop constructive cooperation in protecting persons belonging to national minorities, treating them as a factor of strengthening mutual trust and good neighbourly relations between the Belarusian and Polish nations." This provision, along with Art. 1 (which contains the general obligation to closely cooperate in the spirit of friendship, mutual trust and good neighbourly relations, and with respect to the generally recognized principles of international law), can be invoked to raise a general concern regarding the whole idea of the Polish kin-state policy towards, *inter alia*, Belarusian citizens, rather than to selected issues, as the CCRB interpreted it.

CONCLUSIONS

The Constitutional Court of the Republic of Belarus in its 2011 decision on the Act on the Polish Card rightly pointed out that in several instances the Act does not "conform to certain generally recognised principles and rules of international law." There are parts of the decision which lack clarity and where the Court's reasoning is

[52] Journal of Laws 2020, item 35.
[53] Journal of Laws 2019, item 1482 as amended.

missing or is unconvincing; however, there are three main points, indicating explicit contradictions with international law, with which it is difficult not to agree; namely:

1) Polish consuls performing functions regarding the Polish Card, in light of the explicit and clear, formal objection from Belarus, contradicts Art. 26(1) of the bilateral Consular Conventions, which confirmed general rules stipulated in Art. 5(m) of the VCCR;
2) Poland's granting of administrative, quasi-official functions to non-governmental associations registered in Belarus constitutes an indirect form of state power: as such, it can be perceived as being in contradiction to the principle of the territorial sovereignty of Belarus;
3) at least some benefits and privileges for the holders of the Polish Card contradict at least two bilateral treaties in force between these two states, namely the 1995 agreement on Mutual Employment of Citizens (which in its Art. 15 explicitly forbids any parallel schemes for employment), and the 2007 agreement on Mutual Trips of Citizens (which in its Art. 15 lists situations of visa exemptions, and the holders of national cards or similar documents are not included).

This is what the "law on the books" has to say about it. However, what is the reality (or the 'law in action,' to use the term popularized by the legal realists)? As was mentioned earlier, in the detailed report summarising the first eight years of the Act being in force, it was indicated that 162,218 documents were issued during that period, of which over 47% were issued to citizens of Belarus. This trend continues, as official information of the Ministry of Foreign Affairs shows that in subsequent years the number of applications from Belarus was also very robust (in 2015 – 13,094, in 2016 – 12,710, in 2017 – 16,482), and only in isolated cases were the applications rejected.[54] In consequence, almost 50% of Polish Cards have been issued to citizens of Belarus. In light of the above findings, all these decisions and acts can be seen as having been carried out contrary to international law. And moreover, these same legal concerns also apply in relations with other states from which the applicants and now holders of the Polish Card come (for example the authorization of specific local associations to play a role in the procedure of granting Polish Cards).

So how is it possible that despite all of these legitimate concerns the Polish authorities have issued more than a quarter-million Polish Cards so far? There are several possible answers to this question. Bearing in mind that at least some of the answers need further analysis and commentary beyond the scope of this article, I will only briefly present them and elaborate a bit more on only one issue, which is specific only to Belarus. Firstly, what are the common reasons (applicable to all states in which the holders of the Polish Card are citizens) of such a prolonged breach of international law?

1) All states, including Poland, are entirely free to grant their citizenship to basically whomever they want. Having that in mind, a stronger protest against kin-state

[54] The answer to the Parliamentary interpellation no. 23612, available at: http://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=B2YEQD&view=6 (accessed 30 June 2020).

policies could result in establishing even stronger ties (i.e. of citizenship) between the kin-state and its kin-minorities. That was partially the case with Hungary, which, building upon its experiences with kin-policy, in 2010 amended its citizenship act and thus opened the way for ethnic Hungarians living abroad to apply for citizenship under a simplified procedure and without the need to move to Hungary.[55] The factual tacit acceptance of the Polish practice can be explained with reference to the Latin *argumentum a maiore ad minus* – it seems that the relevant States concur with the logic of this argument.

2) There are no real remedies available to the affected States. For instance, Poland (similarly to most of the states affected by the Act on Polish Card) is not a party to the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes,[56] which could be a basis for the jurisdiction of the International Court of Justice (ICJ). The relevant bilateral treaties do not have compromissory clauses providing for dispute resolution by the ICJ or other international courts or tribunals.
3) It seems that other states' kin-state policies are not perceived as something posing a threat of such great importance as to justify a stronger stance. One my recall here Louis Henkin's famous assertion that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[57] While it seems clear that the Polish practice regarding the Polish Card can be deemed non-observance of international law, perhaps the lack of stronger reactions to it by the affected states is shows that they have simply chosen to apply Henkin's assertion to the case at hand and not challenge the Poland's non-observance.

Finally, there is also one reason confirming the above supposition which is specific to Belarus only. Alexander Lukashenko, the President of the Republic of Belarus – a country commonly described as "Europe's last dictatorship"[58] – reversed course and despite his initial protest against the Act on the Polish Card upon its passage in 2007, as early as in April 2008 in his annual state of the nation address presented a different approach and admitted that he had reacted wrongly to the Act and that "if Poland wanted to help Polish Belarusians, it is free to do so.'[59] Such a statement by "Europe's last dictatorship" is treated by other state officials as a kind of source of law (or at least

[55] L. Szymanowska, *The Implementation of the Hungarian Citizenship Law*, OSW Analyses, 2 February 2011, available at: https://www.osw.waw.pl/en/publikacje/analyses/2011-02-02/implementation-hungarian-citizenship-law (accessed 30 June 2020).

[56] 596 UNTS 487.

[57] L. Henkin, *How Nations Behave: Law and Foreign Policy*, Columbia University Press, New York: 1979, p. 47.

[58] A contemporary usage of this term; s*ee, e.g.* R. Gramer, A. Mackinnon, *A Diplomatic Breakthrough for Washington in Europe's Last Dictatorship*, Foreign Policy, 10 January 2019, available at: https://bit.ly/2VIPgcZ (accessed 30 June 2020).

[59] A. Poczobut, *Łukaszenko zmienił zdanie o „Karcie Polaka"* [Lukashenko has changes his opinion of the Polish card], Gazeta Wyborcza, 30 April 2008.

practice), so it is not surprising that at least from that moment onward tacit acceptance of the Polish practice has become the rule.

Returning to the legal analysis, the question remains whether these kinds of oral statements can be perceived as an official annulment of the previous written statements opposing the Polish practice of granting the Polish Card to the citizens of Belarus? Some indication of a positive answer can be found in Art. 7(2)(a) of the Vienna Convention on the Law of Treaties ("(i)n virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, (…), for the purpose of performing all acts relating to the conclusion of a treaty").[60] However, the scope of these provisions is explicitly restricted to acts related to the conclusion of a treaty. In the Polish context, this question is irrelevant as Polish consuls in the territory of Belarus have performed their duties concerning the Polish Card on a constant basis since date the Act on the Polish Card entered into force.

[60] 1155 UNTS 331.