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## Human rights and arbitrary deprivation of nationality

### Report of the Secretary-General

#### *Summary*

The present report recalls the legal framework applicable to the right to nationality and addresses the issue of the prohibition of arbitrary deprivation of nationality. It emphasizes that States have an obligation to implement fully the principle of non-discrimination, in particular when deciding on issues relating to the acquisition and retention of a nationality. It also recalls the general obligation of States to prevent statelessness. Lastly, it addresses the question of the right to a nationality and arbitrary deprivation of nationality in the context of State succession.

## Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction.....	1–2	3
II. Legal framework.....	3–18	3
III. Right to a nationality, in particular the prohibition of arbitrary deprivation of nationality.....	19–46	5
IV. Right to a nationality in the context of State succession.....	47–55	12
V. Conclusions.....	56–65	14

## I. Introduction

1. In its resolution 10/13, the Human Rights Council requested the Secretary-General to prepare a report on the right to nationality with emphasis on the issue of arbitrary deprivation of nationality including in cases of State succession, taking into account the information gathered pursuant to Council resolution 7/10, similar studies conducted by the Sub-Commission for the Promotion and Protection of Human Rights and other relevant sources of information, and to present it to the Council at its thirteenth session. The present report is submitted in accordance with that request.

2. The present report recalls the legal framework applicable to the right to a nationality and analyses different aspects of the right to a nationality, including the right to acquire, change and retain a nationality. It also analyses the obligation of the State to avoid statelessness and to refrain from arbitrarily depriving persons of their nationality, including in situations of State succession. The comments and advice of the United Nations High Commissioner for Refugees used in the preparation of this report are gratefully acknowledged.

## II. Legal framework

3. In its resolutions 7/10 and 10/13, the Council, taking into account article 15 of the Universal Declaration of Human Rights, reaffirmed that the right to a nationality is a fundamental human right. The right to a nationality is recognized in a series of international legal instruments, including the Universal Declaration of Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Nationality of Married Women, the Convention on the Rights of Persons with Disabilities and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The issue of nationality is also regulated in the Convention on the Reduction of Statelessness, the Convention relating to the Status of Stateless Persons and the Convention relating to the Status of Refugees. In this respect, to understand fully the extent of the regulation of the right to a nationality as a fundamental right, it is important to recall the specific norms and principles spelled out in these instruments.

4. Article 15 of the Universal Declaration of Human Rights provides that everyone has the right to a nationality. It also indicates that no one should be arbitrarily deprived of their nationality, nor denied the right to change it.

5. The International Convention on the Elimination of All Forms of Racial Discrimination, in article 5 (d) (iii), provides that States parties undertake to prohibit and eliminate racial discrimination in all its forms, and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of, *inter alia*, the right to nationality.

6. The International Covenant on Civil and Political Rights also provides, in article 24 (3), that every child has the right to acquire a nationality.

7. Article 7 of the Convention on the Rights of the Child provides that children should be registered immediately after birth and have the right from birth to, *inter alia*, acquire a nationality, and that States parties should ensure the implementation of these rights in accordance with national law and international obligations, in particular where the child would otherwise be stateless. According to article 8, States parties should undertake to

respect the right of the child to preserve his or her identity, including their nationality, as recognized by law, without unlawful interference.

8. Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women indicates that States parties should grant women equal rights with men with respect to the nationality of their children. According to the Convention, States parties should also grant women equal rights to acquire, change or retain their nationality, and ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage will automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. Similar guarantees on the nationality of married women are contained in the Convention on the Nationality of Married Women.

9. According to article 18 of the Convention on the Rights of Persons with Disabilities, States parties should recognize, inter alia, the right of persons with disabilities to a nationality, on an equal basis with others, including by ensuring that persons with disabilities have the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability. The Convention also recognizes that children with disabilities should have the right to acquire a nationality.

10. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families specifies in article 29 that children migrant workers have the right to a nationality.

11. On a regional level, numerous instruments also guarantee the right to a nationality. For instance, article 6 of the African Charter on the Rights and Welfare of the Child provides for the right of children to acquire a nationality, and specifies that States parties' legislation should provide for the acquisition of nationality by children born in their territory who are not granted the nationality of another State.

12. Article 20 of the American Convention on Human Rights provides that every person has the right to a nationality, and that every person has the right to the nationality of the State on whose territory he or she was born if he or she does not have the right to any other nationality. The Convention also provides that no one should be arbitrarily deprived of his or her nationality or of the right to change it.

13. The revised Arab Charter on Human Rights provides, in article 29, that everyone has the right to nationality and that no one should be arbitrarily or unlawfully deprived of their nationality. The Charter also provides that States parties should take such measures as they deem appropriate, in accordance with their domestic laws on nationality, to allow a child to acquire the mother's nationality, having due regard, in all cases, to the best interests of the child.

14. Article 7 of the Covenant on the Rights of the Child in Islam provides that a child has the right from birth to have his or her nationality determined, that States parties should safeguard the child's identity, including his or her nationality, and will make every effort to resolve the issue of statelessness for any child born on their territory or to any of their citizens outside their territory. Furthermore, it provides that children of unknown descent have the right to a nationality.

15. Article 4 of the European Convention on Nationality provides that the rules on nationality of each State party should be based on the principles that everyone has the right to a nationality; that statelessness is to be avoided; and that no one should be arbitrarily deprived of his or her nationality. Other provisions of the Convention provide for the obligation of States to realize these principles.

16. Finally, article 24 of the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms provides that everyone has the right to

citizenship and that no one should be arbitrarily deprived of their citizenship or of the right to change it.

17. The above-mentioned human rights legal framework is complemented by the Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons, which deal specifically with the issue of statelessness. In particular, articles 1 and 4 of the Convention on the Reduction of Statelessness provide that States parties should introduce safeguards to prevent statelessness by granting their nationality to persons who would otherwise be stateless and are either born in their territory or are born abroad to one of their nationals. The Convention also requires States parties to prevent statelessness upon loss or deprivation of nationality. Under article 32 of the Convention relating to the Status of Stateless Persons, States should, as far as possible, facilitate the assimilation and naturalization of stateless persons.

18. It should be noted also that the principle of non-discrimination is a common feature applicable to the context of international human rights instruments. For instance, the principle of non-discrimination is foreseen in, *inter alia*, article 2 of the Universal Declaration of Human Rights; article 2 of the International Covenant on Civil and Political Rights; article 2 of the International Covenant on Economic, Social and Cultural Rights; article 5 of the Convention on the Elimination of Racial Discrimination; article 3 of the Convention on the Rights of Persons with Disabilities; article 2 of the Convention on the Rights of the Child; articles 2 and 3 of the Convention on the Elimination of Discrimination against Women; and article 1 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The principle of non-discrimination implies that States are under the obligation to respect and ensure to all individuals the rights recognized in the relevant conventions, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

### **III. Right to a nationality, in particular the prohibition of arbitrary deprivation of nationality**

19. While acquisition and loss of nationality are essentially governed by internal legislation, their regulation is of direct concern to the international order. In this respect, in its draft articles on nationality of natural persons in relation to succession of States, the International Law Commission indicated that “the competence of States in this field may be exercised only within the limits set by international law”.<sup>1</sup> For example, article 1 of the Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides that “it is for each State to determine under its own law who are its nationals. This law shall be recognized by other States insofar as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality”. The International Law Commission also recalled that this provision follows the reasoning of the Permanent Court of International Justice in its advisory opinion No. 4 on the Nationality Decrees Issue in Tunis and Morocco, in which the Court indicated that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending on the development of international relations. It also held that, even in respect of matters that in principle were not regulated by international law, the right of a State to use its discretion might be restricted by obligations

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<sup>1</sup> *Yearbook of the International Law Commission*, 1999, vol. II (2), p. 24.

which it might have undertaken towards other States, so that its jurisdiction became limited by rules of international law.<sup>1</sup>

20. As recalled by the International Law Commission in its commentary on the draft articles on the nationality of natural persons, since 1945, the evolution of international human rights has fundamentally changed the traditional approach based on the preponderance of the interests of States over the interests of individuals.<sup>1</sup> The Commission also affirmed that the right of States to decide who their nationals are is not absolute and that, in particular, States must comply with their human rights obligations concerning the granting of nationality.<sup>2</sup> This approach has been further evidenced in the practice of regional human rights courts; for example, the Inter-American Court of Human Rights, in its advisory opinion on proposed amendments to the naturalization provisions of the Constitution of Costa Rica, indicated that “the manners in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights”. Consequently, as the rapporteur on nationality in relation to the succession of States indicated in his third report,<sup>3</sup> States should ensure that they exercise their discretionary powers concerning nationality issues in a manner that is consistent with their international obligations in the field of human rights.

21. The right to a nationality implies the right of each individual to acquire, change and retain a nationality. The right to retain a nationality corresponds to the prohibition of arbitrary deprivation of nationality. As indicated above, an explicit and general prohibition of arbitrary deprivation of nationality can be found in numerous international instruments. In particular, it is worth noting that article 15 of the Universal Declaration of Human Rights explicitly provides that no one should be arbitrarily deprived of his or her nationality. The General Assembly, in its resolution 50/152, also recognized the fundamental nature of the prohibition of arbitrary deprivation of nationality.

22. It is against this background that Human Rights Council resolution 10/13 should be understood, when the Council recognizes that arbitrary deprivation of nationality, especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, constitutes a violation of human rights and fundamental freedoms.

23. While the question of arbitrary deprivation of nationality does not comprise the loss of nationality voluntarily requested by the individual, it covers all other forms of loss of nationality, including those that arbitrarily preclude a person from obtaining or retaining a nationality, particularly on discriminatory grounds, as well as those that automatically deprive a person of a nationality by operation of the law, and those acts taken by administrative authorities that result in a person being arbitrarily deprived of a nationality.

24. Concerning the notion of arbitrary deprivation, it should be recalled that the Human Rights Committee has shed light on the meaning of the concept of “arbitrary” in the context of the International Covenant on Civil and Political Rights. In its general comment No. 16, the Committee stated that the expression “arbitrary interference” was relevant to the protection of the right provided for in article 17. In the Committee’s view, the expression “arbitrary interference” could also extend to interference provided for under the law. The introduction of the concept of arbitrariness was intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the

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<sup>2</sup> *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10)*, chap. IV, commentary on article 4, para. 6.

<sup>3</sup> *Yearbook of the International Law Commission, 1997*, vol. II (1), p. 20.

Covenant and should, in any event, be reasonable in the particular circumstances. In its general comment No. 27, the Committee further indicated that the reference to the concept of arbitrariness in this context was intended to emphasize that it applied to all State action, legislative, administrative and judicial, and guaranteed that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should, in any event, be reasonable in the particular circumstances.

25. Thus, while international law allows for the deprivation of nationality in certain circumstances, it must be in conformity with domestic law and comply with specific procedural and substantive standards, in particular the principle of proportionality. Measures leading to the deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law. Such measures must be the least intrusive instrument of those that might achieve the desired result, and they must be proportional to the interest to be protected. In this respect, the notion of arbitrariness applies to all State action, legislative, administrative and judicial. The notion of arbitrariness could be interpreted to include not only acts that are against the law but, more broadly, elements of inappropriateness, injustice and lack of predictability also.

26. The prohibition of arbitrary deprivation of nationality, which aims at protecting the right to retain a nationality, is implicit in provisions of human rights treaties that proscribe specific forms of discrimination. As indicated above, article 15 of the Universal Declaration of Human Rights explicitly provides that no one should be arbitrarily deprived of a nationality. Article 5 (d) (iii) of the Convention on the Elimination of All Forms of Racial Discrimination prohibits racial discrimination in respect of the right to a nationality. In its general recommendation XXX, the Committee on the Elimination of Racial Discrimination indicates that States should recognize that deprivation of citizenship on the basis of race, colour, descent or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality. According to article 9 of the Convention on the Elimination of All Forms of Discrimination against Women and the 1957 Convention on the Nationality of Married Women, women have the right to retain their nationality regardless of the celebration or dissolution of a marriage or the change of nationality by a husband. In its comment on article 9 of the Convention, the Committee on the Elimination of Discrimination against Women stated that "nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality" (CEDAW/C/1995/7, annex, appendix, chap. III B). As indicated above, under article 26 of the International Covenant on Civil and Political Rights, discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status is prohibited. Non-discrimination in this context includes issues related to nationality.

27. In the report of the Secretary-General on arbitrary deprivation of nationality (A/HRC/10/34), the United Nations High Commissioner for Refugees (UNHCR) indicated that deprivation of nationality resulting in statelessness would generally be arbitrary unless it served a legitimate purpose and complied with the principle of proportionality. For example, article 8 of the Convention on the Reduction of Statelessness allows for a limited set of circumstances under which deprivation of nationality resulting in statelessness is permissible. The exceptions allowed for in that Convention are set out in its article 8, paragraphs 2 and 3. Paragraph 2 (a) provides that naturalized persons may be rendered stateless by loss of nationality if they have resided abroad for at least seven years and failed to declare their intention to retain their nationality. States may also deprive persons born abroad of their nationality if, one year after attaining majority, they do not reside in the State or register with the appropriate authority. Paragraph 2 (b) provides that deprivation of nationality resulting in statelessness is also permissible if the nationality has been obtained

by misrepresentation or fraud. Certain additional exceptions are provided for in paragraph 3, but they may only be applied if the State expressly indicates its intention to retain them in its national law at the time of signature, ratification or accession. However, as exceptions to a general principle, they should be narrowly construed.

28. Concerning regional instruments, it should be noted that article 7 (3) of the 1997 European Convention on Nationality allows for deprivation of nationality resulting in statelessness only in cases of misrepresentation and fraud. In its recommendation R (1999) 18 on the avoidance and reduction of statelessness, the Council of Ministers of the Council of Europe recommended that “a State should not necessarily deprive of its nationality persons who have acquired its nationality by fraudulent conduct, false information or concealment of any relevant fact. To this effect, the gravity of the facts, as well as other relevant circumstances, such as the genuine and effective link of these persons with the State concerned, should be taken into account”.

29. Concerning the right of a person to acquire a nationality, it should be recalled the general principle established in article 15 of the Universal Declaration of Human Rights that everyone has the right to a nationality. It is generally recognized that acquisition of nationality can take place at birth through the application of the principles of *jus soli* or of *jus sanguinis*, or by naturalization. Nationality can be acquired automatically by operation of law, at birth or at a later stage, or as a result of an act of the administrative authorities. States enjoy a degree of discretion with regard to the criteria governing acquisition of nationality, but these criteria must not be arbitrary. In order not to be arbitrary, denial of access to a nationality must be in conformity with domestic law and standards of international law, in particular the principle of proportionality.

30. As stated earlier, the Convention on the Rights of the Child provides that children should have the right from birth to, inter alia, acquire a nationality. Similar guarantees can be found in the International Covenant on Civil and Political Rights and other international and regional instruments; for example, the Committee on the Rights of the Child reiterates in its general comment No. 11 that States parties are obliged to ensure that all children are registered immediately after birth and that they acquire a nationality. The Committee has further emphasized this position in a number of concluding observations, in which it stated, inter alia, that articles 2 and 7 of the Convention require that all children within the State party’s jurisdiction have the right to be registered and acquire a nationality, irrespective of the child’s or his or her parents’ or legal guardians’ sex, race, religion or ethnic origin.

31. Article 2 (1) of the International Covenant on Civil and Political Rights provides that States parties undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognized in the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, article 26 prohibits discrimination on these grounds. In its general comment No. 18, the Human Rights Committee indicates that article 26 prohibits discrimination in law or in fact in any field regulated and protected by public authorities; it is therefore concerned with the obligations imposed on States parties with regard to their legislation thereof. This would include nationality legislation and its application. Moreover, in application of the principle of non-discrimination, the Committee, in its general comment No. 24, states that no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents, or based on the nationality status of one or both parents.

32. The principle of non-discrimination is clearly recognized in article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, which prohibits distinctions between men and women with regard to acquisition of nationality and in relation to acquisition of nationality by their children. Such discrimination against



women can also result in children being stateless where they cannot acquire their father's nationality. The Human Rights Committee, in its general comment No. 28, and the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child in numerous concluding observations have stressed that there must be no discrimination between men and women in their capacity to transmit their nationality to children.

33. Discrimination on the grounds of race, colour, descent or national or ethnic origin falls under the scope of the Convention on the Elimination of All Forms of Racial Discrimination. With regard to the acquisition of nationality, the Committee on the Elimination of Racial Discrimination, in its general recommendation XXX, recommended that States parties ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents, and to take into consideration that, in certain cases, denial of citizenship for long-term or permanent residents could result in creating a disadvantage for them in access to employment and social benefits, in violation of the anti-discrimination principles of the Convention.

34. In its judgment of 8 September 2005, on the case *Girls Yean and Bosico v. Dominican Republic*, the Inter-American Court of Human Rights also underlined the prohibition of discrimination regarding access to a nationality.

35. According to the independent expert on minority issues, the principle of non-discrimination should be regarded as a norm of international law that admits no derogation (A/HRC/7/23, para. 35). The principle of non-discrimination is also dealt with in article 15 of the draft articles on nationality of natural persons of the International Law Commission. In its commentary, the Commission recalled that the principle of non-discrimination has a solid legal basis in both treaty law and international jurisprudence. In this context, the Commission recalled the advisory opinion of the Permanent Court of International Justice on the question concerning the acquisition of Polish nationality, in which the Court referred to, inter alia, the problem of States refusing their nationality to certain categories of persons on the basis of racial, religious or linguistic grounds in spite of the link attaching these persons to the territory allocated to these States.<sup>4</sup>

36. From a more general perspective, it should be taken into account that, regardless of the general rules regulating nationality issues at the domestic level, States should ensure that safeguards are in place to ensure that nationality is not denied to persons with relevant links to that State who would otherwise be stateless. Article 7, paragraph 2, of the Convention on the Rights of the Child explicitly requires States parties to ensure the implementation of the right to acquire a nationality in accordance with their national legislation and their obligations under the relevant international human rights instruments, in particular where the child would otherwise be stateless. Similarly, the Human Rights Committee, in its general comment No. 17, states, in the context of the provision of article 24, paragraph 3, of the Covenant, that the purpose of that provision is to prevent a child from being afforded less protection by society and the State because he is stateless. While the Committee recognizes that States do not necessarily have an obligation to grant their nationality to every child born in their territory, they should take every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he or she is born.

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<sup>4</sup> *Yearbook of the International Law Commission*, 1999, vol. II (2), p. 37.

37. Birth on the territory of a State and birth to a national are the most important criteria used to establish the legal bond of nationality. Particularly in the context of migration, a child may therefore have a link to more than one State. In cases where States have adopted diverging rules on the acquisition of nationality, a conflict of laws between these States could leave the child stateless. In such cases, the Convention on the Reduction of Statelessness contributes to resolve this type of conflict of norms by providing, in article 1, that contracting States must grant nationality to a person born on their territory who would otherwise be stateless. Article 4 also provides that contracting States must grant nationality if a person is born to one of their nationals outside of a contracting State and would otherwise be stateless. According to article 7 of the Covenant on the Rights of the Child in Islam, State parties should make every effort to resolve the issue of statelessness for any child born on their territories or to any of their citizens outside their territory. Obligations to grant nationality to children born in the territory of a State and that would otherwise be stateless are also contained in article 20 (2) of the American Convention on Human Rights, article 6 (4) of the African Charter on the Rights and Welfare of the Child, and article 6 (2) of the European Convention on Nationality.

38. The importance of universal birth registration should be highlighted, taking also into consideration that a birth certificate provides proof of both parental affiliation and place of birth; for instance, the Committee on the Rights of the Child, in its general comments No. 9 and 11, notes that there is a higher risk of statelessness for indigenous children and children with disabilities owing to their vulnerability to non-registration at birth. The right to birth registration is recognized in numerous international instruments, most notably in article 7, paragraph 1, of the Convention on the Rights of the Child, and article 24, paragraph 24, of the International Covenant on Civil and Political Rights.

39. According to article 2 of the Convention on the Reduction of Statelessness, States parties should consider foundlings to be born to nationals of that State in the territory of that State, and as a result, grant nationality. A similar provision is contained in article 6 (1) (b) of the European Convention on Nationality. Article 7 (3) of the Covenant on the Rights of the Child in Islam also guarantees the right to a nationality to children of unknown descent. In its final report concerning the questionnaire on statelessness pursuant to the agenda for protection, of March 2004, UNCHR indicated that State practice showed strong adherence to this principle.<sup>5</sup>

40. The right to acquisition of nationality also relates to naturalization. As indicated above, the Committee on the Elimination of Racial Discrimination recommended that States parties ensure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization.

41. According to article 34 of the Convention on the Status of Refugees and article 32 of the Convention relating to the Status of Stateless Persons, States should, as far as possible, facilitate the assimilation and naturalization of refugees and stateless persons and, in particular, expedite naturalization proceedings and reduce as much as possible the charges and costs of such procedures. The European Convention on Nationality, in article 6 (4), also requires States to facilitate naturalization for various groups of persons, including stateless persons and refugees.

42. In the context of the right to change nationality — particularly relevant in the context of migration where persons develop links with another State — it is worth

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<sup>5</sup> UNHCR found that 86.5 per cent of 74 States responding to the questionnaire granted nationality or provided for a legal status to abandoned or orphaned children; 8.1 per cent did not provide an answer.

highlighting international standards addressing the risk of statelessness. Such a risk arises when States require the prior renunciation of another nationality in order to process a request for its own.<sup>6</sup> This practice was reflected in, inter alia, the submissions of a number of States – for the previous report of the Secretary-General on the issue of arbitrary deprivation of nationality (A/HRC/10/34). The International Law Commission, in its draft articles on the nationality of natural persons in relation to the succession of States, noted that such requirements should not be applied in a manner that would render an applicant for nationality stateless, even if only temporarily. Furthermore, according to article 7 of the Convention on the Reduction of Statelessness, States should not deprive a national who applies for naturalization in another State of his or her nationality, unless the person has acquired or obtained assurances of acquiring another nationality. Similarly, it also provides that States should only grant renunciation of nationality where the person concerned possesses or acquires another nationality.

43. Procedural safeguards are essential to prevent abuse of the law. States are thus expected to observe minimum procedural standards in order to ensure that decisions on nationality matters do not contain any element of arbitrariness. For example, according to article 17 of the International Law Commission's draft articles on the nationality of natural persons, decisions relating to acquisition, retention or renunciation of nationality should be issued in writing and be open to effective administrative or judicial review. These elements, according to the Commission, "represent minimum requirements in this respect".<sup>7</sup>

44. The International Law Commission also stated in the above-mentioned commentary on the draft articles that the review process could be carried out by a competent jurisdiction of an administrative or judicial nature in conformity with the internal law of each State. The Commission clarified that the term "effective" was intended to stress the fact that an opportunity had to be provided to permit meaningful review of relevant substantive issues; it could thus be understood in the same sense as in article 2, paragraph 3 (a), of the International Covenant on Civil and Political Rights, where the same word is used. Moreover, the Commission stressed that the word "judicial" should be understood as covering both civil and administrative jurisdictions. The right to a review against deprivation of nationality is guaranteed by article 8, paragraph 4, of the Convention on the Reduction of Statelessness.

45. At the regional level, the European Convention on Nationality also contains important procedural standards on deprivation of nationality; for instance, in article 11, it states that decisions should contain reasons in writing. Article 12 further requires that decisions be open to an administrative or judicial review in conformity with internal law.

46. Violations of the right to a nationality must be open to an effective remedy. Article 8, paragraph 2, of the Convention on the Rights of the Child, expressly provides that, where a child is illegally deprived of some or all of the elements of his or her identity, including a nationality, States parties should provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity. The Human Rights Council, in its resolutions 7/10 and 10/13, called upon States to ensure that an effective remedy is available to persons who have been arbitrarily deprived of their nationality, including, but not limited to, restoration of nationality. The Executive Committee of UNHCR, in its conclusion No. 102 (LVI) of 2005, called on States to assist stateless persons to give them access to legal remedies to redress statelessness, in particular resulting from the arbitrary deprivation of nationality. It has also been noted that access to effective remedies often relies on providing

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<sup>6</sup> *Yearbook of the International Law Commission*, 1999, vol. II (2), p. 31.

<sup>7</sup> *Ibid.*, p. 38.

proof for personal identification, a task that can be hampered by the effects of deprivation of nationality. In this respect, States could envisage adopting flexible rules for evidence, which would allow the person concerned to provide witness testimony or resort to various sources of documentary evidence (A/HRC/10/34, para. 59).

#### **IV. Right to a nationality in the context of State succession**

47. In 1993, at its forty-fifth session, the International Law Commission decided to include in its agenda the topic entitled “State succession and its impact on the nationality of natural and legal persons”. The General Assembly endorsed this decision in its resolution 48/31. In its resolution 49/51, the Assembly also endorsed the intention of the Commission to undertake work on the topic. In its resolution 51/160, the Assembly requested the Commission to, inter alia, prepare draft articles in the form of a declaration to be adopted by the Assembly on the question of the nationality of natural persons. In its resolution 10/13, the Human Rights Council recalled General Assembly resolutions 55/153 and 59/34, in which the Assembly invited Member States to take into account the provisions of the draft articles on the nationality of natural persons contained in the annex to Council resolution 55/153 in dealing with issues of nationality in relation to the succession of States.

48. The International Law Commission adopted the draft articles on the nationality of natural persons in relation to the succession of States at its fifty-first session.<sup>8</sup> It is worth noting that the draft articles are the result of an exhaustive analysis carried out by the Commission on the issue of nationality of natural persons in situations of State succession. While the Commission recognizes that there is a need for the codification and progressive development of international law in this area, it considered that the draft articles may be seen to reflect both *lex lata* and the Commission’s proposals *de lege ferenda*. As such, they provide guidance on the status of the question of acquisition, change and retention of nationality in situations of State succession.

49. In its commentary to the first paragraph of the preamble, the Commission recalled that the draft articles aimed at addressing the concern of the international community concerning the resolution of nationality problems in the case of succession of States. The Commission also recalled that, “as a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided”. Accordingly, the Commission affirmed that, “in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account”.<sup>9</sup> The Commission also expressed its concern over the protection of human rights of persons whose nationality may be affected following a succession of States. While noting that State practice had concentrated on the obligation of newly created States to protect the human rights of all inhabitants of their territory without distinction, the Commission concluded that, as a matter of principle, it was important to safeguard basic rights and fundamental freedoms of all persons whose nationality could be affected by a succession, irrespective of their habitual residence. In practical terms, this problem was raised by the independent expert on minority issues in her 2008 report on the situation in certain European countries, in which a number of problems related particularly to the way citizenship and nationality had been construed in view of State succession and State

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid., pp. 23–24.

restoration, as demonstrated in the countries of the former Soviet Union and Yugoslavia (A/HRC/7/23, para. 65).

50. As indicated above, article 15 of the Universal Declaration of Human Rights provides the general rule on the right to a nationality that applies in all circumstances. This general principle was reiterated by the International Law Commission in article 1 of the draft articles on nationality of natural persons, stating that the principle contained in article 1 was “a key provision, the very foundation of the present draft articles”.<sup>10</sup> While recognizing the potential challenges of applying this principle to cases where it is difficult to determine the State in relation to which a person would be entitled to present a claim for nationality, the Commission concluded that, in cases of State succession, it was always possible to identify such a State, because it was either the successor State (or one of the successor States when there were more than one) of the predecessor State. Article 5 of the draft articles further provides that, subject to other provisions of the draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State.

51. The draft articles on nationality of natural persons also included two fundamental principles concerning the right to a nationality. Article 15 embodies the general principle of non-discrimination. In its commentary, the International Law Commission clarified that this provision sought to avoid discriminatory treatment with regard to matters of nationality in the context of State succession on any ground, which was an all encompassing formula to avoid the risk of any *a contrario* interpretation.<sup>11</sup> On the other hand, article 16 contains two elements: the first is the prohibition of the arbitrary withdrawal by the predecessor State of the nationality from persons concerned who were entitled to retain their nationality following the succession of States and of the arbitrary refusal by the successor State to attribute its nationality to persons concerned who were entitled to acquire such nationality; the second is the prohibition of the arbitrary denial of a person’s right of option, which is an expression of the right of a person to change his or her nationality in the context of a succession of States.

52. These two normative provisions — the principle of non-discrimination and the prohibition of arbitrary deprivation of nationality in the context of State succession — should be also read in conjunction with the right of children born in the territory of one of the successor States to acquire the nationality of that State (art. 13). This provision reflects the obligation enshrined in articles 7 and 8 of the Convention on the Rights of the Child, namely the right of the child to acquire a nationality at birth and to preserve it without unlawful interference.

53. In article 11 of the draft articles on nationality of natural persons, the International Law Commission also provided the right of persons who have the option to claim the nationality of more than one State to be able to freely decide which of these nationalities would be retained in situations of State succession. According to the Commission, “the respect for the will of the individual is a consideration which, with the development of human rights law, has become paramount”. The Commission noted in particular that “a right of option has a role to play, in particular, in resolving problems of attribution of nationality to persons concerned falling within an area of overlapping jurisdictions of States concerned”.<sup>12</sup>

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<sup>10</sup> Ibid., p. 25.

<sup>11</sup> Ibid., p. 37.

<sup>12</sup> Ibid., p. 34.

54. According to the Commission, when there is more than one successor State, not every one has the obligation to attribute its nationality to every single person concerned; nonetheless, the obligation to prevent the occurrence of statelessness is a corollary of the right to a nationality and, thus, creates an obligation for States to take all appropriate measures to prevent persons from becoming stateless. In the context of State succession, it is generally accepted that States may require the renunciation of the nationality of another State as a condition for granting its nationality subject to the condition that such a procedure does not result in statelessness. For instance, in its commentary on article 9 of the draft articles on the nationality of natural persons, the Commission expressed its concern “with the risk of statelessness related to the ... requirement of prior renunciation of another nationality”.<sup>13</sup>

55. Considering the detrimental impact that State succession may have on, *inter alia*, the right to a nationality, article 18 of the draft articles on the nationality of natural persons provides that States concerned should exchange information and consult to identify such effects and, when necessary, eliminate or mitigate such effects through negotiation. The Commission pointed out that one of the most important questions in this regard is the prevention of statelessness.

## V. Conclusions

**56. The right of every individual to a nationality is clearly regulated in international human rights law, which provides for the explicit recognition of that right. International human rights law also explicitly provides for the prohibition of arbitrary deprivation of nationality.**

**57. International human rights law provides that the right of States to decide who their nationals are is not absolute and, in particular, States must comply with their human rights obligations concerning the granting and loss of nationality.**

**58. International human rights law clearly establishes the obligation of all States to respect the human rights of all individuals without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. States therefore have the obligation to ensure that all persons enjoy the right to nationality without discrimination of any kind, and that no one is denied or deprived of their nationality on the basis of discriminatory grounds.**

**59. Deprivation of nationality resulting in statelessness will generally be arbitrary unless it serves a legitimate purpose and complies with the principle of proportionality. Exceptions to this general principle should be construed narrowly.**

**60. All children have the right to acquire a nationality. International standards provide that children born in the territory of a State or abroad to a national should acquire the nationality of that State where they would otherwise be stateless.**

**61. International instruments also provide for the facilitated naturalization of stateless persons and refugees.**

**62. States have an obligation to register all children at birth. Birth registration ensures, *inter alia*, that children are able to document links to one or more States and acquire a nationality based on birth to a national and/or birth on the territory.**

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<sup>13</sup> *Ibid.*, pp. 28, 31.

63. States are expected to observe minimum procedural standards in order to ensure that decisions concerning the acquisition, deprivation or change of nationality do not contain any element of arbitrariness. In particular, States should ensure that a review process can be carried out by a competent jurisdiction of an administrative or judicial nature in conformity with the internal law of each State and the relevant international human rights standards.

64. States should ensure that an effective remedy is available to persons whose right to a nationality has been violated.

65. The above principles on the right to nationality, as well as the rules concerning the prohibition of arbitrary deprivation of nationality, the principle of non-discrimination, the avoidance of statelessness and the requirement of procedural guarantees and effective remedies are also fully applicable to situations of State succession.

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