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**2nd EUROPEAN CONFERENCE ON NATIONALITY**  
**“CHALLENGES TO NATIONAL AND INTERNATIONAL  
LAW ON NATIONALITY AT THE BEGINNING OF THE  
NEW MILLENNIUM”**  
**(Strasbourg, 8 and 9 October 2001)**

**PROCEEDINGS**



## CONTENTS

	Page
Foreword .....	5
<b>OPENING SPEECHES</b>	
Hans Christian Krüger, Deputy Secretary General of the Council of Europe .....	9
Diogo Lacerda Machado, State Secretary for Justice of Portugal .....	11
<b>INTRODUCTION</b>	
<i>The work of the Committee of experts on nationality (CJ-NA)</i>	
By: Zdzislaw GALICKI, Professor, Director of the Institute of International Law, University of Warsaw, Poland, Chair of the CJ-NA .....	17
<b>I. INTEGRATION AND NATIONALITY</b>	
<i>“Interaction between nationality and integration”</i>	
Rapporteur: Felicita MEDVED, Centre for Research in International Migration and Ethnic Relations (CEIFO), Stockholm University, Sweden .....	23
<i>“Identity and nationality”</i>	
Rapporteur: Thomas CASSUTO, Judge, LL.D, Ministry of Justice, France, former Member of the CJ-NA.....	41
<b>II. CONDITIONS FOR THE ACQUISITION OF NATIONALITY</b>	
<i>“Conditions for the acquisition of nationality by operation of law ex lege or by lodging a declaration of option”</i>	
Rapporteur: Gerard René de GROOT, Professor of Comparative and Private International Law, University of Maastricht, The Netherlands .....	65
<i>“Acquisition of nationality through naturalisation: an assessment of European legislation”</i>	
Rapporteur: Andrew WALMSLEY, former Director of Nationality, Home Office, Liverpool, United Kingdom, former Member of the CJ-NA .....	95
<b>III. MULTIPLE NATIONALITY</b>	
<i>“Regulation of multiple nationality by bilateral and multilateral agreements”</i>	
Rapporteur: Mykola RUDKO, Head of the Citizenship Department, Administration of the President of Ukraine, Member of the CJ-NA .....	109
<i>“Multiple nationality and the European Convention on Human Rights”</i>	
Rapporteur: Nuala MOLE, Director, The AIRE Centre, Advice on Individual Rights in Europe .....	129

#### **IV. NATIONALITY IN RELATION TO STATE SUCCESSION**

*“General aspects of nationality and human rights in relation to state succession”*  
*Rapporteur:* Ineta ZIEMELE, Professor of International Law and Human Rights,  
R. Wallenberg Institute / Riga Graduate School of Law ..... 149

*“Statelessness in relation to State succession : the necessity of an additional instrument to the European Convention on Nationality”*  
*Rapporteur:* Roland SCHÄRER, Head of the Nationality Section, Office Fédéral de la Police, Département fédéral de justice et police, Berne, Switzerland, former Chair and Member of the CJ-NA ..... 173

#### **CONTRIBUTIONS**

*De facto and de jure “belonger” status: the relevance of recognition of sovereignty*  
Paper submitted by: Andrew GROSSMAN, LLB ( Columbia ), Docteur en droit ( Louvain ) ..... 191

*How does nationality integrate?*  
Paper submitted by: Robin M WHITE, Department of Law, University of Dundee, UK written with the assistance of Margaret Barron Linton, Department of Law, University of Dundee, UK ..... 195

*The principle of non-discrimination in matters relating to nationality law - a need for clarification?*  
Paper submitted by: Eva ERSBØLL, Cand. Jur., Research Fellow, The Danish Centre for Human Rights ..... 199

*Repatriation as a form of acquiring Polish Citizenship*  
Paper submitted by: Artur KOZŁOWSKI, Vice-Director, Office for Repatriation and Foreigners, Poland ..... 201

*Assimilation or Integration?*  
Paper submitted by: Juris CIBULS, Deputy Head of Foreign Relations Department, Naturalisation Board, Latvia ..... 205

#### **CLOSING SPEECHES**

N.A. KALSBECK, State Secretary for Justice of the Netherlands ..... 211

Margaret KILLERBY, Head of the Private Law Department, Directorate General of Legal Affairs, Council of Europe ..... 215

**CONCLUSIONS AND PROPOSALS** ..... 217

**List of participants** ..... 219

## FOREWORD

The 2<sup>nd</sup> European Conference on Nationality focused on the following subjects:

- integration and nationality
- conditions for acquisition of nationality
- multiple nationality
- state succession and nationality.

Eighty participants from all over Europe and beyond attended this important gathering of professionals working in the field of nationality. The Conference represented an important opportunity for the Council of Europe benefit from the experience of these professionals and for the views and knowledge to be shared.

After detailed and in-depth discussions on the reports presented by the eight Rapporteurs, the participants called on the Council of Europe, through its Committee of Experts on Nationality (CJ-NA)<sup>1</sup>, to concentrate on three areas of activity. Firstly the principles and rules of the European Convention on Nationality should be developed with regard to conditions for the acquisition of nationality, the question of the right to a 'given' nationality and State succession and nationality. Secondly, the CJ-NA should pay particular attention to the relationship between integration and acquisition of nationality, the question of when distinctions in the field of nationality law might amount to discrimination and the effect of other aspects of human rights issues on nationality matters. The Committee should also consider the regulation, at national, bilateral and multilateral levels of problems arising from nationality in relation to State succession and multiple nationality.

The delegates took into account the guidelines produced by the 1<sup>st</sup> European Conference on Nationality<sup>2</sup> and centred their discussions on the new challenges created by the evolution of nationality law.

The proposals outlined at the Conference form the logical continuation to the many years of work already carried out by the Council of Europe with regard to nationality law. This work led to the adoption of the European Convention on Nationality in 1997. This Convention entered into force in March 2000 and combines for the first time in a single text all the important issues relating to acquisition and loss of nationality.

These Proceedings contain the opening and closing speeches of the Conference, the texts of all the reports as well papers submitted by certain delegates and the conclusions of the Conference. A list of participants also features at the end of the text.

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<sup>1</sup> The CJ-NA is a subordinate committee to the European Committee on Legal Co-operation (CDCJ)

<sup>2</sup> The 1<sup>st</sup> European conference on Nationality on "Trends and Developments in National and International Law on Nationality" took place in Strasbourg in October 1999.



## **OPENING SPEECHES**





## OPENING SPEECH

By

**Hans Christian KRÜGER**

Deputy Secretary General of the Council of Europe

State Secretary, Ambassadors, Ladies and Gentlemen,

It is an honour for me to open the 2<sup>nd</sup> European Conference on Nationality on behalf of the Council of Europe.

Nationality is and remains the main link between the individual and the state: it is the basis for many fundamental individual rights and an important aspect of the identity both of individuals and of states.

The right to a nationality is recognised in the Universal Declaration on Human Rights of 1948. It is also the basis of the European Convention on Nationality and other international instruments. There has, however, not yet been any general agreement on how to identify which nationality a person has the right to obtain.

The European Convention on Nationality contains principles and rules on acquisition and loss of nationality aimed at providing some answers to the question of which nationality a person has the right to obtain and at avoiding statelessness. These are also the main aims of the Council of Europe's work in the field of nationality, as well as of our partner organisations in this field, in particular the United Nations High Commissioner for Refugees. The Convention was inspired by the drastic changes which took place in Europe after 1989.

The European Convention on Nationality entered into force on 1 March of last year. According to the conclusions of the first Conference, this Convention has become a kind of European code on nationality, although its effects reach beyond Europe. The provisions and principles contained in this Convention have influenced not only the nationality laws of the States Party to the Convention but also the laws of many other States.

The Convention is also the basis for our legal co-operation activities in the field of nationality. Countries, ranging from the Czech Republic to Azerbaijan and from the Russian Federation to Croatia, have taken part in our bilateral activities in this field, which aim at assisting states in carrying out legislative and institutional reforms in nationality matters.

The first European Conference on Nationality was an initial stock-taking of the relevance of the Convention inside and outside of Europe, and it opened the door, for the first time, to the direct involvement of all people who have a professional interest in nationality in the work of the Council of Europe in this field. In this respect, it helped us to identify the priorities for our work in the near future. The subjects covered a wide area of topics and the discussions and conclusions of the Conference contributed in an important way to bringing the work of the Council of Europe forward in this field.

The four main subjects of this second Nationality Conference are directly inspired by the discussions that took place in the first Conference:

The issue of **integration and nationality** is much wider than the question of the legal link between an individual and a state. Integration touches upon sociological, cultural, psychological, demographic and other elements. Integration is, as is nationality, also an issue of identity, both for the individual and for the state.

**Conditions for the acquisition of nationality** are the essence of the right to a nationality. In the worst case scenario, these conditions may prevent a child from acquiring any nationality, or make it impossible for a person ever to acquire the nationality of the state in which he or she is living. These problems might arise in particular as a result of a conflict between the nationality laws of different states.

Increased migration and mixed marriages have led to a growing number of people with **multiple nationality**. Despite the rules contained in the European Convention on Nationality, multiple nationality continues to raise a number of legal and political questions. There is a need for states to co-operate.

**Lastly**, nationality in relation to state succession **remains a major source of statelessness and a huge challenge to identify which people have the right to which nationality.**

I look forward to these two days of important discussions. I feel sure that the problems raised and the proposals for further action made will enable the Council of Europe and all states, organisations and individuals represented here to work together towards improved solutions.

I wish you every success in your discussions.

## **OPENING SPEECH**

**By**

**Mr Diogo Lacerda MACHADO**

The Portuguese State Secretary for Justice

First of all, allow me to say how honoured I am to be here with you today and to say these words of welcome.

It is an honour for my country and for the government I represent to have been invited to open this major conference. It is also an honour and a privilege for me personally to be invited to address this eminent Assembly.

Nationality issues are a subject of great importance to both individuals and society and they deserve the Council of Europe's close and constant attention.

The various Council of Europe activities in this field include the drafting of several international instruments designed to address complex problems in both the national legislation of each state and the application of foreign legislation, especially in cases of statelessness or multiple nationality.

I therefore wish to stress the great significance acquired by the European Convention on Nationality, which was opened for signature on 6 November 1997 and came into force on 1 March 2000 in respect of Slovenia, Austria and Moldova and, subsequently, the Netherlands and Sweden.

In one single text, which can be considered a genuine European nationality code, the Convention establishes a series of general principles and rules aimed at addressing the complex issues now arising in nationality law. It is therefore an extremely important instrument designed to encourage European states to update their nationality legislation.

This body of general principles and rules is impregnated with the ideal, common to all modern democratic societies, that the discretionary power of states in matters concerning nationality should be compatible with the fundamental rights of individuals to have a nationality. The establishment of this bond between the individual and the State – which is the organised expression of individuals' membership of society – places the State under an obligation to protect the individual.

The Council of Europe's activities in this field do not, however, concern only the drafting of international instruments. It also considers, examines and debates current nationality issues, as it did at the First European Conference on Nationality, which it held in Strasbourg on 18 and 19 October 1999 on the theme "Trends and developments in national and international law on nationality".

The Second Conference on Nationality, which begins today on the subject of "Challenges to national and international law on nationality at the beginning of the new millennium", also reflects this commitment.

Portugal is taking an active part in the work of the Committee of Experts on Nationality (CJ-NA), the Council of Europe's main intergovernmental co-operation body in the field of nationality, and it was the fifth state to ratify the European Convention on Nationality, by Decree N° 7/200 of the President of the Republic, dated 6 March 2000. It will within the next few days deposit the instrument of ratification with the Secretary General of the Council of Europe.

The main principles set out in this Convention, ie that there should be no discrimination on the grounds of sex, religion, race or ethnic origin, that statelessness should be avoided and that the rights of persons who are habitually resident in a given country should be respected, have already been adopted in Portuguese domestic legislation and have long been part of our custom and usage.

The 1976 Constitution of the Portuguese Republic already includes a body of rules and principles which directly concern the nationality bond. One of the most important is the principle of the right to citizenship, which is a fundamental human right.

The Constitution also stipulates that a person may be deprived of citizenship only in the cases and under the conditions laid down by law and never on political grounds, which implies that no-one may be arbitrarily deprived of their nationality by the public authorities.

The Portuguese Constitution also sets out a body of principles relating to family, marriage and filiation, establishing for example the principle of equality between spouses – which in the case of family relations flows from the general principle of non-discrimination between the sexes – and non-discrimination against children born out of wedlock. These principles have had significant repercussions on the nationality legislation in force since 1981, which prohibits all forms of discrimination on grounds of sex, race, language, religion, political beliefs or financial or social status.

The need for legislation to prevent cases of statelessness has also been taken into consideration by the Portuguese parliament, which introduced a provision stipulating that all those born on Portuguese territory who certify that they have no other nationality will be granted Portuguese nationality.

With a view to safeguarding the interests of foreigners habitually resident in Portuguese territory, Portuguese nationality may be granted to their children born in Portuguese territory under certain conditions established by law. Habitual residence in Portugal is also an important condition for obtaining naturalisation.

Only individuals can renounce their nationality. There are no conditions under which Portugal can deprive one of its citizens of their nationality. Loss of nationality is a choice which individuals can make provided they certify that they have another nationality.

There was, therefore, no obstacle to Portugal's ratification of the European Convention on Nationality since Portuguese domestic legislation was already compatible with the main principles set out in this convention.

Since a large number of Portuguese nationals have for many years emigrated to other countries, in particular other European countries, Portugal is particularly sensitive to problems concerning the civil status and nationality of its own nationals, who, for various reasons, often have dual nationality. As a result Portugal has sought more flexible legal solutions that are more appropriate to the situation.

The growing movement of people is an irreversible trend which raises new issues concerning nationality, particularly with regard to situations in which people have several nationalities.

Other phenomena such as state interaction, state succession and all other forms of transfer of sovereignty have constant repercussions on nationality issues.

It is essential that we consider, examine and discuss these issues, especially that of multiple nationality which raises questions relating to the application of international private law, diplomatic and consular protection, national service, welfare benefits, the exercise of political rights and even identity and civil status.

The second European Conference on Nationality provides the opportunity to broaden our consideration, examination and discussion of nationality issues, thus making a major contribution to efforts to find equitable, well-balanced and lasting solutions, in the interest of both individuals and states.

The interest expressed in this theme, the high standard of the reports presented to us and of the statements we will hear and the overall commitment to addressing these issues, lead me to believe that the outcome of this conference will fully meet our expectations.



## **REPORTS**





## INTRODUCTION

### THE WORK OF THE COMMITTEE OF EXPERTS ON NATIONALITY (CJ-NA)

#### Report by

**Zdzislaw GALICKI**

Professor, Vice-Director of the Institute of International Law,  
University of Warsaw, Poland, Chair of CJ-NA

The work of the Council of Europe in the field of nationality has been realised in different forms, through various instruments and by numerous organs.

Legal documents produced by the Council of Europe, as well as a variety of practical steps undertaken for their implementation and for the assistance concerning matters relating to nationality sought by the States and by individuals – these are principal forms of the operation of the Council of Europe in the said area.

An impressive collection of texts of the Council of Europe in the field of nationality may be found in the last edition of the publication entitled “Council of Europe achievements in the field of law. Nationality” (September 2001, Strasbourg). These texts include a great number of documents, starting with resolutions and recommendations adopted by the Committee of Ministers and by the Parliamentary Assembly and culminating in legally binding conventions and protocols. They are accompanied by some other instruments adopted by other bodies of the Council of Europe linked to nationality questions.

All legal documents adopted or elaborated within the Council of Europe are formally and substantially connected with activities of appropriate organs of this organisation. This connection reflects a specific characteristic of modern international organisations, known as so-called “institutionalism”, which means that their functions in particular areas of their competencies are carried out by the organs and sub-organs especially established for that purpose.

Among numerous internal bodies of the Council of Europe which are more or less engaged in nationality matters there is one which role and importance cannot be overestimated. This is the Committee of Experts on Nationality (CJ-NA), the 18<sup>th</sup> annual meeting of which will immediately follow our Conference.

I would like to ask the distinguished participants of this Conference not to consider that opinion about the Committee as a conceit of its Chairman. On the contrary, it has been clearly stated in the above-mentioned Council publication that:

“The main focus of the inter governmental co-operation of the Council of Europe in the field of citizenship (...) is the Committee of Experts on Nationality (CJ-NA). This Committee consists of officials who have practical knowledge in citizenship issues from all forty-three member States of the Council of Europe as well as observers from a number of other States and international organisations.”

I have to admit, however, that it is really difficult for me to retain full objectivism and complete lack of personal emotions talking about the institution within which I have had an honour and a pleasure to spend last seven years, in a friendly and constructive co-operation with all my colleagues.

I am proud to have an opportunity to participate in the work of the Committee of Experts on Nationality precisely from the formal beginning of its existence under actual name, i.e. since 1995. It was not only a formality to change the name from a former “Committee of Experts on Multiple Nationality” (CJ-PL) to the actual “Committee of Experts on Nationality”. The Committee of Ministers of the Council of Europe had approved, in February 1995, the request by the European Committee on Legal Co-operation (CDCJ) to modify the name of our Committee as it was dealing in fact with all aspects of nationality and not merely with questions concerning multiple nationality.

It is worth to remind that although in February 1995 the CJ-NA was still continuing the work of its predecessor on the draft European convention on nationality with the view to modernise and develop the old 1963 Convention, however, already in November of the same year of 1995 the Committee undertook its most important task which was the elaboration of a comprehensive convention on nationality. As we know now, this uneasy task was fulfilled successfully in July 1996 by the adoption of the draft convention and, finally, the European Convention on Nationality has been opened for signature on 6 November 1997.

Although any international convention – in general – reflects a political will of States which decide to conclude such a treaty, there is- without any doubt – a significant role played in this process of conclusion by the bodies carrying out preparatory and drafting functions.

The elaboration of the European Convention on Nationality was for the Committee of Experts on Nationality and its Working Party a very important and difficult examination of their abilities and effectiveness. Mutual understanding and true spirit of co-operation between the members of the Committee have become a valuable and permanent effect of our work on the draft convention on nationality.

It is necessary to remember that in connection with this work the Committee had become a forum of confrontation – though a fully peaceful one – of highly differentiated internal legal systems governing nationality matters. Many of us, who were participating in these negotiations, remember that it was not an easy task to find out a satisfying compromise on various disputable questions and to reach a final consensus.

Furthermore, because of the political changes which occurred in Central and Eastern Europe after 1989, which – in consequence – caused a significant enlargement of the number of members of the Council of Europe and its organs – including our Committee, we have got another field of confrontation – between so called old Western European democracies and “newcomers” from Central and Eastern Europe. This was a confrontation of different views, opinions, legal traditions and practical experiences. After five years since the Committee finalised successfully its work on the draft convention on nationality, I may say frankly, as representing - once- those “newcomers”

that it was for us a priceless lesson of democracy in its practical meaning, and – as I hope – our colleagues from Western European Countries have also gained some profits from those memorable joint efforts to finalise our work on the Convention on Nationality. It is my personal impression, but I think that my colleagues and friends from the Committee will join it, that since then the mentioned before differentiation between old and new members went into the past, as a part of history, and the Committee is now representing a whole family of European nations, continuing together our joint work with mutual understanding of our individual problems. It is my personal humble opinion of the first Chairman of the CJNA from Central and Eastern Europe.

Having this opportunity I would like to mention here my distinguished predecessors, to whom I owe so much for their kind advice, co-operation and friendship. Fortunately, all of them are among us. So my words of gratitude go first of all, to former chairmen of the CJNA: Professor Giovanni Kojanec, Ambassador Ulrich Hack and Mr Roland Schaerer. Equally grateful I am to other “veterans” of the Committee like Mr Niels Beckman and Mr Andrew Walmsley.

The Committee of Experts on Nationality is now a large organ, consisting of all members of the Council of Europe. Meeting usually once a year, it is a forum of general exchange of views and opinions on nationality matters, where final decisions are discussed and adopted, to be reported later to our “superior” which is the European Committee on Legal Co-operation (CDCJ).

But a really “hard and dirty” work on a detailed elaboration of future CJNA documents takes place within a smaller body, consisting now of experts coming from twelve countries and some observers. This body has a very meaning name, which is “the Working Party”. May be, because its work never ends within the official hours of its sessions but is constructively continued later in various, more social forms. As a former chairman of this Working Party, I can assure you, ladies and gentlemen, that many important compromises have been found and agreements have been reached during those informal evening sessions.

But it seems to be in accordance with one of the principles of the Council of Europe, which is a general recognition of importance of human factor.

Speaking about high evaluation of human factor it is necessary to add, that the whole operation of the Committee of Experts on Nationality, as well as its Working Party, would be virtually impossible without a very hard, very professional and very devoted work of our colleagues and friends from the Secretariat. Special thanks should go here, first of all, to a “good spirit” of the Committee, i.e. to Mrs Margaret Killerby, Head of the Private Law Department, Directorate General, Legal Affairs. Her personal care of the Committee matters, as well as her top-level professional assistance in substantial work, have been always highly appreciated by the members.

In fact, our gratitude should be extended on all members of the Secretariat personnel engaged in the work of the CJNA, so let me mention here just three of them, who were exercising a really uneasy function of secretaries of the Committee. They are

Mr Horst Schade, Mr Gianluca Esposito, and finally – my right hand in the Committee – Mr Jens Ölander. They have done a really good job for the Committee.

Ladies and Gentlemen!

I would not like to create any kind of impression that together with the adoption of the draft Convention on Nationality, the Committee has become fully satisfied of its achievements and limited itself to the enjoyment of this satisfaction. Nothing would be more false! Noblesse oblige!

Immediately after the adoption of the European Convention on Nationality the CJNA has started still lasting process of facilitating the implementation of this Convention in internal law and international agreements in accordance with Article 23 of the said convention.

The first positive result of this exercise may be found in the Recommendation No. R (99) 18 adopted by the Committee of Ministers of the Council of Europe on 15 September 1999 on the avoidance and reduction of statelessness. The text of this Recommendation was prepared by the CJNA, taking into account the importance of the principles and rules of the 1997 Convention towards the reduction of statelessness, and realising the need for further measures, both at national and international levels, to avoid and reduce cases of statelessness.

Furthermore, at its 16<sup>th</sup> meeting in October 1999 the Committee adopted the Report on the misuse of nationality laws for the attention of the CDCJ, highlighting the problems and indicating the action which can be taken by States to prevent the misuse of their nationality laws by the States themselves or by individuals.

Subsequently, during its 17<sup>th</sup> meeting in October 2000 the CJNA adopted the Report on Multiply Nationality. Being neutral with respect to the desirability of multiple nationality, the Committee noted that, although the 1997 Convention contains examples when multiple nationality must be permitted and though it is practically impossible totally to prevent cases of multiple nationality, States are generally free to decide whether to allow multiple nationality or whether to try to prevent it, as long as the position chosen is not applied in a discriminatory way.

The agenda of the 18<sup>th</sup> meeting of the CJNA, which will start the day after tomorrow looks rather rich one and provides, among others, for

1. Finalisation and adoption of a report on the feasibility of the preparation of an additional instrument to the European Convention on Nationality on statelessness in relation to State succession;
2. Preliminary examination of a draft report on conditions for the acquisition and loss of nationality;
3. Adoption of opinions on Parliamentary Assembly Recommendations:
  - a. No 1443 (2001) on international adoption: respecting children's rights; and
  - b. No 1500 (2001) of the participation of immigrants and foreign residents in the political life of Council of Europe Member States.

In a draft specific terms of reference of the CJNA for years 2002-2003 two first topics on statelessness in relation to State succession and on conditions for the acquisition and loss of nationality are going to be continued in these years on the basis of the mentioned above reports.

Summing up it may be said that the programme of activities of the CJNA after the adoption of the 1997 Convention is quite rich, sometimes may be even too ambitious, but – anyway – it proves that the Committee has become an useful and necessary element in developing activities of the Council of Europe in the field of nationality.

Finally, I would like to say few words about two important political and legal events, which have been taking place as a result of initiatives undertaken within the CJNA. These are, of course, two European Conferences on Nationality.

The 1<sup>st</sup> European Conferences on Nationality on “Trends and Developments in National and International Law on Nationality” took place, as we all remember, in Strasbourg in October 1999. It successfully brought together around 120 persons with a professional interest in nationality matters. The Conference gave a major impetus towards co-operation between States in finding peaceful solutions in the field of nationality, as well as it created a very solid basis for further follow-up action by the Committee. Various mentioned before activities of the Committee of Experts on Nationality have been carried out as a result of the follow-up to the 1<sup>st</sup> Conference.

Today, we start the 2<sup>nd</sup> European Conferences on Nationality on “Challenges to National and International Law on Nationality at the Beginning of the New Millennium”. The main topics of the Conference which are: integration and nationality, conditions for acquisition of nationality, multiple nationality and State succession and nationality are extremely important for future work of the Committee. I can assure you, ladies and gentlemen, that the CJNA will pay all necessary attention to the consideration of the follow-up of the 2<sup>nd</sup> European Conference on Nationality already at this year session, as well as during subsequent meetings. The Committee will await with a great interest for all proposals and suggestions brought up by the Conference to use them as a source of inspiration and to realise them in its future activities. The success of the Conference will simultaneously make possible a successful realisation of our tasks. So having in mind this specific community of interests, with the view of the achievement of greater unity between the members of the Council of Europe, I will wish you – ladies and gentlemen - fruitful debates, hot discussions in friendly atmosphere and constructive conclusions.



## INTERACTION BETWEEN NATIONALITY AND INTEGRATION

Report by  
Felicitá MEDVED<sup>3</sup>

Centre for Research in International Migration and Ethnic Relations (CEIFO)  
Stockholm University, Sweden

We live in an era of globalisation where states are fixed in territory and where membership in societies is becoming increasingly mobile, reaching beyond the boundaries of territory, nationality and citizenship. Additional dimensions to the geography of social relations that globalisation has brought about contributed to an era obsessed with questions of individual and collective identity. In most European societies the treatment of the celebrated 'other', the other in ourselves, the other in our midst and the other clamouring at our doors and shores is an issue extremely high on the political and public agenda. As indicated in the invitation to the Second European Conference on Nationality, there is a need for the development of international standards in the field of nationality and the need for changes in citizenship rules and practices. Yet, at the beginning of the new millennium the traditional, classical vocabulary of nationality, of the State, the 'Nation' and 'People' seem to provoke complicated reactions, expressing a profound anxiety, which reflects the deepest dilemmas of constructing the ends and means of the integration at the national, international and supranational level.

Knowledge on nationality and specifically on laws on nationality is generally regarded as a specialist one. Yet legal definitions of who belongs, and on what terms, to political units most commonly called nation-states have inevitably, consciously or not, in combination with various other policies and laws, influenced the sense of national identity. Scrutiny and amendment of the plans of States, the Council of Europe and the European Union require from people in each of these to ask questions, worthy of critical analysis and important to practical action, questions of a fundamental kind. The purpose of this paper is to put some of these questions on the 'mental map' by examining the interaction between nationality and integration or rather nationality and citizenship in a state versus membership in a society, especially with respect to the membership of long-term immigrants. To do this it briefly explores the meanings of nationality as a legal, political and mental bond to the State utilising the analytical distinction between nationality as nominal citizenship and substantive citizenship consisting of rights and duties. The deepest, most clearly engraved hallmark of citizenship is that citizens constitute the *demos* of the polity, citizenship being not only about public authority, but also about the social reality of peoplehood and the identity of the polity. It is claimed that in the modern European nation-state, the most prominent of social forms that modernity has produced, a complete divorce of *ethnos* from *demos* has thus far never worked. Of the three models regarding citizenship for immigrants, the pluralist inclusionary model seems to offer the best perspectives for breaking tensions inherent in the relationship between immigration, integration and citizenship. Therefore, meanings of integration and multiculturalism are briefly debated, particularly the potential of multiculturalism for achieving social cohesion and in making a new statement on substantive citizenship.

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<sup>3</sup> This text is a revised version of the report presented at the 2<sup>nd</sup> European Conference on Nationality (CONF/NAT (2001) Rep 1) of the Council of Europe held in Strasbourg, 8-9 October 2001.

Finally, specifically in view of recent proposals in the European Union, ‘denizenship’ as a result of the social relationship with the state is explored in the framework of the political concept of society in its relation to polity and naturalisation of an individual. The latter is, or ought to be, an act of consent based on choice.

*everyone has the right to a nationality*  
(...; 1997 European Convention on Nationality, Article 4 (a))

Everyone has the right to a nationality. But what is ‘nationality’? And what means the ‘right to’? According to the Council of Europe’s definition “‘nationality’ means the legal bond between a person and a State and does not indicate the person’s ethnic origin.”<sup>4</sup> To some degree this definition follows the concept of nationality as defined by the International Court of Justice in the famous *Nottebohm Case* in 1955, as “... a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties...”<sup>5</sup> With regard to the effects of the 1997 European Convention on Nationality, the terms ‘nationality’ and ‘citizenship’ are synonymous, something I am not entirely comfortable with.

Experience learns that there is something called nationality: for it is really difficult to imagine a person without nationality. To be a ‘stateless person’, however, is a different matter. It is almost considered a legal or/and political deficiency. Likewise we experience there is something such as legal nationality: I have my passport, the materialisation of my public personal identity with my given and family name and the name of a particular state, which ought to be my home and protector. With the whole landmass of the globe divided into mutually exclusive state territories, this link – the nominal categorisation of populations into groups of ‘nationals’, in French ‘*ressortissants*’ – is critical in the law between states. It is each state’s right, indeed its reserved domain to determine, within certain limits, who are its own nationals.<sup>6</sup> We are not free to choose our legal nationality. I acquired it at birth *ex lege*; according to one of the dominating principles, still most widely adopted master rule governing the acquisition of nationality in Europe: *ius sanguinis*. Incidentally, I was born in a multinational state, where ‘nations’ as intergenerational communities were imagined as preceding the state, holding also citizenship of federal republic, and where the term nationality was also used to characterise membership in particular groups with some sort of cultural or regional autonomy, and in order to make legal differentiations between nations and still other (ethnic) groups within the state’s jurisdiction. When dissolved, with a successor state creating its law on nationality and establishing continuity with the previous legal order, my nationality identified in name my membership in a nation with the one in the state, again “by operation of law.” Now, more than before, the ‘ethnic origin’ is indicated. For, in the case of Slovenia it was the people that gave the name to the country, and by their declared right of self-determination to the state, and not the other way around.<sup>7</sup>

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<sup>4</sup> European Convention on Nationality, 1997: ETS no.166, Article 2(a).

<sup>5</sup> Explanatory Report to the European Convention on Nationality, ETS no.166, Article 2.

<sup>6</sup> See the 1997 European Convention on Nationality, Article 2(a), and The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930, Article 1.

<sup>7</sup> On state succession and nationality in case of Slovenia see Slovenia, in *European Bulletin on Nationality*, Strasbourg, September 2000, DIR/JUR (2000) 4, p. 174; *Consequences of state succession for*



If in international order of nationality, so adequately termed by de Groot as nominal citizenship,<sup>8</sup> one's right to nationality is about a 'legal bond' to a State similar to that of a ship or aircraft, or even if one's right to nationality in the 'internal, national' order primarily means to acquire, to possess, then one has to agree that "the individual's right to nationality has not, as yet, found its final form and application".<sup>9</sup> Yet, this is a fundamental right which gives nominal citizenship its minimal substance: if human beings would be pushed out of state membership there would be no conceivable guarantee for human rights, as long as sovereignty lies essentially with individual states. Indeed, allocation of nominal citizenship can be compared to the international political map: "ideally" then, this map would be complete when there are no stateless persons and regular if no individuals are multiple nationals. Since that is not the case, because of various reasons of which international mobility/migration of people is merely one, these two features of an international order of citizenship have been topics in many international declarations and conventions, especially in the 1960s.<sup>10</sup>

The principle of personal jurisdiction of States over their nationals as opposed to the subjection to territorial sovereignty, or more elementary to the monopoly of violence of any state where one (with few and well-defined exceptions) at any point of time happens to be, reflects 'nationality' as "the status of a natural person who is attached to a State by the tie of allegiance."<sup>11</sup> With the development of the subjectivisation of individuals the 'legal bond' became less a tie of allegiance and more a matter of reciprocal rights and duties. One wonders however, whether this bond is a legal relationship between a person and a State recognised by that State, or rather a legal status of a person granted by that State.

Nationality is inextricably linked to citizenship, not simply as a code of group identity, but also as a package of rights and duties. The nature of the relation and characterisation of both individuals and states implied by this relationship – the reciprocity of rights and duties - makes it different from other relations between individual and state. With respect to the individual this description refers to citizenship as a particular kind of status, it distinguishes citizens from other groups of population within a state, who do not enjoy all rights and from those who do not have to comply with all obligations of citizenship.

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*nationality, Report of the Venice Commission, Science and technique of democracy, No. 23, Council of Europe 1998; Mesojedec-Pervinšek, A., 1997: Predpisi o državljanih in tujcih z uvodnimi pojasnili (Regulations on citizens and aliens with the introduction). Ljubljana: CZ Uradni list Republike Slovenije; Medved, F., 1996: Slovenias bevisbyrde (Slovenia's Burden of Proof) Nordisk Östforum 2. Oslo, Stockholm, Copenhagen, Boston: Scandinavian University Press.*

<sup>8</sup> de Groot, G.-R., 1989, as referred to in Bauböck, R. 1994: Changing the Boundaries of Citizenship, in Bauböck, R. (ed.), 1994: *From Aliens to Citizens*. Aldershot: Avenbury, pp. 199-232, p. 208.

<sup>9</sup> Galicki, Z. W., 1998: Does the right to a nationality belong to the catalogue of human rights? In *Aan de grenzen van het Nederlanderschap*, 's-Gravenhage: Ministerie van Justitie, pp. 69- 73, p. 73.

<sup>10</sup> Council of Europe has dealt with these issues in the 1963 Convention on the reduction of cases of multiple nationality and on military obligations in cases of multiple nationality, ETS No.43 and Protocols to it in 1977 and 1993.

<sup>11</sup> As defined by the 1929 Draft Convention on Nationality prepared by Harvard Law School's Research on International Law, cited in Galicki, *op.cit.*, p. 70.

Citizenship thus also implies a description of the state; there must be guarantees for certain basic rights.<sup>12</sup>

Therefore, it is really useful to look at nationality in terms of nominal and substantive citizenship. Nominal order of citizenship is not hierarchical (or at least it is not supposed to be), but it does not exclude a 'rank order' in its substantive form, as many States make legal distinctions between various categories of nationals.<sup>13</sup> From this follows that the concept of substantive citizenship does not automatically derive from the nominal one.

Nationality is not only a legal but also a political bond. As membership in the *demos* of the polity - *demos* being a link between citizenship and democracy - it is related to a belief in equality, liberty and self-governance, fundamental values and qualities worth protecting. However, equally so is citizenship often connected with the belief that the citizen would be superior to an alien and that this inequality of citizens and foreigners is proper and in order as it is reflected in the presumption of international law that citizenship under certain circumstances can be a suitable ground for discrimination.<sup>14</sup> As such citizenship is a membership in a polity rather than in a society.

### ***Es gibt keine Demokratie ohne Demos***

*(Josef Isensee, 1993)<sup>15</sup>*

The concept of citizenship, having its roots in classical antiquity, is older than the concept of nation-state. Greeks were *politai*, citizens who participated in the political life of the *polis*. Foreigners, or barbarians, were *patriotai* named similarly as modern nationals after their country of origin.<sup>16</sup> They could earn citizenship only as a special privilege, "particularly by risking one's life in the military service of the city".<sup>17</sup> Roman citizens - *cives Romani* introduced a distinction between those governed by *ius civile* and those governed by *ius gentium*. The concept transformed during the existence of the empire, until 'dominate' was introduced and citizens were turned into subjects.<sup>18</sup> In the medieval Europe, with the exception of some prosperous city-states, people were subjects (*sujets*) by birthplace or by the ruler's right of conquest, tied to the ruler by allegiance.

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<sup>12</sup> See Marshall, T. H., 1948/1964: Citizenship and Social Class, in *Class, Citizenship and Social Development: Essays by T. H. Marshall*. New York: Anchor Books, pp. 78ff.

<sup>13</sup> See *Report of the Venice Commission, op.cit.*, pp. 22-24.

<sup>14</sup> Medved, F., 1998: On the human dilemma of human rights, in *The European Convention on human rights and its implementing mechanisms for the protection of human rights of nationals, foreigners and refugees*. Ljubljana: UNHCR and The information and Documentation Centre on the Council of Europe, pp. 5 –19.

<sup>15</sup> Isensee, J., 1993: Europa – die politische Erfindung eines Erdteils, in Isensee, J. (ed.) *Europe als politics Idée und als rechtliche Form*, Berlin Duncker & Humblot, p. 133; Cf. Grimm, D., 1995: Does Europe Need a Constitution? *European Law Journal*, 1995, p. 295 and Habermas, J., 1995: Comment on the paper by Dieter Grimm: Does Europe Need a Constitution? *European Law Journal*, 1995, pp. 303 ff.

<sup>16</sup> Kantorowicz, E. H., 1950: Pro Patria Mori in Medieval Political Thought, *The American Historical Review* 56, pp. 472-492.

<sup>17</sup> Gouldner, A. W., 1994, quoted in Žagar, M., 2000: Citizenship-Nationality: A proper balance between the interests of states and those of individuals. *1st European Conference on Nationality*, Strasbourg, 18 and 19 October 1999, CONF/NAT (99) PRO 1, pp. 93-111, p. 95.

<sup>18</sup> *Ibid.*

During the eighteenth and nineteenth centuries the evolving concept of nation-states, under the impact of a triple Western revolution - in the spheres of the division of labour, administration and culture - involved the formation of a new subjectivity; one based upon identification with *national space* and *political nation* rather than a selfhood rooted solely in a social hierarchy, religious order or local authority. The identification of *demos* and *ethnos*, both of a Greek heritage, was crucial for the self-understanding of nineteenth-century democracies, in view of becoming of democracy and the nation-state as nearly identical entities. The democratic model handed down by the Greeks was quite imperfect. Its ancient legacy also entailed the notion of the 'barbarian'. In spite of the originally liberal concept of democracy, based on two basic pillars, individuality and public reason,<sup>19</sup> democracy could not be but interpreted as the political arrangement of a particular *ethnos*. The new equality was not all embracing. Only slowly the rights of blacks (except slaves), Jews, Protestants and women were accepted, in spite of the demands of the *hommes de couleur* in 1789.<sup>20</sup> The idea of citizens as being equal in their rights and being homogeneous in their capacity as citizens was historically based on exclusion of women and other significant groups of the population. Equality before the law was a vital condition of advancement in all societal spheres.

For general European democratic perception, the foreigner, unless a celebrated *émigré*, was the equivalent of the uncivilised barbarian. Post World War One treatment of refugees was a result of this perception and a prelude to totalitarian population transfers and concentration camps.<sup>21</sup> True enough, democracy added a Christian innovation, solidarity on the one hand and assimilation as an idea and practice on the other. The assimilation, though in many cases both painful and oppressive for the assimilated, was quite often not considered to be final or irrevocable. In any hour of national humiliation or political hysteria, the dominant *ethnos* could always reverse the process; declaring those having been since long assimilated to be hidden and potentially dangerous aliens and treating them accordingly.<sup>22</sup>

Four historical trends were needed to trigger the reconsideration of this dominant pattern. First, the long shadow of totalitarianism, especially thrown by the Hitler-Stalin experience made it mandatory that totalitarianism should not merely be seen as the 'Other' of democracy, as in certain democratic practices, particularly in the treatment of minorities and foreigners, the seeds of totalitarianism could be recognized. Second, the collapse of colonial empires required western democrats to make amends, among other things by opening the gates of their home countries, naturalising huge groups of the former colonial subjects and recognising them as citizens whose presence created an imprint of 'cultural difference' on the domestic scene. Third, the world-wide spread socio-political arrangement of modernity, often without being underpinned by its dynamic spirit in arts and thought, made it possible for various human groups to

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<sup>19</sup> Cf. Gauthier, D., 1995: Public Reason, *Social Philosophy and Policy*, pp. 19 ff.

<sup>20</sup> Dummet, A., Nicol, A., 1990: *Subjects, Citizens, Aliens and Others*. London: Weidenfeld and Nicolson, p. 81.

<sup>21</sup> Marrus, M. R., 1985: *The unwanted European refugees in the twentieth century*. New York: Oxford University Press.

<sup>22</sup> One of the convincing examples is the treatment of the Canadian-Japanese community during World War II. In 1988 Canada's Prime Minister announced a decision to acknowledge of the unjust treatment of Canadians of Japanese origin, which had suffered during that period.

formulate their claims in modernity's dominant vocabulary: the language of rights. Finally, in contrast to this, the advocates of the philosophical crisis of universalism/humanism, have been emphasising the often hypocritical character of universalism in which the language of rights itself is grounded.<sup>23</sup>

Changes that have occurred in Europe after 1989, following the collapse of the precedent communist attempt to create a universal melting-pot society in the 'proletarian world republic', have shown that a mere shift of authority rarely suffices for the internal cohesion of a human group and that a complete divorce of *ethnos* from *demos* has thus far almost never worked. I do not only refer to the newly found nationalisms in the *Alt-Neu* Europe of the East; the captivating idea of 'nation' has retained a surprising amount of its astonishing allure even after more than fifty years of European integration (in the framework of the EU), as exemplified in the *Maastricht Urteil* by the German Constitutional Court.<sup>24</sup>

### "Cosa Nostra"<sup>25</sup>

The indiscriminate use of the words nation and state is not always helpful. While the concept of state is tangible, defining and conceptualising nation is more complicated. There has always been a troubling duality at the very heart of the term. It can mean a political unit within the jurisdiction of a state, thus a purely political arrangement with a system of liberties, rights and obligations as well as a type of authority.<sup>26</sup> As such it is not a property of any particular group and it cannot be deepened into - to use Raymond Williams' expression - "common structure of feeling" that people so often associate with nation and which requires a characteristic ideology that is not only a symbolic identification with rituals and emblems, like flags and anthems. To define itself national identity must appeal to the materiality of 'common roots', the 'blood and soil' or as Slavoj Žižek, the Slovene philosopher, once put it 'cosa nostra'. Nationalism, as a political movement has generally sought one, or most frequently both.<sup>27</sup>

The ambition of the political, rationalising and secularising aspect of nationalism however, was precisely the rearrangement of the old primordial and patriarchal order. A nation-state should be superimposed over ties of blood, the familial and regional authority as "a legal and political organization with the power to require obedience and loyalty from its citizens".<sup>28</sup> Nevertheless, even a modern phenomenon, historically specific to industrialism, needed ideological legitimation. Giving to a nation a feel of

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<sup>23</sup> Medved, F., 1993: Swedish multiculturalism: the case of Slovene immigrant organisations. *Geographica Slovenica* 24. University of Ljubljana: Institute of Geography, pp. 93-104.

<sup>24</sup> See Weiler, J. H. H., 1995: Does Europe Need a Constitution? Reflections on Demos, Telos, and the German Maastricht Decision. *European Law Journal*, pp. 219 ff.

<sup>25</sup> Žižek, S. 1993: Svojega nocemo, tujega ne damo. (Ours we don't want, others we don't give) *Razgledi*, July 1993.

<sup>26</sup> As in United Nations, international law, national sovereignty.

<sup>27</sup> See among others: Anderson, B., 1983: *Imagined Communities. Reflections on the Origin and Spread of Nationalism*. London: Verso; Gellner, E., 1983: *Nations and Nationalism*. Oxford: Basil Blackwell; Seton-Watson, H., 1977: *Nations and States: An Enquiry into the Origins of Nations and the Politics of Nationalism*. London: Methuen; Smith, A. D., 1986: *The Ethnic Origins of Nations*. Oxford: Basil Blackwell.

<sup>28</sup> Seton-Watson, H., *op.cit.*, p. 1f.

mystical blessing and at the same time giving it a formalized, legalistic account, culture as the substantive form of nationhood and national self-definition seems to serve the purpose equally well. Culture becomes a second nature.

Moreover, culture is often associated with civilisation. While the latter is primarily rooted in things and rules and is, at least in principle, a universal skill, the former is a process resulting in all the insignia, which further shape our actions and fantasy. As a national substance it is above all grounded in language. Law, politics and jurisdiction, one could say, are specific to civilised people. While everyone can learn to handle things and obey rules appropriately, the 'natural' use of a language and participation in its 'life' is confined to a particular group. Even civic, political nationalism goes beyond the objectively instrumental identification of community with language and its communicative role in the reorganisation of economic and political systems, as Karl Deutsch<sup>29</sup> would let us believe, to the identification of language with a particular language, in the Herderian sense experientially unique.

Conclusively, supposing that a nation is a political entity, à la Anderson an 'imagined political community', the meaning of the term nation can be explained as a modern integrating principle of two aspects of people: people as *demos*, a group of citizens, and people as *ethnos* - historically relatively permanent yet continuously renovated collective identity of a culture community based on a fictive common descent and on concrete dimensions of which 'country' is one. Only this latter aspect is a distinctively created 'unique' manifestation of 'people'. This because it appears to satisfy a deeply rooted human value, if not need: the existential yearning for a meaning located in space and time.<sup>30</sup> One belongs, just by being there – independently of one's achievements. In this view, nationhood is a form rather than an instrument of belonging. The claim about "uniqueness" is also an instrument of demarcation, whereby the nation coexisting alongside other nations is the vehicle for realising human potential. At the societal level, nationhood involves the drawing of boundaries, indeed a constitutive act by which the nation will be defined and separated from others. The categories of boundary drawing are myriad: linguistic, ethnic, geographic, religious and similar. With time boundaries, especially non-geographical ones write themselves on individual and collective consciousness with such intensity that they appear as natural. It is hard to think in the societal sphere of the world without a category of nation.

Nationhood does not require statehood, but statehood can offer advantages to the nation, both intrinsic and those resulting from the current organisation of international life. Without territorial sovereignty, as Jean Gottmann put it in "Significance of territory" a 'nation' cannot implement the "*right to exclude others*".<sup>31</sup> The governance with its most important functions of securing welfare and security is situated within the framework of the state. For these functions to be attained the well-being and integrity of the state must be secured. This is not a meagre value in itself, but to the extent that the state may claim a loyalty, which is more than pragmatic it is because it is at the service of the nation.

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<sup>29</sup> Deutsch, K. W., 1966: *Nationalism and Social Communication*. Cambridge, Massachusetts and London, England: M.I.T. Press. (2nd edition).

<sup>30</sup> Medved, F., 2000: The Concept of Homeland, in Runblom, H.; Blanck, D. (eds.): *Migrants and the Homeland: Images, Symbols and Realities*. Uppsala: Acta Universitatis Upsaliensis, pp. 74- 96.

<sup>31</sup> Gottmann, J. 1973: *Significance of Territory*, Charlottesville, p. 95, emphasis original.

This conceptualisation may underscore, or exaggerate, the difference with non-ethnos polity and a state (the Republic). However, in the European project of nation-state, I would argue, it is the *ethnos* aspect of people, which holds the strongest social and cultural-spiritual power, a force that can readily be mobilised to construct a ‘nation’ or resist destruction from inside or outside.

Juxtaposition of the two concepts of nation, the first based on *ius soli* (the territorial/, contractual/civic/political) concept of the nation, the second following the *ius sanguinis* principle (cultural/ethnic), deriving from the older division between *Staatsnation* and *Kulturnation* or more horizontally western-eastern division, has received a great deal of attention and support in recent years. It has been claimed that every nation-state has its own ideas about the ‘essence of the nation’ and that such deeply rooted ways of thinking govern policy and legislation on migration regulation, on aliens and opportunities for their naturalisation. I have argued elsewhere, that while there are different routes to the formation of nations as well as nation-states, this does not mean what is implied at first hand, namely that their ideologies are radically different. On the contrary, the ‘essence of the nation’ is essentially the same.<sup>32</sup> It is rather that political discourses and by extension legislation on these issues are the manifestations of nationalism, as “primarily a political principle”,<sup>33</sup> with its potential of the abuse of boundaries, which are evidently the very central feature of the European nation-state enterprise. There are three principal boundaries, the external boundary of the state, the boundary between the nation and state, and the internal cognitive boundary of those making up the nation. Migration primarily instigates the instability of relation between nation and state, the hyphenation built on fragile foundation already from then, when the nation was constructed on retrospective illusion of unity and continuity.

***Main entry: in-te-gra-tion***

***Date: 1620***

***1a: incorporation as equals into society or an organization of individuals of different groups***

***2b: the operation of solving a differential equation***

There is no time here to dwell on the close relationship between policies aimed at managing and regulating im/migration, policies addressing the changes in society that result from immigration and policies of citizenship.<sup>34</sup> Although the idea of the citizen as a free person with equal civil and political rights exists in all democracies, the precise form and meaning of citizenship varies from country to country.<sup>35</sup> Existing models of citizenship in themselves often contradictory, contested and subject to change have provided differing conditions for the incorporation of immigrants. Thus, the analytical distinction between access to nominative and substantive citizenship cannot always be maintained in practice.

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<sup>32</sup> Medved, F, 1997: Nation and patria in the emerging world order. *GeoJournal Special issue: The State Idea* 1997, no. 43, pp. 5- 15.

<sup>33</sup> Gellner, *op.cit.* p.1

<sup>34</sup> See e.g. Hammar, T., 1985: *European immigration policy. A comparative study.* Cambridge: Cambridge University Press.

<sup>35</sup> Turner, B. .J., 1990: Outline of a Theory of Citizenship, *Sociology* 24, no. 2, pp. 189-217.

Well-known analytical simplified divisions regarding citizenship for immigrants describe three models: the model of (differential) exclusion, the model of assimilation or rather differential inclusion and the multicultural or pluralist inclusionary model.<sup>36</sup> In every model there are substantial variations and none is an exact description of any specific country. According to the first model, immigrants are for the most part excluded from the membership in a state, while, according to the second model, they are mainly included. There are similarities between the models, both exclude non-naturalised immigrants from the electoral process, but whilst countries adhering to the first model exclude immigrants unless they are willing to assimilate culturally, countries adhering to the second model include immigrants unless they fail to assimilate or unless assimilation is unlikely. Naturalisation is thus a crowning touch of assimilation or a starting point. Both models have comparable impacts, they foster socio-economic marginalisation or exclusion and racism and the first model furthermore results in political exclusion. The pluralist inclusionary model evolved mainly in countries where immigration has been seen as part of their strategy for nation-building. It is similar to the second model, it admits immigrants to political community but accepts the maintenance of cultural differences. Membership in civil society and nation-state is seen as consistent with cultural difference, based on its tolerance or even encouragement, but within the limits set within the bounds of the rule of law and the acceptance, indeed assimilation, of certain fundamental core political values and institutions. Negotiation of these limits is the field of struggle and contains the potential of both conflict and innovation.

The three models thus clearly diverge on the issue of cultural policy, understood here in its broadest sense. There is a question however, if they are set on typology of policy differences or rather on national traits that are seen as the sources of these differences. A growing number of comparative studies may have contributed to the increasing desire to coordinate national policies, especially within the European Union in view of the post-Tampere developments. However, many of these studies focus on differences and relate these to differing notions of citizenship and nationhood.<sup>37</sup> In my view retrospective reasoning as a quest for explanation of differences in legislation as well as culturalist explanations that overemphasise historical continuity and incompatibility in culture can be counterproductive. They reinforce the belief that differences stem from deeply rooted cultural and ideological notions that will be slow to change. Convergence on finding solutions on a practical level for specific problems that are laid down in statutes and regulations are even harder to change. In the process, it becomes all the more difficult to explain why for example Sweden suddenly turned from assimilationist to pluralist course.<sup>38</sup> Models could be viewed as phases in a historical process.

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<sup>36</sup> See among others Castles, S., Miller, M. J., 1993: *The age of migration. International population movements in the modern world*. Basingstoke: MacMillan; Castles, S., 1994: 'Democracy and multicultural citizenship. Australian debates and their relevance for Western Europe, in R. Bauböck (ed.), *op.cit.* pp. 3-27.

<sup>37</sup> See e.g. Brubaker, W. R., 1992: *Citizenship and nationhood in France and Germany*. Cambridge, MA: Harvard University Press; Brubaker, R. W. (ed.), 1989: *Immigration and the Politics of Citizenship in Europe and North America*. Lanham, N.Y. London: University Press of America.

<sup>38</sup> See Runblom, H., 1996: Immigration to Scandinavia after World War II, in Tägil, S. (ed.), *Ethnicity and nation building in the Nordic world*, London: Hurst & Company, pp. 282-324; Hammar, T., 1981: *Swedish and European immigration policy. A comparative study*. Stockholm: Swedish Commission on Immigration Research; Hammar, T., 1985, *op.cit.*

In western Europe it was only in the late 1970s when to varying degrees the permanent stay of immigrants became an explicit assumption underlying policy, which led to a stepwise introduction of measures to strengthen their legal status. Simultaneously a halt to immigration was seen as a necessary condition for an effective integration policy. Many countries modified their rules for naturalisation since the beginning of the 1990s, watering down the right of the blood and there is a growing tendency to accept or tolerate multiple citizenship. More than just regulating the residence status of immigrants, policies try to bring about their integration into society, aimed predominantly at education, employment and housing. There is a convergence towards incorporation of long-term immigrants on a basis of respect for the democratic values and norms in the receiving society. All of them try to do this with some degree of respect for the distinctive cultural character of each immigrant group.

If the pluralist inclusionary model offers the best perspectives for a rapid and conflict free solution to problems inherent to the relationship between immigration, integration and citizenship what does it represent and what does it do to democracy? Firstly, it is connected with the concept of integration, popularised in the 1960s as an alternative to assimilation. Secondly, with the concept of multiculturalism in its prime in the 1980s as a “formula” of ‘management of diversity’. Both notions are not used everywhere in the same context.

Integration as the relation between the whole and its parts represents the most poignant feature of society. As society has been built of multitude of complex, hierarchical and parallel subsystems and their remnants, the organisation of all these parts into a well functioning unity is the central question of the fundamentals of society. In this sense integration is a phenomenon that pertains to society as a whole and also to its parts – groups, institutions and organisations. The classical sociology offers two main explanations that allude to the togetherness of society. Firstly, integration builds on members sharing the same values, norms and perceptions. Traditionally, the church was the main mediator of values and perceptions about the meaning of life, thus the instrument of integration. Later this role has been taken by the state-run school system, working environment and media. Thus, integration, in Durkheim term’s mechanical solidarity, is the result of a shared direction. Secondly, the division of labour and specialisation leads to professional differentiation, the final result of which is also, or anyway, integration, according to Durkheim organic solidarity, because of the complex interdependency of relations.<sup>39</sup> There are also other differentiations, which fill similar complementary functions, such as gender or generation. In democratic societies there is also a differentiated party system. Common to these examples are institutionalised forms of conflict solving, if and when the differentiation leads to conflict. Differentiation in terms of culture, religion and ethnicity do not have an equivalent complementarity and are therefore more problematic when it comes to integration. Neither are there accepted or institutionalised forms for conflict solving for cultural, religious or ethnic conflicts. Integration in this meaning is a feature of the social system and not of the individuals or groups. Hence, society may be more or less integrated but not its individuals.<sup>40</sup>

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<sup>39</sup> See Durkheim, É., 1984: *The Division of Labour in Society*. London: McMillans.

<sup>40</sup> Westin, Ch. m fl., 1999: *Mångfald, integration, rasism och andra ord*. Stockholm: SOS-Rapport 1999:6.



The notion of integration associated with the question of participation of cultural and ethnic minorities in society, especially immigrants and their children, was introduced as an alternative to assimilation in the 1960s. The American 'melting pot' assimilation became an unrealistic objective, with ethnic groups and immigrants starting to demand recognition of their cultural identities. The word assimilation came to be avoided almost everywhere and especially for policy purposes integration became the keyword, putting emphasis on eliminating inequality and deprivation. The then British Home Secretary, Roy Jenkins, introduced the word integration as a policy term in 1966, when he defined it "not [as] a flattening process of assimilation, but as equal opportunity accompanied by cultural diversity in an atmosphere of mutual tolerance".<sup>41</sup> The central criterion for integration in this meaning is participation of immigrants and ethnic minorities in the public sphere, in economy and production, in resource sharing, politics and government. The European nation-state started to be less concerned with the achievement of cultural uniformity. Although some degree of uniformity was still considered to be necessary, a political entity was seen to be sustainable in combination with cultural diversity. Thus, the 'Jenkins formula' has been seen as an initial articulation of the concept of a 'multicultural society'.<sup>42</sup>

Multiculturalism depends upon the use of the concept of culture, and indeed it is not always clear what is meant by culture in this context.<sup>43</sup> Multiculturalism is sometimes used descriptively referring to empirical reality of presence of cultural diversity,<sup>44</sup> most often of ethnic character relating to recent immigration, but also to other 'minority' and 'subaltern' groups within a state. Such a demographic discourse of multiculturalism is increasingly present in the debates about a need to accept minorities as a permanent feature of society and has been criticised as labelling of people for the purposes of government, as in censuses.<sup>45</sup> It appears to be better to reserve the term for normative notions on how to shape a multicultural society and on how government and society should deal with diversity. So the term is conceived in most cases in a normative sense as a vision with an ideological tint, which urges at least recognition and tolerance of difference and sometimes its active stimulation. The first priority of the pluralist inclusion model, as suggested by Stephen Castles, is to make immigrants citizens without too many delays. This does not yet mean substantive citizenship, actual equality, which can be achieved when state and society accept that both individuals and groups have the right to cultural difference. However, the adaptation to the prevailing rules, which have been laid down by the dominant group, and are culture-specific, is required. The model thus involves recognition of cultures as, in principle, equal. Multicultural society, thus

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<sup>41</sup> Cashmore, E., 1994: *Dictionary of race and ethnic relations*. London: Routledge (Third edition), p. 148.

<sup>42</sup> Rex, J., 1991: The political sociology of multi-cultural society. *European Journal of Intercultural Studies* 2 (1), pp. 7-19.

<sup>43</sup> See e.g. Castles, S., Cope, B., Kalantzis, M. and Morrisey, M., 1988: *Mistaken Identity: Multiculturalism and the Demise of Nationalism in Australia*. Sidney: Pluto Press, p.121 and Medved, F., 1993, *op.cit.*

<sup>44</sup> Sometimes called multicultural society or more abstractly multiculturalism. See Cohen, R. 1993: Conclusion. Ethnicity, the state and moral order, in Toland, J. (ed.), *Ethnicity and the state*, 231-258. New Brunswick, NY: transaction Publ.; Robertson, R., 1992: *Globalization. Social theory and global culture*. London: Sage.

<sup>45</sup> See e.g. Sivanandan, A., 1982: *A Different Hunger*, London: Pluto Press.

gives to an individual a possibility to freely choose to belong to either a minority or a majority. But it involves more than culture, a simultaneous concern for political integration, social and economic emancipation. In this view it combines measures against socio-economic inequity on cultural lines with the acceptance of the principle of differential treatment of people with different characteristics, needs and desires.<sup>46</sup> This is the reason that anti-discrimination legislation, positive action and measures against xenophobia and racism tend to be regarded as aspects of multiculturalism.

The academic debate on multiculturalism has been lively, focusing either on the difference - between, among and beyond cultural groups - and binarity between the public and private spheres that intersect through the theme of difference; or on a critique of existing majority's cultural notions with the aim of building a more open democratic society.<sup>47</sup>

The value of multiculturalism is, as is often stressed, for achieving social cohesion in diverse societies. In the context of citizenship, multiculturalism makes a new statement on substantive citizenship concerning not only immigrants but all citizens as a new model for national identity in a heterogeneous society. The idea of multicultural citizenship implies departing from the idea of all citizens as simply equal individuals and instead combines the principle of universality of rights with the demand of differential treatment for groups, which have differing values, interests and needs. In the post-Marshallian debate on citizenship it may be seen as an attempt to redefine citizenship in a way appropriate to a social and multicultural democracy taking for granted three types of rights, namely civil, political and socio-economic by adding a new component of cultural rights. The central aim is to achieve equity for all members of society, whereby "equity means resolving the tension between formal equality and real difference by means of mechanisms to ensure participation of disadvantaged groups in decision-making and by means of special policies to break down barriers and meet varying needs and wants."<sup>48</sup> The "differentiated citizenship" demanding the articulation of 'special' rights for differentiated treatment in order to undermine oppression and disadvantage or "communitarian" citizenship demanding 'group' rights and mechanisms for group presentation however, is problematic because of the potential tension between individual and collective rights, and indeed the principles of democratic society, equality and liberty.<sup>49</sup> If multicultural citizenship, so far mainly an abstract characterisation, has a potential, solutions have to be found for practical problems such as how to measure

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<sup>46</sup> Castles, S., 1994, *op.cit.*, p. 17.

<sup>47</sup> See among others Goldberg, T. D. (ed.), 1994: *Multiculturalism: A Critical Reader*. Oxford: Blackwell; Fish; S., 1997: Boutique multiculturalism, or why liberals are incapable of thinking about hate speech, *Critical Inquiry*, Vol 23, No. 2, pp. 378-395; García Düttmann, A., 1997: The culture of polemic: misrecognizing recognition, *Radical Philosophy*, Vol. 81, pp. 27-34; Kymlicka, W., 1989: *Liberalism, Community and Culture*, Oxford: Clarendon Press; Kymlicka, W., 1995: *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Oxford University Press; Kymlicka, W., 1997: Do we need a liberal theory of minority rights? Reply to Carens, Young, Parekh and Frost, *Constellations*, Vol. 4, No.1, pp. 72-87; Young, I. M., 1997: A multicultural continuum: A critique of Will Kymlicka's ethnic-nation dichotomy, *Constellations*, Vol. 4, No. 1, pp. 48-53; Gooding-Williams, R., 1998: Race, multiculturalism and democracy, *Constellations*, Vol 5., No. 1, pp. 18- 41.

<sup>48</sup> Castels, S., 1994: *op.cit.*, p.16

<sup>49</sup> Medved, F., 1998: Razprava o multikulturalizmu in individualnih clovekovih pravicah (Treatise on multiculturalism and individual human rights), *Razprave in gradivo* 33. Ljubljana: Inštitut za narodnostna vprašanja (Treatises and Documents, Institute for Ethnic Studies), pp. 269-278.

needs, how to secure participation, how to dismantle barriers and how to avoid favouring one group not creating reverse discrimination in a process. The precondition however, is securing public agreement on the need for change.

In recent years criticism of multiculturalism has mounted sharply, partially due to social trends such as rising unemployment, the scaling down of the welfare state and the influence of right wing politics. Moves to scale back multicultural policies sometimes defended that they play into the hands of extremists giving people the idea that minorities are receiving preferential treatment. Some newer policies are turning back to a moderate assimilationism. Together with critical analyses of multiculturalism in academic circles there has also been a renewed focus and reappraisal of the notion of assimilation.<sup>50</sup> It would be wrong however to view the criticism of multiculturalism purely as conservatism; it is confined neither to conservatives nor to members of the majority culture.<sup>51</sup> One of the objections raised is that multiculturalism views cultural differences as too absolute and too static and that this encourages reification of culture and a cult of difference. It may also give rise to competition for status and power and even to conflict between ethnic groups. It even triggers an us-too reaction because it allocates rights to some and not to others or it can unnoticeably stray into ‘new racism.’<sup>52</sup> Even in the face of this criticism few experts would argue a return to old-style assimilation policies. A redefined multiculturalism could still be a good guide in the new world order. In the long run, as Jürgen Habermas has argued, a democratic society has no alternative but to incorporate immigrants as citizens, even if this means institutional changes in major subsystems such as political and economic structure. He talks of two stages of assimilation, the first comprising acceptance of constitutional principles in which autonomy of the citizen is conceived so that what Rawls calls public use of reason is practised; the second means an assimilation which takes place on the level of ethnic-cultural integration, but which the state has no right to demand.<sup>53</sup> This is similar to the earlier Gordon’s model of gradual immigrant participation in different areas of society, where integration is seen as a process towards assimilation, distinguishing structural (economic, social and political) and cultural integration.<sup>54</sup>

Though terms in which policy objectives are cast differ from country to country, as well as areas it targets, policy debates and changes are taking place almost everywhere. In the European Union “fair treatment of third country nationals” has been outlined as one of the essential elements of common migration and asylum policy and further elaborated

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<sup>50</sup> Glazer, N., 1993: Is assimilation dead? *The Annals of the American Academy of Political and Social Science* 530, pp. 187-202.

<sup>51</sup> See among others Mitchell, M., Russel, D., 1996: Immigration, citizenship and the nation-state in the new Europe, in Jenkins, B., Sofos, S. A. (eds.), *Nation & identity in contemporary Europe*, London: Routledge, pp. 54-80. Collinson, S., 1993: *Beyond borders. West European migration policy towards the 21<sup>st</sup> century*. London: Royal Institute of International Affairs; Schlesinger, A. M., 1991: *The disuniting of America. Reflections on a multicultural society*. New York: Norton & Company; Bissoondath, N., 1994: *Selling illusions. The cult of multiculturalism of Canada*. Toronto: Penguin books.

<sup>52</sup> See Ålund, A., Schierup, C-U. (eds.), 1991: *Paradoxes of Multiculturalism*. Aldershot: Avenbury.

<sup>53</sup> Habermas, J., 1993: Die Festung Europa und das neue Deutschland. *Die Zeit*, Hamburg, 28 May.

<sup>54</sup> Gordon, M. M., 1964: *Assimilation in American Life. The Roles of Race, Religion and National Origins*. New York, NY.

upon in the communication on Community immigration policy.<sup>55</sup> A good deal of consensus prevails that integration is a two-way process, involving adaptation on the part of both immigrant and society, and on what structural integration implies. Immigrants should benefit from comparable conditions, living and working, to those of nationals, including voting rights for long-term residents. The appreciation of the value of pluralism is based on the recognition that membership of society is based on a series of “rights but also responsibilities” for all of its members, nationals or migrants. There should be respect for human rights and human dignity, respect for cultural and social differences and for fundamental shared principles and values. Furthermore, The Charter of Fundamental Rights of the European Union<sup>56</sup> is seen as to provide a reference for the development of the concept of “civic citizenship” in a particular Member State for third country nationals. Enabling migrants to acquire such a citizenship after a minimum period of x years might be sufficient guarantee for many migrants to settle successfully into society or as a first step in the process of acquiring the nationality of the Member State concerned.

In this sense the basic standard for inclusion is based on a specific notion of society, which can be interpreted within the framework of Reiner Bauböck’s political concept of society. This is wider than the notion of polity including only citizens, whose state membership is of a political rather than social nature, and narrower than sociological concept of society as an open system of interaction and communication. The outline of political concept of society can be determined by applying the norm of democratic legitimacy to the societal instead of the political sphere. From the perspective of individuals, a society in this sense comprises all whose social position durably relates them to a certain state so that they depend on this state for their rights and protection. From the perspective of the state a society is a basic ensemble of populations permanently affected by its collectively binding decisions.<sup>57</sup> The convergence between rights and duties of resident aliens and of citizens demonstrates that the basic democratic norm of legitimacy applies to a resident population rather than only to those individuals who are formally recognised as members of polity. The boundary of this concept of society is the result of the exercise of political power and the envisaged ‘civic-residential citizenship’ the result of the social relationship with the state. This would be a kind of ‘denizenship’, distinct to full citizenship, especially concerning the right to indefinite abode and voting rights, particularly at the state parliamentary level.<sup>58</sup> The boundary of polity can be controlled so that individuals who are not admitted are excluded regardless of their social relation to the state. Admission to the polity remains under the control of the receiving state, because the essential qualifying criterion for naturalisation is not the period of residence but a credible change of loyalty. In this view the boundaries of polity do not relate to a territory or to the population living there but emerge in interaction and confrontation with other polities. This membership is a legal one, the argument of

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<sup>55</sup> Communication from the Commission to the Council and the European Parliament on a Community Immigration Policy, Brussels, 22. November 2000 COM (2000) 757 final (...)

<sup>56</sup> Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities* C 364, 18.12. 2000.

<sup>57</sup> Cf. Bauböck, R., 1994, *op.cit.*

<sup>58</sup> See Locke, J., 1956: *The Second Treatise of Government and A Letter Concerning Toleration* edited with an introduction by J. W. Gough, New York: Macmillan; Hammar, T., 1990: *Democracy and the Nation-State. Aliens, Denizens and Citizens in a World of International Migration*. Alershot: Gower.

mutually exclusive nature of sovereignty, still the conventional wisdom that supposedly justifies discretionary procedures of naturalisation and the legal discrimination of foreigners. Liberal democratic legitimating requires inclusion of the whole society in the sense that distribution of rights must correspond to the impact of political power and in the sense that the polity be genuinely open for the admission of everybody who can claim membership in society. Of course, it is possible to argue that the acceptance of foreign status is voluntary, the result of a social contract gained by admission to the territory or not to choose to naturalise. In contrast to automatic acquisition of nationality at birth, a citizen does not chose to be a member, so one could say that from the perspective of a liberal democratic polity inclusion seems more important than choice. The norm of inclusiveness thus supports an opposition to restrictive naturalisation rules. Naturalisation however is, or ought to be, an act of consent based on choice.

Naturalisation by definition is a transition from one legal status to another. The etymological roots of the term suggest the receiving group to be a natural one and require that new members of a 'nation' change their nature. This implies a change of identity, thus a change of culture as the second nature.<sup>59</sup> However, frequently the term appears to be closer to the residential principle, naturalisation signifying a 'natural' way of obtaining a similar status, as it is 'natural' for nationals. In legal traditions naturalisation meant extension of certain rights and privileges rather than a change of identity.

Table 1: Criteria/conditions for facilitated and impeded naturalisation (nationality by application)

	<b>Facilitated admission</b>	<b>Impeded admission</b>
	Shorter period of residence and/or optional admission	Additional criteria and conditions for integration Emphasis on discretion
<b>Territorial (<i>ius soli</i>)</b>  Birth Residence ( <i>ius domicili</i> )	<ul style="list-style-type: none"> <li>➤ Birth</li> <li>➤ (Long-term) residence*</li> <li>➤ Former citizenship</li> </ul>	<ul style="list-style-type: none"> <li>➤ Economic integration</li> <li>➤ Social integration</li> <li>➤ No threat to public order</li> <li>➤ "Communicational" language skills</li> </ul>
<b>Descent (<i>ius sanguinis</i>)</b>  "Ethnic" origin  Family membership	<ul style="list-style-type: none"> <li>➤ "Co-ethnic" immigrants</li> <li>➤ Marriage/registered partnership, extended to family members and adopted</li> </ul>	<ul style="list-style-type: none"> <li>➤ Proficiency in language</li> <li>➤ Cultural integration</li> </ul>
<b>Political consent</b>	<ul style="list-style-type: none"> <li>➤ Special services for the state ("national interest")</li> <li>➤ "Political" refugees</li> <li>➤ Stateless persons</li> </ul>	<ul style="list-style-type: none"> <li>➤ Political knowledge</li> <li>➤ Loyalty</li> <li>➤ Renunciation of previous citizenship</li> </ul>

\* >10 years of "lawful and habitual" residence: see European Convention on Nationality, 1997: ETS no.166, Article 6 (3).

<sup>59</sup> See Fehér, F., Heller, A., 1994: Naturalization or "Culturalization"?, in Bauböck, R. (ed.), *op.cit.*, pp. 135-147.

Three principles are underlying laws on nationality: territory, descent and consent (see Table 1). The first two are passive and objectivist mechanisms of attribution, no state relies entirely on either one or the other. Territorial principle minimises the potential incongruities between the population over which territorial sovereignty can be rightfully exercised and the collective of those formally recognised as citizens. This relation can be stabilised by two criteria: birth in the territory and residence/domicile, referred to as *ius domicili*.<sup>60</sup> Descent operates both, in the reproduction of membership and non-membership, citizens are then a self-reproducing group; territory and people being two separate fields of sovereignty. *Ius sanguinis*, the prevailing rule, has in fact often been combined with *ius soli*, cumulatively or alternatively, either for restriction or extension beyond descent and territory. Citizenship is not an ascriptive feature, still it is acquired at birth and intended to last for life.

All states' rules for naturalisation emphasise this temporal stability by inhibiting frequent change. There are political reasons for enhancing stability, the exercise of political power is territorially constraint by territorial sovereignty but it does not require all who are liable to obey the laws to be bound to the state by any lasting ties. However, any system of government calls for a durable relation between the state and those to whom it can impose obligations. There is also a strong democratic argument in favour of stability. For citizens to participate in political deliberation there needs to be a common temporal perspective.

Consistent with the principle of descent, which appears the most obvious, is extension of citizenship to 'co-ethnics' and those who become new members of families already composed of citizens, frequently referred to as "extraordinary" or "facilitated" naturalisation. Naturalisation depends on voluntary application by an individual who wants to become a citizen, yet admission depends on extended dominating principles. An individual applies for membership and the State authorities, empowered by internal consent of present citizens, grant it. Admission is consensual only, if both sides are free to say no.

Naturalisation criteria may be split into two groups: on the one hand those which are used in order to facilitate naturalisation and on the other hand conditions which are imposed to make naturalisation less easily accessible. The latter more than the former are the so-called integration conditions.

Currently there are no accepted standards for integration and naturalisation, states' laws and practices diverge significantly. In the endeavour of attaining seamless integration, states bound by the European Convention on Nationality shall provide for the "possibility of naturalisation of persons lawfully and habitually resident on its territory."<sup>61</sup> The threshold of residence is set to ten years. In combination with facilitating criteria and acceptance or at least tolerance of multiple nationality this is a substantial improvement. In my view however, it is not the far stretching measure required for legal and societal integration. The challenge ahead as I see it is perhaps not to look for the perfect solution

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<sup>60</sup> Hammar, T. 1990, *op.cit.*

<sup>61</sup> European Convention on Nationality, 1997: ETS no.166, Article 6 (3).

to national and international law on nationality, but to find a concept of co-existence positive and giving for all involved.

***Humankind has no nationality***  
(Lord Russel-Johnston, 1999)

So, where does this leave me as a person? This has been in many ways a personal report. I have attempted to show that my nationality is only one of my identities, and as the references of my identity grow it would be more correct to talk about my "differentity", which is an antithesis of difference of which some varieties of multiculturalism are so much about.

The challenging tensions between nationality, integration and multicultural sensibility have changed our understanding of national membership, are changing it or ought to change it because of our changing understanding of state and the nation and self-understanding. These tensions take place not only within the classical state but also at the international and supranational level. A focal point of the latter discussion concerns citizenship of the European Union, a first attempt to construct a citizenship beyond the nation-state. Much has already been said about it; what it might add and to whom with respect to rights and duties almost forgotten, and who might lose.<sup>62</sup> But perhaps the main question is why a new concept of citizenship has been established. Lacking ontological independence, it remains a political riddle. In a world of personal differentity and fragmented state sovereignty however, where states cannot even pretend anymore to have control over their most elementary functions, provisions for material welfare and individual and collective security, a new concept of citizenship might be a fitting project. Nationality, being "also an integral part of the identity of the State,"<sup>63</sup> leads me to believe, we ought to rethink not what is the 'essence of the nation' but rather what is the 'essence of democracy'. In an integrated Europe there will be no *demos* without democracy. Hence, I would reaffirm that democracy, in the sense of majority rule, presupposes some fundamental pre-legal conditions and some fundamental normative political and moral principles. Democracy as a political institution needs a civil society. This does not need to coincide with a *Schicksalgemeinschaft*, a homogeneous ethnic and linguistic community. It is time for Europe, her states and peoples itself to integrate and leave behind the nation of blood and soil. "We have to find a way to reach beyond."<sup>64</sup>

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<sup>62</sup> See e.g. Kojanec, G., 1998: The citizenship of the European Union, in *Aan de ...op.cit.* pp. 133–138; D'Oliveira, J. H. U., 1993: European Citizenship: Its Meaning, Its Potential, in Monar, J., Ungerer, W., Wessels, W. (eds.): *The Maastricht Treaty on European Union*. Brussels: University Press; O'Leary, S., 1996: *The Evolving Concept of European Citizenship*. The Hague: Kluwer Publ., O'Keefe, D. O., Twomey, P. (eds.), 1993: *Legal Issues of the Maastricht Treaty*. London: Chancery Press; Soysal, Y. N., 1994: *Limits of citizenship. Migrants and postnational membership in Europe*. Chicago: The University of Chicago Press.

<sup>63</sup> Krüger, H-C.: *Opening Speech, 1<sup>st</sup> European Conference on Nationality* "Trends and Developments in National and International Law on Nationality," Strasbourg, 18 and 19 October 1999, in CONF/NAT (99) PRO 1, p. 9.

<sup>64</sup> Lord Russel-Johnston: *Humankind has no nationality*; Inaugural speech to the Parliamentary Assembly, Strasbourg, 25 January 1999, in *Humankind has no nationality*, Speeches 1999, Council of Europe Publishing 2000, p. 10.





# IDENTITY AND NATIONALITY

## Report by

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## Summary

### Nationality and identity

Europe nowadays has two aspects: integration of states and building a human-rights zone. As an element of civil status, nationality contributes both to the individual's identity and to the establishment of a bond between an individual and a state. These two aspects, in the context of the individual, raise questions as to the link between nationality and identity - that is to say, to what extent, through nationality, can a person change whilst still remaining the same person?

This requires us to take account of changes and developments in the substance and nature of nationality law, particularly with regard to the corresponding development and influence of international law. We have to start by acknowledging that nationality law, as an objective element in the status of persons, is itself influenced by the development of the law relating to civil status and that treating sense of identity as a source of nationality law tends to blur the distinction between laws and rights.

Nationality constitutes an objective component of identity. Expressing the bond between an individual and a legal community, it is traditionally for the state as lawmaker to confer unilaterally as it sees fit and, depending on each country's particular approach, is subject to a number of rights and obligations of the individual.

For more than half a century the definition of nationality in international law has scarcely changed. Progress in the subject is essentially a matter of standardising national law and raising legal standards. At the same time, statements of general principles, particularly the European Convention on Nationality, are providing greater legal certainty in the matter for the individual.

Objectively therefore nationality has an inalienability both from the individual's and the state's point of view, but also a relativity – an evolving aspect and an emotional dimension – which the traditional analysis of nationality law is too limited to accommodate.

For a number of years, the sense of identity underlying nationality has been recognised as a factor in integration. This idea, pivotal to the nation state and developed in the 19<sup>th</sup> century, involves the feeling of belonging to a community and being legally and *de facto* recognised by the community as one of its members. The relatively vague

concept of integration, if distorted by nationalist feeling, can however lead to the worst excesses.

International law, as it develops, would be capable of containing such excesses, in particular by rationalising and securing the role of nationality within the national legal system. Here, the European Convention on Nationality can set a good example. Furthermore, the general principles it establishes open up the possibility of treating nationality as a personal right.

The right to nationality would then reflect identity, the individual's attachment to one nationality and rejection of others. In the light of its traditional definition, nationality could be rooted in different social factors, themselves affected by the transformation and globalisation of our society.

Recognition of the general principle of a right to a nationality, that right being guaranteed by various legal mechanisms, thus constitutes an essential factor in personalisation of nationality law. This is a marked trend in which identity becomes a source of nationality based on objective elements to do with private life and individual choices, these being given legal acknowledgement. Thus the individual's right to claim a nationality is recognised.

Having become part of the patrimony of the individual, should the right to a nationality be restricted so that it is not misused? To deal with this, the doctrine of abuse of right is a traditional mechanism that is both well-known and widely exercised. More specifically, it is around the nationalist claim that nationality law will in future have a duty to provide answers, in order to prevent excesses associated with the identity issue degenerating into social exclusion and creating legal instability and legal uncertainty.

Without fundamentally challenging notions currently accepted in nationality law, recognition of a legal pluralism which accommodates social and emotional reality could usefully help standardise nationality law and promote community of values within the Council of Europe and beyond.

Prudent broadening of nationality law, which is a widespread tendency, would protect expression of individual identity within a diversified and coherent community, thus reconciling individual fulfilment with the general interest.

## **Nationality and identity**

Minorities...are almost always in the right (Sidney Smith, 1771-1845).

Qui parle Europe a tort, notion géographique [He who speaks of Europe is mistaken; it is a geographical idea] (Otto von Bismarck, 1815-1898)

## **INTRODUCTION**

Anyone looking for a pattern to European construction might see it as an endlessly repeating cycle. So could there be a Hegelian interpretation of nationality law in terms of a personal right bound up with identity? This is the issue as regards nationality, its essence and functions.

Legal identity would seem to be primarily a question of civil status<sup>65</sup>. Fundamentally it embodies the notion of guaranteeing recognition of someone's personal and official status. Contrariwise, there are rules to prevent the anxiety of lack of identity or confusion of identity<sup>66</sup>.

Nationality in the legal sense could also have several definitions. To put it simply, if we connect nation and nationality, we can arguably accept that "the nation is defined by its aim of transcending the citizenship of individual, biological (or at least perceived as such), historical, economic, social, religious or cultural affiliations and treating the citizen as an abstract individual" according to an ideal model that takes no account of specific allegiances<sup>67</sup>. At the political level, the debate has been, and sometimes still is, about the distinction between the national view and the popular one. We can, nevertheless, infer that nationality transcends individuality through a legal and political bond which connects an individual to a sovereign state. Such a definition, however, presents difficulties in terms of the existence and recognition of this bond, particularly when legal rules conflict with it, or when the state concerned does not have sovereignty or does not exist.

So the link between nationality and identity seems obvious in principle, but how far does it go in terms of substance, precision and completeness?

At the legal level, there are various approaches to nationality and identity though their most widely accepted, yet very debatable, legal definition scarcely suggests it. By considering a number of issues this study aims to explore the limits to the connection between nationality and identity in terms of their variability, and poses the question: to

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<sup>65</sup> See definition given in the Dalloz dictionary of legal terms, 8<sup>th</sup> edition, 1990: combination of elements from which it can be established that a person is actually who he claims to be or is presumed to be (name, first names, nationality, line of descent, etc.). According to Locke perception of identity is of what he calls "the first act of the mind" ("An Essay concerning Human Understanding", Wordsworth Classics, IV.I.I).

<sup>66</sup> There are also other forms of identity: digital/cyber, anthropological or biological identity.

<sup>67</sup> D. Schnapper, "La communauté des citoyens", p. 49, but such a link could be disputed, contested. The nation is actually external to nationality. Membership of a nation is not a matter that comes under complex rules of nationality law, whose development is relatively recent.

what extent can someone change nationality and yet remain the same person?<sup>68</sup> Primarily it will focus on nationality law as a branch of law, but we shall also consider the relationship between different countries' systems of law and how they apply depending on nationality of the individual<sup>69</sup>.

Nationality law developed in the 19<sup>th</sup> century with the emergence of nation states, breaking with the former system of overlord and subject<sup>70</sup>. This development resulted in a shift towards individual identification with a national community, a group of individuals.

In this study it is impossible to examine the precise consequences of the French Revolution, particularly as a phenomenon giving rise to national identity, or to consider the effects of dissemination of its concepts abroad, though we shall look at the dissemination of its political system. However, the wording of the 1789 Declaration of the Rights of Man and the Citizen suggests that the principles in it were certainly not intended for a community of people enclosed within national boundaries and united solely by the bond of their nationality. The aim was to reveal to all people and citizens how, politically, to achieve their freedom by taking their destiny into their own hands, respect for others and the separation of powers being of particular importance.

The birth of nation states occurred at the same time as the birth of imperialism in the 18<sup>th</sup> and 19<sup>th</sup> centuries<sup>71</sup>. Later came their gradual collapse, a "disaster" linked to biological, aristocratic and cultural nationalism, as states developed and reorganised, with the absence of democratic change opening up the way for challenges to political uniformity.

The emergence of nation states involved gathering scattered and disparate entities around a cultural identity. Here I see the Romantic Movement as having played a role, notably in Germany and Italy, and then in France and Great Britain, which glorified Romantic sentiment. Thereafter, especially in Europe, two world wars demonstrated the vanity and perhaps the emptiness of patriotism, even though this was perhaps not the sole trigger factor in the conflicts.

Unstable borders and sedentary population showed in the 19<sup>th</sup> and 20<sup>th</sup> centuries that the individual did not have control over his nationality, and that nationality imposed more obligations, in particular military obligations, than it conferred rights.

The end of the second world war marked the beginning of a change based on the establishment of stable borders, and this remained the situation until 1989, in part due to geopolitical polarisation around two blocs, and increased population movement for essentially economic reasons.

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<sup>68</sup> As S. Ferret puts it in "Le philosophe et son scalpel. Le problème de l'identité personnelle", Editions du Press, 1993. See also Descartes, "Méditations philosophiques" in Oeuvres Philosophiques, published by F. Alquier Garnier, 1967, specifically p. 142 et ff.

<sup>69</sup> Such questions essentially come under public and private international law.

<sup>70</sup> In this connection see P. Weil, "L'histoire de la nationalité française: une leçon pour l'Europe", in "Nationalité et citoyenneté en Europe", P. Weil and R. Hansen eds, published by La Découverte, 1999.

<sup>71</sup> Cf. A. Arendt, "Les origines du totalitarisme", Coll. Points, Vol. II, p. 270.

This gradual shift, associated with different aspects of European construction, the strengthening of international law and its involvement in international relations and also the development of individual rights, led to a change in nationality law. An objective component of personal status, nationality law has followed the development of civil status (I). This clear process, from which the concept of identity derives directly, and even more so the concept of personal identity, raises questions about nationality law's entering the sphere of strictly personal rights, of personal patrimony (II).

As an element in the individual's identity, nationality has a social and legal dimension. This study will deal exclusively with the legal dimension, even though we cannot ignore the fact that nationality law itself rests on social factors.

#### 1. Nationality as an objective element in identity

Although nationality constitutes an aspect of a person's status, the fact remains that it is relative<sup>72</sup>, personal<sup>73</sup> and, lastly, comes under the jurisdiction of the state<sup>74</sup>. It therefore helps identify, designate and define the individual<sup>75</sup>.

As an element in identity (A), nationality is fundamentally objective in character. But it is also a factor in politico-legal integration, which is a matter for the collective sensibility (B), which has a say in such identity.

#### A. Nationality as an element in identity

Nationality is a political issue because it goes beyond the individual and refers to a community and hence to identification, to the feeling of belonging to that community. This prompts two sets of questions on integration: how does the state gauge degree of assimilation, and how do we assess the strength of someone's feeling of belonging to a community, a culture, an identity and a nationality? Which factors lead a person to identify himself as and claim to be of such and such a nationality? It is difficult for the law to deal with feelings and evaluations of this kind: it is one thing to say "I am French", which usually means "I feel French", quite another to be legally so, and yet a third, recognised in the law of some countries, to be recognised as such by the state<sup>76</sup>.

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<sup>72</sup> It continues to evolve, being linked to events.

<sup>73</sup> It is handed down on the principles of *ius sanguinis* [a person's nationality at birth is the same as that of his natural parents] and *ius soli* [a person's nationality at birth is determined by the territory within which he was born], in the same way as name, property, etc. are passed on according to special rules.

<sup>74</sup> It is a matter for the State, which draws up the applicable law, and which has prerogatives such as naturalisation (in the broad sense), forfeit or release from the bonds of allegiance.

<sup>75</sup> According to Locke, the person is "an intelligent, thinking being, capable of reason and reflection ..... ." (Essay concerning Human Understanding, II, 27, § 9 p. 264); in contrast, Hume believed that, while personal identity cannot be found, the same is not true of the sense of identity. Hume denied any reality in identity whilst recognising the existence of the sense of identity (see P. Guenancia, "Identity", in D. Kambouchner, "Notions de philosophie", vol II, Gallimard 1995, p. 563 et ff.

<sup>76</sup> That is to say, to take appearances into account as well as to erect barriers on purely discriminatory grounds.

We could start from the French experience, which has evolved, for reasons of varying obviousness and varying legal acceptability, and the European, national, international and supranational experiences which can be brought to light. It would then be interesting to compare the approaches to and influences on nationality law, the various “philosophies” underpinning European organisations. Thus from the outset, the European Union, stemming from the ECC, was a supranational integrating organisation whose function was to promote democracy, peace and stability in Europe through the development of economic exchanges. Integration as effected by the European Union is characterised by the development of European citizenship<sup>77</sup> guaranteeing unrestricted intra-Community circulation for people. We have to ask ourselves to what extent that challenges the meaning and value of the traditional concept of nationality<sup>78</sup>.

In another direction, the Council of Europe has developed a form of co-operation enabling better co-ordination of legislation and guaranteeing the sovereignty of states in this field, whilst at the same time highlighting general principles designed to resolve conflicts of law, provide guarantees in the granting of nationality and finally place controls on state sovereignty so as to preserve the fundamental principles attached to personal rights. Here, there are undeniable links between the 1997 European Convention on Nationality and the European Convention on Human Rights, whose principles are further developed by its Court’s case law.

Developments in inter-state relations, the socio-economic part played by demography, and the influence of foreign law all play an additional part in the evolution of national laws, as can be seen in Germany, Switzerland, Sweden and so on.<sup>79</sup>

Nationality law is therefore bound up with political issues, but at the same time it extends beyond them. Nationality law has a dynamism of its own connected to the image of nationality, to expression of a feeling of belonging or exclusion within a community.

So nationality law contains a psychological and emotional element of belonging within a community of individuals - recognition of self and of others<sup>80</sup>. Professor Paul Lagarde has said that “French nationality is uncertain”<sup>81</sup>; it seems to me that any nationality is uncertain<sup>82</sup>.

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<sup>77</sup> Shown on passports for example, or which finds expression in European and some national elections, but which derives from belonging to a member state.

<sup>78</sup> Europe is characterised by two not necessarily contradictory trends which certainly affect the states and the nations they embody: supranationality and regionalism, which sometimes borders on regional nationalism. The most noticeable effect is to blur the differences in civil and political rights between citizens regardless of which state they are in (freedom of residence, establishment, law, entry to certain areas of public employment, exercise of certain civic rights, etc.).

<sup>79</sup> Circumstances relating to progress towards major reform of nationality law in these countries vary, but it could be said that they concern States traditionally attached to the concept of the uniqueness of nationality and follow quite similar trends. However, we are not in a position to elaborate further here.

<sup>80</sup> To quote Levinas’ famous dictum.

<sup>81</sup> Cf. P. Lagarde, “La nationalité française”, Dalloz, 3<sup>rd</sup> edition.

<sup>82</sup> It is sometimes difficult to be certain about a person’s situation with regard to nationality law because legal mechanisms may only take factual considerations into account – as in the case of a mechanism for automatic acquisition of nationality on the basis of residence in the country concerned.

The definition of nationality in the Council of Europe's legal system is in large part bound up with the *Nottebohm* judgment<sup>83</sup>, which defines nationality as a "social fact of attachment" which can be based on material, tangible or current factors but also on very long-standing ones independent of the will or even consciousness of the individual and relating to an ancestor. Such social facts of attachment are catered for in law, notably in the conditions governing eligibility for nationality. But they also go beyond law, as the ICJ held in the above-mentioned judgment. This is also recognised in the Council of Europe's 1997 Convention on Nationality.

Certain states which came into being following the break-up of the former USSR wanted intended to restore the nationality law of half a century earlier. Such an approach emphasises historical continuity, but has the disadvantage, recognised by the national authorities, of excluding a part of the population which has been settled in the country for several generations. The fact is that, despite active integration policy, access to nationality for such "non-citizens" remains limited.

The effect of strengthening legal mechanisms at the international level has thus been to establish a true right to nationality which echoes factual considerations that can arise with any integration process: family life, marriage, line of descent (whether natural, legitimate or adoptive), occupation (the fact of doing a job which benefits the host state), or having been settled in the country for a certain period. This right to nationality is reinforced by the principle of legal certainty, itself at the heart of European Court of Human Rights case law.

On the other hand, can we talk of actual certainty when there remain nationality uncertainties with multiple nationality and positive or negative conflicts of law posing obstacles to acquiring another nationality or relinquishing one's original nationality?

If we look at nationality from the point of view of civil status, as an element of identity, we then have to consider the question of inalienability<sup>84</sup>. It will then be possible to offer a view on relativity of the principle.

#### 1. Is nationality inalienable?

The principle of inalienability of status, lending permanence to individual identity, ought to apply to each element of identity and particularly to nationality, from the standpoint both of the State and the individual.

##### 1.1 Prohibition on arbitrary deprivation

Arbitrary deprivation can cause statelessness, but more generally what we have here is rejection of any form of arbitrariness. Arbitrary deprivation, which is essentially a punishment imposed by the state, is precluded by Article 7 of the 7 November 1997 convention and Article 14 of the European Convention on Human Rights prohibiting any form of discrimination.

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<sup>83</sup> ICJ, 20 April, 1955, *Nottebohm*, ECR. 55, p. 4

<sup>84</sup> It is commonly accepted, with a few rare exceptions, that a person's status is inalienable.

Statelessness, which is a failure of nationality law resulting from negative conflict of law, appeared in the 19<sup>th</sup> century with the nation states: “Nations had made their appearance on the historical scene and had become emancipated when peoples acquired an awareness of themselves as cultural and historical entities occupying territory with permanent boundaries, territory where history had left visible traces and the culture represented the fruits of their ancestors’ labour and whose future was bound up with the development of a common civilisation”<sup>85</sup>.

The same goes for the Convention’s rejection of arbitrary decisions on nationality when they involve withdrawing it.

But mechanisms such as those provided for by Articles 25 and 25-1 of the French Civil Code, which enable French nationality to be removed from someone who, after acquiring it, commits serious offences against the state or nation, can be found in most national law. Is this a form of differentiation between citizens, with some being considered more citizens than others? Although such provisions have not been declared unconstitutional, we have to accept that there is still room for progress. That would also raise legal standards.

## 1.2. The inalienability of nationality

From the individual’s point of view, there is the question whether nationality constitutes a right which is transferable<sup>86</sup>. I am tempted to reply in the negative. Nationality is transferred by operation of the law, according to *jus soli*, or *jus sanguinis* as developed around the collectively claimed bond or social fact. From this point of view, sentiment originates in an external fact, namely the law. But is this all there is to it?

Nationality cannot be traded. It may not be the object of agreement or transfer (unlike name, domicile and so on). It may be transmitted, notably by *jus sanguinis* regardless of any manifestation of will, from generation to generation, and also regardless of any objective bond of attachment. To come to the facts of the Nottebohm case, we can ask to what extent Nottebohm did not “negotiate” his naturalisation with Liechtenstein. However, such an approach is clearly not unassailable.

Conversely, nationality may remain “dormant” because the state embodying it has disappeared, at least temporarily. Nationality is reinstated when that state returns to the international political scene.

The question then arises of people who have “temporarily” lost their nationality, or who, where a nationality does not exist - or at least is not yet - in existence nevertheless lay claim to it. Undeniably such nationality is an original ingredient of identity, being essentially based on feeling or a non-existent “virtual” legal fact.

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<sup>85</sup> Cf. A. Arendt, *op. cit.*, p. 181

<sup>86</sup> Cf. the Council of Europe CJ-NA Committee of Experts on Nationality report by A. Walmsley.



This question also has a bearing on relations between private individuals since the effect of nationality is to determine which law applies in certain conflicts of law. Under French case law, when an individual has several nationalities, one of which is French, then only the French nationality is taken into consideration. This rule has been rightly justified on the ground of legal certainty. Discounting mere feeling, it is concerned with precision of identity<sup>87</sup>, regardless of actuality of nationality, since any other approach would involve a deprivation of French nationality not provided for in law<sup>88</sup>.

However several trends appear to run counter to this analysis and ultimately challenge the principle to some extent (see below).

## 2. Nationality a relative legal fact

To be a proper part of identity, nationality - the social and legal fact of attachment – needs to be immutable, in the way that, in theory, name, first name and sex are. These three ingredients of identity, like nationality, can be assumed<sup>89</sup>. This is of varying uncommonness, but the fact that it happens requires that account be taken of it.

Several things can lead to nationality being assumed as an element of identity. Without being exhaustive, we could cite population displacement, developments in law itself, the globalisation of law, mutual influence of legal systems and, on a political level, the importance of nationality as a social and economic factor more – I would suggest - than a legal one, and finally heightening of national feeling.

### 2.1. Nationality, an evolving fact

A legal bond made up of “a social fact of attachment, a genuine connection of existence, interests and feelings, together with the existence of reciprocal rights and duties” (Nottebohm) has components that affect the permanence and uniqueness of nationality. From this point of view, nationality takes on a major circumstantial dimension, subject, what is more, to sociological discussion.

Every social aspect of attachment (occupational, intellectual, family-related, sporting, etc) constitutes a factor in nationality and in nationality developments, and freedom of movement and developments in law or international relations mean the various aspects can be present simultaneously in various combinations. How can the principal social fact of attachment be determined when an individual carries on his work in several countries each of which is of equal importance all the time, when he is involved in political life and civil society in all these countries and when he has interests and family in all of them?

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<sup>87</sup> Cf. Civ. 1<sup>st</sup> 17.06.68 KASPAYAN RCDP 1969, p. 59 note BATIFFOL, GADIP no. 4, p. 378, 1<sup>st</sup> civ. 16.03.1999, JCP 99, IV, 187 etc.

<sup>88</sup> See J. Dessappe, “La nationalité étrangère devant le juge français”, RCDIP 1959, p. 201 et ff. Seeking effective nationality therefore includes an arbitrary dimension (the opposite approach from the Nottebohm judgment).

<sup>89</sup> Even invalidating the British maxim that parliament can do everything except change a man into a woman or a woman into a man. In a general sense, the role performed by the European Court of Human Rights will be retained in this change, guided particularly by the desire to protect privacy.

Politically, the individual's circumstances may also be affected by state succession, where a state has been either absorbed or divided up. Such events give rise to particularly complex situations, impossible to examine here. Suffice it to note that they are not covered by international law or national jurisdiction, and thus lead to statelessness or multiple nationality with no account being taken of the realities of social attachment, which can in turn bring subsidiary mechanisms into play<sup>90</sup>. But whatever criteria are used, they ought always to at least take into consideration a factor external to the state - the individual's feelings of identity.

## 2.2. Nationality, the product of an emotional bond

Today, nationality is considered a factor in integration. During debate in France at the time of the 1993 and 1998 legislative reforms, the fundamental issue of *jus soli* was not challenged and early declaration in the case of 13-18 year-olds replaced the former "manifestation of will" made at the age of majority. Early declaration demonstrates a process of attraction, is a token of assimilation<sup>91</sup>. For all that, legal recognition of a "sufficient" bond cannot be proof positive that the bond is a substantive one. Law in general - like states - is disinclined to endow a feeling with legal title.

In my opinion, taking personal feelings into consideration is relatively recent. Moreover, it is affected by change: society, relationships between individuals and relations between states have changed, particularly on the European scale<sup>92</sup>, no doubt because one nationality's feelings do not preclude another's. Doubtless also because the investigations that taking into consideration a naturalisation applicant's feelings would require would probably involve arbitrariness.

Multiple nationality provides a good example of legal pluralism. "Dual nationality influences sense of identity"<sup>93</sup>. In my opinion, the problem is not dual nationality in itself<sup>94</sup>, but how dual nationality is perceived. Hence the spectacular changes in Germany, Sweden or Switzerland, already in place, under way or still to come.

### B. Nationality, a factor in (political/legal) integration

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<sup>90</sup> Which may be arbitrary in that they are not concerned to prevent or remedy a situation of statelessness and ignore the social fact of attachment.

<sup>91</sup> The idea put forward in 1993 was that no one should become French "without wishing to or being aware of it". At the time, before the Nationality Commission, Professor P. Lagarde pointed out that "what the legislator takes into consideration is the strength of the bonds between an individual and the community. If the bonds are very strong, then nationality will be given to the person without his being consulted. What the individual wants plays no part in it. On the other hand, if the bonds are real but not sufficiently strong, then an express wish on the part of the interested party will be needed to make up for the inadequacy of the bonds".

<sup>92</sup> Particularly under the aegis of international organisations, as part of European construction, the legalisation of international relations, controlling the balance of power and seeking peace, - in other words, establishing mutual trust so as to make nationalist power politics unacceptable. National ambition is shifted into other fields such as art, culture, sport, scientific research, almost as a kind of folklore.

<sup>93</sup> D. Gutman, "Le feeling d'identité. Etude de droit des personnes et de la famille" *Bibl. de droit privé*, volume 327.

<sup>94</sup> Which I consider to be almost inevitable in principle.

“Everywhere where nation states had been created, emigration had stopped”<sup>95</sup>. From the sociological point of view, the nation state represented the body politic of emancipated European peasant classes, which raises questions about the consequences of that class’s disappearance as the numerically largest class, or about the consequences of the army - to which the peasantry were naturally attracted and where they made good - becoming a career organisation. This is why during the 19<sup>th</sup> and 20<sup>th</sup> centuries, the army, as an integrating factor, drawing heavily on the rural classes<sup>96</sup> and maintained by general conscription, made nationality the implicit link between homeland (the native soil) and imperialist nation, and between the citizen (the subject) and the endangered nation.

The state is a long-standing concept and structure, whereas national awareness appears to be a recent phenomenon<sup>97</sup>. The state was supposed to be the supreme protector of everyone on its territory regardless of nationality. The naturalisation decrees of France’s “ancien régime” represented more an official recognition than an exclusive and necessary manifestation of an integrated national community.

An odd feature of the Declaration of Rights of Man and the Citizen, at one and the same time a universal model and a national achievement, is precisely its being concerned simultaneously with man and the citizen. Surely the wording is an implicit rejection of nationalism<sup>98</sup>? Integration can be seen in purely political and legal terms as the acknowledgement of duties and exercise of rights within a community of values freely accepted and shared, one in which ideas of nationhood play no part<sup>99</sup>.

Of course, stability of population supports the social architecture. It is also a factor in the international legal order<sup>100</sup>, whereas mobility is a wealth factor but is difficult to handle in that it generates collective anxieties, particularly as regards the protection of national (ie collective) identity. There is no getting away from the fact that, although it is possible to define an individual precisely by his identity, it is more or less impossible to do so for a people<sup>101</sup>, other than by means of the legal bond which nationality arguably constitutes.

All these ideas fall within the emotional realm, and integration is the expression of a twin emotion: on the one hand, the feeling of being the national of a state and on the

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<sup>95</sup> A. Arendt, op.cit., p.271.

<sup>96</sup> Marx’s analysis.

<sup>97</sup> Linked in fact to the emergence of nation states, not as a concept, but as a political reality itself resulting from the substitution of the people for the monarch as the source of sovereignty, with adaptations in the case of monarchies which succeeded or survived the changes in the 18<sup>th</sup> and 19<sup>th</sup> centuries.

<sup>98</sup> This idea has support already: A. Finkelkraut, “La défaite de la pensée”, Folio Essays 1987, p. 23.

<sup>99</sup> There is also the very real difficulty, particularly for foreigners, of enjoying equal treatment, which is a fundamental legal issue with which the ECHR has regularly dealt. Restrictions on the rights of foreigners, viewed as exceptions necessitated by law and order, are difficult to square with the principles laid down in the various declarations relating to human rights.

<sup>100</sup> See, for example, the 1995 Council of Europe Framework Convention for the Protection of Minorities, adopted in Strasbourg on 1 February 1995. By accepting the concept of national cross-border minorities, the convention weakens that of nationality.

<sup>101</sup> Cf. A. Arendt: “The state was partially transforming itself from an instrument of the law into an instrument of the nation”, and one subject to its whims. A characteristic feature of the 19<sup>th</sup> century romantic movement was that it exalted the idea of a “national genius”.

other, that of being considered so by third parties, and not merely by fellow citizens (a much more ambiguous notion even though it may seem as broad). The feeling of integration is therefore both individual and collective. It can be linked to nationality law but nationality law is not superimposable on it.

Integration constitutes a particularly vague end-concept because of this twin emotional dimension. But above all, it is even more difficult to make it a source of law<sup>102</sup>. At the international level, the concept of integration reflects mutual trust amongst states with regard to common institutions with common objectives that are for the benefit of all.

That analysis is borne out at international and supranational level. European law signifies renunciation by states of an (ever increasing) proportion of their sovereignty, and a transfer of jurisdiction towards an international or supranational organisation. The indirect “competition” between the European Union and the Council of Europe results in the two areas taking different approaches to nationality law<sup>103</sup>.

Therefore, as far as nationality is concerned and by the rules it creates, international law has undermined the sovereignty of states in two ways: on the one hand, nationality is no longer for states to confer or withdraw as they see fit, even although it is still considered an essential prerogative, and on the other, it itself constitutes an international or supranational factor in identify and integration. Furthermore, it must be accepted that if states use nationality law as a means of integration, they could tacitly be creating a standard for individual and national identity.

The definition of nationality in the Nottebohm judgment examines integration in a purely objective way and without taking into account the sense of identity associated with the bond, thus misrepresenting a possible emotional dimension<sup>104</sup>. In contrast I see, and have set out to demonstrate, a connection between nationality and identity, and view nationality as a component of personality and as an element in integration within a community.

National legal theory on nationality law as regards multiple nationality illustrates this. The issues here are covered by a session of this conference, and so I shall not enlarge on the matter other than to say that the legal systems which rest on the principle of single nationality<sup>105</sup> are suspicious of multiple nationality, being convinced that complete loyalty to more than one state is not possible<sup>106</sup>.

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<sup>102</sup> It seems as pointless to seek to force someone to feel integrated into a community or a nationality as to force a nation to welcome in a foreigner. It would be more acceptable nowadays to have an approach based on interest: the individual seeks to integrate on account of his individual interest (and not just for the sake of acceptance into a community). The community is strengthened by being enriched with new members who are absorbed into the social corpus.

<sup>103</sup> That also poses problems of democracy which European Union institutions have overcome up till now.

<sup>104</sup> Even if there is reason to believe that M Nottebohm had acquired Liechtenstein nationality for opportunist rather than emotional reasons.

<sup>105</sup> Even states which exclude multiple nationality (or which accept it to comply with the 1997 convention) in general accept that some cases of multiple nationality do arise. In other words, they cannot ignore the phenomenon or, in certain cases, object to it. Further, in some such countries the law is changing (within the European Union and outside – some examples are Germany, Sweden, Norway, Switzerland – by

Nationality law's desire for and spirit of integration can be measured by the different methods of acquisition, the acquisition requirements and the implementation approach, which enables us to venture a tentative analysis grid based on objective criteria<sup>107</sup>. Comparing the various components enables us to determine a country's political will in the matter.

It has to be understood that a right which is in principle open may be rendered extremely narrow by the practice of the authorities or the courts charged with applying it. In matters of nationality, international law has the essential role of laying down common rules and affirming general principles by which national parliaments are bound.

It should be emphasised that the 1997 convention establishes what is, in my opinion, a true individual right to nationality. What is more, such a right, civil in nature, is in the spirit of that convention and links up with the European Convention for the Protection of Human Rights<sup>108</sup>, thus making it even more of a personal right. I therefore think there is room for another study to look at the possible impact of the Rome Convention of 4 November 1950 through the Strasbourg Convention of 7 November 1997.

Are identity, as an objective concept in civil law, and the sense of identity, as something subjectively experienced by the individual, interconnected in such a way that the second gives rise to the first? "Do we have here an aspect of law which accommodates the sense of identity"<sup>109</sup>, which makes that sense a legal factor, leaving aside any cultural and sociological consideration? Might this force us to redefine civil institutions? Might it impact upon relations between the state and the individual?

## **II. Nationality as a subjective element in identity**

If nationality is a component of individual civil status and nationality law contributes to identity, then on the basis of positive law we should be seeking those factors in identity which could be taken as creating a right of the individual to a nationality and which would enable us to detect, if not confer recognition on, a personal right within nationality law.

### **A. Is nationality an element of personality?**

Of course, genealogical ties and ties to a community are rooted in the legal mechanisms which determine nationality, but also in the individual's identification with

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introducing distinctions according to the state of origin, particularly when it is a member of the European Union. This lends support to the idea that there is suspicion regarding attachment to another sovereign country to varying degrees, depending on the country of origin.

<sup>106</sup> It could be added that when the principle of single nationality rests on a *jus sanguinis* transmission mechanism, it reflects, at least unwittingly, archaic biological thinking on nationality and community.

<sup>107</sup> Taking our line from the definition of nationality given in the Nottebohm judgment (6 April 1995, ECR 55, p. 4).

<sup>108</sup> Particularly Article 8 and the later Protocol 12 (Rome, 4 November 2000) prohibiting discrimination.

<sup>109</sup> Cf. D. Gutman, *op.cit.*, p. 403 et ff.

the community. This is the other side to the sense of identity. But we have to be able to define it.

Taking the sense of identity into consideration as a source of nationality presupposes that the state, at least in part, stop unilaterally insisting on a legal connection between individual and community and acknowledge an individual right of self-determination vis-à-vis the potential or actual existence of such a connection. From the individual's point of view, there is a twin issue: on the one hand the possibility of claiming a nationality and having a nationality acknowledged, and on the other the possibility of relinquishing a nationality. In both cases, the legal mechanism creating nationality would then be the endorsement of the individual's sense of identity.

Undeniably, such mechanisms exist. There are many ways to acquire a nationality. Similarly, there are provisions allowing nationality to be relinquished or someone to be released from nationality<sup>110</sup>.

The matter can also be considered from the point of view of multiple nationality, which poses real questions about identity, real-life experience of it and its reflection in multiplicity of attachment. Communitarian philosophy attempts to deal with the questions<sup>111</sup>. It encapsulates the view that nationality law has two obligations - to identify a sense of identity and of belonging to a community, and to draw the appropriate political and legal conclusions.

This sense of identity can be expressed through the sense of belonging to a community of values. This, on the face of it, vague notion which has fuelled the most virulent nationalist feelings, can be given very specific legal meaning which international law is drawing to our attention.

The globalisation of law<sup>112</sup>, in terms both of widening of legal relationships and standardisation of fundamental legal principles, particularly due to the role of international and supranational courts, is undeniably an effective propagator of the fundamental values and related rights promoted for centuries in Europe and the United States, and since 1945 through treaties, conventions and international organisations<sup>113</sup>.

Several comments can be made about this.

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<sup>110</sup> In this latter case, there is a commonly accepted limit, namely if release from allegiance would result in statelessness. However, that limit is perhaps contestable where maintaining the legal bond would seriously interfere with a sense of "non-identity".

<sup>111</sup> See, for example, D. Bell "Communitarianism and its Critics", OUP, 1993; or A. Berten ed., "Libéraux et communautariens", PUF, 1997. The communitarian doctrine developed particularly in response to the liberal thinking of J. Rawls (cf. "Theory of Justice", Cambridge (Mass.), HUP, 1971, Seuil Publications, 1987).

<sup>112</sup> On this topic, see M. Delmas-Marty, "L'espace judiciaire européen laboratoire de la mondialisation", D. 2000, chr. p. 421, "La mondialisation du droit: chances et risques", D. 99 chr. p.43.

<sup>113</sup> It is impossible to mention them all here. Those principles can be found implicitly or incidentally at the heart of an international instrument. Thus the 1945 Treaty of London establishing the Nuremberg Tribunal was based on attachment to fundamental values.

Firstly, it seems possible to see a universality in the French Revolution<sup>114</sup>: the Declaration of the Rights of Man and the Citizen makes no reference to a small, specified community. It is addressed to every individual and establishes the respective duties and obligations of the citizen and the institution charged with administering the community. Ideally, the community can be a universal one. From the first months of the 1<sup>st</sup> Republic the Convention decreed the homeland to be in danger, but that was not so much with reference to a particular nation as to a sanctuary for democracy which intended to liberate peoples from the yoke of oppression by explaining to them the principles expressed in the Declaration of 26 August 1789.

Next, these instruments have undergone developments which, in my view, have produced necessary and useful extensions of them – a set of matrix principles<sup>115</sup> - and there has been concomitant development of the judicial system. In this connection it is worth remembering that the communitarian thesis does not acknowledge any form of group authority over a group's members<sup>116</sup>. This is a particularly thorny matter: how do you recognise the existence of minorities and at the same time contain nationalist sentiment which could result in irredentism or separatism? Far from being resolved, the issue is becoming more and more fraught, both in democracies and authoritarian regimes, and as a form of political opposition.

So it is not so much the content of the law which is developing as its consolidation. And that is how it is with human equality, which, even in the postwar period, has suffered serious exceptions (colonialism, segregation, discrimination and so on), particularly on the part of countries expressly acknowledging equality.

Consequently nationality may find itself demoted to the status of a “cultural manifestation” of the individual, reflecting an identity adopted and as such, legally endorsed. Conversely, it can be experienced as oppression, as a denial of desired national identity<sup>117</sup>.

In practice, the issue of nationality crops up in conflicts of law. There are several solutions: the traditional approach, *lex fori* and, much less common, the functional

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<sup>114</sup> According to Hegel, the battle of Jena marked the end of history, in the sense that the French Revolution constituted the advent of a model society which was to spread across Europe (and consequently throughout the world) and from that date, time was little more than a sort of metronome pacing out its progression. Almost two centuries later, the idea was taken up again by F. Fukuyama, “La fin de l’histoire et le dernier homme”, Flammarion, 1991.

<sup>115</sup> On the idea of matrix principles, see B. Mathieu, “La supra-constitutionnalité existe-t-elle? Réflexions sur un mythe et quelques réalités”, Les Petites Affiches, 1995, no. 29, p. 12 ; “Pour une reconnaissance des principes ‘matriciels’ en matière de protection constitutionnelle des droits de l’homme”, D. 95 chr. p. 211.

<sup>116</sup> Cf. United Nations report, F. Capotorti, “Etude des droits des personnes appartenant aux minorités religieuses et linguistiques”, 1991, p. 103: (translation) “You cannot accept that the individual should have to conform to the choice made by the majority of a minority group of which he is a member ( and within which individuals not wishing to preserve their culture, language and religion are themselves in the minority)”.

<sup>117</sup> There are still oddities in nationality law. For example, it has been argued that the Vatican is a state without nationality recognising only one citizenship under the principle of *jus officii*, in conformity with the law of 7 June 1929. Cf. Jean-Louis Clergerie, “La spécificité de l’Etat de la cité du Vatican”, Mél. Braun Pulim, 1998, p. 191.

approach. While the first two are classic solutions, the last, which takes account of the nationality, for practical purposes, of the individual, has had its advocates<sup>118</sup> and has been viewed as inherently “promoting the concept of sense of identity”,<sup>119</sup>.

## 1. Is nationality a right of the individual?

This question leads us to consider the prerogatives at the individual’s disposal in the field of nationality law as an element of identity. We can reasonably do so only if we first set aside a number of prejudices, foremost amongst which is the view that nationality is a sovereign prerogative of the state<sup>120</sup>. We then have to consider the possible sources of such a right before tackling the forms it might take.

### 1.1 The sources

State monopoly of nationality is being challenged by the idea of a present trend in law towards helping the individual achieve self-fulfilment<sup>121</sup>, in that many people feel the need to live their sense of identity to the full, and the state has a duty to protect the individual sense of identity and membership of a particular culture<sup>122</sup>.

This sense of belonging needs to be respected in that it falls within the province of private life<sup>123</sup>, including when it involves a bond such as nationality<sup>124</sup>. This idea is to be found in the United Nations Declaration of 18 December 1992 (Article 4-2): “States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, traditions and customs, except where specific practices are in violation of national law and contrary to international

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<sup>118</sup> This analysis has been defended in particular by J-P Laborde, “Les conflits de nationalité dans le droit français”, J-Cl. Droit international, Nationalité-Naturalisation, Fasc. 502-I,2, 1984. It deals more specifically with private international law and goes well beyond the framework of the present study. It fits the definition of nationality in the Nottebohm judgment.

<sup>119</sup> Cf. D. Gutman, op. cit., p. 407.

<sup>120</sup> “It is an institutional reflection of the state prerogative to confer or take away” (P. Weil, R. Hansen, “Citoyenneté, immigration et nationalité: vers une convergence européenne?” in “Nationalité et citoyenneté”, op. cit., p. 9.

<sup>121</sup> Happiness was central to the United States Declaration of Independence in 1776. The concept of self-fulfilment started being talked about after the second world war. However, I think these ideas and also the idea of well-being can be detected in major constitutional and documents. It is obviously not appropriate to review and comment on them all here. Nevertheless, it seems to me that adding nationality law, as a branch of law, to fundamental principles, would broaden the approach considerably.

<sup>122</sup> Cf. D. Gutman, op. cit., p. 438-439. For a case law illustration, see Civ. 1<sup>st</sup> 22.07.1987, Dujaque Rev. cr. 88 p. 85, and P. LAGARDE’s commentary “Vers une approche fonctionnelle du conflit positive de nationalités” Rev. cr. DIP 88, p.29 et ff. .

<sup>123</sup> A notion which goes back to Article 8 of the ECHR.

<sup>124</sup> “The right of every individual to live humanely encompasses respect for individual behaviours through which he manifests man’s characteristic ability to achieve self-realisation in all kinds of ways”. Therefore each individual has the “right to participate fully in his own culture and therefore to maintain differences basic to his identity” (F. Tinland, “Droit de vivre humainement et droit aux différences. Réflexion sur les fondements anthropologiques des droits de l’homme”, in “L’intolérance et le droit de l’autre”, Labor et Fides publications, Coll. Le Champ éthique, no. 20, Geneva, 1992, pp. 167-199.



standards”<sup>125</sup>. Article 5 of the 1997 convention for its part establishes a link between nationality law and general principles relating to the protection of human rights<sup>126</sup>.

This principle may conflict with the idea that a homogeneous and egalitarian community with no restriction on expression and fulfilment of identity is the best individual guarantee capable of removing all basis for a concept of minority. This analysis, which could have limits in practice<sup>127</sup>, may lend force to the view that communitarian sentiment can undermine social cohesion<sup>128</sup>, if it is fuelled by supposedly oppressed nationalist feeling. So we need to consider how the public arena is divided up in the search for the common good<sup>129</sup>.

At best this could lead to accepting national identity in relation only to a positively identified nation, and to simply ignoring whatever derives from communitarianism<sup>130</sup>. However, the major difficulty seems to lie in the definition<sup>131</sup> and recognition of the nation<sup>132</sup>.

Recognising a personal element in nationality law requires us to examine whether it amounts to an individual right. I shall examine the different factors which provide an insight into the nature of this right before evaluating the prospects. That will essentially

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<sup>125</sup> See also the International Convention on the Rights of the Child (Art. 30). France lodged reservations on the grounds that it might undermine the principles of indivisibility and secularism of the Republic, a principle that ran counter to the recognition of ethnic minorities.

<sup>126</sup> We could broaden out and look at connections between nationality and the protection of human dignity, but that would open up too vast an area.

<sup>127</sup> For example, for J. Rawls, citizens can have, and at a given time often have, emotions, devotions and loyalties from which they think they would not, could not and even should not distance themselves in order to evaluate them objectively. They can judge that it is simply unthinkable for them to imagine themselves without certain moral, religious or philosophical convictions, or without certain lasting emotions and loyalties (see “Political Liberalism”, Columbia, 1993).

<sup>128</sup> The principles of multiculturalism and pluralism seem to me to be extremely harmful to national interests, to the interests of all nations and in particular France, because they imply, particularly in current circumstances, that civil war is inevitable in the short or long run. And although it may be possible to individualise certain ethnic groups of different origins, we are faced with the impossibility of reconciling (...) cultures which are incompatible and which cannot fight each other without self-destructing” (cf. “Etre français aujourd’hui et demain”, committee report to the Prime Minister on nationality, presented by M Long, La documentation française, 1988, p.744). As I see it, there is no ideal solution, and within liberal and pluralist democratic states it seems to me that the contrasting solutions all have their share of disadvantages.

<sup>129</sup> We are aware of the dose of idealism that this idea contains and that we cannot disregard. Freud’s view was that community feeling is incomplete without hostility towards an outside minority and that the smallness of the excluded minority leads to oppression. To that I would reply that the most difficult issue in democracy (as “the least bad of systems”) is to transform individual aspirations into collective will and to satisfy the common good whilst respecting the individual interest, all within a close relationship.

<sup>130</sup> The principle expressed by Napoleon that the law takes cognisance of French citizens only.

<sup>131</sup> According to Carré de Malberg a nation is defined by a people, a territory and a state. For all that, as a constitutionalist he does not provide an adequate definition of the people, particularly with regard to phenomena such as emigration and immigration.

<sup>132</sup> A certain ambiguity arguably results from the principle of peoples’ right to self-determination. This was intended as a political response to the problem of colonialism, but has to be understood narrowly as otherwise there is a risk of break-up of the whole political system and the societies it underpins, including even the most homogeneous ones. That also poses difficulties in terms of the spatial and temporal definition of a people. Is France to be seen as the land of the Gauls, to quote the time-honoured formula in school books?

involve looking at the right to claim nationality before examining the limits of such a right.

## 1.2. Personalisation of nationality: the right to claim a nationality

This is essentially a matter of acknowledging the relevant elements of general mechanisms such as naturalisation in the broad sense<sup>133</sup> and providing the basis for a critical appraisal of such a right by seeking the general rules which corroborate the hypothesis in both national and international law.

We need to ascertain whether the individual has absolute free choice in determining his destiny as a member of a community legally defined by nationality law.

Several things suggest that there could be a personal right to nationality. The main ones are recognition of a right to nationality in Article 4 of the 1997 convention, obligatory effective access to naturalisation mechanisms as required by Article 6<sup>134</sup>, the legal constraints to which the decision is subject<sup>135</sup> (Articles 10 and 11 of the Convention)<sup>136</sup>, judicial review of official decisions (Article 12)<sup>137</sup>.

These rules are to be found in whole or in part in positive law nationally. Their incorporation into domestic law should lead not only to a more widely recognised right to nationality in Europe, but to making it a true natural right. This is where construing the principle could cause difficulties. As a right conferred on an individual, the right of nationality would run into regional fragmentation and supranational watering down<sup>138</sup>.

Other indicators would be the number of naturalisations<sup>139</sup> and the methods by which the individual exercises choice of nationality for himself or others<sup>140</sup>. It seems to me that setting up an acquisition mechanism with collective effect that automatically or objectively confers nationality on one or more persons lends support to the idea that

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<sup>133</sup> That is to say, including acquisition of nationality by making a declaration. Here we must take into account the basic rules (content of the right, nature of the right, persons covered, conditions to be met, effects, etc) and procedural rules (waiting periods, terms and conditions, appeal, disputes procedure, etc).

<sup>134</sup> This covers most of the mechanisms by which nationality is acquired, and (importantly) prohibits a waiting period of longer than 10 years, thus making the right effective.

<sup>135</sup> Whatever the competent authority.

<sup>136</sup> Reasonable time, giving reason for decisions (no doubt essentially in the case of unfavourable decisions).

<sup>137</sup> The right to administrative or judicial review, which connects with a general principle of law: that of being able to challenge an injurious decision in court. In this connection, we refer to a previous comment on possible links with the ECHR - the influence of the guiding principles of the 1950 convention and its case law on the 1997 convention.

<sup>138</sup> See below.

<sup>139</sup> Itself a thorny issue! Do we have to take into account persons of a given nationality by virtue of double *jus sanguinis* and whose parents are foreigners? Properly speaking, there is no acquisition since there is no new fact generating nationality. The child is born with a given nationality. Estimates are possible, but taking this into account in statistics would be politically sensitive.

<sup>140</sup> Usually his under-age children.

nationality involves a right of the individual. That right might even be passable to third parties<sup>141</sup>.

To take this further, it could even be said that whatever the basis of national law governing naturalisation of foreigners (that is to say, opening up access to nationality), the fact that this right comes under the 1997 convention tends to change nationality into a personal right.

Recognising a personal right to nationality has various implications, particularly as regards the conditions for exercising the right, whether it is inalienable and whether there are limits to it. Such a conferred right cannot be an exclusively private matter taking no account of the public sphere with which there may or may not be a legal link<sup>142</sup>.

## 2. Limits

All internal nationality law has one limitation at the very least, linked to its very nature: a state can take nationality decisions only in respect of its own nationals. It cannot *a priori* lay down rules establishing a legal connection between an individual and another state. As a result it cannot deal with a nationality other than its own. Unless a state is attached to it a separate nationality cannot exist<sup>143</sup>. Although it is a subtle point, the result is that there is a legal obstacle to recognising a nationality peculiar to a minority. This disadvantage no doubt applies more to the nation states that emerged in the 19<sup>th</sup> century. An alternative could be to recognise intermediate levels, but the objection there is that such a structure would establish sub-nationalities.

This is far from being an insignificant issue. How in fact do you define an identity in terms of sense of identity if you cannot first determine the level of the person-state bond? Is there actually a relevant level between the individual and humankind?

There are several leads we can follow up. First there is the classic case of abuse of right. Second and much more delicately, there is the nationalist claim. Finally, we have to give some thought to the actual limits to the idea of nationality.

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<sup>141</sup> Generally, parents can opt for concomitant naturalisation of their under-age children; children not benefiting from the collective procedure can be naturalised by simplified or preferential right.

<sup>142</sup> Whether the person is a foreigner, a stateless person or a person claiming membership of a minority. Santi Romano views minorities as “legal systems”.

<sup>143</sup> This analysis does not reflect exactly the situation at the time of the Soviet Union, within its various republics or in the states deriving from its break-up.. But *de facto* the issue of the administrative position regarding persons who do not hold the nationality of the state in which they reside, and in which they may even have been settled for several generations, remains unresolved.

## 2.1. Abuse of right

Abuse of right is a traditional limit on exercise of a right or a prerogative. The theory of abuse of right therefore applies to each individual and to each state. In nationality law, abuse of right presents a real problem. The Council of Europe, aware of the issues, has carried out studies of the question to help prevent abuse situations<sup>144</sup>. But one also has to wonder to what extent penalising abuse of right might not itself involve discrimination, for example hidden in the origins of nationality law.

## 2.2. Nationalism

How do we reconcile a right arising from natural law and recognising sense of identity with prevention of excesses associated with nationalism, whether artificial or historical, purely regionalist or political? This issue may force us to look at the origins of nationality - that is to say, the state. It could be argued that nationality is only one non-exclusive bond between an individual and a politically organised community and capable of reflecting a personal sense of identity (in the private sphere?). To give nationality a personal dimension available to the citizen would help put the citizen in charge of personal identity and sense of identity<sup>145</sup>.

The disappearance of the monarchy triggered a search for a basic bond between citizens of the nation state, and this led to the idea of “the common origin”, the symbol of a basic community (counterbalancing class conflicts). “Nationalism essentially involves a distortion of the concept of state for the nation’s purposes, with the citizen becoming a member of the nation”<sup>146</sup>.

This doctrine runs into the problem of multiple nationality, which creates doubt, a problem of attachment to several places and ambivalence particularly as regards the individual’s loyalty to the community to which he belongs. So nationalism produces integration through loyalty, as expressed in the German *staatsfremd* (alien to the state) and *volksfremd* (alien to the people).

Nationalism constitutes a defence mechanism for minorities, arousing a feeling of insecurity and oppression to provoke psychological regression, a turning in on oneself, creating an exaggerated sense of local identity. The two feelings feed off each other because each finds support in the other for its own intensification.

Nationalist feeling allows the individual to identify but at the same time allows the group to set itself apart. It constitutes social regression in that it involves a turning inwards on the part of a group of individuals in relation to the whole community<sup>147</sup>. Such

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<sup>144</sup> Here the reader is referred to the Council of Europe CDCJ report by A. Walmsley.

<sup>145</sup> A few comments are necessary here. For example, Finkelkraut, “La défaite de la pensée”, Folio, Essais Gallimard, 1987, p.23: “in defiance of etymology (*nascor* in Latin means *to be born*), the revolutionary nation uprooted individuals and defined them more by their humanity than by their birth”.

<sup>146</sup> A. Arendt, *op.cit.*

<sup>147</sup> Therefore the problem of the minority, unresolved, is probably not its existence (though more and more are emerging) but its autonomy demands, resulting from a justifiable (to an uncertain degree) feeling of its

regression is fuelled by a nursing of often artificial frustration to do with sense of identity and not the identity itself, which remains. The individual's inability to preserve identity sometimes then leads to an identity fantasy. The outcome, arguably, is a setting aside of actual identity, as being unsatisfactory, and its replacement by a wishful identity, rising above its rather unreliable basis.

Whether by dint of intuition or realism, the Maastricht and Amsterdam treaties established a European citizenship without intervening in the field of nationality law, either at the national or supranational level. So we have a citizenship of a kind, operating in many areas, which encompasses several nationalities, which it renders almost irrelevant. In addition, this citizenship symbolises belonging to a community of values which transcends 15 nationalities<sup>148</sup>. Finally, we can also accept that such a community blossoms and grows by, at least in part, removing the potential divisions caused by nationality, and devotes itself to the greater well-being of the individual<sup>149</sup>.

### 2.3. Legal pluralism, aspects of a social and emotional reality

It cannot be denied that nationality confers many advantages in the field of citizens' rights. But, at least within the Council of Europe legal area, I think that the most serious imbalances may be reduced by the very existence of the European Convention on Human Rights<sup>150</sup>.

Political developments in Europe since the second world war, particularly since 1992, indicate various convergent trends, which, far from marking the end of citizenship, on the contrary reflect a strengthening of its substance and the advent of liberal principles in matters of nationality law<sup>151</sup>.

Belonging to a community, being part of a history is certainly an essential basic ingredient of nationality. But this belonging is basically rooted in interpretation of historical fact according to whether it fuels or not the sense of identity, the fact of feeling

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very existence being denied within a community, which in turn develops into a desire for self-determination. Basically it is an issue which concerns any democracy: the tyranny of the majority unduly influences decisions about the good of all (social contract). Behind the issue of nationality and sovereignty, there lies not really the question of democracy in the sense of the will of the people as expressed through majority suffrage but of the social contract - that is, of a form and practice of government acceptable to all. This analysis could perhaps itself be criticised for being tyrannical, tolerating no disagreement and riding roughshod over the individual. But as soon as the individual's identity, his ipseity, is protected, what value remains to nationality? Local French law accommodates individuality albeit with some contradictions.

<sup>148</sup> The European situation must be distinguished from imperial regimes, which are made up of agglomerations of states and nations, with one country's citizenship being generalised, not necessarily on a reciprocal, shared basis. Thus British citizenship before and after the 1948 Act is an illustration of national law's capacity to adapt, on the basis of traditional allegiance, to migratory flow from the empire and later the Commonwealth. See R. Hansen, "Le droit de l'immigration et de la nationalité au Royaume Uni. Des sujets aux citoyens", in "Nationalité et Citoyenneté en Europe", op.cit., p.71 et ff.

<sup>149</sup> This analysis has, however, been criticised, particularly with regard to the limits of citizenship which it assumes. Cf. D. Jacobson, "Rights across Borders: Immigration and the Decline of Citizenship", Johns Hopkins University Press, Baltimore, 1997, p. 8.

<sup>150</sup> Particularly all forms of discrimination based on nationality or origin, or even unjustified intrusions into private life.

<sup>151</sup> Note here that European citizenship can basically be defined only in relation to nationality of one of the member states. There is therefore no separate European nationality or European citizenship.

connected. Such interpretation is unavoidable since it allows the choice of allegiance and, if necessary, its exclusivity to be enhanced and justified.

The law accepts more and more that sense of identity is a variable, and that in future identity must correspondingly incorporate the possibility of change. Many aspects of civil status are subject to change, including some which we once considered inalienable and immutable<sup>152</sup>, which justifies re-examining the very concept of nationality and, with reference to sense of identity and its essentially social role, challenging the consequences of the concept as it stands.

From the standpoint of the above arguments, the Nottebohm judgment takes account of actuality of nationality by viewing the ties between Mr Nottebohm and Liechtenstein as extremely tenuous<sup>153</sup> whereas there was a long-standing and close connection with Guatemala. The judgment does not consider personal feelings or reasonable prospects of current links with a state<sup>154</sup>. Yet the “psycho-emotional” dimension seems to me almost more important, in that it determines the individual’s future and his position within society.

Neither does the judgment, in my view, take a modern approach to nationality law, involving a personal right linked to sense of identity, a choice within the province of private life and no longer bound up with historical lineage but interfacing with a social perspective.

Legal pluralism also comes through in the interpretation of rights, the influence of comparative law and the role of legal sociology. National law is itself affected by foreign law<sup>155</sup>. The upshot is that the law can be independent of the state, even in matters of nationality. The Council of Europe’s achievements here illustrate this perfectly. The 1997 convention clearly provides a legal framework which can be used to standardise countries’ nationality law so that it develops greater openness and greater sensitivity to personal rights.

## CONCLUSION

Nationality is part of identity. It may also involve a sense of belonging that goes beyond the mere objective tie. The shift we are witnessing in nationality law towards accommodation of personal rights seems to reflect an acknowledgement of sense of identity as a source of nationality. For all that, although nationality is a legally accepted ingredient in identity, how relevant is it in view of its mutability and ever-increasing exploitability?

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<sup>152</sup> Such as name, first name or even sex.

<sup>153</sup> The Court took the view that Liechtenstein nationality had been granted “regardless of the concept of nationality that we have in international relations”.

<sup>154</sup> Many people have fled their country of origin; some, in the firm hope of returning there, retain an attachment to their nationality of origin, whilst others make a complete and final break with their nationality of origin.

<sup>155</sup> See particularly the analyses in the field of legal sociology by J. Carbonnier and R. Treves.

Legal integration into the national community by “naturalisation” - that is to say, any form of access to nationality - also includes factual aspects. It enriches<sup>156</sup> the community in a relatively diffuse way. Who is bothered about Picasso’s or Chagall’s nationality, both of them born abroad yet spending most of their lives in France, and whatever their circumstances are they to be considered French, Russian, Spanish or world artists<sup>157</sup>? On the other hand no one mentions that the 2000 winner of the Nobel prize for literature is French, because before being granted French citizenship he was Chinese and a political dissident. Quite a few French people, having heard him talk, would not mind speaking French as well as he does<sup>158</sup>.

Few people will have heard of Anacharsis Cloots, a Prussian of Dutch origin who, having been decreed a French citizen by the National Assembly and elected to represent the *département* of Oise, was later expelled by the Convention, on 26 December 1793, because of his foreign birth and guillotined on 24 March 1794. An American citizen, Thomas Paine, suffered a similar turnabout but escaped the guillotine.

What has changed ? Has nationality law? Has integration or identification of someone on the basis of his origins or his present or future? Ideally the individual could pursue self-fulfilment within a secure legal order capable of disregarding nationality, which would be an almost trivial aspect of identity. Law doubtless has a long way to go before nationality no longer represents an obstacle in the relations between individuals, not to say between individuals and the state<sup>159</sup>.

In this area, pluralist democracy seems to be the system best able to protect expression of personal identity within a diversified and homogeneous community which is close-knit because it has confidence in itself and which shows respect for each individual in its pursuit of the general interest.

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<sup>156</sup> According to the Deputy Director of Population at the Ministry of Naturalisations, Jean Graemynek. In this sense, it also constitutes a response to issues linked to demographic deficit.

<sup>157</sup> Many French people, not to say foreigners, consider Picasso to be French, whilst the Spaniards are proud of his Spanish nationality. Doubtless the same could be said of Chagall.

<sup>158</sup> By keeping his original patronymic he is marking his attachment to his origins and strengthening his image as a political dissident.

<sup>159</sup> In Canada, a foreigner may become a civil servant.





# CONDITIONS FOR THE ACQUISITION OF NATIONALITY BY OPERATION OF LAW EX LEGE OR BY LODGING A DECLARATION OF OPTION

**Report by**

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## SUMMARY

In perspective of the various rules described below some suggestions can be made.

1) In respect of the grounds for acquisition ex lege:

a) Exceptions made with regard to children born abroad should be drafted on a way which never lead to situations of statelessness (so already Recommendation R 99 (18) of the Committee of Ministers of the Council of Europe on the avoidance and the reduction of stateless, in rule II A (a)).

b) If for one of the reasons mentioned above, a legislator wants to restrict the transmission of nationality *iure sanguinis a patre* in case of children born out of wedlock, the restriction should only be as wide as necessary in order to reach the goal for the restriction.

c) Full adoption of a minor should have nationality consequences ex lege (both in the case of an adoption by a decree of the own courts as in the case of foreign adoptions recognised because of rules of private international law).

d) A special study should be made on the possibilities which parents possess to represent the interest of their children in nationality matters, on the rules regarding to the extension of the acquisition, respectively loss of a nationality by a parent to his (minor) children, and on the possibilities which children have in order to renounce, respectively reacquire a nationality acquired, respectively lost during their minority.

e) Certain *ius soli* oriented ways of acquisition of nationality (ex lege or by way of option) should be encouraged in order to promote the nationality integration of persons born on the territory of a State. A double *ius soli* rule (or the residence oriented variation) should be recommended in order to promote the nationality integration of families permanently living on the territory of a State.

f) In respect of the nationality provisions on foundlings Art. 6 (1) (b) ECN gives a very concrete rule. It is desirable to promote that States implement the rule involved.

2) In respect of the grant of option rights.

g) The exercise of residence based option rights on a nationality should not be limited in time if the person involved continues to live in the country involved.

h) It is desirable to recommend legislators to include in their nationality legislation grounds for acquisition based on territorial elements and to allow the choice between some alternatives.

i) Persons who were treated for a long period as a national and were in good faith should either acquire the nationality involved by operation of law or should have the possibility to acquire this nationality by declaration of option.

j) The rules on certification and proof of nationality should be studied in detail in order to elaborate recommendations.

j) It is necessary to study both the categories of persons who possess a right of option and the categories of persons who are facilitated in respect of the acquisition of nationality by way of naturalisation in order to draft recommendations elaborating art. 6 (4).

## **THE ACQUISITION OF NATIONALITY BY OPERATION OF THE LAW OR BY LODGING A DECLARATION OF OPTION**

### **I. Introductory remarks**

The object of this contribution is an inventory of the rules regarding the acquisition of the nationality of a State. Nationality should indicate a genuine link between a State and a person.<sup>160</sup> The nationality law of a State, therefore, gives rules determining under which conditions the nationality of the State involved is attributed to a person who is deemed to have a genuine link with this State. Furthermore, rules are given that set out under which conditions the nationality of the State can be acquired because the person involved has built up a link with this State. Finally, rules are given on the loss of nationality.

In Par. II a comparative description of the grounds for acquisition of a nationality by operation of the law will be given. Par. III will describe which categories of persons are entitled to the acquisition of a nationality by lodging a declaration of option. In this paper, prepared for the Second Conference on Nationality initiated by the Council of Europe, no attention will be given to the possibility of acquisition of nationality by naturalisation. Another paper prepared by Mr. Andrew Walmsley will be completely devoted to that way of acquiring nationality, describing the conditions which have to be fulfilled in order to qualify for naturalisation. Grounds for loss of nationality will - in principle - not be addressed in this contribution.<sup>161</sup>

A description of the rules of acquisition of a nationality by operation of the law, and the cases where a nationality can be acquired by declaration of option, is useful for several reasons. First of all, it gives a foundation from which ideas can be elaborated on desirable grounds for attribution of nationality and on regulations which give to some categories of foreigners the possibility to acquire the nationality in a way other than by naturalisation because it is very likely that they have (built up) a significant link with the State involved.

To develop such ideas is appropriate in view of the fact that Art. 15 (1) of the Universal Declaration of Human Rights<sup>162</sup> states that everybody is entitled to a nationality, but it does not indicate under which conditions a person is entitled to a certain nationality. It is therefore attractive to study the similarities and differences between the various rules on acquisition of nationality in order to develop recommendations on rules on acquisition of nationality. It has to be stressed that up to now only a few international documents exist with a couple of concrete rules on acquisition of nationality. The most elaborate provision

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<sup>160</sup> Compare the Nottebohm-decision ICJ Reports 1955, 4 (23); *Fontes iuris gentium*, Series A, sectio 1, tomus 5, 81.

<sup>161</sup> See for a comparative inventory in comparison with the provisions of Art. 7 and 8 European convention on nationality my report 'Loss of nationality' for the German Marshall Fund Project on Dual Nationality, initiated by Kay Hailbronner and David Martin (1999/2000).

<sup>162</sup> Adopted on 10 December 1948. Resolution 217A (III) of the General Assembly of the United Nations, UN General Assembly Official Records 3rd Session, Resolutions part I, 71. See on this resolution Marie-Hélène Marescaux, *Nationalité et statut personnel dans les instruments des Nations Unies*, in: Michel Verwilghen, *Nationalité et statut personnel*, Brussels 1984, 18-24.

can be found in Art. 6 of the European Convention on Nationality (Strasbourg 6 November 1997) (hereinafter abbreviated as ECN)<sup>163</sup>, but even the rules of that provision have -in part- a quite general character. Due to the modest number of provisions dealing with the acquisition of nationality in international instruments and the fact that these rules are not very detailed, the rules on the acquisition of nationality in the various States differ remarkably.

Furthermore, knowledge about the rules on acquisition of nationality is essential if one wants to compare and discuss rules on naturalisation in a comparative perspective, particularly statistics on naturalisation. It is obvious that rules on naturalisation are superfluous for those categories of persons who already acquire the nationality of a country *ex lege* or can acquire this nationality by declaration of option.

In light of the fact that this paper is intended for the second conference on nationality law of the Council of Europe an attempt is made to include a considerable number of the jurisdictions of the Member States of The Council. Of course the information will focus on the main issues. Many details had to be omitted, due to the permitted maximum size of this paper.

In this article references to the legislation of the different jurisdictions are made by using abbreviations. For example '15 (1) (b) NET' means 'Art. 15 paragraph 1, lit. b of the Nationality Act<sup>164</sup> of the Netherlands'. In order to indicate the nationality legislations of the different countries the following abbreviations are used<sup>165</sup>: AUS = Austria; BEL = Belgium; CZE = Czech Republic; DEN = Denmark; EST = Estonia; FIN = Finland; FRA = France; GER = Germany; GRE = Greece; HUN = Hungary; ICE = Iceland; IRE = Ireland; ITA = Italy; LIE = Liechtenstein; LUX = Luxembourg; MOL = Moldova; NET = Netherlands; NOR = Norway; POR = Portugal; POL = Poland; SLK = Slovakia; SLN = Slovenia; SPA = Spain; SWE = Sweden; SWI = Switzerland; UK = United Kingdom.

Of course, in principle, references are made to the legislation in force in the various countries. An exception is made for the Netherlands where, if the contrary is not indicated, it refers to the nationality statute including the modifications which will come in force in the year 2002.<sup>166</sup> In respect of Polish nationality law references are made to the bill on Polish nationality (*o obywatelstwie polskim*) which was pending in parliament in 1999/2000.<sup>167</sup> For Sweden, references are made to the very recent Nationality Act of 1 March 2001 which will come in force on 1 July 2001.

Of course I am realising that it is likely that some references are not completely up to date due to the rapid legislative developments in the field of nationality law in the various

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<sup>163</sup> European treaties Series No. 166.

<sup>164</sup> This abbreviation is also used for countries where the nationality provisions are included in the civil code, such as France and Spain.

<sup>165</sup> These abbreviations correspond with those used in the European Bulletin on Nationality (English edition).

<sup>166</sup> Rijkswet (Kingdom Statute) of 21 December 2000, Staatsblad 618.

<sup>167</sup> This bill was finally not accepted by the Senate. A new draft is under preparation.

countries. Furthermore, because of the complexity of many details of nationality statutes, it may have happened that my interpretation of some regulations is not completely correctly.

## II. Acquisition ex lege

### 1. Children of a national (acquisition iure sanguinis/ by descent)

#### a) A matre<sup>168</sup>

Almost all States provide for - in principle - an acquisition of their nationality if the mother of a child possesses the nationality involved at the moment of birth of the child. Only in the case of a birth abroad do some States make an exception to this rule (see below). The old practice of the predominance of the acquisition iure sanguinis a patre is abolished in nearly all States included in this contribution. In Switzerland 57a SWI provides, however, that a child of a Swiss mother who acquired her nationality by a previous marriage only acquires Swiss nationality if he does not acquire another nationality or becomes stateless before attaining the age of majority.<sup>169</sup>

In principle, the mother of a child is the woman who gave birth to the child (so expressly e.g. 1 (1) (c) NET; 50 (9) UK). This is in conformity with the ruling of the European Court of Human Rights in *re Paula Marckx v. Belgium*<sup>170</sup> and furthermore with the Convention on the establishment of the maternal affiliation of children born out of wedlock<sup>171</sup>. Therefore, in principle, a woman does not need to recognise a child born out of wedlock in order to establish a family relationship between herself and the child. However, some civil codes still contain provisions on the recognition by the mother of children born out of wedlock, along with provisions which allow the judicial establishment of maternity.

The acquisition of a nationality iure sanguinis (a matre et a patre) is prescribed by Art. 6 ECN. According to paragraph 1, each State Party shall provide in its internal law for its nationality to be acquired ex lege by children, one of whose parents possesses at the time of the birth of these children the nationality of that State Party. States are allowed to make an exception for children born abroad. However, the explanatory report (Nr. 65) on this provision underscores that any provisions limiting the transmission of the nationality of a parent to a child born abroad should not apply if such a child would become stateless. The report continues:

"It must be added that the acquisition of the nationality of one of the parents at birth on the basis of the ius sanguinis principle, by children born abroad should be automatic and not

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<sup>168</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 190-194, 199, 200.

<sup>169</sup> This provision has a transitory character because since 1992 the foreign wife of a Swiss man does not acquire Swiss nationality by her marriage anymore. The restriction on the transmission of nationality was since then moved from Art. 2 to Art. 57a SWI.

<sup>170</sup> ECHR 13 June 1979.

<sup>171</sup> Convention relative à l'établissement de la filiation maternelle des enfants naturels, Brussels 12 September 1962, *Tractatenblad* 1963, 93.

made conditional upon a registration or option, the absence of which would make them stateless."

Recommendation R 99 (18) of the Committee of Ministers of the Council of Europe on the avoidance and the reduction of statelessness adopted on 15 September 1999 underscores this desideratum in rule II A, sub a:

"Exceptions made with regard to children born abroad should not lead to situations of statelessness."

This is an important addition to the Convention, which ideally should be added to the text of the Convention, preferably in an additional protocol.

### **Cases of non-acquisition iure sanguinis by children born abroad:**

Several of the countries studied in this contribution make use of the possibility to provide for a limitation of their nationality in the case of birth abroad.

According to 8 (1) (2) BEL, Belgian nationality is acquired by every child of a Belgian parent born in Belgium, but by a child of a Belgian parent born abroad only if one of three different conditions is fulfilled: a) the parent was born in Belgium or in territories under Belgian administration ("dans des territoires soumis à la souveraineté belge ou confiés à l'administration de la Belgique")<sup>172</sup>; b) the Belgian parent registers the child as a Belgian national within five years after the birth of the child; c) the child is otherwise born stateless or loses his (other) nationality before his eighteenth birthday ("ou ne conserve pas jusqu'à l'âge de dix-huit ans ou son émancipation avant cet âge, une autre nationalité").

Since 1 January 2000 the German nationality Act provides in 4 (4) GER, that German nationality will no longer be acquired by descent if a child of German parent(s) is born abroad and the parent was also born abroad after 31 December 1999 and the parent has his habitual residence outside of Germany ("wenn der deutsche Elternteil nach dem 31. Dezember 1999 im Ausland geboren wurde und dort seinen gewöhnlichen Aufenthalt"). German nationality is nevertheless acquired if the child otherwise would be stateless. If the child does not acquire the German nationality of the parent(s) ex lege because of the 'double' birth abroad, a parent can register the child as a German national within one year after the birth of the child.<sup>173</sup>

British nationality law contains a limitation of the transmission by descent in the case of birth abroad as well. The relevant British provisions are quite complicated. Sect. 2 UK states, inter alia, that a person born outside the United Kingdom shall be a British citizen if at the time of the birth his father or mother (a) is a British citizen otherwise than by descent

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<sup>172</sup> Congo, Ruanda and Burundi.

<sup>173</sup> This limitation on the transmission of German nationality is completely new in German nationality law, and it will take a considerable amount of time before this modification will have concrete results. The first children who will not acquire German nationality because of this limitation are the children of the German children born outside of Germany in the year 2000.

(e.g. British because of birth in the UK or British by naturalisation);<sup>174</sup> or (b) is a British citizen and is outside the United Kingdom in British service, his or her recruitment for that service having taken place in the United Kingdom; or (c) is a British citizen and is outside the United Kingdom in service under a Community institution, his or her recruitment for that service having taken place in a country which at the time of the recruitment was a member of the European Community.

Sect. 3 UK deals with the nationality status of -to put it briefly- the second generation born abroad. According to 3 (2) UK, a person born outside the United Kingdom shall be entitled, on an application for his registration as a British citizen made within a period of twelve months from the date of the birth, to be registered as such a citizen if the requirements specified in 3 (3) UK or, in the case of a person born stateless, the requirements specified in paragraphs (a) and (b) of that subsection, are fulfilled in the case of either that person's father or his mother ("the parent in question"). These requirements are:

- (a) that the parent in question was a British citizen by descent at the time of the birth; and
- (b) that the father or mother of the parent in question--
  - (i) was a British citizen otherwise than by descent at the time of the birth of the parent in question; or
  - (ii) became a British citizen otherwise than by descent at commencement of the British Nationality Act on 1 January 1983, or would have become such a citizen otherwise than by descent at commencement but for his or her death; and
- (c) that, as regards some period of three years ending with a date not later than the date of the birth--
  - (i) the parent in question was in the United Kingdom at the beginning of that period; and
  - (ii) the number of days on which the parent in question was absent from the United Kingdom in that period does not exceed 270.

If a person is born abroad as a child of a British parent without acquiring British citizenship, he may nevertheless acquire a right to registration if one of the parents was a British citizen by descent and certain other conditions of 3 (5) UK are fulfilled.

According to Irish nationality law, Irish nationality is not acquired ex lege in case of birth outside of Ireland if the father or mother through whom the child can derive Irish nationality was also born outside of Ireland, unless the relevant parent was at the time of birth of the child in Irish public service. The child acquires Irish nationality by registration as a Irish citizen (7 (2) juncto 27 IRE) on application of the parent or of the person himself.

According to Slovenian nationality law, a child born abroad acquires Slovenian nationality, if both parents possess this nationality (4 (1) SLN). If only one parent is Slovenian, this nationality is in principle only transmitted if the child is born in Slovenia (4 (2) SLN). In

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<sup>174</sup> Children of naturalised British citizen therefore always acquire British nationality in case of birth abroad. The High Court, Queens Bench Division decided on 6 October 2000 per Mr. Justice Gibbs, that British citizen by descent are entitled to seek naturalisation (Law report 17 October 2000).

the case of birth abroad of one Slovenian parent, the child acquires Slovenian nationality by registration as such before the age of 18 or by settling in Slovenia together with the Slovenian parent. If the child has already reached the age of 14 his consent is required (8 SLN). If the child would be stateless if he does not acquire Slovenian nationality registration is not necessary: the nationality is in that case acquired ex lege (5 SLN). Between the age of 18 and 23 a child of one Slovenian parent who did not acquire Slovenian nationality can acquire this nationality by lodging a declaration of option (6 SLN).

Another country with a limitation on the transmission of nationality iure sanguinis in case of birth abroad is Portugal. 1 (1) (b) POR provides that the children of a Portuguese father or a Portuguese mother born abroad acquire Portuguese nationality by birth if they declare that they want to be Portuguese, or if they register the birth in a Portuguese civil register. If the parents reside abroad in the service of Portugal, their children acquire Portuguese nationality ex lege (1 (1) (a) POR).

It is obvious, that it is desirable for Ireland, Portugal and the United Kingdom to provide for an acquisition ex lege if the child born abroad otherwise would be stateless.

The reason to limit the transmission of nationality in case of birth abroad is linked with the function of the institution of nationality as such. As already mentioned above, nationality should be a manifestation of a genuine link between a person and a State. If several generations have already been born abroad, it becomes less likely that the next generations will develop a link which legitimates the possession of the nationality of the State of origin of their ancestors. In that respect, a limitation on the transmission of nationality in the case of birth outside the country is - in principle - acceptable. This is also the opinion of the explanatory report on Art. 6 ECN (Nr. 65 and 66):

"However, it should be noted that this provision does not require a State to grant its nationality to children born abroad generation after generation without limitation, when such children have no links with that State. Normally, such children will acquire the nationality of the State of birth (with which - presumably - they have a genuine and effective link)."

An alternative for a limitation of the transmission of a nationality at birth is for a legislator to provide for the loss of nationality if a national habitually resides abroad and does not have (anymore) a sufficient genuine link with the State involved.

It is obvious that a provision on loss of nationality because of lack of a sufficient link is preferable over a limitation of the transmission of nationality in case of birth abroad if a State wants to give to the child the possibility to decide himself to develop a link with the State of his ancestors in order to keep his inherited nationality. In that case, it is desirable to grant to the child a reasonable period after having attained the age of majority to establish significant ties with the State of his inherited nationality in order to keep this nationality. On the other hand, one has to realise, that almost the same result can be reached by granting an option right to children who did not acquire the nationality of their parent because of their birth abroad.



If the acquisition of nationality by a child born abroad depends on an action to be undertaken by a parent (e.g. registration) or depends on significant ties which have to be developed during the minority of the child (e.g. a period of residence in the country of the inherited nationality before the age of majority) without compensating for this by an option right to (re)acquire the nationality after having attained the age of majority, it gives to the parent(s) a considerable power to determine the nationality position of the child. One can question, whether that is desirable. Compare in this context the principle mentioned in Art. 8 (1) Convention on the Rights of the Child<sup>175</sup>, that States should undertake to respect the right of a child to preserve his or her identity, including nationality, ..... as recognised by law without unlawful interference. Of course, this is a very weak statement and the rules described above can certainly not be qualified as unlawful interference, but the principle opens our eyes to the fact that the nationality of a child is a part of his identity and that it should not be lost by the child during his minority without very good reasons. Furthermore, one has to realise that the choices which States make in this respect should have consequences as well for provisions on the extension of loss of nationality by parents to their children<sup>176</sup> (see below Par. II, 9) and the grounds for loss of nationality by minors in general<sup>177</sup>. Special attention should be given to the possibilities which parents possess to represent their children in nationality matters.

## **b) A patre<sup>178</sup>**

### **b-1) Children born within wedlock**

All States studied for the purpose of this report provide for - in principle - an acquisition of their nationality if the father of a child possesses the nationality involved at the moment of birth of the child. Of course, it has to be mentioned again that Belgium, Germany, Ireland, Portugal and the United Kingdom provide for an exception to this rule if a child is born abroad.

In order to conclude that a child derives a certain nationality *iure sanguinis a patre*, it has to be determined that a person is the child of a certain "father" in the sense of the provisions involved.

All States studied provide that a child born within wedlock acquires the nationality of the husband of the mother. Furthermore, the nationality can be derived from this father even if he died before the birth of the child.

If the parents are not married to each other, the situation is different. Art. 6 ECN expressly allows an exception in respect of the acquisition *iure sanguinis* regarding children born out of wedlock. If the family relationship between a child born out of wedlock and his father is established by recognition, legitimation or a judicial decision, this does not necessarily have

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<sup>175</sup> Concluded in New York 20 November 1989.

<sup>176</sup> See De Groot, Loss of nationality (o.c. footnote 3), Par. 8.

<sup>177</sup> See De Groot, Loss of nationality (o.c. footnote 3), Par. 6 and 12.

<sup>178</sup> See Gerard-René de Groot, Staatsangehörigkeitsrecht im Wandel, Köln 1989, 194-196, 201-203.

as a legal consequence the acquisition of the nationality of the father. A State may provide that the child has to fulfill additional requirements before he acquires or can acquire the nationality of his father.

Nevertheless, many countries provide that children born out of wedlock also acquire the nationality of their father if a family relationship exist between him and the child. So explicitly e.g. 4 (1) GER and implicitly 8 BEL; 18 FRA; 2 I; 6 (2) IRE). Almost all countries require that the family relationship in that case must be determined before the child reaches the age of majority; so explicitly: 20-1 FRA. Exception: 4 (1) GER (before the age of 23).

In some countries not all children born out of wedlock acquire the father's nationality. This is the case in for example Austria, Denmark, Finland, Iceland, Netherlands, Norway, Sweden, Switzerland, United Kingdom.

### **b-2) Children born out of wedlock, but legitimated by a subsequent marriage of the parents**

In most countries children born out of wedlock, but legitimated by a subsequent marriage between their mother and their father acquire ex lege the nationality of the father by legitimation. Almost all countries require that the legitimation takes place during the minority of the child (20-1 FRA). In some countries legitimation is mentioned as a separate ground for acquisition. In some other countries, this ground for acquisition is covered by the general provision that children acquire the nationality of a parent if the family relationship with this parent is established during the minority of the child.

In Austria, an additional rule is of importance: legitimation is a ground for acquisition of nationality, but if the minor is already over 14 years of age, his and his legal representative's consent to the acquisition of nationality is required (7a (2) AUS). Under certain conditions a required consent can be replaced by a decision of the court in the interest of the minor involved (7a (5) AUS).

According to Netherlands nationality law, legitimation does not have ex lege nationality consequences. Legitimation does not exist anymore as a legal institution in the family law of the Netherlands because it was considered to be superfluous after the implementation of the principle of equal treatment of children born within and out of wedlock.<sup>179</sup> A legitimation which took place under foreign law will under certain circumstances be recognised in the Netherlands, but will not have ex lege nationality consequences. Under certain conditions the legitimated child has an option right on Netherlands nationality (6 (1) (c) NET)<sup>180</sup> (see below Par. III, 5a).

### **b-3) Children born out of wedlock, but recognised by the father**

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<sup>179</sup> Compare Iceland where the provision on legitimation was abolished in 1998.

<sup>180</sup> This provision will come in force in 2002. At the moment 4 NET still provides for ex lege nationality consequences, if the legitimation took place during the minority of the child.

Several countries provide that recognition of a child born out of wedlock by a man has as a consequence the acquisition of the nationality of this man. Again, most countries require that the recognition takes place during the minority of the child.

1 (DEN) and 1 (2) (SWE) provide that a child born out of wedlock gets exclusively ex lege the nationality of the father if he is born in Denmark or Sweden respectively. A child of a Swedish father born out of wedlock outside of Sweden acquires Swedish nationality if the father registers the child as a Swedish citizen (5 SWE)<sup>181</sup>.

2 (ICE) provides that a child born abroad of an unmarried woman and an Icelandic man acquires Icelandic nationality on application of the father before the child reaches the age of 18 years. The father has to consult the child if he is over 12 years old. If the father submits, in opinion of the Icelandic authorities, satisfactory evidence concerning the child and his paternity, the child acquires Icelandic nationality on confirmation of the ministry.

In the Netherlands, recognition does not have ex lege nationality consequences. Under certain conditions the recognised child can opt for Netherlands nationality (6 (1) (c) NET)<sup>182</sup> (see below Par. III, 5a). However, if the father did recognise the child before his birth, the child acquires Netherlands nationality ex lege because that case is covered by the general provision of 3 (1) NET.

#### **b-4) Children born out of wedlock of a man, whose fathership was judicially established**

In some countries judicial establishment of paternity is expressly mentioned as a ground for acquisition of nationality. In a considerable number of other countries, this ground for acquisition is covered by a general provision (see above). Again, most countries provide that the judicial establishment has to take place during the minority of the child in order to have nationality consequences ex lege.

For the Netherlands, it has to be mentioned that a judicial establishment of paternity is not yet regulated in the Nationality Act as a ground for acquisition of nationality, but a statute introducing this ground for acquisition will come into force in 2002. The possibility of a judicial establishment of paternity was only very recently introduced into Netherlands family law (since 1 April 1998) and the Nationality Act has not been adapted yet to this new legal institution. However, courts in the Netherlands have already come to the conclusion that at the moment judicial establishment of paternity has also nationality consequences because it is covered by the general provision that a child acquires Netherlands nationality a patre, if at the time of its birth the father possesses this nationality (3 (1) NET). Because Art. 207 (5) of the Civil code of the Netherlands provides that a judicial establishment of paternity has retroactivity to the moment of birth, the conditions of 3 (1) NET after the judicial establishment of the paternity have been fulfilled.

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<sup>181</sup> It has to be mentioned that the provisions involved are already considerably more generous than the prior Par. 1 and 2a SWE.

<sup>182</sup> This provision will come into force in 2002. At the moment 4 NET still provides for ex lege nationality consequences, if the recognition took place during the minority of the child.

### Some elements for an evaluation

Some critical remarks on the use of the exception allowed by Art. 6 ECN, in respect of the transmission of the nationality *iure sanguinis a patre* in case of children born out of wedlock, are appropriate. If I see it correctly, three different arguments are used in order to exclude (some) children born out of wedlock from the transmission of the nationality of their father:

a) One could argue, that a child born out of wedlock will less likely develop close ties with the State of nationality of his father, in particular if he lives abroad. This seems to me to be the background of the Danish and Swedish legislation. Perhaps this argument is behind the exception made in respect of children born out of wedlock in some other countries as well.

b) In countries where a man can recognise a child, even in cases where this is not in conformity with the biological truth, there is a certain danger that recognition, if it does have nationality consequences *ex lege*, can be abused e.g. to circumvent procedures and restrictions in respect of international adoption. This is e.g. the case in the Netherlands. The Netherlands Nationality Act of 1985 still mentions recognition and legitimation as grounds for acquisition of nationality (4 NET (1985)). Some years ago it was discovered that some Netherlands men recognised -after having received money- foreign illegitimate minors in order to give them Netherlands nationality and therefore free access to the Netherlands. As a reaction to this discovery, the government of the Netherlands proposed to abolish recognition and legitimation as grounds for *ex lege* acquisition of nationality. This proposal was accepted by parliament and will come into force in 2002. It has to be mentioned, that this modification was heavily criticised in the legal literature<sup>183</sup> *inter alia* because in most cases of recognition and legitimation the man involved really is the biological father of the child. Furthermore, the Public Prosecutors Office already has the ability to request the annulment of a recognition if the recognition violates public policy (*ordre public*).

c) Finally, it has to be admitted that the acquisition of a nationality *ex lege* based on recognition or legitimation sometimes can be problematic for completely different reasons. It may happen that an older foreign minor acquires a certain nationality because of the recognition or legitimation without his own consent in respect of the nationality consequences. This leads to problems if the acquisition of the new nationality causes the loss of his previous nationality (usually the nationality of the mother). Of course, one of the requirements for recognition or legitimation is normally the consent of the mother of the child (in the Netherlands until the child reaches the age of 16) as well as the consent of the child (in the Netherlands if he is older than 12 years). However, one has to realise that the consent is focussed on the establishment of a family relationship between the child and the man involved. The nationality dimension of a recognition is in many cases not taken into account. Furthermore, potential nationality consequences should not be the reason to give or to refuse the required consent. In Austria, the Constitutional Court came to the

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<sup>183</sup> Against a modification of Art. 4 Nationality Act: Matjaz Tratnik, *Een overheid, die spoken ziet*, NJB 1989, 296-298. See also M.J.C. Koens, *Nationaliteit en Nederlanderschap*, in: Pitlo/Gr. van der Burght/M. Rood-de Boer, *Personen- en familierecht*, 11th edition, Arnhem 1998, 13.

conclusion that the acquisition of Austrian nationality *ex lege* by a foreign minor legitimated by an Austrian man constituted a violation of the Austrian constitution, *inter alia* because of the potential loss of another nationality (in that case, the nationality of Liechtenstein).<sup>184</sup> This decision made a modification of Austrian nationality law necessary. Therefore, since 1985<sup>185</sup> Austrian nationality is exclusively acquired *ex lege* by legitimation if the child who has already reached the age of 14 gives his consent and the legal representative does also (see above b-2).

Although all of the arguments mentioned have some value, I would submit that one should study all possibilities to give children born out of wedlock as much as possible, the same position as children born in wedlock. If for one of the reasons just mentioned, a legislator wants to restrict the transmission of nationality *iure sanguinis a patre* in case of children born out of wedlock, the restriction should only be as wide as necessary in order to reach the goal of that restriction.

If, for example, a country does not give *ex lege* nationality consequences to recognition of a minor because of potential circumvention of the rules on international adoption, it should be possible to acquire the nationality if evidence on the biological truth of the recognition is presented. If a country does not link *ex lege* acquisition of nationality to a recognition because of the fact that a child may lose another nationality already acquired *iure sanguinis a matre*, it should be studied whether an *ex lege* acquisition linked with an opting out possibility perhaps would bring the child in question closer to the position of a child born within wedlock than the possibility to acquire the nationality via the lodging of a declaration of option.

Not to attribute the nationality of the father to a child born out of wedlock in case of birth abroad because such a child probably will not develop a genuine link with the country of nationality of the father seems to me, in all cases, a differential treatment of children born out of wedlock in comparison to those born within wedlock which can not be supported by convincing arguments.<sup>186</sup>

## 2. Adopted children<sup>187</sup>

Acquisition of nationality by adoption is not mentioned in Art. 6 ECN as a desirable ground for acquisition of nationality *ex lege*. It is only mentioned as a ground for privileged acquisition. This is remarkable because on the other hand, Art. 7 (g) ECN does mention

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<sup>184</sup> Decision of 12 Juni 1984, Bundesgesetzblatt Nr. 375/1984.

<sup>185</sup> See Staatsbürgerschafts-Novelle 1985, Bundesgesetzblatt 1985, 568. Compare on that modification Gerard-René de Groot, Staatsangehörigkeitsrecht im Wandel, Köln 1989, 145, 146; Hans Pfersmann, Reforme und Probleme im Staatsbürgerschaftsrecht, Österreichische Juristenzeitung 1985, 76, 77; Michael Schwimann, Österreich. Erneute Änderung des Staatsbürgerschaftsrechts, Das Standesamt 1986, 110-116.

<sup>186</sup> Children born abroad after the death of their father who was married to the mother do acquire -as far as I see- in principle the nationality of their father but are in a comparable position.

<sup>187</sup> Compare Hellmuth Hecker, Einfluß der Adoption auf die Staatsangehörigkeit. Eine rechtsvergleichende Darstellung der Regelungen in 175 Staaten, StAZ 1985, 153-163 and Gerard-René de Groot, Staatsangehörigkeitsrecht im Wandel, Köln 1989, 196-199.

that a nationality act may provide that a nationality is lost by the adoption of children, if the nationality of the adopting parents is acquired.

Nevertheless, many countries mention adoption as a ground for acquisition of nationality *ex lege*. Most of these countries require that the adoption involved was realised during the minority of the child. However, in some countries the age limit is lower.

Some countries only provide for nationality consequences of adoption when the adoption order was made by a court, or by authorities of the country involved. However, an increasing number of nationality codes provide for the possibility, that a foreign adoption order has nationality consequences if this foreign adoption order is recognised because of rules of private international law. In some countries, a special reference is made to the Hague Adoption Convention of 29 May 1993.

In respect of adoption, one has to realise that many countries only know full adoption, which replaces completely the pre-existing legal family ties of the child with the original parents by a family relationship with the adoptive parents. Some countries provide (in most cases as an alternative: so e.g. France and Portugal) for a weak adoption (also called 'simple adoption'), which creates a family relationship with the adoptive parents, but does not disrupt all legal ties with the original parents. This so-called 'weak' adoption often lacks nationality consequences, whereas the full adoption has these consequences.

### **3. Acquisition *iure soli* (by birth on the territory)**

#### **a) Strict *ius soli***

Of the countries studied for this report only Ireland (Sect. 6 (1)) applies a strict *ius soli*: by birth on Irish territory a child acquires the nationality of Ireland. An exception is made for children of aliens entitled to diplomatic immunity (6 (4) IRE). This exception conforms to the Optional Protocol to the Vienna Conventions on Diplomatic relations<sup>188</sup> concerning Acquisition of Nationality and the Optional Protocol to the Vienna Conventions on Consular relations<sup>189</sup> concerning Acquisition of Nationality. Compare as well the Portuguese legislation (see below Par. III, 1).

#### **b) Acquisition *iure soli* by children, who otherwise would be stateless<sup>190</sup>**

According to Art. 6 (2) ECN, each State Party shall provide in its internal law for its nationality to be acquired by persons born on its territory who would otherwise be stateless. This rule is repeated in Recommendation R 99 (18) in Part II A sub b, already mentioned above. The nationality of the country of birth has to be attributed either *ex lege* at birth or subsequently to children who remained stateless upon application.

Most countries included in this publication opted for the first mentioned possibility. In most of these countries, a provision also can be found dealing with the loss of this nationality if it

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<sup>188</sup> Concluded in Vienna 18 April 1961, UNTS vol. 500, 223.

<sup>189</sup> Concluded in Vienna 24 April 1963, UNTS vol. 596, 469.

<sup>190</sup> Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 204, 205.

is later discovered that the person involved was not stateless.<sup>191</sup> According to Belgian law, Belgian nationality is also acquired by a person born on Belgian territory who becomes stateless during his minority. The Czech Republic provides that Czech nationality is acquired by a potential stateless child born on the territory of the republic if at least one parent has his permanent residence there.

Compare below Par. III, 2.

**c) Acquisition iure soli by children, whose parent(s) have domicile/residence within the territory of the State involved (iure domicilii)<sup>192</sup>**

Above, it was mentioned that Ireland attributes the nationality to all children born on Irish territory. Until 1983 this was also the case in the United Kingdom. However, since the commencement of the British Nationality Act of 1981 on 1 January 1983, Sect. 1 (1) provides that a person born in the United Kingdom after commencement shall be a British citizen if at the time of the birth his father or mother is (a) a British citizen or (b) settled in the United Kingdom. Sect. 1 (8) juncto 50 (2) indicates that references in the British Nationality Act to a person being settled in the United Kingdom are references to his being ordinarily resident in the United Kingdom without being subject under the immigration laws to any restriction on the period for which he may remain.

Since 1 January 2000, Par. 4 (3) of the German Nationality Act provides that a child of foreign parents born in Germany acquires iure soli German nationality if one parent has, at the time of birth of the child, legally his habitual residence in Germany for at least eight years, or has an entitlement to stay permanently ('Aufenthaltsberechtigung') or since at least three years an unlimited residence permit ('Aufenthaltsurlaubnis'). It has to be mentioned that Par. 29 G provides that, inter alia, a child who acquired German nationality in this way and also possesses a foreign nationality has to lodge a written declaration with the German authorities before his 23rd birthday, stating whether he wants to retain the German or the foreign nationality. If he chooses in favour of the foreign nationality, German nationality is lost. If no declaration is made before the 23rd birthday, German nationality is lost as well. Before the 21st birthday, an application can be made to receive a permit of retention of the foreign nationality along with German nationality.

This ground for loss is remarkable: after having possessed German nationality for his whole life, a person can lose German nationality even in cases where the person involved continues to live in Germany. In my opinion this ground of loss is not covered by any provision of Art. 7 ECN.

If we set aside the just criticised Par. 29 G, the British and German provisions are an inspiring attempt to indicate that a certain group of persons born on the territory of a State quite likely will develop such close ties with the State involved that acquisition of nationality ex lege is legitimated. See also II-5. Compare as well the option rights mentioned in Par. III, 1, 3 and 10 and the ex lege acquisition of nationality by the second generation born on the territory of a country (below Par. II-3d).

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<sup>191</sup> See G.R. de Groot, Loss of nationality (above footnote 3), Par. 11.2.

<sup>192</sup> See Gerard-René de Groot, Staatsangehörigkeitsrecht im Wandel, Köln 1989, 203, 205-207.

**d) Acquisition iure soli by children, whose parent(s) was (were) also born on the territory of the State involved (double ius soli)<sup>193</sup>**

**d-1) Strict application of the double ius soli principle**

In some countries nationality is attributed ex lege to children whose parent(s) was (were) also born on the territory of the State involved. This ground for acquisition of nationality was introduced for the first time by France in 1851<sup>194</sup> and is often described as acquisition because of double ius soli. The background of the rule is that the second generation of persons living on the territory of a State (being the third generation living there) are deemed to have such a close link with the State involved that neither the persons involved nor the authorities of the country of birth should have the possibility to prevent the acquisition of the nationality of the country of birth. The rule is still in the French Code civil (19-3 FRA) and can also be found in Spain (17 (1) (b) SPA).

In this context also a remarkable Austrian provision has to be mentioned. 8 (2) AUS provides that -until the proof of the contrary- a person is deemed to be Austrian if he is born in Austria and one of his parents was born there as well. In the case of birth out of wedlock the place of birth of the mother is decisive.

**d-2) A residence oriented variation on the double ius soli principle**

Art. 3 (3) of the Netherlands nationality act contains a rule which comes very close to the traditional French double ius soli rule. 3 (3) NET provides that a child shall be a Netherlands national if it is born to a father or mother who has his/her main habitual residence ("hoofdverblijf" in the sense of "feitelijke woonstede") in the Netherlands, the Netherlands Antilles or Aruba at the time of its birth, and if this father or mother was born to a father or mother residing in one of these countries at the moment of the birth of her child, provided the child has also his main habitual residence in the Netherlands. This is the so-called third-generation rule. The provision of Art. 3 (3) does not contain a strict ius soli-regulation. The provision does not demand that the child be born on Netherlands soil, only that the father or mother resides in the Kingdom.

11 (1) BEL provides that a person who is born in Belgium as the child of a foreigner who also was born in Belgium and who had his main habitual residence in Belgium for at least 5 years within the 10 years directly preceding the birth of the child acquires Belgian nationality ex lege. A similar rule applies in the case of adoption (11 (2) BEL).

**4. Children found on the territory<sup>195</sup>**

Art. 6 (1) (b) ECN prescribes that a foundling found in the territory of a State has to acquire the nationality of that State if he otherwise would be stateless. The wording of this provision is drawn from Art. 1 of the 1961 Convention on the Reduction of Statelessness. One

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<sup>193</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 206-208.

<sup>194</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 77, 399.

<sup>195</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 209, 210.



has to realise that this provision is not restricted to new-born infants, but applies to every child in the sense of the Convention, i.e. every person below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier (see Art. 1 sub c). If later on, but during his minority, it is discovered who the parents of the child are, and the child derives a nationality from (one of) these parents or acquired a nationality because of his place of birth, the nationality acquired because of the foundling provision may be lost. This is allowed by Art. 7 (1) (f) ECN.

The nationality legislation of several countries is in conformity with Art. 6 (1) (b) ECN. E.g. Art. 3 (2) NET provides that a child shall be deemed to be the child of a national if he was found on the territory of the Netherlands, the Netherlands Antilles or Aruba or on a ship or aircraft registered in one of these countries. In this case, he thus obtains the Netherlands nationality on the basis of Art. 3 (1) NET. This presupposition (*praesumptio iuris sanguinis*) is not absolute. If it becomes apparent within five years from the day on which the child was found that he does not possess Netherlands nationality, but exclusively a foreign nationality by birth, the nationality of the Netherlands will be lost. But in the case of potential statelessness, he keeps this nationality.

Many States have similar regulations, but provide that the nationality acquired by a foundling is lost if during his minority it is discovered that he is the child of foreign parents and would not become stateless. These provisions correspond precisely with Art. 6 (1) (b) ECN.

In some States the nationality is also lost by a foundling if his descent is discovered after majority. That conflicts with the ECN.

In some countries, the provision on foundlings only applies to new born infants. That is also not in conformity with the ECN. The Czech Republic limits the provision for found children to persons under 15 years old. In view of the ECN the provision should apply on all persons younger than 18 years.

Remarkable is 5 (2) EST according to which a child of unknown parents found in Estonia is declared on application of his guardian or a guardianship authority by a court decision to have acquired Estonian nationality by birth unless the child is proved to be a national of another State. The obvious declaratory character of the court decision and the absence of any discretionary power of the court leads to the conclusion that this regulation is in conformity with the ECN.

## **5. Acquisition because of birth on the territory after a certain period of residence<sup>196</sup>**

Children born in France to foreign parents born abroad acquire French nationality *ex lege* when they reach the age of majority (21-7 FRA). They may lodge a declaration of option in order to acquire French nationality earlier. From the age of 16 years they can make such a declaration themselves; their legal representative may lodge an application with the consent of the minor once the minor has reached the age of 13 years. The applicant has to fulfil the

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<sup>196</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 213, 214.

following conditions: they must reside in France and must have lived there for at least five years. See also 21-11 FRA.

## **6. Acquisition because of military service or State service<sup>197</sup>**

According to Austrian nationality law an alien acquires ex lege Austrian nationality by accepting an appointment as an ordinary professor at an Austrian university. This is provided by Art. 6 (4) Austrian constitution (Bundesverfassungsgesetz) (see as well 25 A). Compare also the legislation of the Vatican.

In France, French nationality can be acquired by a person born in France who enters the French army if certain conditions are fulfilled (21-9 FRA).

Ex lege nationality consequences of an appointment in State or military service or the grant of an option right based on such an appointment implies a decentral decision on the acquisition of nationality by authorities which do normally have no competence in nationality matters. Although civil or military service of a State implies in principle a close link with the State involved which legitimates the possession of the nationality of this State, it is understandable that almost all States prefer to have these links controlled by authorities which are - inter alia - specialised in nationality matters.

## **7. Acquisition because of continuous treatment as a national<sup>198</sup>**

In Spain the possession and continuous use of Spanish nationality for 10 years in good faith and based on a title registered in the civil register is cause for consolidation of the nationality if the title for the acquisition involved is annuled (18 SPA), with other words continuous treatment as a national is in the case of good faith of the person involved a ground for acquisition of nationality. Compare also 29 SWI (privileged naturalisation).

See also the option rights described in Par. III, 7.

## **8. Acquisition because of marriage<sup>199</sup>**

Marriage as a ground for acquisition of a nationality ex lege disappeared completely in the legislation of the States which are included in this contribution. This is in conformity with Art. 4 (d) ECN which provides that neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

In the past, almost all nationality acts applied the so-called unitary system<sup>200</sup> of nationality within a family. A foreign woman who married a national generally acquired the nationality of her husband. By marrying a foreigner a woman lost her original nationality.

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<sup>197</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, [].

<sup>198</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, [].

<sup>199</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 308-311.

<sup>200</sup> In French "système unitaire". See Bernard Dutoit, *La nationalité de la femme mariée*, Band I: Europa (Genf 1973); Band II: Afrique (Genf 1976); Band III: Amérique, Asie, Océanie (Genf 1980) and Bernard Dutoit, *Nationalité et mariage: leur interaction dans le droit comparé de la nationalité*, in: Verwilghen, *Nationalité*, Brussel 1984, 443-474

Nevertheless, in some countries some provisions still deal with the position of married women.

In France Art. 21-1 underscores that a marriage does not affect the acquisition or loss of French citizenship. A similar provision can be found in the Greek nationality act (4 GRE). See also 22 and 23 IRE.

These provisions can be understood as a reaction to the previous legal situation, but are - strictly speaking- superfluous.

## **9. Acquisition by extension of the acquisition of nationality by a parent<sup>201</sup>**

Most countries provide that -under certain conditions- children of a person who acquires the nationality of the country acquire as well this nationality, if they are still minors. The specific conditions and details of the different regulations of extension can not be elaborated in this publication because of the allowed maximum size of this paper. An enormous variety of conditions for an extension of acquisition can be observed. Compare e.g. 12 BEL; 6 and 13 DEN; 22-1 FRA; 10 GRE; 2 (3) LUX; 14 ITA; 2 (3) LUX; 6 and 11 NET. The content of the provisions on the extension of the acquisition of nationality depends, inter alia, on the power which a State wants to give to parents in respect of the determination of the nationality position of their minor children. Compare the remarks made above in Par. II, 1-a.

## **10. Persons of a certain ethnicity**

A foreigner who is recognised in Germany as a refugee or expellee of German ethnicity in the sense of Art. 116 of the German constitution ('Grundgesetz') acquires, at the moment of the delivery of the certificate of recognition, German nationality (7 GER).

The text of Art. 116 Constitution reads -in English translation- as follows:

"Unless otherwise provided by law, a German within the meaning of this Constitution is a person who possesses German nationality or who has been admitted to the territory of Germany within the frontiers of 31 December 1937 as a refugee or expellee of German ethnicity or as the spouse or descendant of such a person."<sup>202</sup> Compare the Greek provisions mentioned in Par. III, 4.

This provision may be understandable in view of the history of Germany in the 20th century but is problematic in view of Art. 5 (1) ECN which forbids, inter alia, every discrimination in respect of the acquisition or loss of nationality based on race or ethnicity.

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<sup>201</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 271-273.

<sup>202</sup> Art. 116 Grundgesetz: "Deutscher im Sinne dieses Grundgesetzes ist vorbehaltlich anderweitiger gesetzlicher Regelung, wer die deutsche Staatsangehörigkeit besitzt oder Vertriebener deutscher Volkszugehörigkeit oder als dessen Ehegatte oder Abkömmling in dem Gebiete des Deutschen Reiches nach dem Stande vom 31. Dezember 1937 Aufnahme gefunden hat."

## 11. Varia

A stateless child under the guardianship of citizens of Moldova acquires Moldovan nationality *ex lege*. The same applies if one of the guardians is a Moldovan citizen and the other stateless (15 (1) and (2) MOL).

### III. Acquisition by declaration of option<sup>203</sup>

This paragraph will discuss which persons are entitled in the various countries to acquire - under certain conditions- the nationality of the country involved by lodging a declaration of option. The details of the conditions can not be elaborated nor will the precise option procedure be described. The object of this paragraph is only to present a list of categories of persons, who are privileged in some States in respect of the acquisition of nationality by granting a right of option. Option rights of a transitory character (e.g. in favor of children of female nationals born before the nationality legislation of the country of the mother implemented the equal treatment of men and women) are not mentioned.

It is important to stress that there are at least two distinct types of options. According to the law of some countries, a declaration of option can be made orally without any formality.<sup>204</sup> Of course the declaration has to reach the competent authorities. Normally these authorities will make an official document, which will be signed in order to prove the declaration, but if such a document does not exist, the declaration can be proved by all other means. If a declaration was made, but not all the conditions giving a right to opt were fulfilled, the nationality is not acquired. If all conditions were fulfilled and the declaration can be proved, although no document exists, the nationality is nevertheless acquired. The authorities do not have the possibility to avoid the acquisition of nationality because of e.g. reasons of public policy or the security of the State.

In some other countries, a person who uses his right of option has to make a written declaration. The authorities control whether all conditions are fulfilled, but also have the possibility to reject the option for reasons of public security or lack of integration (default d'assimilation). It is obvious that this kind of option is much weaker than the first category mentioned. It is therefore not surprising that generally speaking countries which have this second type of option rights grant this right often to considerably more persons than countries where the first type of option rights exists.

Some countries do not use the term 'option rights', but provide for the possibility to register as a citizen if certain requirements are met. If the authorities do not have any discretion in respect of the registration, such a right to register as a citizen is in fact an option right of the first mentioned category. If there is discretion of the authorities, it can be classified as an option right of the second category.

In this context it also has to be mentioned that a couple of countries use the construction of a legal entitlement to naturalisation ('Einbürgerungsanspruch'): if certain conditions are

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<sup>203</sup> Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 215, 216.

<sup>204</sup> This type of option still exists in the Netherlands at the moment but will be replaced in 2002 by the second type of option rights.

fulfilled naturalisation has to be granted on application of the person involved. The discretion of the authorities is reduced to zero. Such an entitlement comes close to the option rights of the first mentioned category. If the naturalisation still can be refused for reasons of public policy or similar general reasons, the entitlement can be compared with the option rights of the second category.

### **1. Persons born on the territory**<sup>205</sup>

Children born in Portugal to foreign parents who have been resident in Portugal for at least six years, in case of nationals of countries whose official language is Portuguese or, in other cases, at least ten years (1 (1) (c) POR) acquire Portuguese nationality by making an option declaration.

Sect. 1 (3) grants a right to register as a British citizen to a person born in the United Kingdom if, while he is a minor his father or mother becomes a British citizen or becomes settled in the United Kingdom. Sect. 1 (4) UK gives a right to register to a person born in the United Kingdom after he has attained the age of ten years if, as regards each of the first ten years of that person's life, the number of days on which he was absent from the United Kingdom in that year does not exceed 90.

A child born in Belgium can acquire Belgian nationality by a declaration of option made by the parents before the 12th birthday of the child. The parents must have had their main habitual residence in Belgium for ten years before they make this declaration (11bis BEL). A similar rule applies for adopted children born in Belgium. After having attained the age of 18 a person born in Belgium has another option right (12bis (1) (1) BEL). Compare also 13 (1) juncto 14 and 15 BEL.

In Luxembourg, there is an option right for persons born in Luxembourg which has to be used between the age of 18 and 25. During the year prior to the declaration of option the person involved must have had his habitual residence in Luxembourg; in total he must have lived there for at least 5 years (19 (1) LUX).

See furthermore 6 (4) (e) ECN.

### **2. Stateless persons born on the territory**<sup>206</sup>

Art. 6 (2) ECN prescribes that a state which does not grant its nationality to potential stateless persons born on its territory ex lege has to grant the nationality subject to only one or both of the following conditions: a) lawful and habitual residence on the territory of the State involved for a period not exceeding five years immediately preceding the lodging of the application, and b) absence of a conviction for a serious offence.

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<sup>205</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 216-221, 229, 235.

<sup>206</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 221, 222, 235.

It was already mentioned above (Par. II, 3b), that a considerable number of countries provide for an ex lege acquisition in case of potential stateless children born on the territory of that State.

See furthermore 6 (4) (e) and (g) ECN.

### **3. Persons who fulfill certain residence requirements<sup>207</sup>**

In Belgium, a foreigner having his main habitual residence there for seven years and who possesses a permanent residence permit or a permit to settle permanently can acquire Belgian nationality by making a declaration of option (12bis (1) (3) BEL). See also 13 (2) juncto 14 and 15 BEL.

In Sweden children younger than 18 years have an option right if they live in Sweden for 5 years (stateless persons: for three years) and possess a permanent residence permit. Children older than 12 years have to give their consent (7 SWE).

According to German legislation, foreigners living in Germany longer than 15 years have under certain additional conditions a legal entitlement to naturalisation (Par. 86 Aliens Act ('Ausländergesetz')). In Austria, foreigners can under certain conditions have a legal entitlement to naturalisation after 30 years of residence (12 (a) AUS).

See furthermore 6 (4) (f) ECN.

### **4. Persons under guardianship or parental authority of a national<sup>208</sup>**

A foreign child who is under joint custody of a parent and the partner of this parent or under the custody of two guardians (one of them possessing Netherlands nationality) can opt for Netherlands nationality after the Netherlands national involved has cared for him and educated him for at least three years before the age of majority (6 (1) (d) NET).

Spain provides for an option right for all foreign minors who are or were under the parental authority of a Spanish national. For a minor younger than 14 years the legal representative has to opt.

This option right does not correspond with any category of persons whose acquisition of a nationality should be facilitated according 6 (4) ECN.

## **5. Children of a national**

### **5a) Children which did not acquire nationality because of an exception allowed by Art. 6 (1) ECN (birth abroad or out of wedlock)<sup>209</sup>**

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<sup>207</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 236.

<sup>208</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 223.

<sup>209</sup> See Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 236.

Art. 6 (4) (b) ECN prescribes the facilitation of the acquisition of nationality by children of one of its nationals falling under the exceptions of Art. 6 (1) (a) ECN (i.e. children who did not acquire the nationality of a parent because they were born abroad or born out of wedlock). Of course, only in countries which make use of these exceptions can option rights for these categories of children be found.

In the Netherlands, recognised or legitimised children of a Netherlands father have the opportunity to acquire Netherlands nationality by confirmation of a declaration of option after the father has cared for them and educated them ("verzorging en opvoeding") for a period of three years (6 (1) (c) NET). Also compare the complicated regulation of the entitlement to naturalisation of the child born out of wedlock of an Austrian father (12 (d) and 17 (1) (3) juncto 10 (1) (1-8) and (2) AUS).

According Swedish legislation, a Swedish father can register his children born abroad outside of wedlock as Swedish citizens before they reach the age of 18 (5 SWE).

3a FIN provides that the child born out of wedlock of a Finish father has an option right on Finish nationality if a) the father is still Finish, b) the father has (joint) custody; c) the child resides in Finland and d) the child is younger than 18 years and not married.

A special provision can be found in Spain, where 17 (2) SPA provides, that the descent of a Spanish national established after majority creates an option right on Spanish nationality to be used within two years after the establishment. The same applies if the birth in Spain was discovered only after majority.

The Belgian legislation grants an option right to the child older than 18 years born abroad of a Belgian national (12bis BEL). If the child born abroad is only the adopted child of a Belgian national and the child did not yet receive Belgian nationality the Belgian legislation provides for an option right to be used between the age of 18 and 22 (13 (3) juncto 14 and 15 BEL).

A comparable option right has the child born abroad of **one** Slovenian parent between the age of 18 and 23 (6 SLN; see for adopted children: 7 SLN).

### **5b) Other children (parent acquired the nationality of the State involved after the birth of the child)**

In most countries, (minor) children often acquire the nationality of the country if one of their parents acquires this nationality (see above Par. 11, 9). In countries where this is not the case and for cases where the conditions in the legislation are not met, (minor) children sometimes have a right of option on the nationality involved if certain requirements are met. See e.g. 12bis (1) (2) BEL; 2 POR.

If the parents of a child who has already reached the age of majority acquire Luxembourg nationality the child gets an option right to be used between the age of 18 and 25. During the year prior to the declaration of option the person involved must have had his habitual

residence in Luxembourg; in total he must have lived there for at least 5 years (19 (6) LUX).

Compare furthermore 6 (4) (c) ECN.

## **6. Former nationals<sup>210</sup>**

Very common is the facilitation of the acquisition of nationality by former nationals, also described as recovery of nationality. In many States their naturalisation is facilitated (compare Art. 9 ECN), in some countries an option right is granted in addition if certain requirements are met.

## **7. Persons treated as nationals<sup>211</sup>**

In a couple of countries, persons treated as nationals for a certain period of time can acquire the nationality of the country involved by lodging a declaration of option, if they possessed the nationality in good faith. This is the case in Belgium after a possession of Belgian nationality in good faith for a period of 10 years (17 BEL). A very similar rule exists in France (21-13 FRA).

This option right does not correspond with any category of persons whose acquisition of a nationality should be facilitated according 6 (4) ECN.

## **8. Spouses of nationals<sup>212</sup>**

In a considerable number of countries, spouses of nationals can acquire the nationality by declaration of option, if certain conditions are met.

22-2 FRA gives an option right to the foreign spouse of a French national after one year of marriage. The spouses must live together at the moment of declaration of option.

Most countries require that the marriage exists already three years before a declaration of option can be made by the foreign spouse of a national in order to acquire the nationality. This is the case in Ireland where the foreign spouse of an Irish national can opt for Irish nationality after three years from the date of marriage or the date on which the spouse became Irish. At the moment of the declaration of option the marriage must still exist and the spouses must live together (8 IRE).

In Belgium the foreign spouse also has an option right after three years of marriage if the spouses were living together in Belgium. If the foreign spouse was already living in Belgium before the marriage the option can be lodged earlier (16 BEL). A very similar provision exists in Luxembourg (19 (3) juncto 21 LUX).

In the Netherlands their naturalisation is facilitated by 8 (2) NET. After three years of marriage they can apply for naturalisation, even if they do not live in the Netherlands. It is

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<sup>210</sup> Gerard-René de Groot, Staatsangehörigkeitsrecht im Wandel, Köln 1989, 223, 232, 236.

<sup>211</sup> Gerard-René de Groot, Staatsangehörigkeitsrecht im Wandel, Köln 1989, 226, 234.

<sup>212</sup> Gerard-René de Groot, Staatsangehörigkeitsrecht im Wandel, Köln 1989, 231, 236.



remarkable that 8 (4) NET also facilitates the naturalisation of unmarried persons who have lived with an unmarried Netherlands national for at least three years and have a permanent relationship other than marriage. 8 (4) applies to all cohabitation relationships in which the partners are not married, regardless of whether they are hetero- or homosexual. The partners must have lived together in the Netherlands; cohabitation with a Netherlands national abroad does not entitle one to a facilitation of naturalisation.

Compare furthermore 6 (4) (a) ECN.

### **9. Persons educated in the territory of the State involved<sup>213</sup>**

Art. 6 (4) (f) ECN prescribes the facilitation of the acquisition of nationality by persons who have been lawfully and habitually resident on its territory for a period of time beginning before the age of 18 as determined by the internal law of the State Party concerned.

According to Netherlands nationality law, these persons have an option right if they have legally had their main habitual residence in the Netherlands since at least four years of age (6 (1) (e) NET).

19 (4) LUX gives an option right to the foreigner who received his whole mandatory school education in Luxembourg. This right has to be used between the age of 18 and 25. During the year prior to the declaration of option the person involved must have had his habitual residence in Luxembourg; in total he must have lived there for at least 5 years (19 (4) LUX).

In Sweden a person can opt for Swedish nationality between the age of 18 and 22, if he lives in Sweden with a permanent residence permit since the age of 13 (stateless persons since the age of 15) (8 SWE). A similar option right exists in Finland, Iceland and Norway for persons living there since the age of 16 but for at least 5 years. The declaration of option has to be made between the age of 21 and 23. Stateless persons and persons who will lose their nationality by the acquisition of Finnish nationality can already opt after having reached the age of 18 (5 FIN; 3 ICE; 3 NOR). Denmark had a similar provision until 2000. Since then,<sup>214</sup> persons with a criminal record or charged with a criminal offence are excluded from this option right. The required period of residence is now 10 years of which 5 years within the last six years immediately before lodging the declaration of option.

In Germany a foreigner between 16 and 23 who was living there legally for at least 8 years and got his education mainly in Germany has a legal entitlement to naturalisation (Par. 85 Aliens Act ('Ausländergesetz')).

In France certain children educated in France by a French national or a French institution or at least under circumstances which enabled them to visit during at least 5 years French schools can acquire French nationality by lodging a declaration of option (21-12 (2) (1) and (2) F).

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<sup>213</sup> Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 230.

<sup>214</sup> Act 1102 of 29 December 1999.

## 10. Children adopted by nationals<sup>215</sup>

As we already saw above, the facilitation of the acquisition of nationality by children adopted by one of its nationals is prescribed by Art. 6 (4) (d) ECN. In many countries these children acquire the nationality of the adoptive parents *ex lege* if certain conditions are fulfilled (see above Par. II, 2). In a couple of countries, option rights exist.

## 11. Persons of a certain ethnicity

In Greece persons of Greek ethnicity are facilitated by the grant of a kind of option right (5 GRE, see also 12, 13 and 19 GRE).

Compare the German provision described in Par. II, 10.

As already mentioned above, this facilitation is problematic in view of 5 (1) ECN because it could be classified as a positive discrimination based on ethnic origin.

## 12. Varia

According to Irish nationality law, a person born on the territory of Northern Ireland after 6 December 1922 may lodge a declaration of option in order to register as an Irish citizen. If the person is still a minor, this declaration can be made by his legal representative (7 (1) ITA)

Children and grandchildren of Italians have an option right on Italian nationality if they live two years in Italy after having attained the age of majority. They can opt even earlier, if they enter into (military) service of Italy (4 (1) (a) ITA).

The child born abroad of a person who possessed Luxembourg nationality may acquire this nationality by lodging a declaration of option between the age of 18 and 25. During the year prior to the declaration of option the person involved must have had his habitual residence in Luxembourg; in total he must have lived there for at least 5 years (19 (2) LUX).

The Irish option right can be understood in view of the history of Ireland in the 20th century. The Italian and Luxembourg option rights are an extension of the preferential treatment of former nationals.

## Some elements for an evaluation

Reading the list of categories of persons entitled to an option right or entitled to naturalisation in the various countries nearly all the categories listed in Art. 6 (4) ECN which should be facilitated in respect of the acquisition of nationality, are mentioned. Exclusively stateless persons and refugees do not have, in any of the countries studied for this publication, as such a right of option. In respect of stateless persons **born** on the territory, Par. II, 3b mentions that in many countries they acquire the nationality of the country of birth *ex lege*, in several other countries they have option rights (see Par. III, 2).

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<sup>215</sup> Gerard-René de Groot, *Staatsangehörigkeitsrecht im Wandel*, Köln 1989, 233.

Of course, not all the categories mentioned in 6 (4) ECN have option rights in all countries. In some countries, facilitation of the acquisition of nationality by naturalisation is preferred. At first sight, this seems to be a completely different approach. However, one should realise that a controlled option procedure is more or less the same as an efficient naturalisation procedure. If naturalisation is a right which can be enforced if the conditions for naturalisation are fulfilled, it does not really matter whether a category of persons has a controlled option right or a privileged position in respect of the conditions for naturalisation.

If a strict option right is granted the position of the persons involved is quite different. Such a right goes in the direction of acquisition *ex lege*, but pays attention to the will of the person involved.

It is - by the way - not necessary for a State to make a choice between both types of option constructions. They can be used alongside each other for different categories of persons.

Many of the option rights granted to different categories of persons are limited in time: the option right has to be used within a certain period of time. This is completely understandable e.g. for the cases where children or young adults have an option right to acquire the nationality of a parent or to reacquire a nationality lost by them during their minority.

Such a limitation is less understandable in cases where the option right is granted because of the fact that persons have lived for their whole life, or at least for a considerable period, in the country of residence and therefore built up close ties with this country. I would like to submit that these ties get closer and closer if somebody continues to live in the country involved. A limitation of this category of option rights is therefore in principle not justified.

A limitation of these option rights in age can exclusively be defended if it is likely that persons would like to postpone the exercise of the option right until a moment, where one does not need to fulfil certain obligations. This could happen in the past in almost all countries in respect of military service obligations.

It is fascinating to notice how many countries have, *inter alia*, grounds for *ex lege* acquisition based on territorial elements (birth on the territory (*ius soli*/ double *ius soli*) or residence within the territory (*ius domicilii*: residence of a parent or residence of the person involved)) or provide for option rights based on these elements. The details of these regulations vary considerably from country to country. However, their aim is always to promote the nationality integration of persons permanently living on the territory of a State. It would therefore be desirable to recommend legislators to include in their nationality legislation grounds for acquisition based on territorial units and to allow the choice between some alternatives.

It is interesting to see that some countries grant option rights to categories of persons which are not mentioned in the list of Art. 6 (4) ECN. The most interesting category is the preferential treatment of persons who were treated as a national in good faith. There exist a relationship between this option right and the issue of certification and proof of nationality

(see 10 and 11 ECN). It is desirable to study these issues and to elaborate recommendations.

#### **IV. Some concluding remarks**

In perspective of the various rules described above some suggestions can be made.

1) In respect of the grounds for acquisition ex lege:

a) Exceptions made with regard to children born abroad should be drafted on a way which never lead to situations of statelessness (so already Recommendation R 99 (18) of the Committee of Ministers of the Council of Europe on the avoidance and the reduction of stateless, in rule II A (a)).

b) If for one of the reasons mentioned above, a legislator wants to restrict the transmission of nationality *iure sanguinis a patre* in case of children born out of wedlock, the restriction should only be as wide as necessary in order to reach the goal for the restriction.

c) Full adoption of a minor should have nationality consequences ex lege (both in the case of an adoption by a decree of the own courts as in the case of foreign adoptions recognised because of rules of private international law).

d) A special study should be made on the possibilities which parents possess to represent the interest of their children in nationality matters, on the rules regarding to the extension of the acquisition, respectively loss of a nationality by a parent to his (minor) children, and on the possibilities which children have in order to renounce, respectively reacquire a nationality acquired, respectively lost during their minority.

e) Certain *ius soli* oriented ways of acquisition of nationality (ex lege or by way of option) should be encouraged in order to promote the nationality integration of persons born on the territory of a State. A double *ius soli* rule (or the residence oriented variation) should be recommended in order to promote the nationality integration of families permanently living on the territory of a State.

f) In respect of the nationality provisions on foundlings Art. 6 (1) (b) ECN gives a very concrete rule. It is desirable to promote that States implement the rule involved.

2) In respect of the grant of option rights.

g) The exercise of residence based option rights on a nationality should not be limited in time if the person involved continues to live in the country involved.

h) It is desirable to recommend legislators to include in their nationality legislation grounds for acquisition based on territorial elements and to allow the choice between some alternatives.

i) Persons who were treated for a long period as a national and were in good faith should either acquire the nationality involved by operation of law or should have the possibility to acquire this nationality by declaration of option.

j) The rules on certification and proof of nationality should be studied in detail in order to elaborate recommendations.

j) It is necessary to study both the categories of persons who possess a right of option and the categories of persons who are facilitated in respect of the acquisition of nationality by way of naturalisation in order to draft recommendations elaborating art. 6 (4).



# ACQUISITION OF NATIONALITY THROUGH NATURALISATION: AN ASSESSMENT OF EUROPEAN LEGISLATION

## Report by

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## SUMMARY

This report is complementary to the report by Prof Dr Gerard-Rene de Groot regarding the acquisition of the nationality of a State *ex lege* or by lodging a declaration of option. It deals with the primary means for the voluntary acquisition of a State's nationality: naturalisation, and begins by reference to international instruments and then goes on to assess the requirements for naturalisation contained in the legislation of Member States.

Few countries have the same requirements for naturalisation or refer to them in the same terms as other States. The paper attempts to place the requirements into a number of basic categories :

- age;
- residence;
- spouses;
- ability to support oneself;
- character and health;
- language and integration;
- security;
- benefit to country; and
- renunciation of previous nationality.

As the principal means for a foreign immigrant to acquire the nationality of the State in which he is permanently resident, the requirements for naturalisation are some of the most important elements of a State's nationality laws and reflect their attitude towards non-ethnic residents in their State. The paper sets out the requirements and questions whether or not some of them are justifiable. Amongst the matters which it raises for discussion are:

- How the length of residence in a State should be calculated;

- whether exceptions to the residence requirements should be allowed;

- whether the future intentions of an applicant regarding residence should be taken into consideration if it reduces the rights on acquiring citizenship;

- the facilitation of the naturalisation of spouses of citizens;

- the requirement to be able to support oneself;

what issue should be taken into consideration in determining whether or not the good character requirement has been met; and

the degree of knowledge of a State's language and integration into society which should be required.

The paper suggests that the Council of Europe should draft an instrument concerning the requirements for the acquisition of nationality through naturalisation setting a flexible approach to determining applications in favour of the applicant. Doing so would aid the integration of foreign nationals into the State in which they were legally and habitually resident.



## INTRODUCTORY REMARKS

1. On 10 December 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights in which Article 15 stated that “(1) Everyone has the right to a nationality” and “(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality”. Unfortunately, the Universal Declaration did not set out any means by which people should be able to acquire a nationality nor the way in which they could exercise their right to change their nationality, thereby following Article 1 of the Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws which stated that “each State shall determine under its own law who are its nationals”. That has been followed by other international instruments: for example, Article 24.3 of the 1966 International Covenant on Civil and Political Rights states that “Every child has the right to acquire a nationality” whilst Article 7.1 of the 1989 Convention on the Rights of the Child says “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents”. The only instrument which attempted to set out provisions for the acquisition of nationality was the 1961 Convention on the Reduction of Statelessness which dealt with basic provisions for the acquisition of a State’s nationality by a person who was stateless. Such provisions included matters relating to persons born on the territory of a State who would otherwise be stateless; children one of whose parents was a national of the State; and foundlings. It was not until the European Convention on Nationality was opened for signature on 6 November 1997 that an international instrument set out detailed basic requirements regarding the conditions for the acquisition and loss of nationality. An analysis of the rules regarding the acquisition of the nationality of a State *ex lege* or by lodging a declaration of option is contained in the paper by Prof Dr Gerard-Rene de Groot. This paper addresses the conditions which have to be fulfilled by an applicant in order to qualify for citizenship by means of naturalisation.

2. The term “naturalisation” is not used in the legislation of all States: in some the legislation refers to “admission to citizenship” whilst in others it is “acquisition of citizenship as a result of granting”. This paper deals with the basic means of voluntarily acquiring citizenship by people who do not have connections with a State through birth on its territory or parentage, although in some States there are less stringent requirements for naturalisation for some individuals who have some connections with them. The paper also deals in the main with the naturalisation of adults even though some States use the term “naturalisation” for the voluntary acquisition of their citizenship by children.

3. Most applications for naturalisation are made by foreign nationals who have emigrated to the country in question and is the only means by which they can acquire the nationality of that State. The requirements which an applicant is expected to meet are therefore some of the most important elements of a State’s nationality laws because they reflect the country’s attitude towards immigrants. This paper is based on an examination of the laws of Member States of the Council of Europe and those States which have observer status at the Council’s Committee of Experts on Nationality. The requirements, which are discussed below, do not occur in all States’ legislation for there are no basic requirements which all States expect applicants to meet. Nor are there any basic requirements set out in

international instruments. Article 6.3 of the 1997 European Convention on Nationality sets out that States should provide for the possibility of persons lawfully and habitually resident on their territory to acquire their nationality through naturalisation. It allows States to set conditions for naturalisation but only stipulates that the period of residence required of an applicant by a State should not exceed 10 years. Article 34 of the 1951 Convention relating to the Status of Refugees states that “The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings”. Similarly, Article 32 of the 1954 Convention relating to the Status of Stateless Persons repeated the provision for stateless applicants for naturalisation, but neither Convention set out the basic requirements which States should apply in their laws regarding naturalisation. Hopefully this paper and the discussion which follows it will contribute to any consideration which may be given to setting out in an instrument the acceptable requirements for naturalisation which States should set.

#### A. Age

4. Most States require applicants for naturalisation to be adults, 18 years or over, or of “full legal age” which would seem to be reasonable provided that the child of an applicant could acquire the State’s nationality if the parent’s application was successful and the child also lived on the state’s territory. This is provided for in most States but a problem might arise where one of the conditions for acquiring nationality is to renounce one’s existing nationality. In some States minors cannot renounce their nationality and in such cases the State granting nationality to the parent should also grant nationality to the child subject to the child either renouncing its former nationality on reaching its majority or losing the nationality acquired by the parent. Some States permit individuals under the age of 18 to apply for naturalisation in their own right if they are married or previously nationals of the State concerned, and the lowest age by which an individual who does not meet those two requirements could apply would appear to be 15 years. In these three cases the difficulty in renouncing existing citizenship could still apply depending on the law of the State of which they were already nationals and the provision suggested above should be applied.

#### B Residence

5. Residence requirements are nothing new. According to Jean Duhamel in his book *The Fifty Days: Napoleon in England* when Napoleon was defeated at the Battle of Waterloo in 1815 he threw himself on the English sense of liberty and surrendered to them because “with any other Allied power, I would have been at the mercy of the whims and will of a monarch. In submitting to England I put myself at the mercy of a nation”. However, on being told that the British Government planned to repay this confidence by packing him off to the island of St Helena, he was outraged. “I demand to be received as an English citizen” he said. “I know indeed that I cannot be admitted to the rights of an Englishman at first. Some years are requisite to entitle one to be domiciled.” The requirement “to be of good character” (discussed in paragraphs 17-19 below) he did not appear to consider.

### i lawful and habitual

6. Article 6.3 of the European Convention sets out that States should provide for the possibility of persons lawfully and habitually resident upon their territory to acquire their nationality through naturalisation. The nationality laws of most States specify requirements regarding residence by applicants for their citizenship. This is understandable, as residence in a State is one means by which an individual can establish a “genuine and effective link” with the State. The requirement might be described as lawful or permanent or registered. Some States require an applicant to have been issued with a permanent residence permit whilst others require an applicant not to have been denied residence in the State. The way in which the requirements are expressed may depend upon the wording of the State’s immigration laws but the vast majority of requirements examined would appear to meet the requirements of Article 6.3.

### ii length of residence

7. Article 6.3 states that the period of residence required of an applicant should not exceed 10 years. The requirements in the legislation of Member States stretch from 2 years to 25 years although the vast majority of States meet the requirements of the Article. Of those that do not, many appear to be in the process of reducing the period of residence before the application may be made. In addition to some of the provisions discussed immediately below, reduced requirements are often permitted for certain classes of individuals: refugees, stateless persons, adopted children or a national of a country with which the State has close links through a Treaty.

8. The residence requirements raise three issues worthy of discussion: how the required period should be defined; whether exceptions should be made to the normal rules; and whether some exceptions would be contrary to Article 5.1 of the Convention which states that “The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin”. The first question is whether “lawfully and habitually resident” should include time spent when the applicant was subject to restrictions placed upon him or her by the immigration laws of the State. For example, in some countries an immigrant who legally enters the country in order to take approved employment may initially be subject to restrictions on the time he or she may remain in the country. After a number of years the immigrant may then be granted permanent residence or indefinite leave to remain in the country, and he or she would no longer be subject to the time restrictions on their stay. So far as naturalisation is concerned, the question would be whether the time spent before the grant of permanent residence should count as part of the period of residence required under the nationality legislation as being lawful and habitual. In most States it would, but some States have a large number of foreign nationals on their territory who are there for a temporary purpose, such as students, which would not qualify them for permanent residence. If the residence requirement for naturalisation was 5 years, should the student be allowed to apply for naturalisation after being in the country for 5 years subject to conditions under the immigration laws? In some countries this problem is dealt with by a specific requirement in their legislation which requires an applicant to be free of immigration restrictions and in such cases the time spent before the

restrictions were removed counts towards the period of lawful and habitual residence. In other States though the legislation refers to a specific period of time following the declaration or grant of permanent residence. If time spent before an applicant is granted permanent residence does not count towards the residence requirement for naturalisation, then the period an applicant has lived in the country legally could be well above the requirement in Article 6.3 (although neither the Convention nor its explanatory report sets out how the residence period should be interpreted). As the Convention requires a maximum period of 10 years residence I think that time spent more or less continuously in the country, even if subject to time restrictions under the immigration laws, should count towards the requirement for nationality provided that the applicant has been granted permanent residence in the country.

### iii exceptions to the rules

9. The other question is whether exceptions should be made to the rules regarding residence. Some States specify such exceptions in their legislation. For example, in one State the legislation permits discretion to waive absences up to one year for temporary employment abroad or for absences for unavoidable reasons such as the illness of a close relative or 3 years if the applicant was studying abroad provided that his or her overall residence meets the requirements. Other States allow the residence requirement to be eased for those who came to their country under the age of 15 or who have received a substantial proportion of their general or specialised education in the country. Other requirements are expressed as 1 year immediately before the application and 4 out of the last 8, or 10 years with 5 years immediately preceding the application, or 10 years out of the last 12. Such conditions would seem to acknowledge that immigrants might be leaving the country for certain periods of time during the qualifying period. In some countries, the amount of such permitted absences is specified in their legislation. For example, in one State which requires an applicant to have been resident for 5 years it specifies that he or she should not have been absent for more than 450 days in that period and for no more than 90 days in the final 12 months. But even so that legislation permits any excess absences to be waived in the special circumstances of any particular case. In applying their residence requirements States should allow the exercise of discretion so that absences might be disregarded according to the reasons for such absences. Total residence in the country should also be taken into consideration. For example, where a State requires an applicant to have been resident for 5 years before an application for naturalisation is made and the applicant has been absent for about 18 months overall during that period because of the nature of his employment, the State should take into account the length of his total residence. If he had only been resident for 5 years then the State's authorities might determine that the residence requirements had not been met, but if the applicant had been resident for 15 years then that length of residence should be taken into consideration in the applicant's favour. In today's world more and more people are required to visit other countries because of the nature of their business or employment, and immigrants quite often want to return to their country of origin to maintain links with their families still resident there. It is not therefore possible for many immigrants to meet a strict requirement to have been resident in a country for a number of years without any absences. In deciding whether the residence requirements have been met the State authorities should take into consideration the overall circumstances of the applicant and the reasons for such absences.

10. Finally, some States make exceptions to their residence requirements for the nationals of neighbouring countries with which there are special bonds, or for nationals of States to whom they are allied through Treaties, or to individuals of their national or ethnic descent who do not acquire their citizenship *ex lege*. Such provisions might on the surface be considered as being contrary to Article 5.1 of the Convention. However this is discussed in paragraphs 39-44 of the explanatory report to the Convention. Paragraph 41 talks about more favourable treatment being given to nationals of certain other States and says that provisions such as these “would constitute preferential treatment on the basis of nationality and not discrimination on the grounds of national origin”. Most exceptions to the residence requirements could rightly be regarded as being preferential treatment and not discrimination and do not therefore conflict with Article 5.1. Where States specifically allow a shorter period of residence for the spouses of nationals or individuals of their ethnic descent, they should consider offering such facilitation to stateless persons and refugees, as *per* Article 6.4.g of the Convention.

#### iv future intentions

11. Some States require applicants for naturalisation to intend to continue residing in the State in the event of them being granted its citizenship. Such a requirement is probably designed to deter individuals from acquiring the State’s nationality as a matter of convenience or solely in order to facilitate their travel or emigration to another country. That is understandable as people acquiring citizenship through naturalisation are usually expected to have “thrown in their lot” with the State through assimilation or integration. However the nationals of some States, such as those who are members of the European Union, have rights of free movement within other member States. Thus if an individual who met all the other requirements for naturalisation was going to be denied citizenship because he or she wanted to work in another member State, it would be denying him or her the rights which other citizens would have. Such provisions could therefore lead to applicants not being totally honest about their future intentions (which in itself could be a ground for revoking citizenship). That could be regarded as being discriminatory, especially if the future intentions requirement was not applied to spouses of their nationals or to people working for companies based in the State or those who intended working for the State abroad. As most States require a period of residence from applicants for naturalisation that should be the determining factor in deciding whether to approve the application, not the future intentions of the applicant. In cases where the residence requirement was not met, the future intention of the applicant could be taken into account in deciding whether or not to exercise discretion in his or her favour.

#### C Spouses

13. Most countries in which the spouse of one of their nationals does not acquire citizenship through a declaration of option have less stringent conditions for their acquisition of citizenship through naturalisation. There are a number of variations: some States require the marriage to have existed for a specified number of years; others require a (shorter) period of residence. Which requirement should be applied does not really matter provided that the overall requirements facilitate the acquisition of citizenship by the spouse (in accordance with Article 6.4.a of the Convention).

14. Other questions though, raised by the requirement, are whether residence in the State should be required and whether the facilitation should also be extended to partners in a recognised cohabitational union. In many States marriage of a woman to one of its nationals used to confer its nationality upon her or give her the opportunity to acquire their nationality through option or registration. However, in 1957 the Convention on the Nationality of Married Women declared that neither marriage nor the dissolution of marriage between a national of one State and a woman of another State, nor the change of nationality by the husband during marriage, should automatically effect the nationality of the wife. When Article 4.d of the European Convention on Nationality was drafted that provision was reflected in the Article which was extended to cover “spouses” in the way that the nationality legislation of most States now refers to spouses and not just to wives. Most States changed their legislation to conform to the 1957 Convention but as a result many women lost their automatic entitlement to their husband’s nationality and needed to be resident in the husband’s country in order to acquire his citizenship through naturalisation. This may have been because of concerns over “marriages of convenience” (which was discussed at the 1<sup>st</sup> European Conference on Nationality – paragraphs 11-13 and 36-38 of CONF/NAT (99) Rap4 refer) but if a spouse is not living on the territory of the State it is hardly likely that the marriage could be so described. In cases where the spouse is not resident in the State consideration should be given to permitting him or her to apply for naturalisation provided that the marriage has been in existence for a specified number of years and that the partners are still co-habiting.

15. The term “spouse” usually means a person whom is legally married to another but the frequency of cohabitational relationships without marriage, whether between persons of the same or different sex, appears to be increasing. Where the relationship has been in existence for the specified period required of the spouse of a national, the provisions for acquiring citizenship through naturalisation should be extended to the partners of a recognised cohabitational union, although it may be difficult for the partners to prove that their relationship has been in existence for that length of time given the absence in many States of authorised documentation.

16. In some countries the legislation specifies that the national whose citizenship will be acquired should have been a citizen for a specified number of years. This again might be intended to reduce the number of “marriages of convenience” but in many cases this would only apply in cases where the applicant was married to a spouse of former foreign nationality who had acquired the citizenship of the State. This provision may not comply with Article 5 on non-discrimination in that in practice it is only spouses of foreign origin who are likely to be required to have citizenship for those specified number of years.

#### D Ability to support oneself

17. In some States one of the requirements of an applicant is for him or her to have a home and/or sufficient legal income to support themselves and their family. In other countries this self-sufficiency is expressed in terms of not receiving support from the State or local authority. The need for a legitimate source of income is understood, but an illegitimate source of income is a matter which could be considered under the “character” requirement discussed below. In the legislation in which self-sufficiency is a provision

there does not appear to be any discretion to waive the requirement. This could prevent some individuals from applying for naturalisation because of their unemployed status. Some people might not be able to work through a disability, whilst others might have lost their jobs through the collapse of their employers' company for reasons over which they had no control. In times of economic recession many individuals will find themselves unemployed and lack of the State's nationality might prevent them from applying for certain jobs. In some States this is recognised. One Act, for example, specifies that an applicant is required to have secured subsistence except in cases of undeserved financial misery. If the ability to support oneself is to be a requirement for naturalisation then there should be discretion in the legislation to allow an applicant to acquire support from the State depending on the circumstances which led to such support. Physical disability is one circumstance which should be permitted. In the case of elderly applicants who are in receipt of State pensions, their employment record and the financial contributions they made towards the pension whilst in employment are matters which should be taken into consideration in assessing whether or not they met the requirement.

#### E Character and health

18. Most States require an applicant for naturalisation to demonstrate his or her good conduct. This is expressed in many different ways. In some cases the State requires an applicant to be of "good character", which is not defined in their legislation, whereas in others specific reference is made to convictions for criminal offences. In general terms the requirements regarding character, besides those mentioned elsewhere, are intended to ensure that a successful applicant has not been engaged in undermining public safety, public order, health or morality, rights and freedoms or another person's honour or reputation. In at least one State persons who are alcoholics or drug addicts or ill with especially dangerous infectious diseases would not be granted citizenship through naturalisation.

19. The main question which arises from the requirement regarding character is whether conviction for a criminal offence should be a permanent barrier to an individual becoming a naturalised citizen. In some legislation the prohibition relates to offences punishable or punished by a specified term of imprisonment whereas others refer to offences committed during the period of lawful and habitual residence which makes up their residence requirement. The period of imprisonment is expressed in different terms. In one State an applicant is required not to have been imprisoned for more than 3 months, whereas in another the applicant is required not to have been convicted of an offence punishable, not punished, by at least 3 years imprisonment. Others refer to commitment of a grave crime, whilst in another State the legislation requires that no sentence should have been pronounced in the past 5 years. Many States will not grant citizenship to an applicant who is still the subject of criminal proceedings. The intention behind all of these provisions is that recent criminal activity should be a bar to the grant of citizenship and none of them are in themselves objectionable provided that there is some recognition that criminals can be rehabilitated, and that therefore some convictions should not be taken into consideration in determining an application if they occurred some time before the application for naturalisation was being made. The length of imprisonment which counted against the applicant would depend upon the average prison sentence imposed in the country. In some cases a person may have been convicted of an offence which was no

longer a criminal offence and yet, strictly speaking, the conviction might still weigh against the application for naturalisation. Basically conviction of a criminal offence should be disregarded after a certain length of time depending upon the nature of the crime and the sentence imposed.

20. Payment of taxes and duties and alimony are other matters which are taken into consideration in deciding the “character” requirement in some States. In other States an applicant’s health, whether mental or physical, is also a matter for consideration. In some of these States an applicant is required to be of good health or not suffering from a dangerous infectious disease. In others the applicant is expected to be of full mental capacity. Whilst it is important that an applicant broadly understands what the acquisition of a new nationality means, physical illness in itself should not be a barrier to an applicant acquiring citizenship. Where States have such requirements they should have the discretion to waive them in appropriate cases. Some potentially fatal illnesses have been passed on to individuals through no fault of their own – through blood transfusions for instance – and to hold that against an applicant would not seem correct. In determining whether to waive the requirement States should consider what effect it might have upon an applicant to refuse the application and the bias should be towards waiving the requirement for someone who otherwise meets the requirements.

#### F Language and integration

21. Most countries require an applicant for naturalisation to have some knowledge of their official language (or one of them in some States in which there is more than one official language), although exceptions may be made for the spouse of one of their nationals. This is an understandable requirement, especially in these days of trans-global communications, where some States rely upon their language as one means of maintaining their identity or, in others, use it as a means of restoring their national identity. The question is to what extent knowledge of the language is required. In the legislation of some states the requirement is for the knowledge to be “elementary” whereas in others it is “adequate”, “sufficient”, “within established minimum”, “to the extent necessary for communication”, “to be able to make themselves understood in the community”, “speak”, “familiar with language and Latin alphabet” or “mastery”. In other States an applicant is required to have passed an examination regarding knowledge of the state’s language before they can apply for naturalisation. But if an individual does not have sufficient knowledge of the state’s language and cannot obtain citizenship through naturalisation, what would be the result of refusing the application? In some cases the applicant may endeavour to learn the language, but knowledge of the language will not affect their rights to be lawfully and habitually resident in the state. Ability to learn a new language can depend upon age, disabilities or the circumstances in which one lives. For example, people who are deaf or blind or dumb may find it difficult to learn a language, as might people living in an area whose inhabitants are foreign nationals. The degree of knowledge of the language which should be required is therefore something which should be discretionary according to the circumstances of an applicant. Knowledge of the language is a requirement which on the surface might lead towards integration. But what is the position of someone who is refused solely because of their lack of knowledge of the language? As a legal resident he or she should still be allowed to reside in the country in which their lack of knowledge of the language would not seem to be seriously affecting



their way of life. Exceptions should be made for elderly applicants, those with disabilities, those who have resided in the country for lengthy periods, and those who have been educated in schools or colleges in the State.

22. These considerations could also apply to the requirements in some States for knowledge of their constitution, laws, citizenship laws, history and other issues.

23. Some States require an applicant for naturalisation to demonstrate evidence of integration into the State. In most States in which this provision is included in their legislation there is no definition of “integration”. Knowledge of the language is one thing, but what should be required of an applicant for naturalisation regarding integration. In a State which has a predominant religion, would it require an applicant to convert to that religion? Or does it mean that an immigrant from a country with a basic non-European method of dressing should abandon those clothes and wear European-style clothing? What exactly is meant by “integration”? Do States assume that their way of life is the correct one to which others should subscribe and that there is nothing to be learnt from the lifestyles of other countries?

#### G Security

24. Many, if not all, countries take into account consideration regarding national security in determining applications for naturalisation. In some countries this is included in their consideration of the “character” requirement, whereas others specify that acceptance as a national should not affect security and defence of the nation or that an applicant should not have been involved in any activities undermining national security. The necessity for such a requirement or consideration is fairly obvious and refusal of naturalisation on such grounds is totally defensible. The only question is why a foreign national who is a threat to a State’s national security should be allowed to remain lawfully and habitually resident in the country.

#### H Benefit to country

25. Some States make an exception to their normal requirements for naturalisation for individuals who have made extraordinary contributions to the State’s scientific, economic, cultural or national interests, including their achievements on the sporting front. Such individuals may not be granted naturalisation upon their own application but at the initiative of the State with citizenship being granted by Parliament or the Head of State. Such cases might include individuals in public office. Where a foreign national makes such a major contribution to the interests of a State it is easy to understand why the normal requirements for naturalisation might be set aside. The individual might not have established the normal genuine and effective link with the state but will have managed to create another important link through his or her activities. That would seem to be acceptable although some States stipulate only a very small number of persons who can achieve their nationality through such means in a year. That could call into question whether the grant of citizenship is a reward for the extraordinary contribution made to the State or a stimulant for more persons to deliver such results.

26. In some cases individuals can obtain citizenship not through residence or the establishment of a genuine and effective link but through investment of a large sum of money in the State. Such an avenue to citizenship discriminates against the less well-off and could be described as “buying a passport”. If citizenship legislation is generally based upon a link between an individual and the state should the ability to essentially “buy” naturalisation be accepted by other States?

#### I Renunciation of previous nationality

27. States who abide by the principle of single nationality usually require applicants for naturalisation to give up their existing citizenship before their new nationality is granted. In principle this is acceptable but it can lead to practical difficulties. In many cases where the applicant does not lose his existing nationality *ex lege* upon acquiring another, he needs to renounce his existing citizenship. In some countries they will not allow an individual to renounce their citizenship unless he possesses another nationality. Article 16 of the Convention states that a “State Party shall not make the renunciation or loss of another nationality a condition for the acquisition or retention of its nationality where such renunciation or loss is not possible or cannot reasonably be required”. Such a provision would be applicable in the case of nationals of a country which does not allow the renunciation of its citizenship, but it would not apply in the case of a country which did permit renunciation but only when the individual had another nationality. The different approaches by States lead to this problem. The solution might be for States granting citizenship to require renunciation of existing citizenship not before they granted it but within a specified period of time otherwise citizenship would be withdrawn. At the same time States should grant the renunciation of their citizenship before another nationality is acquired provided such citizenship is acquired within another specified period. If it is not acquired then the original citizenship would be recovered and the individual treated as though it had never been renounced. Given the possibility that an applicant for another nationality could on paper be stateless whilst awaiting the decisions of the two states, he should be allowed by the first State 12 months in which to renounce his existing citizenship, and 6 months by the second State in which to acquire a new citizenship.

#### CONCLUSION

28. Most States meet the requirement of Article 6.3 of the European Convention in that their legislation allows for the naturalisation of foreign nationals lawfully and habitually resident upon their territory. But the requirements for naturalisation differ considerably with some being quite stringent. In the European Convention the Council of Europe set quite restrictive terms for the loss of nationality at the initiative of States and it should now consider drawing up an international instrument on the acquisition of nationality through naturalisation. In setting the requirements which it considers to be acceptable the Council should favour a flexible approach which allows discretion to be exercised in favour of the applicant based upon his or her overall circumstances and the length of residence in the State concerned. Some States consider that they are honouring an individual by granting him or her their citizenship. That is true, but the individual also honours the State by applying for its citizenship. As a person who is legally and habitually resident in the State, of good character, who speaks one of the official

languages, has a legal income, is of no danger to national security and intends to reside in the State for the foreseeable future, why would he or she want or need to acquire the citizenship of the State? In most cases it is because they want to be citizens so that they can fully participate in the activities of the State like their neighbours and work colleagues, and this should be borne in mind by States in determining applications for citizenship. Refusing applications does nothing for the State but it does deny an individual certain rights which are enjoyed by others. As he or she is going to continue to be resident in the State the case against refusing an applicant citizenship should be overwhelming rather than his or her inability to meet an otherwise minor requirement in the State's legislation.



# **REGULATION OF MULTIPLE NATIONALITY BY BILATERAL AND MULTILATERAL AGREEMENTS**

## **Report by**

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## SUMMARY

This report explores how multiple nationality has been regulated in the States that acquired or restored independence following the dissolution of the Soviet Union.

Over the last decade, the general opinion on the admissibility of multiple nationality has undergone an important evolution: starting from the aim of the 1963 Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality which was to fight multiple nationality to the neutral stand point on the issue of multiple nationality of the 1997 European Convention on Nationality. It is significant that multiple nationality is now seen less as a source of conflict of loyalties of the individual towards two or more States.

Nevertheless, the situation of each country is unique and many of the States covered in this report have chosen to regulate multiple nationality in different ways. The following examples are identified in the report:

1. Application of non-recognition principle of dual (multiple) citizenship for the citizens of the country without any exception from this rule;
2. Application of non-recognition principle of dual (multiple) citizenship for the citizens of the country and providing for certain exceptions from this rule ;
3. Recognition of dual (multiple) citizenship in all cases;
4. Recognition of dual citizenship in individual cases ;
5. Prohibition for the citizens of the country to have dual (multiple) citizenship without providing for individual exceptions;
6. Prohibition for citizens of the country to have dual (multiple) citizenship with certain exceptions from this rule;
7. Allowance of citizenship of different countries for the citizen of the country, with recognition of such persons as having only the citizenship of the country in legal relations with the country.

Whether a State aims at preventing the occurrence of multiple nationality or not, the issue of multiple nationality has international consequences. For this reason, States have attempted to regulate, by bilateral or multilateral treaties, such questions as military

obligations and other rights and duties of multiple nationals, the prevention of multiple nationality, facilitated change of citizenship and option rights. It is noted that, some of these agreements require modifications because, as they stand, they may lead to the creation of statelessness. Such modifications must provide that no person is rendered stateless in the process of changing citizenship or in the attempt of some States to prevent multiple nationality.

## BACKGROUND

Multiple citizenship is a given, objective phenomenon, stipulated by multilateral legal mutual relations between people and countries. There is a lot of reasons for the occurrence of multiple (dual) citizenship. They are sufficiently analyzed in the scientific literature.

A constructive approach towards the problem of multiple citizenship lies in the ability to envisage, take into account and reconcile in time the legal consequences of this phenomenon both for the persons with multiple citizenship, and for the countries in which these people live, rather than ignoring, non-recognition, objection or, on the contrary, encouragement of this phenomenon.

In relation to multiple citizenship, the last decade has shown a certain evolution, resulting in the legal interpretation of multiple citizenship in the 1997 European Convention on Nationality.

Since the 1930 Hague Convention, a standard norm (principle) of international law has been the non-recognition of multiple citizenship by countries, even concerning persons who without wishing to have become persons having dual citizenship due to collisions of the citizenship law.

A negative attitude towards multiple citizenship is also shown in the Council of Europe 1963 Convention on Reduction Cases of Multiple Nationality and Military Obligations in cases of multiple nationality. In this Convention, an analysis of multiple citizenship cases was accompanied by finding out the methods for removal thereof as undesirable.

In the 1980s - 1990s, when dual citizenship became an appreciable reality, the majority of the European countries started increasingly believing in the idea that this phenomenon causes no dual loyalty, and as such, no less loyalty of the citizen to their country of residence.

The arguments have begun to spread all the more actively that dual citizenship is an efficient means of strengthening the social reliance of “non-aboriginal population” and encouraging trust of this population in the country of residence; that it helps supervise migration flows, rendering additional guarantees for human rights.

Such approaches were reflected to some extent in the 1997 European Convention on Nationality. And while the recognition of multiple citizenship is not raised in the Convention to level of a principle like to the right of each human to citizenship, avoidance of statelessness, impossibility of arbitrary deprivation of citizenship, the Convention still rather expressively stipulates certain expedient cases of multiple citizenship and is orientated towards solving the multiple citizenship problems by permissive methods.

Analysis of the modern trends in the sphere of citizenship allows us to predict further activation of the growth in cases of multiple citizenship. This, in turn, puts on the agenda the improvement of settlement mechanisms for legal consequences of multiple

citizenship. An efficient instrument of such settlement is bilateral international agreements.

Following the collapse of the USSR, newly emerged countries have settled citizenship matters by their national Laws on citizenship. No special agreements to regulate the citizenship matters of the former USSR citizens were made.

The countries pursued different approaches to addressing the citizenship issues, such as single and multiple citizenship. However, there are also joint approaches towards settlements of dual (multiple) citizenship matters.

Single and multiple citizenship in the citizenship law of the countries emerging following the collapse of the USSR. International agreements of post-Soviet countries on the matters of multiple (dual) citizenship

### Azerbaijan

The Law of the Azerbaijan Republic “On Citizenship of the Azerbaijan Republic” contains no regulations of single citizenship.

Article 10 of this Law contains a general rule according to which for persons, who are citizens of the Azerbaijan Republic, no citizenship of another country is recognized, except in certain cases stipulated in the international treaties of the Azerbaijan Republic or allowed according to section 32 Article 109 of the Constitution of the Azerbaijan Republic.

Therefore, the citizenship law of the Azerbaijan Republic allows recognition of citizenship of another country for the citizens of this country in the two following cases:

- if such recognition is stipulated by the international treaties of the Azerbaijan Republic;
- if such recognition is allowed according to the regulation of the Constitution of the Azerbaijan Republic.

However, at present, the Azerbaijan Republic has no agreement, on the grounds on which a citizen of the Azerbaijan Republic with the citizenship of another country is recognized.

### Armenia

In accordance with Article 14 of the Constitution of the Republic of Armenia, the citizens of the Republic of Armenia may not be citizens of another country simultaneously. A similar provision exists in Article 1 of the law of the Republic of Armenia “On the citizenship of the Republic of Armenia”.

In my opinion, as multiple citizenship becomes an objective legal fact, the country cannot ban the citizens from having have foreign citizenship.

The Republic of Armenia has no agreements on citizenship.



## Belarus

According to Article 1 of the Law of the Republic of Belarus “On citizenship of the Republic of Belarus”, a citizen of the Republic of Belarus may not be simultaneously a citizen of another country, except in certain cases stipulated by the law.

This rule is practically the same as the provision of the Law “On the citizenship of the Republic of Armenia”, but it has this exception: the national law may provide for a citizen of the Republic of Belarus to have citizenship of another country simultaneously.

The Republic of Belarus has a number of agreements on citizenship:

- the Agreement between the Republic of Belarus, the Republic of Kazakhstan, Kirghiz Republic on the simplified procedure for acquiring the citizenship (1999). The present agreement allows dual citizenship, as it provides for the possibility of acquiring the citizenship of any party whether previous citizenship ceases or not;
- the Agreement between Ukraine and the Republic of Belarus on the simplified procedure for changing citizenship by the citizens of the Republic of Belarus, who permanently reside in Ukraine and the citizens of Ukraine, who permanently reside in the Republic of Belarus (1999).
- the Agreement between the Republic of Kazakhstan and the Republic of Belarus on the simplified procedure for acquiring citizenship by the citizens of the Republic of Kazakhstan, who arrive for permanent residence in the Republic of Belarus, and citizens of the Republic of Belarus, who arrive for permanent residence in the Republic of Kazakhstan (1996). The said agreements, in my opinion, do not rule out a possibility of dual citizenship, as the agreements contain no provisions on procedure for the termination of the previous citizenship upon acquiring of the new citizenship.

## Georgia

In accordance with Article 12 of the Constitution of Georgia, the citizens of Georgia may not simultaneously be citizens of another country.

In the law of Georgia “On citizenship of Georgia”, Article 1 rules as follows: “Georgia sets forth single citizenship. No citizen of Georgia may be a citizen of another country simultaneously”.

Therefore, the law interprets single citizenship as the interdiction for a citizen of Georgia to have citizenship of a different country simultaneously.

Georgia has made an agreement with Ukraine on the prevention of dual citizenship and the reduction of already existing dual citizenship (1996).

## Kirghiz Republic

In accordance with Article 13 of the Constitution of the Kirghiz Republic, no citizenship of another country is recognized for persons who are the citizens of the Kirghiz Republic.

Article 5 of the law of the Kirghiz Republic contains the same regulation, as the said regulation of the Constitution, but the title of this Article is “Non-recognition of dual citizenship for the citizens of the Kirghiz Republic”.

The Kirghiz Republic has the following agreements on citizenship:

- the Agreement between the Republic of Belarus, Republic of Kazakhstan, Kirghiz Republic, and the Russian Federation on the simplified procedure for acquiring the citizenship (1999);

- the Agreement between the Russian Federation and Kirghiz Republic on the simplified procedure for acquiring citizenship by the citizens the Russian Federation, who arrive for permanent residence in the Kirghiz Republic, and citizens of the Kirghiz Republic, who arrive for permanent residence in the Russian Federation and withdrawal from the previous citizenship (1996). The present agreement does not rule out the occurrence of dual citizenship, as acquiring the citizenship is not made conditional upon termination of previous citizenship.

### Latvia

In accordance with Article 5 of the Constitutional Law of the Latvian Republic “Rights and responsibilities of the person and citizen” at the time of admission to the citizenship of the Latvian Republic no double citizenship shall emerge.

In accordance with Article 1 of the Law of the Latvian Republic on citizenship, dual citizenship is understood as a person having the citizenship of several countries.

In accordance with Article 9 of the aforesaid Law (“Dual citizenship”) dual citizenship is not allowed for persons, who acquire the citizenship of Latvia.

In accordance with Article 9 of the Law of the Latvian Republic on citizenship it is specified that, if a citizen of Latvia according to the law of a foreign country is also recognized as a citizen (subject) of the relevant foreign country, then in legal relations with the Latvian Republic he/she shall be recognized only as the citizen of Latvia.

Therefore, the citizenship law of Latvia does not rule out that the citizens of Latvia may simultaneously have citizenship of different countries.

Latvia has no special agreements on citizenship.

### Lithuania

In accordance with Article 12 of the Constitution of the Lithuanian Republic with an exception made for individual cases established in the law, nobody may simultaneously be a citizen of the Lithuanian republic and of another country. The same regulation exists in Article 1 of the Law of Lithuanian Republic “On citizenship of the Lithuanian republic”.

No special agreements on citizenship with the Lithuanian republic are made.

## Moldova

In accordance with Article 18 of the Constitution of the Republic of Moldova, which is entitled “Limitation of citizenship and protection of citizens”, the citizens of the Republic of Moldova may not be citizens of different countries, except in cases stipulated by the international agreements to which the Republic of Moldova is a party.

A similar provision exists in Article 4 of the Law on Citizenship of Moldova.

At present, there are no agreements with the Republic of Moldova, which provide for citizens of the Republic of Moldova having citizenship of other countries.

## Russian Federation

Article 6 of the Constitution of the Russian Federation stipulates, that the citizenship of the Russian Federation is single.

In accordance with Article 62 of the Constitution of the Russian Federation, the citizens of the Russian Federation may have a citizenship of another country (dual citizenship) according to the Federal Law or the international treaties of the Russian Federation.

Therefore, the regulation of single citizenship and dual citizenship coexist in the Constitution of the Russian Federation.

Nevertheless, this is not a contradiction, as the regulations of single citizenship and dual citizenship are different by legal content.

As for the dual citizenship, it means availability of citizenship of foreign country (and not citizenship of a part of the Russian Federation !).

Article 62 of the Constitution of the Russian Federation also rules, that availability of citizenship of foreign countries for the citizens of the Russian Federation shall not reduce such citizens’ rights and freedoms and does not release them from responsibilities, following from Russian citizenship, unless otherwise stipulated by the federal laws or the international treaties of the Russian Federation.

The Law of the Russian Federation “On citizenship of the Russian Federation” does not completely reproduce the regulation of the Constitution of the Russian Federation.

In accordance with Article 2 of this law, citizenship of a part of the Russian Federation is stipulated: the citizens of the Russian Federation, who permanently reside on territory of the Republic being a part of the Russian Federation, shall simultaneously be citizens of this Republic.

Article 3 of the Law “On dual citizenship” regulates the said matters as follows:

1. Persons, with citizenship of the Russian Federation, citizenship of another country is not recognized unless otherwise stipulated by the international treaties of the Russian Federation.

2. The citizens of the Russian Federation may be allowed, at their request, to simultaneously have the citizenship of a different country, with which there are the relevant agreements of the Russian Federation.
3. The citizens of the Russian Federation, who also have other citizenship, may not on these grounds be restricted in rights, evade from carrying out responsibilities or be relieved from responsibilities following from the citizenship of the Russian Federation.

Therefore, the law “On the citizenship of the Russian Federation” makes no reference to the constitutional regulation that the citizens of the Russian Federation may have a citizenship of a foreign country (dual citizenship) according to the Federal Law.

The Russian Federation has a number of agreements on citizenship.

Article 49 of the Law of the Russian Federation “On citizenship of the Russian Federation” rules that the international agreements of the former USSR on citizenship shall apply on the territory of the Russian Federation. These are the agreements of the former USSR with the former socialist countries on prevention and reduction of dual citizenship.

The Russian Federation is a party to the convention on the simplified procedure for acquiring the citizenship by the citizens of the CIS member countries (1996), and also the agreement between the Republic of Belarus, Republic of Kazakhstan, Kirghiz Republic and the Russian Federation on the simplified procedure for acquiring the citizenship (1999).

The Russian Federation has two agreements on the regulation of dual citizenship:

- the Agreement between the Russian Federation and Turkmenistan on the regulation of dual citizenship matters (1993). According to this agreement, the citizens of any party shall have the right to acquire the citizenship of the other party without termination of their previous citizenship, and also on preservation of citizenship of both parties. The agreement also regulates some legal status matters as to the persons, who have citizenship of both parties: social security, military services, and diplomatic protection;
- the Agreement between the Russian Federation and the Republic of Tajikistan on regulation of dual citizenship matters (1995). This agreement also provides for the right to acquire the citizenship of any party without the termination of the previous citizenship and also the right to preservation of the citizenship of both parties.

In addition, the Russian Federation has:

- The agreement between the Russian Federation and the Republic of Kazakhstan on the simplified procedure for acquiring the citizenship by the citizens of the Russian Federation, who arrive for permanent residence in the Republic of Kazakhstan, and citizens of the Republic of Kazakhstan, who arrive for permanent residence in the Russian Federation (1995);
- the Agreement between the Russian Federation and the Kirghiz Republic on the simplified procedure for acquiring the citizenship by the citizens The Russian Federation, who arrive for permanent residence in Kirghiz Republic, and the citizens of the Kirghiz

Republic, who arrive for permanent residence in the Russian Federation, and withdrawal from the previous citizenship (1997).

### Estonia

The Constitution of Estonia contains no provisions on single or multiple citizenship. According to Article 1 of the Law of the Estonian Republic “On citizenship”, the citizens of Estonia may not have citizenship of another country. Article 3 of this Law is entitled “Avoidance of multiple citizenship” and rules, that a person, who by birth in addition to the citizenship of Estonia acquired citizenship of another country, must, upon reaching 18 years of age refuse either the citizenship of Estonia or the citizenship of the other country. Estonia has no agreement with the CIS countries to regulate the citizenship matters.

### Ukraine

Succession of Ukraine and international agreements of the former USSR on citizenship.

According to Article 6 of the Law of Ukraine «On Succession of Ukraine» dated September 12, 1991, Ukraine confirmed the obligations under the international agreements made by the Ukrainian SSR prior to the declaration of independence.

There were no agreements on citizenship made between Ukrainian SSR and other countries, Ukrainian SSR have never acted as an independent entity for the purposes of the international law in the sphere of citizenship.

Article 7 of the Law of Ukraine «On Succession of Ukraine» ruled that Ukraine is the successor of the rights and obligations of the international agreements of the USSR, which do not contradict the Constitution of Ukraine and the interests of the Republic.

The former USSR made a number of agreements with the former socialist countries for the purpose of avoiding the dual citizenship.

Among them: Convention with SFRY dated May 22, 1956, Convention with Hungarian People’s Republic on addressing of the citizenship issues as to the persons with dual citizenship dated August 24, 1957, similar conventions with Romania dated September 4, 1957, with Albania dated September 18, 1957, with Czech/Slovak Republic dated October 5, 1957, with Bulgaria dated December 12, 1957, Korean People’s Democratic Republic - December 16, 1957, Poland - January 21, 1958, and Mongolia - August 25, 1958.

In the 1960s - 1970s, USSR made new agreements on citizenship:

- On March 31, 1965 — Convention on prevention of dual citizenship with PRP;
- On April 11, 1969 agreement on addressing of the citizenship issues of the persons with dual citizenship with KPDR;
- On October 18, 1969 — Convention on prevention of occurrence of dual citizenship with PRB;
- On September 1, 1975 — Convention on prevention of dual citizenship with PRM;

- June 6, 1978 — Agreement on prevention of dual citizenship with ChSSSR;
- July 28, 1978 — Convention on prevention of dual citizenship with ???.

None of the said agreements, for the purposes of the Law of Ukraine «On Succession of Ukraine», are part of the national legislation of Ukraine, as Ukraine did not inform the countries being the parties to the present agreement on undertaking the responsibility for performance of such agreements. Therefore, no succession occurred to this end, while some of the parties continued to perform provisions contained in the present agreements (for example by the Resolution of the President of the Republic of Poland, the Convention between PRP and USSR on prevention of dual citizenship was denounced on August 3, 2000).

Subject matter of the citizenship regulation by the international agreements according to the laws of Ukraine

According to the Law of Ukraine «On Citizenship of Ukraine» dated October 8, 1991 the citizenship matters could be subject to regulation by the international agreement:

- permission of dual citizenship based on the bilateral international agreements (Part 2 of Article 1 of the Law);
- acquiring the citizenship of Ukraine based on the international agreements of Ukraine (Article 12 of the Law);
- termination of the citizenship of Ukraine based on the international agreements of Ukraine (Article 19 of the Law);
- prevention of dual citizenship (Article 32 of the Law);
- other rules concerning all aspects of citizenship (Article 4 of the Law).

According to the Law of Ukraine «On Citizenship of Ukraine» in the wording dated April 16, 1997 subject to regulation by the international agreements on citizenship may be:

- acquiring the citizenship of Ukraine based on the international agreements, consent to be bound by which was given by the Verkhovna Rada of Ukraine (article 11 of the Law);
- termination of the citizenship of Ukraine based on the international agreements, consent to be bound by which was given by the Verkhovna Rada of Ukraine (article 18 of the Law);
- other rules concerning all spheres of citizenship (Article 4 of the Law).

The Law of Ukraine “On Citizenship of Ukraine” in the wording dated January 18, 2001 sets general rules that if the international agreements stipulate rules other than those, contained in this Law, the rules of international agreements shall apply.

In addition, Articles 8, 9, and 10 of the Law lists the provisions contained in the agreements on citizenship, which were already in force at the moment of ratification of this Law:

- the international agreements, which allow a person to apply for acquisition of citizenship of Ukraine on the condition that such a person proves that he/she is not a citizen of another country;

- the international agreements, which provide for termination of these countries' citizenship simultaneously with the acquisition of the citizenship of Ukraine.

Section 11 Article 6 of the Law of Ukraine "On the citizenship of Ukraine" stipulates that acquisition of the citizenship of Ukraine is subject to regulation by the international agreement on citizenship, and, Section 3 of Article 17 of the Law stipulates that termination of the citizenship of Ukraine shall be subject to regulation.

Therefore, the Law of Ukraine "On Citizenship of Ukraine " in the wording dated October 8, 1991, April 16, 1997 and January 18, 2001 somewhat differently determine the subject matter for regulation of citizenship by the international agreements of Ukraine.

Interpretation of the single citizenship principle in the law of Ukraine and influence thereof on making of the international agreements on citizenship

An important factor, which influenced the conclusion of the bilateral agreements, and also accession to the multilateral agreements on citizenship, was ambiguous understanding of the single citizenship principle as worded in Article 4 of the Constitution of Ukraine.

In Ukrainian legal science, there is no uniform opinion concerning the understanding of the single citizenship principle: some understand this as single internal country citizenship, which follows from the unitary system of Ukraine and do not relate it with availability of citizenship of foreign countries in the citizens of Ukraine, while others consider, that single citizenship is not in any way relates with the state system of Ukraine and means consecutive prevention of dual or multiple citizenship and reduction of having dual citizenship by acquiring the citizenship of Ukraine for persons who terminated previous citizenship, and loss of citizenship of Ukraine, if a person voluntary acquires the citizenship of different country.

There is no accurate determination as to the extent to which the principles of single citizenship and the non-recognition principle of dual citizenship interrelate. There is an idea that the essence of the single citizenship principle consists of non-recognition of dual citizenship, so there is only one principle of single citizenship.

The adherents of other opinion argue, that the principles of single citizenship and non-recognition of the principle of dual citizenship are different.

Both approaches have the right to exist, however their coexistence has complicated both the application of the citizenship law, and the connection to the international agreements on citizenship.

Provisions on single citizenship was borrowed by the law of Ukraine from the Law on citizenship of the former USSR.

We should note, that single citizenship was considered in the citizenship law of the USSR in the internal country context. So, in the Law of the Union of the Soviet Socialist Republics «On Citizenship of the USSR» dated December 1, 1978 single citizenship was

dealt with in a special article referred to as «single federal citizenship» and the contents thereof appeared in the following manner: «For the purposes of the Constitution of the Union of Soviet Socialist Republics, the USSR established single federal citizenship».

Each citizen of the federal Republic is a citizen of the USSR.

The renown lawyer Yu. Boyars interpreted this specificity of the Soviet citizenship in the following manner: «the specific feature of the Soviet citizenship is determined by the federal system of the USSR. So, each federal republic, which belongs to the USSR, in conformity with the Constitution, provides for its own citizenship».

Existence of the USSR as a sovereign nation provides for availability of single federal citizenship. Both federal and republican citizenship is characterized with certain independence and simultaneous organic unity.

That being said, the single citizenship was not considered in relation to external factors — citizenship of any foreign countries.

So, the concept of single citizenship was legislatively determined only as single internal citizenship.

The 1978 Law of the USSR contained separate provisions on the non-recognition of dual citizenship for the citizens of the USSR (article 8 of the Law): for a person who is a citizen of the USSR, no belonging to citizenship of foreign countries is recognized.

These norms were repeated in the Law of the USSR “On Citizenship in the USSR” dated May 23, 1990.

That is, the citizenship law of the USSR differentiated the principles of single citizenship and the non-recognition principle of dual (multiple) citizenship.

The Law of Ukraine «On Citizenship of Ukraine» dated October 8, 1991 rules: «Ukraine provides single citizenship. Based on the bilateral international agreements, dual citizenship is allowed». So, in the first wording of the Ukrainian Law on citizenship, single citizenship opposed the dual one, while their mutual existence was not ruled out.

Article 10 of the Law established that foreign citizenship of citizens of Ukraine is not recognized.

In the Law of Ukraine «On Citizenship of Ukraine» dated 16 April, 1997 wording of the principle of single citizenship remained unchanged. However, changes were made to the non-recognition principle of the citizens Ukraine belonging to foreign citizenship. In particular, Part 2 of Article 20 of the Law determined, that for the citizens of Ukraine, no recognition of belonging to foreign citizenship as to making the decision on loss of the citizenship of Ukraine will be provided.



In the wording of the Law of Ukraine «On Citizenship of Ukraine» dated October 8, 1991, the non-recognition principle of the citizens of Ukraine with foreign citizenship covers different reasons for the occurrence of dual (multiple) citizenship:

- 1) if the citizenship of Ukraine was acquired simultaneously with other (different) citizenship owing to collision in the law between the principles of *jus sanguinis* and *jus soli*;
- 2) if the citizenship of Ukraine was acquired as the second one owing to adoption;
- 3) if a citizen of Ukraine acquired citizenship of different country automatically or voluntarily.

In the Law of 1997, the norm on non-recognition of belonging to foreign citizenship as to making the decision on loss of the citizenship of Ukraine concerned only the cases when a citizen of Ukraine has voluntarily acquired the citizenship of different country. The Law stated no relation to citizenship of foreign countries acquired by the citizens of Ukraine in a manner other than aforesaid. The law-makers did not recognize the existing fact of multiple citizenship.

Based on the Laws of Ukraine “On Citizenship of Ukraine” in the wording dated October 8 and the Law of Ukraine “On Citizenship of Ukraine” in the wording dated April 16, 1997, the principle of single citizenship was transformed into a doctrine of “prevention of multiple (dual) citizenship”. This doctrine was determining both for the national laws, as a condition for acquiring the citizenship of Ukraine was termination of other citizenship at the moment of submitting the application for such acquisition, and it has become the basis for the negotiation process on citizenship. Specifically, this doctrine stipulated making of the agreements on prevention of dual citizenship and reduction of the existing dual citizenship. The approach towards understanding of the principle of single citizenship was changed only with adoption of new wording of the Law of Ukraine “On Citizenship of Ukraine”

On January 18, 2001, new wording of the Law of Ukraine “On Citizenship of Ukraine” was adopted. Article 2 of this Law determines the principles of the Ukrainian citizenship law. Section 1 of this article for the first time at a legislative level explained the contents of the single citizenship principle - citizenship of Ukraine which rules out the existence of citizenship in administrative and territorial units of Ukraine.

Section 1 Article 2 also establishes this rule: if a citizen of Ukraine acquired citizenship (nationality) of other country or countries, then in legal relations with Ukraine he/she is recognized only as a citizen of Ukraine. If a foreigner has acquired the citizenship of Ukraine, then in legal relations with Ukraine he/she is recognized only as a citizen of Ukraine.

This rule is an essential novelty for the Law of Ukraine “On the citizenship of Ukraine”, as the previous wording of the Law was based on specific non-recognition of multiple (dual) citizenship, as an objective legal fact. The Law, in its new wording, recognizes that the citizens of Ukraine may be those of different countries, but mere availability of other citizenship causes no legal consequences, as in legal relations with Ukraine such citizen is recognized exclusively as a citizen of Ukraine.

Considering such interpretation of the principle of single citizenship, the norms concerning the acquisition of the citizenship by territorial origin, owing to acquiring of the citizenship of Ukraine, owing to recovery of the citizenship Ukraine do not bind person to become a stateless person even prior to submission of the appropriate application for acquiring of the citizenship of Ukraine any more. A rather flexible mechanism was introduced.

So, the condition for acquiring the citizenship of Ukraine for foreigners by territorial origin, owing to acquiring of the citizenship, owing to resumption of the citizenship is such person's undertaking the obligations to terminate the foreign citizenship. This means that a foreigner shall submit a written application as to the fact that in case of acquiring of the citizenship of Ukraine he/she will terminate his citizenship of different country and, within one year following the time of his/her acquiring of the citizenship of Ukraine will submit the document on the termination of foreign citizenship of the other country to the authority which issued to him temporary certificate of the citizen of Ukraine.

If the person, having all or any of the necessary grounds to obtain such a document as stipulated by the law of this country, fails to obtain this document, for reasons beyond his/her control, or such person was granted the status of refugee in Ukraine or asylum in Ukraine, they must submit a declaration of refusal of foreign citizenship, i.e. a document in which this person certifies his/her refusal from the citizenship of different country and is obliged not to exercise the rights of this country and perform no obligations connected with belonging to the citizenship thereof.

The Law determines that the "reason beyond the control of the person" for non-receipt of the document on termination of foreign citizenship is non-issuance to the person from whom application on termination of foreign citizenship was accepted, of the document on termination of citizenship within the term established by the law of the foreign countries (excepting the cases when the person was refused in the termination of the citizenship), or absence in the foreign countries' law of the procedure for termination of such person's citizenship at request of individuals, or high registration cost of withdrawal from foreign citizenship, which exceeds the minimum salary established in Ukraine.

In this case the Law provides for exception, connected with Ukraine's signing of the international agreements, which regulate citizenship.

So, the persons who were the citizens of the countries, with which Ukraine has international agreements allow such persons to apply for acquisition of citizenship of Ukraine on the condition that they prove that they are not the citizens of other contractual party, shall comply with the condition of not having foreign citizenship.

The obligation to terminate foreign citizenship is not required for foreigners, if the international agreements of Ukraine stipulate termination of foreign citizenship by the persons simultaneously with the acquisition of the citizenship of Ukraine.

These exceptions stipulated signing of the international agreements of 2 types:

agreement on the prevention of the occurrence of dual citizenship;

agreement on the simplified procedure for acquiring and termination of citizenship and on the simplified procedure for change of citizenship.

#### Agreements of Ukraine on prevention of dual citizenship

At the moment, Ukraine has two agreements on prevention of dual citizenship: in 1996, the Agreement was made with the Republic of Uzbekistan, and in 1997 with Georgia, which were ratified on July 13, 1999 and took effect in October 1999. These agreements took effect prior to the ratification of the new wording of the Law of Ukraine “On Citizenship of Ukraine”.

Making of such agreements was based on understanding the principle of single citizenship as a principle of preventing multiple (dual) citizenship.

The Agreement between Ukraine and the Republic of Uzbekistan dated December 15, 1996 contains provisions on option and norms which would prevent the occurrence of dual Ukrainian-Uzbek citizenship in future.

It is known that option is a choice of citizenship. In all cases the option between one citizenship and another implies both right and obligations.

So, according to Article 3 of the agreement between Ukraine and the Republic of Uzbekistan, adult persons, who permanently reside on the territory of one of the contractual parties, with which any of the contractual parties, according to their law, recognize, as of the date of taking effect of the present agreement by their citizens, should choose the citizenship of one of the contractual parties by submission of application for choice of citizenship.

The above reveals that a person is granted the right to choose the more desirable citizenship out of two, and is obliged to choose one citizenship and refuse the other.

In addition, Article 4 of the Agreement provided a “non-voluntary option”: adult persons who submitted no application for choice of citizenship in the 18 months since the date of taking effect of the Agreement, become the citizens of the contractual parties, on whose territory they permanently reside. Such an option provides for no direct will of the persons.

The Agreement is oriented towards reduction dual citizenship of children, acquired for birth. Such acquiring is possible considering that, the citizenship law of both countries did not exclude cases of acquiring multiple citizenship by birth. And, therefore, Article 5 of the Agreement provides for the right to choose the parental right to choose citizenship for their child, and also “non-voluntary option”: where the parents have reached no agreement on the citizenship of their minor children aged under 14 years, such child shall become the citizen of the contractual party, on whose territory the parents have place of permanent residence.

The agreement contains a provision oriented towards the prevention of the occurrence of dual citizenship. So, upon this agreement taking effect, any of the contractual parties undertook not to grant the citizenship to the persons, which have citizenship of other

contractual party. The Agreement allows the persons to apply to one of the contractual parties with the purpose of acquiring the citizenship on the condition that they will prove that they are not citizens of other contractual party or, subject to the procedure established by the laws of the contractual parties, will withdraw from citizenship of any contractual party.

The Agreement between Ukraine and Georgia has similar contents

Both agreements have two essential defects. First, they prevent dual citizenship by producing statelessness, which is not in line with one of the main principles of international law on the avoidance of statelessness. Second, they impose on the parties very strict obligations, which may complicate continuation of dialogue between them as to making of the agreement on the simplified procedure for change of citizenship, which provide for acquiring the citizenship of one of the parties without preceding termination of the citizenship of the other party, that does not produce statelessness, as mere fact of acquiring the citizenship of one party provides the grounds for termination of citizenship of the other the party.

Agreement between Ukraine and Republic of Uzbekistan concerning cooperation in the settlement of citizenship issues of the deported persons and their successors

The Agreement between Ukraine and Republic of Uzbekistan concerning cooperation in the settlement of citizenship issues of formerly deported persons and their descendants, was in effect from September 4, 1998 to December 31, 2000, and, at the moment, is extended until December 31, 2001. The said agreement complies with the provisions laid down in Article 2 of the Agreement between Ukraine and Republic of Uzbekistan on prevention of dual citizenship. This agreement is not an international agreement of Ukraine on citizenship for the purposes of the Law of Ukraine “On international agreement”, as this agreement determines no new conditions for acquiring of the citizenship of Ukraine. This agreement does not determine any new conditions for termination of the citizenship of Uzbekistan. In a sense, the contents of the said agreement is that authorities of the interior of Ukraine, empowered in the sphere of citizenship, at the time of acceptance of the documents on acquiring of citizenship of Ukraine from the formerly deported persons, and also their children and grandchildren, shall have the right to simultaneously accept applications on the renunciation of the citizenship of Uzbekistan and transfer such applications via diplomatic channels to the competent authorities of Uzbekistan. As provisions laid down in Article 2 of the Agreement between Ukraine and Republic of Uzbekistan on prevention of dual citizenship forbid the contractual parties to grant the citizenship without termination of citizenship of the other contractual party, decision on registration of acquiring the citizenship of Ukraine shall be made upon receipt from the Uzbek party of information on the termination of citizenship of this country. The 1998 agreements as such do not provide for the citizenship continuity principle: existing citizenship (in this case Uzbek) is terminated, and possible (Ukrainian citizenship) is acquired with time rather than at the moment of termination of previous citizenship. This means that for some time a person could remain in a condition of statelessness.

For the purpose of preventing even temporary statelessness, the Ministry of Interior of Ukraine made a decision that the date acquiring the citizenship of Ukraine will be the date of the termination of the citizenship of the Republic of Uzbekistan.

Agreements on the simplified procedure for acquiring and termination of citizenship and the simplified procedure for change of citizenship

The President of Ukraine on November 13, 1998 has entrusted the Minister of Foreign Affairs of Ukraine, the Minister of Interior of Ukraine, the Minister of Justice of Ukraine to draft the Agreement between Ukraine and the Republic of Kazakhstan on the simplified procedure for change of citizenship by the citizens of Ukraine who reside in the Republic of Kazakhstan, and the citizens of the Republic of Kazakhstan, who reside in Ukraine, to prevent statelessness and dual citizenship, and also draft similar agreements with the Kirghiz Republic.

At the moment, the agreement with Kazakhstan on the simplified procedure for acquisition and termination of citizenship was ratified by the parliaments of both countries, on June 8 this year. The Agreement took effect on 7 July 2001.

The Agreement with the Republic of Kyrgyzstan on the simplified procedure for change of citizenship is prepared for signature.

Such agreements, in spite of their different names, simplify the procedure for acquiring the citizenship of Ukraine and the other party for the persons who permanently on legal grounds reside on the territories of the parties, and also for other individual categories: if they or at least one of their parents, grandfather or grandmother was born or permanently resided in Ukraine or on the territory of the party whose citizenship is acquired.

The simplified procedure for acquiring the citizenship shall also cover the persons, who have, on the territory of the party whose citizenship is acquired, permanently residing citizens such as husband (wife), one of the parents (adoptive parents), child (possibly adopted), sister, brother, grandfather or grandmother, grandson (granddaughter).

The agreement requires no previous renunciation the citizenship of one party for acquiring the citizenship of other party: the mere fact of acquiring the citizenship by one party on condition of the present agreement shall be the grounds for termination of citizenship of the other party.

In two months, the parties whose citizenship is terminated, shall execute the termination of its citizenship.

Therefore, the agreements provide for the simplified procedure for acquiring of the citizenship and the simplified procedure for termination of the citizenship of Ukraine and the other contractual party.

According to the agreements, the date of registration of acquiring the citizenship of one of the parties will be the date of termination of citizenship of the other party.

Therefore, the application of this rule will have dual effect: 1) the person even temporarily will not become a stateless person; 2) the person will not be deemed having dual citizenship, as the date of acquiring the citizenship and date of termination of the citizenship coincide.

Undoubtedly, during two months following the registration of the citizenship termination, the person in question will actually have citizenship of both parties, but this will not cause legal consequences. This is a so called “procedural dual citizenship”, as it is produced by the very agreements. The party which grants the citizenship will have authority to withdraw the document which confirms the terminating of citizenship, and within 10 days, this document together with the notice of registration of acquiring the citizenship of this party will be sent to the party, whose citizenship is terminated, via diplomatic channels.

On March 12, 1999 the Agreement was signed between Ukraine and the Republic of Belarus on the simplified procedure for change of citizenship by the citizens of Ukraine, who permanently reside in the Republic of Belarus, and the citizens of the Republic of Belarus, who permanently reside in Ukraine. On April 10, 2000 this agreement took effect.

The said agreement contains a mechanism somewhat different from that incorporated into the agreement between Ukraine and Kazakhstan, Ukraine and Kyrgyzstan. So, the Agreement with the Republic of Belarus provides for no simplified procedure of acquiring the citizenship.

The parties have agreed to grant the citizenship according to their national law. This means that the Ukrainian citizenship will be acquired by the citizens of the Republic of Belarus based on territorial origin or owing to acquiring of the citizenship of Ukraine or resumption of the citizenship of Ukraine.

The procedure for renunciation of the citizenship on agreement with the Republic of Belarus is similar to the mechanism stipulated by the agreement with Kazakhstan and draft agreement with Kyrgyzstan.

The agreement with the Republic of Belarus prevents occurrence of even temporary statelessness and dual citizenship.

#### Accession of Ukraine to the international agreements on citizenship

At the moment, Ukraine according to Resolution of the President of Ukraine studies the opportunities for accession to the European Convention on nationality.

Article 29 of the Convention stipulated the sections of the Convention to which no reservations may be made. These sections concern general matters of nationality, general principles relating to nationality and state succession and nationality.

In my opinion, interdiction of making reservations to these sections is not an obstacle for Ukraine’s adhering to the Convention, as a significant part of the provisions is already implemented in the citizenship law of Ukraine. However, there is one disputable matter

which even today follows from ambiguous understanding of the term “single citizenship” in Ukraine. Section 3 of Article 18 of the Convention, which determines the principles of citizenship in the context of succession stipulates, that where, in the context of state succession, acquisition of citizenship is subject to the loss of foreign citizenship, the provisions laid down in Article 16 of the Convention will apply.

Article 16 of the Convention «Conservation of previous nationality» stipulates, that the member country will not make renunciation or loss of another citizenship a condition for acquisition or retention of such member country’s citizenship, if such renunciation or loss is impossible or request of the same may not be acceptable.

Article 16 may be appended with non-use reservations, while Article 18 may not. In connection with this, a question arises whether the provisions laid down in Article 16 will apply in cases stipulated by Article 18, if Ukraine, for instance, introduces non-use reservations to Article 16.

In my opinion, Article 16 is a general rule to apply in all cases of acquisition and retention of citizenship, and Article 18 is related only with the state succession.

Considering the completion of the country succession process in Ukraine, the application of the provisions laid down in Article 16 of the Convention, has almost lost its urgency and, therefore, may not prevent Ukraine from joining the Convention.

#### Conclusions and Suggestions

The citizenship law of the CIS and the Baltic countries regulates single or dual citizenship differently.

The regulations of single citizenship exist in the law (the Constitution or the citizenship law) of Georgia, the Russian Federation, Uzbekistan, and Ukraine. Only in Georgia, this regulation is interpreted by the law “On citizenship of Georgia” as an interdiction for the citizens of Georgia to be citizens of a different country simultaneously. The other countries consider single citizenship as a uniform internal citizenship, which is related to the government (territorial) system of the country.

Regulation of dual (multiple) citizenship in the national law of the said countries may be classified as follows:

1. Application of non-recognition principle of dual (multiple) citizenship for the citizens of the country without any exception from this rule: Kazakhstan, Kirghizstan;
2. Application of non-recognition principle of dual (multiple) citizenship for the citizens of the country and providing for certain exceptions from this rule: the Azerbaijan Republic, the Russian Federation;
3. Recognition of dual (multiple) citizenship in all cases (Turkmenistan);
4. Recognition of dual citizenship in individual cases: the Russian Federation (we should note that the non-recognition provision of the citizenship of different countries for the

citizens of the country with provision for individual exceptions, means, by legal content, recognition of dual citizenship in individual cases. The only difference lies in application of legal terminology);

5. Interdiction for the citizens of the country to have dual (multiple) citizenship without providing for individual exceptions (Armenia, Georgia, Estonia);

6. Interdiction for citizens of the country to have dual (multiple) citizenship with certain exceptions from this rule (Republic of Belarus, Lithuanian Republic, Republic of Moldova, Republic of Tajikistan);

7. Allowance of citizenship of different countries for the citizen of the country, with recognition of such persons as having only the citizenship of the country in legal relations with the country (Latvian Republic, Ukraine).

8. The agreements on citizenship of the CIS countries on regulation of dual (multiple) citizenship may be seen as follows:

- a) the agreements on regulation of dual citizenship, which provide for dual citizenship and regulate the status of the bipatrides (Russia/Tajikistan, Russia/Turkmenistan);
- b) the agreements on avoidance of dual citizenship and reduction of existing dual citizenship (Ukraine/Uzbekistan, Ukraine/Georgia). The agreements on prevention of dual citizenship and reduction of existing dual citizenship, at the moment require revision, as they prevent dual citizenship by producing statelessness, since they require termination of citizenship of any of the parties prior to application for acquiring of citizenship of the other contractual party. They shall be superseded by new agreements on the simplified procedure for change of citizenship, which would prevent statelessness;
- c) the agreements on the simplified procedure for acquiring the citizenship, which do not rule out a possibility of occurrence of dual (multiple) citizenship (Kazakhstan / Russian Federation / Tajikistan; Belarus / Kazakhstan / Kirgizstan / Russian Federation; Kazakhstan / Belarus; Russian Federation / Kirgizstan);
- d) the agreements on the simplified procedure for changing the citizenship and the simplified procedure for acquiring and termination of citizenship, which prevent dual citizenship (Ukraine / Belarus, Ukraine / Kazakhstan).

9. for further research on multiple citizenship regulation matters by the bilateral agreements it would be useful to organize a group of experts and to draft the code of the effective agreements of the Council of Europe member countries concerning citizenship.



# MULTIPLE NATIONALITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Report by

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## SUMMARY

Now is the time to put on the nationality agenda the issue of multiple nationality in the context of the ECHR, particularly article 3 of Protocol 4. Multiple nationality has been legitimated both by the ECN 1997 and as a consequence of Community law and is on the increase.

The issue is believed to be novel within the Council of Europe and is at least as much a concern for nationality experts as for human rights experts. This is because it is at least as much by regulating the enjoyment of multiple nationality that states may control the extent of their obligations under Protocol 4, Article 3. A state wishing to limit the extent of those obligations might at one extreme seek to deprive a dual national of his nationality of that state on the ground that he has another, (more) genuine and effective, nationality. Or, on the same ground, the state may argue that Article 3 is not a benefit of multiple nationality the individual is entitled to enjoy. Or, particularly in state succession cases, the state may decline to confer the formal status of national upon someone whose (only) genuine and effective link is with that state.

This paper stops short of any attempt to answer these points and merely tentatively identifies these as the points to be addressed. There may be additional or alternative ones. But the paper does attempt to signpost some of the provisions of international and human rights laws from which answers may come. These are that: -

1. State powers in nationality matters are circumscribed by the obligation to ensure full protection of human rights.
2. Every individual has a right to a nationality.
3. An individual may possibly even have a right in international law to a particular nationality (where factually a genuine and effective link is established, including a minimum of 10 years' residence).
4. Alternatively, emerging ECHR jurisprudence suggests that where such a link has been established Protocol 4 may be engaged without the conferment of the formal status of national being necessary.
5. If this is right, a corollary might be that Protocol 4 is *not* engaged where the link between the state and the dual national is merely the formal status of national and nothing else.

6. It is Article 7(e) ECN, which suggests that the importation of *Nottebohm* concepts of 'genuine and effective link' and 'dominant nationality' into contemporary treaty provisions on loss of nationality is valid. The issue of multiple nationality in the context of ECHR, Protocol 4, may demand a reappraisal of the exact extent to which *Nottebohm* remains good law today. The legitimisation of multiple nationality (possession of an original national status surviving the acquisition of a second) means it is neither necessary nor desirable to strive to identify a single dominant nationality as the proper nationality of the individual. It is now axiomatic that historical connections provide a sufficient basis for the retention of a national status, alongside new genuine and effective links. This is already evident in the Community law context. *Nottebohm* concepts may continue to govern the acquisition of nationality and the enjoyment of its benefits but it must be very seriously questioned whether they can properly govern loss.

7. In any event, where a national status of a multiple national is lost under Article 7(e), such as by deprivation, the ECHR surely demands that the state concerned ensure full procedural fairness.

The debate on the issue of multiple nationality in the context of the ECHR, particularly Article 3 of Protocol 4, is not a mere theoretical exercise. It has a considerable practical application. Exploring its implications may assist states in deciding whether to ratify the ECN, and for those that have not done so to date, in deciding to ratify Protocol 4.

## **Multiple Nationality and the European Convention on Human Rights**

### **A preliminary note on vocabulary.**

In adopting the new European Convention on Nationality (ECN) in 1997 the Member States of the Council of Europe opted to retain the word “nationality” to describe the subject matter of the Convention, that is “the legal bond between an individual and the state”. In so doing they followed the terminology which had been adopted in all the previous Council of Europe instruments in this field. In many jurisdictions, and languages, of the Council of Europe the word “nationality” does not signify this legal bond, but is used when identifying the ethnicity or sometimes the cultural or religious community of origin of an individual. The word used to describe the legal bond is “citizenship”. In some jurisdictions the two are inter-changeable. However, in many jurisdictions and languages of the Council of Europe the word citizenship encompasses not only a legal bond but membership of a political community – in the widest sense of the word – as well as the civic rights, privileges and obligations which attach to that status. At various stages in European history legal rights, privileges and obligations have also attached to nationality – in the sense of ethnic or community origin, often associated with religious affiliation. These rights evolved, for example in Upper Silesia under the Convention of 1922, precisely because the prevailing wisdom favoured the exclusive adherence to one citizenship but required recognition of some aspects of the “national” (including religious or linguistic) affiliation of those who were obliged to opt for that citizenship. Such rights are now enshrined in the Framework Convention for National Minorities.

In the context of this paper it is clear that a single individual may have a claim to more than one “nationality” (ethno/socio/cultural) and also to more than one “citizenship” (legal bond). This phenomenon is found everywhere, but has particular significance in the Former Yugoslavia. What is the (ethno/socio/cultural) “nationality” of the child of a Bosnian and a person who was born of a Croat mother and a Serbian father? Which citizenship is appropriate for them if they have genuine and effective ties with Serbia, Croatia and Bosnia Herzegovina? What procedural guarantees must exist, particularly in respect of time limits and cumbersome bureaucracies, to ensure that the new citizenship laws do not perpetuate ethnic cleansing? The problems of those who are impeded in their return to their previous habitual residence are especially important particularly where there has been a breakdown of marital relations. In a region that is still so unsettled the recognition not only of multiple “nationality”, but also of multiple citizenship, may be crucial for at least the next decades.

Within the European Union the concept of multiple citizenship has developed a new – unique - dimension. Since the Treaty on European Union, (often called the Treaty of Maastricht) everyone with the nationality (legal bond) of a Member State of the Union also has Citizenship of the Union (Article 17 ex Art 8) which will be discussed in more detail below. This unique new form of citizenship confers, inter alia the right to European diplomatic protection provided by a state of which the European Citizen is not a national

(legal bond). The issue of diplomatic protection was of course the key question in the *Nottebohm*<sup>216</sup> case that set out so many of the concepts used to establish nationality today.

This paper deals primarily with multiple nationality in the sense in which the word is used in Article 2 ECN. (legal bond) But the growing trend towards the acceptance of multiple nationality (legal bond) is closely connected to an increasing acceptance - in most of Europe - of the presence of multiple nationalities (ethno/ socio/cultural) within a single state. It has become increasingly invidious to exclude third-country national workers and taxpayers of the European Union from all the benefits of European Citizenship because they are unwilling - for a variety of very understandable reasons - to sever all legal ties with their country of origin. The Dutch Government's remarks in the European Nationality Bulletin are precisely in point. Often the two issues - multiple "nationality" and multiple citizenship - overlap. Where tolerance of such plurality has been absent the consequences have been disastrous. "With the exception of the atrocities in Greece under the colonels, all the gravest violations of human rights in the post war period in Europe have been associated with minority problems."<sup>217</sup>

## **Introduction**

This paper does not repeat the excellent analysis of multiple nationality issues, which were set out in Professor Kojanec's paper for the 1999 conference and in the CJNA Report. It seeks rather to raise questions which explore this analysis further, and also to place multiple nationality law in the context of the European Convention on Human Rights and in particular of Protocol 4.

The number of individuals holding multiple nationalities has continued to grow in recent decades, notwithstanding efforts in the earlier years on the part of the international community to prevent this phenomenon from developing.<sup>218</sup> This topic is particularly timely, not only because of the numerical increase in the incidence of the phenomenon but also because a positive approach to it has now been legitimated both by the policy change underlying the new Convention and as a consequential development of European community law.

There are many explanations for this. States are generally at liberty to determine who are their own nationals. International law generally permits States to decide not to permit the possession of multiple nationality for their own nationals, but international law does not prohibit them from conferring their nationality on individuals possessing the nationality of another state, nor does it prescribe uniform rules for the conferment of nationality to

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<sup>216</sup> ICJ Reports 1955, p 4

<sup>217</sup> Simpson, *Human Rights and the End of Empire*, OUP 2001, p 333

<sup>218</sup> See, for example, International Law Commission, First Report on Diplomatic protection, John R. Dugard, Special Rapporteur, Fifty-second session, 7 March 2000 at paragraphs 121-122; Recent studies reveal the extent of the increase in the phenomenon of multiple nationality. For example a recent study reports that 60 percent of Swiss nationals who live abroad do so as dual nationals: Schuck, Peter H., *Citizens, Strangers and In-Betweens*, 1998 at 223 as cited by A. Aleinikoff and D. Klusmeyer, 'Plural Nationality: Facing the Future in a Migratory World' in *Citizenship Today: Global Perspectives and Practices* (A. Aleinikoff and D. Klusmeyer, eds.) 63. Another study has estimated that more than half a million children born each year in the United States have at least one additional nationality: A. Aleinikoff, *Between Principles and Politics: the Direction of US Citizenship Policy*, 1998, Washington in id at 63.

which states must adhere.<sup>219</sup> Nor does international law expressly require any kind of consent on the part of the individual to the acquisition of a nationality *ex lege*. Thus, for example, the Ulster Unionists - whose political goals are to maintain Northern Ireland as a part of the United Kingdom and not to permit it to become a part of the Republic of Ireland - are all born with entitlement to citizenship of the Republic of Ireland as well as of the United Kingdom, whether they like it or not.

An individual may acquire more than one nationality as a result of the parallel operation of the principles of *jus soli* and *jus sanguinis* and of the conferment of nationality by naturalisation under legal arrangement which do not require the renunciation of a prior nationality.<sup>220</sup> In recent decades the increasing incidence of mixed marriages, combined with a recognition of the importance of principles of equality of spouses (which have prevented women from automatically losing their nationality on marriage: 1957 New York Convention on the Nationality of Married Women and Council of Europe recommendations) and the right of children to inherit the nationality of both parents, has led to a continued rise in the number of individuals enjoying the nationality of more than one state. There is no clearly ascertainable principle of international law, which would in theory prevent states from bestowing their nationality on the whole world. The key issue is whether other states would recognise it.

The attitude of European States in the 1960s was that multiple nationality should be discouraged, since cases of multiple nationality “are liable to cause difficulties” and thus “joint action to reduce as far as possible the number of cases of multiple nationality [...] corresponds to the aims of the Council of Europe”<sup>221</sup>. Thirty years later the 1997 European Convention on Nationality (ECN) not only permits contracting states to provide for multiple nationality but also positively requires recognition in certain closely circumscribed cases. The increasing acceptance of this reality by states, particularly those states traditionally steadfastly opposed to dual nationality<sup>222</sup>, may well be explained by a recognition of the inevitability of the phenomenon as well as by a recognition that the practical problems posed by it are minimal and easily circumvented<sup>223</sup>. In connection with the new Swedish law on citizenship which came into force in 2001, it was noted in the course of drafting that “changes in society have meant that people feel to a higher degree that they have deep and true connections to more than one country ... in the long run the stability and safety of keeping the old citizenship may contribute to well being and faster integration into the host society.” As the Swedes importantly noted: “amongst the people who already have dual / multiple citizenship in Sweden it is difficult to see any problems.”

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<sup>219</sup> ILC at para 123

<sup>220</sup> ILC at para 121

<sup>221</sup> Preamble to the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality- ETS No 43, hereafter “1963 Convention”. Indeed, Article 1 of the 1963 Convention provides that, “Nationals of the Contracting Parties who are of full age and who acquire of their own free will, by means of naturalisation, option or recovery, the nationality of another Party *shall* lose their former nationality. They *shall not be authorised* to retain their former nationality” (emphasis added). The 1963 Convention was amended by a Protocol (ETS No. 95) and Additional Protocol (ETS No. 96).

<sup>222</sup> See Aleinikoff at 78 - even Germany has changed its policy regarding dual nationals.

<sup>223</sup> Aleinikoff. Refer to provisions concerning multiple military obligations.

The institutions of the European Convention on Human Rights have, in addition, always been careful to interpret the provisions of that convention in a way which does not undermine international comity, for example in relation to co-operation in the field of criminal justice (see for example, *Soering v U.K.*<sup>224</sup> *Drozdz and Janousek v France and Spain*<sup>225</sup>)

One of the consequences of the increased incidence of multiple nationality is that dual nationals enjoy the rights and benefits traditionally reserved to nationals vis-à-vis more than one country. According to Article 17 of the European Convention on Nationality, nationals of a State in possession of another nationality shall have, in the territory of that State in which they reside, the same rights and duties as other nationals of that State. Where rights are attached to nationality, this enjoyment should apply to all the nationalities which the law permits them to possess. Within the European Economic Area (EU + EFTA) the benefits which can be reserved by a state for its own nationals are now reduced to such a bare minimum that these member States are already accustomed to having to accord these benefits to other European Citizens. Regulation 1612/68, and its parallel instruments, reserve only public service of the kind most closely associated to functions of state to own nationals, and the Court has been robust in applying this exception strictly.<sup>226</sup>

The other great European legal order - that of the European Convention on Human Rights - protects “everyone” within the jurisdiction of the contracting states, not just citizens. It makes little reference to nationality. Article 1 of Protocol 1 refers to it obliquely in requiring the general principles of international law (which oblige states to compensate aliens, but not own nationals, for interferences with their property: cf. *Chorzow Factory*<sup>227</sup>) to be observed. The jurisprudence of European Court of Human Rights has rendered this distinction nominal.

The Court has also had the opportunity to examine the impact of multiple nationality in expulsion cases and has, until now, considered it non-existent. A number of cases against the U.K. have involved dual nationals, where children born in the U.K. to British or “settled” persons (permanent residents) and a foreigner in an irregular immigration situation became British Citizens at birth. In each case the custodial foreign parent was threatened with expulsion either because the marriage had broken down or, where the marriage was happily subsisting, because the state was unwilling to regularise their immigration status. The children were thus obliged to accompany their parents to the land of their other nationality. This was despite the fact that they were full British Citizens who had acquired that nationality by the normal operation of *ius sanguinis* or a combination of *ius sanguinis* and *ius soli* and not just by an accident of geography as to their place of birth. The European Commission of Human Rights, as it then was, held all such cases inadmissible, noting that the British Citizenship of the affected children and the constructive exile (effective exile) of the children consequent on the expulsion of their custodial parent did not constitute an interference with either family or, more importantly private life, under Article 8 (the U.K. has not ratified the 4th Protocol to the ECHR). Had

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<sup>224</sup> Series A No 161, (1989) 11 EHRR 439

<sup>225</sup> Series A No 240, (1992) 14 EHRR 745

<sup>226</sup> *Sotgiu v Deutsche Bundespost*, Case 152/73

<sup>227</sup> (1928) PCIJ Reports, Series A, No 17 PP 46-48

the children held no other nationality and had no possibility of accompanying the expelled parent the Commission might have decided otherwise.<sup>228</sup> Their constructive exile did not of course deprive them of their formal nationality, but merely of the rights generally associated with its enjoyment. This point will be further discussed below.

The only provisions in the European Convention on Human Rights reserved for the exclusive benefit of nationals are contained in Article 3 of Protocol 4, which provides that:

“1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national.

2. No one shall be deprived of the right to enter the territory of the state to which he is a national.

One issue which this paper will explore is what constraints are imposed by the ECHR and international law generally on states who wish to regulate the enjoyment of multiple nationality in order to reduce their obligations under provisions such as Article 3 of Protocol 4? Importantly, what constraints should be imposed on states? The incidence of statelessness has been reduced by adherence to the 1961 UN Convention on the Reduction of Statelessness and the European Convention on Nationality, and it is now generally accepted that nationality laws must not operate so as to render a person stateless. Protocol 4 now has a different interface with nationality law and practice. It focuses on the limits that its provisions can impose on states that seek to deprive a person of one nationality in situations where that person can avail himself of another nationality.

This new interface between nationality law and the ECHR poses several questions.

- does protocol 4 in principle apply equally in respect of each state of which a given individual is a national?
- if so, can a state (partly in accordance with the principle that nationality is within its reserved domain) regulate the enjoyment of multiple nationality so as to reduce its obligations under Article 3 of Protocol 4?
- if so, what constraints, if any, are imposed?

In order to answer these questions we need to consider the steps states might wish to take to regulate the enjoyment of multiple nationality – for example:

1. not according the rights contained in Protocol 4 on the ground that the other nationality is the (more) genuine and effective one;

2. depriving the individual of that state’s nationality because he has another, (more) genuine and effective one;

3. declining, in cases of state succession at least, to confer the formal status of “national” on those whose most genuine and effective link is with the successor state.

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<sup>228</sup> see e.g. *Jaramillo v U.K.* 24865/94, *Sorabjee v U.K.* 25297/94

The responsibility for ensuring that the interface between nationality law and human rights law is properly observed falls as much to the drafters and administrators of nationality laws as it does to the monitors of human rights.

### **Multiple Nationality, General principles of International Law, and International Human Rights Law**

It is a well-established principle of international law that the determination of nationality is within the discretion of states<sup>229</sup>. While this freedom to devise domestic rules and regulations regarding nationality has traditionally been restricted by the principle that domestic law “shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality”<sup>230</sup>, historically international law imposed few restrictions on states’ discretion in this regard. Further, any restrictions were not framed in terms of the rights of individuals to acquire or resist a revocation of nationality, but rather as restrictions on the obligations of other states to recognise domestic determinations of nationality in a particular instance (as was set out in the famous *Nottebohm* case).

Since international law concerning nationality has been traditionally limited to inter-state issues it has been the advent of international human rights law, with its emphasis on the regulation of states’ duties vis-à-vis individuals, that has witnessed the emergence of restrictions on the discretion of states in their determination of nationality vis-à-vis the affected individuals.<sup>231</sup> This has gone hand in hand with the growth of a rights culture. An important element in this development is that international human rights instruments, such as the ECHR, not only confer rights on individual, but provide that those same individuals are able to vindicate their rights by taking complaints to an international court with the power to make binding judgement against the states concerned. It is those individuals - and not states - who decide whether to seize an international court of the issues. The extent to which international human rights law may encroach on a traditional area of state sovereignty remains to be explored.

From Article 15 of the Universal Declaration on Human Rights onwards and outwards to global and regional instruments such as the American Convention on Human Rights<sup>232</sup>

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<sup>229</sup> Tunis-Morocco Nationality decrees, Permanent Court of International Justice, 1923, PCIJ Ser. B No. 4 where the Court stated that: “Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain [i.e. solely within the jurisdiction of a State]”. See Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 179 L.N.T.S. 89: “It is for each State to determine under its own law who are its nationals” and Article 2: “Any question as to whether a person possesses the nationality of a particular state shall be determined in accordance with the law of that State”. See also *Nottebohm* Case (Liechtenstein v Guatemala) 1955 WL 1 (ICJ): “It is for Liechtenstein, as it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalization granted by its own organs in accordance with that legislation”. See also I. Brownlie, *Principles of Public International Law*, Fourth Edition, 1990 at 381.

<sup>230</sup> Article 1 of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws

<sup>231</sup> Hoffman at 7.

<sup>232</sup> Article 20(1) provides that ‘every person has the right to a nationality’ and Article 20(3) provides that ‘no one shall be arbitrarily deprived of his nationality or of the right to change it. see Mass Expulsion in Modern International Law and Practice by Jean-Marie Henckaerts at 86.



international human right instruments have increasingly concerned themselves with nationality issues (see for example Article 7 of the Convention on the Rights of the Child). The 1957 Convention on the Nationality of Married Women and the 1979 Convention on the Elimination of All Forms of Discrimination against Women, changed the previous practice of imposing nationality changes *ex lege* on women upon marriage, and application of the 1961 Convention on the Reduction of Statelessness has gone far towards eliminating that phenomenon. Article 5 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination guarantees ‘the right of everyone, without the distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights’, which expressly include the right to leave any country, including one’s own, and to return to one’s country<sup>233</sup> and the right to nationality.<sup>234</sup> Although not including a particular provision regarding nationality, the Framework Convention for the Protection of National Minorities<sup>235</sup> provides that any discrimination based on belonging to a national minority shall be prohibited.<sup>236</sup> Finally, the International Covenant on Civil and Political Rights provides that no one shall be arbitrarily deprived of the right to enter his own country (Article 12) and that ‘every child has the right to acquire a nationality’ (Article 24(3)).

What is the general impact of these international instruments on cases of multiple nationality and, in the Council of Europe, on the obligations of states under Protocol 4?

The developments in international human rights law in this regard have led another regional court - the Inter-American Court of Human Rights - to state that:

It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual’s legal capacity.

Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by states in that area, and 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’.<sup>237</sup>

However what is the exact nature of the limits? In terms of limits on the circumstances in which states may revoke nationality, once the obligation to prevent statelessness is met, the key requirements are that the deprivation is neither arbitrary nor discriminatory.

Article 3 of Protocol 4 to the European Convention on Human Rights

Protocol 4 was opened for signature on 6 May 1963 and entered into force on 2 May 1968<sup>238</sup>.

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<sup>233</sup> Article 5(d)(ii)

<sup>234</sup> Article 5(d)(iii). See Aleinikoff at 69

<sup>235</sup> European Treaty Series No 157 1995

<sup>236</sup> Article 4.

<sup>237</sup> Proposed Amendments Case at paragraph 32.

<sup>238</sup> Having been ratified by Denmark, Iceland, Luxembourg, Norway and Sweden

Since then the attitude of the European States to the phenomenon of multiple nationality has undergone a transformation - if not a complete *volte face*.

Paragraph 1 of Article 3 could be said to codify customary international law under which a state has a duty both to admit and not to expel its own nationals.<sup>239</sup> Each of these duties can be seen as a corollary of the other.<sup>240</sup> Clearly the pivotal issue in determining whether Article 3 of Protocol 4 is engaged is whether or not a person is recognised as a national of the relevant state.<sup>241</sup> The key question in determining the applicability of Protocol 4 in relation to multiple nationals is whether the Convention - or international law generally - imposes any limitations on the right of states to remove nationality, or in cases of state succession to prevent its acquisition, where such action will render the individual an alien vis-à-vis the depriving state (but will not result in statelessness - Article 7(3) ECN). Such deprivation may lead to expulsion or condemn former habitual residents to the status of second class citizens.

The background materials to the drafting of Protocol 4 reveal that there had been a proposal to provide that “a State would be forbidden to deprive a national of his nationality for the purpose of expelling him.” The summary of the relevant debates in relation to this issue is as follows:

“Although the principle which inspired the proposal was approved of by the Committee, the majority of the experts thought it was inadvisable in Article 3 to touch on the delicate question of the legitimacy of measures depriving individuals of nationality. It was also noted that it would be very difficult to prove, when a State deprived a national of his nationality and expelled him immediately afterwards, whether or not the deprivation of nationality had been ordered with the intention of expelling the person concerned.”<sup>242</sup>

Although no explicit restriction regarding the deprivation of nationality was therefore inserted into Protocol 4, this does not mean that states parties to the ECHR are completely untrammelled in their decisions regarding the conferment and deprivation of nationality. It may be that such a provision was unnecessary in that it is arguable that denationalisation for the purpose of evading obligations under general international law, such as the obligation not to expel nationals, would engage the responsibility of the state.<sup>243</sup>

In any event, the Commission has recognised that although it is beyond its competence to investigate a refusal to grant nationality, a simultaneous refusal to grant nationality and issuing of an order of expulsion could suggest that the decision to remove nationality had

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<sup>239</sup> Brownlie 4<sup>th</sup> edition at 397; Oppenheim i. 646, 695; Weis Nationality pp 45-49; Whiteman, viii 99, 367-8, 620-1. cf. Art 9 UDHR: no one shall be subjected to arbitrary exile; no provision in ICCPR

<sup>240</sup> *Stewart v Canada* at paragraph 12.2, Henckaerts at 79.

<sup>241</sup> In a number of cases the Commission has outrightly rejected an application based on Protocol 4 on the basis that the person is not a national of the relevant state.

<sup>242</sup> Council of Europe, Explanatory Reports on the Second to Fifth Protocols to the European Convention for the Protection of Human Rights and Fundamental Freedoms, (1971) at 48.

<sup>243</sup> Brownlie 4<sup>th</sup> edition at 397, footnote 84; Weis, Nationality 57, 127 and other authorities cited in Brownlie.

the mere purpose of making the expulsion possible.<sup>244</sup> In *X v Federal Republic of Germany*, the Commission considered whether there existed a causal relationship between the decision of the German government to refuse the (stateless) applicant nationality and the order for expulsion which would create a presumption that the refusal had the sole object of expelling the applicant from German territory. In that case, the Commission was not satisfied that there was a sufficient causal connection. Presumably very explicit facts would be required to satisfy the Court that this had in fact occurred, as the Committee of Experts recognised.<sup>245</sup>

Is there a right to a particular nationality? The answer of the European Convention organs has been that under the ECHR no such right exists.<sup>246</sup> One issue that has emerged in recent years is whether contemporary practice can support the argument that there is an evolving right to a particular nationality, which is based on an individual's genuine and effective link with a particular state. If nationality is understood as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties',<sup>247</sup> or 'the legal bond between a person and a State',<sup>248</sup> it is not surprising that many states provide for the possibility of naturalisation when such a link is established.<sup>249</sup> Indeed, the European Convention on Nationality expressly provides that 'Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application'.<sup>250</sup> The explanatory report explains that the maximum period of residence corresponds to a common standard as most countries of Europe requiring between five and ten years of residence. The Convention also provides that a State party may, in addition, fix other justifiable conditions for naturalisation, in particular as regards integration. However, it remains the case that parties are required to allow the possibility of naturalisation of those habitually resident in the state. Increasingly states, which were formerly opposed to multiple nationality, are amending their laws to permit settled immigrants to acquire the nationality of their new home without losing that of their old.

This paper has raised the question whether states may refuse to accord multiple nationals the enjoyment of the guarantees of Article 3 of Protocol 4 in relation to the nationality which they formally possess, on the ground that they have a more genuine link with the state of their other nationality. A converse issue also arises. Can a state refuse to accord the guarantees of Article 3 Protocol 4 to individuals who has the requisite genuine links

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<sup>244</sup> *X v Federal Republic of Germany*, App no 3745/68, Coll. 31 (1970) 107 (110) as cited at 674 of Van Dijk and Van Hoof.

<sup>245</sup> Query whether the principle that everyone should have a nationality and not be deprived of one arbitrarily (Art 15) has the status of customary international law and thus applies in any case to signatories to the ECHR.

<sup>246</sup> *K & W v Netherlands* 43 DR 216

<sup>247</sup> *Nottebohm*

<sup>248</sup> Article 2 of the Nationality Convention 1997.

<sup>249</sup> See Carol A. Batchelor, 'Developments in International Law: the Avoidance of Statelessness through Positive Application of the right to a Nationality', in proceedings from 1<sup>st</sup> European Conference on Nationality, 'Trends and Developments in National and International Law on Nationality' at 52-57.

<sup>250</sup> Article 6(3).

with it but who have not availed, or have not been able to avail, themselves of the possibility of acquiring formal nationality? Where the possibility of naturalisation is not accorded, or the individual is unable to comply with the requirements or has made some technical error, it is a controversial and highly debatable question whether the factual establishment of a genuine link can confer the status of 'national' upon an individual for the purpose of the application of those international human rights provisions (such as Article 3 of Protocol 4) which refer explicitly to nationals of a State. Do these provisions protect only those who have been accorded a formal status as national by the states concerned?

In a very interesting recent development, the European Court of Human Rights has been seized of a complaint, *Slivenko and others v Latvia*, relating to the state's prerogative to regulate the conferment of nationality in the context of Article 3 of Protocol 4. The Court has communicated the case but has not yet taken a decision as to admissibility. The proceedings to date suggest that it may be considering whether the concept of 'own national' should include those having an effective and genuine link with a contracting State, as a type of constructive nationality, as is found in the corresponding notion of "own country" in the ICCPR. In *Slivenko* the Court has asked the parties to consider the question of whether Latvia violated Article 3 of Protocol 4 when it forced the removal of two (non-citizen) permanent residents in accordance with domestic law.

The background to the case is the dissolution of the Soviet Union into fifteen independent states (including some whose pre-World War II independence was restored). Soviet citizenship ceased to exist at the date of independence. The newly created States introduced new nationality laws. Most citizens of the former Soviet Union who had Russian "nationality" (ethno/socio/cultural) could apply for Russian citizenship, but was is not granted automatically<sup>251</sup> and could involve the loss of certain privileges such as voting in the country of residence.<sup>252</sup>

Many of the former Soviet States adopted a 'zero-option' policy, according to which they granted their nationality to all people living in the republic either at the time of independence or at the moment the new nationality law was passed.<sup>253</sup> While this policy was acceptable in those countries retaining a very high proportion of the native ethnic population (for example, in the Baltic States this policy was adopted by Lithuania which consists of 80% Lithuanians<sup>254</sup>) it was not considered politically acceptable in the Baltic states of Latvia or Estonia where 'a significant part of the population is not of Baltic background, does not speak the local language, and is present as a result of a post-war occupation'.<sup>255</sup>

In the case of Latvia, the nationality law passed on July 22, 1994 provides for automatic nationality for two categories of persons: 1) those individuals who were citizens of the Republic of Latvia on June 17, 1940 and their descendants and 2) orphans whose parents

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<sup>251</sup> Kalvaitis at 254

<sup>252</sup> Kalvaitis at 240

<sup>253</sup> Henckarts at 92

<sup>254</sup> id

<sup>255</sup> Ruta M. Kalvaitis, 'Note: Citizenship and National Identity in the Baltic States' (1998) 16 Boston University International Law Journal 231 at 232.

are unknown or who have no parents. All other people residing in Latvia who wish to acquire Latvian nationality must be naturalised following the satisfaction of a set of criteria involving a residence requirement (5 years after May 1990), basic knowledge of the Latvian language, history and Constitution, a pledge of loyalty, renunciation of any other citizenship and a legal source of income. However, Article 11 of the Citizenship Law specifically excludes certain categories of citizens from ever obtaining citizenship, including those individuals who served in the armed forces, police or security service of a foreign state or served in the USSR armed forces and chose to reside in Latvia directly following their demobilisation (unless they were permanent residents of Latvia at the time of their conscription).<sup>256</sup>

In the case currently pending before the European Court, the key facts that emerge from the application are that ‘the first applicant was born in Estonia in the family of a Soviet military officer. At the age of one month she moved to Latvia together with her parents. The second applicant was transferred to Latvia in 1977 to serve as a Soviet military officer. In 1980 the first and the second applicants married. In 1981 the first applicant gave birth to their daughter, the third applicant. The first applicant’s father retired from military service in 1986.’ Following Latvia’s independence the first and the third applicants (mother and daughter) and the first applicant’s parents were entered on the register of Latvian residents as ‘ex USSR citizens’. The second applicant continued his service in the Russian army until his retirement on 5 June 1994. When he applied for a temporary residence permit in 1994 on the basis of his marriage to a permanent resident, his application was refused and he was informed that he and his family would be required to leave Latvia following the withdrawal of the Russian troops at the end of 1994, due to their status as a family of a Soviet military officer. A series of domestic applications were then made to various levels of the Latvian court hierarchy by all applicants. In 1996 the second applicant moved to Russia, however the first and third applicants continued to lodge appeals in the Latvian courts on the basis that Latvia was their motherland, ‘as they had lived there all their lives and had no other nationality, and that [the first applicant] was required to take care of her handicapped parents who were permanently resident in Latvia.’ Ultimately, following harassment by police, the first and third applicants left Latvia to join the second applicant. Although they were not technically expelled, they were effectively forced to leave, having lost their legal status and being threatened with further imprisonment.

The Court has specifically raised the question whether the removal of the first and third applicants violated Article 3 of Protocol 4. The question does not refer to the second applicant. This suggests that the Court is not likely to consider attributing a status akin to nationality to persons who came to Latvia solely for the purpose of serving in the Soviet military, as was the situation in the case of the second applicant. However, in the case of the first and third applicants, who have lived almost their entire lives in Latvia, the Court’s questions to the parties suggest that it might be willing to take a more robust approach to Latvia’s determination of the conferment of nationality, one which more closely reflects other comparable international instruments.

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<sup>256</sup> Kalvaitis at 256-7

The Court may well interpret the term ‘nationality’ in Article 3 of Protocol 4 as encompassing something more than formal technical nationality. As Harris *et al* argue, although the classification of an individual as a national under a particular state’s law will generally be decisive, the term ‘national’ presumably has an autonomous Convention meaning that would permit the Court to take into account the limited controls to which general international law subjects states when granting or withdrawing nationality.<sup>257</sup> There are many precedents in Convention case law for the Court attaching an autonomous Convention meaning to words and phrases used in the Convention.<sup>258</sup> Article 53 ECHR provides that “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”. Latvia is a party to the ICCPR. The Court may decide to adopt a special Convention definition of the term ‘national’, such that its meaning is closer to the term ‘his own country’ provided in Art 12(4) of the ICCPR. In relation to the term “ his own country”, the Human Rights Committee has said:

‘Since the concept ‘his own country’ is not limited to nationality in a formal sense, that is, nationality acquired on birth or by conferral, it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot there be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them.’<sup>259</sup> (Emphasis added)

Latvia signed the ECN on 30 May 2001, but has not yet ratified it. Article 20 ECN would appear to apply to the actions taken in this case. However, these events occurred prior to the date of signature. Under Articles 9 and 18 of the Vienna Convention on the Law of Treaties states which have participated in the elaboration of a convention should not in principle take steps to undermine its effectiveness. Maintaining the decision which is complained of after signature of the ECN may be seen as an ongoing violation and will be of importance to the Court in deciding whether the actions can be construed as compatible with the 4<sup>th</sup> Protocol. The same principle would apply *mutatis mutandis* to any other Member States of the Council of Europe.

### **The European Convention on Nationality**

The European Convention on Nationality 1997 entered into force on 1 March 2000. Article 7 of the Convention provides that a State Party may not provide in its internal law for the loss of its nationality *ex lege* or at the initiative of the State Party except specified circumstances, which include:

- a. voluntary acquisition of another nationality;
- ...

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<sup>257</sup> Harris, Boyle and Warbrick, *Law of the European Convention on Human Rights*, Butterworths 1995 at 563

<sup>258</sup> See for example *Engel v Netherlands*, *Ringeisen v Austria*

<sup>259</sup> *Stewart v Canada* IHRR Vol 4 No 2 (1997)

e. lack of a genuine link between the State Party and a national habitually resident abroad;

...

g. adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.

Since the creation of statelessness is specifically forbidden, except in cases of fraud, these provisions apply only to cases of multiple nationality. The parties had moved towards an acceptance of multiple nationality in cases where marriage, the birth of children, or - importantly - the integration of permanent immigrants rendered it desirable. The exception in Article 7(a) creates a paradox, which suggests that the facility referred to in Article 6(3), may be a one way traffic. States must facilitate the naturalisation of immigrants, but if their own citizens choose to exercise that option they may risk losing their first nationality.

The provision permitting the deprivation of nationality where there is a lack of a genuine link (Article 7(e)) clearly draws on the notion of genuine and effective link set out in *Nottebohm*. However, it is questionable whether the same considerations should apply to a decision about diplomatic protection, as in *Nottebohm*, and to a decision to deprive persons of their nationality. In particular the suggestion in *Nottebohm* that one nationality will be dominant (more closely connected) may now be anachronistic. For example, in *Nottebohm* the Court explained that nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.” The Court then went on to say ‘It [nationality] may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State’. However this was not said in the context of determining of whether an individual was entitled to the nationality in question, but in deciding whether a state was entitled to exercise diplomatic protection in relation to that individual vis-à-vis another state. Moreover, given the change in attitude of states since 1955 to multiple nationality, and particularly the explicit recognition in the 1997 Convention of its legitimacy, it is important that older notions of dominant nationality are not imported into the interpretation of modern treaty provisions. The explanatory report to the Nationality Convention states that “this provision [Article 7] applies in particular when the genuine and effective link between a person and a State does not exist, owing to the fact that this person or his or her family have resided habitually abroad for generations.”<sup>260</sup> How many generations? If a state’s nationality laws permit the acquisition of nationality by those who have resided for generation[s] outside its boundaries, it might hint at arbitrariness to deprive that person of nationality on the basis of facts which were no bar to its acquisition.

A paradoxical state of affairs is emerging. When rules reducing cases of both multiple nationality and statelessness were the norm, an individual could not easily lose the nationality of a state with which he had either actual or aspirational links and which he already possessed. There was no alternative status. In the modern climate where multiple

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<sup>260</sup> At para 70.

citizenship is more widespread individuals with the same factual links to a country, may find themselves deprived of the nationality they wish to retain and left only with the nationality they are reluctant to recognise. This may prove particularly invidious if the latter nationality is of a less economically developed state than the former.

It is time to re-visit *Nottebohm*. The judgement was delivered in a climate in which there was concern to ensure that everyone had a nationality, but that people should if possible have only one. In the new millennium the principles which it enshrines may have become an appropriate criterion to add to the *ius soli* and *ius sanguinis* as grounds for entitlement to a specific nationality. It is highly questionable if the new incidence in the legitimacy of multiple nationality should operate in practice so as to permit *Nottebohm* principles to deprive a person of a nationality, which he has lawfully acquired.

### **The special position of European Union law**

As noted at the outset, since the conclusion of the Treaty on European Union, all those possessing the nationality of a Member State are also citizens of the Union (Article 17(1) ex 8(1) EC Treaty). However, this provision clearly states that “Citizenship of the Union shall complement and not replace national citizenship”. Multiple citizenship of an entirely novel kind is thus conferred on all citizens of the Union. It is unique in that it is a citizenship which confers rights on its holders which they do not have as a direct result of their primary nationality, but nonetheless cannot exist independently of it (see *Kaur*). Amongst the other rights which citizenship of the Union confers is the right to protection in third countries by a diplomatic mission of another Member State where a citizen’s Member State has no mission. But it is questionable whether this can properly be called a right at all since it is dependent on the agreement of the Host State to accepting such a state’s claim to have the right to protect. It is, however, the right, which was at issue in *Nottebohm*.

The law of the European Union has an increasing importance in this field for members of the Council of Europe because it affects both existing citizens of the Union and the candidate countries for enlargement. The provisions discussed below form part of the *acquis communautaire*, which all new Member States will be required to accept on joining. The ECJ has already found - in the well known case of *Micheletti* - that national law cannot invoke the *Nottebohm* principle so as to classify a person as a non-EU national, if he has another nationality which is that of an EU Member State. It may be equally important for national law to ensure that provisions permitting deprivation of citizenship in the absence of a genuine link (Article 7(e) ECN) are not used in a manner that may constrain a person’s right under Community law to exercise Community rights in another Member State. The ECJ has not yet ruled on this point. The Advocate General’s recent Opinion in *Baumbast and R* (C413/99) suggests however that an individual can rely directly on Article 18 (ex 8a) in circumstances where none of the provisions of secondary legislation apply. The ECJ has held in several cases that nationals of Member States must not be deterred from leaving their country of origin in order to exercise the right to enter, and reside in the territory of another Member State (as guaranteed by Articles 39 and 43 of the EC Treaty,) by the prospect that they will suffer a detriment in doing so. Relying on this principle, states must ensure that they do not apply Article 7(e) ECN (the absence of a genuine link) in an overly strict manner. Dual nationals must not be deterred from



exercising their Community rights in other Member States for fear of being deemed to have lost their genuine link with the country of nationality, or for fear that their children born abroad may be placed in such a situation with the consequence that they would lose their status as EU nationals and citizens of the Union. A number of cases have occurred in which Dutch dual nationals born outside the EU have lost their Dutch nationality as a result of failing to establish the necessary connection with the Netherlands. In some cases the individual's offending time outside the Netherlands has been spent in other EU countries exercising treaty rights as Dutch citizens. Dutch law makes no express provision to exempt those exercising treaty rights from loss of citizenship. An informal internal guidance note which is understood to exist and which advises that automatic loss of citizenship should not become effective in such cases is no substitute for a clear legal provision of national law exempting individuals from deprivation in cases where it is likely to be in breach of EU law.

The question of multiple nationality is also raised by the provisions of Regulation 1347/2000 (Brussels II) which regulates issues of jurisdiction, recognition and enforcement of matrimonial matters. Nationality has assumed a more important role in determining the state, which has exclusive jurisdiction to decide matrimonial disputes and other related matters. Where individuals have more than one nationality, they may be provided with opportunities for forum shopping under Brussels II. This will be particularly important in states which have a strict approach to the removal of children from the jurisdiction or where there is a traditional view that a child should be brought up in the country of its own "nationality" (culture). Even where the child has multiple nationality experience tells us that some states will focus exclusively on their own nationality ignoring the claims of any other. This has raised many problems under the Hague Convention on the Civil Aspects of International Child Abduction (see for example *Ignaccolo Zenide v Romania* ECtHR January 2000). The operation of that Convention is, however, expressly excluded from the mandatory jurisdictional rules of Brussels II. It is the nationalities of the parents which are primarily the determinative factor under Brussels II, not those of the children. Brussels II also expressly excludes any effect on the problems relating to cross-border civil status registers which rightly concerned Professor Kojanec in his paper on multiple nationality for the 1999 conference. The problems to which he alluded in that paper have become even more pressing outside the EU in cases of state succession particularly in relation to the FSU and the Former Yugoslavia.

### **Procedural fairness**

Of particular concern is the question of the extent to which a state party to the ECN is obliged to afford procedural fairness to individuals by informing them of their intention to deprive them of their nationality due to the absence of a genuine link with the relevant state, or on any of the other grounds set out in Article 7. Article 4(c) ECN prohibits arbitrary deprivation of nationality and Articles 10 – 13 set out 'procedures relating to nationality'. These procedures do not include a right to be heard or to make submissions prior to a decision on revocation being made by a state party.<sup>261</sup> It is vital then that

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<sup>261</sup> The articles require that applications and decisions are processed within a reasonable time (Article 10); that decisions contain written reasons (Article 11); that individuals be given a right to seek review of decisions (Article 12) and that fees charged for applications regarding nationality are reasonable (Article 13).

substantive content be given concurrently to the principle that ‘no-one shall be arbitrarily deprived of his or her nationality’ and that no-one shall be arbitrarily deprived of the right to enter a state of which he is a national under the ECHR. At a minimum, a prohibition on arbitrary deprivation should import rules of procedural fairness. This is particularly important in cases of deprivation based on the ground of lack of genuine link authorised under Article 7(1)(e). The explanatory report to the ECN provides examples of evidence that might suggest the lack of a genuine link with the State. These consist of the omission of one of the following steps taken with the competent authorities: registration, application for identity and travel documents and a declaration expressing the desire to conserve the nationality of the State Party. Procedural fairness requires that individuals must be informed that they risk losing their nationality and be given an opportunity to establish their continuing links with the relevant state notwithstanding previous lack of habitual residence. There is serious risk of arbitrariness if individuals are not given an express opportunity to take one of these steps before nationality is revoked on this ground. The Report notes that “it is presumed that the state concerned will have taken all reasonable measures to ensure that this information is communicated to the persons concerned.”<sup>262</sup> Experience tells us that this presumption may be somewhat optimistic. The procedural aspect of the right not to be subject to arbitrary deprivation should be read as conferring further safeguards in addition to those provided for explicitly in the Convention. Although the explanatory note recommends that reference should be made to those provisions in this context, it is arguable that a wider notion is appropriate.

The notion of arbitrariness may also include a substantive as well as a procedural element. This is recognised in the explanatory report where it is stated that ‘as regards the substantive grounds, the deprivation must in general be foreseeable, proportional and prescribed by law.’<sup>263</sup> This is also consistent with interpretations of other human rights bodies. For example, some members of the UN Human Rights Committee have given substantive content to the notion of ‘arbitrary’ in the context of Article 12 of the ICCPR which provides that ‘no one shall be arbitrarily deprived of the right to enter his own country’<sup>264</sup>. In *Stewart v Canada*, those members of the Committee that considered the ‘arbitrary’ aspect of the case noted:

Was the deprivation of the author’s right to enter Canada arbitrary? In another context, the Committee has taken the view that ‘arbitrary’ means unreasonable in the particular circumstances, or contrary to the aims and objectives of the Covenant (General Comment on article 17). That approach also appears to be appropriate in the context of article 12, paragraph 4. In the case of citizens, there are likely to be few if any situations when deportation would not be considered arbitrary in the sense outlined. In the case of an alien such as the author, deportation would be considered arbitrary if the grounds relied on to deprive him of his right to enter and remain in the country were, in the circumstances,

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<sup>262</sup> See Paragraph 71 of the explanatory report to the European Convention on Nationality

<sup>263</sup> Para 36

<sup>264</sup> *Stewart v Canada*- although note that these judgments were dissents. This is because the majority did not consider that Canada was the applicant’s ‘own country’ for the purposes of 12(4) of the Convention and therefore did not need to consider whether his prohibition from return was arbitrary. As the dissents’ comments regarding the notion of ‘arbitrary’ drew on previous jurisprudence from the Committee, they can be relied upon in this context.

unreasonable, when weighed against the circumstances which make that country his “own country”.<sup>265</sup>

Similarly, Bhagwati said, on the question of the arbitrariness of the expulsion, that:

‘...I recall the Committee’s jurisprudence that the concept of arbitrariness must not be confined to procedural arbitrariness but must include substantive arbitrariness as well and it must not be equated with “against the law” but must be interpreted broadly to include such elements as inappropriateness or excessiveness or disproportionateness. Where an action taken by the State Party against a person is excessive or disproportionate to the harm sought to be prevented, it would be unreasonable and arbitrary.’<sup>266</sup>

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<sup>265</sup> Individual opinion by Elizabeth Evatt and Cecilia Medina Quiroga, co-signed by Francisco Jose Aguilar Urbina (dissenting) at para 8.

<sup>266</sup> IHRR Vol 4 No 2 (1997) at 438.



# GENERAL ASPECTS OF NATIONALITY AND HUMAN RIGHTS IN RELATION TO STATE SUCCESSION

Report by

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## SUMMARY

The aim of the Report is to examine the relationship of several human rights with other applicable principles or solutions in matters of nationality arising in situations of State succession.

The definition of State succession, as provided for in the two *Vienna Conventions*, even if used as a point of departure, has been generally criticised for its limited utility in determining when State succession takes place. This determination is crucial for the purposes of the application of rules of State succession or State continuity (e.g. Yugoslavia). As for nationality, the Report highlights that continuity of a predecessor State may provide additional solutions in nationality questions. The Report argues that human rights continue to apply even in disputed situations of State succession.

As to applicable human rights, Article 15 of the UDHR is the only universal statement of a general human right to a nationality, consisting of three elements: (a) the right to a nationality, (b) the prohibition of arbitrary deprivation of person's nationality, and (c) the right to change one's nationality. The binding character of the right to a nationality in customary international law is disputed.

In situations of State succession, it is noted, that both the ILC and Council of Europe experts have recently stated that the prevention of statelessness "is a corollary of the right of a person to a nationality". The right to a nationality and a corollary obligation to attribute nationality in these situations can be enforced against specific States. The question still remains whether each and every person finding himself/herself in the territory subject to territorial changes has the automatic right to a nationality in general or when he/she is otherwise stateless. Could one argue that international law attributes this right on the basis of residence or some other attachment to the territory? The ECN provides for the principle that everyone has the right to a nationality, but specific application of this principle in situations of State succession may need further elaboration.

The Report also looks into the question whether automatic change of nationality follows change in sovereignty over the territory. The ILC Articles define this as 'presumption of nationality' in situations of State succession. The Report notes that in determining nationality, there has been an attempt to attribute normative force in international law to some kind of territorial attachment principle, when State succession occurs. Clearly, the ICJ judgment in *Nottebohm* has provided the inspiration for the application of the principle of effective link beyond naturalisation. The ECN and the ILC

Articles propose to apply this principle in situations of State succession. The ILC Articles even talk about ‘appropriate connection’ for the purposes of attribution of nationality, while the ECN emphasises habitual residence and territorial origin among other criteria for granting nationality. The ultimate aim is the avoidance of statelessness. The question still remains whether any of these criteria or a presumption have become rules of international law binding on States, including new States.

Recent nationality legislation, as described in the Report, does not accept simple solutions, like granting nationality to all habitual residents. It is indeed difficult to establish the existence of a general principle of automatic change of nationality in cases of territorial change which could bind States concerned and raise issues of responsibility.

Despite State practice, the ECN drafters and the ILC Articles emphasise that the right to a nationality applies in situations of State succession. According to Article 1 of the ILC Articles, “every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, ..” In other words, it is considered unacceptable that nationals of a predecessor State become stateless as a result of State succession. However, nationality of the individuals concerned has to be determined depending on type of State succession and the nature of links between an individual and the State in question.

As far as a successor State is concerned, it is difficult to see the difference between the obligation to grant the nationality of the successor State, if such an obligation is established with any certainty, in situations in which both the predecessor State and the successor State remain, and such an obligation in the case of the extinction of the predecessor State. Each State needs a population and thus it could be presumed that the successor States will determine the population of their territories as their respective nationals. In cases where a predecessor State continues to exist (e.g. the Russian Federation or Germany), nationality solutions are approached from a totally different viewpoint.

To the question whether each and every person acquires a nationality in these situations and whether there is a relevant legal obligation under international law, State practice does not provide a positive answer. Recent codification efforts, however, indicate that through a combined effect of the right to a nationality and the principle of appropriate links individual cases should be settled in a manner complying with the prohibition of statelessness.

The Report argues further that the application of the right to a nationality in situations of State succession is less circumscribed as far as children are concerned. The right has developed a fairly precise content in relation to children. If a child would remain stateless for a considerable period of time because of the age requirement or for other reasons, this would violate his/her right to acquire a nationality of the State of his/her birth. This equally applies in all situations of State succession providing for relevant obligations and determining responsibility in relation to States where children are born.

The Report concludes that there are two main contexts in which nationality legislation could, directly or indirectly, be linked with the non-discrimination rule. First, the provisions of such legislation could be discriminatory in themselves. Second, the lack of nationality may serve as a basis for discrimination. It is argued that there are no valid reasons to say that the prohibition of discrimination does not apply to State actions in the field of nationality, including situations of State succession with the exception of some distinctions between nationals and non-nationals specifically provided for under international law. It is mentioned that the European Court of Human Rights may come to deal with such cases under the new Protocol 12 and that a possible Protocol to the ECN should address the issues of nationality and non-discrimination in situations of State succession.

## **General aspects of nationality and human rights in relation to state succession**

### **Introduction**<sup>267</sup>

This report intends to introduce several human rights standards, as they (should) apply in regulating nationality in situations of State succession, and to examine their relationship, if any, with international law principles applicable in determining nationality in such situations.

An important point of departure is the acknowledgement that in this exercise one deals with several of areas of law: (1) the regulation of nationality in international law in general and in situations of State succession in particular, (2) rules regulating State succession and (3) applicable human rights rules. The relevant regulations may be scarce or unclear, but difficulties in recognising influences between different areas of law also persist, especially as concerns the effects of human rights on nationality. The *European Convention on Nationality* (ECN) is one of the very few legally binding instruments incorporating some rules of human rights law in the area of nationality. The ECN will be the point of departure in the analysis below.

In the Report, references will be made to the approaches taken and principles elaborated by the UN International Law Commission (ILC) in its *Articles on nationality of natural persons in relation to the succession of States* (ILC Articles).<sup>268</sup> Relevant human rights instruments, such as the *Universal Declaration of Human Rights* (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR), the *Convention on the Rights of the Child* (CRC) and the *European Convention on Human Rights* (ECHR), will be referred to where necessary. In addition, references will be made to applicable norms of customary international law, as they bind all members of the Council of Europe.

The Report will deal with the following issues: Who has the right to a nationality in situations of State succession with the corollary question about State obligations. The rule on the acquisition of nationality by children, if they would otherwise be stateless, will be highlighted. The applicability of the prohibition of discrimination in identifying persons

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<sup>267</sup> The report is based on the research carried out for the PhD dissertation of the author entitled "State Continuity and Nationality in the Baltic States: International and Constitutional Law Issues", University of Cambridge, 1998.

<sup>268</sup> Resolution 55/153 of the UN General Assembly of 12 December 2000.

who have the right to a nationality and in attributing nationality to these persons will be looked at. The Report will not deal with the issue of prohibition of statelessness in any detail. It will not bring up those new challenges that the consolidation of international regulation of nationality in situations of State succession may pose for the interpretation and application of Protocol 4 of the ECHR.

## 1. Definition of State succession

### 1.1 Vienna Conventions

It is generally recognised in international law that the definition of State succession as set forth in the two *Vienna Conventions*<sup>269</sup> provides a general description of the phenomenon, although it has also been generally criticised for its limited utility in determining when State succession takes place.<sup>270</sup> The *Conventions* thus provide that State succession means "the replacement of one State by another State in the responsibility for the international relations of territory".<sup>271</sup> When the *Vienna Conventions* were drafted, the ILC explained that "succession of States" takes place exclusively in relation to the fact of the replacement of one State by another. It is not concerned with (1) other changes of legal personality<sup>272</sup> or (2) any possible inherited rights or obligations.<sup>273</sup>

### 1.2 'State succession' in violation of international law

Another qualification in determining State succession was identified by the ILC when it stated that only cases in which the replacement of one State by another takes place in compliance with international law are considered to fall within the definition proper. The ILC recognised that it deals with "facts or situations not in conformity with international law" only when they "call for specific treatment or mention". This has been confirmed recently in the work of the ILC *Articles*. Former Special Rapporteur Václav Mikulka in his *Second Report* acknowledged that, for example,

"the relevance of the case of the three Baltic Republics ... , which regained their independence in 1991 for the study of situations of secession, is questionable, as they maintain that they never *legally* formed part of the

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<sup>269</sup> *Vienna Convention on State Succession in Respect of Treaties*, 23 August 1978; *Vienna Convention on Succession of States in Respect of State Property, Archives and Debts*, 18 April 1983.

<sup>270</sup> This definition of State succession has been taken as a point of departure for the work of the ILC on State succession and nationality. The Venice Commission and the group of experts which drafted the *European Convention on Nationality* adopted the same approach. See: Mikulka (1995) 10; *Explanatory Report*, 1997, para. 104; *Report on the Consequences of State Succession for Nationality*, 1996, 21-2, para 23.

<sup>271</sup> Article 2(1)(b), *Vienna Convention on Succession of States in Respect of Treaties*, reproduced in (1978) 17 *I.L.M.*1488.

<sup>272</sup> In explaining the use of the term 'for the international relations of territory' in the definition of State succession, the ILC said that the term covers "in a neutral manner any specific case independently of the particular status of the territory ... (national territory, trusteeship, mandate, protectorate, dependent territory)." It did not mean that the principles of the *Vienna Convention on Succession of States in Respect of Treaties* covered particular questions in relation to legal persons other than States, but the ILC recognised that the principles of the *Convention* may "be applicable to treaties to which other subjects of international law are parties". *Report of the International Law Commission on the work of its twenty-sixth session 6 May-26 July 1974* (1974) 2, Part 1, *ILC Yrbk.*175-6.

<sup>273</sup> *Ibid.* 175.



Soviet Union and, accordingly, the resumption of their sovereignty *is not a case of succession of States in the proper meaning of the term* (italics added).”<sup>274</sup>

Article 3 of ILC *Articles* addresses this principle in general. It states that:

“The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.”

In its commentary to the article, the ILC stated that:

“the Commission considered that it was not incumbent upon it to study questions of nationality which could arise in situations such as military occupation or illegal annexation of territory.”<sup>275</sup>

Thus, the replacement of one State by means of the unlawful use or threat of force is not dealt with by the codified law on State succession. Occupation of a State during the course of war does not result in State succession, as clearly developed under international humanitarian law and rules of State continuity. These situations may result in a *de facto* replacement of one State by another, but the legal effects of such a replacement, including changes in nationality, are disputed unless validated through the international normative process.<sup>276</sup>

### 1.3 Applicability of human rights

It is important to note that the ILC has recognised that considerations of humanitarian nature could sometimes intervene with the above principle. This was identified by the International Court of Justice (ICJ) in the *Namibia* case where the Court supported the argument that practical or humanitarian considerations relating to the treatment of individuals affected by unlawful actions could modify the basic position that no valid consequences arise in consequence of violation of international law.<sup>277</sup> Indeed, one can draw parallels with the approach taken by the European Court of Human Rights in *Loizidou v Turkey* case (1995) in which the disputed status of the Turkish Republic of Northern Cyprus did not prevent the Court from finding a violation of the *European Convention on Human Rights* (ECHR) by those exercising effective control over the territory in question.<sup>278</sup>

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<sup>274</sup> Mikulka (1996) para. 10.

<sup>275</sup> *Report of the International Law Commission on the work of its forty-ninth session 12 May – 18 July 1997*, UN Doc. A/52/10, 93.

<sup>276</sup> *Ibid.* According to the example of the Baltic States, such situations are to be examined under the rubric of State continuity. As for nationality solutions, the principle of continuity of nationality applies. Ziemele (1998).

<sup>277</sup> 1971 *I.C.J. Reports* 43.

<sup>278</sup> *Loizidou* judgment of 23 March 1995, Series A no. 310.

In the commentary to the ILC Articles, it is recognised that Article 3 is “without prejudice to the right of everyone to a nationality in accordance with Article 15 of the Universal Declaration of Human Rights”.<sup>279</sup> In other words, human rights continue to apply even in disputed situations of State succession. The main task is to determine which human rights are applicable and what is their scope and content.

## 2. The right to a nationality

### 2.1 A human right

Article 15 of the UDHR is the only universal statement of a general human right to a nationality. According to this Article, the right is formed of three elements: (a) the right to a nationality, (b) the prohibition of arbitrary deprivation of person’s nationality, and (c) the right to change one’s nationality.<sup>280</sup> This Report will not elaborate points (b) and (c). It suffices to mention that they provide for relevant obligations for States under customary international law.

The prohibition of arbitrary deprivation of nationality means the prohibition of both arbitrary laws and arbitrary actions and decisions of authorities.<sup>281</sup> It also implies the obligation to provide effective remedies against such laws and decisions. States cannot prevent nationals from changing nationality. They are under obligation to recognise such wishes provided nationals do not become stateless. It seems however that these rules become relevant in situations of State succession once it is established who are nationals. The drafting process of the UDHR shows that the last two elements of Article 15 were proposed first and the insertion of the right to a nationality followed later and was primarily aimed at the problem of statelessness.<sup>282</sup> This has provided the basis for a suggestion that each of the elements of Article 15 represents an independent right.<sup>283</sup> Whether one considers the right to a nationality as applicable strictly in situations of statelessness or takes a view that the right to a nationality is the basis for the applicability of the other two guarantees does not affect the main question as to who has the right to a nationality with corollary obligations on the part of States, including situations of State succession.

A number of objections to this right as a positive rule of international law have been raised.<sup>284</sup> The non-binding character of the UDHR itself is a problem.<sup>285</sup> There is a certain agreement that some of the rights in the UDHR may have become rules of customary international law,<sup>286</sup> but it seems that Article 15 does not fall within this category. First, it

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<sup>279</sup> *Report of the International Law Commission (1999) – Chapter IV*, available at <http://www.un.org/law/ilc/reports/1999/english/chap4/htm> (visited 17.04.01), para 3 under Article 3.

<sup>280</sup> For a more recent commentary on this article, see Ziemele & Schram (1999).

<sup>281</sup> *Summary Records of Meetings 21 September – 8 December*, U.N.G.A. Official Records, Third Session, 1948, Part I.

<sup>282</sup> Donner (1994) 190, fn. 19.

<sup>283</sup> Chan (1991) 3.

<sup>284</sup> Article 15 caused heated discussions during the drafting process, including a rejection of the right as a human right by the Soviet Union and Ukraine. *Summary Records of Meetings 21 September – 8 December*, U.N.G.A. Official Records, Third Session, 1948, Part I, 355, 358.

<sup>285</sup> Donner (1994) 191.

<sup>286</sup> Eide & Alfredsson (1999) XXX - XXII.

does not identify the nationality to which a person is entitled, thus leaving the right without a corollary obligation on the part of a particular State.<sup>287</sup> Second, subsequent international human rights instruments, such as the ICCPR, the *Convention on the Reduction of Statelessness* and the ECHR, do not provide for the general right to a nationality. Third, there is a lack of general *opinio juris* as to Article 15, as indicated by limiting the right to children in the ICCPR. If it is a right, it is an imperfect right.

In more recent codification exercises in the area of nationality, such as the ECN and the *Venice Declaration*,<sup>288</sup> Article 15 has been referred to as the embodiment of a general principle guiding the drafting of relevant rules.<sup>289</sup> The ECN refers to the right to a nationality under the heading ‘Principles’ in Article 4. In the Explanatory Report, the drafters explain that:

“The principle of a right to a nationality is included in the Convention because it provides the inspiration for the substantive provisions of the Convention which follow, in particular those concerning the avoidance of statelessness.”<sup>290</sup>

In situations of State succession, both the ILC and Council of Europe experts have stated that the prevention of statelessness “is a corollary of the right of a person to a nationality”<sup>291</sup> and that in these situations one can identify a State having an obligation to grant nationality. The right to a nationality and a corollary obligation to attribute nationality in these situations can be enforced. It seems, however, that the question still remains whether each and every person finding himself/herself in the territory subject to territorial changes has the automatic right to a nationality in general or when he/she is otherwise stateless. Could one argue that international law attributes this right on the basis of residence in this territory?

Indeed, regional arrangements may provide for some answers in this respect. For example, the 1978 *American Convention on Human Rights* in Article 20 provides for the right to a nationality of the State in whose territory the individual is born, if he/she does not have the right to any other nationality.<sup>292</sup> The *jus soli* principle is the conventional rule.

As mentioned, the ECN provides for the principle that everyone has the right to a nationality. Specific application of this principle in situations of State succession may need further elaboration. There is a rule in the ECN that children may acquire nationality in the territory of their birth.<sup>293</sup> This issue will be discussed below.

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<sup>287</sup> Donner (1994) 245. Eide has argued that Article 15 should, at least, be viewed as moral guidance which in situations of territorial change would involve the right to acquire nationality. He did not argue for the duty to grant nationality. Eide (1993) 9.

<sup>288</sup> *Report on the Consequences of State Succession for Nationality*, 1996.

<sup>289</sup> Schärer (1998) 89 – 90.

<sup>290</sup> See *European Convention on Nationality* (ETS no. 166). Explanatory Report, available at <http://conventions.coe.int/Treaty/en/Reports/Html/166.htm> (visited in April 2001).

<sup>291</sup> *Supra*, fn 1.

<sup>292</sup> *American Convention on Human Rights* (1970) 9 *I.L.M.* 673.

<sup>293</sup> Schärer (1998) 89, 91.

## 2.2 Automatic change of nationality in situations of State succession

It is not surprising that the debate on nationality in the context of State succession has traditionally turned around the question whether automatic change of nationality follows change in sovereignty over the territory.<sup>294</sup> This has found reflection in the ILC Articles in which Article 5 speaks about ‘presumption of nationality’:

“Subject to the provisions of the present 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 on the date of such succession.”

Historically, it was assumed that, because persons are linked with a certain territory, a new sovereign acquired these persons with the acquisition of that territory and a new link of allegiance would be established.<sup>295</sup> This understanding of the relationship between people and territory is nowadays considered outdated and the existing doctrine and State practice vary on the point of any automatic change of nationality in situations of State succession. At the same time, the individual continues to be affiliated with a particular territory and thus with a State, and not only in instances when nationality is determined on the basis of the *jus soli* principle.

In dealing with matters of nationality arising from State succession, the focus of attention has been an attempt to attribute normative force in international law to some kind of territorial attachment principle. Clearly, the ICJ judgment in *Nottebohm* has provided the inspiration for the application of the principle of effective link beyond cases of naturalisation. As seen from the ECN and the ILC Articles, they propose to apply this principle in situations of State succession. They go, however, beyond the principle of effective link. The ILC Articles talk about ‘appropriate connection’ for the purposes of attribution of nationality in situations of State succession, while the ECN emphasises habitual residence and territorial origin as other criteria for granting nationality (Art. 18). The ultimate aim is the avoidance of statelessness, primary concern of the drafters of the ILC Articles and the ECN.<sup>296</sup>

It remains a question whether any of these criteria or a presumption of nationality have become rules of international law binding on States, including new States. The ECN drafters consider these criteria only as principles to be taken into consideration by States but with a view to their particular circumstances.<sup>297</sup> The ILC recognises in its commentary to Article 5 that presumption of nationality is rebuttable in situations where other principles would apply but emphasises that habitual residence has been the main

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<sup>294</sup> Brownlie (1963) 320. But see: Hudson (1952).

<sup>295</sup> Debate in the ILC, 49<sup>th</sup> Session, 1997, UN Doc. A/CN.4/SR.2476 (Mr. Economides); UN Doc. A/CN.4/SR.2481 (Mr. Simma).

<sup>296</sup> *Report of the International Law Commission on the work of its forty-ninth session 12 May – 18 July 1997*, UN GA Official Records, 52<sup>nd</sup> Session Supp. No.10 (A/52/10) 38-9. See discussion: *supra*, Chapter 3.6.

<sup>297</sup> In the *Explanatory Report* introducing Article 1, the drafters explain that rules of the Convention are not self-executing and they can thus be applied in accordance with particular circumstances of States parties to the Convention. Available at <http://conventions.coe.int/Treaty/en/Reports/Html/166.htm> (visited in April 2001).

criterion used in practice in determining nationals. The answer to the question remains unclear. It is proposed to look at recent State practice, which could suggest the emergence of *opinio juris* in relation to any of these criteria. Before doing that, it may be useful to clarify that it is the initial determination of nationals which is important for the purposes of the assessment of State practice at the moment of State succession. At the same time, subsequent amendments in laws or the adoption of new laws can be telling as to the emergence of the understanding of those principles and rules that such laws should comply with. It may also show what pressures the international community has exercised in relation to domestic laws.

### 2.2.1 Examples of State practice

The dissolution of the three federations of Yugoslavia, Czechoslovakia and the USSR was not fully regulated by international treaties.<sup>298</sup> Nationality questions were settled primarily by national legislation. The former republics of Czechoslovakia and Yugoslavia identified their nationals on the basis of their republican citizenship. For example, in Bosnia and Herzegovina, all persons who had the citizenship of the (Yugoslav) Republic Bosnia and Herzegovina on 6 April 1992 were presumed to be nationals of the new State. The re-examination of validity of nationality of those persons who acquired it through naturalisation after this date and before the Constitution of the country entered into force was provided for in Articles 40 and 41 of the *Law on Citizenship* of 1998.<sup>299</sup>

In Croatia, persons who were Croatian citizens under former federal laws were considered nationals of Croatia automatically under a new law of 8 October 1991. Local authorities kept the registers of citizens. In case the entry was missing or destroyed, persons had difficulties to prove their status. Persons who belonged to the Croatian people and had been residents for ten years when the *Citizenship Law* entered into force could apply for nationality,<sup>300</sup> thus clearly singling out ethnic Croats for the exercise of the right to acquire nationality. The ten-year residence requirement was subsequently abolished.<sup>301</sup> Non-Croat citizens of other former Yugoslav republics who have come to Croatia at different times and under different circumstances are considered foreigners and they may have to go through a complex naturalisation procedure. This practice has raised serious human rights problems.<sup>302</sup>

In “the former Yugoslav Republic of Macedonia”, persons who were Macedonian citizens under former federal laws were considered nationals of “the former Yugoslav Republic of Macedonia” automatically under the new law of 1992. Other citizens of the former SFRY, if they were at least 18 years old, had resided there for fifteen years and had a permanent income, could apply for Macedonian nationality. Article 11 of the

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<sup>298</sup> In the document entitled “Principles on Citizenship Legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina”, a list of principles to govern national legislation was identified by experts of the Council of Europe, UNHCR and the States concerned. Doc. DIR/JUR (97) 3, 16 January 1997.

<sup>299</sup> *Law on Citizenship of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina* 4/98.

<sup>300</sup> Article 30 of the *Law on Croatian Citizenship*, published in the *Peoples’s Journal* No.53, 8 October 1991.

<sup>301</sup> Boric (1998) 202.

<sup>302</sup> Pejic (1998) 179-80.

Macedonian law provided for the possibility of preferential treatment in relation to persons of Macedonian origin residing outside Macedonia for naturalisation purposes.

In Slovenia, individuals who held republican and SFRY nationality at the time of coming into force of the new law<sup>303</sup> were automatically considered nationals. Individuals who had permanently resided in her territory on 23 December 1990<sup>304</sup> and thereafter and who could have acquired the republican citizenship under the former federal laws could acquire nationality by submitting an application form.<sup>305</sup> Citizens of other SFRY republics, if they continued to reside permanently on the territory of Slovenia after 23 December 1990 could apply for Slovenian nationality at the place of their permanent residence.<sup>306</sup> There was, however, a time limit of 6 month.

The *Yugoslav Citizenship Law* was adopted on 16 July 1996, superseding the *SFRY Citizenship Law* then in force. It provided that, because of the constitutional continuity, nationals of the former SFRY who were citizens of the Republics of Serbia and Montenegro on the date of proclamation of the *Constitution*, i.e., 27 April 1992, were to be regarded as FRY nationals automatically.<sup>307</sup>

The acquisition of nationality by application was used in relation to some other groups of individuals in the new successor States of Central and Eastern Europe. Yugoslavia provides for the possibility to acquire her nationality for all former SFRY nationals (1) who have not acquired other nationality and have fled to Yugoslavia for fear of persecution, (2) who resided permanently in the FRY on 27 April 1992,<sup>308</sup> or (3) are stateless residents abroad.<sup>309</sup>

In Slovakia, former nationals of the CSFR were considered Slovak nationals or could apply for Slovak nationality.<sup>310</sup> The Czech Republic considered only former citizens of the former federal Czech Republic as original nationals. Citizens of the former federal Slovak Republic, if they had resided in the Czech Republic for at least two years or if their last place of residence was the Czech Republic, were permitted to apply for Czech nationality. There were, however, additional requirements which individuals had to meet, such as a clean criminal record for the last five years and the non-possession of other

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<sup>303</sup> 25 June 1991 – the day of the independence of Slovenia.

<sup>304</sup> The day of the plebiscite for independence.

<sup>305</sup> Article 40, *Republic of Slovenia Citizenship Act*, 1992, in *Citizenship and Language Laws in the Newly Independent States of Europe. Materials of the Seminar*, Seminar held in Copenhagen January 9-10, 1993.

<sup>306</sup> Boriè (1998) 200.

<sup>307</sup> Even if the international community refused to accept the FRY claim for the continuation of SFRY's international legal personality, the debate within the FRY took place with reference to continuity rules which are embodied in the new *Constitution*. See: Buzadzic & Baletic (1996) 26; Pejic (1998) 173-78; Boric (1998) 206.

<sup>308</sup> The day of promulgation of Yugoslav Constitution.

<sup>309</sup> The Law contained a number of discriminatory provisions allowing for wide discretion of relevant authorities in assessing requests from persons of different ethnic origin, etc. *Supra* note 33. The *Law on Changes and Addenda of the Law on Yugoslav Citizenship* was adopted in February 2001. Relevant articles were amended leaving, however, the main approach intact. Citizens of another republic of SFRY habitually resident in Yugoslavia on 27 April 1992 could acquire Yugoslav citizenship (Art. 47). *Official Gazette*, No. 9, 2 March 2001.

<sup>310</sup> Mikulka (1997a) 66-7, para. 30.

nationality.<sup>311</sup> The 1996 amendments to the Czech law only partially lifted the demand for a clean criminal record. Further improvements in this respect were subsequently considered.

In the former Soviet republics, the main principle for determining nationality rested on territorial origin or permanent residence in the territory before the date of independence.<sup>312</sup> In some of the republics, permanent registration (*propyska*) was regarded as sufficient evidence of republican citizenship, which was consequently the basis for the automatic acquisition of nationality provided that an individual did not have another nationality. Republican citizenship was not, however, a strong institution in all the former Soviet republics and did not play as decisive a role in determining nationals as in the former Yugoslavia or Czechoslovakia. Instead, residence for a certain number of years was the main criterion for determining nationals.

Some former Soviet republics, like Armenia, provided for a simplified procedure for the acquisition of nationality by application or registration, as opposed to naturalization.<sup>313</sup> In Belarus, persons who were permanent residents there on the day the *Law on Citizenship* came into force, i.e., 13 November 1991, and who did not have other nationality or stateless persons in Belarus were considered nationals of Belarus. A simplified procedure for the acquisition of citizenship was available to former nationals of the USSR who had resided in the territory of the republic, but left it before the Law entered into force.<sup>314</sup> In Ukraine, all residents on the day of the entry into force of the *Law on Citizenship*, i.e., 14 November 1991, were granted nationality of Ukraine if they were not nationals of another country and did not refuse Ukrainian nationality explicitly. Those who lived outside the State, but were born or once had a permanent residence (*propyska*) there, could apply for her nationality until the end of 1999.<sup>315</sup> A new *Law on Citizenship* of Ukraine entered into force in January 2001. In defining nationals, the above mentioned principles are preserved.

In other words, State practice continues to vary in State succession cases. The former republics of the USSR considered it necessary to confer nationality on persons who had permanently resided in their territories for a certain period of time or originated from there. The Yugoslav and Czech republics emphasised citizenship of the respective federal republic as a criterion for granting nationality. Whether the States did so because they acknowledged the principle of automatic change of nationality as a rule of customary international law is a question. Was the granting of nationality on the basis of secondary

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<sup>311</sup> Ibid. para 31. The UNHCR and the Council of Europe have criticised the Czech approach because it resulted in statelessness for the former citizens of Slovak Republic who were habitual residents in the Czech Republic, unless they were naturalised as Czech nationals. *Report of the Experts of the Council of Europe on the Citizenship Laws of the Czech Republic and Slovakia and their Implementation and Replies of the Government of the Czech Republic and Slovakia*, Doc. DIR/JUR (96) 4, 2 April 1996, para. 46 and 76.

<sup>312</sup> E.g. Armenia, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Ukraine.

<sup>313</sup> According to Article 10(1) of the Armenian *Citizenship Law*, persons who reside outside Armenia but are citizens of the former Armenian SSR or of Armenian descent, if they have not acquired another nationality, are nationals of the Republic of Armenia. *Republic of Armenia Citizenship Law* (visited 19 February 1998) <http://www.armeniaemb.org/visa/citlaw.html>.

<sup>314</sup> Vashkevitch (1998) 187 – 189.

<sup>315</sup> Council of Europe, *European Bulletin on Nationality*, DIR/JUR (96) 1, 173; Petrauskas (1998) 34.

nationality used by the former SFRY republics and the Czech Republic consistent with such a principle? The Czech representative in the UN Sixth Committee in 1997, Mr. Beranek, criticising the presumption of nationality in the ILC *Draft Articles* at the time, stated that it had clearly not been applied when secondary nationality served as the criterion for granting nationality.<sup>316</sup> Furthermore, a distinction has to be drawn between the determination of original nationals and other available procedures. The presumption does not apply to situations when, on the basis of different criteria, States grant nationality by way of simplified procedures or naturalization; these situations are not about automatic change of nationality.

The Czech and Yugoslav cases show that, when only secondary citizenship is used as a criterion for determining original nationals, it is likely that other permanent residents, including former citizens of another federal republic, could become stateless until they acquired nationality through naturalization or a simplified procedure. It is true that some new States, for example Slovakia, accepted such individuals as potential nationals if they wanted to. However, they could want to remain in the Czech Republic, if they had lived there for decades. Would this mean that they should be regarded automatically as original nationals of the Czech Republic or would the right to acquire a nationality through certain procedures be sufficient? It appears to be an open question. The Council of Europe has accepted the latter as sufficient, provided that the procedure was reasonable and in compliance with general human rights considerations.<sup>317</sup> The ILC *Articles* imply that other grounds should be used so as to make sure that every permanent resident with nationality of a predecessor State becomes a national unless he/she decides otherwise.

It has not been uncommon to consider a particular ethnic or national group to have an especially strong claim to one or another nationality, as evidenced by the Croatian and Armenian laws, bringing up possible questions concerning equal rights and discrimination.<sup>318</sup> The ILC implicitly draws a distinction between discrimination on any grounds which results in denial of nationality, on the one hand, and using criteria to enlarge the circle of individuals entitled to acquire nationality, on the other hand.<sup>319</sup> By leaving out the issue of such preferences in nationality matters, the ILC seems to imply that they are lawful.<sup>320</sup> But this distinction appears to be very thin and difficult to justify.

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<sup>316</sup> U.N.G.A. Official Records, 52<sup>nd</sup> Session, A/C.6/52/SR.19, 1998, 8-9.

<sup>317</sup> *Supra* note 311.

<sup>318</sup> See discussion below under 4.

<sup>319</sup> The ILC says that traditional elements on the basis of which discrimination has been acknowledged may not cover all situations, which in the specific context of State succession may result in discrimination. It mentions the reaction of the Council of Europe and the UNHCR to the provision in the Czech law which excludes prevented individuals with a criminal record from naturalisation. *Report of the International Law Commission on the work of its forty-ninth session 12 May – 18 July 1997*, U.N.G.A. Official Records, 52<sup>nd</sup> Session Supp. No.10 (A/52/10) 62-3, fn. 98.

<sup>320</sup> The debate in the Sixth Committee in 1997 evidences that the view among States concerning the functioning of non-discrimination in situations of State succession is not yet uniform. First of all, some members of the ILC questioned whether the rule has to be dealt with specifically in the context of State succession. It is a more general issue and thus will apply to State succession by implication. UN Doc. A/C.6/52/SR.18, 1998, 4. In relation to substance, the Swiss representative argued that Article 14 is too broad because it may imply that any criteria for naturalization are discriminatory. He doubted whether States agree on such an understanding of the non-discrimination rule. A/C.6/52/SR.18, 16. The Czech representative suggested a distinction between criteria used to prevent individuals from the acquisition of nationality, on the one hand, and criteria for naturalization, on the other hand. A/C.6/52/SR.19, 9. In



Such preferences may not immediately result in denial of nationality to other groups of people, but they may introduce an element of inequality in comparable situations.<sup>321</sup>

Recent nationality laws, as described, do not favour simple solutions like granting nationality to all habitual residents in the territory concerned. It is indeed difficult to establish the existence of a general principle of automatic change of nationality in cases of territorial change which could bind States concerned and raise issues of responsibility. It remains an underlying presumption in situations of territorial change subject to other applicable rules and the assessment of the character of links between an individual and a State. In these circumstances, does the right to a nationality, as applicable in situations of territorial change, have any added value?

### 2.2.2 Summary

It has to be noted that the ECN drafters and the ILC Articles are firm as concerns the right to a nationality in situations of State succession. According to Article 1 of the ILC Articles, “every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, [in accordance with the present articles].” In other words, *it is unacceptable that nationals of a predecessor State become stateless as a result of State succession*. The determination of a State with an obligation to attribute a nationality in each individual case depends on type of State succession and the nature of links between an individual and the State. The ILC and Council of Europe experts have emphasized this. In other words, it is a combination of the right to a nationality, recognised as clearly applicable in situations of territorial change, together with the principle of appropriate connection to the territory that is the proposed solution for each individual situation. Furthermore, the combined effect of the two principles may not result in statelessness.

### 2.3 Different situations, different rules

Views have differed as to whether different categories of State succession invite the application of different rules in matters of nationality. It has been argued that, in principle, the presumption of automatic change of nationality in consequence of change of sovereignty applies irrespectively of the situation involved.<sup>322</sup> As explained above, this is not a very helpful presumption at the level of individuals. Former ILC Special Rapporteur Václav Mikulka has argued that rules could differ depending on whether the predecessor State disappears or continues to exist.<sup>323</sup> This is the approach supported by the ILC Articles.

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principle, all the members agreed that the rule of non-discrimination applies. The views varied as to the scope of criteria. The Slovenian representative suggested to spell out such grounds as race, colour, descent, national or ethnic origin and religion. A/C.6/52/SR.19, 7.

<sup>321</sup> The representative of Germany in the Sixth Committee noted the implied distinction in then draft Article 14 (now Art. 15) between prohibited discrimination resulting in deprivation of nationality which seemed to be subject-matter of the article and positive measures in matters of nationality which was not covered by Article 14. A/C.6/52/SR.18, 1998, 12.

<sup>322</sup> Brownlie (1990) 665.

<sup>323</sup> For the assessment that there are differences between the case of transfer of territory and the separation, see: Mikulka (1995) 32, para. 90; Mikulka (1997b) 21.

### 2.3.1. Extinction of a predecessor State

It follows from the principle that nationality is linked to a particular statehood and that the extinction of a State brings about the extinction of its nationality.<sup>324</sup> With the extinction of Czechoslovakia and Yugoslavia, their nationality disappeared. The reunification of Germany led to the disappearance of GDR nationality because the GDR ceased to exist, while the nationality of Germany continued to apply. Thus, a total absorption of one State by another would, in principle, extinguish the nationality of the absorbed State.

The unification of States and the dissolution of States seem to produce similar difficulties in nationality matters. In each case, a predecessor State ceases to exist. The successor States do not, in principle, simply 'inherit' all the nationals of the predecessor State, as there is no binding rule on automatic change of nationality following change of territory. This is also consistent with the principle that new States are distinct legal persons under international law and that therefore each has its own nationals, as determined by themselves within the limits of international law. The dissolution of Czechoslovakia and Yugoslavia showed that each successor State laid down its own rules, although they did not differ substantially from each other or earlier cases, presumably because there was not much practice for new States to refer to. This does not answer the question of existing international obligations, if any, or whether they were observed in the mentioned cases.

### 2.3.2. Continuity of a predecessor State

The former ILC Special Rapporteur on *Succession of States in respect of Rights and Duties resulting from Sources other than Treaties*, Mohammed Bedjaoui, argued that the principle of non-continuity of nationality applied in situations of State succession.<sup>325</sup> This meant that as soon as the predecessor State withdrew its sovereignty over a certain territory the population concerned lost their former nationality.<sup>326</sup> This was the traditional understanding of nationality as a matter of State sovereignty. Does more contemporary understanding of the relationship between States and nationality endorse this view? It was stated above that a particular nationality is linked with a particular State. It followed that, if the State ceases to exist, its nationality also ceases to exist. Where the State continues, even if it has lost some of its territory, there is no reason to assume that the nationality of individuals residing in third States ceases to exist by mere reason of their residence. Accepting the opposite would result in a return to the old understanding of the relationship between people, territory and sovereign existing in the era of feudalism: the territory would determine the future of the people rather than the people the future of the territory.<sup>327</sup>

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<sup>324</sup> For an analysis of this principle, see Crawford (1979) 34; Crawford (1986).

<sup>325</sup> Bedjaoui (1968) 114, para. 133.

<sup>326</sup> It has been conceded that upon territorial change individuals who found themselves in another State are, in principle, susceptible of having lost their former nationality. This, however, has been subject to the evaluation of relevant links with the territory. See: O'Connell (1967) 511; also see debate on the *Venice Declaration*, *supra*, note 288.

<sup>327</sup> 1975 *I.C.J. Reports* (also Diss. opn. of Judge Dillard).

Withdrawal of nationality from nationals of a State which continues to exist despite territorial changes, even if they reside outside it, without consulting them could arbitrarily deprive them of their nationality and could violate the principle of the reduction of statelessness; in both respects it would be unlawful.<sup>328</sup> It is a common practice today that many individuals reside in another State than a State of their nationality. This does not constitute grounds for depriving them of their nationality; why should it do so merely because there has been a partial territorial change? Something more should be required, such as the free choice of the individuals concerned to acquire another nationality, or at least to renounce the old one. One cannot but notice a clear evolution of the understanding of the way nationality links operate, even in a situation of territorial change. This could be attributed to a more human rights oriented approach taken in relation to nationality as well as to the evolution of a more integrated international community in which loyalties may more readily change.

It has to be recognised that this may create a conflict in situations in which the successor State intends to grant nationality, while the individual is presumed to be a national of the predecessor State. This situation is clearly subject to international law regulation, as any situation involving two States. The question is whether international law contains any rules which the respective States have to follow? As explained above, recent codification attempts suggest the combination of criteria of territorial connection and applicable human rights rules. Also general principles of international law, such as respect for State sovereignty and independence would support the primary right of the successor State to determine that nationals of the predecessor State acquire the new nationality.<sup>329</sup> At the same time, where the successor State does not confer nationality on these individuals, the predecessor State should not withdraw its nationality from them.<sup>330</sup> This would be clearly supported by the principle of the reduction of statelessness. The development of the right of option has become useful in dealing with potential conflict in such situations and has, in addition, reinforced the human rights approach in dealing with nationality in situations of State succession.<sup>331</sup> In cases where a predecessor State continues to exist (e.g. the Russian Federation or Germany), one can see that nationality solutions are approached from a totally different viewpoint.<sup>332</sup>

### 2.3.3. Summary

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<sup>328</sup> The *Convention on the Reduction of Statelessness* permits to deprive naturalized nationals of a nationality, if they have resided abroad for seven consecutive years and have not announced their intention to retain nationality (Art. 7.4). The *Convention* prohibits to deprive of a nationality, if this would result in statelessness (Art. 8.1). Individuals subject to deprivation of their nationality have the right to appeal such a decision (Art. 8.4).

<sup>329</sup> This was the understanding which emerged in settling Austrian nationality issues after its restoration after World War II.

<sup>330</sup> Article 10 of the *ILC Articles* recognises the presumption that the individual, in principle, retains nationality of the predecessor State unless he/she voluntarily acquires nationality of the successor State. It states that:

1. A predecessor State may provide that persons concerned who, in relation to the succession of States, voluntarily acquire the nationality of a successor State shall lose its nationality.

<sup>331</sup> *Ibid.*

<sup>332</sup> Zimmermann (2000) 660.

The principle explained above under 2.2.2, as applicable in determining nationality in situations of territorial change, could be amended as follows. A person, having had a nationality of a predecessor State, is entitled to have a nationality of a successor State or preserve that of a predecessor State, if applicable. This determination is subject to the assessment of appropriate connections to the territory in question and the prohibition of statelessness and other rules of human rights. There is a need to clarify the approach of the ECN in this respect. It will be argued further that a few other human rights provide for more specific obligations in this context.

### 3. The right of a child to a nationality

The ICCPR does not provide for the general right to a nationality, but Article 24(3) provides that "every child has a right to acquire a nationality." The purpose is to ensure that a child is not given less protection because of statelessness.<sup>333</sup> Thus, every child must be registered and given a name immediately after birth (Art. 24(2)). The UN Human Rights Committee (HRC) has emphasised that the duty to register a child is closely linked with the right of a child to special measures of protection. The HRC did not say that States are obliged to grant nationality at birth, but emphasised that a State is required to adopt every appropriate measure to ensure that a child has a nationality when he/she is born.<sup>334</sup>

Article 24(3) addresses the right to a nationality in a sense of the right to acquire a nationality and sets forth some requirements for the acquisition procedures. Procedures for the acquisition of nationality differ from State to State and may be rather lengthy, but paragraph 2 indicates a preferable time element in that a State should register a child "immediately after birth".<sup>335</sup> The additional guarantee rests on the non-discrimination rule in this context. The HRC has emphasised that:

"[N]o 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 of the parents."<sup>336</sup>

In addition, the HRC has identified grounds, such as statelessness of the parents, their nationality or marital status, which may not serve to justify distinctions, exclusions, etc., in relation to children. The traditional grounds for prohibiting discrimination will also apply.

The implementation of the rights of children clearly requires the adoption of special measures, as stressed by the HRC and other relevant international forums. It does not appear that States have objected to this obligation. No State party to the ICCPR, including members of the Council of Europe, has made a reservation in relation to Article 24. Furthermore, the *Convention on the Rights of the Child* (CRC) enjoys almost

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<sup>333</sup> *General Comment 17. Article 24*, 1989, reproduced in UN Doc. HRI/GEN/1/Rev.2, 29 March 1996, 25.

<sup>334</sup> UN Doc. HRI/GEN/1/Rev.2, 29 March 1996, 25.

<sup>335</sup> Nowak (1993) 434.

<sup>336</sup> UN Doc. HRI/GEN/1/Rev.2, 29 March 1996, 25.

universal acceptance.<sup>337</sup> It has, therefore, been suggested that rights pertinent to a child's well being, including the right to acquire a nationality, are recognised as part of customary international law.<sup>338</sup>

The CRC in Article 7 provides for the right of a child to acquire a nationality after birth. At the same time, paragraph 2 recognises that the implementation of this right is subject to municipal law. Each State can determine the procedures for the acquisition or loss of nationality, albeit within the limits of "their obligations under the relevant international instruments" and with special attention to situations where the child "would otherwise be stateless". This formulation suggests that child statelessness is still a reality, but that national measures in implementing Article 7 must seek to eliminate the problem. An additional guarantee against the abuse of the right of the child to a nationality is the rule that the best interests of child should be protected, as provided for in Article 3 of the CRC.

The ECN sets forth detailed rules concerning nationality of children. Article 6 requires that nationality is granted *ex lege* or upon the application, if children, who are born on the territory of a State, are otherwise stateless. As far as application procedures are concerned, the ECN requires that lawful and habitual residence requirement should not exceed five years.

The right to acquire a nationality now has fairly precise content in relation to children.<sup>339</sup> However, the right is not always implemented, especially in States which have identified the primary body of nationals on the basis of the *jus sanguinis* principle. Procedures relating to the acquisition of nationality rely on length of residence, age of the applicant and other requirements, but in the process the non-discrimination rule, the prohibition to render children stateless and the prohibition against adopting arbitrary decisions have to be respected. It appears that, if a child would remain stateless for a considerable period of time because of the age requirement or for other reasons, this would violate his/her right to acquire a nationality of the State of the child's birth. This rule applies equally in all situations of State succession providing for relevant obligations and determining responsibility in relation to States where children are born.

#### **4. Equality principle and the prohibition of discrimination**

Article 1(3) of the *International Convention on Elimination of All Forms of Racial Discrimination* (ICERD) puts forth an interesting qualification. It states that:

"Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or

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<sup>337</sup> *Convention on the Rights of the Child* (1989) 28 *I.L.M.* 1448. As of 31 May 2001, 191 States have ratified it.

<sup>338</sup> Chan (1991) 11.

<sup>339</sup> For a detailed analysis of human rights treaties which obligate States to guarantee the right to acquire a nationality for children, if they are otherwise stateless, see a Letter of the OSCE High Commissioner on National Minorities to the Minister for Foreign Affairs of the Republic of Latvia of 23 May 1997 (1998) 9 *Helsinki Monitor* 61-3.

naturalization, provided that such provisions do not discriminate against any particular nationality.”<sup>340</sup>

Initially, the Convention was not meant to apply to domestic law in relation to the granting of nationality or naturalisation, except when they discriminated against a particular nationality.<sup>341</sup> Since the adoption of the ICERD, the rule on the prohibition of discrimination has developed further. The view has emerged that the prohibition of discrimination applies fully to nationality legislation, including naturalisation.<sup>342</sup> In Article 5d (iii), the ICERD itself links the prohibition of discrimination on the grounds of race, colour, or national or ethnic origin with the right to a nationality.

In accordance with the principle of equality before the law and equal protection of the law, one could argue that individuals should be equal before domestic nationality laws in general or, at least, as far as arbitrary deprivation of nationality is concerned, as discussed above under 2.1. The equality principle may only apply, however, when a person is determined as subject of nationality law. It does not attribute the right to a nationality independently unless, of course, the right to a nationality can be established as applicable in the case in question under national or international law (e.g. cases of State succession).

Nevertheless, States continue to adopt some provisions in their nationality legislation with a view to supporting the re-integration into the body of nationals of individuals belonging to the same “core nation”, i.e. an ethnic or linguistic group identified with the State.<sup>343</sup> States continue to use language requirements in law and practice for their naturalisation purposes. One may question whether all or some of these practices generate inequality and could amount to discrimination? The ECN as well as Article 15 of the ILC Articles seem to accept that this type of reference to language or origin in attributing nationality is permitted where such measures do not affect negatively anyone with a particular national or ethnic origin.<sup>344</sup> The ILC Articles deal specifically with State succession and thus it could be argued that in the opinion of the ILC this practice should apply in such situations. At the same time, the ECN accepts it as generally applicable,

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<sup>340</sup> The debate in the Third Committee was divided on a number of questions, including terms such as citizenship, nationality or national origin. Varying understandings were attributed to the term ‘any particular nationality’. The two main interpretations were: (1) nationality in its legal sense denoting the membership in a State; and (2) nationality in its ethnic or national origin sense. Practice developed by the treaty monitoring body, the CERD, seems to have accepted the latter view. (Author’s discussion with Committee members during the July-August session, 1997).

<sup>341</sup> See: Schwelb (1966) 1009-11; Lerner (1970) 43.

<sup>342</sup> In considering periodic State reports, the CERD has begun to evaluate practices in granting the right to acquire nationality as well as other human rights to aliens from the point of view of the prohibition of discrimination. The right to a nationality without any discrimination was the focus of attention in assessing Latvia’s report under the ICERD. See CERD/C/55/Misc.39/Rev.4 (*Concluding observations of the Committee on the Elimination of Racial Discrimination: Latvia. 24/08/99.*) 24 August 1999.

<sup>343</sup> See discussions above, notes 320-321.

<sup>344</sup> It was admitted in the *Explanatory Report* to the ECN that the attribution of nationality on the basis of certain criteria fixed by States may result in preferential treatment. *Explanatory Report*, para. 41. The ILC has taken a similar view. The Inter-American Court of Human Rights held that, because a State offers the possibility to acquire nationality to persons who were initially aliens, it is that State which is best able to determine conditions for such a conferral. The Court supported its argument by referring to the judgment of the ICJ in *Nottebohm. Amendments to the naturalization provisions of the Constitution of Costa Rica, Advisory Opinion* (1984) 5 *H.R.L.J.* 168. Compare: Mikulka (1997a) 88-92.

arguing that it is the practice in many States. It is interesting to note that the ECN does not mention language as one of the possible general grounds of discrimination. This means that it accepts a language requirement as part of domestic nationality laws.

It has been an essential part of the functioning of the current State-centric society that for practical or other reasons one language is accepted as the State language, although the UN *Charter* prohibits discrimination on the grounds of language.<sup>345</sup> It could, however, be questioned whether preferential treatment is reasonable when it distinguishes between groups on ethnic or linguistic grounds, thus introducing an element of inequality, especially where the situation of these groups is otherwise comparable.

There are thus two main contexts in which nationality legislation could, directly or indirectly, be linked with the non-discrimination rule. First, the provisions of such legislation could be discriminatory in themselves. They might deprive persons of nationality on discriminatory grounds or prevent persons from acquiring nationality on discriminatory grounds. Whether facilitating the acquisition of nationality by ethnic, linguistic or other groups is consistent with the equal treatment rule will depend on the existence of objective and reasonable justifications.<sup>346</sup>

Second, the lack of nationality may serve as a basis for discrimination. Non-nationals, in principle, should enjoy almost all human rights, including social and economic benefits where applicable. Any distinction which is linked with the lack of particular nationality could be found to violate human rights.<sup>347</sup> According to the *Vienna Convention on the Law of Treaties*, a State may not justify non-compliance with its international treaty obligations by invoking domestic law provisions. This applies equally to nationality legislation where a treaty obligation not to discriminate is concerned. As part of customary international law it will bind both old and new States and the granting of nationality in situations of State succession will be thus affected by the rule on non-discrimination.

The drafters of the ECN have, however, rightly pointed out that the existing international treaties do not “expressly prohibit discrimination in the field of nationality”.<sup>348</sup> In that respect the ECN containing a general provision to that extent is an innovation among international treaties. It is argued here that there are no valid or lawful reasons for saying that the prohibition of discrimination in international law does not apply to State actions in the field of nationality, including situations of State succession, except where some distinctions between nationals and non-nationals are specifically provided for under international law.

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<sup>345</sup> Articles 1 and 55 of the UN Charter.

<sup>346</sup> The *Explanatory Report* to Protocol 12 argues that “the principle of equality requires that equal situations are treated equally and unequal situations differently”. It has been established in case law of the European Court of Human Rights that failure to do so amounts to discrimination unless an objective and reasonable justification exists. The Court has allowed a certain margin of appreciation to national authorities in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. See paras 15, 18 and 19, available at <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>

<sup>347</sup> Visek (1997) 354-56, fn. 225.

<sup>348</sup> Schärer (1998) 90.

It also appears that where domestic laws provides for the right to a nationality, irrespective of whether it is called attribution of nationality, naturalisation or something else, and where the enjoyment of this right may be impeded on the grounds listed in Article 1 of Protocol 12 to the ECHR, individuals may use their right to complaint in the European Court of Human Rights.<sup>349</sup> It has to be pointed out that this Article contains among other things such grounds as language or membership of a minority. Indeed, the new Protocol opens up possibilities for judicial control in the area of nationality and non-discrimination.

### **Concluding Remarks**

If the inter-relationship between various fields of international law was accepted and used for codifying and developing rules of international law, some of the questions outlined above would not arise, such as the applicability of the non-discrimination rule in matters of nationality, including situations of State succession.

At the same time, the development of the right to a nationality as part of human rights law and the right to a nationality with relevant obligations for States in different situations of State succession will continue to pose questions in different specific contexts.

It is important that the work started by the ILC in its Articles on nationality of natural persons in situations of State succession, doing away with some of the fragmentation existing in international law, is picked up and brought further in the future work of the Council of Europe. In the context of a possible Additional Protocol to the ECN, this should mean the recognition of the applicability of relevant human rights rules to the solutions sought in relation to nationality in situations of State succession.

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<sup>349</sup> The *Explanatory Report* to Protocol 12 lists cases protected under Article 1 arising in domestic law. *Explanatory Report*, para 22.



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# **STATELESSNESS IN RELATION TO STATE SUCCESSION: THE NECESSITY OF AN ADDITIONAL INSTRUMENT TO THE EUROPEAN CONVENTION ON NATIONALITY**

**Report by**

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## **Summary**

### **Statelessness in Relation to State Succession**

#### **The Feasibility of an Additional Instrument to the European Convention on Nationality**

#### **Object and Scope of the Study**

The right to a nationality is the main human right in the field of nationality. Without a nationality, individuals cannot enjoy the fundamental rights based on its possession in the State of residence and benefit from the protection that States grant their citizens abroad. The elimination of statelessness is the main concern of the international community in the field of nationality.

Statelessness has a particular significance in cases of State succession. State succession has a high potential to create – concentrated on short periods – huge numbers of stateless persons, in particular when the predecessor State disappears and no successor State is ready to grant its nationality to former nationals of the State which has disappeared.

State succession with regard to nationality is regulated on the international level by binding and non-binding instruments. The binding instruments (in particular the 1961 UN Convention on the Reduction of Statelessness and the European Convention on Nationality) contain some large principles but lack detailed regulations. The non-binding instruments (the Declaration of the Venice Commission on the Consequences of State Succession for the Nationality of Natural Persons, the 1999 Council of Europe Recommendation on the Avoidance and the Reduction of Statelessness as well as the 1999 UN Resolution, prepared by the International Law Commission, on Nationality of Natural Persons in Relation to the Succession of States) contain principles and specific rules but have no binding character and do not address some important aspects of statelessness in case of State succession.

The CJ-NA received the mandate to prepare a feasibility study in 2001 for the attention of the CDCJ on the necessity to prepare an additional instrument to the European Convention on Nationality concerning statelessness in relation do State succession.

#### **Existing international instruments and need for other rules**

If we combine the ideas of the above-mentioned international instruments we arrive at the following rules:

A successor State shall grant its nationality to persons habitually resident in its territory, in particular if they become stateless as a result of the State succession.

A predecessor State shall not withdraw its nationality from its nationals who have been unable to acquire the nationality of a successor State.

A successor State shall grant its nationality to persons habitually resident in a third State who become stateless as a result of the succession if they were born in the territory which has become the territory of the successor State, had their last habitual residence in it or have any other appropriate connection with the successor State.

In case of dissolution of a federal State, a successor State shall grant its nationality to stateless persons who previously possessed its internal citizenship.

States should endeavour to regulate matters relating to statelessness by international agreement.

There is, however, a need for other rules based on practical experience of recent cases of State succession and on the Recommendation on statelessness:

There should be an obligation of a successor State, after a period of residence in its territory, to grant its nationality through a facilitated procedure to persons who remained stateless in the wake of the succession of States because of a change of the place of residence.

There should be an obligation of a successor State to interpret largely the term of habitual residence so as to permit persons having a stable factual residence on legal grounds in a successor State to acquire its nationality on the basis of residence.

Successor States should be obliged not to require full proof of conditions for the acquisition of their nationality if this would otherwise lead to de facto statelessness. A high probability that the conditions for acquisition of the nationality of a successor State are fulfilled should be sufficient.

There should be an obligation of successor States not to require proof of non-acquisition of another nationality for persons habitually resident in their territory at the moment of State succession as a condition for recognising such persons as citizens.

States shall promote the avoidance of statelessness, in particular in case of State succession, through international co-operation.

States should facilitate the acquisition of their nationality by stateless persons lawfully and habitually residing on its territory, in particular in case of State succession.

Stateless children born of former citizens of a predecessor State in a successor State after the date of State succession should acquire the nationality of the State where they were born.

## **Conclusion**

On the basis of this study, it is proposed to the Council of Europe to prepare an additional instrument to the European Convention on Nationality concerning statelessness in relation to State succession

## **Report on the Necessity of an Additional Instrument to the European Convention on Nationality**

### **Chapter I: Object and Scope of the Study**

#### **1. Importance of statelessness in case of State succession in the field of nationality**

The right to a nationality (article 15 of the Universal Declaration of Human Rights) is the main human right in the field of nationality. Without a nationality, individuals cannot enjoy the fundamental rights based on the possession of the nationality of the State of residence, nor enjoy the protection that States grant their citizens who live abroad. The situation of stateless persons may be characterised by the formula that they have no place where they can stay and no place to which they can return. The elimination of statelessness is thus the main concern of the international community in the field of nationality.

Statelessness has a particular significance in cases of State succession. On the one hand, State succession has a high potential to create – concentrated on short periods – huge numbers of stateless persons, in particular when the predecessor State disappears and no successor State is ready to grant its nationality to former nationals of the State which has disappeared. On the other hand, as State succession often means that new States are created, all persons concerned by State succession should be able to participate in the building up of these States in the crucial period of setting up new State structures.

#### **2. Lack of exhausting international regulations concerning State succession and statelessness**

State succession with regard to nationality is regulated on the international level by binding and non-binding international instruments. The binding instruments (in particular the 1961 UN Convention on the Reduction of Statelessness [hereinafter: Convention on the reduction of statelessness] and the European Convention on Nationality (hereinafter: European Convention) contain some large principles. Even if they are very important, the lack of detailed regulations in these instruments does not permit to efficiently combat statelessness in case of State succession in a great number of cases and therefore an additional instrument seems necessary.

The non-binding instruments (the Declaration of the Venice Commission on the Consequences of State Succession for the Nationality of Natural Persons [hereinafter: Venice Declaration], the 1999 Council of Europe Recommendation on the Avoidance and the Reduction of Statelessness [hereinafter: Recommendation on statelessness] as well as the 1999 UN Resolution, prepared by the International Law Commission, on Nationality of Natural Persons in Relation to the Succession of States [hereinafter: UN Resolution] contain principles and specific rules. However, they have no binding character and do not address some important aspects of statelessness in case of State succession (see below para. 15 and 16).

### **3. Role of the Council of Europe with regard to statelessness and State succession**

The Council of Europe is the only European body dealing with nationality. The European Union, in particular, does not consider nationality matters to be in its sphere of competence. Therefore, the Council of Europe has to ask itself whether the upholding of the most important human right in the field of nationality – the avoidance of statelessness – in situations where normally the greatest problems occur – in case of State succession – justifies its intervention in an area where no other European institution is capable to act.

### **4. Mandate of the CJ-NA**

The CJ-NA received the mandate to prepare a feasibility study in 2001 for the attention of the CDCJ on the necessity to prepare an additional instrument to the European Convention on Nationality concerning statelessness in relation do State succession. The draft study will be prepared by the Working Party of the CJ-NA for adoption by the CJ-NA.

### **5. Main criteria for the report**

The European Convention was signed on 6 November 1997 and entered into force on 1<sup>st</sup> March 2000. It contains a chapter on State succession which limits itself to principles and guidelines but which does not provide for specific rules which States should respect in cases of State succession.

The Committee of Ministers adopted on 15 September 1999 a Recommendation on the Avoidance and the Reduction of Statelessness (hereinafter: Recommendation on statelessness). This recommendation was made on the basis of the European Convention and was intended to further develop its rules and principles on avoiding and reducing statelessness.

This report is based on the question whether it is possible, a little more than three years after the adoption of the European Convention, to develop its chapter on State succession, to apply to State succession also the ideas which are at the basis of the Recommendation on statelessness and to take into account the practical experience made in the last couple of years with regard to State succession and statelessness in a certain number of States.

### **6. General avoidance of statelessness also concerns statelessness arising from State succession**

The general principles regarding statelessness in international instruments on nationality – e.g. in the European Convention or the Convention on the reduction of statelessness – concern all instances of statelessness, i.e. apply also to the avoidance of statelessness in case of State succession, even if this is not explicitly mentioned. Therefore, even if we distinguish below (para. 11) between provisions mentioning explicitly statelessness in case of State succession and others which make only a general reference to statelessness, we should be aware of the fact that rules on statelessness as such always apply also to statelessness arising from State succession.



## **7. Limitation to State succession in so far as statelessness is concerned**

When the European Convention deals with State succession, it does so by taking into account the whole range of nationality problems arising from State succession. In the same way, the Venice Declaration as well as the UN Resolution deal with the whole set of nationality problems.

The present report, however, limits itself to consider State succession with regard only to statelessness and does not deal with the wider question as to whether a nationality acquired through State succession is the most adequate one on the basis of predominant effective links of a person with a State. This report also excludes cases of statelessness that are not a consequence of State succession, but which already existed before the State succession occurred. This approach undoubtedly facilitates the study and makes conclusions easier to reach. We should, however, bear in mind that this is only a partial approach which does not take into account all the questions which deserve to be raised in the field of State succession and nationality.

## **8. Wide approach to statelessness and State succession**

The present report outlines problems and suggests possible solutions with regard to statelessness in cases of State succession on a broad basis. Proposals which are made as to obligations of States concerned by State succession always take into account that some of these States do not always comply with the proposed obligations. The consequence is that in order to fight effectively against statelessness various States concerned by State succession must have a parallel obligation to avoid statelessness in cases of State succession. The suggested solutions have thus at times a redundant character. They may at the same time concern the predecessor State, the successor State where a person resides as well as another successor State with which the person concerned has an effective connection.

## **Chapter II: Review of relevant situations and existing international instruments**

### **9. Definition of State succession**

The 1978 Vienna Convention on Succession of States in Respect of Treaties defines succession of States as “the replacement of one State by another in the responsibility for international relations of territory”. According to the Convention, it applies only to the effects of State succession occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations. This definition of State succession is also used in the field of nationality. In particular, the relevant provisions of the UN Resolution (art. 2 para. a and art. 3) repeat the wording of the Vienna Convention.

### **10. Categories of State succession and specific problems connected with them with regard to statelessness**

#### **10.1. Transfer of territory from one State to the other**

This category considers the transfer of part of a territory of one State to another State. All the persons concerned in the field of nationality by such a State succession were necessarily citizens of the predecessor State. As the predecessor State continues to exist, there is an easy

solution for not creating cases of statelessness: If the predecessor State is obliged not to withdraw its nationality from persons who do not acquire the nationality of the successor State, nobody would become stateless through the succession. But the most appropriate nationality in case of transfer of territory for persons habitually residing in that territory is normally the one of the successor State. There must therefore be a combined responsibility for avoiding statelessness between the successor State – which should have the primary responsibility for granting nationality – and the predecessor State – which has a subsidiary responsibility for not taking away its nationality as long as persons concerned have not acquired, or cannot acquire, the nationality of the successor State.

### **10.2. Unification of States**

This example of State succession does not create problems with regard to statelessness. All persons possessing the nationality of the predecessor States acquire through the unification the nationality of the new State (or, if one State unites with another which continues to exist, all persons who possessed the nationality of the disappearing State will acquire the nationality of the State which continues to exist).

### **10.3. Dissolution of a State**

The dissolution of a State creates the greatest problems with regard to statelessness. As the predecessor State ceases to exist, all persons who previously possessed its nationality automatically lose it at the moment of its disappearance. The persons who cannot acquire the nationality of a successor State and who possess no other nationality necessarily remain stateless. Thus, there must be rules for the successor States to grant their nationality to persons who have a decisive link with them and who have lost the previous nationality through the dissolution of the predecessor State.

### **10.4. Dissolution of a federal State with internal citizenship**

In a federal State with internal citizenship, all citizens of the federal State necessarily possess the internal citizenship of a constituent unit of the federal State. Change of the place of residence – to another State or another constituent unit of the federal State - does not affect the internal citizenship. If the federal State disappears through dissolution into its constituent units, only the federal citizenship disappears, whereas the internal citizenship of each former constituent unit remains untouched, independently of the place of residence of the citizens concerned.

Thus, In a federal State with internal citizenship, statelessness in case of dissolution of the federal State can easily be avoided if all persons who possessed the internal citizenship of a former constituent unit acquire the nationality of the corresponding successor State. However, the nationality thus acquired may not be the most relevant one with regard to the tightest links of a person with a successor State. Problems may also arise with regard to family unit as it is possible that members of the same family - husband or wife or parents and children - do not have the same internal citizenship. Moreover, it is possible that registration of the former internal citizenship was not thoroughly carried out with the effect that a number of persons cannot prove their former internal citizenship and, after the succession occurred, the acquisition of the citizenship of a successor State. But the problem of de jure statelessness is, at least theoretically, resolved.

### **10.5. Separation of part of the territory**

The separation of part or parts of the territory of a predecessor State is similar, as to the situation regarding statelessness, to the transfer of territory from one State to another. All the persons concerned by the State succession in the field of nationality were necessarily citizens of the predecessor State. As the predecessor State continues to exist, there is an easy solution for not creating cases of statelessness, if the predecessor State is obliged not to withdraw its nationality from persons who do not acquire the nationality of the successor State. But the most appropriate nationality in case of separation of territory for persons habitually residing in the separated territory is normally the one of the successor State. There should therefore be a combined responsibility for avoiding statelessness between the successor State – which should have the primary responsibility for granting nationality – and the predecessor State – which has a subsidiary responsibility for not taking away its nationality as long as persons concerned have not acquired, or cannot acquire, the nationality of the successor State.

### **11. International instruments on State succession and nationality with specific provisions on statelessness**

For the purpose of this report, the three above-mentioned international instruments of the Venice Commission, the Council of Europe and the UN are taken into account. Special attention is given to provisions which explicitly refer to statelessness in case of State succession. This approach is based on the idea that if the drafters of these provisions felt the need to mention explicitly statelessness in case of State succession, such provisions must undoubtedly be relevant in the context of this study. This does not exclude that also other provisions may be important. The following provisions of the above-mentioned instruments may be considered to be of particular relevance.

#### *Venice Declaration:*

In the Declaration of the Venice Commission, the avoidance of statelessness in case of State succession is explicitly mentioned in particular in the following provisions:

“The successor State shall grant its nationality:

to permanent residents of the transferred territory who become stateless as a result of the succession

to persons originating from the transferred territory, resident outside that territory, who become stateless as a result of the succession (art. IV.10).”

“The predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State (art. IV. 12)”.

Even if not explicitly referring to State succession, the Venice declaration also contains the fundamental principles that “the States concerned shall respect the principle that everyone has the right to a nationality (art. II 5) and that they “shall avoid creating cases of statelessness (art. II 6)”.

*European Convention:*

The Convention, in its chapter on State succession and nationality (chapter VI), explicitly provides that States have to respect the principles of the rule of law, the principles concerning human rights, the general principles of the Convention (in particular the right to a nationality; the avoidance of statelessness, the prohibition of arbitrary deprivation of nationality, the principle of non-discrimination) and the specific principles applicable to State succession, in particular to avoid statelessness (art. 18 para.1)

Among the specific principles applicable to State succession are the following (art. 18 para. 2):

“In deciding on the granting or the retention of nationality in cases of State succession, each State Party concerned shall take account in particular of:

- a. the genuine and effective link of the person concerned with the State;
- b. the habitual residence of the person concerned at the time of State succession;
- c. the will of the person concerned;
- d. the territorial origin of the person concerned.”

In the same chapter, the Convention provides that “In cases of State succession, States Parties concerned shall endeavour to regulate matters relating to nationality by agreement amongst themselves and, where applicable, in their relationships with other States concerned. Such agreements shall respect the principles and rules contained or referred to in this chapter (art. 19)”.

*UN Resolution:*

In the UN Resolution, the avoidance of statelessness in cases of State succession is explicitly mentioned in the following provisions:

“States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, had the nationality of the predecessor State from becoming stateless as a result of such succession (art. 4).”

“Each State concerned shall grant a right to opt for its nationality to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States (art. 11, para. 2).”

“A child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose territory that child was born (art. 13).”

In case of transfer of territory, “the predecessor State shall not withdraw its nationality before the person concerned has acquired the nationality of the successor State (art. 20, 2<sup>nd</sup> sentence).”

In case of dissolution of States, each successor State shall grant its nationality to persons concerned not entitled to the nationality of any State concerned who have their habitual residence in a third State, on the condition that they were born in, had their last habitual residence in or have any other appropriate connection with the successor State (art. 22, para. b. subpara. ii).

In case of dissolution of a federal State, a successor State shall grant its nationality to stateless persons who previously possessed the internal citizenship of the unit which has become the successor State (art. 22 para. b, subpara. i).

In case of separation of part(s) of the territory, “the predecessor State shall not... withdraw its nationality before...persons (concerned) acquire the nationality of the successor State (art. 25, para. 1).

As concerns other States, nothing in the Resolution “requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless (art. 19 para. 1)”. Likewise, nothing in the Resolution “precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons (art- 19 para. 2)”.

The following articles of the UN Resolution are particularly relevant in the context of this report even if they do not explicitly refer to statelessness in cases of State succession:

In case of transfer of territory, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory (art. 20, 1<sup>st</sup> sentence).

In case of dissolution of States, each successor States shall attribute its nationality to persons concerned having their habitual residence in its territory (art. 22, para. a).

## **12. International instruments on statelessness with specific provisions on State succession**

For the purpose of this report, the Convention on the reduction of statelessness and the Recommendation on statelessness are taken into account. Special attention is given to provisions mentioning explicitly statelessness in case of State succession (see above, beginning of para. 11).

### *Convention on the reduction of statelessness*

The Convention contains the following explicit provisions concerning State succession and statelessness:

“1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the

transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions.

2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition (art. 10).”

Even if they do not explicitly mention statelessness with regard to State succession, the following articles of the Convention have also a particular significance in cases of State succession:

A contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless (art. 1 para. 1). Such a nationality shall be granted either at birth or at a later moment in conformity with the detailed provisions contained in article 1 of the Convention.

” A contracting State shall not deprive a person of its nationality if such deprivation would render him stateless (art. 8 para. 1).”

“A contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds (art. 9).

#### *Recommendation on statelessness*

The Convention contains the following explicit provision concerning State succession and statelessness:

“States should endeavour to regulate matters relating to statelessness, where appropriate and in particular in cases of state succession, by international agreement (art. I. e)”.

Even if they do not explicitly mention statelessness in the context of State succession, the following articles of the Convention have also a particular significance in cases of State succession:

“Each State should ensure that its legislation provides for the acquisition of its nationality by children born on its territory who would otherwise be stateless (art. II A b).

“Each State should facilitate the acquisition of its nationality by stateless persons lawfully and habitually resident on its territory...(art. II B para. 1)”. In particular, each State should reduce the required period of residence, not require more than an adequate knowledge of one of its official languages, ensure that procedures be easily accessible, not subject to undue delay and available on payment of reduced fees and ensure that offences do not unreasonably prevent stateless persons from seeking nationality (art. II B a – d).

### **13. Rules of the above-mentioned international instruments with regard to the categories of State succession creating statelessness**

### **13.1. Transfer of and separation of part of the territory**

The Venice Declaration as well as the UN Resolution refer to the fundamental rule that in case of transfer and separation of part of the territory the predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State (art. IV.12 of the Venice Declaration ; art. 20, 2<sup>nd</sup> sentence of the UN Resolution).

As to the obligations of the successor State with regard to avoiding statelessness in case of transfer and separation of part of the territory, the rules of the Venice Declaration (art. IV.10 a) as well as the ones of the UN-Declaration (art. 20, 1<sup>st</sup> sentence) do not differ from the rules applicable in case of dissolution of a State. They will thus be dealt with in the next paragraph (8.2.).

The European Convention, containing only principles with regard to statelessness, does not provide for specific rules in this area.

### **13.2. Dissolution of a State**

The Venice Declaration as well as the UN Resolution distinguish between persons who have their habitual residence in a successor State at the moment of State succession and persons living in a third State.

#### *Persons having their habitual residence in a successor State*

According to the Venice Declaration, the successor State shall grant its nationality to persons concerned having their habitual residence in a successor State who become stateless as a result of the succession (art. IV.10 a).

The UN Resolution provides that in case of dissolution of a State the successor States shall attribute their nationality to persons concerned who have their habitual residence in their territory (art. 22, para. a).

#### *Persons living in a third State*

According to the Venice Declaration, “the successor State shall grant its nationality to persons originating from the transferred territory, resident outside that territory, who become stateless as a result of the succession (art. IV.10 b).”

According to the UN Resolution, in case of dissolution of States, each successor State shall grant its nationality to persons concerned not entitled to the nationality of any State concerned who have their habitual residence in a third State, on the condition that they were born in, had their last habitual residence in or have any other appropriate connection with the successor State (art. 22, para. b. subpara. ii).

The UN Resolution provides that in case of dissolution of a federal State, a successor State shall grant its nationality to stateless persons having their habitual residence in a third State who previously possessed the internal citizenship of the unit which has become the successor State (art. 22 para. B, subpara. ii).

Also in this case, the European Convention, which contains only principles with regard to statelessness, does not provide for specific rules in this area.

#### **14. Combination of the rules of the above-mentioned international instruments with regard to avoiding and reducing statelessness in cases of State succession**

If we combine the ideas of the above-mentioned international instruments without distinguishing between categories of State succession and if we limit ourselves – as is the purpose of this paper – to avoiding statelessness, we arrive at the following rules:

A successor State shall grant its nationality to persons habitually resident in its territory, in particular if they become stateless as a result of the State succession.

A predecessor State shall not withdraw its nationality from its nationals who have been unable to acquire the nationality of a successor State.

A successor State shall grant its nationality to persons habitually resident in a third State who become stateless as a result of the succession if they were born in the territory which has become the territory of the successor State, had their last habitual residence in it or have any other appropriate connection with the successor State.

In case of dissolution of a federal State, a successor State shall grant its nationality to stateless persons who previously possessed its internal citizenship.

We may add to these rules the principle that States should endeavour to regulate matters relating to statelessness, where appropriate and in particular in cases of State succession, by international agreement.

#### **15. Is there a need for other rules?**

If the rules outlined in the previous paragraph do apply, is there a need for other rules with regard to statelessness and State succession not referred to above in the context of the Venice Declaration, the European Convention, the UN Resolution or the Convention on the reduction of statelessness?

This question might be studied on the basis of two different approaches: the practical experience of recent cases of State succession and the 1999 Recommendation of the Council of Europe on the avoidance and reduction of statelessness.

#### **16. Other rules based on practical experience**

Practical experience with regard to statelessness and State succession has shown us additional difficulties in the following areas:



### *Change of place of residence*

As has been outlined above, a successor State should grant its nationality to persons habitually resident in its territory who become stateless as a result of the State succession. In case of dissolution of a State, the moment of State succession may not be the same for all successor States because of differing attitudes as to the moment of disappearance of the predecessor State. Or successor States may consider decisive for the acquisition of their nationality not the residence in their territory at the moment of State succession but at another moment, e.g. the day of adoption of their Constitution or the entry into force of their citizenship law. Persons who changed their residence before the decisive date for acquisition of nationality in their former State of residence and after the decisive date for acquisition of nationality in their new State of residence remain stateless if they cannot acquire the nationality of a successor State on the basis of a criterion other than residence.

Thus, there should be an obligation of the new State of residence, after a period of residence in its territory, to grant its nationality through a facilitated procedure to persons who remained stateless in the wake of State succession because of a change of place of residence.

### *Habitual residence*

Often persons who have a long-time factual residence in a State legally have only temporary residence because of a restrictive interpretation of the term of habitual residence. It may be assumed that this distinction is responsible for a huge number of cases of statelessness of persons who cannot acquire the nationality of the successor State in which they habitually reside.

As a consequence, there should be an obligation of a successor State to interpret largely the term of habitual residence so as to permit persons without nationality who have a stable factual residence on legal grounds in a successor State to acquire its nationality on the basis of residence.

### *Rules of proof*

Often requirements of proof that a person has acquired the nationality of a successor State are so strict in regard of all the circumstances that persons who are entitled to such a nationality are unable to be recognised as citizens and remain in fact stateless. This also applies to successor States of Federal States where theoretically no case of statelessness should occur in the wake of State succession, if all persons who previously possessed the internal citizenship of the newly formed successor State acquire its citizenship.

Successor States should therefore be obliged not to require full proof of conditions for the acquisition of their nationality if this would otherwise lead to de facto statelessness. An - according to the circumstances - high probability that the conditions for acquisition of the nationality of a successor State are fulfilled should be sufficient.

### *Avoiding multiple nationality*

The fear of creating cases of multiple nationality is an important factor in creating statelessness in cases of State succession. If for the acquisition of the nationality of a successor State persons are required to prove that they have not acquired the nationality of another or other successor States and they are unable to do so because the other successor State does not co-operate, such a requirement leads to statelessness. Even if this case of creation of statelessness is partially linked to the above-mentioned case relative to the rules of proof, it has an independent significance.

There should be an obligation of Successor States not to require proof of non-acquisition of another nationality for persons habitually resident in their territory at the moment of State succession as a condition for recognising such persons as citizens. The provision on non-recognition of another nationality according to the 1930 Hague Convention on certain questions relating to the conflict of nationality laws (art. 3) and a provision on automatic loss of nationality in case of voluntary acquisition of another nationality, in conformity with the European Convention, should normally be sufficient to avoid problems for the States concerned with regard to multiple nationality.

### **17. Other rules which may be considered on the basis on the Council of Europe Recommendation on the avoidance and reduction of statelessness**

The following rules of the Recommendation on statelessness have a particular significance in the field of State succession:

#### *International co-operation*

The recommendation provides that States promote the avoidance of statelessness through international co-operation. This point is of particular importance when persons who reside in one successor State are only able to prove the acquisition - or non-acquisition - of the nationality of another successor State through international co-operation between the two States and if those persons are considered, until such proof is produced, as having no nationality. A similar provision is contained in the UN Resolution (Art. 18).

#### *Avoiding statelessness at birth*

According to the recommendation, each State should ensure that its legislation provides for the acquisition of its nationality by children born on its territory who would otherwise be stateless (art. II.A.b.). This rule is of particular importance for children of parents concerned by State succession who could not acquire the nationality of the successor State where they reside. At least their children born after the date of State succession should acquire the nationality of the successor State where they were born if they have no other nationality. Such an excellent rule is provided in the UN Resolution (art. 13).

#### *Facilitating the acquisition of nationality by stateless persons*

The recommendation provides that each State should facilitate the acquisition of its nationality by stateless persons lawfully and habitually residing on its territory (art. II. B.). This provision is particularly important in cases of State succession for stateless former citizens of the predecessor State who reside in a successor State whose nationality they could not acquire because they failed to fulfil the relevant conditions.

### **Chapter III : Conclusions**

#### **18. Conclusions for an international instrument on State succession and statelessness**

It appears that the following rules deserve attentive consideration in regard of new instruments to the European Convention:

States should endeavour to regulate matters relating to statelessness, where appropriate and in particular in cases of State succession, by international agreement.

A successor State shall grant its nationality to persons habitually resident in its territory, in particular if they become stateless as a result of the State succession.

A predecessor State shall not withdraw its nationality from its nationals who have been unable to acquire the nationality of a successor State.

A successor State shall grant its nationality to persons habitually resident in a third State who become stateless as a result of the succession if they were born in the territory which has become the territory of the successor State, had their last habitual residence in it or have any other appropriate connection with the successor State.

In case of dissolution of a federal State, a successor State shall grant its nationality to stateless persons who previously possessed its internal citizenship.

There should be an obligation of the new State of residence, after a period of residence in its territory, to grant its nationality through a facilitated procedure to persons who remained stateless in the wake of the succession of States because of a change of the place of residence.

There should be an obligation of a successor State to interpret largely the term of habitual residence so as to permit persons having a stable factual residence on legal grounds in a successor State to acquire its nationality on the basis of residence.

Successor States should be obliged not to require full proof of conditions for the acquisition of their nationality if this would otherwise lead to de facto statelessness. An - according to the circumstances - high probability that the conditions for acquisition of the nationality of a successor State are fulfilled should be sufficient.

There should be an obligation of successor States not to require proof of non-acquisition of another nationality for persons habitually resident in their territory at the moment of State succession as a condition for recognising such persons as citizens.

States shall promote the avoidance of statelessness, in particular in case of State succession, through international co-operation.

States should facilitate the acquisition of their nationality by stateless persons lawfully and habitually residing on its territory, in particular in case of State succession.

Stateless children born of former citizens of a predecessor State in a successor State after the date of State succession should acquire the nationality of the State where they were born.

#### **19. Feasibility of an international instrument on State succession and statelessness**

It results from the above that there is a need for a comprehensive international instrument on State succession and statelessness. It should go beyond what already exists in this field. Such an instrument of the Council of Europe is feasible. It would take into account the primary responsibility of the Council of Europe to be active in the field of nationality on the

European level. It may be based on the one hand on the Convention on the Reduction of Statelessness, the Venice Declaration, the European Convention and the UN Resolution, on the other hand on recent practical experience of State succession and the Recommendation of the Council of Europe on statelessness,. The elaboration of such an instrument, as it is limited to statelessness, is easier than the preparation of a general instrument on State succession and nationality, where one considerable difficulty relates to the right of option for the most appropriate nationality in case of State succession for persons who are not stateless.

## **20. Nature of an international instrument on State succession and statelessness**

During the elaboration of the European Convention on Nationality, the chapter on State succession gave rise to large and controversial discussions. Given the complexity of the issue, it was not possible to lay down specific rules. Therefore, the relevant provisions had to be limited to mere principles. This was necessary in order to reach agreement between member States.

The Convention was opened for signature in November 1997 and entered into force in March 2000. Even if important developments in the field of nationality have taken place in many member States since its adoption, the Convention is a relatively recent instrument. If also the comparatively difficult process of reaching agreement on the chapter of the European Convention concerning State succession is taken into account, it is not certain whether the immediate preparation of a protocol to the Convention is advisable or whether it might be appropriate to concentrate first on the elaboration of a new recommendation. Such a recommendation might give the basis, together with the already adopted recommendation on the avoidance and reduction of statelessness, for a subsequent protocol to the Convention. In that case, the protocol might contain a general part on statelessness – based on the 1999 Recommendation on statelessness - and another on State succession and statelessness, based on a new recommendation.

Another reason might be given for not engaging immediately in the preparation of a protocol on State succession and statelessness. Already now, the possible need for amendments to the Convention in other fields than statelessness in general and State succession with regard to statelessness can be perceived. It might thus be advisable to wait with the elaboration of a new protocol until the Council of Europe has done all the relevant preparatory work and is ready to decide on the contents of a comprehensive protocol, covering all necessary amendments to the Convention.

Given the complexity of the issue, the decision on the appropriate nature of the instrument – recommendation as a first step towards a protocol or immediate elaboration of a protocol to the Convention – should only be taken during the preparation of the instrument on the basis of the experience gained during its process.

## **21. Proposal**

On the basis of this study, the undersigned proposes that the Council of Europe prepares an additional instrument to the European Convention on Nationality concerning statelessness in relation do State succession.

## **CONTRIBUTIONS**



**DE FACTO AND DE JURE “BELONGER” STATUS: THE RELEVANCE OF  
RECOGNITION OF SOVEREIGNTY<sup>350</sup>**

**Paper submitted by**

**Andrew GROSSMAN**

LLB (Columbia), Docteur en droit (Louvain)

It is an element of most definitions of “nationality” that the sponsoring political entity is recognised as a sovereign State<sup>351</sup>. I would argue, however, that such a criterion is as obsolete as the criteria of race, gender and exclusivity<sup>352</sup> that have, post-War, fallen by the wayside in the liberal State. Nationality has changed in other ways, too: in many rich countries it has achieved economic value as a source of rights of residence and economic activity – sometimes a “dowry” in the context of “chain migration” – even as the concomitant obligation of military service for males has largely disappeared. More than that, nationality does not, if it ever did, bear a single meaning<sup>353</sup>: one may have different nationalities for different purposes, and one may be accepted as a national and citizen of a particular territory by one or some governments, but not by others. This is inherent in the *Nottebohm*<sup>354</sup> holding: Nottebohm may not have had the right to diplomatic protection in Guatemala, but he indisputably retained the right to return and to live in Liechtenstein. Even an individual’s “effective nationality” need not be the same for all purposes, and one may argue whether the doctrine is anyway relevant to any nationality acquired (among other involuntary circumstances) at birth or adoption. The development of certain reciprocal rights for nationals of member states of particular blocs: the Nordic countries, the British Isles Common Travel Area, the EU, the EEA, NAFTA and, less effectively, attempts at economic unions in Africa and Latin America, does not detract from this argument, and in fact emphasises the economic aspect of nationality.

The most obvious support for my argument is the status of *ressortissants* of Taiwan. These persons did not cease to be “nationals” in any practical sense in relation to those countries that withdrew sovereign recognition that they had previously granted to Taiwan’s government. True, a government may deny the citizen of an unrecognised State benefits that depend upon recognition and upon sovereignty: diplomatic privileges (as in the case of the representatives in London of the Turkish Republic of Northern Cyprus<sup>355</sup>), visa waivers, recognition of passports, tax credits, even recognition of status and of judgments. But pragmatism and expedience argue otherwise, and governments are selective in the way they treat such persons. Diplomatic pretence is common; as in the case of Palestinians, Northern Irish and Bosnians, the international status of the inhabitants of a particular territory may be a result of diplomatic haggling.

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<sup>350</sup> Based on an article by the same author to appear in the October 2001 issue of *International and Comparative Law Quarterly* entitled “Nationality and the Unrecognised State”.

<sup>351</sup> P. Weis, *Nationality and Statelessness in International Law*, (2nd edn. 1979), p. 3.

<sup>352</sup> That is, the prohibition against dual nationality.

<sup>353</sup> The common law knew only the concepts of allegiance and domicile, which together filled the civil-law functions of nationality.

<sup>354</sup> *Liechtenstein v. Guatemala* (2d phase), I.C.J., p. 4. (1955).

<sup>355</sup> *Caglar v. Billingham* (Inspector of Taxes) [1996] S.T.C. (S.C.) 150, [1996] 1 L.R.C. 526.

The multiple meanings of nationality are evident in other ways, too: in deportation and extradition; in differential treatment of nationals holding a particular internal status (Hong Kong, Macau; First Canadians and Native Americans<sup>356</sup>). The main argument, however, is that irrespective of diplomatic posturing abroad, the inhabitant of a breakaway territory, of a pariah state, even of a community of displaced persons or a country lacking effective government (and especially where that territory's inhabitants enjoy some stability of residence and economic occupation) possesses a nationality and a national identity for many purposes. Transnistria, the Republika Srpska, Crne Gore (Montenegro) and Kosovo all claim to have normative acts that define a distinct right of residence: it is as a practical matter irrelevant to most of the beneficiaries of those acts whether the world outside "recognises" their territory's particular identity or not. Indeed, foreign countries *do* invariably recognise it at least in one sense: the "internal flight alternative" of refugee law, and the resulting right claimed by destination states to deport would-be refugees to such a non-State geographic area. Where the citizen of the unrecognised State may be disadvantaged ranges from the trivial (the application of visa by foreign consular officials to a separate form, the practice with respect to North Cypriot passports but not Taiwanese or Palestinian passports) to the more serious (unfavourable choice of law). There exists a legal principle against the application to a refugee of what normally would be applicable personal law<sup>357</sup>, although some courts alternatively may apply a subsidiary level of government theory or general principles of equity<sup>358</sup>.

For the outside world, a principal contentious issue may be the claim of the unrecognised government to exclude particular groups of individuals (and property claims which may result), and an official sympathy with the recognised governing authorities who claim authority over a recalcitrant territory and people: this is the Cypriot model, which has resulted in a number of law cases<sup>359</sup>. That sympathy may be genuine or feigned, expedient or legitimate. And conflicting claims over territory can yield anomalous results, through compromise as in the case of the Good Friday (Belfast) Agreement, allowing almost all persons born and living in Northern Ireland to present themselves as British nationals, as Irish nationals, or both; or unilaterally as in the case of persons born in the Falkland Islands, normally British Dependent Territories citizens under the British Nationality Act 1981, but always accepted by Argentina as its own nationals by *jus soli*

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<sup>356</sup> Jay Treaty, T.S. 105, 8 Stat. 116 (1794), grants the indigenous inhabitants of the United States and Canada cross-border residence and employment rights.

<sup>357</sup> *Martini v. Creyssac*, Cass. civ. (1re Ch.), 25 June 1974, (1975 II) Dalloz 189; *Martini v. Martini*, C.A. Paris, 10 June 1972, (1973 II) Dalloz 296, conclusions Advocate General Cabannes (Jewish refugees from Syria); *Casperus v. Casperus*, Israeli Sup. Ct. sitting as Ct. App., 28 Oct. 1954, 21 I.L.R. 181 (nationality of testator, German refugee in Palestine); *Panayotti v. Paitchadze* (Russian refugee), Cass. civ. (1st Ch.), 1 Dec. 1969, Bull. Civ., No. 371, p. 296 (marital regime).

<sup>358</sup> *In re James* (an Insolvent) [1977] 1 Ch. 41 (bankruptcy; misappropriation of funds; Rhodesian insolvency proceeding); but see *Adams v. Adams* [1971] P. 188, 52 I.L.R. 45 (Rhodesian divorce; incompetence of judicial authority of renegade colony); effect attenuated by Orders in Council, SI 1970/1540 and SI 1972/1718, both repealed by the Zimbabwe Act 1979, s. 6(3).

<sup>359</sup> *Loizidou v. Turkey*, E.C.H.R. case No. 40/1993/435/514, 28 July 1998; *Cyprus v. Turkey*, case No. 25781/94, 10 May 2001 and cases in national courts including *Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts, Inc.* 917 F.2d 278 (7th Cir. 1990); *Crist v. Turkey* 1997 U.S. App. LEXIS 749 (D.C. Cir. 1997).



through birth in the territory it claims as *las Malvinas*. This conflict of laws issue does not arise in the case of Gibraltar because neither Gibraltar nor Spanish nationality (or belonging) status is accorded solely by reason of place of birth; but it does occur in Northern Ireland so long as at least one parent is a British national or “settled”, defined in the case of Irish nationals (in the light of the Ireland Act 1949) as having a stable residence in Britain.

The independence of nationality as here defined from the diplomatic and administrative discretion of foreign governments is highlighted by the recent decision of the Divisional Court in London in the Chagos Islanders (the Ilois formerly resident on Diego Garcia and other Indian Ocean islands) affair<sup>360</sup>: Mr Justice Laws, in a decision that the British Government decided not to appeal, found that the inhabitants of the dependent territory had an inalienable right to be “governed, not removed”. In other words, they had inherent nationality rights. When it is considered that inhabitants of countries which from time to time have lacked any nationality law at all – China and Israel among them – and certain indigenous peoples and inhabitants of mandate and trusteeship countries and protectorate who have been excluded from nationality laws of the governing state have nonetheless possessed attributes of nationality for many or most purposes<sup>361</sup>. Of course any value to be attributed to the “nationality” of an unrecognised state may be dependent upon that state’s durability and stability; but this is really independent of the recognition: university law libraries contain shelves of the collected legislation and jurisprudence of legal systems that once earned great respect and today either no longer exist, the country having descended into chaos, or have become mere instruments of an oppressive dictatorship.

In this brief adumbration of the argument for a wider definition of nationality it has not been possible to explore more than a few of the issues. It must be noted, however, that there are distinct categories of unrecognised states, and the quality of the nationality applied or sought to be applied to persons associated with each will vary. At the upper level, the state will be economically and territorially substantial and enjoy legal and political stability. Other unrecognised states may be precluded, for the time being, from recognition by extraneous political and diplomatic factors. Territories may be under the domination of hostile military force in contravention of international law. Finally there are fictitious offshore entities without serious claim to statehood<sup>362</sup> and chaotic

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<sup>360</sup> R. v. Secretary of State for the Foreign & Commonwealth Office, ex parte Bancoult, Divisional Court (Q.B.D), Case No. CO/3775/98, 3 Nov. 2000. The judgment can be accessed on the Court Service Web site, <<http://www.courtservice.gov.uk>>.

<sup>361</sup> We can exclude certain American cases which relate to the alienage jurisdiction of federal courts. The dependence of that jurisdiction upon the sovereign status of the territory of nationality is an unfortunate result of legislative drafting and is mitigated by the availability of an alternative state forum: *Windert Watch Co., Inc. v. Remex Electronics Ltd.* 468 F. Supp. 1242 (S.D.N.Y. 1979); *Matimak Trading Co. Ltd. v. Khalily* 936 F. Supp. 151 (S.D.N.Y. 1996), aff’d, *Matimak Trading Co. Ltd. v. Khalily* 118 F.3d 76 (2d Cir. 1997) (Hong Kong); *Koehler v. Bank of Bermuda (New York) Ltd.* 209 F.3d 130, en banc reconsideration denied.

<sup>362</sup> Thus *In re Duchy of Sealand*, case 9K2565/77, Admin. Court of Cologne, 3 May 1978, DVBl. 1978, p. 510, *Fontes Iuris Gentium*, Ser. A, sect. II, Tom. 8, 1976-80, p. 312, 80 I.L.R. 683 (German rule forbidding renunciation of German nationality that would lead to statelessness); and see, generally, Samuel

ungovernable territories and governments in exile, as to which the case law dates mostly from World War II (but which includes more recently the Government of Kuwait). These ‘degrees of statehood’ only reinforce the argument that nationality is a *relative* notion and that recognition of sovereignty is pertinent only to some, not to all, its elements.

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Pyeatt Menefee, “‘Republics of the Reefs:’ Nation-Building on the Continental Shelf and in the World’s Oceans”, (1994) 25 *Cal. W. Int. L.J.* 81.

## HOW DOES NATIONALITY INTEGRATE?

Paper submitted by

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### Introduction

The first topic for discussion within the general title of this conference is "Integration and nationality". Nationality is defined in the *European Convention on Nationality* ("ECN") as "the legal bond between a person and a State and does not indicate the person's ethnic origin". This paper asks "How does this legal bond integrate?". It concludes that a number of prior questions have to be answered and observes that nationality is in any case a means of discrimination, to which extent, it is opposed to a human rights regime.

### Three means of integration

There are three interlocking means by which nationality can integrate: the rules on acquisition; the content; and symbolism.

### Rules on acquisition

The traditional focus of the law and study of nationality is the rules of acquisition, and closely related topics of loss of nationality, multiple nationality, and statelessness. They are therefore a good place to start. If the rules integrate, there are four points to notice:

- firstly, the rules are essentially a matter of municipal law. They are written by states, not by individuals. The question is therefore raised "Integrate for whose benefit?". Nationality emerged in customary international law as a means for states to determine which individuals they might protect, but any claim is the state's, not the individual's.

- secondly, the obvious basis for integration with the state is the *jus soli*, or some sort of voluntary adherence (as in naturalisation). Why, then, have some states used the *jus sanguinis* as a basis? This latter promotes ethnic integration rather than civic and delays the integration of immigrants ("Third Country Nationals"). Thus two further questions are "Integrate with what?" and "Integrate whom?".

- thirdly, treaties limit this municipal discretion. The limits may favour individuals as against states, as with statelessness, while limits on multiple nationality are at least as much for states' benefit as individuals', restating the question "whose benefit?". The *ECN* also limits rules on acquisition, as such, nevertheless do so primarily by requiring *jus sanguinis* for at least one generation, while restricting the requirement of *jus soli* to where the child would otherwise be stateless, restating the questions "with what?"

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<sup>363</sup> Written with the assistance of Margaret Barron Linton, Department of Law, University of Dundee, United Kingdom.

and "with whom?". These limits, incidentally, may appear in the guise of human rights, which raises an issue revisited below.

- fourthly, and most fundamentally, the rules define the group which acquires nationality (the nationals), but by the same token, the much larger group which does not (the rest of humankind). Thus another question "Does nationality only integrate by excluding?".

However, examination of rules on acquisition alone is somewhat vacuous. If it made no difference whether you were excluded from a particular nationality or not, it would be difficult to say that acquisition had much integrating (and excluding) force. Which takes us to content.

## **Content**

This is best considered in three contexts: international; EU; and municipal.

**International:** In customary international law, diplomatic protection turns on nationality, but some obligation to admit nationals, the right to refuse extradition of nationals, etc can be included. Whoever, unless they are concerned with human rights which have an indirect effect on nationality (see above and below), treaties on nationality are rarely concerned with content, and then usually only with military obligations (on which, however, see below also), and in general the international law content tends to indicate that nationality exists primarily for the benefit of states, not individuals. Thus the question arises "Is the international law content intended to integrate?".

**EU:** EC law has always forbidden discriminatory use of nationality as between Member States (though not otherwise), and relied on it for freedom of movement. However, there is now Citizenship of the EU. It can be argued whether this is a nationality, and what it adds to the rights and duties of those who hold it. However, it exists by having a content rather than rules of acquisition, and was created specifically to try and better integrate the population of EU Member States with the institutions and aspirations of the EU. So the question is posed "What content does nationality have to have in order to integrate?" (and perhaps "Does more content integrate more?").

**Municipal:** Probably because most discussion is among international lawyers, and the difficulties of extrapolating from one national system, the municipal law content of nationality is rarely discussed. (Military obligations is the only clear exception, and probably because it is a concern of states, it has been viewed as a question of international law). Also, in the United Kingdom, discussion has been complicated by confused argument on the difference between "nationality" and "citizenship", and by the complexities of UK nationality law. Nevertheless, in the UK municipal law rights and duties turn on nationality. These broadly include the franchise, freedom to seek public office and to serve in the armed forces, and the obligation to undertake jury service, but also "allegiance" (of which more later). It is worth digressing to consider TH Marshall's analysis. This analysis by a sociologist specifically concerns "citizenship" (a term never

actually defined), and is 50 years old, but UK discussion on the topic ever since has largely been a dialogue with TH Marshall. As is well-known, he suggested there were three "elements" of "citizenship", the "civil" (including legal rights traditionally described in the UK as "civil liberties", such as freedom of speech), the "political" (including rights and obligations involved in formal participation in the political process, such as freedom to stand for public office); and the "social" (including rights concerned with economic welfare). Interestingly, the right of entry, which turns on nationality and to which so much attention is now paid, did not figure in TH Marshall's analysis. What is chiefly interesting, however, is that in the UK, broadly speaking, only the second, "political", element turns upon nationality: in short, rather little. The "civil", rather like human rights, are available to all. It may also be hazarded that most UK nationals have no idea what rights and duties they have as nationals. ("Citizen" is used freely and inaccurately, as in "citizen's arrest", meaning any arrest not by a police officer). Thus a challenging new question is posed "Does the content of nationality in fact have any integrating force?".

However, just as examination of the rules of acquisition is somewhat vacuous without consideration of the content of nationality, so consideration of the content fails to capture "nationality", and presses us to look at symbolism.

### **Symbolism**

*Civis romanus sum* is one of the more memorable things said about nationality, and arguably about its integrating force. But Cicero was not concerned with the rules of acquisition of Roman citizenship, nor even the rights and obligations entailed. He was making a statement about a symbol of integration into a political and moral identity which only makes sense if there are people who *Cives romani non sunt*. Similarly in the UK context, one could not reduce the resonance the term "British Subject" had to a set of rules on acquisition or a particular content. It was a statement of integration within a particular form of British political and moral identity. The rules on acquisition and content to a greater or lesser extent reflected the symbol to express the identity, but were dependent variables. Interestingly, UK textbooks examining the content of nationality do so negatively by discussing "the disabilities of aliens". Thus we have the question "Does nationality fundamentally rather reflect an existing political or moral identity?".

### **Conclusion: integration and disintegration: discrimination and human rights**

To consider nationality and integration, a series of questions has to be posed: "Integrate for whose benefit?", "Integrate with what?", "Integrate whom?", "Does nationality only integrate by excluding?", "Is the international law content of nationality intended to integrate?", "What content does nationality have to have in order to integrate?" (and "Does more content integrate more?"), "Does the content on nationality in fact have any integrating force?" and "Does nationality fundamentally rather reflect an existing political and moral identity?".

More succinctly put, nationality integrates by providing a symbol. Its power lies in the exclusion of others. That such exclusion has little effect in law may not be important (though who wants to be stateless?). It is a means of discrimination.

And this shows nationality to be opposed to human rights. The point of human rights is that all humans have them. The point of nationality is that all humans do not. So nationality integrates to the extent that it compromises rights available to all human beings. Or, alternatively put, the expansion of human rights is at the expense of nationality.

**THE PRINCIPLE OF NON-DISCRIMINATION  
IN MATTERS RELATING TO NATIONALITY LAW –  
A NEED FOR CLARIFICATION?**

**Paper submitted by**

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According to the Preamble to the European Convention on Nationality (ECN) member states of the European Council and other states signatory to the Convention, desiring to avoid discrimination in matters relating to nationality, have, among other things, agreed on the following provision on non-discrimination, as contained in article 5, para. 1, in ECN:

“The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.”

The question to be raised is, why states have not agreed on a general, open-ended prohibition on nationality?

In the Explanatory Report to the Convention, para. 39 - 44, it is explained, that the quoted provision takes account of article 14 in the European Convention on Human Rights (ECHR) and the Universal Declaration on Human Rights (UDHR). However, as it is furthermore stated, the very nature of the attribution of nationality requires states to fix certain criteria to determine their own nationals, and these criteria could result, in given cases, in more preferential treatment in the field of nationality, e. g. facilitated acquisition of nationality due to descent or place of birth.

It has therefore, according to the Explanatory Report, para. 42, “been necessary to consider differently distinctions in treatment which do not amount to discrimination and distinctions which would amount to prohibited discrimination in the field of nationality”. A further explanation is given in para. 43: “As some of the different grounds of discrimination listed in Article 14 of the European Convention on Human Rights were considered not amounting to discrimination in the field of nationality, they were therefore excluded from the grounds of discrimination in paragraph 1 of Article 5”.

Thus, grounds as language, political or other opinion, social origin, association with a national minority, property, birth or other status (for instance nationality) are left out, and consequently, discrimination on any of the grounds not mentioned in article 5 para. 1, does not seem to be prohibited by article 5, para. 1.

It is, however, mentioned in the Explanatory Report, para. 44, that the Convention, furthermore “contains many provisions designed to prevent an arbitrary exercise of powers (for example Articles 4.c, 11 and 12) which may also result in a discrimination”; the next question to be raised is therefore whether grounds of discrimination, not

mentioned in article 5, para. 1, might amount to prohibited discrimination *according to the other provisions of the Convention* (cf. for instance article 9 in the Convention on the Reduction on Statelessness (1954) which prohibits discriminatory deprivation of nationality on *political grounds*).

The remarks in the Explanatory Report on the need of considering distinctions which would or would not amount to discrimination seem somehow misleading. It is true that not all differences in legal treatment are discriminatory as such; a decision on, whether that is the case or not, must however, as a rule, be based on concrete and not general considerations.

As stated by the European Court of Human Rights, a difference in treatment is only discriminatory when it has no objective and reasonable justification, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality between the means employed and the aim sought to be realized”, cf. for example, the judgment *Abdulaziz, Cabales and Balkandali*, (Series A, No. 94).

Thus, there may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment; however, differences in treatment should be based on substantial factual differences and there must exist a reasonable relationship of proportionality between these differences and the aim of the legal rule establishing the differential treatment, cf. Advisory Opinion of the Inter-American Court of Human Rights on *proposed amendments to the naturalization provisions of the constitution of Costa Rica* OC-4/84 of January 1984 (Series A No. 4).

Since not every distinction or difference of treatment amounts to discrimination, and because of the general character of the principle of non-discrimination, it was not considered necessary or appropriate to include a restriction clause in the protocol No. 12 to the European Convention on Human Rights. In the Commentary to the provisions of the Protocol it is mentioned, that situations where distinctions are acceptable are sufficiently safeguarded by the very meaning of the notion “discrimination”, since distinctions for which a reasonable justification exists do not constitute discrimination.

The Protocol affords a scope of protection which extends beyond the enjoyment of the rights and freedoms set forth in the Convention (cf. ECHR’s article 14); in particular, the additional scope of protection concern cases where a person is discriminated against by national law or by public authorities. Thus, in principle, decisions on nationality will be covered by the Protocol - considering, that ECN, article 26 safeguards those provisions of international instruments which put an individual in a more favourable position than provided for under the Convention.

Summing up, in a European perspective there seems to be a need for clarification of the protection against discrimination in matters relating to nationality law.



## **REPATRIATION AS A FORM OF ACQUIRING POLISH CITIZENSHIP**

**Paper submitted by**

**Artur KOZLOWSKI**

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The collapse of communism resulted in the problem related to the return to their homeland by many inhabitants of the Central and Eastern European countries. In the case of Poland, this problem is particularly complex owing to changes in the borders and deportations of Poles during various historic periods.

- The Repatriation Act dated 9 November 2000 which became effective on 1 January 2001 enabled many Poles to return to their homeland who due to deportation or other persecution on such grounds as national origin and political opinion had not been able to settle in Poland. Solely for these reasons, the Parliament limited to a part of the former USSR the territories from which persons are repatriated to Poland, namely to the Republic of Armenia, the Republic of Azerbaijan, the Republic of Georgia, the Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Tajikistan, the Republic of Uzbekistan and the Asian part of the Russian Federation. The Act provides for the possibility of the extension of repatriation to other countries or other parts of the Russian Federation if their inhabitants of Polish origin are discriminated against on such grounds as religion, national origin and political opinion.
- Within the meaning of the Act, a repatriate shall be any person of Polish origin who has arrived in the Republic of Poland based on the repatriation visa with the intention of permanent settlement. Upon the entry to the Republic of Poland, the repatriate, based on the repatriation visa, shall acquire the Polish citizenship by virtue of the law. Therefore, only persons that do not have Polish citizenship can be repatriated.

Repatriation is one of the methods for acquiring Polish citizenship by virtue of the law. Under the Polish Citizenship Act dated 15 February 1962, which has been amended many times since, the Polish citizenship shall be acquired by virtue of the law by:

- a child of parents of whom at least one is a Polish citizen,
- a child borne or found in Poland if both parents are unknown, their citizenship is not specified, or if they are stateless persons.

Hence, repatriation is a special, privileged form of the acquisition of Polish citizenship by aliens of the Polish origin. This can be justified by the common belief to the effect that repatriation can be instituted with respect to the persons who themselves or whose ancestors have been taken away from their homeland against their will and who have remained their homeland's "children".

- The following persons can not apply for the repatriation visa:

1. persons who have lost Polish citizenship acquired through the repatriation procedure pursuant to the binding act, or
2. persons who have been repatriated from the territory of the Republic of Poland based on repatriation treaties entered into in 1944-1957 to a country being a party to these treaties, or
3. persons who during their stay outside the territory of the Republic of Poland have acted to the detriment of basic interests of the Republic of Poland, or
4. persons who have violated human rights.

In order to apply for the repatriation visa, a person of Polish origin must file the application for granting such a visa with the Polish diplomatic agency with jurisdiction over his residence. The following documents should be attached to the application:

- documents evidencing the Polish origin,
- other documents confirming facts specified in the application for granting the visa.

The persons of the nationality or origin other than Polish who wish to resettle as members of the repatriate's family, file an application for granting a permit for temporary residence in the Republic of Poland. In order to arrive in Poland along with the repatriate, these persons are granted visas from the consul for the resettlement purposes.

Both the repatriation and resettlement visas entitling their holders to single entry to the Republic of Poland are valid for 12 months.

Under the Act, the documents evidencing Polish origin can be documents issued by the Polish state or church authorities and the authorities of the former Soviet Union pertaining to the applicant or his parents, grandparents or great-grandparents, such as:

- Polish identity cards,
- marriage/birth/death certificates, their certified copies or baptismal certificates evidencing the relationship with Poland,
- documents evidencing military service in the Polish Army, including the entry on Polish nationality,
- documents evidencing deportation or imprisonment, including the entry on Polish nationality.

During the interview with the candidate for a repatriate, the consul determines whether the representation made on Polish origin is true, verifies the documents attached to the application and issues or refuses to issue the decision in recognition of the applicant as a person of Polish origin. In the event that a negative decision has been issued, the applicant has the right to appeal against such decision to the Head of the Office for Repatriation and Aliens.

The decision issued by the consul in recognition of the person of the Polish origin along with the application for the repatriation visa is submitted to the Office for Repatriation and Aliens for the approval to granting the repatriation visa. The Head of the Office may

refuse to grant the visa in view of the security of the Polish state or public order. After the approval has been obtained, the repatriation visa may be granted.

Minors under parental care of the repatriate may also acquire Polish citizenship through repatriation. In the event that only one parent is the repatriate, the minor shall acquire Polish citizenship provided that the other parent agrees thereto by way of a representation made before the consul. The minor who turned 16 shall acquire Polish citizenship provided that he consents thereto

The repatriation visa is granted to a person who presents the consul with evidence confirming that he has or is capable of ensuring conditions for settlement, that is, an apartment and a source of income in Poland. Such evidence can be, for example, a resolution passed by the commune council with the obligation ensuring settlement conditions for at least 12 months, an invitation, prepared in the form of a notarial deed, from a legal person (for example, an enterprise or association) or a natural person (a family) that guarantees the repatriate residence following his resettlement in Poland. Under the act, the invitation from a natural person may refer to ascendants, descendants or siblings of the person in question.

Regarding the persons who do not have a guaranteed apartment and sources of income in the Republic of Poland but satisfy the remaining conditions for obtaining the repatriation visa, the consul may issue a decision promising the issuance of the repatriation visa. To enable persons to resettle in Poland, the Office for Repatriation and Aliens has developed and maintained the register of apartments and sources of income offered to repatriates (the database called "Rodak"). In the first place such offers will be made available to the persons who have been deported and persecuted on the grounds of national origin or political opinion and whose age and bad condition justify prompt repatriation to Poland.

Apart from the above, an exceptional method for acquiring Polish citizenship is the institution introduced by the act consisting in the recognition as a repatriate which is applicable to aliens of Polish origin who had previously resided in the Asian part of the former USSR and who upon the day on which the Act became effective had already resided in Poland either as Polish scholarship holders or as persons holding a permanent residence card. An authority competent for issuing decisions on the recognition as a repatriate is the voivode. The person recognised as a repatriate shall acquire Polish citizenship on the day on which the respective decision has become final.

### **Repatriation statistics in 1997-2000**

The increasing difference between living conditions in Poland and in the Eastern countries where Polish minorities reside results in the growing number of applications for repatriation filed with the Polish diplomatic agencies annually.

In 1997 - 267 persons arrived

In 1998 – 399 persons arrived

In 1999 – 362 persons arrived

In 2000 – 944 persons arrived

In total, between 1997 and 2000, 1972 persons were repatriated to Poland.

The above figures include both repatriees who have arrived to Poland based on the repatriation visa and their family members of the nationality other than Polish who are granted permits for temporary residence in Poland. The Ministry of Internal Affairs and Administration estimates that those persons constitute approximately 10% of all settled

## ASSIMILATION OR INTEGRATION?

Paper submitted by

**Juris CIBULS**

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The *Webster's Encyclopaedic Unabridged Dictionary of the English Language*, 1996 says the following:

**to assimilate** - to bring into conformity with the customs, attitudes etc., of a group, nation, or the like; adapt or adjust: *to assimilate the new immigrants*  
to confer or adjust to the customs, attitudes etc., of a group, nation, or the like; adapt or adjust: *The new arrivals assimilated easily and quickly.*

**assimilation** *sociol.* the merging of cultural traits from previously distinct cultural groups, not involving biological amalgamation  
(p. 126)

**to integrate** - to give or cause to give [no article is used - J.C.] equal opportunity and consideration to (a racial, religious or ethnic group or a member of such a group): *to integrate the minority groups in school system*

to give or cause to give members of all races, religions and ethnic groups an equal opportunity to belong to, be employed by, be customers of, or vote in (an organization, place of business, city, state, etc.): *to integrate a restaurant, to integrate a country club.*

**integration** - an act of integrating a racial, religious or ethnic group  
(p. 990)

In my opinion, integration is to be considered as the first activity to be carried out as regards the following categories of residents (arranged alphabetically):

- 1) ecological migrants who, it may happen, will not be able to return to their previous place or residence,
- 2) persons belonging to the deported nations having returned to the country of their citizenship or origin,
- 3) persons transferred against their will,
- 4) repatriates.

For refugees and persons having been transferred within the country integration is to be considered as a good solution for their problem, however, only if it is obvious that

voluntary repatriation or returning to their previous place of residence is not possible in the nearest future.

I am of the opinion that settlers who have settled in a new country as a result of colonization or occupation should be assimilated in the best case.

Activities and measures aiming at integration should be adapted to the percentage of the indigenous population and that of the residents to be integrated. If there are a lot of residents of foreign origin in the country (and this is the case in Latvia - the total number of the population is 2,239,470 including 534, 747 non-citizens as at July 1, 2001) the measures must be well-weighed. It is highly questionable whether, for example, in the second largest city of Latvia - Daugavpils some 13% of Latvians would be able to integrate or assimilate 87% of non-Latvians. Even in case of assimilation the question arises **who** will assimilate **whom**.

It seems that in Latvia integration can take place as individual, partial or group, and gradual. No community can be integrated on the basis of a decree, order, or a programme.

One of the biggest challenges to integration in Latvia is the relationship between the overwhelming majority of the population of foreign origin [irrespective of nationality/citizenship] speaking only Russian, and the ethnic Latvian majority.

Persons do have the right not to wish to be integrated if they want to preserve their otherness in such a content and way with what they have settled in a new country, but only on condition that this wish is not in collision with the constitution or the basic principles of the country they have settled in. All states wish to have loyal residents - this is a right acquired together with independence of the State.

**Latvians** will have to admit the fact that the persons of foreign origin (the majority Russian-speakers) are part of the permanent population of Latvia.

**The population of foreign origin** will have to accept the sudden change of status (brought about by the unexpected collapse of the USSR), the legislation of Latvia and the fact that Latvian now is the main language in the country.

The acceptance of these conditions is a prerequisite for any integration.

It is one thing to admit the sudden independence of the country. However, it is quite a different one to request a permanent residence permit, to take and to pass examinations in order to become a citizen of the country one has been residing for dozens of years or even been born in.

There are a lot of questions

- how to integrate Russian-speaking population (and whether it is possible at all since in a lot of towns and settlements of Latvia their numbers are greater than those of Latvians),
- how Russian-speakers should integrate themselves since they wish to stay in Latvia,
- what should be taken as the basis for integration.

As a rule not everybody wishes to be integrated solely on the basis of the language or culture of another nation.

Not much skill is needed to talk **about** integration but who will be the wise person to tell **how** to integrate? Should naturalization follow integration or vice versa? After all naturalization can be measured or calculated, but not integration.

So many questions need one infallible answer. I wonder who knows it.

**Final Act of the United Nations Conference on the Status of Stateless Person. Done at New York, on 28 September 1954**

**Convention relating to the Status of Stateless Person. Done at New York, on 28 September 1954**

*Article 32*  
*Naturalization*

The Contracting States shall as far as possible facilitate the **assimilation** [display - J. C.] and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Note

The Republic of Latvia has acceded to this convention on 16 September 1999 and it came into force for Latvia on 6 February 2000.

**Convention relating to the Status of Refugees. Signed at Geneva, on 28 July 1951**

*Article 34*  
*Naturalization*

The Contracting States shall as far as possible facilitate the **assimilation** [display - J. C.] and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

Note

The Republic of Latvia has acceded to this convention on 19 June 1997 and it came into force for Latvia on 29 October 1997.



## **CLOSING SPEECHES**



## CLOSING SPEECH

by

**Ms N.A. KALSBECK**<sup>364</sup>

State Secretary for Justice of the Netherlands

Ladies and Gentlemen,

In the middle of the discussions of this Second European Conference on Nationality, I am sorry to have say goodbye. It would have been an honour to me to be able to conclude this conference. Circumstances, however, prevent this.

The objective of this second conference on nationality, like the first, was to explore and further shape the ideas underlying the 1997 European Convention on Nationality.

In the democracies in which you work on a daily basis as public officials or as academics, it is not unusual to give politics the last and often decisive word.

After this two-day conference, you will not hear such decisive words from me.

I am not entitled to give a synopsis of the intellectual part of this Conference and draw conclusions from it. This would be inappropriate given that I attended this Conference only partly.

Nor do I have a clear answer to the question of how integration and nationality in the countries of the Council of Europe must be balanced. The stratifications of each of our countries diverge too widely for that.

I would just like to add some questions from a political point of view to the many that have already been raised over the past two days.

The Netherlands recently ratified the European Convention on Nationality. The question whether some parts of the Dutch law on nationality had to be amended as a result of this ratification quickly led to the following question:

what principal elements constitute the concept of nationality?

It is clear that nationality implies a bond between the individual and the State, but what kind of bond? What does this bond look like, what must it look like?

All the countries of the Council of Europe – some for many years, some more recently – have had to deal with considerable changes in their demographic situation. Those changes have altered our views of national identity and citizenship.

Classical ideas of the nation-state based on criteria such as the unity of language, people, religion and history have become inadequate in the complexity of contemporary societies and may even pose a threat to their existence.

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<sup>364</sup> Unfortunately Ms Kalsbek was unable to attend the Conference at the last minute.

What is striking is the multitude of ideas being expressed.

There are citizens of the world who feel at home everywhere and for whom nationality is merely a sometimes useful, sometimes inconvenient administrative circumstance.

But there are also people who experience nationality as part of their identity. Politicians must take both into consideration.

The Universal Declaration of Human Rights provides that every person has a right to nationality, other treaties also include provisions that guarantee such a right.

The question remains as to how close the ties with a country must be to be entitled to claim this right. To what extent must a person be integrated in a country to be entitled to the nationality of that country?

The explanatory report to the Second Protocol to the Strasbourg Convention seeks to describe the connection between integration and nationality, and I quote:

‘Acquisition of the nationality of the host country is certainly an important, even crucial factor in integration in that country. Seen from the point of view of States it is not in a country’s national interest that a large section of its population should remain from generation to generation without the nationality of the country, which has become its home.

Seen from the viewpoint of immigrants of long standing, who are recognized in the host country in practically all respects, the absence of full participation in political life there can only be regarded as deplorable.’

But what extent of integration creates a right to nationality? How many ties must one have with the country of residence to have a right to its nationality, how many ties may one retain with the country of origin without losing that right?

Some believe that the acquisition of a nationality is the crowning of a successful process of integration. In their opinion solely in the event that all ties with any other country have gone, or have at any rate become irrelevant, may a person be naturalized. Multiple nationality is unnecessary in their view. In fact, retaining the nationality of a country with which one no longer has any genuine link is considered undesirable.

On the other hand, other people view the acquisition of a nationality as a necessary step on the road towards full integration. They assume that the obligation to give up the nationality of one’s country of origin poses a real obstacle for many people, that this obligation impedes them on the road towards full participation in the society of a country where they live and work and where, increasingly, they are also born.

This is not a new discussion within the Council of Europe. The 1963 Convention of Strasbourg is based on the State’s interest in a close-knit community and therefore aims at the reduction of cases of multiple nationality. On the contrary, the 1997 European Convention on Nationality takes a more neutral position and states that citizens have a right to the protection of their interests. In Article 6, the Convention propagates that the acquisition of nationality for persons having a special bond with that country be

facilitated. The Convention allows multiple nationality if it serves the special interest of the individual.

The Netherlands recently made some drastic amendments to its nationality law.

It was surprising to see how many people turned out to be attached to ties they have with different countries, and to what extent the principle of single nationality may have an adverse effect on the interests of persons.

The ratification of the Strasbourg Convention, about twenty years ago, obliged the Netherlands to counteract multiple nationality in all cases. Reactions to that policy came soon after.

Since the years after the Second World War, many Dutch people have emigrated to countries such as Canada, Australia and the USA. They are often most successful, economically and socially, and have clearly integrated. Many of them have accepted the nationality of their new country of residence and have – very much against their will – lost their Dutch nationality by operation of law.

Others have remained Dutch nationals considering the loss of their Dutch nationality as too great an offer to make.

Many have also indicated that their wish to retain the Dutch nationality had no economic or political reasons, but were simply based on emotional grounds. To them, the loss of the Dutch nationality meant the loss of a bond with their country of birth, the country of their parents and their youth, the country of the culture in which they were born and bred.

During the recent amendment to the Dutch law on nationality, tens of thousands of them made a case for the retention of the Dutch nationality upon the acquisition of the nationality of their actual country of residence, and the re-acquisition of the Dutch nationality while retaining their acquired new nationality.

Each of you will have similar experiences in your country with fellow countrymen finding a future elsewhere while retaining those strong ties with their native country.

To many of us, those feelings are understandable and justified.

Should we therefore not understand the identical feelings of immigrated persons who are economically and socially integrated in our country? Should we not justify that they have a right to naturalization while retaining the nationality of their country of their birth, culture and origin?

Still, my opening question remains: how strong must ties be to be entitled to the acquisition of the nationality, and how weak must they have become to justify the loss of the nationality?

This leads me to my final remarks.

As a politician, I am aware that, from a government point of view, it is most desirable that groups of persons residing in a country for a considerable time should acquire and use political opportunities to participate at all levels

in the political decision-making. This stimulates the integration of these groups. The acquisition of the nationality is often a prerequisite in this respect.

I am also aware that many immigrants would like to participate in the political decision-making in their new country of residence.

But not at all costs.

Naturalization with the retention of the original nationality is an acceptable solution as long as a person has a genuine link with the country of origin.

However, in the discussion so far, the position of the country of origin remains unclear.

After all, by laying down the conditions for the retention and the loss of its nationality the authorities of that country affect the integration of its nationals in the country of their domicile and habitual residence. Their willingness to allow those nationals to naturalize in another country for purposes of integration, while retaining their own nationality, and their readiness to release these nationals from their nationality if any genuine link between that national and the country is lacking, are subjects that to date have not really been examined thoroughly.

Ladies and Gentlemen,

The law is the art of the equitable and the good, *ars aequi et boni*.

This applies in a particular way to the law on nationality.

I do hope that this conference has shed some light on what is equitable and good.

Nevertheless, there is still plenty of material left for another Conference.

Thank you for your attention.

## **CLOSING SPEECH**

by

**Margaret KILLERBY**

Head of the Private Law Department, Directorate General of Legal Affairs,  
Council of Europe

The 2<sup>nd</sup> European Conference on nationality has been very successful in identifying the numerous challenges to national and international law concerning nationality at the beginning of the new millennium. For this we are extremely grateful for the invaluable contributions made by you, the nationality specialists, at this Conference.

The Conference has enabled us to share our experiences and learn from one another in an area where the practical procedures in each State are often complex. In addition it is essential in the field of nationality to be aware of the different procedures, in particular concerning the effect of the acquisition of the nationality of one State on any existing nationality which may be held.

The discussions of the Conference have focused on many important issues and in particular on integration and nationality, conditions for the acquisition of nationality, multiple nationality and State succession and nationality. Participants have highlighted the need, in particular following the demographic and democratic changes in Europe since 1989, for appropriate nationality laws which take account not only of the interests of States but also of the interests of individuals

Of course these discussions have been greatly assisted by “our code” of nationality – the European Convention on nationality – which has had so much influence, even when it was being drafted, on the nationality laws of a very large number of States.

However, we cannot afford to be complacent and it is clear that this Convention needs to be effectively applied in States and strengthened by more detailed rules in certain areas. In fact the Convention has already been strengthened by recommendations made to member States on the avoidance and reduction of statelessness (Recommendation No R (99)18).

Nationality experts will continue have many tasks such as assisting States in the implementation of the provisions of the Convention and, where necessary, carrying out additional work to deal with nationality problems which have arisen or preventing such problems from arising. This practical co-operation between specialists is essential in order to avoid problems for individuals concerning their nationalities and for States to ensure that appropriate laws can be properly applied. The information provided by the Conference will be very helpful for this work.

Many of you here will be aware of the considerable amount of technical assistance in the field of nationality provided to individual States by the Council of Europe. I should therefore like to take this opportunity to thank all those persons who have contributed to this assistance by participating in fact-finding visits, preparing or commenting on draft nationality laws, assisting in the implementation of laws and procedures, providing training for staff and assessing computer needs.

We for our part will continue our standard setting work in this field by building on the existing Conventions and Recommendations and providing technical assistance to States. The discussions, papers, conclusions and proposals for the follow-up to this Conference will be particularly important for the future work of the Committee of experts on nationality (CJ-NA) which will meet immediately after the Conference. Therefore I should like to close the discussions by thanking you all for the essential contribution you have made to the success of the 2<sup>nd</sup> European Conference on nationality.



## CONCLUSIONS AND PROPOSALS

Conclusions and proposals  
for the follow-up to the 2<sup>nd</sup> European Conference on Nationality  
“Challenges to national and international law on nationality at the beginning of the new millennium”, organised by the Council of Europe in Strasbourg on 8-10 October 2001

The participants of the Conference, having discussed the various topics introduced by the rapporteurs, called on the Council of Europe, through its Committee of Experts on Nationality (CJ-NA), to take account of the discussions at this Conference and in particular to:

1. Develop the principles and rules of the European Convention on Nationality with regard to:
  - conditions for the acquisition of nationality (in particular issues of residence, family ties, children’s rights and adoption),
  - the question of the right to a *given* nationality and
  - statelessness in particular relating to State succession.
2. Pay particular attention in its future work to:
  - the relationship between integration and acquisition of nationality,
  - the question of when distinctions in the field of nationality law might amount to discrimination,
  - the effect of other aspects of human rights issues on nationality matters.
3. Consider the regulation, at a national, bilateral and multilateral level of problems arising from:
  - nationality in relation to State succession,
  - multiple nationality.



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