



Strasbourg, 3 February 2000  
[cdcj/cjna/na99/1stconference/report/acts confnat

CONF/NAT (99) PRO 1  
PROCEEDINGS CONFNAT

## **1<sup>st</sup> EUROPEAN CONFERENCE ON NATIONALITY**

**“TRENDS AND DEVELOPMENTS IN NATIONAL AND  
INTERNATIONAL LAW ON NATIONALITY”  
(Strasbourg, 18 and 19 October 1999)**

### **PROCEEDINGS**



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## I. FOREWORD

1. The theme of the 1<sup>st</sup> European Conference on Nationality, organised at the headquarters of the Council of Europe in Strasbourg on 18 and 19 October 1999, was “Trends and Developments in National and International Law on Nationality”.
2. The Council of Europe has been dealing with issues relating to nationality for over thirty years. Indeed, since 1963 both the Committee of Ministers and the Parliamentary Assembly have adopted numerous international instruments in this field (e.g. conventions, resolutions and recommendations). It is with the adoption on 14 May 1997 of the European Convention on Nationality (ETS 166) that the Council of Europe has made a fundamental contribution to the development of international law in this area. This Convention, which was opened for signature on 6 November 1997, consolidates, in a single text, the important issues relating to nationality.
3. The aim of the Conference, which was open to all persons with a professional interest in nationality matters, was to assist States to work together to find peaceful solutions in the field of nationality and to promote stability in the European States, as well as to consider important nationality issues for both individuals and States.
4. After the opening speeches by Mrs Cornelia SONNTAG-WOLGAST, Secretary of State in the German Ministry of Interior and Mr Hans Christian KRÜGER, Deputy Secretary General of the Council of Europe, debates took place for two days on the following subjects:

- **The European Convention on Nationality: is a European Code on Nationality possible?**

*Chair:* Mr Ulrich HACK, Ambassador, Permanent Representative of Austria to the Council of Europe

*Rapporteur:* Mr Michel AUTEM, former Head of the Legal Department, Naturalisation Directorate, Reze (France), former member of the Committee of experts on nationality (CJ-NA)

- **Multiple nationality**

*Chair:* Mr Ulrich HACK, Ambassador, Permanent Representative of Austria to the Council of Europe

*Rapporteur:* Mr Giovanni KOJANEC, Professor, University of Rome “La Sapienza”, Rome (Italy), member of the Committee of experts on nationality (CJ-NA)

- **Avoidance and reduction of statelessness**

*Chair:* Mr Benedetto CONFORTI, Judge, European Court of Human Rights

*Rapporteur:* Mrs Carol BATCHELOR, General Legal Adviser, Division of International Protection, United Nations High Commissioner for Refugees (UNHCR), member of the Committee of experts on nationality (CJ-NA)

- **The misuse of nationality laws**

*Chair:* Mr Benedetto CONFORTI, Judge, European Court of Human Rights

*Rapporteur:* Mr Andrew WALMSLEY, former Head of the Nationality Directorate, Home Office, Liverpool (United Kingdom), former member of the Committee of experts on nationality (CJ-NA)

- **State succession and nationality**

*Chair:* Mr Gunnar JANSSON, Chair of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe

*Rapporteur:* Mr Zdislaw GALICKI, Professor, Director of the Institute of International Law, University of Warsaw, Warsaw (Poland), Chair of the International Law Commission of the United Nations and of the Working Party of the Committee of experts on Nationality (CJ-NA-GT) of the Council of Europe

- **The need for a proper balance between the interests of States and those of individuals on questions relating to nationality**

*Chair:* Mr Gunnar JANSSON, Chair of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe

*Rapporteur:* Mr Mitja ZAGAR, Professor, University of Ljubljana (Slovenia)

- **The relevance of the European Convention on Nationality for non-European States**

*Chair:* Mr Roland SCHÄRER, Head of the Nationality Section, Federal Department of Justice and Police, Bern (Switzerland), Chair of the Committee of experts on nationality (CJ-NA)

*Rapporteur:* Mr Norman SABOURIN, Registrar of the Canadian Citizenship, Ottawa (Canada)

5. After the presentation and debates on the above seven reports, a session was devoted to the proposals for further follow-up action by the Council of Europe and, in particular, by its Committee of experts on nationality (CJ-NA), a subordinate committee to the European Committee on Legal Co-operation (CDCJ). These proposals were made by Mrs Margaret KILLERBY, Head of the Division of Private Law, Directorate General for Legal Affairs (DG I) of the Council of Europe. And adopted by the conference, finally, the main conclusions of the Conference were presented by the General Rapporteur of the Conference, Mr Roland SCHÄRER and adopted by the Conference. These conclusions referred in particular to the various interventions which were made during the Conference, highlighting the main ideas and suggestions expressed by the different speakers.
6. The closing speeches of the Conference were made by Mrs Lena NYBERG, Secretary of State in the Swedish Ministry of Culture and Mr Guy DE VEL, Director General of Legal Affairs, Council of Europe.
7. This text contains in particular the opening and closing speeches, the reports and papers presented by the Rapporteurs and the participants in the Conference, the proposals adopted by the Conference and the main conclusions of the Conference by the General Rapporteur.

## **OPENING SPEECHES**





**OPENING SPEECH****By****Hans Christian KRÜGER**

Deputy Secretary General of the Council of Europe

Mrs State Secretary,  
Ambassador,  
Ladies and Gentlemen,

It is a great honour for me to welcome you to the Council of Europe and to open this Conference on nationality issues.

Nationality – the legal bond between the individual and the State – is an essential factor at all levels of human life. Each of us, as individuals, would be deprived of an important part of our most fundamental rights if we did not have a nationality.

Nationality is also an integral part of the identity of the State. But just as the identities of States are very different, so are the ways in which States have chosen to determine their nationals.

If States were isolated from each other and if they co-existed in a static international community with little interaction between their populations, the determination of nationality might be an easy task of theoretical relevance only. But this is not the case.

In our world there is increasing interaction between States, there are State successions and other kinds of change of sovereignty, there is growing movement of persons and there are yet more marriages between persons of different nationality.

In fact, the very values which the Council of Europe supports and promotes, as well as the recent drastic expansion of the membership of the Council, contribute to the increasing need of co-ordination in determining who is the national of which State or, perhaps, which States. This need for co-ordination becomes crucial in situations when incompatible nationality legislation in two or more States might create problems for individuals and pose a threat to democratic stability.

The avoidance of statelessness is one of the main concerns. It is an issue which may threaten peace and stability. Several million persons in the world, many of whom are in Europe, are not considered to be nationals of any State and are thus deprived of all rights pertaining to nationality. Depending on the national legislation in question, these persons might, for instance, be unable to vote or stand in elections, to travel, to work, or to own property.

The fight against statelessness is one of the main concerns of the Council of Europe in the field of nationality. Indeed, only last month, the Committee of Ministers of the Council of Europe adopted a Recommendation to member States on the avoidance and the reduction of statelessness. This Recommendation contains concrete principles and

rules which States should follow in order to eliminate the problem of statelessness. The avoidance of statelessness is also a major theme in this conference.

Statelessness is one example of what may be the result of the simultaneous operation of nationality legislation of two or more States. Another example of the effect of different nationality laws is the very opposite of statelessness – multiple nationality.

It used to be broadly accepted by many western European States that multiple nationality was undesirable and should be avoided as far as possible. In line with this way of thinking, the Council of Europe adopted the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, which was opened for signature in 1963. However, owing to the various developments that have taken place in Europe since then, the Council of Europe decided to reconsider the strict application of the principle of avoiding multiple nationality. Two additional protocols to the 1963 Convention were adopted in order to reflect this change in position as regards multiple nationality.

The European Convention on Nationality, which was opened for signature on 6 November 1997, is neutral with regard to the admissibility of multiple nationality. Only children who automatically at birth, or spouses who automatically by marriage, have acquired multiple nationality must be allowed to retain their nationalities. The Report which has been prepared for the Conference on this theme concludes that even in States which actively try to avoid multiple nationality it is impossible to prevent it altogether.

Between the two extremes, statelessness and multiple nationality, are a number of other issues related to all aspects of acquisition and loss of nationality. These issues, for the first time ever, have been comprehensively regulated in an international treaty by the adoption of the European Convention on Nationality. Its purpose is to make acquisition of a new nationality and recovery of a former one easier, to ensure that nationality is lost only for good reason and that it cannot be arbitrarily withdrawn, and to guarantee that the procedures governing applications for nationality are just, fair and open to appeal. It also covers military obligations and co-operation between States parties.

The Reports presented at this Conference, and the discussions during these two days, will explore further some of the other issues relating to nationality questions, such as State succession and nationality, the misuse of nationality laws, the need for a balance between the interests of the individuals and those of States in questions relating to nationality, the relevance of the Convention for non-European states, as well as the possibility of a European Code on Nationality.

Technical assistance provided by the Council of Europe should be highlighted in our discussions. Apart from preparing conventions and recommendations concerning the different aspects of nationality which I have mentioned, the Council of Europe also provides technical assistance in the field of nationality to many European countries on a bilateral or multilateral basis. In this respect, the Council, with the assistance of experts from its Committee of Experts on Nationality:

- gives comments on draft laws and on the implementation of laws,

- provides advice on the setting up of administrative structures to process applications and on computerisation of such processes,
- offers training of staff, and
- organises study visits in member States' administrations.

Successful co-operation in the field of nationality between the Council of Europe and the United Nations High Commissioner for Refugees has already taken place over a number of years. During the years to come this co-operation will be further intensified and just recently, a Memorandum of Understanding has been concluded between our Organisations with the aim of working closer together in all fields of common interest. The fact that the 1954 United Nations Convention Relating to the Status of Stateless Persons, the 1961 UN Convention on the Reduction of Statelessness and the 1997 European Convention on Nationality are complementary legal instruments makes the co-operation in the field of nationality and statelessness easy and natural.

The purpose of this Conference is to assist States to work together in order to find peaceful solutions in the field of nationality and thus promote stability in Europe, to the benefit of both individuals and States. Indeed this is the aim of the overall action of the Council of Europe in this field.

All the issues discussed in the Conference will be examined in the light of the European Convention on Nationality and consideration will be given to whether this could constitute a starting point for a real Code on Nationality. You are also invited to encourage your States, if they have not already done so, to sign and ratify the Convention as soon as possible.

I hope that this Conference may also give States an incentive to explore new avenues of co-operation in this area, in particular as the field of nationality is one which more than most other legal fields have implications reaching across borders. In this respect, I would like to stress the potential importance of the mechanism for exchange of information on nationality issues created by the European Convention on Nationality and the special role assigned to the Committee of Experts on Nationality of the Council of Europe in this context.

I now have the honour to welcome to the podium Mrs Sonntag Wolgast, Parliamentary State Secretary at the Ministry of Interior of Germany who has given us the honour and the pleasure of her participation in this Conference and whose country, which happens to be also my country, is making great efforts in reforming its nationality legislation.

I thank you for your attention.



## OPENING SPEECH

by

**Dr. Cornelia SONNTAG-WOLGAST**

Secretary of State in the German Ministry of Interior

Ladies and gentlemen,

First let me tell you that Mr. Otto Schily the Minister of Interior is very sorry that he can't be here today. As his Secretary of State I was asked to open this conference.

For more than 30 years now, the Council of Europe has dealt with nationality matters. It has done excellent work in this field.

The work of the Council of Europe has brought about a great number of resolutions and recommendations of the Committee of Ministers and the Parliamentary Assembly. They illustrate the developments, aiming to take up and further develop major issues of nationality law at the European level. These issues are for instance the avoidance of statelessness, the question of how to deal with multiple nationality, and the need to facilitate the acquisition of nationality for certain groups of persons.

The clear objective has been to safeguard and protect the rights and interests of the individuals concerned on the basis of the European Convention on Human Rights, which guarantees the respect for, and protection of, human rights and fundamental freedoms. Their provisions have deeply and sustainedly shaped and raised the awareness of governments and parliaments.

It would take too long now to list all the achievements of the Council of Europe in the field of nationality over the past decades. Might I restrict my contribution to the most recent ones.

The European Convention on Nationality is particularly worth mentioning here. The Convention was not opened for signature before 1997, but has already been signed by a great number of Member States and ratified by two Member States – Austria and the Slovak Republic.

Germany will also sign and ratify the European Convention on Nationality soon.

This Convention has incorporated major parts of the national and administrative practice of the Council of Europe Member States. The Convention on the Reduction of Cases of Multiple Nationality and the Military Obligations of Multiple Nationals, which was opened for signature in 1963, only contains specific nationality law provisions regarding the issue of multiple nationality. By contrast, the European Convention on Nationality is the first comprehensive treaty at the European level which seeks to harmonise nationality law.

Furthermore, the European Convention on Nationality lays down European standards for the solution of matters of nationality law, thus giving a major impetus to the Member States of the Council of Europe to modernise their nationality law. Germany, too, has benefited from this development when we reformed our nationality law.

A modern nationality law geared to the changed living conditions in Europe is the guarantee of social peace and internal stability. It is an essential part of a political integration concept. In this sense, the European Convention on Nationality makes a valuable contribution to social peace and internal security across Europe.

The Council of Europe is an organisation with an amazing innovative power and constant commitment, which is clearly reflected by the recently drafted recommendation on matters of statelessness. It does not only aim to avoid statelessness in the individual Member States and to reduce cases of statelessness as far as possible. In addition, it is intended to further develop the provisions of the European Convention on Nationality. Today's conference, too, clearly indicates that we need to look across national borders to solve nationality law matters.

The conference programme shows the great variety of nationality matters which need to be dealt with. Numerous topics to be addressed at this conference also affect the German nationality law. These are sensitive and delicate questions, to which easy answers are hardly possible. This has been particularly illustrated by the fact that in Germany multiple nationality was publicly discussed in a very emotional manner. The solution of such questions requires all those involved in forming the political will to show a particular degree of reasonableness and general preparedness to bring about a consensus.

Despite difficulties – above all surrounding the discussion of multiple nationality and despite the populist campaigns launched against the so-called "dual ID card" - we have successfully concluded major parts of the reform of the German nationality law when we adopted the Act to Amend the Nationality Law on 15 July 1999. Some of the provisions of this act are already in force, while most of them will take effect at the beginning of the New Year on 1 January 2000.

One of the major novelties of the German Nationality Law is that, on top of the traditional principle of decent, the *ius soli* has been introduced for children born to foreign parents in Germany. The pre-condition is that at least one parent has a consolidated residence status in Germany. A corresponding naturalisation entitlement has been created for children up to the age of ten who were born in Germany and for whom the conditions of the *ius-soli* acquisition would have been present at birth.

It is true that, if one of those children acquire another nationality at birth besides the German one, they need to opt either for the German nationality or for the foreign nationality derived from those of the parents within five years after coming of age – leaving aside legal exceptions designed to tolerate multiple nationality. However, the acquisition of nationality by birth and the naturalisation entitlement for foreign children up to the age of ten enables children born in Germany to foreign parents to grow up in Germany without any formal marginalisation at an early stage.

Furthermore, Germany has notably reduced the period of residence required for a foreign national to be entitled to naturalisation, that is from 15 years to 8 years; this is a clear signal for foreigners who have lived in Germany for a long time that all those wishing to identify with the Federal Republic of Germany as a democratic and constitutional state are welcome as citizens with equal rights. Integration can only be successful, though, if those whom we wish to integrate contribute their share. We have therefore stepped up our integration requirements. The new law makes naturalisation conditional on sufficient knowledge of the German language and the clear commitment to the principles of freedom and democracy.

Last but not least, Germany has introduced more exceptions to the principle of avoiding multiple nationality. This concerns in particular older persons, persons suffering political persecution and recognised refugees, and cases where it would be unreasonably difficult or entail considerable disadvantages if the person concerned was released from the previous nationality. The aim is to remove excessive and sometimes insurmountable obstacles for naturalisation applicants willing to be integrated.

The reform of the German nationality law was long overdue, as clearly reflected by the social conditions in Germany. At the end of 1998, some 7.3 million foreigners were living in Germany, half of those for at least 10 years, some 30% for 20 years and more; these numbers are related to the overall population figure of slightly over 80 million. Some 100,000 foreign children are born in Germany per year. 1.63 million foreigners living in Germany were also born in our country. The same applies to over two thirds of the foreign children and adolescents living in Germany.

The life of foreigners who permanently and lawfully live in Germany is centred on our country. This applies primarily to the second- and third-generation foreigners. The fact that less than 90,000 foreigners were naturalised per year shows that their previous possibilities to acquire German nationality were insufficient. All political parties have long agreed that the German Nationality Act, whose original version dates back to 1913, needed to be modernised urgently in light of the situation depicted above. The new Federal Government has given top priority to the reform of the nationality law, so that we were able to adopt the new law after a short preparatory period as an efficient and necessary instrument for more integration.

This reform was urgently required due to several reasons:

It is not tolerable for any state if a large number of citizens stay outside the public community over generations and are excluded from full democratic participation.

Instead, it is a democratic principle to establish a congruence between the holders of democratic political rights and the resident population permanently subject to the public rule. Those who live in Germany permanently should live in our country with the rights and obligations of a citizen.

This contributes largely to social peace. Under this aspect, an adequate balance is struck between public and individual interest. The state is called upon to prevent conflict potentials arising from the increasing alienation between individual groups of the population and the development of parallel societies. This can be achieved if the

state transfers political and social responsibility on all individuals living on its territory, and if it enables them to contribute to shaping the community. This primarily requires granting them full democratic participation in the public community.

In this sense, the new German Nationality Law is a clear integration offer to all foreign citizens living permanently in Germany. And in my view it is a clear signal of political responsibility and farsightedness that this integration offer is supported by a great majority of the German Parliament.

With this reform of its nationality law, Germany commits itself to a modern notion of what a nation really is. A society in peace and partnership can only be achieved through participation in the public community on equal terms.

In my view, a nation is a deliberate of citizens identifying with certain basic values, a notion on which the reform of the German nationality law is actually based. In Germany, this concept of a nation and thus of a modern nationality law can only build on the joint pursuit of peaceful co-existence and of shaping the future together, and on a clear commitment to the basic values of a free society, as formulated in the Basic Law of the Federal Republic of Germany.

I am convinced that this European Conference on Nationality will contribute to maintaining and securing social peace and internal security also beyond the borders of Europe.

I thank you for your attention.



## **REPORTS**



**THE EUROPEAN CONVENTION ON NATIONALITY  
IS A EUROPEAN CODE OF NATIONALITY POSSIBLE?**

**Report by**

**Michel AUTEM**

Former Head of the Legal Department,  
Naturalisation Directorate, Reze (France),  
former member of the Committee of experts on nationality (CJ-NA)

Can there be a European Code of Nationality? The very question is almost a provocation because of the paradoxes it implies and the threats it poses to states and their nationals.

A code, whatever its purpose, is first and foremost a binding instrument as it obliges the parties to conform to its provisions, even though some of them may be of a protective nature.

In the field of nationality, a European code might appear to be an instrument that limits states' sovereign prerogatives in favour of recognised individual rights or rights that have been conferred on individuals, whether nationals or foreigners.

Legal logic would also expect that in the event of disputes or difficulties in connection with the application of the provisions of such a code, individuals and states may refer to a regulatory body, in other words, a European court.

One might also object that the drafting of a European code of nationality is, by definition, an impossible task, since it could not take into consideration the domestic law of the forty-one Council of Europe member states, much of which is a result of their past and a component of their identity. Unless the project is based on the idea of a European nationality, a possibility that, as things stand, seems neither desirable nor likely to be accepted.

However, a European Convention on Nationality dealing with all aspects of nationality, hereafter referred to as the Convention, was adopted in November 1997. This international instrument on nationality sets out a number of principles, some of which are imperative and binding, and lays down rules which are likely to modify the domestic legislation of states parties.

To date, twenty Council of Europe member states have signed the Convention, two have ratified it and others are preparing to do so.

Therefore, once the first shock waves have subsided, one might wonder whether the idea of a European code of nationality has not already been accepted and that it is only its practical formulation that prompts a negative reaction.

One has to admit that the Convention is already written in the form of a code, which gives it precision and clarity. This leads to the inevitable question: is the Convention

not a kind of first draft of a European Code of Nationality, or perhaps even a genuine code in itself, one of the first European codes?

If this were the case, it would have to be admitted that states' notion of nationality has evolved, not in the sense of seeking a European nationality designed for a federal or confederal Europe or a Europe of regions, but owing to the recognition of individual rights in a field which has hitherto been the preserve of state sovereignty.

## **I – A EUROPEAN CODE OF NATIONALITY NECESSARILY IMPLIES A CHANGE IN STATES' PREROGATIVES**

### **1. What the Convention has borrowed from codification techniques**

The main purpose of a code is to provide a coherent and reasonable form of easy access to a specific field while guaranteeing the legal security of the parties that use it. A code can gather the existing texts in an established field of law and sort them according to a clear set of themes, but it can also be the completion of a new set of organised instructions that has its own purpose and dynamics.

Of course, it is not the aim of the 1997 Convention to bring together all the international instruments that deal with questions of nationality: only Chapter II of the 1963 Council of Europe Convention, known as the Strasbourg Convention, is incorporated in its entirety in Chapter VII under the title "Military obligations in cases of multiple nationality". Rather than summarising the provisions of all international instruments dealing with questions of nationality, it aims at least to take their most pertinent principles into consideration.

One of the paragraphs of the Preamble refers to "the numerous international instruments relating to nationality, multiple nationality and statelessness" and more particularly the Convention for the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on Human Rights (ECHR).

The influence of other international instruments, although they are not formally mentioned or included in the Convention, is nonetheless present. I am particularly referring to the Convention on certain questions relating to the conflict of nationality laws signed in the Hague on 12 April 1930, the 1948 Universal Declaration of Human Rights, the 1951 UN Convention relating to the status of refugees, the 1954 UN Convention relating to the status of stateless persons and the 1957 UN Convention on the nationality of married women.

Section 12 of the explanatory report gives an exhaustive list of the international instruments from which a number of principles have been taken and incorporated in the 1997 Convention.

A code also defines the scope of the legal area containing the essential rules and principles ensuring that texts are organised logically.

In providing that that the "Convention establishes principles and rules relating to the nationality of natural persons and rules regulating military obligations in cases of multiple nationality", Article 1 defines the said area, from which are excluded legal

entities and the settlement of disputes governed by private international law in cases of multiple nationality (Article 17-2b). The Convention also specifies that its provisions do not affect customary international law concerning diplomatic protection in cases of multiple nationality (Article 17-2a).

The traditional questions raised in connection with nationality, such as the acquisition, conservation or loss of nationality, are, of course, dealt with. The technical rules referred to for practical reasons by the expressions *jus sanguinis* and *jus soli*, and whose legal value depends on how states use them according to their political and legal objectives, comprise another of the sides of the polygon formed by the Convention.

But above all, paragraphs 3, 8, 9 and 10 of the Preamble stress the importance the Convention gives to questions related to multiple nationality and the prevention of statelessness.

The Convention's formal structure, which, in addition to the Preamble, is made up of thirty-two Articles divided into nine chapters, complies with the traditional technique of codification. The classification of the themes covered, the layout used and the titles given to each Article, though the latter have no legal force, supply useful information on the Convention's objectives and the value it ascribes to certain aspects of the subject dealt with.

In the light of this, the importance of multiple nationality (Chapter V), cases of state succession (Chapter VI) and Chapter IV on "Procedures relating to nationality" which, it should be emphasised, is an unusual area to feature in an international instrument, is evident. Furthermore, the titles to the Articles often give a clear indication of their purpose. Article 5, for example, is entitled "Non-discrimination" and Article 20 is entitled "Principles concerning non-nationals".

The principles that govern a code and embody its dynamic character are traditionally set out at the beginning. This is the case with the Convention, since Chapters III and IV respectively deal with the rules and procedures relating to nationality, after Chapter I, entitled "General matters", has defined "nationality", "multiple nationality" and "child", and Chapter II has stated the general principles relating to nationality.

This second chapter, together with the Preamble, defines the two poles that define the purpose of the Convention.

Thus Article 3-1, in accordance with the provisions of Article 1 of the Hague Convention of 1930, lays down that "Each State shall determine under its own law who are its nationals", whereas paragraph 4 of the Preamble strongly asserts that "in matters concerning nationality, account should be taken of both the legitimate interests of States and those of individuals".

The objectives thus defined enable the Convention to take into consideration specific situations, such as the rights of non-nationals in cases of state succession. Moreover, the Convention is not a closed book and Chapter VII, entitled "Co-operation between the States Parties", leaves the field open for future developments, the scope of which shall be determined by the contracting parties.

The recognition of individual rights in the field of nationality, and thus of the expression of individual will, necessarily implies that in a field of exclusive sovereignty, states should, if not abandon their sometimes age-old prerogatives, at least limit their effects.

Some of the reasons behind this change should be explained.

## **2. The change in states' traditional prerogatives in nationality matters**

There is a trend in Europe to bring foreigners' and nationals' rights closer together and generally assert the individual rights guaranteed by values that are claimed to be universal. This trend is fostered by the development of "Euro-systems" which limit states' prerogatives or impose obligations upon them.

The 1997 Convention is a part of this trend.

### **- Foreigners and nationals**

A state can only exist if it exercises its sovereignty over a population, over its own nationals, so that a longstanding discrimination between foreigners and nationals, though not in the pejorative sense of the word, is inevitable.

In defining nationality as the legal bond between a person and a state (Article 2a) the Convention makes no innovations, and it is not surprising that certain jobs, or even certain professions, that are considered vital to the proper functioning or continuity of the state are reserved for nationals.

Article 20-2 of the Convention accepts that in cases of state succession, "Each State Party may exclude persons considered under paragraph 1 from employment in the public service involving the exercise of sovereign powers".

But the massive presence of foreigners in many Council of Europe member states, often the result of recent and complex migrations, has brought about changes in the approach to this form of discrimination.

Former emigration countries, such as Spain, are becoming immigration countries, and other countries, such as Austria or Germany, have also become new destinations for immigrants.

The break-up of the USSR and Yugoslavia has caused population movements connected with the reconstitution, creation or restoration of states.

A state's political or economic situation, or even its legal tradition, do not always allow foreigners to enjoy the same rights as nationals. In certain states, foreigners may not exercise full ownership rights.

However, the trend, especially in many member states of the European Union, is to assert equal civil and, above all, social rights for foreigners and nationals, and Article 20-1b of the Convention provides that "persons referred to in sub-paragraph a

[nationals of a predecessor state who have not acquired the nationality of the successor state] shall enjoy equality of treatment with nationals of the successor State in relation to social and economic rights".

Foreigners who are recognised participants in social and economic life, who are active in educational, social or professional bodies, admittedly to varying degrees, have been granted the right to vote, particularly in local elections, in countries such as Iceland, Switzerland, Moldova, Hungary and Denmark.

By asserting the existence of a European citizenship, of which one of the essential characteristics is the right of European Union nationals to vote in local and European elections, the Maastricht Treaty and Article 5 of the Treaty of Amsterdam of 2 October 1997 have helped to quicken the loosening of the ties between citizenship and nationality. The other fields in which state sovereignty has been particularly affected are the police, currency, immigration and the movement of persons, and public safety and foreign policy are no longer exclusively dependent on the sovereign powers of states.

Furthermore, a number of the social and economic powers of the member states of the European Union have been shared and subjected to Community rules.

This move, characterised by the loss of some of the states' prerogatives, is accompanied by the assertion of individual rights.

#### - **The assertion of individual rights**

Individuals are tending to want to set their own standards, make their own rules, and lead what some authors call a form of "insular" life. This is a recent phenomenon. Sovereignty is therefore no longer solely entrusted to the state and individuals intend to exercise a part of that sovereignty to their own advantage *hic et nunc*. Individualism is itself becoming a source of rights.

However, the individual values inherent in this new-found insularity can only be durably exercised if they are guaranteed by other, universal values, whose most complete legal expression is the Convention for the Protection of Human Rights and Fundamental Freedoms. The importance of its position among the "Euro-systems" that have been set up is beyond question.

But before the 1997 Convention, the "Euro-systems" had no direct influence on the field of nationality, and although a few years ago the Court in Luxembourg<sup>1</sup> rejected the Spanish authorities' traditional analysis of persons with multiple nationality, the Strasbourg Court, to which applications are regularly made to judge nationality disputes, has so far refused to hear them, arguing that they concern neither criminal matters nor civil disputes.

Nevertheless, the European Court of Human Rights has indirectly referred to nationality matters on several occasions, for example in the NASRI and BELDJOURI

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<sup>1</sup> MICHELETTI/DELEGATION DEL GOBIERNO EN CANTABRIA

cases<sup>2</sup> and has affirmed more recently that although the Convention and its protocols "do not guarantee the right to nationality, the arbitrary refusal to grant nationality may, in certain circumstances, raise problems in the light of this provision (Article 8 on the right to family life) given the repercussions that such refusals may have on the private life of the person concerned and which may be serious enough to raise a problem in respect of these provisions" (KARASBEV/FINLAND, No.314114/96, decision of 12 January 1999, section IV). In this case, the application made on behalf of a child born in Finland for whom Finnish nationality had been requested and who, at the time of birth, had had Russian nationality, was rejected as the applicants were no longer threatened with expulsion.

The seventh paragraph of the Preamble to the Nationality Convention makes a direct reference to the existence of these protective provisions: "Aware of the right to respect for family life as contained in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms".

Thus, new forms of solidarity and new legally protected individual rights are emerging.

- **The Convention is guaranteed and upheld by universal values that are binding on states**

The 1997 Convention is part of this trend and invokes the principle of equality to which it refers in prohibiting discrimination.

The Preamble states that the aim of the Convention is "to avoid discrimination in matters relating to nationality", and Article 5, in Chapter II on general principles, is entitled "Non-discrimination". It includes the assertion of the principle 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", which echoes the very definition of nationality, the legal tie between a person and a state regardless of that person's ethnic origin (Article 5-1). The second paragraph of Article 5 encourages each State Party to be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently (Article 5-2).

The Convention endorses previously expressed and well-known principles for which it claims universal validity in the field of nationality. Some of them appear in Article 4: everyone has the right to a nationality; no one shall be arbitrarily deprived of his or her nationality; neither marriage nor the dissolution of a marriage ... shall automatically affect a person's nationality; statelessness shall be avoided.

The principles and rules that result from this are not so much the formal expression of common practice as imperative international standards intended for acceptance by states, all states.

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<sup>2</sup> European Court of Human Rights – BELDJOURI judgment, 26 March 1992, vol. 234-a; NASRI judgment, 13 July 1995, vol. 324.



According to Article 27, the Convention "shall be open for signature by the member States of the Council of Europe and the non-member States which have participated in its elaboration", and Article 28 provides for the widening of its scope of application in the following terms: "After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State of the Council of Europe which has not participated in its elaboration to accede to this Convention".

The effectiveness of the genuinely universal values upheld by the Convention in nationality matters is founded on the rule of law as underlined, in cases of state succession, in Article 18-1.

The Convention is indeed structured like a code of which a number of provisions, guaranteed by values which transcend states' interests, enable individuals' recognised rights to be exercised. Does this mean that in the future these same states will abandon their prerogatives in matters of nationality?

A code is an instrument of social and, in this case, political regulation. It will only be consistent with the facts if it embodies the balance that may exist at a given time between state powers and individual interests while remaining open to future change.

But balance does not necessarily signify perfect equality and it would be erroneous to deduce that the emergence of recognised individual rights leads to the even partial erosion of the states' role, which is not, perhaps, desirable.

The Convention is pragmatic and does not aim either to be a code of state codes on nationality matters, or to replace their domestic laws: it modulates the effects of the constraints it is likely to exercise with regard to the States Parties.

## **II – THE CONVENTION: STATES' POWERS AND RECOGNISED INDIVIDUAL RIGHTS**

### **1. States' powers and the pragmatism of the Convention**

- **States' powers are expressed in accordance with formal requirements**

Some states consider that their powers in nationality matters are protected by their very political structures. Federal or confederal states like Switzerland, Austria or Germany are, to a certain extent, less open to the influence of international instruments. It should also be noted that in the hierarchy of domestic legal rules, texts regulating questions of nationality may be governed by the constitution, as is the case in Iceland, Denmark and Croatia, supplemented where need be by laws, as in Germany and Belgium.

In some Council of Europe member states, the granting of nationality is vested in elected bodies, as in Belgium and Luxembourg, or in the president of the republic, as in Hungary. Oath-taking is current practice in several states, including the Baltic States and Austria.

These formal observations are enough in themselves to show the importance placed on questions of nationality, but the exercise of sovereign power in this area can be especially expressed through the procedural rules and discretionary power that states have assumed or are recognised as having.

With a few exceptions, such as Denmark and Luxembourg, most states' administrative procedures or practices have an important role to play in matters of nationality. The Convention does indeed set about to limit states' discretionary powers, or at least prevent them from being arbitrary, since Articles 11 and 12 require States Parties to ensure that the reasons for adverse decisions are given in writing and that these decisions are open to administrative or judicial review.

Furthermore, Article 13-2 forestalls administrative or procedural obstacles by limiting the administrative fees for applications relating to the acquisition, retention or loss of the nationality of the State Party, as well as for issuing proof of that nationality.

Finally, under Article 10 of the Convention, applications must be processed within a reasonable time.

The importance of questions concerning nationality mainly stems - as generally acknowledged - from the fact that one of a state's essential characteristics is the maintenance of sovereignty over its population, but it may also find its roots in a part of a nation's history, or even its legendary tradition, that influences the contents of its domestic nationality laws.

- **A state's power may draw its strength from its history, or even its legendary tradition**

Both Greece, with its liberation from the Ottoman yoke, and Austria, with the break-up of the Austro-Hungarian Empire and the second world war, have experience of the trials and tribulations of history.

The two countries have adopted different approaches to the question of nationality: Austria has deliberately dissociated national identity from nationality, whereas Greece has constantly sought to integrate its population inside its frontiers, basing its policy on the feeling of belonging to the Hellene ethnic group. And yet the conditions under which foreigners may acquire the nationalities of both these countries are equally restrictive. Applicants must have lived in the country for at least ten years and the right to nationality through being born in the country has little influence on whether or not a foreigner is granted that nationality. But a person of Greek descent may be granted citizenship after a period of residence in Greek territory of only two years.

A state's concept of nationhood may therefore influence the expression of the fundamental principles determining its domestic legislation. In his excellent book<sup>3</sup>, Roger BRUBAKER notes that the German conception of "a nation in quest of a state" is "an organic community of culture, language and irreducibly different race", whereas the French vision of nationality is centred on the state, based on assimilation-inspired virtues and associated with the expression of an almost messianic

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<sup>3</sup> *Citoyenneté et nationalité en France et en Allemagne* – Berlin, 1997.

universalism whereby foreigners may become French citizens as of right. Germany's ethnic conception of nationality favours nationality through descent (*jus sanguinis*). France widely applies the principle of the dual right to nationality through being born on French soil (*jus soli*).

In pragmatic fashion, the United Kingdom has shifted from a doctrine of allegiance to a conception of nationality that borrows some of its principles from French republican tradition. However, the application of the right to British nationality through birth on British territory is not absolute. Under the 1981 Act, British nationality is only granted to children born on British soil if one of their parents is a British citizen or a foreigner who has been granted the right of abode. The right of abode in the United Kingdom also makes it easier for the spouses of British citizens to acquire British nationality. However, British law differs from French law in that the acquisition of British citizenship at birth is subject to certain conditions regarding the place of birth.

The Baltic countries, even though there are differences between them, each express in their domestic law the importance of the prerogatives claimed by the state and which can easily be explained by their recent history. The application of the principle of the right to nationality through descent is, of course, pre-eminent and a number of the conditions required for acquiring the respective nationality are strictly checked. In Latvia, for example, these conditions concern applicants' past and present political loyalties and their knowledge of the language, which is tested by means of oral and written examinations.

Nevertheless, the maintenance of states' powers and the complexity of individual situations, some of which have been briefly described, present no obstacle to the application of the rules and principles set out in the Convention.

This can be explained by the coexistence of a number of admittedly heterogeneous factors which causes ideas on nationality to converge. Let us recapitulate the factors already mentioned: the importance of international instruments, the recognised rights of individuals, the massive and permanent presence of foreigners, the influence of the European Union and international developments in the law of persons. The list is incomplete but a study of the other factors falls outside the scope of this report and must be left to legal and social historians.

But above all, the Convention, which is intended to be pragmatic, is not an exhaustive instrument on nationality matters comparable to states' domestic laws. It sets the limits of its own scope.

- **The Convention takes the complexity of the various situations into consideration**

States' domestic legislation regarding, for example, the acquisition of their nationality by foreigners or stateless persons is a result of the combination of a number of criteria and their degree of importance. These mainly concern: circumstances of entry, length of time spent on the national territory, residence, the assimilation of customs and habits, moral standards, marital status, occupational integration, loyalty, knowledge of the language and political system and real and genuine ties.

Given the complexity of possible combinations, the Convention is silent on the conditions required by states regarding the acquisition of nationality after birth, with the notable exception of the effects of lawful and habitual residence on the state's territory.

The situation, as regards nationality, of children or foreign spouses may vary considerably from one state to another.

With the exception of a few states such as the United Kingdom, Denmark and Austria, the principle of equality has led to a convergence of the situations regarding legitimate, adopted or natural children. On the other hand, a study of the conditions governing children's acquisition or loss of nationality and their place of residence, whether on the national territory or abroad, reveals that there are considerable differences.

In France, for example, subject to certain conditions aimed at combating fraud, the child of a foreigner who has acquired French nationality automatically becomes French, but - apart from a special application of the Strasbourg Convention - the loss of nationality has no collective effect.

In France, there is no procedure whereby children are consulted, whereas in many other states a minor's opinion or even consent is required when the acquisition or loss of nationality has a collective effect. This is the case in Moldova, where the opinion of a minor of over 16 is a determining factor. In Austria, children of over 14 do not lose their previous nationality unless they expressly agree to acquire a foreign nationality.

Children's wishes are therefore taken into consideration in varying degrees. Although in France children have no say in the collective effect of acquisition, their wishes are acknowledged in the form of a declaration which they may make as part of an autonomous acquisition procedure open to them from the age of 16. Similar declarations may be made in other states, subject to certain conditions regarding parental responsibility, from the age of 13. In Austria, minors of over 14 can apply for naturalisation with their parents' consent.

The Convention therefore confines itself to laying down a rule that acts as an incentive and whose scope of application is relatively limited, since sub-paragraphs c and d of Article 6-4 provide that "Each State Party shall facilitate in its internal law the acquisition of its nationality for the following persons: [...] children one of whose parents acquires or has acquired its nationality; children adopted by one of its nationals".

The same provisions apply to the spouses of nationals (Article 6-4a), whose situation in many states hardly differs from that of a foreigner who applies for naturalisation, whereas in others, such as Austria and France, it enables them to exercise genuine rights as long as the relatively simple legal conditions are met.

These provisions correspond with Article 1 of the Convention, which establishes the principles and rules relating to the nationality of natural persons to which the internal law of States Parties shall conform.

The explanatory report makes it clear that the wording indicates that the principles and rules set out in the Convention are not intended for immediate application and that states may take their specific situations into account when transposing them into their domestic law.

However, this interpretation of the provisions of the Convention is not totally acceptable.

It is correct as regards the situation of nationals' children or spouses. States are also given great leeway when the principle set out is both political and legal, such as every individual's right to a nationality.

Elsewhere, although certain rules or principles, particularly those dealing with multiple nationality, allow states to take their domestic situations into consideration, there are nonetheless limits to this freedom, as it is also stipulated that a State Party must allow children who have automatically acquired different nationalities at birth to retain those nationalities.

In other cases, the Convention offers states a choice of different provisions, but it is imperative that one of them should appear in their domestic law. This is the case with children born on the territory of a State Party and who may not remain stateless.

But the Convention, aware of the difficulties that states may encounter, provides for limited exceptions to the absolute principles it prescribes, so that the diversity of the states' situations can be taken into consideration. This is the case with the provisions of Article 8 on the loss of nationality at the initiative of the individual.

Whether silent, conducive, adamant or pragmatic, the Convention establishes a veritable hierarchy in the fields it covers and makes it possible to balance state interests with individual rights regarding those provisions that it considers essential. In particular, it emphasises the importance of the notion of residence, which contributes to maintaining and guaranteeing the balance it seeks.

## **2. States' powers and individuals' interests: a balanced approach**

A balanced situation, insofar as the conditions prevailing in Council of Europe member states permit, is particularly sought in the following areas: multiple nationality, the prevention of statelessness, and state succession, subjects that will be dealt with in other reports. But it is also sought with regard to the loss or acquisition of nationality based on the application of the technical rules of *jus sanguinis* and *jus soli*.

### **- Loss**

Traditionally, states do not wish to see their nationals free themselves of their ties of allegiance, although they sometimes seek to deprive them of their nationality in order to sanction them on the grounds that they represent a burden or a danger considered to be incompatible with the proper functioning of the country.

Article 7 of the Convention protects individuals' rights by stating 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".

However, if this principle were to be applied without any possibility of adjustment, states, which have to protect themselves and ensure their continuity, would find it unacceptable. It is therefore acknowledged that states have certain prerogatives, but these are limited to those set out in Article 7-1a to 7-1g.

A State Party can, therefore, deprive nationals of their nationality in order to sanction a lack of loyalty or the acquisition of that nationality "by means of fraudulent conduct, false information or concealment of any relevant fact" (Article 7-1b).

It is accepted that a State Party may provide for the loss of nationality as a matter of law or at its initiative in the event of a subject acquiring another nationality. This provision complies with the 1963 Strasbourg Convention and limits cases of multiple nationality.

The states' acknowledged rights as regards the loss of nationality extend to children since, because of the "collective effect", they may lose their nationality at the same time as their parents, unless the parent's loss of nationality is punishment for disloyal conduct (Article 7-1c and d) or one of the two parents retains his or her nationality.

However, states' acknowledged prerogatives as regards the loss of nationality are limited when such loss would lead to statelessness (Article 7-3), unless the nationality was acquired by fraudulent means.

On the other hand, states' powers may be widened if the national habitually resides abroad and his or her effective and genuine links with the state no longer exist. In this way, the Convention acknowledges that in matters of loss of nationality, but in those matters only, states have a power of appreciation of the definition of an effective and genuine link and, possibly, the notion of residence abroad (Article 7-1e).

The Convention also imperatively asserts the right of every individual to renounce his or her nationality on the sole condition that he or she does not become stateless as a result (Article 8-1). This measure both protects individuals and reminds states of their obligations.

Nevertheless, there is an exception to this principle and it is an important one, since it empties a right which is expressed in absolute terms of much of its content: a state may provide that nationals may only voluntarily give up their nationality if they reside abroad.

- **Jus sanguinis, jus soli**

As regards the attribution of nationality at birth or the acquisition of nationality by foreigners, the Convention does not alter existing situations in any radical way but does oblige certain states to accept changes in their internal legislation.

The transmission of nationality by descent is, save a few rare exceptions, the practice in Council of Europe member states. Article 6-1a of the Convention expresses a general and absolute rule in this area: "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".

These provisions attribute equal importance to mothers and fathers and therefore lead to the acknowledgement of multiple nationality situations. However, exceptions to this principle are provided for and aimed at children born abroad or whose descent has been established by recognition or adoption.

Thus, the rule referred to above may be expressed as follows: legitimate children born on the territory of a State Party of a parent who possesses the nationality of that state acquire that nationality as a matter of law (*ex lege*). This is a combination of the right to nationality through descent and the right to nationality through country of birth, which at least enables the children of mixed couples not to be foreigners in the country of one of their parents.

The application of this principle, known as the double right through country of birth (in fact *jus soli* combined with *jus sanguinis*), enables third generation foreigners to acquire automatically the nationality of the state in which they were born and which is also the nationality of at least one of their parents. This rule, which exists in the domestic law of Belgium, France and the Netherlands, bases the attribution of nationality at birth on a strong presumption of assimilation.

On the other hand, birth on a country's soil, except in a few states such as Moldova, does not automatically give foreigners a right to that country's nationality unless other criteria exist, such as statelessness or the existence of a lawful and habitual residence.

The application of the principle of *jus soli* inevitably leads to a complex relationship between the states' prerogatives and the individual's rights, and falls within a sensitive area of national life. Depending on the accepted criteria and the extent to which they are applied, the introduction of the right to nationality through one's country of birth in domestic law can modify the balance that has been achieved, if the percentage of foreigners in the population is high.

Many states, therefore, still only resort to a very limited complementarity of the two principles (*jus sanguinis* and *jus soli*) and the acquisition of their nationality on the basis of the right to nationality through one's country of birth is reserved to foundlings or to children born on their territory who would otherwise be stateless.

The relative caution of the Convention is therefore understandable.

However, it does provide for simplified acquisition of nationality for foreign children born on the territory of a State Party, subject to their residing in that state (Article 6-4e) leaving only new-born foundlings - who would otherwise be stateless and to whom the State Party is bound to grant its nationality - as the only individuals to benefit from the right to nationality through one's country of birth with no other conditions attached.

The Convention also encourages each State Party to grant its nationality *ex lege* at birth to children born stateless, a provision to which there is a partial exception, since acquisition of nationality may be subject to conditions of age, lawfulness of residence, 5 years habitual residence in the country concerned or a specific request (Article 6-2b).

- **The effects of residence**

The notion of residence, which has already been referred to in connection with the loss of nationality in the states' interest, whether or not it is linked to birth on the national territory, also enables states to provide access to their nationality while improving their control and exercising due caution.

The United Kingdom grants British nationality to children born in the country of a parent who has settled there. Children born in France acquire French nationality at their majority on condition that France is their country of residence or by taking positive steps to do so in the form of a declaration made between the ages of 13 and 18.

The notion of residence or abode, in addition to being connected with states' immigration and residence policies, is complex and embraces a number of factors: whether residence is continuous or intermittent; whether it began during childhood or at birth; and whether or not it is subject to minimum periods of residence which may be subject to total or partial exemptions.

The diversity of these criteria, their various combinations or connections with other notions provide states with a wealth of technical instruments on which to base their domestic nationality laws.

But residence, which is defined as lawful and habitual residence, also implies, if not a presumption of assimilation in a given community, at least the desire to live in it. In Austria, for example, thirty years' residence in the country entitles foreigners to apply for Austrian nationality.

The Convention takes account of the notion of residence which, combined with other criteria, is designed to make it easier for individuals born in a State Party (Article 6-2a and b, 6-4e - see above) or for individuals in need of protection (refugees and stateless persons - Article 6-4g) to acquire that country's nationality.

But above all, it promotes the idea that voluntary residence on a state's territory gives individuals rights which they may rely on in order to acquire that state's nationality.

Article 6-3 states that "Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory". Under the same Article, the required period of residence preceding the lodging of an application is limited to a maximum of ten years.

In this way, lawful and habitual residence is no longer considered as one of the conditions that has to be fulfilled for acquiring the nationality of a State Party, but almost as a ground for becoming entitled to the right to acquire that nationality. The



importance attached to the notion of residence is such that, in cases of state succession, it appears to form the basis of a "right to remain" for non-nationals residing on a territory whose sovereignty has been transferred and on which they were residing previously (Article 20-1a).

The Convention, which is structured like a code, has managed to strike a balance between state powers and individual rights in areas considered by the Council of Europe to be crucial.

However, it is a specific code whose particular approach and structure could act as a reference for drawing up other international instruments, in particular within the framework of the Council of Europe.

The Convention also derives its strength from the universal values it contains and which should result in its influence being felt beyond the confines of Europe.

At the end of 1999, the internal legislation of many Council of Europe member states already complies with the provisions of the Convention, in some cases having been quickly modified in order to do so. Other states, in particular the countries of central Europe, have begun to examine their domestic law in the light of the Convention and this should lead to changes, though, no doubt, not without difficulty and discussion. In this sense, the Convention is indeed a reference instrument.

Changes over the coming years are possible and perhaps even desirable. They could affect areas such as statelessness, multiple nationality, state succession, the application of the principle of *jus soli*, children's rights and the fight against fraud.

This movement corresponds with the goal the Council of Europe set itself and which remains, as indicated in the Preamble to the Convention, the achievement of greater unity between its members in keeping with the principle of the rule of law.

The Convention's development will also depend on the measures that may be taken to bring the nationality laws in Council of Europe member states into closer conformity, and how states behave towards their resident foreigners.

If this development comes about, it will be the result of co-operation between the States Parties in compliance with the provisions of Chapter VIII. First and foremost, such co-operation encourages states to provide each other with fuller information. The structure and spirit of the Convention do not, therefore, call for a supranational body to be set up to ensure that it is applied.

It is only suggested that an intergovernmental body be set up "in order to deal with all relevant problems and to promote the progressive development of legal principles and practice concerning nationality and related matters" (Article 23-2).

The CJ-NA (Committee of Experts on Nationality) and the CJ-NA Working Party would seem to be in a position to carry out this task reliably. There is therefore no need for the 1997 European Convention on Nationality, a genuine European code, to cause alarm.

NB: Some of the ideas expressed in this report were inspired by reading "*La transformation de la citoyenneté*", by Roger BRUBAKER and Jacques CHEVALIER, *Regard sur l'actualité*, April 1999; "*Déclin des spécificités françaises et éventuel retour d'un droit commun européen*" by Patrick WEIL in *13<sup>ème</sup> cahier*, recueil DALLOZ, 1999; the circular of 30 May 1996 on the codification of legislative and regulatory texts (*circulaire du 30 mai 1996 relative à la codification des textes législatifs et réglementaires*) published in the *Journal Officiel de la République Française* (the French official gazette), 5 June 1996.

## MULTIPLE NATIONALITY

### Report by

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### Abstract

1. Rules on the acquisition and loss of nationality are established by each State in the exercise of its sovereignty and may lead, by their simultaneous application, to multiple nationality.

No rules of customary international law limit the exclusive competence of States in the field of nationality. Nevertheless, the Principles referred to in Art. 4 of the European Convention on Nationality of 1997 have general relevance.

Specific obligations to harmonise internal law in this area may be established by treaty on a bilateral or multilateral basis. The scope of the European Convention of 1963 was to reduce cases of multiple nationality by providing that, for nationals of the State Parties, through the operation of their internal law, voluntary acquisition of another nationality must determine the loss of the nationality previously possessed. It should be noted that the Second Protocol amending this convention reduced the cases to which this rule would apply, and the European Convention of 1997 remained neutral with regard to the admissibility of multiple nationality.

2. There are international law rules relating to the consequences of the possession of multiple nationality. In this sense, the Hague Convention of 1930 consolidated the Principles that the national of a State could not invoke before its authorities the possession of a foreign nationality, and that a State was precluded to exercise diplomatic protection in favour of one of its nationals against another State whose nationality that person also possesses. The ICJ stressed, in the *Nottebohm Case*, the relevance of the criterion of effectiveness of the nationality possessed by a person in order to determine if a State is entitled to exercise diplomatic protection in favour of one of its nationals: this is particularly relevant in cases of multiple nationality.

3. In European Community Law, Citizenship of the Union is conferred to nationals of Member States who, thereby, enjoy the rights and are subject to the obligations provided by the Treaty establishing the Community. It does not therefore create situations of dual nationality. In a case concerning a national of a Member State possessing simultaneously the nationality of a non-Member State, the Court of Justice has decided that another Member State may not, applying its internal law, exclude that person from the enjoyment of rights based on Community Law on the ground that the nationality of the non-Member State should prevail being the effective one. This indicates that States are free to determine, by treaty, applicable criteria in cases of multiple nationality, giving or denying relevance to the nationality concerned.

4. States have different positions, in favour or against the admissibility of multiple nationality, which are reflected in their legislations on nationality. The contemporary possession of two or more nationalities may be considered by the State concerned as contrary to the exclusive character of their sovereignty, which must be reflected in the legal and political bond of nationality. The admissibility of multiple nationality must also be considered in connection with the problem of integration of migrants in the receiving State and the acquisition of its nationality.

5. Cases of multiple nationality being unavoidable, the consequences must be analysed, in order to find a solution to related problems, the basic principle being that the possession of a foreign nationality cannot be invoked before the authorities of a State of which the person concerned is also a national.

## REPORT

### 1. Definition

Multiple nationality originates from the sovereign determination of each State in establishing the content of its rules concerning acquisition and loss of nationality.

If birth on the territory of a given State is, in application of the jus soli principle, a ground for acquiring automatically the nationality of that State according to its internal law, dual nationality will occur whenever, on the basis of the law of another State applying the jus sanguinis principle, the same person is considered to possess its nationality by descent because one of the parents or both are its nationals.

The situation would not be different if two States, both having adopted the jus sanguinis principle, in the case of marriage of one of their nationals with a national of the other State, each maintaining the nationality of origin, grant their respective nationality to the children issued of such marriage in application of the rules guaranteeing the equality of spouses.

The unilateral determination of a State is also the source of multiple nationality cases whenever the acquisition of its nationality by naturalisation is not made dependent on the loss of nationality possessed by the person concerned (which in certain situations might not be possible) or when the voluntary acquisition of a foreign nationality does not automatically lead to the loss of the nationality previously possessed, as provided, e.g., in the Italian or French legislation. Other situations may also be relevant in this context, particularly if the acquisition of nationality is the automatic consequence of adoption or recognition of a foreign minor: it would be contrary to the principle of family unity to deprive the child of the possibility of acquiring that nationality because of conditions depending on foreign legislation, which might not provide for loss of the nationality of origin in this case.

## 2. International Law and Nationality

### 2.1 Are there rules of general international law limiting the sovereignty of States in the field of nationality?

The answer is negative because the political and philosophical background of the regulation of nationality is different in each State, due to its specific characteristics and its historical development. Nevertheless, the principles that everyone should have a nationality and not be arbitrarily deprived of the nationality possessed (see Art. 16 of the Universal Declaration of Human Rights) as well as that statelessness should be avoided, must be considered as accepted at universal level, even if the adoption of the corresponding rules to implement them depends on State legislation. Indeed, the international community consists of States and the legal bond with a State, which characterises nationality (See Art. 2, a) of the European Convention on Nationality of 1997) is essential for the protection of the individual and to ensure the guarantee of his rights. Consequently, it must be recognised by other States.

### 2.2 The question then arises whether any harmonisation of the internal rules concerning nationality is otherwise possible and desirable. If, for the reasons indicated above, it is hard to conceive the existence of customary rules of general International Law imposing on States the acceptance in their internal legal order of common criteria relating to the various aspects of nationality law, including the question of admissibility or denial of multiple nationality, this could be achieved by treaty.

The Hague Convention on Certain Questions Relating to the Conflicts of Nationality Laws of 12 April 1930 constituted the first attempt in this direction purporting to establish common regulations in specific areas; it contained provisions whose objective was the avoidance of statelessness and considered also inter-State aspects of nationality, in particular of the consequences of multiple nationality. Its acceptance has been very limited.

The New York Convention of 1961 on the Reduction of Statelessness was intended to harmonise the internal legislation of States to reach that scope, but it has been ratified by few States.

The Convention on the Nationality of Married Women, signed in New York in 1957 had greater success, its scope being to give effect in the internal law of States parties to the basic Human Rights principle of equality of sexes.

It must be remarked that no treaty concluded at universal level ever dealt with the question of multiple nationality in order to harmonise the internal legislation of States in this respect.

On the contrary, this has been the case at regional level, in Europe, with the Convention of 1963 on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality.

As its title indicates, the Convention, on the one hand, assuming, in its Chapter II, that multiple nationality may occur, contains rules to avoid, in this case, that the person concerned be obliged to fulfil military obligations in more than one State (and there are several bilateral treaties concluded to this effect). On the other hand, its Chapter I, based on the consideration, contained in the Preamble, that “cases of multiple nationality are liable to cause difficulties and joint action to reduce as far as possible the number of cases of multiple nationality, as between Member States, corresponds to the aims of the Council of Europe”, provides for the obligation of Contracting Parties accepting this Chapter (See Art. 7) to comply in their internal law with the rule stated in Art. 1.1 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”, to permit renunciation of one of the nationalities possessed (Articles 2 and 3) and to adopt specific provisions to the same effect concerning minors (Art. 1, Para.2 and 3, and Art.2, Para.2).

The Convention, reflecting the attitude of the internal law of the State Parties contrary to multiple nationality, was intended to establish, on the basis of the acceptance of equal standards, an automatic mechanism leading to the loss of the nationality of one State Party in connection with the acquisition of the nationality of another State Party in certain cases. When the acquisition of another nationality was not dependent on the will of the person, that mechanism did not operate, and multiple nationality was therefore possible. Even in the context of a regional instrument, a general exclusion of the possibility to possess multiple nationality could not be realised.

Indeed, further developments went in the opposite sense, e.g. increasing the number of situations where the automatic loss of nationality provided by the Convention would not operate. This was the effect of the Second Protocol amending the Convention, adopted twenty years later, in 1993, and in force for three European States (France, Italy and the Netherlands).

The reason for this change of perspective is to be found in a new appreciation of the phenomenon of permanent immigration in the light of the relevance of nationality for the process of integration of migrants in the receiving State. In such a process, the requirement of loss of the nationality previously possessed as a condition for the acquisition of the nationality of the State of permanent residence, appeared to be an obstacle to full integration, due to the reluctance of the persons concerned to cut definitively all their links with the State of origin, even when, as in the case of second generation immigrants, they were reduced merely to a formal legal bond expressed by nationality, which, however, did not make them foreigners in their country of origin. It is worth noting, in this regard, that the Italian law on nationality of 1912, a period characterised by large flows of emigrants from the country, provided expressly that, as an exception to the general acceptance of the principle of unicity of nationality, Italians born and resident in another State which considered them as nationals, retained the Italian nationality, unless they renounced to it. This provision was conceived to meet the preoccupations referred to above.

The Second Protocol allows the Contracting Parties not to apply the general rule of the Convention concerning the loss of nationality in three cases.

In the first place, where a national of a Contracting Party acquires the nationality of another Contracting Party on whose territory either he was born and is resident, or has been ordinarily resident for a period of time beginning before the age of 18. This provision, permitting to retain the nationality of origin, recognises the admissibility of dual nationality.

Furthermore, a similar effect as obtained in cases of marriage between nationals of different Contracting Parties, when the spouse acquires of his or her own free will the nationality of the other spouse.

Finally, the nationality of origin will not be lost whenever a minor whose parents are nationals of different States possesses the nationality of one of his parents and acquires also the nationality of the other parent.

The last two provisions are clearly meant in favour of the unity of nationality within the family whenever the person concerned would not be prepared to lose the nationality of origin, while the scope of the first one is to promote the full integration in the receiving State of second generation migrants permanently resident in that State, as stated in the Preamble to the Protocol.

These developments indicate that States, at least in Europe, are no longer prepared to have recourse to multilateral international instruments in order to limit the occurrence of multiple nationality even if in their internal law they may have different attitudes, which are reflected in the substantive provisions of their legislation. The absence of international constraints gives room to greater flexibility in relation to their specific approach to the problem.

This was also the conclusion reached at the end of a long negotiation within the Council of Europe, which led to the adoption of the European Convention on Nationality in 1997.

The Convention is the first international body of rules dealing with all the basic aspects of nationality law in the perspective of the guarantee of Human Rights and Fundamental Freedoms, and it may be stated that its impact is not necessarily limited to Europe.

This is certainly the case for the provisions contained in its Chapter II, concerning general principles relating to nationality, which should condition the operation of substantive rules of internal legislation.

While, in this regard, avoidance of statelessness is considered as being the objective in proclaiming a right to nationality, and the prohibition of arbitrary deprivation of nationality, which may also lead to statelessness, constitutes a safeguard in the implementation of that right, the principle of non-discrimination being of fundamental importance, it should be noted that the question of multiple nationality is not dealt with in the light of general principles referred to in Chapter II.

Indeed, specific rules in this respect are contained in Chapter V, but they are based on the assumption (Art.15) that “the provisions of this Convention shall not limit the right of a State Party to determine in its internal law” whether it permits or denies its nationals to possess another nationality, with the sole exception provided for in Art. 14, according to which children having automatically acquired at birth different nationalities, must be allowed to retain them, and nationals must be permitted to possess another nationality when it has been automatically acquired by marriage.

As stated in Para.97 of the explanatory report, the Convention “is neutral on the issues of the desirability of multiple nationality. Whereas Chapter I of the 1963 Convention as intended to avoid multiple nationality, Art. 15 of this convention reflects the fact that multiple nationality is accepted by a number of States in Europe, while other European States tend to exclude it”.

2.3 It is clear, in this situation, that no general international rule can be said to exist with regard to multiple nationality. The matter remains subject to the sovereign decision of States, in accordance with the criterion of their exclusive competence in determining who are their nationals and to the obligation of other States to accept such determination if it is not contrary to International Law and to principles of law generally recognised with regard to nationality (Art. 3 of the European Convention). Each State remains, nevertheless, free not to recognise the possession of another nationality by its nationals.

It should however be noted that, in view of specific circumstances, bilateral treaties have been or may be concluded in order to permit or avoid cases of dual nationality in relation to nationals of the States concerned.

### 3. Stand of International Law with regard to certain problems arising from multiple nationality.

The occurrence of multiple nationality, determined by the autonomous operation of different legal systems, gives way to the necessity of establishing which of the nationalities possessed is the relevant one in specific situations.

The Hague Convention of 1930 contained, in this regard, rules, which have been widely accepted by States, independently of their ratification of that instrument.

In the first place, it stated in Art. 3, that each of the States whose nationality is possessed by the person concerned may consider that person in its internal legal system as possessing exclusively its nationality: other nationalities would be irrelevant. It may be observed that the most recent legislation in Europe relating to Conflict of Law (Italian Law nr. 218/1995) reproduces this rule (in Art. 19, Para.2) for the purpose of determining applicable law on the basis of nationality.

If the person possesses more foreign nationalities, a State, in conformity with the Convention, may give exclusive relevance to the nationality of the State where the person is habitually resident or to that of the State with which that person has stronger links (Art.5). Effectiveness is also the criterion adopted in this case by Art. 19, Para.2 of the Italian Law referred to above.



These provisions of an international treaty deal with solutions to be adopted in internal law.

Art.4 of the Convention refers to certain international consequences of multiple nationality concerning the exercise of diplomatic protection, excluding such intervention of the State in favour of one of its nationals against another State whose nationality that person also possesses. Which is a consequence of the absolute character of the bond of nationality deriving from the sovereignty of the State.

It would constitute interference by one State on matters reserved to the domestic jurisdiction of another State, to claim a specific treatment in relation to persons who are nationals of the latter (even if they also possess the nationality of the intervening State) unless specific rules of international law, whether customary or treaty law, so permits (as is the case in contemporary international community in areas connected with the violation of fundamental human rights).

Nationality being a prerequisite for the exercise of diplomatic protection, the ICJ (Nottebohm Case, 1955) was led to consider which conditions must be satisfied in order that nationality conferred upon an individual by a State may be relieved upon as against another State and give a title to the exercise of protection against that State.

The Court stressed that it is for every sovereign State “to settle by its own legislation the rules relating to the acquisition of its own nationality”, indeed, “nationality is within the domestic jurisdiction of the State” (p.20). Nevertheless, “a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted with this general aim of making the legal bond of nationality accord with the individual’s genuine connection with the State which assumes the defence of its citizens by means of protection as against other States” (p.23). The nationality conferred to Mr. Nottbohm by Liechtenstein not presenting this character, the Court denied this State a title to exercise protection and to institute international judicial proceedings.

It may be disputed if the effectiveness of the connection between the individual and the State conferring its nationality is such a relevant factor for the international recognition of that nationality, unless we are confronted with cases of multiple nationality where it is necessary to determine which of the nationalities possessed should prevail. Preference must then be given to the “real and effective nationality”, based on “stronger factual ties between the person concerned and one of the States whose nationality is involved”, as the Court (p.22) considered to emerge from international arbitral decisions with regard to the exercise of protection.

#### 4. European Community Law

According to Para.1 of Art.17 of the consolidated version of the treaty establishing the European Community (as resulting after the entry into force of the treaty of Amsterdam, on 1 May 1999, and corresponding to former Art. 8) “Citizenship of the Union is hereby established. Every person holding the nationality of a member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship”. Par.2 explains the nature of Citizenship of the Union

stating that “Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby”.

It follows that, while Citizenship of the Union is not an autonomous concept, the personal status attached to it depends on the possession of the nationality of a Member State. There being no Community rules with regard to nationality, Member States are free to determine conditions and procedures on the acquisition and loss of their nationality. As indicated in Declaration 2, annexed to the Final Act of the Treaty of Maastricht, “The question whether an individual possesses the nationality of a Member State shall be settled solely by reference to national law of the Member State concerned”.

In the context of freedom of movement, freedom of establishment and freedom to provide services, which are fundamental in the Community system, the aforementioned principles are fundamental because they prevent a Member State to deny those freedoms, not recognising the possession by the person concerned of the nationality of another Member State.

This question was raised in the Micheletti Case, brought for preliminary ruling before the Court of Justice of the Community (case c-369/90, Judgement of 7 July 1992), in consideration of the circumstance that Mr Micheletti was a dual national, Argentinean and Italian, who claimed the freedom of establishment in Spain under Community law. According to Spanish law (Art.9(9) of the Civil Code), only his Argentinean nationality would be recognised due to the fact that his last place of residence had been in Argentina. Therefore, he would have been denied entitlement to that freedom in Spain.

The application of the Nottebohm doctrine would have confirmed such consequences, Argentina being the State with which real and effective links existed, even if the possession of Italian nationality was not in question. Nevertheless, the Court held that “it is not permissible to interpret Art. 52 of the Treaty to the effect that where a national of a Member State is also a national of a non-member country, the other Member States may make recognition of the status of Community national subject to a condition such as the habitual residence of the person concerned in the territory of the first Member State”. It concluded that “the provisions of Community Law on freedom of establishment preclude a Member State from denying a national of another Member State who possesses at the same time the nationality of a non-member country entitlement to that freedom on the ground that the law of the host State deems him to be a national of a non-member country”.

It should be noted that the reasoning of the Court is not based on the application of rules and principles of customary international law to cases of multiple nationality, nor does the Court deny that the internal law of a Member State, may, in general, establish criteria to determine the relevant nationality in such cases. The Court, indeed, deals with the problem arising from multiple nationality only in connection with the application of Community law, and its decision confirms that the operation of internal law of a Member State may not override or condition the enjoyment of the rights granted by Community Law.

It follows that States may by agreement not only permit or prevent multiple nationality, but also adopt the solutions they consider most appropriate to the problems arising from multiple nationality and give or deny relevance to each nationality concerned, taking into account the specific circumstances of their reciprocal relations.

## 5. Multiple nationality in internal law.

5.1 In many States the legislation on nationality adopts mechanisms intended to prevent multiple nationality. Indeed, it is deemed contrary to the exclusiveness of sovereignty of a State that its nationals may at the same time possess the nationality of another State. Nationality implies not only rights and obligations of a legal nature, but constitutes also a political link, and allegiance to one State is considered to be incompatible with allegiance to another State. Multiple nationality might lead to interference (in a wider sense) of a State with the position of the individual in the other State.

The decision of the High Court of Australia in June 1999, according to which an Australian national possessing simultaneously another nationality may not, in application of Art. 44 of the Constitution, be elected to the Federal Parliament because of his ties to a “foreign power”, illustrates this conception.

The obligation to fulfil military obligations in relation to all States the nationality of which is possessed by the person concerned, is another example, even if bilateral or multilateral conventions (as the European Convention of 1963 of the European Convention of Nationality of 1997) may introduce rules which remedy to this situation on the basis of the principle that these obligations shall be complied with only in relation to one State, determined according to the criteria chosen by the parties (e.g., the place of residence).

These and other aspects of multiple nationality, which are considered significant in order to deny its admissibility are related to the idea of Nation-State.

If the State is necessarily a form of territorial organisation of a group of individuals united by their common sharing of values based on a given cultural heritage (which has linguistic, religious, ethnic, historical and other characteristics), then it is a safeguard of the identity and the existence of the State not to permit its nationals to possess the nationality of another State. A person admitted in that Community cannot be committed to abide by other values, which find their expression in the existence of a legal bond of nationality with another State.

Nevertheless, there is not a necessary identity between Nation and State, although that conception has, historically as well as in our times, contributed to the formation of newly independent States through the unification or dissolution of existing entities.

The modern State, based on the rule of law and on the respect and guarantee of fundamental rights, may integrate and protect a variety of values (as in the case of minorities); nationality does not, therefore, reflect in an exclusive way one or the other specific connection between the individual and the community organised in the

from of State. Nationality “does not indicate the person’s ethnic origin”, states Art.2, a) of the European Convention on Nationality. As the ICJ said in the *Nottebohm Case* (p.23), it is a “legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties”. Such an attachment does not exclude, a priori, the possibility of maintenance of a similar legal bond with another State. The only problem is to establish under which conditions the nationality of one of the States concerned prevails.

5.2 There are various States where the possession or the acquisition of a foreign nationality by a national or by a person acquiring their nationality has no legal relevance: they permit multiple nationality to subsist, in consideration of different circumstances.

In the case of children born of mixed marriages, their possession by birth of the nationality of each parent is the result of the recognition of the principle of equality of spouses, which makes dual nationality unavoidable. It does not seem to be in conformity with this principle, ranking in the category of fundamental human rights both at constitutional and international level, to oblige said children to lose one of these nationalities on reaching the age of majority or later in order to eliminate dual nationality, while their social attachment to both States is effective and the interruption of their legal bond to one of them is not the result of their free will.

It may be noted that even States opposing multiple nationality do not in general exclude it in this context (see Art. 14 of the European Convention of 1997).

States conferring nationality on the basis of jus soli do not, normally, consider relevant to this effect the possession of any other nationality by the person concerned. A notable exception is provided by the new German legislation approved by Parliament in 1999, whereby the conservation of German nationality acquired by a person born in the territory of foreign parents, one of them being habitually resident in the country for a period of at least 8 years, is made dependent on the loss before the age of 23 of the foreign nationality possessed (Art. 4 and 29 of the German law on nationality as modified in 1999). This constitutes a compromise solution adopted by a State having a negative attitude towards multiple nationality but introducing new rules according to which nationality is acquired, in certain cases, by birth on the territory.

A number of legislations, with the intent to facilitate voluntary acquisition of a foreign nationality by nationals residing abroad who wish to preserve their links with the State of origin, exclude the automatic loss of their nationality in these cases (e.g., Italy and France). This may be the result of an explicit policy aiming at favouring the integration of nationals in another State where they live and work, and who might be prevented to acquire the nationality of that State if it entails the loss of the nationality previously possessed. Obviously, multiple nationality will depend in these cases on the circumstances that the State whose nationality is acquired does not require the proof (or the assurance) of loss of the nationality of origin.

States wishing to promote full integration in their society of a foreign population settled in their territory (e.g. immigrants) may give priority to this aim and not

exclude naturalisation if those persons retain their foreign nationality. The acquisition of nationality is considered as a means to realise integration in their society. Multiple nationality will be the result (see, in this regard, the Swedish Report on Nationality, by the 1997 Nationality Commission, Stockholm 1999, in particular p.6, ff.).

If, on the contrary, the acquisition of nationality is viewed as being the final step in the process of integration, then nationality is conceived as an exclusive bond, incompatible with the possession of another nationality. But, even in this case, the rule may not be absolute, as shown by the recent German legislation which requires loss of nationality as a condition for naturalisation (new Art.85, 1), 4) of the Law on Foreigners, approved in 1999) but admits a series of exceptions permitting multiple nationality (Art. 87 of the Law on Foreigners, in the new version of 1999).

It may be concluded that the stance of internal law in relation to the problem of multiple nationality is the result of historical, philosophical and social factors, which lay at the basis of the legislative approach in each State and determine its finalities. This hints to the difficulty of defining common criteria accepted by sovereign States.

## 6. Consequences of multiple nationality

6.1 It emerges from the analysis conducted in the preceding Paragraphs that cases of multiple nationality are unavoidable even when internal legislation or international treaties, as the European Convention of 1963, contain rules intended to reduce them.

As the Final Report of the Swedish 1997 Nationality Commission underlines, although “Swedish nationality legislation is traditionally based on the principle of avoiding dual nationality”, there are “about 300.000 people in Sweden who have dual nationality” (pages 6 and 7). This is indicative of a phenomenon of a general nature, concerning all States, which is related to the increasingly international character of our societies.

It is therefore understandable that in various States legislation allows nationals to hold another nationality permitting, for the reasons we have already examined, persons who acquire their nationality or a foreign nationality to maintain a link with both States concerned. A remarkable example is contained in the new version of Art. 87, Para.2 of the German Law on Foreigners approved in 1999, which permits, by the way of exception to the general rule, multiple nationality to be held, on condition of reciprocity, by all European Union citizens acquiring German nationality by naturalisation.

The Swedish 1997 Nationality Commission has a more general view when, considering (p.8) “that the interest of an individual in being able to possess dual nationality is more substantial than the disadvantages linked to such possessions”, it proposes that “Sweden abandons the prevailing principle and instead accepts dual nationality completely as the coming into force on the new Nationality Act. It is estimated that this could take place on 1 July 2001”.

In these circumstances it is necessary to consider specific problems arising from multiple nationality and to analyse possible solution, the basic principle being, as we

have seen, that the possession of a foreign nationality cannot be invoked before the authorities of another State of which the person concerned is also a national, except in cases where an international agreement between the two States so permits (see Art. 3 of the Hague Convention of 1930).

6.2 Problems related to military service obligations which a multinational must fulfil in relation to each State whose nationality he possesses, may be solved by treaty, whereby a person fulfilling such obligations in relation to one State Party is deemed to have fulfilled his military obligations in relation to any other State Party of which he is also a national (as stated in Art. 6.3 of the Strasbourg Convention of 1963 and in Art. 21.3,c) of the European Convention on nationality).

The possession of multiple nationality becomes in this way relevant for each State concerned in order to achieve the aim of avoiding multiple military service.

6.3 In the field of Private International Law, nationality is frequently used as a connecting factor to determine applicable law. This leads, in the case of multiple nationality, to the necessity of giving preference to one of these nationalities to avoid simultaneous reference to possibly conflicting legislations; each State may establish its own criteria to this effect.

In general, the possession of the nationality of a State will prevail in that State, leading to the application of its legislation and reference to effective nationality will be made by States in case of simultaneous possession of two or more foreign nationalities by the person concerned. The Hague Convention of 1930 (see above, Para.3) was intended to promote, among others, the adoption of these criteria by a large number of States so that uniform solutions might be reached in determining applicable foreign law. Efforts to this effect should be pursued, even if recourse to nationality as a connecting factor tends to be substituted by the adoption of the criterion of habitual residence.

Furthermore, multiple nationality has an influence on civil status registrations because these are normally entered in the State of residence and whenever the person concerned is a national of that State they will not be transmitted for transcription to the other State of which that person is also a national, in application of agreements to that effect. It follows that data contained in the registries of the two States concerning births, marriages, death, etc. may not necessarily correspond.

International co-operation and co-ordination in connection to these registrations seem therefore necessary to avoid conflicting determinations of civil status (including the name of persons) in the relevant States.

6.4 Persons in possession of a plurality of nationalities may enjoy political rights in more States. This is frequently considered as inadmissible in view of the preservation of the exclusive character of sovereignty.

Nevertheless, for various reasons, such rights are normally exercised in the State of residence, and, consequently, the simultaneous possession of the same rights in another State appears to be actually irrelevant, except in the case where voting may be held abroad.

It should also be noted that multiple nationals are not entitled to consular or diplomatic protection in the States whose nationality they possess. This should not be regarded as a restriction of their rights because in those States they are not treated as foreigners.

6.5 Being a national of a State is an element in the process of integration of a person in a community. Integration is considered implicit when nationality is acquired at birth, jure sanguinis or jure soli, unless the individual, being in possession or acquiring another nationality, renounces to it. The circumstance that the person continues to possess one nationality is certainly not an obstacle to the process of integration, but may favour it, when another nationality is conferred to that person. It is clear that, also in this context, the decision to permit or reduce cases of multiple nationality is essentially of a political nature, conditioned by historical factors.





**DEVELOPMENTS IN INTERNATIONAL LAW:  
THE AVOIDANCE OF STATELESSNESS THROUGH POSITIVE  
APPLICATION OF THE RIGHT TO A NATIONALITY**

**Report by**

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**Introduction: The Right to a Nationality**

"Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality." Such is the pronouncement of article 15 of the 1948 Universal Declaration of Human Rights. Since everyone has the right to a nationality, could one claim everyone has the right to the French nationality, or perhaps to British or Canadian, Japanese or South African nationality? If not, why not? International law stipulates it is for each *State* to determine, through the operation of national law, who are its citizens. Hence, international law provides for an individual right, but the exercise of that right will depend upon each State's assessment of how nationality should be granted. State practice would have to be harmonised and uniform in this area in order to ensure everyone's right to a nationality is implemented in practice and statelessness is avoided. Is determination of nationality uniform in State law and practice?

Review of State practice globally reveals a select number of ways in which nationality is granted to individuals by States. Nationality is generally granted with reference to specific factors indicative of an established link between the individual and the State. Evidence of this 'link' might include place of birth, descent, or strong ties established through, for example, residence or marriage. Different approaches, however, very often lead to conflicts, as well as to statelessness, because legislation between States is not harmonised sufficiently to ensure gaps do not occur. Moreover, given the various approaches to nationality determination and various ways of interpreting and applying laws, States are very often unaware of the ramifications on an international level of their own national approach, the lack of harmonisation *between* laws leading to gaps and to conflicts. Hence, avoidance of statelessness nationally does not always mean statelessness will be avoided globally. What can be done at the national level to promote the right for all to a nationality?

The 'genuine and effective link' or appropriate connection between an individual and a State is a valuable tool in ascertaining which nationality is the most appropriate one to ascribe an individual. State practice suggests that an effective link to a State might include factors such birth on a State's territory, descent from nationals, marriage to a national, or habitual and lawful residence in the State. While not limited to such factors, place of birth, descent, residence and marriage are fairly straightforward factual elements, easier to identify and apply in an objective and non-discriminatory

manner than are some of the more subtle signs of attachment which might, still, be used as supplementary means of determining ties. Moreover, *jus soli*, *jus sanguinis*, and long-term residence are each well-established and globally practised principles upon which nationality is legitimately granted *ex lege* or through naturalisation. The problem comes in that they are not applied in the same way by all States, nor are they applied equally to individuals within a State. Thus, while *all* the factors of an effective link or connection are important, a good starting point for developing some uniformity in the laws and their application would be with reference to the more obvious factors of birth, descent, and residence. If considered as *primary* elements of a link between an individual and a State or States, positive application of the right to a nationality would be possible based on such factors.

Why does harmonisation of legal systems matter? The emergence of conflicts involving ethnic groups, numerous sudden cases of State succession, and increased displacement have brought the nationality issue to the foreground. Statelessness and the inability to acquire an effective nationality have, in recent years, received greater attention from the international community as their potential as a source of regional tension and of involuntary displacement have come to be more widely recognised. The General Assembly of the United Nations and the Executive Committee of the United Nations High Commissioner for Refugees have respectively adopted resolutions and conclusions stressing the importance of the principles embodied in international instruments, and the need for States to adopt measures to avoid statelessness. The United Nations International Law Commission has undertaken work on nationality attribution following a succession of States.<sup>4</sup> Efforts have also been undertaken at the regional level by the Organization of American States and the Council of Europe, the latter having opened for signature in November of 1997 the European Convention on Nationality.<sup>5</sup> The preamble to the 1997 European Convention indicates the effort is being made to find a balance between the legitimate interests of States and of individuals in the area of nationality. Generally, and certainly so in the case of statelessness, it is not only in the interest of individuals to acquire and retain an effective nationality. The avoidance of statelessness is wholly in the interest of *States* to reduce conflicts which arise between States in the field of nationality. Hence, it might be said that in efforts to avoid and reduce cases of statelessness, a balance must be sought between the legitimate interest of one relevant State as opposed to the legitimate interests of another relevant State.

Additionally, it should be recalled that statelessness is not merely a legal problem, nor is it merely a political problem. Statelessness is a human problem. Failure to acquire status under the law can negatively impact many important elements of life, including the right to vote, to own property, to have health care, to send one's children to school, to work, and to travel to and from one's country of residence. Many complications arise for those who have no nationality or whose nationality status is unclear, including such problems as indefinite detention in a foreign State when that State cannot determine the

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<sup>4</sup> See Mikulka, Václav, 'Third Report on Nationality in Relation to the Succession of States', A/CN.4/480, 27 February 1997, 'Report of the International Law Commission on the work of its forty-ninth session', 12 May - 18 July 1997, United Nations General Assembly Official Records, A/52/10, United Nations New York, 1997, and the 'Draft Articles on Nationality of Natural Persons in Relation to the Succession of States', A/CN.4/L.573.

<sup>5</sup> The European Convention on Nationality, adopted by the Council of Europe's Committee of Ministers in May of 1997, was opened for signature by member States of the Council of Europe and non-member States which participated in its elaboration on 6 November 1997.

individual's citizenship for purposes of expulsion and release on the territory is not authorized.<sup>6</sup> In this regard, it is important to bring to bear in analysis of the problem not only the legal aspects, rules, and developments, but also the human issues and realities they are intended to address.

The 1961 Convention on the Reduction of Statelessness<sup>7</sup> was drafted by the United Nations International Law Commission in an effort to address the problem of statelessness and to provide an international reference point for resolution of cases. The 1997 European Convention on Nationality, while dealing with many aspects of nationality, enunciates as a core principle and backdrop to all articles the avoidance and reduction of statelessness. Both instruments provide a legal framework for the application of positive attribution of nationality, avoiding statelessness largely through recognition of a genuine and effective link or connection between the individual and the State.

The United Nations High Commissioner for Refugees, UNHCR, has been designated under Article 11 of the 1961 Convention to play a mediating role for individuals and States seeking to resolve nationality issues. UNHCR has also been designated by the United Nations General Assembly with, *inter alia*, the function of providing technical and advisory services on nationality legislation and practice to States globally with a view toward reducing cases of statelessness. UNHCR participated with the International Law Commission in the drafting of the 1961 Convention, as it did in recent years toward the promulgation of the 'Draft Articles on Nationality of Natural Persons in Relation to the Succession of States' which will be before the UN General Assembly for adoption this year. UNHCR was also very pleased to be an active participant of the Working Group on Nationality which drafted the 1997 European Convention on Nationality and the Council of Europe Recommendation on the Avoidance and Reduction of Statelessness. The Office of the UN High Commissioner for Refugees, in dealing directly with cases of statelessness globally and in participating closely with partners such as sister UN agencies and the Council of Europe in the drafting of laws to address the problem of statelessness, is well-positioned to observe the effectiveness of existing international laws, as well as to make recommendations concerning future developments. It is in this capacity as UNHCR's specialist on statelessness that I would like to offer some observations on the basic principles and provisions of the 1961 and 1997 Conventions, particularly as regards the avoidance of statelessness through recognition of a link between the individual and the State.<sup>8</sup>

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<sup>6</sup> There are currently an unknown, but high, number of 'forgotten persons', individuals who entered a country to seek asylum and who were rejected, or who perhaps entered illegally, some who were convicted of crimes, others who stayed beyond the duration of their visa or, additionally, those whose identity documentation was lost or stolen. They remain in detention because their country of residence or nationality will not acknowledge them or accept them back and the country of detention will not release them on its territory. It is not uncommon for these forgotten persons to languish in detention for years, turning often to decades.

<sup>7</sup> *United Nations Document A/CONF.9/15*, 1961, entry into force 13 December 1975.

<sup>8</sup> See also the Council of Europe Recommendation on the Avoidance and Reduction of Statelessness and Draft Explanatory Memorandum, CJ-NA(98)12/CDCJ(98)59. The author provided a working background paper on statelessness issues at the request of the C.o.E. Nationality Secretariat, and participated actively in the drafting of the Recommendation. Although time does not here allow exploration of all instruments relevant to the question of statelessness, it should be borne in mind that the Recommendation, intended as a guideline for States in implementing the 1997 Convention, will play an important role in the avoidance of statelessness.

### **The Right to a Given Nationality in the Avoidance of Statelessness**

Citizenship, or nationality,<sup>9</sup> has been described as man's basic right, as, in fact, the right to have rights.<sup>10</sup> Nationality is not only a right of itself, it is a necessary precursor to the exercise of other rights. Nationality provides the legal connection between an individual and a State which serves as a basis for certain rights for both the individual and the State, including the State's entitlement to grant diplomatic protection.

Article 38 of the Statute of the International Court of Justice cites international conventions (treaties), international custom (State practice), and general principles of law as the primary sources of law. These sources have, as regards nationality, developed over time as new conventions, custom, case law and principles have emerged. The United Nations General Assembly has called upon States to adopt nationality legislation with a view to reducing statelessness, consistent with the fundamental principles of international law pertaining to nationality.<sup>11</sup> Nationality of a State is a primary link between the individual and international law. It is, further, representative of identity, supportable by diplomatic protection, for the individual and for States in responding to individuals. While the extension of rights generally associated with citizenship, such as voting, employment, or ownership of property, may be one means of normalizing the status of non-citizens on a State's territory, under international law there is no replacement for citizenship itself.

As early as 1923, the Permanent Court of International Justice (PCIJ) stated in its *Advisory Opinion on the Tunis and Morocco Nationality Decrees* that, 'The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations'.<sup>12</sup> Nationality, in principle a matter within domestic jurisdiction, was thus governed by rules of international law so far as State discretion might be limited by obligations undertaken towards other States.

This theme was woven into the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. Held under the auspices of the Assembly of the League of Nations and the first international attempt to ensure that all persons have a nationality, the Hague Convention picked up this theme and went further. Article 1 provided that:

"It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality."<sup>13</sup>

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<sup>9</sup> The terms citizenship and nationality are used as synonyms in this paper. As stated in article 2(a) of the 1997 European Convention on Nationality, nationality means "the legal bond between a person and a State and does not indicate the person's ethnic origin". European Convention on Nationality and Explanatory Report, European Treaty Series No. 166, *Council of Europe*, Strasbourg, 1997.

<sup>10</sup> Chief Justice Earl Warren, *Trop v. Dulles*, 1958, quoted in Independent Commission on International Humanitarian Issues, *Winning the Human Race?*, 1988, p.107.

<sup>11</sup> United Nations General Assembly Resolution 50/152, 9 February 1996.

<sup>12</sup> Permanent Court of International Justice, *Advisory Opinion on the Tunis and Morocco Nationality Decrees*, Ser.B, No.4, 1923, p.23.

<sup>13</sup> 179 *League of Nations Treaty Series* 89, 99.

This reference to the three primary sources of international law, later encoded in Article 38 of the Statute of the International Court of Justice and restated in Article 3 of the 1997 European Convention on Nationality, indicates that the State's exercise of its right to determine its citizens should accord with the relevant provisions of international law. International law stipulates against the creation of statelessness. Moreover, and perhaps of more interest as a developing body of law, there are certain instances in which international law stipulates the right to a *given* nationality.

The concept of the genuine and effective link was formally enunciated in the *Nottebohm Case* as a means of defining the nature of nationality, the particular facts of the case relating to opposability vis-à-vis another State. In the words of the International Court of Justice (ICJ):

"According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties."<sup>14</sup>

The Court, in making this assessment, took into consideration the practice of States, jurisprudence, and the general nature of the relationship of nationals to the State of nationality. While the facts of the case were limited in scope, the Court's reasoning provided practitioners with one of few legal perspectives on what could or should serve as an unchallenged basis for nationality. In the *Nottebohm* case the question was one of effective nationality in the context of opposability, yet what if one were to apply the reasoning of the Court in assessment of different facts, for example, in cases of statelessness? What of the many instances in which persons have social, genuine, existing connections with a State but do not have the State's nationality, do not have the legally recognized bond?

In an effort to further develop the law and introduce a positive application of the Court's language, the concept of the genuine and effective link, as extrapolated from the *Nottebohm Case*, has since been moulded and developed into a broader concept in the area of nationality legislation and practice. The broadened concept is based upon principles embodied in State practice, treaties, case law and general principles of law.<sup>15</sup>

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<sup>14</sup> ICJ *Reports*, 1955, p.23.

<sup>15</sup> Examples include the 1997 European Convention on Nationality, the C.o.E. Recommendation on the Avoidance and Reduction of Statelessness stating "access to the nationality of a state should be possible whenever a person has a genuine and effective link with that state, in particular through birth, descent or residence" (art.I.b.), as well as the 'Principles on Citizenship Legislation Concerning the Parties to the Peace Agreement on Bosnia and Herzegovina', adopted by the Expert Meeting on Citizenship Legislation. The latter was held in co-operation with the United Nations High Commissioner for Refugees (UNHCR), the Council of Europe, Office of the High Representative, OSCE, and State party delegates from the five States on the territory of the former Yugoslavia (attached in Annex to Batchelor, Leclerc, Schack, 'Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia', *UNHCR European Series*, Vol.3, No.1, June 1997). All of these instruments refer explicitly to the genuine and effective link and request States to apply this doctrine in specific circumstances. The International Law Commission (ILC) Special Rapporteur on nationality utilized the concept of the genuine and effective link as well in laying the foundation for the ILC's work on nationality in the context of State succession, (see Mikulka, Václav, Special Rapporteur, International Law Commission, 'First Report on State Succession and its Impact on the Nationality of Natural and Legal Persons', A/CN.4/467, 17 April

The expanded elements of the genuine and effective link between the individual and the State, manifested primarily by factors of birth, descent, and residence, can be found in a majority of domestic nationality legislation. Most States do not, however, apply these elements on an equal basis but, rather, indicate a preference for either birth or descent by basing national legislation and practice on either *jus soli* (nationality based upon place of birth) or *jus sanguinis* (nationality based upon descent). Naturalization procedures are generally available for immigrants who remain in the country for a fixed period prior to application and who meet certain criteria. Thus, birth, descent, and long-term residence serve as evidence of either an automatically established link, or of a link acquired over time, between the individual and the State. For purposes of avoiding statelessness, what are the elements of a genuine and effective link, or appropriate connection, underlying the provisions of the 1961 Convention on the Reduction of Statelessness and the 1997 European Convention on Nationality?<sup>16</sup>

#### i. *General Principles*

Article 4 of the 1997 European Convention on Nationality outlines as basic principles the right to a nationality for all, the avoidance of statelessness, the prohibition against arbitrary deprivation of nationality, and the preservation of nationality in marriage or the dissolution of marriage. The non-discrimination clause, also contained in Chapter II on general principles, was the subject of lengthy discussions, a balance being sought in distinguishing between ‘positive’ discrimination for those persons with stronger links to the State in question who might have access to facilitated naturalization procedures, and ‘negative’ discrimination based on grounds of sex, religion, race, colour or national or ethnic origin in the grant of nationality. The language used in article 5 allows for distinctions provided they do not amount to discrimination on any of the enumerated grounds. The non-discrimination clause of the European Convention builds upon article 9 of the 1961 Convention, the latter stipulating against deprivation of nationality on

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1995, ‘Second Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons’, A/CN.4/474, 17 April 1996, and ‘Third Report on Nationality in Relation to the Succession of States’, A/CN.4/480, 27 February 1997). The concept of the genuine and effective link, rephrased by the ILC during its 1997 sessions in the broadened concept of an ‘appropriate connection’, between an individual and a State is one of the pivotal reference points underlying the ‘Draft Articles on Nationality of Natural Persons in Relation to the Succession of States’. See ‘Report of the International Law Commission on the work of its forty-ninth session’, 12 May - 18 July 1997, United Nations General Assembly Official Records, A/52/10, United Nations New York, 1997. In May 1999, following review of comments received by States, the ILC adopted the slightly altered ‘draft Articles on Nationality of Natural Persons in Relation to the Succession of States’, A/CN.4/L.573, 27 May 1999, hereinafter, ILC ‘Draft Articles’. A final version of the ILC ‘Draft Articles’ in the form of a declaration is expected to be presented to the United Nations General Assembly in 1999 for adoption.

<sup>16</sup> An important reference tool for contemporary law and practice relating to nationality, the Convention is relevant not only within the Council of Europe member and observer States participating in its formulation, but also for analysis of problems relating to nationality for individuals who originate from these States and those who are granted lawful residence in these States.

racial, ethnic, religious or political grounds.<sup>17</sup> Reservations may not be made to Chapter II of the 1997 Convention containing basic principles.<sup>18</sup>

The 1961 does not list a set of principles, but the underlying principles can nonetheless be surmised from the articles and from the object and purpose of the Convention. The purpose of the instrument is to reduce and avoid cases of statelessness. In doing this, the right to a nationality is recognized and promoted. Procedural guarantees are included in article 8(4) to guard against arbitrary deprivation of nationality and the basic principle is stated in article 8(1) that a person should not be deprived of nationality if such deprivation would render the person stateless. Article 9 stipulates against deprivation of nationality of any person or group of persons on racial, ethnic, religious or political grounds. Changes in civil status such as marriage, dissolution of marriage, legitimation, recognition or adoption are all specifically conditioned upon the avoidance of statelessness (articles 5 and 6). Reservation may not be made to any of the substantive provisions of the 1961 Convention.

The principle of family unity, although not specified in either instrument as such, is nonetheless an important underlying concept in both instruments. In addition to acquisition of nationality based on descent, facilitated acquisition of nationality is provided for in the 1997 Convention in instances of adoption and recognition, marriage, children born to nationals overseas, and allowance of dual nationality in instances where the parents hold different nationalities. The balance is drawn where statelessness would otherwise be created or discrimination would result (see articles 4(d) and 7). The 1961 Convention strikes a similar balance in striving for family unity and providing for the avoidance of statelessness.<sup>19</sup>

## ii. *Links entitling acquisition of nationality*

The 1961 Convention on the Reduction of Statelessness bases the right to a nationality on ties implicitly held with the State in which one is born, or in the State in which a parent held citizenship at the time of one's birth. This right is necessarily contingent on the fact that one would otherwise be stateless, the purpose of the Convention being the avoidance and reduction of cases of statelessness. Birth on a State's territory and

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<sup>17</sup> Article 15 of the ILC 'Draft Articles' provides: "States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground". Of particular interest is article 16 prohibiting arbitrary deprivation of the nationality of the predecessor State *or* arbitrary deprivation of the right to *acquire* the nationality of the successor State, a step forward in promoting the positive right to a nationality for the individual verses the less specific obligation upon States to avoid statelessness. Article 16 also stipulates against arbitrary deprivation of the right of option.

<sup>18</sup> See, in particular, articles 4(b), 6(2), 7(3), 8, and 18 of the 1997 European Convention on Nationality for an indication of the importance placed on avoidance of statelessness. Article 4 of the ILC "Draft Articles" provides that States concerned are to 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 the succession. However, those stateless before the succession will not acquire a right to a nationality by virtue of the succession, and the avoidance of statelessness here is more a question of the 'transfer' of rights and identity parallel to the transfer of territory, than recognition of a new right. This is the case even in instances where the stateless persons may in fact have had an appropriate connection with the former State but never have been granted its nationality.

<sup>19</sup> See article 12 of the ILC 'Draft Articles' providing "Where the acquisition or loss of nationality in relation to the succession of States would impair the unity of a family, States concerned shall take all appropriate measures to allow that family to remain together or to be reunited".

descent from a State's nationals, under the terms of the 1961 Convention, are evidence of a link between the individual and the State upon which it is legally sound to grant nationality in an effort to avoid the creation of statelessness. Foundlings have an automatic entitlement to the nationality of the country in which they are found, the Convention stipulating that the principles of *jus soli* and of *jus sanguinis* are both considered relevant rationale for resolving such cases (articles 1 - 4).

The 1997 European Convention on Nationality builds off of the approach adopted in the 1961 Convention on the Reduction of Statelessness. Article 6 of the European Convention provides for automatic acquisition of a Contracting State's nationality for children "one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party".<sup>20</sup> Foundlings and children born on the State's territory who do not acquire at birth another nationality are also to be granted the nationality of the State Party.<sup>21</sup> Thus, the principles of *jus sanguinis* and of *jus soli* are reflected in the 1997 European Convention.<sup>22</sup>

The European Convention takes, moreover, a significant step forward in nationality legislation and practice. Article 6(3) states:

"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>23</sup>

Thus, habitual residence is formally recognized as a sound basis for the grant of nationality and may be said to compose one of the elements of a link between an individual and a State. The individual will have the *right* to apply for citizenship after a maximum period of 10 years of residence. While fulfillment of certain criteria may still be required, the habitual residence in itself constitutes a sufficient basis upon which to ensure the individual is allowed to *try* to naturalize. This period of time will logically be less for stateless persons and refugees, as article 6(4)(g) recommends that such individuals should have access to facilitated naturalization procedures.

Access to nationality for persons lawfully and habitually resident is not a new concept. Both the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons recommend that States facilitate the assimilation and naturalization of refugees and stateless persons. In particular, States are requested to make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.<sup>24</sup> The 1997 European Convention adds a new element to these existing recommendations by specifying a

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<sup>20</sup> While children born abroad may be subject to variations on this acquisition (article 6(1)(a)), any initial differences in treatment (failure to acquire the nationality *ex lege* for example) could later be done away with through facilitated acquisition of nationality by descent (article 6(4)(b)), above note 4.

<sup>21</sup> See articles 6(1)(b) and 6(2), above note 4.

<sup>22</sup> See also article 13 of the ILC 'Draft Articles' which provides that a child born after the date of succession, who has not acquired any nationality, "has the right to acquire the nationality of the State concerned on whose territory that child was born", *jus soli* thereby resolving cases in which nationality by descent has not been acquired. Prior habitual residence, tempered by principles of, for example, family unity, will resolve the nationality of children born prior to the date of succession.

<sup>23</sup> Article 6(3), above note 4.

<sup>24</sup> *UNTS* 2545, Vol.189, p.137 article 34 and *UNTS* 5158, Vol.360, p.117, article 32.



timeframe of ten years for the average applicant. Facilitated access to nationality for stateless persons would imply a reduction in the number of years of residence required. The 1997 Convention firmly establishes lawful and habitual residence as a legitimate means of granting nationality generally and, therefore, of looking beyond *jus soli* and *jus sanguinis* in determining the link an individual has with a State which would support the grant of nationality. Family ties, including marriage to a national, adoption, and the naturalization of a parent, are an additional basis upon which acquisition of nationality is facilitated under the 1997 Convention. In other words, in addition to the links one is born with, there may be links one acquires over time.

### iii. *Nationality in the Context of State Succession*

Chapter VI of the 1997 European Convention contains provisions concerning State succession. In the case of State succession, habitual residence and the genuine and effective link are primary factors which the State should take into consideration in determining nationality attribution. The will of the person concerned should also be taken into account by the State, giving the individual the opportunity to indicate expressly which nationality is desired. States are encouraged, in article 19, to promote the conclusion of treaties which “shall respect the principles and rules” contained and referred to in the chapter, including a non-discriminatory application of the genuine and effective link, habitual residence, and the will of the persons concerned, in particular so as to avoid statelessness.<sup>25</sup> These elements are more broadly approached in article 10 of the 1961 Convention which stipulates that in the case of transfer of territory a Contracting State, in the absence of a treaty ensuring that statelessness does not occur, *shall* confer its nationality on persons under that State’s jurisdiction who would otherwise be made stateless.<sup>26</sup>

<sup>25</sup> Also to be taken into account is the territorial origin of the person concerned. It should be noted that territorial origin does not refer to either ethnic or social origin but, rather, to where the person was born, where the parents or grandparents were born or, perhaps, to an internal nationality designation. It is intended to be similar in application, therefore, to the principles of *jus soli* and *jus sanguinis* in determining nationality. Quite important in the case of article 18 is the fact that each of the elements the State is to take into account must be weighed in the balance in a non-discriminatory manner, in particular so as to avoid statelessness.

<sup>26</sup> Article 8 of the ILC ‘Draft Articles’ provides that, subject to consideration of the will of persons concerned as stipulated in article 11, “a successor State does not have the obligation to attribute its nationality to persons concerned *if* they have their habitual residence in another State and *also* have the nationality of that or any other State” (emphasis added). Article 5 indicates a presumption of nationality for persons who have their habitual residence in the territory affected by the succession, the presumption being that they acquire the nationality of the successor State. Part II of the ILC ‘Draft Articles’ contains further provisions stipulating the grant of nationality to habitual residents: see article 20 and following. Article 11(2) requires States concluding treaties to provide for a right of option “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”. Article 11(1) requires States, in general, to “give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned”. Presumably what qualifies someone to acquire nationality is the ‘appropriate connection’ with a State. According to the ILC commentary, the concept of an appropriate connection “should be interpreted in a broader sense than the notion of ‘genuine link’”. In debate in the ILC, some members expressed the view that the genuine and effective link was limited in that its legal context derived from the questions of diplomatic protection at issue in the *Nottebohm Case*. However, this view does not take into account the many later applications of this phrase or the fact that the components of the genuine and effective link derived from State practice and were not enunciated by the Court as new concepts. Cf. the 1997 European Convention on Nationality as a good example of the application of genuine and effective link quite outside the context of diplomatic protection. From a practical perspective, it will be helpful in resolving nationality conflicts

#### iv. *Loss of Nationality*

Article 7(3) of the European Convention allows the State to withdraw its nationality resulting in statelessness *only* in instances of nationality acquired on the basis of fraudulent conduct, false information or concealment of relevant facts directly attributable to the applicant. Article 8 of the 1961 Convention stipulates that a Contracting State should not withdraw nationality if statelessness will result. While the article then introduces certain exceptions to this rule, the criteria for the State in acting upon these exceptions are so narrow (see article 8(3) and (4) and Parts II and III attached in Resolution to the Convention) that it would be exceptional that a State establish a basis for withdrawing nationality creating statelessness. Moreover, article 13 of the 1961 Convention stipulates that the provisions of the instrument shall not be construed as affecting any provisions more conducive to the reduction of statelessness existing or later developed in legislation. Given the developments in human rights law since the drafting of the 1961 Convention, it is arguable that the removal of nationality resulting in statelessness must now be limited strictly to cases of fraudulent conduct, directly attributable to the applicant, which if known would have disqualified the person concerned from the grant of nationality. Article 26 of the 1997 Convention contains a similar provision regarding the development and application of laws with more favourable rights for the individual in the field of nationality. Both instruments must be read, therefore, in the light of other relevant national and international laws which may be more favourable in applying the principle of the avoidance of statelessness. In the event of a discrepancy or lack of clarity, States which are party to the 1961 and the 1997 Conventions would be required to apply whichever conditions are more conducive to the avoidance of statelessness in these instruments or in other relevant laws.

Loss at the initiative of the individual through renunciation of nationality is permitted in article 7 of the 1961 Convention and article 8 of the 1997 Convention, but in both cases is premised upon the previous acquisition, or guarantee of acquisition, of an alternative nationality and may not result in statelessness. The 1997 Convention provides, in article 9, for the re-establishment of a link through recovery of nationality for former nationals who take up lawful and habitual residence on the State's territory.

#### v. *Application of the 1961 and 1997 Conventions*

Procedural guarantees are outlined in Chapter IV of the European Convention and in article 8 of the 1961 Convention, seeking to ensure that decisions will not be arbitrary and will be made in an independent application of the law.<sup>27</sup> Article 11 of the 1961

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if legal terminology is harmonised. The ILC 'Draft Articles', intended to become a non-binding Declaration, deal only with nationality in the context of State succession of persons who had a nationality before the succession. An appropriate connection might arguably exist for all former nationals in relation to all successor States and specific links such as habitual residence, territorial origin, express will of the individual and other 'genuine and effective links' would have to be assessed independently to determine nationality. The term 'appropriate connection' will require full commentary, therefore, to have a specific meaning.

<sup>27</sup> Article 17 of the ILC 'Draft Articles' provides for full procedural guarantees indicating that relevant decisions "shall be issued in writing and shall be open to effective administrative or judicial review". Article 18 places an obligation upon States to consult and negotiate in order to identify problems regarding nationality arising from the succession and to seek solutions.

Convention provides for “a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority”, a function designated to the United Nations High Commissioner for Refugees when the Convention came into force.<sup>28</sup> Review of the implementation of the 1997 European Convention on Nationality, however, is left to the legal system of the State Party, no review being possible through, for example, the European Court of Human Rights under the terms of the Convention.<sup>29</sup>

vi. *Summary observations*

Other sources of law, notably human rights law and laws pertaining to civil status, have a bearing on the interpretation and application of both the 1961 and the 1997 Conventions. Reference can be made to instruments at both the international and the regional levels which play a role in this regard.<sup>30</sup> Developments of recent decades have fundamentally altered the reference points for nationality legislation and practice and are based now on the presumption that everyone has the right to a nationality. Everyone needs a nationality because nationality serves as the basis for legal recognition and for

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<sup>28</sup> See Batchelor, C.A., ‘Stateless Persons: Some Gaps in International Protection’, *IJRL*, Vol.7, No.2 (1995), for background of events surrounding the drafting and adoption of the 1954 Convention relating to the status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness.

<sup>29</sup> Article 11 of the 1961 Convention on the Reduction of Statelessness provides for an agency, a role extended to United Nations High Commissioner for Refugees (UNHCR) when the Convention came into force, to help individuals and States clarify nationality status and to advise on how to avoid the creation of statelessness. Although discussed during the drafting of the 1997 European Convention on Nationality, a supervisory body or mechanism which might extend assistance to both States and individuals regarding the implementation of the Convention has not been provided for. Direct review by the European Court of Human Rights of the application of the 1997 Convention is not possible as the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Convention on Nationality are independent instruments. The current work of the International Law Commission on nationality attribution following a succession of States is expected to result in a Declaration, useful because such an instrument will not require lengthy debate and negotiation to secure States Parties but, once again, unable to provide for a supervisory agency or mechanism to which the State and the individuals concerned might turn for guidance. Moreover, while UNHCR does have the responsibility of assisting States and individuals in avoiding statelessness, neither UNHCR, other international/regional organizations, nor other States can give final pronouncement on the nationality granting State's position as each State alone determines who are its nationals.

Article 23 of the 1997 European Convention on Nationality calls upon States Parties to “co-operate amongst themselves and with other member States” but there is little opportunity for the individual to participate or for actual cases to be brought to a forum designed for resolving them. Formal provision for a review body to guide on interpretation of articles, particularly in the case of a treaty which is intended to address differences between national systems, would have been helpful not only for the individual, but also for the State, and might well have contributed to consistency, clarity, and close cooperation, while facilitating the resolution of conflicts in the attribution of nationality. However, ‘progressive development of legal principles and practice’, encouraged under article 23 of the Convention, continues to be achieved through the Working Party on Nationality. The Working Party drafted the Convention and received a provisionally extended mandate for purposes, *inter alia*, of drafting guidelines on the implementation of the Convention. The first set of guidelines focused on statelessness and was finalized by the CJ-NA in November 1998. See CJ-NA(98)12/CDCJ(98)59.

<sup>30</sup> See, for example, the Universal Declaration of Human Rights, article 15; the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, article 5; the 1957 Convention on the Nationality of Married Women; the 1966 International Covenant on Civil and Political Rights, article 24; the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, article 9; the Convention on the Rights of the Child, articles 2 and 7; the 1969 American Convention on Human Rights, article 20; and the 1990 African Charter on the Rights and Welfare of the Child, article 6 (not yet in force).

exercise of other rights. Nationality should, therefore, be an effective one so as to ensure the exercise of these rights. Statelessness should be avoided as it defeats these goals and may, further, lead to displacement and instability in international relations. One of the best means of avoiding statelessness is to ensure recognition of an individual's established link with a State, based on identifiable factors including place of birth, descent, habitual residence and certain family ties. The international legal framework established under the United Nations, including the 1954 and 1961 Conventions on statelessness,<sup>31</sup> and the framework established within the European setting by way of the 1997 European Convention on Nationality, both provide for the avoidance of statelessness through links of birth, descent, and lawful and habitual residence, recognizing additionally the need to provide for family unity. Everyone has these types of links, often having all of them in a single State. Hence, the avoidance of statelessness should not be difficult to achieve, in theory.

There has been some progress, therefore, in development of a positive approach to granting nationality in certain circumstances, even in cases where statelessness is not a factor. For States which wish to ratify the 1961 and the 1997 Conventions, it is important to note that these instruments are compatible and complimentary. The object and purpose and scope of the 1961 Convention is the reduction of statelessness globally. This instrument continues to be used as a reference point for minimum steps States should take to ensure statelessness is not created. The object and purpose and scope of the 1997 European Convention is both broader, aimed at the harmonization of all nationality law and practice in the European context including issues of statelessness, and narrower as it is particularly relevant for a specific region making harmonization to some degree less difficult to pursue. From a global perspective, both the 1961 and the 1997 Conventions will play an important role in forwarding the international community's goal of the avoidance and reduction of statelessness.

## **Conclusion**

In his 1952 report for the International Law Commission in preparation for the drafting of the international conventions on statelessness, the Special Rapporteur, Manley Hudson, stated that the greatest number of cases of statelessness had been created by collective denationalization on political, racial or religious grounds.<sup>32</sup> He further stated that "Purely formal solutions ... might reduce the number of stateless persons but not the number of unprotected persons. They might lead to a shifting from statelessness *de jure* to statelessness *de facto*."<sup>33</sup>

This analysis of future developments has, largely, proved true not only because of continued instances of denationalization but, additionally, due to a failure ever to acquire

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<sup>31</sup> The ILC 'Draft Articles' will also constitute an important part of the United Nations legal framework developed to deal with issues of nationality, including statelessness. Previously, international law provided that a person could not be arbitrarily deprived of a nationality *already held*. Of particular interest, therefore, in the ILC 'Draft Articles' is article 16 prohibiting arbitrary deprivation of the nationality of the predecessor State *or* arbitrary deprivation of the right to *acquire* the nationality of the successor State, a step forward in promoting the positive right to a nationality for the individual verses the less specific obligation upon States to avoid statelessness. Article 16 also stipulates against arbitrary deprivation of the right of option.

<sup>32</sup> Hudson, Manley O., *Report on Nationality, Including Statelessness*, International Law Commission 4th session: UN doc. A/CN.4/50, 21 February 1952, p.49.

<sup>33</sup> *Ibid.*, p.49.

the nationality of the State with which the individual is most closely connected in daily life. If reference is made, however, to an effective link or connection, in most cases it is not difficult to identify one or two States which would be the most logical candidates to ensure the right to a nationality is an effective right. This was, in essence, what Hudson proposed when, studying the question as Special Rapporteur for the International Law Commission, he observed that any attempt to eliminate statelessness would only be fruitful if it resulted in:

“[N]ot only...the attribution of a nationality to individuals, but also an improvement of their status. As a rule, such an improvement will be achieved only if the nationality of the individual is the nationality of that State with which he is, in fact, most closely connected, his ‘effective nationality’, if it ensures for the national the enjoyment of those rights which are attributed to nationality under international law, and the enjoyment of that status which results from nationality under municipal law.”<sup>34</sup>

Hudson went on to say that, in his view, the principle he coined as ‘*jus connectionis*’, or right of attachment, was in this regard superior to those of *jus soli* or *jus sanguinis*, for it advocates the nationality of the State to which the individual is proved to be most closely attached in his or her conditions in life.<sup>35</sup>

This is, in fact, an argument for a more balanced application of the genuine and effective link or appropriate connection going beyond the purely formal application of either *jus soli* or *jus sanguinis*. This concept, although not stated in these words, is reflected in the 1997 European Convention on Nationality. The 1997 Convention has not only *jus sanguinis* and *jus soli* provisions, it also provides for a maximum period of ten years of residence after which the State of residence must allow applications for naturalization. Place of habitual residence, moreover, has taken a prominent position in Chapter VI of the European Convention concerning nationality attribution following State succession, as it does in article 10 of the 1961 Convention stipulating that the State grant nationality to persons under its jurisdiction who would otherwise be made stateless by a transfer of territory.<sup>36</sup>

Residence is not the only element of an established link which plays a greater role. The concept of an effective connection with a State includes, for example, recognition of the tie a child has with its mother and with the mother’s nationality. Similar considerations of strong and relevant ties are also made in the context of marriage, adoption, and other family relations. Proactive application by States of an effective link an individual has with the State will serve, largely, to side-step the existing legal vacuum in addressing cases of *de facto* statelessness. Rather than placing the burden on the individual to

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Efforts toward a more balanced application may also be found in the ILC’s ‘Draft Articles’ which seek to base the grant of nationality on habitual residence and the appropriate connection, a broadened concept of the genuine and effective link, and stipulate that States should ensure statelessness is not created for persons under their jurisdiction as a result of the succession. Moreover, the arbitrary deprivation of the right of option *and* the arbitrary deprivation of the right to acquire the nationality of the successor State for persons with an entitlement in relation to the succession are also prohibited. This goes beyond the obligation to avoid statelessness and creates, in conjunction with the other draft articles concerning habitual residence, family unity, and appropriate connections, an obligation for the State toward persons with the specified links.

establish a negative, to prove that he or she is *de jure* stateless, emphasis can be placed on the positive right to a nationality by establishing *which* nationality the individual has a right to.<sup>37</sup>

Any successful effort in this regard will require a forum for discussions and negotiations between States, with the opportunity for individuals and concerned international agencies to provide information on actual problems and cases. Without such dialogue and openness, States may continue to make laudable efforts individually and at the regional level, but fail nonetheless in addressing the core philosophical differences in the approach to law. The risk will be the development of technically correct laws which miss the object and purpose of international legal principles, legal principles drafted so as to provide for the right to a nationality for the individual while recognizing the sovereign rights and concerns of States. The approach needs necessarily to be flexible, incorporating not only the acknowledged legal systems of *jus soli* and *jus sanguinis*, but also additional relevant factors which can resolve problems created between States through narrow adherence to place of birth or descent. The tools for this proactive application of the law exist already in nationality law itself, in legal constructs such as the genuine and effective link or appropriate connection or, as Hudson said, the 'right of attachment'. A balance of the interests of individuals in relation to States, as well as of conflicting interests between States themselves, is in the interest of the international community to pursue.

Stateless persons have been described as a kind of flotsam, as anomalies, "nationality still being the principal link between the individual and the Law of Nations".<sup>38</sup> The relevance of nationality has not diminished in the years since my predecessor at the UNHCR made this observation.<sup>39</sup> The problem of statelessness is not only a legal problem resulting in the inability to exercise rights, it is also a problem of identity. The right to a nationality entails more than a unilateral obligation on a State to avoid the creation of statelessness under its own legislation without regard to the international consequences of the application of this legislation. The right to a nationality is, or should be, based on a recognition of the link, or bond, established between an individual and a State recognized in full under the law. Positive steps by all States can ensure the integration and implementation of these concepts as vehicles to promote a balanced recognition of the interests of individuals, of States, and of the international community as a whole.

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<sup>37</sup> See Batchelor, C.A., 'Statelessness and the Problem of Resolving Nationality Status', *IJRL*, Vol.10, No.1/2 (1998) for a discussion of the problem of defining statelessness and its relevance in resolving cases.

<sup>38</sup> Weis, P., 'The United Nations Convention on the Reduction of Statelessness, 1961', 11 *ICLQ* 1073, 1962

<sup>39</sup> See Batchelor, C.A., 'UNHCR and Issues Related To Nationality', *Refugee Survey Quarterly*, Vol.14, No.3 (1995) for an overview of the underlying causes of statelessness.

## MISUSE OF NATIONALITY LAWS

### Report by

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1. In November 1998 I was asked by the Council of Europe to draw up a report for consideration by its Committee of Experts on Nationality (CJ-NA) on the misuse of nationality laws. The report which I prepared drew on instances of misuse recorded by some Member States, and this paper for the 1st European Conference on Nationality is based on that report. The views expressed in this paper are mine and not necessarily those of the Council of Europe, Member States, the Government of the United Kingdom or its Immigration and Nationality Directorate.
2. This paper deals, in the main, with the misuse or abuse of nationality law, by individuals. However, in considering this question, it is important to stress that the overwhelming majority of applicants for citizenship, or those people who want to establish their citizenship status, do so legally. However, because many rights and privileges and benefits flow from a particular nationality status, some people, a tiny minority, who do not qualify for citizenship try to exploit the laws to gain access to those rights and benefits. In seeking to guard against this potential exploitation a proper balance needs to be struck between the interests of the State and those of the individual. States should not require such absolute evidence from applicants that would deter the ordinary, honest, applicants from seeking citizenship or place unnecessary administrative obstacles in their way.
3. In general, there must be a presumption that democratic countries which subscribe to the European Convention on Human Rights would not misuse their nationality laws to deny individuals the citizenship of those countries for improper reasons. But occasionally States do enact legislation which is contrary to principles in international treaties and instruments. Article 3 of the European Convention on Nationality re-states the principle first enunciated in Article 1 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws, that each State shall determine under its own law who are its nationals. But the two Conventions limit this acceptance by going on to say that this law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality. This recognises that occasionally a State might enact nationality legislation whose provisions are not generally acceptable to other States. One such instance would be where an individual has acquired the nationality of a State without there being a genuine and effective link between the two, and another would be where an individual has lost the nationality of a State without possessing or acquiring the nationality of another, thereby becoming stateless.

## **SITUATIONS IN WHICH THE LEGISLATION MAY FAVOUR THE MISUSE OF NATIONALITY LAWS**

### **A. Acquisition of nationality**

4. "Nationality" is defined in Article 2 of the European Convention on Nationality as being "the legal bond between a person and a State". In the famous Nottebohm Case (ICJ Reports, 1955, p23) it was described as being "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred.... is in fact more closely connected with the population of the State conferring nationality than with that of any other State." It is up to States to decide what constitutes a "genuine connection". Most base their laws on the acquisition of nationality at birth on the principle of *jus sanguinis* (acquisition by descent from a parent who at the time of the birth possessed the country's nationality) or *jus soli* (acquisition by birth in the territory of the State) or a combination of the two. Voluntary acquisition of a country's nationality after birth is generally based on physical presence in the country or the establishment of an appropriate connection, such as marriage, in cases of naturalisation, or family connection, such as those established through marriage or adoption, in the cases of registration (or declaration or option or petit-naturalisation). There are some instances where the acquisition of a country's nationality cannot be said to meet any of these principles.

5. With international travel becoming easier and cheaper and economic and other pressures growing on individuals, intra- and inter-continental migration has increased over the past 30 years or so. This has led to States restricting immigration to their territory from those not having close connections with it, or not having special skills justifying their entry for employment. However, some countries, primarily those in the European Union and the European Economic Area, have reduced immigration controls on citizens of other member States, thus creating certain Treaty Rights to freedom of movement and employment, amongst others. Citizenship of these member States has therefore become attractive to those from outside who wish to have the same rights.

6. A recent phenomenon, one that emerged over the last thirty years or so, concerned those States which granted their nationality on the basis of the *jus soli* principle and was the growth of the so-called "birth tourism". Pregnant women entered the territory of a State in order to give birth to their child and thereby enabled the child to acquire the nationality of that State. Having a child born in the State could also constitute a sufficiently strong link to enable the mother to remain in the territory when she would otherwise not have qualified to do so, and perhaps later acquire the nationality of that State along with other members of the family.

### **B. Renunciation of nationality**

7. The situation which most often allows the misuse of nationality laws is where States permit their nationals to renounce their citizenship without first acquiring the nationality of another country or the guarantee of acquisition. Most cases of this nature involve individuals who are living outside the territory of the State concerned, sometimes only temporarily. Renunciation of their citizenship makes them stateless



persons if they do not possess another nationality and can create problems for the State in which they are residing, especially if they do not have permanent residence or settled status under that State's immigration laws. Any renunciation which took place without the individual possessing either another nationality or the promise of acquiring one would not be consistent with the relevant principles of customary international law, as well as with international treaties and the principles of law generally recognised with regard to nationality. (See in particular the Council of Europe 1997 Convention on Nationality, and the United Nations 1961 Convention on the reduction of statelessness.) Article 4 of The European Convention on Nationality states that the rules on nationality shall be based on the principle *inter alia* that statelessness shall be avoided, whilst Article 8 states that each State party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless. Article 7 of the 1961 Convention on the reduction of Statelessness provides that if the law of a contracting State permits renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality.

### C. **Deprivation**

8. There have been occasions, when during political, religious and ethnic conflicts, groups of individuals have been deprived of their citizenship because of their race, national or ethnic origin, religion or political beliefs. Whether deprivation is *de jure* or *de facto*, both are unacceptable and such action would be a misuse of nationality law by the State concerned and should not be recognised by other States. Discrimination is covered in Article 14 of the European Convention on Human Rights but, so far as nationality law is concerned, Article 5 of the European Convention on Nationality specifically provides that the rules of a State party on nationality "shall not contain distinctions or include any practise which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin". Occasionally an individual might be deprived of his nationality for political reasons but Article 4 of the European Convention on Nationality provides that "no one shall be arbitrarily deprived of his or her nationality". To do so contravenes the Convention and is a misuse of nationality law.

### D. **Conflict of nationality laws**

9. Finally, possible misuse can occur when a State or an individual takes advantage of the conflict of nationality laws which might apply to an individual in order to achieve a position which would not otherwise be allowed. For example, take an individual living in State A who was born a national of State B, a single nationality country, but who has voluntarily acquired the nationality of State C. In order not to be deported from State A, the individual could inform the authorities of State B that he had become a national of State C thereby automatically losing the citizenship of State B. Before doing so though he could renounce his citizenship of State C who would allow him to do so because he was, at that time, still a national of State B. He would thus render himself potentially stateless.

### **MISUSE BY INDIVIDUALS**

10. The main reason why individuals misuse or abuse nationality law is to evade or circumvent immigration controls. Most countries severely restrict admission to their

territory by non-nationals of that country, except for those coming for genuinely temporary purposes, or those with whom they are in agreement regarding inter-country travel (such as the EU and the EEA, the British/Irish Common Travel Area, and the arrangements which existed in the Benelux countries or now exist in the Nordic Union). In the context of this report immigration control refers not only to entry into a country, but also the rules governing settlement, the freedom from deportation and allied legislation such as that concerning extradition. But the misuse or abuse of nationality laws is not confined solely to the evasion of immigration control. In some countries the right to live in certain areas, the right to own property, hold public office or participate in the sale of State assets, is confined to nationals of the State, thereby increasing the incentive for those who do not qualify for citizenship in their own right to seek to acquire it by other means. The paragraphs below seek to examine some of the more frequently encountered instances of misuse or abuse.

A. **Marriage**

(i) **Marriages of convenience**

11. European States have different attitudes regarding the legal consequences of marriage on the nationality status of individuals. Some States give foreign spouses the right to acquire their nationality without the exercise of discretion by the state through an automatic entitlement to registration, while other States give foreign spouses the right to apply for facilitated naturalisation. Both of these approaches are in accordance with Article 6.4.a. of the European Convention on Nationality which requires States Parties to facilitate the acquisition of nationality for foreign spouses of their nationals. Marriage should only be used as a basis to facilitate the acquisition of the nationality of the other spouse if the marriage has not broken down by when the acquisition is due to take place. There are many instances of couples going through a marriage ceremony solely in order to confer this eligibility upon the non-national. Some times this is done for money, on some occasions for other reasons, and in such cases the couple rarely live together as husband and wife, and separate and divorce once nationality has been granted to the spouse. These are commonly known as "sham" marriages, or marriages of convenience.

12. Such marriages also occur where citizenship, or the right to apply, is not conferred immediately. Usually the marriage takes place primarily to assist the individual to circumvent immigration controls because they do not otherwise qualify to enter or remain in the country. After a certain length of time the individual can apply for either the acquisition of citizenship through entitlement or for facilitated naturalisation. For example, in France the spouse has to wait for a year before signing the declaration of acquisition of French nationality, whereas in the United Kingdom a spouse has to wait for three years, compared to the normal five, before they can apply for naturalisation. In both cases the fact that the marriage has not been dissolved gives the spouse the opportunity to acquire, or to apply for, citizenship on terms more favourable than those which apply to others, even though a genuine conjugal relationship has never existed between the couple.

13. The fact that marriage to a national allows a foreigner to circumvent a country's immigration control or acquire its citizenship has encouraged some individuals to set up rackets in which they will either marry, or arrange for someone else to marry, a foreigner for money without any intention of having a normal married life, to assist them in such

an aim. However, the time it might take for the spouse to achieve permanent residence or settled status or acquire citizenship, and thus allow the dissolution of the marriage, can restrict the opportunity for such racketeers to contract lawful marriages, so many contract bigamous or polygamous marriages. These marriages by a national may render them unlawful, but they may not come to the attention of the nationality authorities until some time after citizenship has been granted to the supposed spouse, and when it did a view would need to be taken on whether the citizenship was acquired by means of fraudulent conduct which justified the loss of nationality at the initiative of the State.

ii) Polygamous marriages and "marriages reconnitifs"

14. Not all polygamous or potentially polygamous marriages are unlawful. Islamic law, and therefore the laws of some Islamic States, allows polygamous marriages to be contracted. Whether a polygamous marriage contracted by a national of one of these States in another State is lawful is something which would depend on the domicile of the contracting parties and the laws of the country in which the marriage took place. Where the marriage is genuine it is unlikely that the existence of a previous on-going marriage would be concealed either from the spouse or the immigration or nationality authorities of the country of the spouse. However, in some cases persons applying for citizenship sometime conceal the existence of the previous marriage, and the previous spouse, until after citizenship has been granted, and then try to pass on their newly acquired nationality to their first spouse. Or the first spouse is divorced by local or national custom, a second marriage is entered into, and then the second (or subsequent) marriage is dissolved and the new citizen re-marries the first spouse and tries to pass on citizenship.

15. An example of this sort of problem is the so-called "marriage reconnitif" which can facilitate certain types of fraud. This type of marriage, which is allowed by the legislation of certain Islamic countries, aims at officially recognising a precedent marriage through a declaration to the competent authorities by, for instance, twelve witnesses. "Marriage reconnitif", which may be declared to French authorities, may have therefore retroactive effects. Foreigners may be naturalised as single persons and afterwards declare to the French authorities that they were already married when the decision concerning the attribution of nationality was taken. "Marriage reconnitifs" are therefore a way to hide the existence of relatives during the naturalisation procedure. Indeed, if this situation was known, according to the practice and the case law, the foreigner may not have been naturalised in the first place.

16. The trouble with marriages of convenience and polygamous, or potentially polygamous, marriages is that often they are accepted reluctantly by the immigration authorities even where there are considerable doubts about the genuineness of the marriage. That makes it difficult for the nationality authorities, where these are different, to question their validity or genuineness, especially in those cases where citizenship derives automatically from being married to a national. These problems also appear where the naturalisation of a spouse is facilitated under a country's laws, but at least in those cases the grant of citizenship is often discretionary and not automatic, and the time between the marriage ceremony and the application being made allows time for the genuineness of the marriage to be called into doubt.

iii) Registered partnerships

17. A new situation which could give rise to the misuse of nationality laws is the emergence of new forms of cohabitation such as "registered partnerships" which are being recognised in certain States. Some might argue that marriage and other forms of cohabitation should have the same legal consequences for the individuals, whilst others might say that this would merely add to the problems. Certain European countries are understood to be undertaking legislative reforms in relation to these new forms of cohabitation. On 15 and 16 March 1999, the Council of Europe and the Ministry of Justice of the Netherlands, in co-operation with the Hague Conference on Private International Law and the International Commission on Civil Status, held the 5th European Conference on Family Law on the topic "Civil law aspects of emerging forms of registered partnerships (legally regulated forms of non-marital cohabitation and registered partnerships)". The outcome of the Conference was considered by the Committee of Experts on Family Law (CJ-FA) at its meeting immediately following the Conference. The CJ-FA noted that the Conference had recognised that the question of the extent to which States chose to regulate non-marital co-habitation, including the question of registered partnerships, depended very much upon their different customs and traditions. The Conference noted that a need is felt in many States to regulate in some way non-marital co-habitation and emerging forms of registered partnerships. The Conference also recognised that, in States where there were laws concerning registered partnerships, these laws often contained not only a number of common features but also important differences. In addition the Conference noted that, even those States which may not wish to regulate non-marital cohabitation further or to introduce registered partnerships could, in any event, wish to consider possible means to deal with problems arising out of relationships and how to deal with them where there is a foreign element (eg partnerships which are registered abroad). The CJ-FA noted that, as a follow-up to the Conference, it was proposed amongst other things that the CJ-NA should take account of the questions discussed during the Conference when dealing with the misuse of nationality law.

B. Adoption

18. Many countries restrict the admission of dependents of foreigners settled on their territory to the spouses, minor children and elderly parents of such permanent residents. Families sometimes therefore try to arrange the immigration of their relatives' children by trying to pass off their nieces and nephews as their own children. Most immigration authorities are aware of this, especially where the personal documentation in the child's country of origin is generally inadequate, and have procedures to combat fraud and misrepresentation of this type. A more difficult area is where the family legally adopts a relative's child in order to facilitate the child's admission to the country of migration but where there has been no genuine transfer of parental responsibility. Cases where the child assumes the adoptive parents' nationality upon the adoption order being made are even more difficult to counter, especially when the adoption order has been made by a court, for the presumption must be that the court has enquired into such matters and satisfied itself to the genuineness of the adoption.

19. Certain problems may arise from the distinction which exists in some countries between simple and full adoption. In France, according to the new nationality law of 1998, children adopted by French nationals abroad (by a simple adoption procedure)

may acquire French nationality by a simple declaration. This could give rise to misuse of nationality laws, even though the foreign judgement has to be subject to an *exequatur* procedure. However, the procedures for full adoption and recognition of foreign adoptions are very detailed in most States, and these procedures are usually generally sufficient to ensure that misuse does not take place.

### C. Recognition

20. In some countries it is not necessary for the putative father of a child to go through the judicial process of adoption in order to pass on his nationality to the child. The administrative process of recognising the child as his own is sufficient to establish his parenthood. This has led to some men going around foreign countries falsely recognising children as their own in order to facilitate the children's acquisition of nationality and right to migrate to the supposed father's country. The more simple the recognition procedures are, the more cases of misuse of nationality laws could occur, in particular when a person could easily claim to be the biological father of another person's child. Misuse of nationality laws may therefore arise from the legislation of certain States which allows a person claiming to be the father to recognise a child by a simple declaration, thereby establishing the parenthood relationship and transmitting nationality to the child.

21. The contrary situation to this is where an individual claims to be the parent of a national in order to secure immigration or nationality rights for themselves. For example, French legislation contains specific provisions relating the entry and the stay in France of foreign parents of French children. It is frequent that, following the acquisition of French nationality by the mother, minor children acquire French nationality through a collective effect ("*effet collectif*"). If these (French) children do not have a clearly established relation with the father, any foreigner, who is irregularly on French soil, could recognise such children in order to become their protector, thereby eliminating all the negative consequences of their illegal presence in France.

22. Another variation on this, again exemplified by French law, concerns minors born on the territory. The French Nationality Code of 1973 (which was repealed by the Act of 22 July 1993) allowed foreigners to claim French nationality for their children born in France. When this system of establishing a parenthood relationship with regard to French children disappeared, a number of mothers of children born out of wedlock without possessing a clearly established relation with their fathers, pretended that the nationality laws of their countries (especially those mothers who come from Maghreb countries) allowed the transmission of nationality only to children born in wedlock. Therefore, children born in France out of wedlock had to be considered stateless and acquire *ex lege* French nationality. If these children were recognised by a foreigner (who could also be their biological father), the latter, as a parent of French children, would benefit from the more favourable provisions relating to the entry and stay in France.

### D. Stateless persons

23. Many States, following their obligations under the 1951 Convention relating to the Status of Refugees and the 1954 Convention on the Reduction of Statelessness, facilitate the naturalisation of refugees and stateless persons resident on their territory.

This could encourage some individuals to become stateless in order to avail themselves of these provisions, especially if they would not qualify for a non-facilitated naturalisation. Sometimes this statelessness has been brought about by either the person concerned or the parents of a child making a declaration to that effect and thus voluntarily and actively becoming stateless in order to obtain this advantage. Or the individual concerned could have the nationality of another country confirmed simply by filling in an application for registration or by opting for it, but chooses not to do so in order to benefit from the facilitated naturalisation procedures. Failure to carry out a simple administrative procedure and thereby render oneself stateless in order to be able to apply for naturalisation on more beneficial terms than would otherwise be the case is a misuse of nationality law. These situations should not be confused with the cases of persons who are not able to acquire the nationality of any State, owing to the absence of appropriate provisions in the nationality laws of the State or States concerned or because the individuals have no appropriate connection with any State. Sometimes involuntary statelessness occurs because States, when drafting their legislation, do not accurately foresee how it will apply in all cases.

#### E. **False acquisition of nationality**

24. The above examples of the misuse of nationality laws mainly refer to individuals notionally going through the process of meeting the statutory requirements of the law in order to obtain nationality of another State when they do not have the genuine and effective link which otherwise would be required of them. Another common problem is the fraudulent use of documents in order to establish a *prima facie* entitlement to nationality. These documents might be genuine documents falsely acquired or the personal details on which have been altered, or false or forged documents. In France, for example, cases of fraud most often involve civil status certificates for minors who can benefit from the effect of the acquisition of French nationality by one of the parents (application of the principle of the collective effect - "*effet collectif*"). For the application of the law before 1993, it is sufficient to establish a parenthood relation of minors with their parents who became French, in order for them to become automatically French as well. Fraudulent acts of recognition and establishment of the parenthood relation, which were easy to establish in certain countries, will thereby determine the conditions for the acquisition of French nationality by those minors. Since 1993, the obligation to declare minors, who have to live with the applicant in order to benefit of the so-called "collective effect", has considerably limited the number of cases of fraud. The latter however still exists in the form of false documents concerning divorce or death abroad of one of the spouses. Applicants to French nationality would thereby be able to state that they have lost any relation with their country of origin.

25. The nature of nationality work is such that many of the documents produced are foreign in origin or of considerable age, making it difficult to check their authenticity. Nationality authorities can of course challenge the authenticity of the documents produced but, in general terms, most apply the rule that any document produced by a foreign country is authentic if it is drawn up in accordance with the usual formal requirements of the country in question. Countries can and do request their diplomatic or consular staff to verify the content and legality of all foreign civil-status certificates if there is doubt as to their authenticity, but such work can be time consuming without any conclusive proof one way or the other. Questioning a document merely because of its foreign origin can be discriminatory. Corruption does unfortunately exist in some States,

but the fact that the authenticity of documents emanating from them is always challenged can create diplomatic problems and decisions are therefore often taken by nationality authorities on false or inaccurate documentation. Where the document is supposedly aged, especially those supposedly emanating from a zone of conflict or national disaster or over which there has been a change of sovereignty, checking their authenticity becomes doubly difficult.

26. The problem of false documentation in citizenship applications was examined in some depth by a Swedish Parliamentary Committee, the 1997 citizenship committee, whilst examining the Swedish Citizenship Act (1950 : 382). In Sweden there is a requirement for an applicant to be able to provide confirmation of his identity in order for Swedish citizenship to be granted. This can give rise to difficulties for the nationals of some countries and some individuals from others who resort to fraud in order to meet the requirement. In its interim report published in November 1997 the committee reported its conclusions on the need to require confirmation of identity. It had looked at the problem of documentation in specific countries - Afghanistan, Ethiopia, Iraq, Iran, Somalia, Syria, Vietnam - and for stateless persons and those of unknown nationality. It also looked at the practice in other Nordic countries and the rest of Europe. The committee concluded that it was not reasonable to require absolute confirmation of an individual's identity, even though under Swedish law it is not possible to revoke citizenship which has been granted on the basis of false information about identity. It proposed though that where an applicant is exempt from the requirement to confirm identity, the period of residence for naturalisation purposes should be increased from 5 years to 8. The committee also provided useful guidelines on the assessment of credibility as far as the information provided by the applicant about his or her identity was concerned and an assessment of the risk of increased instances of fraud.

27. Allied to the production of false documentation are those cases where the applicant submits documents to try to create a false picture of his or her situation, or intentionally presents untrue and false data. A common example is where the national of one State living in another approaches his or her national authorities for the issue of a replacement passport on the grounds that the original passport has been lost or stolen. The second passport is then used for travel in and out of the country of residence. If that country has stringent residence requirements for applicants for naturalisation, requiring no more than a specified number of days absence during the qualifying period, then the first passport is produced when the application for naturalisation is submitted. Other examples would include false applications for refugee status or where an individual tries to misrepresent his or her ability to obtain or pass on citizenship of another country.

28. Another variation is where the applicant has assumed a false identity. Sometimes this relates back to the days of immigration where the individual has assumed a false identity in order to pass themselves off as a close relative of a person having settlement in the country in question. In others they have falsely assumed the identity of an actual person to obtain the rights and benefits accruing to that individual because of their long and legal residence abroad.

29. A particular class of nationality case in which fraud is prevalent, or where the nationality authorities are deceived, sometimes legally, concerns the acquisition of the citizenship of countries who do not recognise multiple nationality for their citizens.

Basically, an individual obtains the nationality of such a state through fraudulent representations concerning their nationality of origin. They may pretend that there are insurmountable obstacles on their release from their existing nationality, or they might present a forged or inaccurate release certificate, or they might renounce their existing nationality but recover it immediately following or shortly after acquiring naturalisation. The legislation of some countries allows their nationals or former nationals who have renounced their nationality to resume it if they have had to renounce it in order to acquire or retain another nationality. But upon resumption they do not notify the authorities of the country acquisition of whose nationality has caused the renunciation in the first place. This allows nationals of countries who accept dual or multiple nationality to acquire the citizenship of a country which only accepts the principle of single nationality. Although the nationality law of the latter probably provides for the loss *ex lege* of that nationality upon the individual resuming or acquiring another nationality, in practice the authorities seldom learn of the resumption or acquisition and thus their nationality law, based on the principle of single nationality, is abused by individuals who retain or resume their former nationality. And where countries require individuals to renounce their existing nationality in order to acquire theirs, applicants often advance non-existent "insurmountable obstacles" to renunciation in order to justify not obtaining release from their existing nationality.

F. **Criminal offences committed prior to the acquisition of a nationality**

30. In certain cases, individuals do not declare that they have committed a criminal offence in order that their offence is not held against them when they try to acquire the nationality of a State, in particular when a clean criminal record is a condition for the grant of the nationality of that State.

G. **Possibilities of misuse of nationality laws in the context of State succession**

31. The situation created by State succession allows for the possibility of the misuse of nationality laws. Nationals of one succeeding State resident in the other may try to persuade the authorities of the State in which they reside that they have not retained or acquired the nationality of the other State in order to gain a more beneficial position in acquiring the nationality of the State in which they are residing, or in order to avoid removal to the country of which they are legally a national. Or the State itself refuses to give its nationality to a person on its territory because it argues that the individual is a national of another State. In considering problems of this nature a proper balance needs to be struck between the interests of States and those of individuals in the context of a State succession situation and to invite States which are involved in State succession situations to co-ordinate their legislation and practice relating to nationality, in particular with a view to avoiding statelessness (eg. by concluding bilateral and/or multilateral agreements).

H. **Other possible sources of misuse of nationality laws**

32. New reproductive technologies could be a potential source of the misuse of nationality laws. In particular, in those States which apply the *jus sanguinis* principle, nationality could theoretically be transmitted through genetic material, thus potentially creating new citizens of the country of the donor even though the child had no genuine and effective link with the country of the donor's nationality.



33. Finally, other examples of abuse of nationality laws which have been cited include cases where nationality has been obtained through naturalisation by persons who are members of extremist organisations who have not been refused citizenship by State authorities in order not to reveal the identity of the witnesses who would need to appear in court to testify as to why the individual should not be granted citizenship, or the fact that the security authorities had information about the individual's terrorist activities.

#### **PART IV - REMEDIES**

34. The above paragraphs attempt to set out some of the more common examples of the misuse or abuse of nationality laws. The hard part is to identify remedies to these problems which make it difficult for the law to be used in this way whilst preserving the rights and entitlements of genuine applicants. Much will depend on how States reached the position in their nationality law which they are in today, the size of the perceived problem, and the remedies available to them domestically. For example, many States have enacted the automatic acquisition of citizenship for the wives of their nationals, and later all spouses, as a positive and welcoming measure. Restricting the grant of citizenship to the spouses of nationals could give off the wrong signals and would be a retrograde step so far as genuine applicants are concerned. The paragraphs below try to illustrate some of the remedies which States have adopted or might wish to consider in reducing the misuse or abuse of their laws.

##### **A. Misuse by States**

35. Where States misuse their nationality laws they lay themselves open to consular or diplomatic representations from the country which has to suffer the repercussions of their action. Bearing in mind Article 1 of the 1930 Hague Convention and Article 3 of the European Convention on Nationality, it would be open to States to refuse to accept the effects of another State's action. That could lead them to not accepting the *de jure* loss of citizenship of one of their nationals who had purchased the citizenship of another country with which he did not have a genuine and effective link. Nor do States have to accept that the national of another country who entered their territory on a passport of another State has lost his or her nationality if renunciation has taken place without another nationality being acquired, or if the individual has been deprived of citizenship for unacceptable and discriminating reasons. Individuals who were arbitrarily deprived of their nationality could apply to the European Court of Human Rights for such action to be dismissed as a violation of Articles 3 and 4 of Protocol No.4. Consideration should be given to setting up an international body to settle these disputes between States over the nationality of individuals but it should be the specific responsibility of States to avoid these problems arising out of their legislation as best they can.

##### **B. Marriages of convenience**

36. With marriages of convenience it is much easier to misuse the nationality laws of States which grant foreign spouses the right to acquire their nationality *ex lege* than the laws of those States which only provide for a facilitated naturalisation procedure for foreign spouses. States which restrict multiple nationality also have less problems than others regarding marriages of convenience in order to acquire their nationality.

However, introducing restrictions concerning multiple nationality is not an appropriate solution to fight against the misuse of nationality laws. One remedy concerning marriages of convenience would be to remove the entitlement to citizenship and make the grant discretionary. This happened in the United Kingdom when the British Nationality Act 1981 came into force. It removed the right of wives of British subjects to register as such themselves and required them and the husbands of British citizens to apply for naturalisation, albeit on more favourable terms than those normally required. When enacting such a fundamental change the entitlements of one Act should be carried forward for a period of grace; in the United Kingdom's case it was 5 years. Another remedy would be to require that the marriage must subsist at the time of acquisition of citizenship, there being a legal bond between the couple and a '*vie conjugale*'.

37. An alternative approach would be to make it harder to contract sham marriages. In the United Kingdom, registrars are to be given the power to request evidence of name, age, marital status and nationality from couples seeking to be married. They will be given the power to halt any marriage where they have doubts about its legality and will be under a statutory duty to report to the immigration authorities any suspicious marriage applications. Those wishing to marry will in future have to give 15 days notice of their intentions rather than the current 24 hours. In France, a recent legislation allows civil status officials, who have serious suspicions that the consent of one of the spouses to a marriage was not true or simulated, to bring the case before the Public Prosecutor, who may oppose to the marriage. This decision may be subject to a judicial review. This procedure has to take place within a very short period of time. Any such restrictions like these need to be considered alongside the fundamental human right set out in Article 12 of the European Convention on Human Rights that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. Ensuring that a couple are free to marry each other is one thing : that ensures that the requirements of the national laws are fulfilled. But trying to prevent two parties who are free to marry from marrying solely because their motives in marrying are doubted could be said to be denying them their fundamental human right. Marriages of convenience have to be seen in their proper context. The vast majority of couples who marry do so for age old reasons which have stood the test of time. Some marriages may be convenient, but that does not mean that they are a sham. Any powers which are taken to limit the right to marry should be carefully considered against Article 12 referred to above. Furthermore, controls of this nature could open up new scope for racial or ethnic discrimination. What will trigger the suspicion that a marriage may not be genuine except for the fact that one of the parties is not a national? What criteria will be applied to determine whether the proposed marriage is a "sham"? What evidence will be required to prove that a party is not married already? (How do you prove a negative?) What about cultural differences? These are all matters which need to be taken into account if any new powers are not to be seen as discriminatory.

38. So far as registered partnerships are concerned, as these are a new phenomenon which, at the present time, do not appear to confer nationality or the right to apply for it as the foreign partner, there is little evidence of them being used to evade immigration controls or misuse nationality laws. Discussion about such partnerships has so far focused on such matters as the conditions for entering into such partnerships, the rights and obligations to each other and to others, separation and dissolution and so on. There has been little discussion about the nationality aspects of such partnerships but, if a registered partnership is to become a legally regulated form of cohabitation which is

equivalent to marriage, then consideration needs to be given by those States who are preparing to acknowledge them to the nationality consequences of a registered partnership. Should the foreign partner be entitled to citizenship on exactly the same basis as a foreign spouse? If the answer to that question is in the affirmative, then this will give rise to the possibility of abuse, as is the case with marriage, and adequate safeguards will need to be taken to prevent such misuse.

### C. Adoption

39. The abuse of the adoption system may have been curtailed by the Hague Convention drafted in 1993 by a special commission of the Hague Conference on Private International Law. The Convention seeks to ensure that inter-country adoptions take place only after the best interests of the child have been properly assessed, and after the appropriate authorities in the "receiving State" (ie the country in which the adopters are habitually resident) have indicated that the child will be permitted to enter and remain in the country. Adoptions carried out in accordance with the terms of the Convention will be known as "Convention adoptions" and in each State there will be a "central authority" which will oversee the transfer process. The central authority will have a power of veto over whether the adoption takes place at all, since the Convention does not allow the country of origin to make an adoption order until it has received confirmation that the child will be permitted to enter and remain in his new country. Other safeguards are that States ratifying the Convention will be responsible for ensuring that the standards and procedures in all inter-country adoptions between Convention countries comply with the Convention's principles and that any contracting State may withdraw recognition of adoptions in another contracting State where it is known or suspected that that other State is not fully discharging its Convention obligations. One of the means to fight effectively against the use of adoption procedures to misuse nationality laws would be to sign and ratify existing international legal instruments in the field of adoption such as the Council of Europe 1967 Convention on the adoption of children (ETS 58) and the 1993 Hague Convention on protection of children and co-operation in respect of inter-country adoption. Again, the problem needs to be seen in context. Full adoption procedures are very complex in most States and do not give rise to any significant misuse of nationality laws. Working Party No.2 of the Committee of experts on family law (CJ-FA-GT2) at its 3rd meeting from 11-15 March 1998 considered that "upon recognition of an adoption of a foreign child by one of its nationals, the State concerned should grant *ex lege* its nationality to the adopted child". However, the Working Party recognised that "nationality is a very sensitive and political matter which has important implications in practice" and that therefore the Committee of experts on family law decided not to formulate any recommendations to States on this question.

### D. Recognition

40. The European Convention on Nationality, in Article 6, paragraphs 1 and 4, makes a distinction between children born in and out of wedlock, as well as children born abroad, so far as the acquisition of nationality is concerned. One of the reasons for making this distinction in the Convention was precisely to avoid, as far as possible, situations of misuse of recognition procedures in order to circumvent difficulties presented by adoption procedures.

41. The legal consequences of recognition varies in different States. While in certain States recognised children have the same rights to nationality as children born in wedlock, in other States this is not the case. More stringent evidence regarding paternity should be required before nationality is granted to an illegitimate child. Within marriage, the presumption must be that the husband is the father of any child born within the marriage unless there are strong contrary indications. But outside of marriage better evidence is required to stop the abuses exemplified above. Article 6 of the European Convention on Nationality provides that with respect to children whose parenthood is established by recognition, court order or similar procedures, each State Party may provide that the child acquires its nationality following the procedure determined by its internal law.

E. **Stateless persons**

42. In considering the question of misuse of nationality laws by stateless persons, the problem is a relative one and needs to be considered on a case by case basis. There is a distinction between genuine and malicious cases of statelessness, and States should strike a balance between the interests of the State and the needs and interests of the individual in considering any possible remedies to this problem.

F. **Fraud, false acquisition and presentation of false documents**

43. Article 7ib of the European Convention on Nationality accepts that States might make provision in its internal law for the loss of nationality *ex lege* where it has been acquired by fraudulent conduct, false information or concealment of any relevant fact and the nationality laws of most countries provide for penalties for fraud. But fraud is always difficult to prove. The solution is to take steps, both preventive and punitive, to prevent it from occurring. In Luxembourg, for example, the authorities require very explicit documentation from foreign authorities in order to grant citizenship to those born in the Grand Duchy who do not hold any other foreign nationality. In “the former Yugoslav Republic of Macedonia”, taking into account the possibilities for such abuses, the Nationality Act contains a provision according to which the formal decision for granting nationality can be declared null and void after it had been handed over, if there has been a confirmation that the individual had submitted untrue or false data or had used forged personal identification documents in his/her request for acquiring nationality status by naturalisation. This formal decision is to be declared null and void in terms provided for expiration of a period set by statute for the prosecution of a criminal offence of presenting incorrect, untrue data and usage of forged identification document. Decisions for granting nationality status to minor children that had acquired this status simultaneously with their parents are also to be declared null and void in such cases, according to the provisions set in the Nationality Act. The legislation in other countries should make similar provisions and provide for documents obtained through fraud, false acquisition and the presentation of false documents to be declared null and void.

G. **Criminal Offences**

44. Where States require applicants for their nationality to have a clean criminal record they might wish to bear in mind the procedure adopted in certain States to require applicants to sign declarations to the effect that they had not committed any criminal offence or been convicted of the same during a certain period before applying for

citizenship. If the authorities concerned later discover that an applicant had made a false declaration then their nationality could be said to have been acquired fraudulently and withdrawn. This procedure would cover criminal acts committed prior to the acquisition of a nationality but prosecuted at a later stage, and also to crimes committed abroad.

45. The requirement for a clean criminal record is compatible with European legal standards in this area. Conditions such as these are usual in the legislation of European countries which either contain requirements of "good moral character" usually assessed *inter alia* through an examination of the criminal record, or specific requirements of clean criminal records. However, rather than ask the individual applicant to produce the record, the authorities should consider obtaining the records themselves so as to reduce the burden on the individual applicant and make it more difficult for false records to be produced.

46. With the requirement for a clean criminal record, as with other requirements, States should bear in mind the need for proportionality, particularly in cases of State succession. Changes in the political system have meant that some offences for which individuals were convicted are no longer offences in the criminal code of the country in which they are living.

#### H. New reproductive technologies

47. As these technologies are new there is little or no evidence that they are being used to circumvent immigration or nationality legislation. But the potential exists and, as with the case of registered partnerships, discussion of the ethical and legal consequences of such acts needs to include a comprehensive analysis of the consequences for a State's nationality laws.

#### I. Acquisition of a second nationality

48. In cases where the national of one State voluntarily acquires the nationality of another, or resumes a previous nationality which has been renounced in order to acquire that State's nationality, a solution to the problems this creates for single nationality countries would be for the authorities in the State granting citizenship to notify the authorities of the State of origin of their new citizen of the acquisition of their citizenship. However, such action mainly benefits only the country whose nationality laws are based on the principle of single nationality. Countries who adhere to the principle of multiple nationality are required to set aside their principles in order to assist single nationality countries maintain their principles. It is probably for this reason that few bilateral agreements covering notification of the grant of citizenship have been entered into, and the matter is becoming more complicated because of the requirements of legislation concerning personal privacy, data protection and the unauthorised disclosure of information. In some cases the person acquiring citizenship might be a refugee who did not want his or her home authorities to know of their whereabouts, even in general terms.

49. There is a solution to this problem though, one which is applied by many Asian countries who adhere to the principle of single nationality. Where one of their nationals is permanently resident abroad and applies to renew his or her passport, the consular authorities require him or her to produce a letter from the authorities of the country in

which they are permanently resident confirming that they have not acquired the citizenship of that country. The letter may be obtained either by the individual or by the consular authorities on production of written consent from the individual to such information being disclosed. In most cases the consular authorities of a State will quickly recognise from a passport whether the individual is permanently or temporarily resident in the country. Few individuals who have obtained the nationality of the country in which they are living are likely to seek renewal of their passports because disclosure of this information would reveal their abuse of their home country's nationality laws, and these procedures would help to bring home to people the consequences of their actions.

50. These procedures would not necessarily assist in those cases where an individual has renounced his nationality of origin in order to obtain another nationality and then resumed that first nationality. However, in many of these cases the individual would be living in the country of which he or she had voluntarily acquired citizenship and in relationship to that country this citizenship would then prevail.

## **CONCLUSIONS**

51. Most, if not all, States have over the centuries benefited from the flow of migrants into their countries. These migrants have greatly enriched their new societies, not only as entrepreneurs, scholars, artists and scientists, but also generally, by adding cultural diversity and broadening the horizons of their new society. Many have positively sought to show their commitment to their new homes by seeking to acquire its nationality. Most do so lawfully and it should not be assumed that because this paper deals exclusively with the misuse of nationality law that all applicants for citizenship seek to misuse or abuse the nationality laws of their adoptive State. The number of cases of misuse of nationality laws does not seem to be unduly high, but the number of such cases could increase and could have negative effects on normal procedures relating to nationality and disproportionately cloud the manner in which migrants are regarded. It is therefore important that States should be aware of the problems linked to the misuse of their nationality laws and take all appropriate action to limit the opportunities for abuse.

52. However, it is difficult to find a common set of remedies for all States. This report contains examples of a few remedies which have been adopted in some States in order to try and prevent the misuse or abuse of their nationality laws but these need to be set in the particular legal, historical and sociological situation in the State concerned and may not be applicable in other States.

53. The problems of fraud and the presentation of false documentation are not unique to nationality questions. They are experienced on a far greater scale by the immigration authorities in most countries. Within a State there should be close co-operation between the immigration and nationality authorities in order to minimise the opportunities for the misuse of nationality laws. Internationally there is also scope for greater co-operation and the exchange of information, and this report recommends that States, where appropriate, should conclude bilateral and/or multilateral agreements in order to regulate matters of common interest and thereby prevent the misuse of their nationality laws. Such agreements are commonplace in the immigration field. For example, within the European Union there are proposals in hand for joint action on the

provision of equipment for the detection of false or falsified documents in the visa departments of representatives abroad and in the offices of domestic authorities dealing with the issue or extension of visas, and for improved exchange of information to combat counterfeit travel documents. The Committee of Experts on Nationality already provides a forum in which information can be exchanged informally but unfortunately, by its very nature, this tends to be about documentation and procedures within European States whereas the real problems concern countries from outside the Council of Europe.

54. Many of the documents fraudulently presented in support of nationality applications are civil status documents. In this connection, the report of the International Commission on Civil Status (CIEC) on "Fraud in Civil Status Matters" of September 1996 is most helpful and relevant in the context of this report. The CIEC document reports on the responses by its member States (Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain, Switzerland and Turkey) to a questionnaire regarding fraud in matters of civil status. It deals with the types of fraud and their causes - false declarations regarding birth, marriage and recognition, and presentation of false foreign documentation; the means of combating them - verifying documents, options for refusing registration or marrying a couple; permissible sanctions; legislative reform; and the limits on the remedial action. It concludes that there is a difference between the States in the way they are organised to combat fraud, in particular in the co-ordination of the interests of internal departments, that there needs to be a common approach to the problems and more exchange of information and material between States to help them combat the problems. It draws a parallel with the co-operation which exists in the matter of visas and immigration control. Greater knowledge of what other States are doing to combat fraud and the effectiveness of the measures they are taking might encourage other States to adopt similar provisions in their legislation.





## STATE SUCCESSION AND NATIONALITY

### Report by

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### Introduction

The issue of State succession as well as the question of nationality have concerned the international community for a long time. International bodies, both of regional and universal character, have dealt with them in their work, what have been reflected in numerous international, legal and political documents. Though for many years the topics of State succession and of nationality were discussed and developed at international forum rather separately<sup>40</sup>, however, there has been a growing recognition of the fact that a mutual relationship between these issues should be considered and analysed in depth. The last decade of our century have proved the correctness of this opinion. The objective necessity of accelerating international legislative works on consequences of State succession for nationality has been revealed, without any doubt, by historical and political events of the said decade. A significant number of newly emerged states, especially in Europe, have brought up the problem of nationality in relation to the succession of States to the attention of lawyers and politicians. Existing legal solutions, both national and international seemed not to be sufficient as it concerns, first of all, necessary protection of basic human rights of individual persons affected by territorial changes.

The efforts of various international institutions towards elaboration of consolidated sets of principles dealing with these matters have been mirrored in the documents adopted by them in the form of declarations or even draft treaty provisions. The most important of them, elaborated and adopted during the last decade, are going to be considered in this report. Because of the time and space limits of my report i) would like to concentrate on three international documents, which in my humble opinion, have had a strong impact on international legal regulation of the consequences of State succession for nationality of individual persons. These are, in chronological order of their adoption:

- 1) The Declaration on the Consequences of State Succession for the Nationality of Natural Persons, adopted by the European Commission for Democracy Through Law at its 28<sup>th</sup> Plenary Meeting in Venice, 13-14 September, 1996<sup>41</sup>,

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<sup>40</sup> See, for instance, a historical review of previous work done by the International Law Commission on the topic of State succession and such a review on the topic of nationality, in: First report on State succession and its impact on the nationality of natural and legal persons, by Mr Václav Mikulka, Special Rapporteur, 17 April 1995, UN Doc A/CN.4?467, pp.4-6.

<sup>41</sup> Hereinafter called "The Venice Declaration".

- 2) The European Convention on Nationality, open for signature on 6 November 1997 (its Chapter VI, entitled: State succession and nationality)<sup>42</sup>,
- 3) The Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, adopted by the United Nations International Law Commission at its 51<sup>st</sup> session in Geneva, 20 July 1999<sup>43</sup>.

There are certain general differences between the mentioned above documents as it concerns their form, territorial and substantial scope and legal nature. The first two of them are regional instruments elaborated and adopted under the auspices of the Council of Europe, while the third one is of universal character being prepared by the United Nations organ. The Venice Declaration as well as the Draft Articles adopted by the International Law Commission are devoted fully to the topic in question while the provisions concerning State succession and nationality create just one chapter the European Convention on Nationality, though some other principles and rules of this Convention may be also applied to the said matters. The advantage of the European Convention on Nationality lies, however in binding legal nature of its provisions, including those on State succession and nationality, for States parties to this treaty. Contrary to this, the principles and rules contained in the Venice Declaration and the ILC Draft Articles (recommended to the General Assembly of the United Nations to be adopted in the Form of a declaration) may be considered now exclusively in the sphere of so-called "soft law". On the other hand, because of the recommendatory character of the provisions of these two declarations, their substantial scope is much more wider in comparison with rather narrow scope of treaty obligations deriving in the field of State succession and nationality from the European Convention on Nationality.

### The Venice Declaration

The European Commission for Democracy through Law, also known as the Venice Commission, was established in May 1990 as a Partial Agreement of the Council of Europe. Among other studies on legal issues which serve to establish the basic principles of the Council of Europe the Commission has undertaken a topic of the consequences of State succession for nationality, starting in 1994 with drawing up a questionnaire which was sent later to the States concerned. Basing on the replies received from the European and non-European States having a practice in the field of State succession, a consolidated report was prepared by the Commission<sup>44</sup>.

This valuable document was aimed to realise two main purposes. Firstly - it was a repertoire of legislative practice in several European and non-European States demonstrating the legal models of regulation which have been adopted, either independently or pursuant to obligations under international law, to deal with the effects of territorial transfers on the nationality of natural persons. One may find there an interesting review of national and international practice in this field starting before 1914 and ending with the events which have occurred in the last decade. And secondly - the report of the Venice Commission made also an attempt to reach a wider purpose

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<sup>42</sup> European Treaty Series No. 166

<sup>43</sup> UN General Assembly Official Records Fifty-four Session, Supplement No.10 (A/54/10), pp.15-24

<sup>44</sup>.Doc. CDL-NAT (96) 5 rev.2.

and to establish some general principles which emerge as common standards to be followed in future cases of State succession.

These general principles emerging from the practice, marked initially by the Commission in the said report, were finally developed and adopted by the Commission in 1996 in the form of the Declaration on the Consequences of State Succession for the Nationality of Natural Persons, also known as the Venice Declaration

The Venice Declaration consists of 16 principles divided into four parts. It starts with the preamble which underlines three main features not to be forgotten when considering the topic. These are:

- 1) the recognition of necessity to take into account both interests of States and individuals,
- 2) the commitment to the principles of democracy, the rule of law and protection of human rights,
- 3) particular regard to State practice in the matter.

The principles of the Venice Declaration are generally formulated in two ways. Some of them are composed in a categorical way, reflecting mostly existing rules of international law. Other provisions constitute recommendations, showing what would be desirable for new legislation adopted following the transfer of sovereignty of a territory.

To the first category we may include such principles like those saying that:

- questions relating to nationality fall to the jurisdiction of States within the limits laid down by international law (originally formulated by the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930);
- the conditions for acquisition and loss of nationality shall be provided for by law;
- everyone has the right to a nationality (first stated in the Universal Declaration of Human Rights of 10 December 1948);
- creating cases of statelessness shall be avoided (deriving from the Convention on the Reduction of Statelessness of 30 August 1961);
- in matters of nationality the will of the persons concerned shall be respected as far as possible.

Furthermore, as it concerns granting its nationality by the successor State, the Venice Declaration provides for obligations to:

- grant it to all nationals of the predecessor State residing permanently on the transferred territory;
- grant it without any discrimination;
- guarantee perfect equality of the persons to whom this nationality has been granted with the other nationals of the Successor State;
- grant its nationality to those who become stateless as a result of the succession.

There is also the obligation provided for the Predecessor State not to withdraw its nationality from persons who have been unable to acquire the nationality of a successor State.

Finally, the Venice Declaration formulates the obligation for the successor States to grant the right of option, understood as the right of persons affected by territorial changes to choose between either the nationality of the successor State and that of the predecessor State or between the nationalities of several successor States.

The exercise of the right of option, however, may be limited by States through a requirement of the existence of effective link between the person concerned and the State. Generally these links are with the predecessor State but sometimes they are with other States (where, for example, two or more States are succeeding to a predecessor State which ceases to exist). The concept of an “effective link”, which the Venice Declaration understands particularly though not exclusively as ethnic, linguistic or religious links, is followed after the well - known judgement of the International Court of Justice in the *Nottebohm* case<sup>45</sup>.

The second category of provisions contained in the Venice Declaration are of recommendatory nature. Simultaneously, however they show possible and desirable ways of development of future international and national regulations and practice concerning the consequences of State succession for the nationality of natural persons. A progressive character of these provisions is out of question, though their practical application may create yet some difficulties.

First of all, the Venice Declaration invites the States involved in the event of succession to settle by agreement the question of nationality, requiring from them at the same time to respect the human rights of the persons concerned.

Then the declaration recognises as desirable that successor States grant their nationality on individual basis, to non-resident nationals of predecessor State originating from the transferred territory and to permanent residents of such territory holding the nationality of a third State.

It is desirable, as well, that the successor State grant its nationality to stateless persons permanently residing in the transferred territory or originating from that territory. This recommendation reflects the ultimate will to eliminate all existing cases of statelessness and not only those caused by the succession of States.

#### The European Convention on Nationality

Initially planned as a new comprehensive version of the 1963 Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality<sup>46</sup>, it has finally extended its substantial scope on all international legal matters concerning nationality of natural persons. Opened for signature on 6 November 1997 the European Convention on Nationality<sup>47</sup>, among other important

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<sup>45</sup> *Nottebohm* case, I.C.J. Reports, 1955, p.23

<sup>46</sup> European Treaty Series No 43.

<sup>47</sup> The text of the draft convention was finalised by the European Committee on Legal Co-operation (CDCJ) on 29 November 1996 and adopted by the Committee of Ministers on 14 May 1997.

issues, deals also with a matter of State succession and nationality within its Chapter VI consisting of three articles:

Article 18 - Principles

Article 19 - Settlement by international agreement

Article 20 - Principles concerning non-nationals.

Moreover, the said articles invoke also some other important provisions of the Convention as being applicable to the matters of nationality in cases of State succession. These are general principles relating to nationality contained in Articles 4 and 5 and rules on conservation of previous nationality embodied in Article 16.

As it has been stated in the Explanatory Report to the 1997 Convention, “The provisions concerning State succession and nationality are based on existing general international practice and contain general guiding principles. They permit States to decide on the appropriate way in which these provisions may be applied in their internal law”<sup>48</sup>.

The general presumption under international law in the field of State succession matters is that in the nationality questions the population follows the change of sovereignty over the territory. However, the first paragraph of Article 18 of the Convention mentions also the principles contained in Articles 4 and 5 of the Convention<sup>49</sup> which have to be respected in cases of State succession, in particular in order to avoid statelessness. In the second paragraph of Article 18 of the Convention it is stated that in cases of State succession each State Party concerned while granting or allowing the retention of nationality should take into account four factors:

- “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.”

Sub-paragraph a) stems from the *Nottebohm* case bringing up the notion of “genuine and effective link”. In sub-paragraph b) the concept of habitual residence is quoted as the conception of the lawful residence is not necessary since there is a presumption that a person being a national just before the State succession was at the same time a lawful resident. The next sub-paragraph prevents from granting the nationality against the will at the person concerned and may be a base to give such a person a right of option.

As to “territorial origin” mentioned in the last point it concerns the place where the person was born and consequently the social or ethnic origins should not have any influence in this field.

Two other very important issues are touched on in the Chapter on the State succession and nationality. The first is the favourisation of agreements compatible with the provisions of this Chapter between States Parties concerned relating to the matters of

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<sup>48</sup> Para.104 of the Explanatory Report in fine.

<sup>49</sup> These are articles on “Principles” and “Non-discrimination”.

nationality. It seems to be a good solution as the States can take into account their own individual circumstances and regulate the matters more thoroughly. The second, these are provisions concerning non-nationals of the successor State (being once the nationals of the predecessor State's and staying as habitual residents on the territory of successor State) and their rights. A link with some articles of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 as well as with the European Convention on Establishment and the European Social Charter, is made here.

Article 20 goes beyond the limits of nationality matters and concerns most of all economic and social rights of these persons, however States Parties may grant some political rights additionally. The right of employment, freedom of establishment and freedom of movement are the basic rights that non-nationals falling into the scope of this Article shall enjoy. Recalling the preamble to the 1997 Convention they will have a right to family life under Article 8 of the 1950 Convention as well. As for the principle of equality of treatment with nationals (as it regards social and economic rights) there is only one exception made: exclusion of non-nationals from employment in the public service when it involves the exercise of sovereign power.

Although the provisions of the European Convention on Nationality concerning State succession and nationality have rather general character and they are not so detailed as those of the Venice Declaration, however, their advantage derives from their binding nature of treaty obligations. Additionally, the founders of the Convention have strengthened the provisions on State succession and nationality excluding in Article 29 a possibility of making reservations to Chapter VI considered as one of the core chapters of the Convention. It guarantees a unified application of those provisions in practice by all States parties to the European Convention on Nationality.

#### The ILC draft articles on nationality of natural persons in relation to the succession of States.

At its forty fifth session in 1993 the International Law Commission of the United Nations decided to include in its agenda the topic entitled "State succession and its impact on the nationality of natural and legal persons". This decision was endorsed by the UN General Assembly<sup>50</sup>.

After completing the preliminary study the Commission at its forty -eight session in 1996 recommended that consideration of the question of the nationality of natural persons would be separated from that of the nationality of legal persons and that priority would be given to the former. The General Assembly endorsed the Commission's recommendations<sup>51</sup> and the Commission continued its substantive work on the topic based on the reports and draft articles presented by the Special Rapporteur<sup>52</sup>.

At its forty-ninth session in 1997 the Commission adopted on first reading a draft preamble and a set of 27 draft articles on nationality of natural persons in relation to

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<sup>50</sup> UN SA Resolution 48/31 of 9 December 1993

<sup>51</sup> UNGA Resolution 51/160 of 16 December 1996.

<sup>52</sup> Mr Václav Mikulka. Reports: UN Doc. A/CN. 4/467 A/CN.4/474, A/CN4./480 and Add.1.

the succession of States, requesting the Governments for written comments and observations.

At its fifty-first session in 1999 the Commission after considering the reports of the Working Group and of the Drafting Committee, adopted the final text of the draft articles together with the commentaries to them<sup>53</sup>.

The scope of application of these draft articles is limited, *ratione personae*, to the nationality of individuals and it does not extend to the nationality of legal persons. *Ratione materiae* the draft articles encompass the loss and acquisition of nationality, as well as the right of option, as far as they relate to situations of succession of States. *Ratione temporis* the scope of application of the draft articles covers the time period in which changes of nationality resulting from the succession of States may occur.

The draft articles are consisting of two parts. The provisions of Part I are general in the sense that they are applicable to all categories of succession of states. On the other hand, Part II contains specific provisions on attribution and withdrawal of nationality and on the right of option applicable in different categories of succession of States. It has to be stressed, however, that this differentiation does not mean that the rules included into Part II have a lower legal standing in comparison with those contained in Part I. On the contrary, it has been noted many times by the Commission that the rules of Part II do not create any *lex specialis*, but that they should be applied together with those of Part I.

Already in the Preamble to the draft articles we may find out main objectives identified by the Commission and running throughout the draft. The first one is a concern for human rights. The draft tries to keep a balance between the rights and interests of individuals and the inherent right of a State to determine who are to be its citizens. The second objective is to avoid cases of statelessness and to provide for continuity of nationality. And, finally, the third main objective spells out an obligation on what is later reflected in the provisions dealing with a right to option<sup>54</sup>.

As it has been correctly pointed out in the commentary made by the Commission, Article 1, entitled "Right to a nationality", constitutes a key provision and the very foundation of the draft articles:

"It states the main principle from which other draft articles are derived. The core element of this article is the recognition of the right to a nationality in the particular context of a succession of States"<sup>55</sup>

This is a right, as Article 1 says, to at least one nationality, although the Commission clearly stated a lack of any intention to encourage a policy of dual or multiple nationality. The identification of the State which is under the obligation to attribute its nationality depends mainly on the type of succession of States and the nature of the links that persons possessing the nationality of predecessor State may have with one or more States involved in the succession.

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<sup>53</sup> See *supra*, note 4, pp.24-99 (text of the draft articles with commentaries).

<sup>54</sup> B. Simma, "The Work of the International Law Commission at Its Forty-Ninth Session (1997)", in "Nordic Journal of International Law", 66, 1997 p.530.

<sup>55</sup> See *supra*, note 14, p. 29.

The definitions incorporated in Article 2 are mainly following those respective definitions contained in Article 2 of the two Vienna Conventions on the succession of States of 1978 and 1983. This uniformity of terms seems to be a positive factor for practical application of rules on nationality. It is also worth to note that a separate article containing definitions is rather unusual for a declaration. On the other hand it may facilitate future transformation of the draft articles in the form of a convention.

Article 3 limits the scope of application of the draft articles, analogically with the two Vienna Conventions on succession, only to the effects of a succession of States occurring in conformity with international law.

One of the main principles proclaimed by the draft articles is the prevention of statelessness as a result of such succession. This idea expressed generally in Article 4, is later reflected in numerous articles which are aimed to protect individuals against statelessness in particular situations (see Articles 7, 8, 9, 11, 19). As it has been correctly noticed, the obligation of States concerned to take all appropriate measures in order to prevent the occurrence of statelessness constitutes a corollary of the right of the persons concerned to a nationality<sup>56</sup>.

For the purpose of protection of these persons against a legal vacuum the Commission also decided to include into Article 5 a presumption of nationality saying that “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”. Though this general presumption is a rebuttable one (“subject to the provisions of the present draft articles”) it seems to create a sufficient general saving clause for a continuity of nationality status of persons affected by the succession of States.

Articles 6 and 7, dealing with “Legislation on nationality and other connected issues” and “Effective date”, are in fact also closely connected to the mentioned before desire to prevent statelessness. They recommend timely and comprehensive legislative actions, consistent with the provisions of the draft articles (Article 6) and provide, if necessary for a retroactive operation of such legislation to the benefit of persons concerned (Article 7).

Article 8, entitled “Persons concerned having their habitual residence in another State”, spells out certain expectations concerning both the obligation of successor State to attribute its nationality and the power of the State to do so. The reason for these exceptions is an objective fact of having by persons concerned their habitual residence abroad.

Though the Commission appears to have a neutral position as it concerns the question of dual or multiple nationality, it has decided, however, to include into Article 9 the freedom of each successor State to make the attribution of its nationality dependent on the renunciation of the nationality of another State concerned. Similarly, in Article 10, the Commission reflected rather generally applied rule concerning the loss of nationality upon voluntary acquisition of nationality of another State.

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<sup>56</sup> B. Simma, *op.cit.*, p. 531.



The draft, as it was said before, pays great attention to safeguarding human rights. This concern for human rights is embodied in Article 11 “Respect for the will of persons concerned”, Article 12 “Unity of family”, and Article 13 “Child born after the succession of States”

The right to option proclaimed generally in Article 14 is later also developed in Part II as it concerns its particular application in specific categories of State succession. Including the provisions on the right to option the Commission have stressed the role which contemporary international law attributes to the will of the individual in matters of acquisition and loss of nationality.

Provisions of Articles 12, 13 and 14 seem to go even beyond the strict limits of nationality matters deriving directly from the succession of States. Expanding the protective umbrella over such categories of persons like family members, children and habitual residents the Commission, once again in the spirit of safeguarding basic human rights, decided to eliminate even indirect negative effects of State succession towards specific categories of persons and their legal status.

Following other regulations on human rights, the Commission included into Article 15 a general non-discrimination clause. This clause does not contain, as for instance article 5 of the European Convention on Nationality, any illustrative list of criteria on which discrimination might be based.

Article 16 deals with prohibition of arbitrary decisions concerning nationality issues. It prohibits the arbitrary withdrawal of nationality from persons entitled to retain it, as well as the arbitrary denial of a person’s right of option.

Procedures relating to nationality issues shall be, according to Article 17, exercised without undue delay and respecting the right to administrative or judicial review.

The Commission considered that exchange of information and consultations between States concerned are essential components of any meaningful examination of the effects of a succession of States on persons concerned. Consequently, there is Article 18 imposing an obligation on the States concerned to negotiate, consult and exchange information.

The last article of Part I, Article 19, deals with the role of other State and attempts to limit the discretion of the successor State to extend its nationality to persons who lack an effective link, or withhold its nationality from persons entitled to acquire it<sup>57</sup>.

The provisions of Part II are divided into four sections, each dealing with a specific category of succession of States. Those sections are the following:

- I Transfer of part of the territory (Article 20)
- II Unification of States (Articles 21)
- III Dissolution of a State (Article 22 and 23)
- IV Separation part or parts of the territory (Articles 24,25 and 26)

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<sup>57</sup> Ibidem, p. 534.

As it has been stated by the Commission in the commentary, the identification of the rules governing the distribution of individuals among the States involved in a succession derives in large part from the application of the principle of effective nationality to a specific case of succession of States. As regards the criteria used for establishment the rules concerning the attribution of the nationality of the successor State, the withdrawal of the nationality of the predecessor State and the recognition of a right of option in Part II, the Commission, on the basis of a State practice, has given particular importance to habitual residence<sup>58</sup>. There are also some other criteria such as the place of birth or the legal bond with a constituent unit of the predecessor State, which may become significant for the determination of the nationality of persons who have their habitual residence outside the territory of a successor State. It may occur, for instance, when they lose the nationality of the predecessor State as a consequence of its disappearance.

The above presented draft articles have been recommended by the International law Commission to the UN General Assembly to be adopted in the form of a declaration. However, it is worth to be noted that both the form of draft articles (including the preamble and definitions of terms) as well as their comprehensive substance may serve in future as a good basis for a convention to be adopted by the UN General Assembly.

### Conclusion

Even a short analysis of three selected international documents concerning the consequences of State succession for the nationality of natural persons may bring us to some conclusions as it concerns possible future developments.

First of all, there is a visible growth of interest of States towards finding of legal solutions for very delicate and complex problems deriving in nationality matters in connection with the succession of States.

Secondly, all presented documents reflect a concurrent opinion of States as it concerns

- 1) the recognition of the human right to a nationality
- 2) the necessity of avoiding statelessness
- 3) the respect for the will of persons concerned in deciding on matters of nationality in connection with the succession.

Finally, it seems that a harmonisation between these three factors and the inherent right of a State to determine who are to be its citizens, is quite possible. The growing concern of international community for human right gives additional impetus to look for more satisfying legal solutions which could guarantee an adequate balance between the rights and interests of individuals and States.

Taking into account international legislative works done up to now in the field of State succession and nationality, it seems to be a proper time for initiating a work on

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<sup>58</sup> See supra note 14, p 72-73.

elaboration of an European convention on State succession and nationality. A good beginning was done with the Chapter VI of the European Convention on Nationality and promising ways of further development are clearly shown by the Venice Declaration and the ILC draft articles.



## **CITIZENSHIP - NATIONALITY: A PROPER BALANCE BETWEEN THE INTERESTS OF STATES AND THOSE OF INDIVIDUALS**

**Report by**

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### **1. INTRODUCTION**

Our contribution examines a specific dimension of nationality (citizenship). It focuses on problems of a proper balance between the interests of states and the interests of individuals. The determination of a proper balance of interests is a complex problem. This problem and other issues relating to nationality can lead to heated public and political debates.<sup>60</sup> Constitutions, laws and political documents of states establish certain basic principles and rules of procedure. Nevertheless, the determination of a proper balance of interests regarding nationality can be a problem in every individual case. In addition to different (and often conflicting) interests of individuals and states, different interests of states within the international community might exist as well. This contribution offers a few proposals concerning how to address these issues.

To provide an institutional and historic framework, the analysis starts with a brief presentation of historic development of states and their transformation into nation-states. In this context, we discuss the evolution of the relationship between states and individuals. Nationality (citizenship) as a specific link between an individual and a certain state establishes rights and duties on both sides. The importance and complexity of this specific link for individuals and for states condition their interests regarding nationality that are often different and sometimes conflicting. In some cases

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\* The author expresses his gratitude for their kind and valuable assistance in preparing and writing this contribution to Ms. Alenka Mesojedec Pervinšek, the Head of the Citizenship Department of the Ministry of Interior of the Republic of Slovenia, member of CJ-NA and WG, to Professors Janez Kranjc (the Dean of the Law Faculty, University of Ljubljana), Oto Luthar (the Director of the Scientific Research Institute of the Slovene Academy of Sciences and Arts) and Thomas W. Simon (Professor at the Department of Philosophy, Illinois State University and Fulbright Scholar at the Faculty of Law, University of Ljubljana), Borivoj Kos, M.A. (Secretary General of the Administrative Court, Ljubljana), and to students of the Law Faculty of the University of Ljubljana members of the Student's Research Project on Democracy, especially Matej Accetto, Carmen Breznikar, Samo Kutoš and Boštjan Vernik. Their contribution to the improvement of this paper was important, and the blame for possible shortcomings and mistakes go exclusively to the author.

<sup>60</sup>. Such discussions on the elaboration of emigration and nationality policy and the reform of the existing nationality (citizenship) legislation (especially regarding dual or multiple nationality/citizenship) continue in almost all European countries (especially in Germany and Sweden), and in several other countries. These discussions are relevant also in the context of the succession of states and the regulation of nationality/citizenship in successor states.

it is extremely difficult to establish a proper balance between the interests of a state and those of an individual.<sup>61</sup> States try to protect and realize their specific interests in this sphere, but at the same time they have to provide certain protections to an individual. The analysis concludes by highlighting some trends of development regarding nationality (citizenship) and by offering a few proposals for the determination of a proper balance between the interests of individual and those of the states.

## 2. STATES, INDIVIDUALS AND CITIZENS

Transformation of a prehistoric society into the first state(s) changed the nature of this society. The historic formation of states established a specific relationship between a state (as a specific form of social organization) and individuals who lived in it: members of a prehistoric society became subjects of this (their?) state. This historic development changed also the nature of our history: it became the history of states<sup>62</sup> and of historic international communities of states.<sup>63</sup> States and empires emerged, developed, evolved, transformed and disappeared in the process of historic development. The relationship and links between individuals and states evolved in this historic process as well.

Relatively quickly, during the Antiquity period, states began to differentiate between citizens (natives, their genuine subjects) and aliens (outsiders, foreigners), who were brought to or resided in the territory under their control (jurisdiction). The distinction between citizens and noncitizens, no doubt, existed in city-states of ancient Greece. A Grecian city-state (*polis*) reserved certain rights, privileges and duties only to its citizens, that is, free individuals (men) born into the polis. This concept of citizenship (that served also as the basis for democracy in city-states) was very exclusive.<sup>64</sup> The "right" to citizenship was "not contingent upon residence and . . . [was] not earned. In this view, citizenship is a kind of property right". Nevertheless, in very exceptional circumstances and under restrictive conditions, the citizenship of city-states could

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<sup>61</sup>. Cases when an individual applies for nationality (citizenship) of a certain state and this state - for different reasons - does not want to grant its nationality to this applicant are the most often in this context.

<sup>62</sup>. In this context the history of states was often perceived mostly as the history of their rulers (monarchs) that did not pay much attention to economic and social situation and/or to common subjects of states. Such apperception of history has been changing slowly emphasising the importance of social and economic history. See, e.g.: Ambrosius, Gerold & Hubbard, William H (1989): *A social and economic history of twentieth-century Europe*. (translated by Keith Tribe and William H. Hubbard) Cambridge, Mass, London: Harvard University Press, 1989; Gellner, Ernest (1988): *Plough, sword and book : The structure of human history*. London: Collins-Harvill, 1988; Hobsbawm, Eric J (1997): *On history*. London: Weidenfeld and Nicolson, 1997; Hobsbawm, Eric & Ranger, Terence, eds. (1998): *The invention of tradition*. (Canto ed., reprinted) Cambridge: Cambridge University Press, 1998; etc.

<sup>63</sup>. Several international communities of states existed in different parts of the world in specific historic epochs in the past. These international communities were often isolated and unaware of the existence of other states and international communities. Transformation of several international communities (of states) into one international community is a relatively new development in a historic perspective.

<sup>64</sup>. See, e.g. Turner, Bryan in Hamilton, Peter, eds. (1994): *Citizenship: Critical Concepts*, Vol. I. London, New York: Routledge, 1994, p. 329.

have been earned as a special privilege, "particularly by risking one's life in the military service of the city". However, a city-state did "not normally make it possible for outsiders to achieve citizenship by performing some routine service or by attainments that . . . [complied] with certain universal standards".<sup>65</sup>

The Roman Empire adapted the concept of citizenship to its needs. Initially, it used citizenship as a device for distinguishing between Romans (citizens - *cives Romani*) themselves and other inhabitants (non-Romans, foreigners) of the empire. Civil Law (*ius civile*) was initially reserved only for Roman citizens, while *ius gentium* was used for other inhabitants of the empire. Later, as a reward for their Romanization citizenship was extended to include large numbers of people in the empire thereby ensuring their loyalty to the empire. Formally, this gave new Roman citizens the right to exercise the political and civil privileges that most of them were unlikely to exercise. In turn, the empire demanded their loyalty and the exercise of their duties. The concept of Roman citizenship transformed throughout the existence of the empire. Finally, emperor Diocletian transformed Roman citizens into subjects, when he adopted the title "*dominus*" (master) and introduced the "dominate".<sup>66</sup>

The concept of citizenship was less important in medieval Europe. People became subjects of their feudal lords, who demanded their allegiance. Feudalism (feudal relations) determined status of individuals, groups and classes. Medieval states were often only loose autarkic forms, characterized by the rivalry of feudal lords who were vassals of the monarch. The concept of citizenship in some city-states (especially in the Mediterranean) was used by prosperous merchants as a means of protection against demands by feudal lords.<sup>67</sup>

Building on Greek, Roman and some medieval traditions and on the Renaissance,<sup>68</sup> the Enlightenment was essential for the development of the modern concept of citizenship. Nevertheless, the crucial historic turning-point in this development was the period of the formation of modern nation-states.

## 2.1. ORIGINS AND EVOLUTION OF NATION-STATES

The development of early capitalism that had begun already in the period of the late feudalism initiated the gradual transformation of a feudal society into a capitalist society. Developing capitalist production that enabled the creation of (larger) economic communities, conditioned also the formation of modern European nations

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<sup>65</sup>. Gouldner, A. W. (1994): "The War Between the Cities" - in Turner, Bryan in Hamilton, Peter, eds. (1994), Vol. I, pp. 335-336.

<sup>66</sup>. For a brief overview of this historic period see, e.g., Encyclopaedia Britannica CD 98, Multimedia Edition; Grolier 1998, Multimedia Encyclopedia.

<sup>67</sup>. For a brief overview of this historic period see, e.g., *ibidem*.

<sup>68</sup>. Among many authors who contributed to the development of modern political thought and the concept of citizenship, we shall mention, at least, Saint Thomas Aquinas, Dante, Machiavelli, Bodin, Grotius and Hobbes, etc.

as specific social phenomena of the capitalist epoch.<sup>69</sup> The 1648 Peace of Westphalia ended the medieval period in Europe and formally established the modern international community of sovereign states.<sup>70</sup> The contemporary (political) philosophy and developing theory of liberal democracy laid philosophical and theoretical foundations for a new - capitalist - social order and for the formal introduction of democratic political systems.<sup>71</sup> Historic turning-points in this historic process were bourgeois revolutions in the Netherlands, England, America and especially the French revolution of 1789.<sup>72</sup> The first article of The Declaration of the Rights of Man and Citizen adopted in the early months of the French Revolution by the National Assembly on 26 August 1789 proclaimed that "[m]en are born and remain free and equal in rights. Social distinctions can be based only upon public utility". The proclamation of the freedom and equal rights of individuals, although at the time limited to men, was a central precondition for the introduction and development of (political) democracy.

All above mentioned specific historic circumstances in Europe conditioned the concept of (modern) nation-states. The process of the formation of European nation-states went hand in hand with the formation of modern European (ethno)nations from the sixteenth and the seventeenth century on.<sup>73</sup> In this process, the existing states tried

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<sup>69</sup>. See, e.g. Hobsbawm, Eric J. (1990), *Nations and Nationalism since 1789: Programme, Myth, Reality*. Cambridge, London, New York, New Rochelle, Melbourne, Sydney: Cambridge University Press, 1990, p. 9.

A **nation** or **ethno-nation** is "a stable, historically developed community of people with a territory, (specific) economic life, distinctive culture, and language in common". (Webster's New Universal Unabridged Dictionary. Deluxe Second Edition. Dorset & Baber, USA, 1983: p. 1196.) A nation has its specific "national identity" that implies the consciousness and will of an individual to be considered a member of a certain nation. Nevertheless, to become a member of a nation this individual has to be recognised by other members of such an ethnic community as its member. (See, e.g. Schlesinger, Philip (1987): "On National Identity: Some Conceptions and Misconceptions Criticized" - in *Social Science Information/ Information sur les sciences sociales* (London, Paris), Vol. 26, No. 2, 1987, pp. 219-264.)

<sup>70</sup>. The Peace Treaties of Westphalia of 1648 ended the Thirty Years War (i.e. the religious wars between Protestants and Catholics in Europe). The treaties reshaped the existing international community by establishing the modern international community. This brought an end to the feudal autarky in Europe. These treaties laid foundations of the legal status of sovereign states in the international community and established principles for relations and cooperation among them. They marked also the beginning in the development of the protection religious minorities. These treaties abolished the previously existing principle "*cuius regio, eius religio*" that determined the religion of the population on a certain territory by the religion of its ruler. They introduced the principle of freedom of conscience and religion and established the obligation of states to grant toleration and self-government to distinct religious communities. (See, e.g. Baron, Salo W. (1985): *Ethnic Minority Rights: Some older and newer trends*. The tenth Sacks Lecture delivered on 26th May 1983. Oxford, England: Oxford Center for Postgraduate Hebrew Studies, 1985, p. 3.)

<sup>71</sup>. Among others, Descartes, Hobbes, Diderot, Locke, Jean Jacques Rousseau, Franklin, Jefferson, Kant, Hegel, and later de Tocqueville, John Stuart Mill and Marx were, no doubt, key philosophers and political thinkers who influenced historic development of capitalism and (liberal) democracy with their theories and theoretical concepts.

<sup>72</sup>. More on this topic, see, e.g., Hunt, Lynn, ed. (1996): *The French revolution and human rights: A brief documentary history*. Boston, New York: Bedford Books of St. Martin's Press, 1996.

<sup>73</sup>. The fact that the process of formation of modern nation-states in Europe went on simultaneously with the process of formation of modern European ethno-nations produced certain terminological



to create their (titular) nations if they had not established them by that time; concurrently, established and emerging nations without existing nation-states strived to form their nation-states.<sup>74</sup> The process of nation-state formation intensified in the nineteenth century and continues today. In this context, the state acquired its ethnic identity and became the nation-state of a certain (titular) ethno-nation.<sup>75</sup> In the international community of nation-states, the nation-state was and often still is considered the only appropriate mechanism for the realization of "national interests"- both within the state and in the international community.<sup>76</sup> States are members of the international community and the only (full) persons of international law. This is an important reason (ethno)nations and other ethnic communities without their own nation-states still strive for the establishment of their nation-states.

Although the existing international community can be defined as the community of nation-states,<sup>77</sup> international law does not define states in their ethnic dimension.<sup>78</sup>

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problems in some languages (e.g., English, French) that use the same term "**nation**" to describe an ethno-nation as **a specific ethnic community** and **a state** as a specific social organisation and structure. To avoid possible misunderstandings the term "nation" is used here only to describe an ethno-nation as a specific ethnic community.

<sup>74</sup>. The emergence of modern nations as specific ethnic communities was often conditioned on the existence of nation-states, and sometimes *vice versa*. (See e.g. Gellner, Ernest (1983): *Nations and Nationalism*. Ithaca, London: Cornell University Press, 1983, str. 6-7, 53-58.)

<sup>75</sup>. A nation-state is a specific form of social organization and government. Nevertheless, as Weber pointed out, a state is (above all) an agency within society, which possesses a monopoly over legitimate violence. (See, e.g., Weber, Max (1989): *The Protestant ethic and the spirit of Capitalism*. Translated by Talcott Parsons; introduction by Anthony Giddens. London: Unwin Paperbacks, 1989; Weber, Max (1922): *Wirtschaft und Gesellschaft*. Bearbeitet von Max Weber. Tübingen: J. C. B. Mohr / P. Siebeck, 1922.) As such it is a powerful tool for the rule of the ruling class (elite). However, a modern nation-state as a welfare state, especially in European traditions of the twentieth century, became an important (social) service of its citizens that provides for social, communal and economic infrastructure, certain basic needs and services (e.g., education, social security and welfare, health care and service, etc.).

<sup>76</sup>. See, e.g., Kellas, James. G. (1998): *The Politics of Nationalism and Ethnicity*, 2<sup>nd</sup> revised and updated edition. Basingstoke, London: Macmillan; New York: St. Martin's Press, 1998; Stavenhagen, Rudolfo (1990) *The Ethnic Question: Conflicts, Development, and Human Rights*. Tokyo, Hong Kong: United Nations University Press, 1990; etc.

Central questions are what are "national interests" and who defines them? "National interests" are usually described as basic interests of a nation as a specific ethnic community that are generally accepted and pursued by members of this community. In practice "national interests" are usually determined and proclaimed by the ruling elite (within a nation as an ethnic community).

<sup>77</sup>. See, e.g., Deutsch, Karl W. (1970): *Political Community at the International Level: Problems of Definition and Measurement*. USA: Archon Books, 1970, pp. 22-24; Macartney, C. A. (1934): *National States and National Minorities*. London: Oxford University Press, Humphrey Milford, 1934, pp. 192-211; Seton-Watson, Hough (1977): *Nations and States*. London: Methuen / Boulder, Colorado: Westview Press, 1977.

<sup>78</sup>. See, e.g., Combacau, Jean & Sur, Serge (1995): *Droit international public*, 2e éd. Paris: Montchrestien, 1995; Dupuy, Pierre-Marie (1995): *Droit international public*, 3e éd. Précis Dalloz. Droit public-science politique. Paris: Dalloz, 1995; Jennings, Robert & Watts, Arthur, eds. (1992): *Oppenheim's International Law*, 9th edition, Volume 1. Essex : Longman Higher Education, 1992; Nguyen, Quoc Dinh (Nguyen/ Pellet) (1994): *Droit international public*, 5eme éd. (Pellet, Adrian, ed.) Paris : Lib. generale de droit et de jurisprudence, 1994; Oppenheim, Lassa Francis Lawrence (Oppenheim/ Lauterpacht) (1948): *International Law: A Treatise, Vol. I: Peace*, 7<sup>th</sup> edition, edited by

The classic and generally accepted definition of a state as a person of international law in Article I of The Montevideo Convention on Rights and Duties of States of 1933 reads:

"The State as a person of international law should possess the following qualifications: a) permanent population; b) defined territory; c) government; and d) capacity to enter into relations with other states."

The existing nation-states have their ethnic dimension. Most states are considered nation-states of certain (ethno)nations. When a state transformed or was established as a nation-state of a certain titular nation, the language, culture and history of this dominant ethnic community in the state became the official language, culture and history of this state. Sometimes the dominant religion became the official state religion. This created an illusion of linguistic, ethnic, cultural and religious homogeneity in established nation-states, although a certain level of ethnic, cultural and religious pluralism has always existed in every society. The myth that nation-states were ethnically homogenous was accepted by people and is still prevailing. In this context, nation-states are perceived as "single-nation-states" (one-nation-states). The existence of ethnic, linguistic, cultural and even religious pluralism in these societies is often considered a problem.<sup>79</sup>

States, including early nation-states, transformed into modern nation-states when the principle of sovereignty of the people as the basis of (liberal) democracy was formally introduced and implemented. The introduction of democracy changed the position and role of individuals - former subjects who became citizens - fundamentally. In this context, citizenship became a legal title for political rights of individuals that enabled their participation in democratic political processes. The ancient Greek city-states, modern nation-states were traditionally restrictive in granting citizenship to individuals. Additionally, nation states only gradually and with hesitation abolished different restrictions (e.g., a property census, exclusion of women, etc.) that initially excluded large sections of people/citizens from political participation.

Although the concept of a homogenous "single-nation-state" (one-nation-state) might seem unrealistic and even obscure considering the existing plural ethnic, cultural and social reality of modern societies, nothing indicates the possible abolition of this concept in the near future. Historic development and gradual democratization conditioned the evolution of the concept and practice of existing nation-states that enabled also the development of the protection of minorities and the introduction of new rights (e.g., economic, social, cultural rights). National politicians and people still perceive the nation-state primarily as a tool for the realization of "national-interests" of the dominant titular (ethno)nations, often at the expense of other distinct communities.<sup>80</sup> Moreover, rather than the existing complex, plural and asymmetrical

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Hersch Lauterpacht. London, New York, Toronto: Longmans, Green and Co., 1948; Starke, J. G. (1989): *Introduction to International Law*, 10<sup>th</sup> edition. London: Butterworths, 1989; etc.

<sup>79</sup>. More see, e.g., Žagar, Mitja (1995): "Constitutions in Multiethnic Reality". *Razprave in gradivo/Treatises and Documents*, No. 29-30 (Ljubljana: Inštitut za narodnostna vprašanja/ Institute for Ethnic Studies, 1994-1995), pp. 143-145, 150-153, 157.

<sup>80</sup>. See, e.g., Mann, Michael, ed. (1990): *The Rise and Decline of the Nation State*. Oxford, Cambridge (Mass.): Basil Blackwell, 1990.

reality, the simple myth of ethnically homogeneous single-nation-states served as a basic model for existing constitutions of most countries in the world. The specific - historically and culturally conditioned - European invention of (single)nation-states that often did not correspond to historical and cultural traditions in different parts of the world was, however, introduced all over the world thanks to historic role of Europe and colonialism.

Existing constitutional systems should evolve to reflect the existing asymmetries, regional and local characteristics and differences, linguistic, ethnic, cultural and religious pluralism, complexity and rich diversity of modern societies. This is especially needed from the perspective of ethnic relations and conflicts in plural societies. The extant model of a single-nation-state (establishing the dominant position of a titular nation) generates nationalism and ethnic conflict in some states.<sup>81</sup> There is a need to develop a multi-ethnic (or, at least, ethnically neutral) concept of a democratic state that would recognize, reflect and regulate (in a democratic way) the existing diversities and asymmetries.<sup>82</sup> This is in line with the European Convention on Nationality, which in Article 5 calls, for a neutral concept of nationality (citizenship) built on the principle of nondiscrimination.<sup>83</sup>

## 2.2. AN INDIVIDUAL, A NATIONAL - CITIZEN, THE PEOPLE AND A STATE

The formal introduction of democracy based on the Jeffersonian principle of "the rule of the people for the people" laid the new foundations for the relationship between an individual and a democratic state. Constitutions of democratic countries declared "the people" as the sovereign.<sup>84</sup> Individuals were no longer subjects. They became rulers. "The people" did not include everybody. Constitutions defined "the people" as citizens of respective countries.<sup>85</sup> For practical reasons, governments expected that citizens meet certain preconditions for democratic participation. The ability to speak the official language, evidence of respect for existing legislation and manifestation of observing history and traditions, became preconditions for granting citizenship. Although democracy and citizenship were considered ethnically and culturally neutral, the actual ethnic determination of (single)nation-states conditioned also these

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<sup>81</sup>. See, Gellner (1983): 3-5; Hobsbawm (1990): 9-12.

<sup>82</sup>. See, e.g., Kymlicka, Will (1996): *Multicultural citizenship: A liberal theory of minority rights*. Oxford political theory. Oxford: Clarendon Press, 1996; Tamir, Yael (1993): *Liberal nationalism*. Studies in moral, political, and legal philosophy. Princeton: Princeton University Press, 1993; etc.

<sup>83</sup>. *European Convention on Nationality and explanatory report*. (1997) Convention opened for signature on 6 November 1997. European Treaty Series, No. 166. Strasbourg: Council of Europe Publishing, 1997.

<sup>84</sup>. "Sovereignty of a sovereign" can be described as a supreme and absolute power and/or authority of final decision by the ruler who is "recognized both as competent to decide and as able to enforce the decision." (Crick, Bernard (1972): "Sovereignty" - in Sills, David L., ed.: *International Encyclopedia of the Social Sciences*, Vol. 15- New York: The Macmillan Company & The Free Press; London: Collier-Macmillan Publishers, Reprint edition 1972 (C 1968), p. 77.)

<sup>85</sup>. See, Hinsley, F. H. (1986): *Sovereignty*, 2nd edition. Cambridge: Cambridge University Press, 1986, pp. 126-157.

concepts. Furthermore, the fact that some languages used the same term "nation" to describe the ethnic community and to describe its (single)nation-state conditioned new terminology, thereby, the term "national" was introduced instead or in addition to the term "citizen" and the term "nationality" was used instead or in addition to the term "citizenship."

To understand the relationship between an individual citizen and a state we have to consider also the other dimension of sovereignty the sovereignty of a state. "Sovereignty of a state" means the actual capability of a government: to control the territory and population of a state, to enter into international relations with other states, to conclude and realize international agreements (treaties), and to comply with international law. The external - international dimension of the sovereignty of a state establishes it as a person of international law and defines its (formally equal) position in the international community.<sup>86</sup> In this context, the international sovereignty of a state is often understood simply as its independence.<sup>87</sup>

The internal dimension of sovereignty of states is especially important for the relationship between individuals (citizens) and states. A democratic state as a specific form of social organization through institutions of its political system is a mechanism for the realization of sovereignty of the people. Direct and indirect participation of citizens in democratic political processes, competencies (rights, duties - obligations, limitations) and functions of a state and its institutions, relations among institutions of the political system and rules of procedure are determined by the constitution and legislation. Democratic constitutions and legislation proclaim the rule of law as a basic principle upon which the functioning of a state and its institutions is organized and realized.<sup>88</sup> Despite all the constitutional, statutory and other limitations a state, the State remains a very powerful institution in comparison with an individual, for it possessed a monopoly on legislation. Democratic states assume the people's (citizen's) consent to the state structure, competencies and functions. States in turn, expect, the loyalty of individuals. Based on this consent of people, the issue of states regulate also citizenship arises within a context of assumed consent and loyalty.

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<sup>86</sup>. The official recognition of the existence of the state by other states is usually considered one of preconditions for its full international legal personality. (e.g., Dugard, John (1987): *Recognition and the United Nations*. Hersch Lauterpacht Memorial Lectures; University of Cambridge, Research Centre for International Law. Cambridge: Grotius Publications Limited, 1987; Oppenheim /Lauterpacht (1948); Starke (1989), etc.)

<sup>87</sup>. See, e.g., Akehurst, Michael (1984): *A Modern Introduction to International Law*, Fifth Edition. London, Boston, Sydney: George Allen and Unwin, 1984, pp. 15-16; Oppenheim/ Lauterpacht (1948): 113-120.

<sup>88</sup>. More on the rule of law, see, e.g., Barnett, Randy E. (1998): *The structure of liberty: justice and the rule of law*. Oxford: Clarendon Press, 1998; Chevallier, Jacques (1992): *L'État de droit*. Clefs. Politique. Paris : Montchrestien, 1992; Dias, Dexter (1997): *Rule of law*. Coronet paperback. London: Coronet Books, Hodder and Stoughton, 1997; Hutchinson, Allan C. & Moynahan, Patrick, eds. (1987): *The rule of law: Ideal or ideology*. Toronto, Calgary, Vancouver: Carswell, 1987; Krawietz, Werner & Pattaro, Enrico & Erh-Soon Tay, Alice, eds. (1997): *Rule of law: Political and legal systems in transition*. World congress / International association for the philosophy of law and social philosophy (IVR) Rechtstheorie. Beiheft, 17. Berlin: Duncker & Humblot, 1997; Morin, Jacques-Yvan (1996): *L'état de droit: Émergence d'un principe du droit international*. Recueil des cours ; T. 254. The Hague, Boston, London: Martinus Nijhoff, 1996; etc.

Human rights and fundamental freedoms proclaimed by constitutions, laws and international legal documents are the most important and effective protection and guarantee of individuals in their relationship with states.<sup>89</sup> The development and promotion of human rights and sovereignty of the people, growing interdependence in the international community and emergence of international integrations were key factors in the gradual evolution and certain relativisation in comparison with the traditional concept of - internal and external - sovereignty of states.<sup>90</sup> In the context of citizenship and its consequences on the relationship between an individual and a state, the regulation of its citizenship is a sovereign right of every state. Nevertheless, international (statutory and custom) law has established a set of rules and minimal standards that states have to observe.

### 3. CITIZENSHIP - NATIONALITY

We could say that citizenship or nationality is a specific relationship between an individual who has a specific status and a state that grants and recognizes such a status. In this context, citizenship or nationality is a special and sometimes the only (mostly legal) link between a sovereign state and its citizens - individuals who live, usually permanently, in a territory of a certain state and possess a special guaranteed legal status. In many ways, this legal link resembles a contract (between a state and its citizen) that, on the one hand, establishes rights, obligations and duties of the state in relation to citizens and, on the other hand, rights and duties of individual citizens in the relation to the state. In this context, citizenship laws of national-states determine the nature and content of citizenship that is usually defined as a specific legal status,

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<sup>89</sup>. See, e.g., Jones, Thomas David (1998): *Human rights: group defamation, freedom of expression and the law of nations*. The Hague, Boston, London: Martinus Nijhoff Publishers, 1998; Lebreton, Gilles (1997): *Libertés publiques et droits de l'homme*, 3eme ed. Paris: A. Colin, Masson, 1997; Lillich, Richard B. & Hannum, Hurst (1995): *International human rights : problems and law, policy and practice*, 3rd ed. Boston, New York, Toronto, London: Little, Brown and Company, 1995; Martin, Pierre-Marie (1995): *Droit international public*. Paris, Milan, Barcelone : Masson, 1995; Meron, Theodor, ed. (1992): *Human rights in international law: Legal and policy issues*. Reprint. Oxford: Clarendon press, 1992; Mills, Kurt (1998): *Human rights in the emerging global order : A new sovereignty?* London: McMillan, 1998; Sellers, Mortimer, ed. (1996): *The new world order : sovereignty, human rights, and the self-determination of peoples*. Oxford, Washington : Berg, 1996; Sieghart, Paul (1995): *The international law of human rights*. Oxford, New York: Clarendon Press, 1995; Steiner, Henry J. & Alston, Philip (1996): *International human rights in context: Law, politics, morals: Text and materials*. Oxford: Clarendon Press, 1996; Thornberry, Patrick (1990): *International Law and the Rights of Minorities*. Oxford, England: Clarendon Press/ New York: Oxford University Press, 1990; Vasak, Karel, ed. (1978): *Les dimensions internationales des droits de l'homme : manuel destiné a l'enseignement des droits de l'homme dans les universités*. Paris: Unesco, 1978; Wallace, Rebecca (1997): *International human rights: Text and materials*. London: Sweet & Maxwell, 1997; Žagar, Mitja (1997): "Rights of ethnic minorities: Individual and/or collective rights? Some new(er) trends in development and the (universal) nature of human rights - the European perspective" - in *Journal of international relations*, Vol. 4, no. 1/4 (1997), pp. 29-48; etc.

<sup>90</sup>. See, e.g.: Bartelson, Jens (1995): *A Genealogy of Sovereignty*. Cambridge, New York, Melbourne: Cambridge University Press, 1995; Hinsley (1986); Oesterud, Oeyvind (1994) "Nationalism and the Transformation of Sovereignty." - in Bucar, Bojko & Kuhnle, Stein, eds.: *Small States Compared: Politics of Norway and Slovenia*. Bergen: Alma Mater, 1994 pp. 253-260; Žagar, Mitja (1994), "National Sovereignty at the End of the Twentieth Century: Relativization of Traditional Concepts; The Case of Slovenia," *ibidem*, pp. 235-252; etc.

relations and links between a state and its citizen, the rights and duties (obligations) of the citizen and those of the state. Additionally, they regulate the criteria and procedure how an individual becomes a citizen of the state.<sup>91</sup> As Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Law pints our, the regulation of citizenship is considered a sovereign right (*domain reserve*) of every state. Nevertheless, a state is expected to observe basic rules and standards developed by international law.<sup>92</sup>

J. G. Starke, following the general practice in international law, describes nationality (citizenship) as:

"the most frequent and sometimes the only link between an individual and a state, ensuring that effect be given to that individual's rights and obligations at international law. It may be defined as the legal status of membership of the collectivity of individuals whose acts, decisions and policy are vouchsafed through the legal concept of the state representing those individuals."<sup>93</sup>

The European Convention on Nationality (1997) defines nationality (citizenship) in Article 2 as follows:

"a 'nationality' means the legal bond between a person and a State and does not indicate the person's ethnic origin;..."

As we mentioned, the term "nationality" is used usually - in the theory and in practice of international and national legal (internal law) and political documents - as a synonym for the term "citizenship."<sup>94</sup> Both terms are often used interchangeably, but sometimes a distinction can be made that might result in a different status of an individual.<sup>95</sup> In this context, we decided to use the term "citizenship," which is

<sup>91</sup>. More see, e.g., Brubaker, William Rogers, ed. (1989): *Immigration and the Politics of Citizenship in Europe and North America*. Lenham, MD, Washington, D.C.: University Press of America, 1989; Donner, Ruth (1994): *The Regulation of Nationality in International Law*, Second Edition. Irvington-on-Hudson, NY: Transnational Publishers, Inc., 1994; Meehan, Elizabeth M. (1993): *Citizenship and the European Community*. London, Newbury Park, Calif.: Sage Publications; 1993; etc.

<sup>92</sup>. The most important international documents and agreements on nationality (citizenship) are listed in: *European Convention on Nationality and explanatory report* (1997), p. 24 in footnote 1. More on these and other relevant international documents see also, Breznikar, Carmen & Vernik, Boštjan (1999): "Vloga mednarodnega prava pri urejanju vprašanj državljanstva: Poskus konceptualne predstavitve" (The role of international law in regulation of citizenship: Conceptual presentation), manuscript - forthcoming; Mesojedec Pervinšek, Alenka (1999): "Ucinek mednarodnega prava v notranjem pravu Republike Slovenije na področju državljanstva" (The effects of International Law in internal law on citizenship in the Republic of Slovenia), manuscript - forthcoming.

International law deals with different problems and conflicts of national citizenship laws (e.g. dual or multiple citizenship, disputed citizenship of married women) and cases, when a certain person does not have his or her citizenship (statelessness). Citizenship establishes a link between a person and a state which is permanent, even in a case, when this person no longer lives in the territory of this state. In such a case, international law and national legislation establish rights and responsibilities of a person and state (e.g. entitlement for diplomatic protection abroad, etc.). (E.g., Starke (1989): pp. 341-347)

<sup>93</sup>. Starke (1989): p. 340.

<sup>94</sup>. See, e.g. Simon, Thomas W. (1999): "Theory of the state: Notes for lectures" (manuscript).

considered more value neutral and which does not have so many different meanings.<sup>96</sup>

Citizenship is not a right but rather a specific legal status granted to individual by a state. For an individual, this is a very important status that entitles an individual to certain - especially political - rights and establishes certain obligations of a state to this individual (e.g., diplomatic protection of its citizen abroad). On the other hand, citizenship creates duties and obligations of a citizen in relation to his/her state. A state might expect from a citizen to respect its laws and social order, to fulfil his/her duties and obligations, such as paying taxes and/or defending a country, etc. In this context, considering mentioned traditions states can demand at least a certain loyalty from their citizens.<sup>97</sup>

A certain confusion might arise from the provisions of Article 15 of the Universal Declaration of Human Rights (1948) that reads:

"(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

Additionally Article 24 of the International Covenant on Civil and Political Rights (1966) states in its paragraph 3 that "[e]very child has the right to acquire a nationality."

A closer analysis of these provisions shows that they speak of the right to acquire the citizenship. They do not define citizenship itself as a right explicitly. Everybody shall have the right, under (equal) legally determined conditions, to acquire citizenship - *ex lege* or by naturalization. Nevertheless it is a state that in accordance with its internal law (based on the principle of the rule of law) grants or does not grant its citizenship to an individual. In accordance with internal law, a state might even deprive its citizen

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<sup>95</sup>. As it is the case in the specific practice of the USA with regard to, e.g., inhabitants of Guam who are considered US nationals but not citizens.

<sup>96</sup>. Webster's Dictionary, for example, lists the following possible meanings of the term "nationality":

1. national quality or character,

2. the condition or fact of belonging to a nation by birth or naturalization,

3. the condition or fact of being a nation,

4. a nation or national group" (Webster's New Universal Unabridged Dictionary. Deluxe Second Edition. Dorset & Baber, USA, 1983, p. 1196.)

One could add a list of additional meanings of the term "nationality," but for the purpose of this contribution we shall mention two additional specific ways in which this term is used:

(i) to express one's belonging to a certain ethnic group and his/her ethnic identity;

(ii) to define a specific ethnic group (ethnie), namely an ethnic/national minority. (E.g., Breton, Roland (1981): *Les ethnies*. Paris: PUF, 1981.)

<sup>97</sup>. People's need for security and long term stability would be the main reason for granting one's loyalty to a state in Hobbesian tradition. Deriving from the traditions of Rousseau we could assume that citizens owe their loyalty to their state as long as it is not in breach with the generally accepted "social contract". (See also, e.g., Accetto, Matej (1999): "Širše implikacije problema državljanstva: Sorazmernost legitimnih interesov države in interesov posameznika" (Implications of the problematic of citizenship: The balance of legitimate interests of a state and those of an individual), manuscript - forthcoming.)

of citizenship.<sup>98</sup> In other words, it is a state's sovereign right to make these decisions, thereby, international law prohibits explicitly the arbitrarily deprivation of citizenship or the denial of one's right to change one's citizenship.

It is in this way that we should understand also the provisions of Article 4 of the European Convention on Nationality (1997), which purport to prevent statelessness.<sup>99</sup>

Although more than a hundred years old (1895, 1896) the following basic principles are still considered relevant:

- nobody shall become stateless,
- everybody shall have only one citizenship (nationality),
- everybody shall have the right to change one's citizenship (nationality),
- for persons born abroad the principle of (limited) passing of citizenship (nationality) from a generation to a generation should be applied *ad infinitum* - mostly to prevent possible statelessness.<sup>100</sup>

The acquisition of citizenship is extremely important for every individual. Three main principles have been developed to determine citizenship (nationality) of a certain person: *ius soli* - based on a territory where a person is born; *ius sanguinis* - based on the nationality of parents at birth; and *ius domicilii* - based on the permanent residency of the parents and child.

Following the mentioned principles, citizenship might be acquired in three principal ways:

1. By birth according to *ius soli*, *ius sanguinis*<sup>101</sup>, or according to both - to prevent statelessness.<sup>102</sup> In some cases also *ius domicilii* might be used.

2. By naturalization in accordance with national laws on citizenship/nationality, based on the application to state authorities usually following the marriage with a citizen of a certain state or lasting habitual/permanent residence.<sup>103</sup>

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<sup>98</sup>. In accordance with internal law, the deprivation of citizenship might be admissible under international law even in cases that would lead to statelessness.

<sup>99</sup>. In this context we shall stress that nobody shall be considered stateless as long as he/she formally possesses citizenship of whatever country, although there are no genuine links between this person and a respective state.

<sup>100</sup>. See, e.g., Donner (1994).

<sup>101</sup>. Based on *ius sanguinis*, a child, although he or she was born abroad, can be or become a citizen of a certain state if his or her parents were citizens of this country in the time of the child's birth; in some cases it is sufficient if at least one parent was a citizen of this country.

<sup>102</sup>. Statelessness would occur if a child is born in the territory of a state that determines the principle *ius sanguinis* as the only way for acquiring citizenship by the birth (*ex lege*) to parents who are citizens (nationals) of a state that follows only *ius soli*.

<sup>103</sup>. Though there is no duty of states to recognize a nationality acquired by a person who has no genuine link or connection with the naturalizing state according to the decision of the International



3. By option, registration or entry into the public service of the state concerned in case of the change of the legal status of a certain territory. "The inhabitants of a subjugated or conquered or ceded territory may assume the nationality (*citizenship*) of the conquering state, or of the state to which a territory is ceded." There is a dispute whether a state may "naturalize persons who do not have their habitual residence in that state's territory."<sup>104</sup>

In theory, citizenship belongs or, at least, should belong to all the people who live in a territory of a certain state and/or who qualify for it on the basis of general conditions determined by internal law. Although citizenship is generally declared an ethnically neutral category, belonging to a certain distinct community (ethnic origin, blood-link) could be an important criterion for the acquisition of citizenship of a certain nation-state *ex lege* or by naturalization. In some cases, following *ius sanguinis*, states might introduce a simpler procedure for naturalization to persons who ethnically belong to a certain ethnic community (usually to a titular nation in a nation-state) even if no other genuine link exists. Such a practice of certain nation-states reflects their view of the role of a nation-state in preserving and developing the identity and culture of a titular nation.

### 3.1. INTERESTS OF INDIVIDUALS AND INTERESTS OF STATES

Citizenship is, no doubt, important for an individual. Although individuals might not like certain aspects of citizenship (e.g., duties that derive from citizenship, such as paying taxes, serving military service, etc.), they are usually interested in acquiring citizenship of a country where they permanently live. Citizenship entitles them to political rights and to all other (economic, social, cultural) rights that are in accordance with the constitution and laws reserved for citizens of a certain state. Especially democratic political participation is usually limited only to citizens of a state. Different (social, medical, etc.) benefits in many countries might also be linked to a status of a citizen. Although the rights and protection of aliens (including stateless persons) have been increasing in the process of development of human rights both at the level of international law and national legislation, the status of alien is usually less favourable. An individual might want to acquire citizenship of two or more states - especially in cases when this person has different links with these states. In these cases, dual or multiple citizenship might seem a proper solution to an individual.<sup>105</sup>

For similar reasons, an individual might not want to lose citizenship of a certain country, especially in cases when this individual is deprived of citizenship by this state. On the other hand, for different reasons an individual might want to renounce citizenship of a certain state. In this context, international law has established the right

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Court of Justice in the *Nottebohm Case (Second Phase)* (Official report of the International Court of Justice, 1955, p. 4.)

<sup>104</sup>. Starke (1989): p. 344.

<sup>105</sup>. To prevent dual or multiple citizenship states - in accordance with national and international law - usually demand the renunciation of the former citizenship from an individual who is granted citizenship of a new state.

of an individual to change citizenship, but for different reasons individuals would often want also citizenship itself to be a human right.

Interests of states relating to citizenship might differ substantially from those of individuals. Citizenship is an important political issue in almost every country. Sovereign states do not want to lose their traditional role in determining their body of citizens and in the regulation of citizenship. They want to decide who will be granted citizenship, who will lose it (automatically or on the basis of one's free will), and who will be deprived of citizenship in accordance with internal law. Taking into account specific (economic, social, cultural, etc.) national interests, states regulate citizenship as a specific status that entitles citizens to certain rights that are in accordance with constitutions and laws linked to the status of citizen. They are aware of different implications and dimensions of citizenship. Therefore, they are willing to grant their citizenship only to individuals who are well integrated in a society, who can contribute to its welfare and development, who are expected to be good law abiding citizens. States also expect from applicants that they will show loyalty to a respective country. States tend to deny citizenship to those applicants who do not meet the above criteria. In the view of loyalty to the country of citizenship, most states are reluctant to grant their citizenship to persons who already are citizens of one or more states, if they are not willing to renounce these citizenships.

Considering all above, we can easily imagine conflicts emerging from the mentioned specific interests of individuals and specific interests of states. Therefore, rules and practice must be established that would properly weight these different interests and enable a proper balance between interests of individuals and those of states. Existing situations and trends lead us to expect that states would not accept citizenship as a human right.

### 3.2. THREE CASES IN THE CONTEXT OF SUCCESSION OF STATES <sup>106</sup>

The succession of states caused some very interesting cases from the perspective of the proper balance of interests of states and those of individuals relating to citizenship. <sup>107</sup> Existing international standards and national legislation cannot cover all possible situations caused by the state succession. Therefore, the willingness of states to resolve specific existing problems is extremely important. In these cases, they have to apply all existing legal instruments. Sometimes this requires a very flexible and creative interpretation of rules and standards. Although we cannot define citizenship as a right, human rights principles can be well used in this context (e.g., special rights of children, protection of family life, etc.). <sup>108</sup> In the following cases the decision-

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<sup>106</sup>. These two cases (acquiring citizenship by naturalisation taking into account specific needs, interests and human rights) are from the practice of the Republic of Slovenia and were presented by Ms. Alenka Mesojedec Pervinšek.

<sup>107</sup>. See, e.g., Decaux, Emmanuel & Pellet, Alain, eds. (1996): *Nationalité minorités et succession d'états en Europe de l'est*. Actes du colloque de Prague des 22-24 septembre 1994. Paris: Montchrestien, 1996.

<sup>108</sup>. Several interesting cases in the context of the succession of states are presented in the overview and analysis of cases relating to citizenship decided by the Supreme Court prepared by Samo Kutoš. See, e.g., Kutoš, Samo (1999): "Pregled sodne prakse Vrhovnega sodišča RS v zvezi s 40. clenom zakona o državljanstvu (državljeni drugih republik bivše SFRJ)" (An overview of decisions of the Supreme Court

maker (the Ministry of Interior of the Republic of Slovenia) took into account specific needs, interests and human rights of applicants and exercised all possibilities within existing legal framework.

## **CASE 1**

Ms. L was born in 1927, as a illegitimate child in the territory of one of the successor states of the former SFR Yugoslavia - outside nowadays Slovenia. Her mother originated from the area where the child was born. The mother came to Ljubljana with her daughter immediately after her birth. Due to mother's critical economic situation the daughter was put in the orphanage in Ljubljana run by Catholic nuns who, took care of the baby. When Ms. L was five years old, her mother married a Slovenian who was not the child's father. Ms. L's stepsister was born in this marriage. Although Ms. L was not adopted by her stepfather, she lived with the family. As a part of the Kingdom of Yugoslavia, Slovenia was occupied in 1941. From the beginning of 1943, Ms. L actively supported the partisans' resistance. After being betrayed, she was arrested by German occupiers (Gestapo) and sent to the Dachau concentration camp and then to Auschwitz (Oswiecim). There she was picked by Dr. Mengele who did several medical experiments on her. Weighting less than 30 kg she was sent to hospital for recovery after the liberation of the concentration camp by Allies. When she recovered, the Yugoslav Red Cross took her to Belgrade. In the beginning of 1947, Ms. L married a demobilized former partisan officer, who was sent within a Program of Technical Cooperation to Prague for technical training. There, her husband opted for the Inform-Biro and renounced the existing Yugoslav political leadership that resisted Stalin. Ms. L stayed in Belgrade and was forced to divorce from her husband (in his absence) to avoid her deportation to the Goli otok prison, where Inform-Biro supporters were imprisoned. She finished her studies and lived in Belgrade, where she was employed. Although she lived in Belgrade until 1994, she kept constant contacts with her mother and stepsister, her only living relatives. During all these years she declared herself a Slovenian and preserved the Slovenian language as her mother tongue. In 1991, with the dissolution of the former SFR Yugoslavia, she stayed in Belgrade where she supported students' demonstrations against Milošević's regime. Because she declared herself Slovenian and supported Slovenia's independence her life was threatened. In 1994, she left Belgrade (leaving all her belongings there) and came to Ljubljana. She moved with her stepsister, where she still lives. Immediately upon her arrival to Slovenia, she applied for Slovenian citizenship.

### Facts, legal facts and explanation:

Ms. L had the right to municipality (citizenship) in the mother's commune as the illegitimate child. When her mother, she acquired her husbands right to municipality in Ljubljana. Ms. L, as the illegitimate child who was not adopted by her stepfather, kept her right to municipality in her mother's commune - outside nowadays Slovenia. Citizenship legislation of Yugoslavia after 1945 determined that every person acquired citizenship of a republic where a person had his/her right to municipality on

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of the Republic of Slovenia regarding Article 40 of the Citizenship law (citizens of other republics of the former SFR Yugoslavia)), manuscript - forthcoming.

6 April 1941 (the day when the occupation of the former Yugoslavia began). Based on this legislation, she became a citizen of the republic where she was born. In 1991, the Slovenian citizenship law on the principle of the continuity of citizenship determined that every person who had Slovenian republic citizenship in the SFR Yugoslavia in accordance with all laws and regulations (after the birth of an individual, even the laws of Austria-Hungary) became Slovenian citizen *ex lege*. When she applied for Slovenian citizenship, Ms. L did not meet a basic condition for naturalization (required period of residence before applying for naturalization).

Ms. L was granted Slovenian citizenship on the ground of the special provision for naturalization. This special provision requires that the government establishes the existence of special national interests listed in Article 13 of the citizenship law. In her case, it was determined that a genuine link with Slovenia existed because she kept close contacts with her relatives in Slovenia and explicitly expressed her Slovenian identity. Additionally, she managed to preserve Slovenian language as her mother tongue. Although the acquisition of citizenship by naturalization is not defined as a human right, the government determined that in this case the special interest of the state was the protection of Ms. L's human rights.

## CASE 2

Ms. J.S. was born in Kosovo in 1963 and had republic citizenship of Serbia in the former SFR Yugoslavia. She is of the Roma (Gypsy) origin. She came to Slovenia in mid 1980s. In 1985s she married in Kosovo. Her husband is also a Roma from Kosovo. They came to live in Slovenia, where their three children were born. In 1990, J.S. had a permanent residency in Slovenia, which in 1991 entitled her to apply for Slovene citizenship under exceptionally facilitated naturalization. Nevertheless, she did not file her application in the legally determined time limit.

In 1991, her husband registered permanent residency in Slovenia, meaning, he was not entitled for applying under Art. 40, e.g. "state succession" provision for naturalization of citizens of former Yugoslav republics.

In 1996 J.S. applied for a citizenship by regular naturalization that is preconditioned with the release of her citizenship of the Federal Republic Yugoslavia (Serbia), which she acquired *ex lege* after the dissolution of the SFR Yugoslavia. It was impossible for Ms. J.S. to meet this condition for the following reasons:

- it is almost impossible to realize the release of citizenship of the FRY - especially for those who apply for Slovenian citizenship;
- Slovenia demands the legalization of all official documents, including the release of citizenship to prevent possible misuses. The legalization of documents from the FRY is extremely difficult, because the FRY is not a party of the 1961 Hague Convention that determines a simple way of legalization (*apostille*). Namely, the FRY has not notified the succession of this convention as other successor states did.

### Facts, legal facts and explanation:

Ms. J.S. fell seriously ill. Her medical condition required immediate and very costly medical treatment that her family could not afford. As an alien in Slovenia, she was not entitled for medical insurance benefits, because there is no bilateral health-

insurance agreement between Slovenia and the FRY. Furthermore, Slovenia and the FRY have not established diplomatic relations.

Ms. J.S. was granted Slovenian citizenship in accordance with the special provision for naturalization. In this case Article 13 of the citizenship law was applied again. Taking into account her genuine links with Slovenia, the government of the Republic of Slovenia determined that a special interest of the state existed to grant her citizenship. It considered that the protection of her human rights demanded such a decision, taking into account also that her husband and children had already acquired Slovenian citizenship.

### **CASE 3**

Ms. J.D. was born in 1976 in Ljubljana, her parents were citizens of another republic of SFRY. When five years old, her mother, who was an alcoholic, left the family (her older brother and sister, as well as the husband). Since then, she didn't have any contacts with the family, nor did the family seek for them. The father took care of the children.

In 1987, J.D.'s father died and J.D. as a minor, was placed under the custody of her uncle.

In 1990, on uncle's request his custody under the niece was suggested and that's why a competent organ for social matters became her custodian.

In early 1994, before J.D. become adult, the custodian applied for her naturalization. Two months before she became adult, she was naturalized.

#### Facts, legal facts and explanation:

From 1991 until March 1994, when the Law on citizenship was amended, only the parents, or at least one of them, were entitled for applying for naturalization of their children. Since the provision being too narrow and didn't cover cases of children, whose parents died, or were deprived of their parental rights, the provision was amended. The naturalization of a minor is now possible also under application of custodian if:

- the child doesn't have parents or
- the parents are deprived of their parental rights or
- if the parents are deprived of full capacity.

If the child is older 14 years, the naturalization is preconditioned by his or her consent.

Proceeding the application, it was found out, that only the proof of J.D.'s father's death existed, while there was no proof on her mother's death. The Ministry of Interior, as a competent authority for decision upon naturalization decided, that application of amended provision (the situation where both of the parents are dead), could lead to conclusion, that the presumption of mother's death exists. Because this fact was not supported by any proof except the fact that mother left the family, Ministry of Interior decided to use Art. 3 of the United Nations Convention on Right of the child, as a material legal ground for naturalization. Namely, under Art. 8 of the

Constitution of the Republic of Slovenia, international treaties have a primacy over internal legislation, and therefore their direct application exists.

In its decision the Ministry of Interior assessed that public interest was not affected by the application of the Convention, while the benefits for the child - as a fundamental guideline in deciding - prevailed.

#### 4. **CONCLUSION: PROPER BALANCE BETWEEN THE INTERESTS OF INDIVIDUALS AND THOSE OF STATES**

The question of a proper balance between the interests of individuals and those of states on issues relating to citizenship (nationality) is extremely delicate from the perspectives of both parties involved. Provisions of the European Convention on Nationality (1997) and other international documents can prove very useful in this context.

Seldom, there are clear and simple solutions. No doubt, we should hope for the highest possible standards determined by international law that would protect individuals and their specific interests. And yet, considering the existing nature, content and consequences of citizenship, we can understand the position of states. They do not want to give up their competencies in this field, including their discretionary rights. A major development in this context would be, if individuals who apply for citizenship of a certain state, would be entitled to explanation of the decision of the state when the application is rejected.

Such standard already exists in Art. 11 of European Convention of Nationality; its implementation in practice, should confirm the significance of individual in relation to the State. On the other hand, a limitation of discretionary power or demand for very transparent conditions, especially on the field of naturalization, could also be a way for development of human rights.

A possible solution to some problems would be the introduction of universal citizenship at a global level. Initially, this global citizenship that would belong to every individual in the world could exist besides national citizenship. Although this option seems unlikely, we know some systems in existing or former federations that know dual citizenship - citizenship of a federation and citizenship of a specific federal unit. An attempt in this direction could be also citizenship of the European Union that was introduced in addition to national citizenship of member states. This European citizenship entitles its holders to certain rights in the territory of other member states.<sup>109</sup> Also universal citizenship could entitle its holders to some rights that are traditionally reserved only to citizens of a certain country, such as the right to political participation at least at the level of local communities and regions.

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<sup>109</sup>. See, e.g., Anderson, Malcolm & den Boer, Monica & Miller, Gary (1994): "European citizenship and cooperation in justice and home affairs:" - in Duff, Andrew & Pinder, John & Pryce, Roy, eds.: *Maastricht and Beyond: Building the European Union*. London, New York: Routledge, 1994, pp. 104-122; Beetham, David & Lord, Christopher (1998): *Legitimacy and the European Union*. London, New York: Longman, 1998, pp. 41-47, 112-113; Meehan (1993); etc.

In any case, states would need to pay more attention to life-long education for democratic citizenship that would include all inhabitants of a certain community in different formal and informal educational and training programs. These programs should not be limited to citizens, but should include everybody who resides in the community. Programs should be adapted to specific needs and situations of participants. This education for democratic citizenship should inform people about economic, social, legal and political system in a respective country, thereby enabling them for a successful integration into social, economic and political life in their community. Special attention should be paid to the ethnic, linguistic, cultural, religious and every other kind of diversity that exists in a certain community; these programs should focus on the promotion of multiculturalism and inter-culturalism, stressing the importance of knowing, respecting and understanding of differences, social integration and the need for equal co-operation of all individual and distinct communities in every specific (social) environment. Among others, such programs would enable also better integration of immigrants in their new communities. At the same time, such programs and activities would promote patriotism and loyalty to a state of people who live in a certain community - both, citizens and non citizens.





**THE RELEVANCE OF THE *EUROPEAN CONVENTION ON  
NATIONALITY* FOR NON-EUROPEAN STATES**

**Report by**

**Norman SABOURIN**

Registrar of Canadian Citizenship,  
Citizenship and Immigration Canada<sup>110</sup>

In the last twenty years or so, developments in transportation and communications have dramatically increased international mobility, allowing people around the world to travel, reside, seek employment, conduct business and share ideas over vast distances with relative ease. As connections between people from different countries increase, the potential for challenges for nationality<sup>111</sup> law will also increase. More marriages and other relationships between people with different nationalities could be formed and more children with the right to citizenship in two or more countries could be born. There will be increased pressure on countries to recognise dual nationality, to reduce conflicts that might occur between their nationality laws, facilitate acquisition of citizenship by family members, and respond to migrations or displacements of persons in other parts of the world. States must carefully form policies that both protect their interests and respond responsibly to the needs of individuals in this changing environment. In this endeavor, it is proper that governments be guided by internationally accepted standards.

But what are those standards? The *European Convention on Nationality* fills a need in that area, as it is the first modern multi-lateral treaty to codify a full range of nationality issues, from basic matters such as the acquisition of nationality to the more complex problems that can arise in trying to manage nationality issues in the context of a state succession. The multi-lateral treaties that currently exist in this field are not as broad in scope, as they tend to respond to specific problem areas, such as multiple nationality, reduction of statelessness and discrimination against women<sup>112</sup>.

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<sup>110</sup> This paper will form the basis for a presentation by Norman Sabourin, Registrar of Canadian Citizenship, Citizenship and Immigration Canada, at the First European Conference on Nationality, to be held at the Council of Europe, Strasbourg, in October 1999. The paper was written by Catherine Howlett, Special Advisor to the Registrar, with assistance from Eric Stevens, Jason Rieskind and Johanne Levasseur, Legal Counsels with the Department of Justice, Canada. Many others provided assistance in finalizing the paper, including Madeleine Riou and Richard Taillefer, Nationality Law Advisors, Citizenship and Immigration Canada.

<sup>111</sup> For convenience, the terms "nationality" and "citizenship" have been used interchangeably in this paper. In Canada, the term "citizenship" is used almost exclusively as Canadian law does not distinguish between a citizen and a national. At the international level, however, the term "nationality" seems to be preferred. Article 2 of the *European Convention on Nationality* defines that nationality is the legal bond between an individual and a state and does not indicate ethnic origin.

<sup>112</sup> See, for example, the *Convention on Certain Questions relating to the Conflict of Nationality Laws* (1930) 179 L.N.T.S. 89, (Canada acceded on 6 April 1934); the *Convention on the Status of Stateless Persons* (1954) 360 U.N.T.S. 117 (Canada is not a party); *Convention on the Nationality of Married Women* (1957) 309 U.N.T.S. 65 (Canada acceded on 21 October 1959); *Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (with annex)* (Canada cannot be a party as this treaty is only opened for signature by member states of the Council of

The *European Convention on Nationality* is in part a codification of fundamental principles taken from international law and the domestic practice of European states. As such, it contains elements of customary international law, binding on all states. These principles are intended to govern the actions of member states of the Council of Europe in their nationality practices. When member states ratify the Convention, they will have to ensure that their domestic legislation complies with its principles, and when those states subsequently amend or revise their nationality laws, they will also have to do so in conformity with the Convention's principles<sup>113</sup>. When interpreting domestic legislation, the domestic courts of member states must, in some cases, look to the Convention to identify common European legal principles and practices in nationality. If conflicts arise between the nationality laws of member states, the Convention can provide a solution or a guideline from which to work through a problem. In this way, the Convention articulates a common standard for European nationality legislation.

Yet, the Convention could well play a significant role beyond European borders. It can encourage other regional or international organizations to take similar initiative in developing declarations or conventions<sup>114</sup>, introduce new principles into international law, or influence the development of nationality law in countries around the world. It is clear from the provisions allowing non-European states to accede to the Convention<sup>115</sup> that the drafters anticipated the treaty could have application beyond European frontiers. And even if non-European states do not become parties to the Convention, it can guide them in their nationality practices in much the same way as it would guide member states of the Council of Europe, although the Convention would only be binding on non-parties in respect of the portions reflecting customary international law<sup>116</sup>. Since many of the provisions of the Convention can be seen as a codification of common European practices, non-European countries, such as Canada, can look to the Convention as an example of a European standard to which they can compare their nationality laws. Individuals and organisations can also look to the Convention to see how the laws their governments enact compare to the European norm.

This paper will attempt to show how the *European Convention on Nationality* might play a role in the development of domestic nationality legislation using illustrations

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Europe); *Convention on the Reduction of Statelessness* (1961), 989 U.N.T.S. 175 (Canada acceded on 17 July 1978).

<sup>113</sup> This will be of particular concern for countries where international treaties are automatically part of domestic law. Article 1 of the Convention clearly articulates that "the internal law of member states shall conform" to the principles and rules contained in the Convention (emphasis added).

<sup>114</sup> As other Council of Europe treaties have done. For example, the development of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), Eur. T.S., No. 5 (in force 1953) acted as a precursor to the United Nations' *International Covenant on Civil and Political Rights* (1966) 999 U.N.T.S. 171. See Kindred, *International Law Chiefly as Interpreted and Applied in Canada*, (5th ed., 1993) 604.

<sup>115</sup> Article 27(1) of the Convention allows non-member states of the Council of Europe that participated in the elaboration of the Convention to become parties. Under Article 28(1), the Committee of Ministers of the Council of Europe may invite other non-member states to accede to the Convention after it enters into force.

<sup>116</sup> Some sections of the Convention could reflect international law. For example, article 3 sets out a state's jurisdiction over nationality, which is likely well established in international law. Other provisions of the Convention, such as those governing state succession, may introduce some new principles into international law and would therefore likely not be part of the body of customary law.

from Canadian law. I will discuss ways in which international law has impacted on the creation and interpretation of Canadian law, and give some specific examples of these impacts to demonstrate how the *European Convention on Nationality* might in the future be similarly influential. However, before beginning that discussion, in the first section of this paper I will discuss why it is critical for countries, their citizens and their other residents, that their nationality legislation be in line with international law.

### **Consistency with International Law**

Nationality is highly significant and has important international value for both individuals and states. As the fundamental link between the individual and the state, nationality confers mutual rights and duties. Individuals can turn to their country of nationality to provide diplomatic protection, to advocate claims on their behalf against foreign states, and to provide documents allowing them to travel internationally. Individuals must depend on their country of nationality for international legal personality. For some states, nationality is a basis for jurisdiction over the individual that can extend beyond a country's borders. States can impose military obligations on their nationals, can be responsible for the acts of their nationals under certain circumstances, and in some cases, will refuse to extradite their nationals. On a less legalistic, more elementary level, nationality is important to a country because it is a key means through which that country defines itself, by identifying who may become full-fledged members of its society.

Because nationality has such a strong international aspect, the effectiveness of a state's nationality laws depends on whether other countries recognise those laws as legitimate. It is well established that the regulation of nationality lies primarily within a state's domestic jurisdiction. However, the exercise of this power must be in line with international law<sup>117</sup>. When a country's nationality legislation is not consistent with international law other countries are not required to recognize it<sup>118</sup>. While respect for state sovereignty and the reciprocal necessities of international relations generally ensure that a country will recognize other states' nationality laws, there are times when it might be reasonable, convenient or a matter of principle for that country not to do so, if those laws are not in conformity with international standards<sup>119</sup>. The seminal *Nottebohm case* illustrates this point, since it came about because Guatemala argued that Liechtenstein's grant of citizenship to Mr. Nottebohm was not valid<sup>120</sup>.

<sup>117</sup> *Convention on Certain Questions relating to the Conflict of Nationality Laws*, *supra* note 3, Article 1. Article 3 of the *European Convention on Nationality* also articulates these principles outlining a state's jurisdiction over nationality matters.

<sup>118</sup> See Ian Brownlee, *Principles of Public International Law*, (1998, 5<sup>th</sup> ed.) Oxford University Press at 385-390 for a discussion of the limits on a state's ability to legislate in nationality and the necessity that domestic legislation be consistent with international law in order to be effective internationally. The Explanatory Report to the *European Convention on Nationality* points out at paragraph 29 that the developments in international human rights law in the last 50 years would likely have a significant impact on a state's freedom to legislate on nationality.

<sup>119</sup> Clearly, this is one of the enforcement mechanisms in international law, which are often applied inconsistently and at the convenience of states, yet it shows the significant impact that international principles can have on domestic legislation.

<sup>120</sup> [1955] I.C.J. Rep. 4. Liechtenstein had filed a claim for damages against Guatemala on behalf of its national, Mr. Nottebohm. Guatemala contended that the claim was inadmissible because, among other reasons, Mr. Nottebohm's acquisition of Liechtenstein nationality had not been in conformity with international law. See Brownlee, *supra*, note 9 at 412-413 for a brief overview of the written

The outcome of that case, specifically the International Court of Justice's decision that Mr. Nottebohm's naturalisation had occurred without regard to the accepted international principles governing nationality and that therefore Guatemala was not obliged to recognize his Liechtenstein nationality, shows that if a country wants its nationality laws to be internationally effective it must legislate within the limits that other states consider legitimate.

The *European Convention on Nationality* can serve as an aid in this respect, since it will indicate what European countries consider acceptable in nationality legislation and practice. Because international principles can have an impact on the international effectiveness of domestic nationality legislation and because citizenship has such international value, states, their citizens and others who might wish to become citizens have a strong interest in ensuring their domestic nationality legislation is consistent with international principles.

### **Canada and European Standards**

Obviously, it is important to Canada to maintain legislation that is consistent with international law. Canada is very similar to European countries in many ways and shares many basic values, such as the importance of the rule of law and democracy. However, a relevant difference is that North American countries have historically received large numbers of immigrants<sup>121</sup>. Even now, Canada receives approximately 200 000 newcomers per year<sup>122</sup>. The historic patterns of immigration in a country can influence the philosophy of citizenship underlying that country's policies and legislation<sup>123</sup>. For Canada, it has been critical to actively integrate newcomers and naturalization is seen as a significant part of that process, not only because naturalization allows newcomers further privileges and responsibilities, such as the

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arguments made by the parties. Note that the Court specifically stated that it was not considering the validity of Nottebohm's naturalization according to Liechtenstein's law, but only whether that naturalization could have international effect such that Liechtenstein could rely on it against Guatemala. This case is quoted most often in international nationality law for the principle that a genuine and effective connection must exist between a state and its citizen.

<sup>121</sup> As a colony and following its confederation, Canada has received large numbers of immigrants. Canada is now made up of its original inhabitants, Canadian First Nations peoples, as well as immigrants and descendants of immigrants, many of whom have lived in North America for generations. The United States has also historically received large numbers of immigrants. Brubaker, W.R., *Citizenship and Naturalization: Policies and Politics in Immigration and the Politics of Citizenship in Europe and North America*. W.R. Brubaker (ed.) (1989: New York, University Press of America)

<sup>122</sup> Between 1990 and 1997, Canada received over 200 000 immigrants and refugees each year. In 1998 Canada received 174 1000 newcomers. While final figures are not yet available, a target of 200,000 to 225,000 newcomers has been set for 1999, which includes 22,100 to 29,300 refugees. *Facts and Figures 1998 and Canada – a Welcoming Land; The 1999 Annual Immigration Plan*, tabled in October 1998. (Both documents are published by Citizenship and Immigration Canada and are available in French and English on the website [www.cic.gc.ca](http://www.cic.gc.ca).)

<sup>123</sup> William Brubaker briefly discusses the impact that historic patterns of immigration have had on citizenship policy in North American and Europe. He links a more expansive definition of citizenship, where citizenship has been conferred automatically on those born on the territory and immigrants have been encouraged to become citizens, with the "classical" countries of immigration, Canada and the United States. He contrasts this with the different migration experiences of European countries, specifically France, Britain, West Germany (as it then was) and Sweden, where he argues citizenship legislation has traditionally been based on descent (Germany, Sweden) or, following WWII, a legacy of colonialism (Britain, France). However, many changes have taken place in citizenship legislation since Brubaker's article was published in 1989. *Supra*, note 12 at 99.

right to vote, but also because it enables them to become full and equal members of Canadian society<sup>124</sup>. The Government of Canada encourages newcomers to apply for citizenship and to become active citizens in their communities.

Given that integrating newcomers is important for Canada and that the citizenship process is a key component of this integration, the *European Convention on Nationality* will be a useful treaty for Canada. As the Convention is relatively new, Canadian courts have not considered it in their judgements yet<sup>125</sup>. Nevertheless, at Citizenship and Immigration Canada<sup>126</sup>, we have referred to the Convention when advising our Minister on various issues relating to nationality, including illustrating the international norms surrounding citizenship revocation. In this way, it is possible that the Convention has already impacted on the development of Canadian citizenship policy. In a broader sense, however, many other international treaties have and will continue to play a role in the development of Canadian law by influencing the content of our legislation and regulations and informing the interpretation of our legislation. In the next two subsections of this paper, I will outline some specific examples of how international conventions have affected the creation and interpretation of Canadian law, and indicate ways in which I believe the *European Convention on Nationality* could be similarly influential in Canada.

### *The Creation of Legislation*

Since Citizenship and Immigration Canada tabled a bill to revise Canada's Citizenship Act (Bill C-63) in the House of Commons in December 1998<sup>127</sup>, and since much consideration of Canada's citizenship policy took place prior to this bill being tabled, it is possible to trace some of the effects of international conventions and norms on the development of the bill. One area in which international conventions were highly influential was in making certain that any potential citizenship legislation did not inadvertently create statelessness. In 1994, after conducting numerous public hearings at which many witnesses appeared, the House of Commons Standing Committee on Citizenship and Immigration released a report recommending a number of specific changes to Canadian citizenship legislation<sup>128</sup>. Among other issues, the Committee was concerned with "birth tourism", the possibility that women might be coming to Canada as visitors for the purpose of giving birth in Canada. This would

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<sup>124</sup> In Canada, permanent residents are considered full members of Canadian society, and enjoy most of the same rights and responsibilities as citizens. However, in applying for Canadian citizenship, a permanent resident is perceived as having a stronger attachment to Canada, since s/he is indicating a desire to commit to the full responsibilities of being Canadian.

<sup>125</sup> A search of Canadian jurisprudence databases in August 1999 showed that the Convention had not yet been considered by Canadian courts.

<sup>126</sup> Citizenship and Immigration Canada is a distinct Department within the Government of Canada and deals with the immigration, settlement and integration of newcomers to Canada as well as other issues relating migration.

<sup>127</sup> Bill C-63, *An Act respecting Canadian Citizenship*, 1<sup>st</sup> session, 36<sup>th</sup> Parliament, 46-47-48 Elizabeth II, 1997-98-99. At the time of writing this paper, Bill C-63 had been reported to the House of Commons by the Standing Committee on Citizenship and Immigration in May 1999 and was awaiting third reading in the House. Bill C-63 was significantly amended by the Standing Committee and all references in this paper are to the Bill as it was reported on May 14, 1999. The progress of Bill C-63 can be monitored via the Canadian parliamentary internet site [www.parl.gc.ca](http://www.parl.gc.ca) under "Government Bills."

<sup>128</sup> *Canadian Citizenship, A Sense of Belonging*. Report of the Standing Committee on Citizenship and Immigration. Judy Bethel, Chairperson. Tabled 20 and 22 June 1994.

ensure that their children would have Canadian citizenship at birth since Canadian law provides that virtually all those born in Canadian territory acquire citizenship automatically<sup>129</sup>. The Committee proposed that children born in Canada should be Canadian citizens only if one of their parents is either a permanent resident or a citizen of Canada. However, the Committee limited that proposal by stating that such a rule should not apply if it would cause a person born in Canada to be stateless. The Committee was clearly influenced by Canada's obligations under the 1961 *Convention on the Reduction of Statelessness*<sup>130</sup>. Article 6(2) of the *European Convention on Nationality* repeats, simplifies and perhaps modernises the requirements of the 1961 Convention<sup>131</sup>. The Committee's recommendation to limit citizenship by birth on the soil to children of citizens or permanent residents was not implemented in Bill C-63 and therefore no potential for statelessness resulting from such a rule was created. However, if that recommendation were ever implemented, Canada could look to the 1961 Convention and the more recent articulation of this norm in the *European Convention on Nationality* for guidance when formulating legislation<sup>132</sup>.

Similarly, when the Standing Committee proposed in the same report to restrict citizenship to the first generation of children born abroad of Canadian parents, it included a proviso "unless statelessness would result". Again, the Committee was influenced by Canada's international obligations under the *1961 Convention on the*

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<sup>129</sup> *Citizenship Act*, R.S.C. 1985, c. C-29, s.3(1)(a). Section 3(2) creates the only exception to this general rule. It provides that children born in Canada to diplomats, consular officers or employees of foreign governments or international organizations that are granted diplomatic privileges in Canada will not be Canadian citizens unless one of their parents was either Canadian or a landed immigrant.

<sup>130</sup> *Supra*, note 3, Article 1. We can see the influence of international norms stemming from the 1961 Convention if we consider the history of Canadian citizenship legislation. The *Canadian Citizenship Act* of 1947 provided that children born in Canada would not obtain citizenship automatically if their parents were aliens who had not been lawfully admitted to Canada as permanent residents. *Canadian Citizenship Act*, R.S.C. 1952, C.33, s. 5(2)(a). No provision was made for the possibility that individuals might become stateless as a result of the application of this rule. The present Canadian citizenship legislation came into force in 1977 and does not make an exception from the *jus soli* rule for children whose parents are not citizens or permanent residents (*Ibid.*). It is clear that the Committee was influenced by the development of international norms and obligations since 1961 when formulating its 1994 proposal, since it did not simply suggest that Canada revert to the 1947 rule, but limited its proposal to ensure that children should not become stateless.

<sup>131</sup> Both the *European Convention on Nationality* and the *1961 Convention on the Reduction of Statelessness* provide for children who would otherwise be stateless to acquire the citizenship of the country in which they are born either *ex lege* (automatically, by operation of law) or by application. If the application method is used, the rules of the two Conventions differ somewhat, with those of the *European Convention on Nationality* being somewhat more simplified. For example, article 6(2) of the *European Convention on Nationality* requires that the application be made before age 18. In contrast, article 1 of the *1961 Convention on the Reduction of Statelessness* states that the period in which the application can be lodged should not begin after age 18, and should not end before age 21 and should allow at least one year in which the affected person is able to legally make the application on his/her own behalf. Another difference is that the 1961 Convention allows a country to not grant citizenship on application if the child has been convicted of an offence against national security or sentenced to imprisonment for five or more years on a criminal charge. The *European Convention on Nationality* merely requires that the child be lawfully and habitually resident on the territory.

<sup>132</sup> The United States has experienced a similar debate on both birth tourism and the policy rationale for granting citizenship to all born on American soil regardless of whether their parents have been legally admitted into the country. Should the United States government decide to legislate in this area, it could also look to international norms, including the *European Convention on Nationality*, for guidance.

*Reduction of Statelessness*<sup>133</sup>. A variation of the Committee's proposal was included in Bill C-63 through a provision that would limit automatic acquisition of citizenship to the second generation of children born abroad of a Canadian citizen. Under this provision, section 14 of Bill C-63, the first generation of children born abroad to a Canadian parent would acquire citizenship automatically. The second generation born abroad (children born outside of Canada to a Canadian parent who had also been born outside Canada) would also acquire citizenship at birth, but would have to fulfil certain conditions before age 28 in order to retain citizenship<sup>134</sup>. The significant change that Bill C-63 would bring about in Canadian law, however, is that these second generation Canadians born abroad would not be able to pass their citizenship on to their children through the bloodline connection, even if they fulfil all the conditions and retain their citizenship<sup>135</sup>. To ensure that none of those third generation children become stateless, another provision was included in Bill C-63 which grants citizenship to individuals born abroad of a Canadian parent if that person has never acquired or had the right to acquire another citizenship, has lived in Canada for three years and has not been convicted of an offence against national security<sup>136</sup>.

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<sup>133</sup> Under both the *Canadian Citizenship Act* of 1947 and the current *Citizenship Act*, there are provisions setting out the potential loss of citizenship for children born abroad. The 1947 *Citizenship Act* required that Canadians born overseas fulfil certain conditions before age 24 in order to retain their citizenship. No provision was made for the possibility of these individuals or their children becoming stateless if they did not fulfil the conditions. *Canadian Citizenship Act*, R.S.C. 1952, c. 33 s. 4(2), 5(1a). Similarly, the current *Citizenship Act* (1977) requires second generation Canadians born abroad to fulfil certain conditions before age 28 in order to maintain their citizenship. *Citizenship Act*, *supra*, note 20, s.8. It also makes no provision for the possibility of statelessness for these individuals or their children. The current Canadian citizenship law is consistent with the requirements under article 4 of the *1961 Convention on the Reduction of Statelessness*.

<sup>134</sup> The conditions for retaining citizenship outlined in section 14 would also be in line with the *1961 Convention on the Reduction of Statelessness*.

Section 14 would also be consistent with the *European Convention on Nationality*. Article 6(1)(a) of the Convention allows exceptions to be made to the acquisition of citizenship *ex lege* for children born abroad, although article 6(4)(b) requires that the acquisition of citizenship be facilitated for these children. Article 7(1)(e) allows a state to provide for the loss of citizenship where a citizen residing abroad does not have a genuine link to that state. Taken together, these articles would allow Canada to provide for the loss of citizenship after two generations born abroad, based on the argument that those individuals did not have a genuine and effective link to Canada.

<sup>135</sup> Clearly, these third generation children would be Canadian if they were born on Canadian territory, so only the third generation of children born abroad would be effected. It is likely that these third generation children born abroad would be entitled to another citizenship via a genuine connection to another country (i.e., birth in the territory or to a citizen parent). Nevertheless, there is a small possibility of statelessness, which prompted the inclusion in Bill C-63 of a provision to avoid this possibility.

<sup>136</sup> See section 11 of Bill C-63. Defining statelessness as never having had a right to acquire citizenship is somewhat controversial. The overall aim of section 11 is to ensure that individuals do not become stateless through the operation of other provisions in Bill C-63. However, in introducing the requirement in subsection 11(e) that an individual never had a right to acquire citizenship in another country, Citizenship and Immigration Canada has attempted to strike a balance between Canada's international obligations and protecting Canada against those who might choose to remain stateless in order to make a claim for Canadian citizenship. Interpreting the phrase "a right to acquire citizenship of any other country" will be key. Each case will have to be determined in accordance with its own unique facts, by taking into consideration such objective factors as whether there is a conditional or unconditional right to citizenship in another country and the existence of any genuine and effective links. There may be situations where individuals have, possibly created through their own actions, an effective link with another country and can be legitimately expected to claim citizenship in that country.

Another initiative which the Government of Canada is attempting to implement in Bill C-63 is a provision that would facilitate acquisition of citizenship for children adopted by Canadians abroad<sup>137</sup>. Under current Canadian law, children adopted by Canadians in foreign countries can acquire Canadian citizenship if they are accepted into Canada as permanent residents sponsored by their Canadian parent<sup>138</sup>. This current law has been challenged in Canadian courts as discriminating against adopted children, since those children are treated differently from children born to a Canadian parent abroad who acquire citizenship automatically<sup>139</sup>. The new provision in Bill C-63 would enable children adopted by Canadians to obtain citizenship without going through the immigration process. It also contains benchmarks protecting the best interests of the child, as well as ensuring that the adoption creates a genuine parent-child relationship, is in accordance with the law and is not an adoption of convenience. The policy objective was to create a provision that treated adopted children as much as possible like children born to Canadians, but that also addressed policy concerns related to the international trafficking of children and the integrity of Canada's immigration and citizenship laws.

When drafting the adoption provision for the proposed citizenship legislation, the Government was concerned with the principles and commitments set out in the *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*<sup>140</sup> as well as the *UN Convention on the Rights of the Child*<sup>141</sup>. There was also discussion on whether the proposed provision was compatible with the *European Convention on Nationality*, and it was concluded that both the current law and the proposed law are consistent with the Convention<sup>142</sup>. In this instance, these international conventions provided guidance when drafting a provision that balances the best interests of adopted children (by ensuring greater equality of treatment,

<sup>137</sup> Section 8 of Bill C-63 reads as follows:

“The Minister shall, on application, grant citizenship to a person who, after February 14, 1977, was adopted by a citizen while the person was a minor child and whose adoption

- (a) was in the best interests of the child;
- (b) created a genuine relationship of parent and child;
- (c) was in accordance with the laws of the place where the adoption took place and the laws of the country of residence of the adopting citizen; and
- (d) was not intended to circumvent the requirements under any enactment for admission to Canada or citizenship.”

<sup>138</sup> These children must enter Canada with the intent to reside permanently in Canada and are subject to immigration requirements, including medical assessments and criminal checks.

<sup>139</sup> *Canada (Attorney General) v. McKenna* (C.A.) [1999] 1 F.C. 401.

<sup>140</sup> (29 May 1993) 32 ILM 1134.

<sup>141</sup> 1992 Can. T.S. No. 3. Article 21 of this Convention sets out principles governing adoption, including requirements that in a country's system of adoption the best interests of the child should be paramount and that the adoption should be authorized by competent authorities and take place in accordance with the law. Subsection (d) of that article requires state parties to take appropriate measures to ensure that a placement in an inter-country adoption does not result in improper financial gain for those involved. Article 11 of the Convention contains an obligation on state parties to take measures to combat the illegal transfer of children abroad.

<sup>142</sup> See article 6(4)(d) of the Convention, which requires a State Party to facilitate the acquisition of its nationality for children adopted by a national. Current Canadian law facilitates acquisition of citizenship for adopted children under section 5(2)(a). That section does not require that children of Canadians (either Canadians by birth or naturalisation, no distinction is made in Canadian law between these two groups) fulfil the period of residence in Canada or the tests relating to knowledge of Canada or Canada's official languages that would be typically required of an adult. Section 8 of Bill C-63 would create slightly different requirements, but would still facilitate the acquisition of citizenship for adopted children.



safeguarding against trafficking in children and facilitating acquisition of citizenship) with concerns relating to the use of citizenship laws to circumvent the regular immigration and citizenship process.

### *Interpretation of Legislation*

International conventions are not only influential when legislation is being developed; they can also be used by courts to interpret that law after its creation. The *European Convention on Nationality* could be influential in Canada in this respect, particularly if Canada were to ratify and implement the Convention. In the past, Canadian courts have occasionally used conventional and customary international law to interpret federal and provincial statutes<sup>143</sup>. As well, international human rights norms have been used by Canadian courts to define the nature of Canada's constitutional guarantees and the appropriate limits to those guarantees, particularly following the adoption of the *Canadian Charter of Rights and Freedoms*<sup>144</sup> [the *Charter*] as a constitutional document in 1982<sup>145</sup>.

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<sup>143</sup> Using international law to interpret Canadian law is a separate although related issue to whether international law is part of Canadian law, creating binding obligations in Canadian law. Complex distinctions are made by courts, as Canadian jurisprudence indicates. See *Baker v. Canada (Minister of Citizenship and Immigration)* (S.C.C.), judgement released 9 July 1999, File No. 25823; *National Corn Growers Association v. Canada (Import Tribunal)* [1990] 2 S.C.R. 1324; *Bhadauria v. Board of Governors of Seneca College* (1981), 124 D.L.R. (3<sup>rd</sup>) 193 (S.C.C.). Customary international law appears to apply in Canada as long as it is not inconsistent with explicit Canadian legislation or judgements of Canadian courts. Therefore, in so far as it articulates customary law, the *European Convention on Nationality* could influence the interpretation of Canadian legislation. By contrast, an international conventional obligation that is not customary law has the force of law in Canada only if it has been implemented via domestic legislation. *Francis v. The Queen*, [1956] S.C.R. 618, at p. 621; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73. However, even if not implemented, an international conventional obligation can be used to inform Canadian law. A rule of statutory interpretation applied by Canadian courts is that the legislator is presumed, in creating legislation, to not wish to put Canada in violation of its international obligations. In a recent judgement, the Supreme Court of Canada applied this rule using a treaty to which Canada had acceded but not implemented, stating:

“the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), p. 330:

[T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.” *Baker v. Canada (Minister of Citizenship and Immigration)*, at para. 70.

Two Justices dissented only on this point, noting the rule that unimplemented treaties have no force or effect in Canadian law and that applying a principle of law that would refer to such a treaty for the purposes of statutory interpretation violates this rule. The full impact of the Baker decision is yet to be determined, however, it appears that if Canada were to ratify the *European Convention on Nationality*, the provisions of that treaty could influence the interpretation of the new *Citizenship of Canada Act* (which is presently still Bill C-63).

<sup>144</sup> *Canadian Charter of Rights and Freedoms, Constitution Act, 1982*, as enacted by Canada Act 1982 (U.K.), 1982, c.11.

<sup>145</sup> The practice of using international human rights law to interpret domestic law has occurred in other common law countries. Kindred, *supra*, note 5 at 203-204; *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (C.A.); *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India). The use of international human rights law to interpret Canadian human rights law has been so pronounced that some commentators have speculated that international human rights law is incorporated into the

In interpreting the *Charter*, judges have used principles from international treaties such as the *International Convention on Civil and Political Rights* and the *European Convention on Human Rights*. In the case of *R. v. Keegstra*<sup>146</sup>, for example, the Supreme Court of Canada looked to principles of international law when deciding whether a section of the Criminal Code prohibiting hate propaganda was a reasonable limit on freedom of expression guaranteed in section 2(b) of the *Charter*. Mr. Keegstra was a teacher who had been found guilty of making anti-Semitic statements to his students. As part of his analysis to determine whether the legislative objective of that section (to prohibit hate propaganda) was pressing and substantial, the Chief Justice referred to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>147</sup> since that Convention had been interpreted to allow racist communications to be prohibited as a valid limit on freedom of expression.<sup>148</sup> Another Justice of Canada's Supreme Court agreed that international treaties are useful in providing a broader context for the interpretation of constitutional guarantees, but stressed that these treaties should not be used to limit the scope of those guarantees<sup>149</sup>. Nevertheless, it is clear that international standards, determined in part through a key Council of Europe document, have assisted Canadian courts to interpret and develop an integral part of Canada's constitution.

The *European Convention on Nationality* could also assist courts to interpret Canadian constitutional guarantees. For example, if the adoption provision in Bill C-63<sup>150</sup> is ever challenged on the ground of age discrimination (the adoption provision specifies that the applicant must be adopted as a child), the Government of Canada could use the Convention, as well as other international instruments such as the *Convention on the Rights of the Child*, to justify treating those under age 18 differently<sup>151</sup>. In this way, the *European Convention on Nationality* could be influential in interpreting the scope and limits of Canada's human rights and freedoms. Since it is the first international treaty of its breadth, the *European Convention on Nationality* has the potential to become an important document in international law, used by both European and non-European domestic courts in interpreting their laws and practices.

Finally, and very briefly, the *European Convention on Nationality* might influence Canadian law as a result of the practice of taking judicial notice of customary international law. In Canada, judges have taken judicial notice of customary

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domestic legal system differently than other types of international law. A. Bayefsky, *International Human Rights Law in Canadian Charter Litigation: A Practical Guide* (1991).

<sup>146</sup> [1990] 3 S.C.R. 697.

<sup>147</sup> *Supra*, note 5, article 9(2).

<sup>148</sup> The Court looked to other key international documents as well, such as the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights* to identify the international norms surrounding the prohibition of hate-promoting expression.

<sup>149</sup> *Supra*, note 37 at 838, according to McLachlin, J.: "Principles agreed upon by free and democratic societies may inform the reading given to certain of [Canada's] guarantees. ... It would be wrong, however, to consider these [international] obligations as determinative of or limiting the scope of those guarantees."

<sup>150</sup> See *supra*, note 28.

<sup>151</sup> Article 2 of the *European Convention on Nationality* defines a child as "every person below the age of 18 years" unless under the applicable law majority is attained earlier. Article 1 of the *Convention on the Rights of the Child* defines a child in almost identical wording.

international law rules, that is, judges have identified and applied rules of customary international law as they would Canadian laws without evidence or argument on the existence of the rule being submitted into the court by legal counsel<sup>152</sup>. International customary law is treated differently in this respect from foreign domestic laws, which must be proved in Canadian courts through expert evidence. Although the *European Convention on Nationality* is not uniformly customary international law at this stage of its existence<sup>153</sup>, the codification of European domestic practices in an international convention could eventually lead to European nationality principles being brought more spontaneously into Canadian judicial decisions.

### **Conclusion**

I have outlined a few ways in which international law has affected the development of Canadian law and have speculated on how the *European Convention on Nationality* might similarly influence Canadian citizenship law and practice. The Convention has already played a role in the Government of Canada, assisting officials at Citizenship and Immigration Canada to give informed advice to their Minister. The Convention could impact on other non-European states in similar ways. Individuals, organizations, officials, legislators, lawyers and judges, all with an interest in citizenship issues, will use the Convention as a comparative standard when creating or interpreting their own laws, when devising solutions to nationality problems, or when developing new citizenship policies or programmes. The Convention lays out basic principles of nationality law that can guide governments in their negotiations, cooperations, and interactions. Eventually, through this process, the *European Convention on Nationality* has the potential to become a standard generally accepted by states beyond European borders.

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<sup>152</sup> *Saint John v. Fraser-Brace Overseas Corp.* [1958] S.C.R. 263. Such a rule would clearly have to be well established in customary international law.

<sup>153</sup> See *supra*, note 7.



**PAPERS**



**Contribution from  
"THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"**

prepared by  
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Assistant Minister  
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## **Introduction**

The legal regulations on citizenship in "the former Yugoslav Republic of Macedonia" have over 50 years of history.<sup>154</sup> All previous laws on nationality<sup>155</sup> were established with respect to the ratified international conventions and standards. The present Law is also based on the most relevant international principles on nationality.<sup>156</sup>

In general, it could be evaluated that the Law on citizenship is a good transitional and post-transitional legal document. It provides functional and effective framework for regulating the citizenship status of those persons who were legally residing on the territory of "the former Yugoslav Republic of Macedonia" at the moment when its independence was proclaimed, as well as of those persons who came latter. Yet, at the time of signing the European Convention on Nationality (ECN) on November 6, 1997, the Government concluded to establish an expert group on nationality.

There are two main reasons for establishing the expert group:

*First*, the need to compare the national legislation with the ECN, as a precondition for ratification of the latter;

*Second*, the need to incorporate the new trends and developments in the field of citizenship legislation and practice.

With this purpose, the expert group was established and started its work in February 1999. It is authorized to develop a proposal for changes and from the perspective of the ECN.

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<sup>154</sup> Zakon za dr`avjanstvoto na FNRJ "Slu`ben list na FNRJ" br.54/46, Pravilnik za izv{uvawe na Zakonot za dr`avjanstvoto na FNRJ "Slu`ben listna FNRJ br.98/46, Upatstvo za vodewe na evidencijata na dr`avjanite na NRM "Slu`ben vesnik na NRM br.35/47, Zakon za dr`avjanstvoto na NRM "Slu`ben vesnik na NRM" br.16/50, Zakon za jugoslovenskoto dr`avjanstvo "Slu`ben list br. 38/64, Zakon za dr`avjanstvoto na Socijalisti~ka Republika Makedonija "Slu`ben vesnik na SRM" br. 9/65, Zakon za dr`avjanstvoto na SFRJ "Slu`ben list na SFRJ" br. 58/76, Zakon za dr`avjanstvoto na SRM "Slu`ben vesnik na SRM " br.19/77

<sup>155</sup> Came in force on 11 November 1992 (was published in "Official Gazette of the Republic of Macedonia" No 67 from 3 November 1992)

<sup>156</sup> As for example: the principle of legal continuity of the citizenship status, the principle of multiple nationality; the principle of free will of the applicants; the principle of non-discrimination on the base of sex, race, religion, ethnical and national origin; the principle of equality of the parents; the principle of avoidance of statelessness; the principle of equality of man and women

The work of the expert group is strongly influenced by the ECN. Its impact is recognized in the working version of the draft Law on citizenship developed by the authorized Ministry, for the expert group discussions.

### **What are the most visible influences of the ECN?**

The ECN had inspired the working version of the draft Law in two fundamental ways

*First*, by its general reformative spirit, compatible with the new inters and intra states relations in Europe in the last ten-years.

*Second*, by its standards and norms common in most of the European countries

On the line with the second dimension of the ECN, the working version

1. accepts the ECN's clarification of the definition of nationality - that "nationality means the legal bond between a person and a state and does not indicate the persons ethnic origin."
2. proposes change of the present articles on acquisition of nationality by naturalization
3. proposes change of present articles on loss and recovery of nationality
4. clarifies some of the procedural rules

With these and other changes which will be notified by the expert group it will be possible to develop a Law on nationality that will serve well the legitimate interest of the state as well as the interest of the individuals. Bearing in mind that "the former Yugoslav Republic of Macedonia" has ratified other agreements and conventions<sup>157</sup> that are also in connection with the citizenship status, expert group will take them in consideration through the process of re-examining the present law. For the work of this group of great importance is the cooperation with the experts from the Committee on nationality in Council of Europe as a unique body. Exchange of information and opinions with the experts from the countries who have already passed reforms in their national legislations under the light of ECN will be also more than useful.

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<sup>157</sup> 1948 Universal Declaration of Human Rights, the 1957 Convention on the Nationality of Married Women, the 1966 International Convention on Elimination of Racial Discrimination, the 1966 International Covenant on Civil and Political Rights, the 1979 Convention on elimination of All Forms of Discrimination against Women, the 1989 Convention on the rights of the child, Convention for Protection of Human Rights and Fundamental Freedoms



**A CONTRIBUTION ON DEVELOPMENTS IN THE UK  
WITH PARTICULAR REFERENCE  
TO THE NATIONALITY CONVENTION**

prepared by  
**Laurie FRANSMAN<sup>158</sup>**

*The UK has not yet ratified or even signed the 1997 Nationality Convention but is known to be keen to do so. What impediments might there be to ratification and how might they be overcome as part of the general developments currently progress here?*

**A. The meaning of "British nationality"**

There is no definition of "British national" in British nationality law. The broad view is that all those listed below, being governed by British nationality legislation and eligible for British passports, are British nationals. The narrower view is that BPPs traditionally are protected *aliens*, not British<sup>159</sup>, and that even BN(O)s may not be true British nationals.

**British citizen** and **British citizenship** are legally precise terms referring to 'full' British nationals; they have the right to enter and reside in the UK. There are also<sup>160</sup>:

**BDTCs** (British Dependent Territories citizens) - only those from Gibraltar and the Falkland Islands have the right to enter and reside in the UK; in 1999 it was stated the dependent territories would now be styled "the overseas territories".

**BOCs** (British Overseas citizens) - about 150,000 have no other nationality/citizenship and about 1 million are dual nationals (BOC/Malaysian); there are no real perpetuation provisions, so in due course the class will disappear.

**British subjects** - a residuary category (of approximately 25,000 to 40,000) almost exclusively comprising persons born prior to 1949; a few have the right to enter and reside in the UK; again, there are no real perpetuation provisions.

**BN(O)s** (British Nationals (Overseas)) - there are nearly 4 million, almost all dual nationals (BN(O)/Chinese) as BN(O)s are former BDTCs from Hong Kong; again, there are no real perpetuation provisions.

**BPPs** (British Protected Persons) - another residuary category (probably less than 10,000) also destined eventually to disappear as it cannot be perpetuated.

**B. Recent and pending nationality-related developments**

British nationality law is governed by a 1981 statute which came into force on 1 January 1983 and subsequent legislative changes have been limited to the Falkland

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<sup>158</sup> Laurie Fransman, a conference participant, is a practising barrister in London and UK nationality law expert.

<sup>159</sup> The Human Rights Commission accepted in *East African Asians v UK* (1981) 3 EHRR 76 that BPPs were not UK nationals.

<sup>160</sup> Unless otherwise stated, none of these others has the right to enter/reside in the UK.

Islands and Hong Kong. There are, however, proposals for the amendment of British nationality laws. Particularly, in the White Paper *Partnership for Progress and Prosperity - Britain and the Overseas Territories*<sup>161</sup> the government says:

"We have decided that British citizenship - and so the right of abode<sup>162</sup> - should be offered to those British Dependent Territories citizens who do not already enjoy it and who want to take it up"<sup>163</sup>.

This is an exciting development: extending British citizenship to BDTCs in the remaining overseas territories will bring the UK into line with other member states of the European Union. Also, because it means BDTCs<sup>164</sup> will acquire the right to enter and reside in the UK, it is a giant step towards enabling the UK to ratify Protocol 4 of the ECHR (see below) and the ratification of Protocol 4 is linked to the ratification of the Nationality Convention (again see below).

Other legislative changes are proposed in the White Paper *Fairer, Faster and Firmer - a Modern Approach to Immigration and Asylum*<sup>165</sup> but these simply concern changes to the residence requirements for naturalisation, etc.

There has been a change - relevant to the Nationality Convention - in the *administration* of the 1981 statute; it concerns the giving of reasons for naturalisation refusals and the like and is referred to below.

### C. Possible impediments to ratification of the Nationality Convention

1. The first difficulty concerns the need to define "British nationals" so as to be able to determine the scope of provisions such as article 5(2) (non-discrimination between 'nationals'). The need for a definition was not addressed when signing/ratifying earlier Council of Europe nationality instruments, but under the new Convention could a British national lawfully<sup>166</sup> be declared to mean something different from the meaning it may have in domestic law or under other treaties, ratified or not yet ratified? This is a very topical and contentious issue in the UK at present because:

*(a) The UK, now incorporating the ECHR into domestic law, is eager to ratify Protocol 4 (ECHR) but is concerned about the article 3(2) obligation that "No one shall be deprived of the right to enter the territory of the State of which he is a national" - much depends on who would be a "British national" for Protocol 4 purposes*

In the White Paper *Rights Brought Home: the Human Rights Bill*<sup>167</sup> the government said Protocol 4 had not been ratified "because of concerns about what is the exact

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<sup>161</sup> March 1999; Cm 4264.

<sup>162</sup> The right to enter and reside in the UK.

<sup>163</sup> Cm 4264, para. 3.7.

<sup>164</sup> *Almost* all: excluded are certain BDTCs who owe their status to a connection with the overseas territories known as 'The Sovereign Base Areas in Cyprus' or 'The British Indian Ocean Territory'.

<sup>165</sup> July 1998; Cm 4018, at para. 10.7.

<sup>166</sup> Under the Nationality Convention itself and under international law/treaty law generally.

<sup>167</sup> October 1997; Cm 3782.

extent of the obligation regarding a right of entry"<sup>168</sup> but that Protocol 4 contains "important rights" and should be ratified "if the potential conflicts with our domestic laws can be resolved"<sup>169</sup>. On 3 March 1999 the Home Secretary in a parliamentary answer reiterated:

"We are ... considering whether legislation is necessary to enable the United Kingdom to ratify the Fourth Protocol to the ECHR"<sup>170</sup>.

The proposal to extend the right to enter and reside in the UK to those in the overseas territories clearly brings the UK much closer to being able to ratify Protocol 4, but does it go far enough? What about BOCs, etc, especially those with no other nationality/citizenship? British nationals for Protocol 4 purposes should be British nationals for the purposes of the Nationality Convention, so ratification of the one may help clear the way to ratification of the other.

*(b) The UK has by unilateral declaration narrowed its definition of British nationals for Community law purposes, but the validity of those declarations is now being challenged in the ECJ*

The UK has declared that only some of the British nationals listed above are to be considered in Community law as nationals of the UK<sup>171</sup>. The validity of the declaration is being challenged in a case referred to the ECJ by the High Court, London, within the last few months. The case is *Manjit Kaur*<sup>172</sup> and in it Ms Kaur, a BOC with no other nationality, argues she is a European Union citizen under the former article 8 of the EC Treaty as the unilateral declarations are of no legal effect as a matter of international treaty law; alternatively, because Protocol 4 of the ECHR, as part of the Court's jurisprudence, is of greater interpretative effect than the declarations. The outcome of this case clearly should have a bearing on how "British nationals" may be construed.

2. Depending in the extent of the definition of British nationals, contrary to article 5 of the Nationality Convention there may possibly be discrimination in UK nationality law against:

- *naturalised* British nationals (British citizens and BDTCs), as they may be deprived of their nationality, whereas there can be no deprivation of nationality acquired by birth.
- British nationals (British citizens and BDTCs) "*by descent*", as they may not transmit their nationality on the same grounds as others.
- British nationals other than British citizens and BDTCs, because those others (unlike British citizens and BDTCs) cannot transmit their nationality at all.
- (of potentially greatest importance) British nationals without the right to enter and reside in the UK.

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<sup>168</sup> Cm 3782, para. 4.10.

<sup>169</sup> Cm 3782, para. 4.11.

<sup>170</sup> *Hansard*, 3 March 1999, column 756.

<sup>171</sup> The original declaration was annexed to the Final Act of the 1972 Accession Treaty. It was replaced as of 1 January 1983: OJ C 23 (28 January 1983); cmdnd.9062.

<sup>172</sup> (1998) 11 December, CO/0985/98, *per* Lightman J.

Other potential difficulties for the UK include:

- Access to British nationality: a breach of articles 4a, 6(3) in respect of Moroccans in Gibraltar. Effectively Moroccan migrant workers in Gibraltar have been denied access to British nationality by being denied prerequisite immigration status (a lifting of the restrictions under immigration laws on the period for which they may remain in the Colony).
- Discrimination against illegitimate children (arts 2(c), 5(1), 6(a)). In 1981 it was indicated<sup>173</sup> that provisions discriminating against illegitimate children would be repealed if the Law Commission so advised. They did, and such discrimination was generally abolished<sup>174</sup> but not in respect of British nationality law. The UK's continuing discrimination may also offend article 14, ECHR, taken together with, for example, article 3.
- A provision of the 1981 Act<sup>175</sup> conflicting with the duty to give reasons in writing (art.11) and right to a review (art.12) under the Convention. So far as the giving of reasons is concerned, the provision is now a dead-letter as the Home Secretary has announced he will volunteer reasons in all cases<sup>176</sup>, but there remains a potential problem in respect of the right to a review.
- Acquisition by stateless<sup>177</sup> persons and refugees is to be "facilitated" (art.6(4)(g)) but currently they are not advantaged at all.
- Delay: whether applications are processed within a reasonable time (art.10).

#### D. Matters to attend to

1. Define "British nationals" (for Nationality Convention, Protocol 4 and Community law purposes).
2. Eradicate discrimination between British nationals (as defined).
3. Repeal provisions of the 1981 Act: s40 (depriving naturalised British citizens), s44(2) (the ouster clause), s50(9) (discrimination against illegitimate children).
4. Introduce amendments to law or practice so as to facilitate acquisition by refugees and stateless persons.

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<sup>173</sup> In parliament: *Hansard*, columns 623 *et seq*, 17 March 1981.

<sup>174</sup> By the Family Law Reform Act 1987.

<sup>175</sup> Section 44(2). It provides that where discretionary matters are concerned, there is no requirement to give any reason for the grant or refusal of an application and the decision on any such application "shall not be subject to appeal to, or review in, any court".

<sup>176</sup> Announcement in the House of Commons, 22 December 1997; *Hansard* column 564.

<sup>177</sup> The need to define "British nationals" under the Convention is again significant here because persons with a British status are stateless if they are not British nationals.

## CITIZENSHIP LEGISLATION IN BOSNIA AND HERZEGOVINA

**contribution by**  
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### **I The Division of responsibilities according to the Constitution of Bosnia and Herzegovina**

When the General Framework Agreement for Peace (the Dayton Peace Accords) was being negotiated back in 1995 one substantive part thereof was the Constitution of Bosnia and Herzegovina (BiH). The result was an unusually weak federal state where only a limited numbers of responsibilities belong to the state whereas the two Entities, Republika Srpska and the Federation of BiH, have residual responsibility in all other areas. When it comes to the division of responsibility for citizenship matters the dispute between the parties concerned whether there should be only one citizenship of the state or also an Entity citizenship.

The compromise reached was laid down in Article 1.7 of the BiH Constitution according to which there shall be a citizenship of BiH and a citizenship of each Entity provided that all citizens of either Entity are thereby citizens of BiH. According to the same article, the citizenship of BiH shall be regulated by the Parliamentary Assembly of BiH and the citizenship of the Entities shall be regulated by the Entities.

## **2. The BiH Citizenship Law**

### **2.1 The compatibility of State and Entity Citizenship**

The implementation of the civilian aspects of the General Framework Agreement for Peace was assigned to the Office of the High Representative (OHR). One of the urgent tasks identified by the High Representative at an early stage was to prepare a set of essential legislation for the new multi-ethnic authorities of BiH, constituted after the elections in September 1996. One of the laws in this so called “Quick Start Package” was a new draft citizenship law, prepared in conjunction with experts from the Council of Europe and UNHCR reflecting the principles in the 1997 European Convention on Nationality and the 1954 and 1961 UN Conventions.<sup>178</sup> The draft was elaborated further by a BiH working group appointed by the new Council of Ministers of BiH and finalised in meetings between the Bosnian working group and the experts of the Council of Europe, OHR and UNHCR held in Strasbourg and Sarajevo.

The division of competence between the state and the Entities in this matter caused great controversies as to which citizenship one acquires first, the BiH citizenship or

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<sup>178</sup> 1954 UN Convention Relating to the Status of Stateless Persons and the 1961 UN Convention on the Reduction of Statelessness.

the Entity citizenship and as to whether the Entity citizenship laws could contain provisions on acquisition and loss of citizenship which differed from the corresponding provisions in the State-level law. However, the BiH Constitution clearly states that a citizen of either Entity by that fact is automatically a BiH citizen. One can thus not hold an Entity citizenship without holding the BiH citizenship or vice versa. The acquisition of BiH citizenship and Entity citizenship is simultaneous. As only the BiH citizenship has international relevance and as the establishment of this citizenship is an integral product of the sovereignty and international personality of BiH, it is also clear that the Entity laws have to be in full conformity with the State-level law.

## **2.2 Acquisition of BiH Citizenship**

Like in most European countries, the BiH citizenship law is a combination of the principles of *jus sanguinis* and *jus soli*. A child born to two BiH citizens, or to one BiH citizen, if born on BiH territory or if he or she would otherwise be stateless, is a citizen of BiH. In cases where a child born or found on the territory of BiH otherwise would become stateless, the principle of *jus soli* applies. Eight years of residence and renunciation of former citizenship are required for naturalisation. Facilitated naturalisation is provided for foreign spouses, children whose parents acquired BiH citizenship and returning emigrants.

The Law also provides for special benefit cases to be decided by the BiH government, the Council of Ministers. Such a decision was recently taken by the Council of Ministers granting BiH citizenship to a journalist and publisher from the Federal Republic of Yugoslavia (Montenegro), known for his newspaper articles in Bosnian media.

## **2.3 Multiple citizenship**

In accordance with Article I.7.(d) of the BiH Constitution, citizens of BiH may hold the citizenship of another state only in case there is a bilateral agreement between BiH and the state concerned. The issue has been a major controversy and is the main reason the adoption of the BiH Citizenship Law by the BiH Parliament was delayed for such a long time.<sup>179</sup> In line with the provisions of the 1997 European Convention on Nationality, it was agreed that this “prohibition” against multiple citizenship applies only to cases in which multiple citizenship is acquired voluntarily. A child born to parents of different citizenship and who at birth automatically acquires dual citizenship is therefore allowed to keep both citizenship.

However, since no such agreement on dual citizenship exists and due to the fact that a great number of BiH citizens voluntarily acquired another citizenship during the war, transitional provisions were needed. Article 39 of the BiH Citizenship Law thus provides that all BiH citizens who voluntarily acquired another citizenship before the entry into force of the BiH Citizenship Law may continue to hold both citizenship

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<sup>179</sup> Due to the failure of the BiH Parliament to adopt the BiH Citizenship Law the High Representative imposed the Law in December 1997. The Law has been in force since January 1, 1998 and was finally approved recently by both chambers of the BiH Parliament.

during a five year transitional period. If no bilateral agreement on dual citizenship has been concluded during that time, i.e. before 2003, such persons will lose their BiH citizenship unless they renounce the other one. Even though the Council of Ministers should have proposed to the Presidency to conclude such an agreement within six months after the Law came into force, this has still not taken place. However, in conjunction with the BiH Citizenship Law recently adopted, the Parliament also adopted a conclusion stating that the Presidency should intensify its activities with a view to concluding such agreements.

#### **2.4 Commission to review the status of persons naturalised during the war**

Another controversial issue that had to be solved in the BiH Law concerns those who through naturalisation became citizens of BiH during the war (from April 6, 1992 until December 14, 1995). This since during the war the authorities in charge in some cases tended to grant citizenship to persons who did not fulfil the criteria for naturalisation. According to the Constitution, the status of these persons shall be regulated by the Parliamentary Assembly.

The solution found in the BiH Law is rather unique, namely a Commission to review individual cases of naturalisation during the above mentioned period. The Commission, consisting of nine members out of which three are international experts, was recently established and is due to take up its work. In case the Commission determines that a person acquired citizenship during the war without fulfilling the criteria of the regulations in force at the time, the Commission can withdraw such citizenship. However, in case such a person now fulfils the criteria for naturalisation or facilitated naturalisation in accordance with the BiH Citizenship Law, he/she is considered a BiH citizen. The Commission cannot withdraw the citizenship of someone who thereby would become stateless.

### **3. The Entity Citizenship Laws**

According to the BiH Citizenship Law, the Entities, i.e. Republika Srpska and the Federation of BiH, should have passed their citizenship laws 45 days after the BiH Law came into force. Both Entity citizenship laws have been drafted in a similar way as the BiH Law. These meetings have produced a draft Federation citizenship law and a draft citizenship law of Republika Srpska. Both draft laws are fully compatible with the BiH citizenship law as well as with the 1997 European Convention on Nationality. However, so far neither one of the Entities has adopted its citizenship law. Republika Srpska is most probably to adopt its law in the next session of the Republika Srpska National Assembly in September whereas the Federation law seems to be further delayed.

The importance of the Entity citizenship laws is stressed by the fact that all decisions on naturalisation and most decisions on loss of citizenship are taken in the first instance by the Entities with a subsequent verification mechanism at the state level. In other words, as long as the Entity citizenship laws are not in place, acquisition through naturalisation cannot take place. The implementation of the Entity citizenship laws will be of utmost importance beginning January 2000 when former citizens of

the Socialist Federal Republic of Yugoslavia, who have resided in BiH since before 1.1.1998 and therefore are eligible for BiH citizenship, will start applying for citizenship.



**AVOIDANCE AND REDUCTION OF STATELESSNESS:****THE UKRAINIAN EXPERIENCE**

**prepared by the  
Ukrainian delegation**

Ukrainian authorities understand the importance of the avoidance and the reduction of statelessness and pay significant attention to the problem.

At the time of the state succession (1991) Ukraine implemented the “zero option” according to which the citizenship of Ukraine was granted to all former USSR citizens and stateless persons who permanently resided on the territory of Ukraine at that time. This helped to avoid mass statelessness.

During drafting and development of the citizenship law in Ukraine great attention was paid to the avoidance and the reduction of statelessness. In 1997 amendments were introduced into the Law of Ukraine on the Citizenship of Ukraine. According to these amendments emigrants from Ukraine who are not foreign citizens can obtain citizenship of Ukraine through simplified procedures.

The problem of the avoidance and the reduction of statelessness is one of the priorities when the issues of citizenship are negotiated by Ukraine.

Today Ukraine is successfully implementing the agreement with Uzbekistan on assistance concerning solution of citizenship issues of the deported individuals, signed the agreement with Belarus on simplified order of changing citizenship. Similar agreements with Moldova, Kazakhstan, Kyrgyzstan are being drafted. In these drafts in order to avoid cases of statelessness dates of termination of the former citizenship and acquisition of the new one are the same.

Decrees of the President of Ukraine play a significant role in the reduction of the statelessness. So, as a result of the implementation of the order of the President of Ukraine of June 11, 1997 <sup>1</sup> 1-14/388 more than 25 thousand deported Crimean Tatars, individuals of other nationalities and their descendants who came to Ukraine and are not foreign citizens were granted the citizenship of Ukraine. Therefore the statelessness de-jure of these categories of individuals in fact is has been terminated.

The issue of the statelessness was a major one during the round table discussion following the Council of Europe experts' analysis of the provisions of the Law of Ukraine on the Citizenship of Ukraine in the light of the 1997 European Convention on Nationality. Recommendations of the Council of Europe developed during the round table discussion were taken into account in the draft of the new version of the Law of Ukraine on the Citizenship of Ukraine.

The assistance of international organisations such as the Council of Europe, the United Nations High Commissioner for Refugees, the Organisation for Security and Co-operation in Europe and the International Organisation for Migration, which provide various types of assistance - expertise, technical, financial - is of extreme importance for the avoidance and the reduction of statelessness.

We hope that such co-operation will continue in the future. In particular we look forward to the analysis of a new draft of the Law of Ukraine on the Citizenship of Ukraine by the experts of the Council of Europe, to a conduct of a seminar on reduction and prevention of the statelessness and to providing Ukrainian experts with an opportunity to study the experience of other states concerning the solution of this problem.

We consider it appropriate to summarise the experience obtained by the Council of Europe member-states. An important contribution to the solution of these issues will be made by the adoption by the Committee of Ministers of the Council of Europe of the Recommendation on the avoidance and the reduction of the statelessness as well as this Conference.

**PROPOSALS ADOPTED BY THE CONFERENCE**



**1<sup>st</sup> EUROPEAN CONFERENCE ON NATIONALITY**

**“TRENDS AND DEVELOPMENTS IN NATIONAL AND  
INTERNATIONAL LAW ON NATIONALITY”  
(Strasbourg, 18 and 19 October 1999)**

**PROPOSALS ADOPTED BY THE CONFERENCE FOR  
FURTHER FOLLOW-UP ACTION BY THE COUNCIL OF  
EUROPE IN THE FIELD OF NATIONALITY AND  
CONCLUSIONS BY THE GENERAL RAPPORTEUR**



**PROPOSALS ADOPTED BY THE CONFERENCE  
FOR FURTHER FOLLOW-UP ACTION  
BY THE COUNCIL OF EUROPE IN THE FIELD OF NATIONALITY**

1. The participants at the 1<sup>st</sup> European Conference on nationality welcomed the information that the European Convention on nationality, the first comprehensive nationality Convention, would soon be ratified by a 3<sup>rd</sup> State and would therefore enter into force at an early date. The participants invited those States, which had not already done so, to become Parties to the Convention, where possible, without reservations. The participants hoped that non-European States would also become Parties to the Convention and noted that Canada might become a Party at an early date.
2. The participants at the Conference invited the Committee of experts on nationality (CJ-NA) to continue and intensify its role in acting as a legal technical forum to assist States to prepare and adopt modern nationality laws, to deal with questions of multiple nationality and to exchange information on nationality issues. Such work should, where appropriate, be carried out in co-operation with other institutions such as the United Nations High Commissioner for Refugees (UNHCR).
3. On the basis of Article 23 (co-operation between the States Parties) of the Convention, the Committee of experts was invited to follow closely the implementation of the Convention by States and act as a dynamic legal technical forum dealing with specific nationality problems which arise in and between States.
4. In order to provide assistance for regional nationality issues the participants at the Conference invited the Committee of experts to continue and increase its role in acting as a legal technical forum to assist such States. The Committee of experts was invited to assist States to conclude any necessary bilateral or regional agreements, such as agreements concerning State succession and nationality or agreements concerning the military obligations of multiple nationals.
5. The participants at the Conference invited the Committee of experts to consider in particular the following topics:
  - the preparation of draft protocols to the European Convention on nationality (in particular concerning statelessness, including the statelessness of children, and concerning State succession);
  - conditions for the acquisition and loss of nationality (legal conditions and effectiveness of conditions).
6. The participants at the Conference welcomed the important practical information provided during the Conference and invited the Council of Europe to hold the 2<sup>nd</sup> European Conference on nationality in the year 2001.





**CONCLUSIONS BY THE GENERAL RAPPOREUR****presented by****Roland SCHÄRER**

Head of the Nationality Section, Federal Department of Justice and Police, Bern  
(Switzerland), Chair of the Committee of experts on nationality (CJ-NA)

We have been dealing intensively with questions of nationality for two days. In order to draw some conclusions, let me come back to the main topics we have treated.

Under the title “Trends and Developments in National and International Law on Nationality” we have first dealt with the European Convention on Nationality under a specific angle: by asking ourselves whether a European Code of Nationality is possible or not.

The question already implies that no European Code of nationality exists – at least for the time being. It also implies that a Code supposes an exhaustive and compulsory regulation of nationality.

However, the rapporteur to this topic pointed out that something similar to a Code of nationality already exists on the European level: the European Convention on Nationality of 1997. He even asked himself whether this Convention may not be considered a full-fledged code of nationality.

He gave us a certain number of reasons. The first being that the Convention attempts to take into account all the important international instruments in the field of nationality, especially the right to a nationality. The preamble of the Convention refers to them. All the principles of the Convention are based on them. The explanatory report contains an exhaustive list of the relevant international instruments.

Then all the traditional questions relating to acquisition, retention and loss of nationality are dealt with. A very important chapter is devoted to procedures relating to nationality. Others to multiple nationality and State succession. So the themes referred to in the Convention are very broad.

The rapporteur mentioned, however, that the internal legislation of each State in the field of nationality is the product of the historic evolution of that State and that complex situations, which are different from State to State, have to be taken into account. .

We can conclude from this that a uniform code of nationality on the European level will hardly be possible in the foreseeable future. It will even be very difficult to achieve in a federal State which has to grant some latitude in the field of nationality to its constituent entities.

The European Convention on nationality seems therefore to be a model for a certain harmonisation of nationality rules on the European level. An additional convergence, however, is not excluded in the future.

If one thinks of an imaginable code of nationality of the European Union, in a more or less distant future, it would certainly be much closer to the European Convention than to an exhaustive set of rules in a specific nationality code.

During the discussion, several proposals for future developments of the Convention were made. Among them the following:

- The Introduction of an enforcement mechanism, even if it was recognised that the corresponding limitation of State competencies might be difficult to achieve. Reference was made to the failed attempt to extend the anti-discrimination provision of the European Convention on Human Rights to nationality matters at the end of the 1980ies. However, this gave finally rise to the anti-discrimination provision of art. 5 of the European Convention on Nationality.
- The acquisition of nationality at birth by the third generation living abroad (double jus soli)
- The regulation of the conditions for naturalisation
- A new protocol based on the 1999 Recommendation of Statelessness

The second topic of our Conference dealt with multiple nationality and the evolution of attitudes of States towards multiple nationality in the last decades.

The starting point was the 1963 Council of Europe Convention on Multiple Nationality and Military Service in Cases of Multiple Nationality. It reflected the traditional attitude of the European States towards multiple nationality. Multiple nationality was considered an evil which had to be fought. Persons who voluntarily acquired the nationality of another Party to the Convention automatically lost their previous nationality and could not be authorised to retain it.

The rapporteur indicated that the attitudes of a number of States concerning multiple nationality changed under the influence of two main factors. It resulted on the one hand from the introduction of equality of men and women with regard to the transmission of nationality to their children. This had the effect that in nationally mixed marriages the children acquired the nationality of both of their parents and thus were dual nationals. On the other hand, massive labour migrations in European countries and the need to plainly integrate the permanently resident foreign population led a certain number of countries to eliminate one of the main obstacles for the naturalisation of foreigners: the obligation to give up the previous nationality.

In a first step, the Council of Europe took account of this evolution through a new protocol to the 1963 Convention. The protocol allowed to admit multiple nationality in case of naturalisation for two categories of persons: second generation migrants and spouses of nationals, i.e. persons very closely connected with the receiving country.

The main change of attitude, however, is expressed in the European Convention on nationality. The Convention does not fight any more against multiple nationality. It recognises that in a certain number of cases multiple nationality is unavoidable (e.g.

when the parents have different nationalities or when a nationality has automatically been acquired by marriage). The Convention leaves it up to the States to choose their attitude towards multiple nationality. It thereby recognises – as it has been very clearly pointed out by the rapporteur - that the positions of States towards multiple nationality are a result of complex factors: of a historical, social, philosophical or a political order. The rapporteur underlined one point which is particularly relevant in the actual discussion on multiple nationality in several countries: the fact that nationality is not only a legal bond – as it is defined in the European Convention – but that it is also a political bond and as such is linked to the notion of “loyalty”, which makes it difficult for some States to accept multiple nationality in case of voluntary acquisition of another nationality. Also the notions of the nation-State and sovereignty have to be considered in this context: The more these notions have a character of exclusiveness, the more the States concerned will fight against multiple nationality.

The report finally showed us that all States act to some extent against multiple nationality. They do so simply by not recognising, in particular circumstances, one nationality or another which a person simultaneously possesses. Reference was made in this respect to the 1930 Hague Convention, according to which a national of a State cannot, before the authorities of that State, avail himself of the possession of another nationality. Furthermore, a State cannot exercise diplomatic and consular protection over one of his nationals against another State the nationality of which that person also possesses. In a third State, a person possessing several nationalities is considered a national of the State with which he has the strongest links.

It was stressed in the panel discussion that a certain number of States do not permit the transmission of their nationality to children born abroad in the first or second generation if these children are not announced to its authorities within a specific time period (which is e.g. the case in the new German law). Reference was made in this context to the provision of the European Convention on Nationality according to which such a loss of nationality is permitted in case of absence of link of a person with a country, on the condition that statelessness is avoided (art. 7 para. 1 let. e).

The next topic was devoted to the avoidance and reduction of statelessness. The report started with the most famous proclamation in the field of nationality, the fundamental principle of the Universal Declaration of Human Rights according to which “Everyone has the right to a nationality”. It has been indicated, however, that this principle does not mean that everyone has the right to a specific nationality. The acquisition of a particular nationality must be dependent on factors like descent, place of birth or long-term residence in a given State.

It has been shown to us that this principle is not respected if there are gaps in the legislation of States which create statelessness. This may lead to tensions, e.g. in case of conflicts between ethnic groups, displacements of persons and State succession. The harmonisation of legal systems with regard to avoiding statelessness is thus not only important for the individuals but also the States concerned. It is of special importance with regard to the fact that the possession of a nationality is, in many countries, a precondition not only for the right to stay in the country, the right to vote and the granting of diplomatic protection, but also for the exercise of such basic rights

for daily life as the right to work, to have health care, to have property and to send one's children to school.

It was underlined during the Conference that in some instances international law even stipulates the right to a *given* nationality, if a person has a genuine and effective link with a given State. The rapporteur characterised that link in the famous words of the international Court of Justice in the *Nottebohm* case, according to which "nationality is a legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties". It was pointed out that this concept of the genuine and effective link did not only apply in circumstances similar to the *Nottebohm* case, but had developed into a broader concept in the area of nationality. It also applies to some extent to stateless persons who do not possess the nationality of the State with which they have genuine connections of existence.

We had then the opportunity to analyse the 1961 Convention on the reduction of statelessness and the 1997 European Convention on nationality, which, as the rapporteur noted, are both compatible and complementary and play an important role in the international community's goal of avoiding and reducing statelessness. The analysis occurred in the light of the importance of the genuine and effective link for preventing statelessness.

The 1961 Convention bases the right to a nationality of a child on descent and, if the child cannot acquire the nationality of one of his parents, on the place of birth. The 1997 Convention is very similar in this area but, as it was mentioned to us, may be a little simpler, somewhat more comprehensive and more modern in approach. It also outlines basic principles for avoiding statelessness and discrimination based on such grounds as sex, religion, race, colour, national or ethnic origin in the field of nationality.

A very interesting remark of the rapporteur concerns the provision of the 1997 Convention according to which "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." The rapporteur notices that this is a significant step forward in nationality legislation and practice in the sense that long-term habitual residence is recognised as a well-founded basis for the granting of nationality. Together with the provision that naturalisation for stateless persons shall be facilitated, the rapporteur arrives at the conclusion that according to the Convention, the residence period for stateless persons must be less than ten years.

It has been outlined that concerning loss of nationality, the 1961 Convention prohibits arbitrary deprivation of nationality if a person would thereby become stateless. The 1997 Convention goes a little further by generally not allowing deprivation or loss of nationality if the person would thereby become stateless, with one exception: in case of acquisition of nationality on the basis of fraudulent conduct.

On the basis of this evolution and the developments in human rights law since the 1961 Convention, the rapporteur comes to the conclusion, that a removal of

nationality resulting in statelessness must today be strictly limited to cases of fraudulent conduct directly attributable to the applicant.

Finally, the rapporteur advocated an extremely interesting and far-reaching idea: the application not of “jus soli” or “jus sanguinis” to stateless persons, but the one of a more flexible “jus connexionis” and points out that in some respect the European Convention on Nationality already follows this approach.

In the discussion it was stressed that the concept of the genuine and effective link of the *Nottebohm* case had developed into a much wider concept and that it did not limit itself any more to cases of opposability of nationality in relation to another State. Reference was made in particular to the State succession provisions of the European Convention on Nationality (art. 18 para. 2 let. a) where the positive aspect of the genuine and effective link is spelled out for the first time in an international instrument.

As to the creation of statelessness in case of fraudulent conduct, several participants expressed the idea that the negative effects of statelessness were such that no deprivation of nationality should ever be tolerated if it resulted in statelessness, even in case of fraudulent conduct.

Our next topic was “misuse of nationality laws”. We looked at nationality legislation from a totally different point of view. Not from the angle of its consistence with international standards or the necessity to harmonise nationality rules, but in considering misuse by individuals or, eventually, by States.

Right at the beginning, the rapporteur put the topic into a larger perspective and stressed that the overwhelming majority of persons who seek nationality do so legally and that only a tiny minority tries to exploit nationality laws in order to get unwarranted benefits. Limiting the misuse of nationality laws should therefore not result in creating unjustified obstacles for honest applicants.

Which are the main situations where the legislation favours misuse of nationality laws? We have seen that one of the classical cases in the field of acquisition of nationality is birth tourism. A pregnant woman having no ties with a State travels to that State in order to give birth on its territory to a child and thus to permit this child to acquire the nationality of the State concerned. The existence of a child having its nationality may even be considered by a State as such a strong link that the mother will be able to remain on its territory. Such a behaviour of the mother cannot even be qualified as illegal. She just avails herself of the possibility given by the legislation.

As to the misuse of nationality laws by individuals, the rapporteur noted that the fundamental reason for misuse is evasion and circumvention of immigration control. Indeed, the acquisition of the nationality of the State of residence definitely settles immigration difficulties and the prospect of deportation.

One of the main areas where misuse is possible is through marriages of convenience. The European Convention on Nationality stipulates that the acquisition of nationality by spouses shall be facilitated. A great number of States do so on the condition that there is not only a formal marriage but an effective community of life between the

spouses. However, it is difficult to check whether a genuine conjugal relationship exists. Individuals may have arranged marriages for money. Or they may have contracted bigamous or polygamous marriages which are unknown to the authorities of the State of residence.

The current discussion on registered partnership raises the same questions: misuse is possible if such a legal institute has consequences in the field of nationality.

Recognition of children may also give rise to misuse of nationality laws. It has been pointed out that families sometimes try to arrange the immigration of their relatives' children by trying to declare them as their own children. The easiest way is through recognition if the recognition procedure is simple. As adoption procedures are generally stricter, it is more difficult to misuse nationality laws by adoption.

Another way of misuse concerns renunciation of one's nationality without possessing or acquiring another nationality. On the one hand, this places the burden to care for the individual concerned on the State of residence. On the other hand, several international instruments – also the 1997 European Convention on nationality – provide that stateless persons shall benefit from facilitated naturalisation: Thus becoming stateless may provide facilitated access to the nationality of the State of residence. It has been stressed, however, that this kind of misuse is possible only with the complicity of the State of origin of the individual concerned, i.e. if the State of origin permits renunciation of its nationality without requiring, as a condition, the possession or acquisition of another nationality.

Our attention has also been drawn at a common problem in the area of misuse of nationality laws: the fraudulent use of documents in order to prove that the conditions for acquiring citizenship are met. As regards civil status documents delivered abroad, even if they are checked by the diplomatic and consular representatives, it is often not possible to be sure of their accuracy, which means that nationality decisions can be taken on the basis of false documents.

It has been noted that the problem is also of relevance for single-nationality States which require the loss of the previous nationality as a condition for acquiring their own nationality. They can get forged documents on the release of the previous nationality, or a genuine document on release may be followed by an immediate reacquisition of the previous nationality.

With regard to the remedies to these situations, the rapporteur stressed that they should not restrict the rights of genuine applicants. He gave us then many ideas, drawn from the experience of States, on how some kinds of misuse of nationality laws might be – not prevented, but limited. He concluded by saying that the number of cases of misuse of nationality laws should not be exaggerated but that States should be take appropriate action in order to avoid negative effects on normal procedures.

In the discussion it was pointed out that with regard to the fraudulent use of documents all the relevant circumstances had to be very carefully evaluated and that special consideration had to be given to the principle of proportionality.

As to marriages of convenience, it was stressed that the prevention of such marriages should not lead to measures contrary to the protection of private life. Lack of time prevented however a more detailed discussion.

The next topic dealt with State succession and nationality. First, reference was made to the fact that the problem of nationality in the area of State succession is a consequence of some of the main historical and political events of this decade. The problems arising from State succession and nationality were considered so important, that several international bodies have made their contributions. In particular, three main international documents have been adopted:

- First a declaration of the European Commission for Democracy through Law (the Venice Commission) on the Consequences of State Succession for the Nationality of Natural Persons in 1996.
- Then The European Convention on Nationality in 1997.
- Finally a draft of the United Nations International Law Commission on Nationality of Natural Persons in Relation to the Succession of States in 1999.

The rapporteur showed us that the underlying ideas of the three instruments were the same. They all are based on the principle that an appropriate balance has to be struck between the interests of the State and the individual. Discrimination shall be prohibited. The fundamental principle is that everyone has a right to a nationality and that statelessness must be avoided. In all of the documents, the main criterion for acquiring nationality is habitual residence in the successor State at the moment of State succession. All the documents also refer to the fact that the will of the individual has to be taken into account, in particular through a right of option for the nationality of the State with which the individual has a genuine and effective link. Also the fact that a person originates from a given territory over which sovereignty is transferred should be relevant. All the instruments invite the States involved to settle the problems, which often are very complex, by international agreement.

It was stressed, however, that the three instruments are different in nature and scope. The Venice Declaration and the European Convention on Nationality are regional instruments, whereas the Draft of the UN Law Commission has a universal character. The European Convention has the advantage of being a binding international instrument. Its State Succession provisions, even if they are very general, have been considered as so fundamental that no reservations are allowed. Due to the character of the other texts as recommendations, their scope is wider and their provisions are more detailed.

The rapporteur comes to the conclusion that the chapter of the European Convention dealing with State succession can be characterised as a good beginning, but that time had probably come to elaborate a new European Convention, a Convention on State Succession and Nationality.

A very interesting discussion followed during which it was pointed out that:

- Statelessness is not the only nationality problem in case of State succession
- Another problem arises from the fact that persons often do not have the nationality which they need in case of State succession

- A main problem concerns the difficulty of implementing legislation which as such respects the relevant international provisions on State succession (e.g. in case of destruction of registers).

Our next topic was devoted to the theme: “nationality: a proper balance between the interests of States and those of individuals. This idea has been mentioned many times during these two days. So I am very glad that it has become a special topic.

The rapporteur showed us first the development of the modern nation-State to which we owe the concept of nationality. From a traditionally restrictive attitude of granting nationality it evolved to a more open one, influenced by the gradual democratisation of society. In this nation-State, the sovereignty of the State – i.e. is the capacity of government – is complemented by popular sovereignty – i.e. the participation of the people in the democratic process. The evaluation of the interests of the individual and the interests of States in the field of nationality is closely linked to this evolution

As to the interest of the individual, it was noted that the possession of the citizenship of the country of residence was usually in the evident interest of the individual as it gives them not only political but also economic, social and cultural rights. Even if the situation of aliens has improved in the process of development of human rights, its status is less favourable. Individuals might even want to acquire the nationality of more than one State if they have links with these States. Individuals also usually do not want to lose or be deprived of their citizenship. But they might want to renounce, for whatever reason, the nationality of a State, in particular if they possess another nationality.

States, however, might have views on nationality and interests in this area which differ considerably from those of individuals. In many countries, nationality is a delicate political issue. Sovereign States may hesitate to give up their prerogatives in this field. While regulating nationality, they take into account various national interests, maybe of an economic, social or cultural order. They may consider contrary to their national interest the possession of another nationality and the loyalty to another State which it may imply if an individual voluntarily acquires another nationality.

The rapporteur also underlined the need to establish a proper balance between these conflicting interests. He gave us some very interesting examples of concrete situations in the context of State succession where the nationality legislation of Slovenia was applied on the basis of a proper balance between the interest of the State and the individual.

Finally, the rapporteur noted that it would be difficult for States to take too much into account individual interests in the field of nationality. He stressed, however, that one of the articles of the European Convention on Nationality was a major development: in the sense of considering individual interests: the provision that decisions on nationality shall contain reasons in writing. One might add that the Convention contains a whole chapter on procedural provisions and that one of them stipulates the fundamental rule that all decisions on nationality must be subject to appeal. Also this rule, of course, is an evident limitation of State prerogatives.



In the discussion it was pointed that in the balance of interest the psychological dimension of the personal links between an individual and a State should be taken into account in favour of the individual.

Our last topic dealt with the relevance of the European Convention on nationality for non-European States. It was mentioned there is an increase of movements of people between different countries, and that governments tend to be guided more frequently by internationally accepted standards in the field of nationality. It was noted that the European Convention on nationality, as the first modern multi-lateral treaty to codify numerous nationality issues, sets such standards in this field.

We have been told that the Convention could play a significant role beyond European borders. Not so much because it contains a provision allowing non-European States to accede to it. Much more because it could lead non-European States to look at the Convention for guidance while regulating their own nationality laws, in particular because the Convention can be seen as a codification of common European practice.

The rapporteur gave us some examples of the impact of international law on Canadian nationality law in order to demonstrate the possible future influence of the European Convention.

He pointed out that according to one of the fundamental principles of nationality law, a country is not required to recognise another nationality legislation if it is not consistent with international law. The European Convention can serve as an aid because it indicates what European countries consider acceptable in nationality legislation and practice.

A interesting example of the influence of international standards in Canada was given with reference to a recent discussion on the limitation of birth-tourism. With regard to the 1961 Convention on the Reduction of Statelessness, Canada refrained from restricting the automatic acquisition of Canadian nationality by birth in its territory. In the future, also the European Convention on Nationality might be referred to in order to resolve such a question,

Another example referred to the acquisition of Canadian nationality by first generation children of Canadian parents born abroad. With regard to the 1961 Convention, a provision avoiding statelessness was added. As to second generation children born abroad, the future interpretation of the complex provision might very well also take into account the European Convention and its further developments.

Another example which was given to us dealt with the acquisition of citizenship for children adopted abroad. The solution proposed by the Canadian authorities is based on international treaties and has also been checked as to its compatibility with the European Convention.

It was also pointed out that Canadian judges at times use for the interpretation of internal provisions principles of international treaties, e.g. the European Convention on Human Rights. The same might happen in the future with regard to the Convention on Nationality.

We were also told that the Convention might have an influence on Canadian courts through the recognition of some of its provisions as customary international law.

The rapporteur finally repeated his initial statement that according to his opinion the Convention will in the future become a generally accepted standard for non-European States.

**CLOSING SPEECHES**



**CLOSING SPEECH**

by

**Lena NYBERG**

Secretary of State in the Swedish Ministry of Culture

Ladies and Gentlemen,

I am delighted to have the opportunity to attend this first European Conference on Nationality or Citizenship and to make a few concluding remarks. Major and crucial issues have been discussed in the past two days. As the only European cooperation body in this sphere, the Council of Europe plays a very important role in this context.

The themes discussed span a wide field. Many of the issues are of major importance both for states and, above all, for individuals. This applies to the question of avoiding statelessness and our view of dual nationality. It applies to misuse of nationality laws and problems in connection with state succession. It also applies to the balance between the individual's right to nationality – the right to belong somewhere – and every state's justifiable interest in deciding who should be its nationals.

The need for common European rules in the nationality sphere and the forms for international cooperation are perhaps the most urgent and essential issues. I consider the 1997 European Convention on Nationality an important instrument which we should safeguard and our aim should be to achieve as broad an accession to it as possible. It should go without saying that all states live up to the Convention's basic principles and provisions.

I would particularly like to point to the principle that everyone shall have the right to a nationality. If we can guarantee this together we can keep the number of stateless persons to an absolute minimum. This is particularly important with regard to children.

I also consider it essential to emphasise the principle of non-discrimination. Discrimination on national, ethnic or on any other grounds should of course not occur in the context of nationality.

I would like to take this opportunity to say a few words about how we in Sweden currently deal with nationality issues and the Swedish Government's views on these matters.

In 1997 the Swedish Government took the initiative for a comprehensive inquiry into nationality. A parliamentary commission was appointed, which submitted its proposals for a new Swedish Nationality Act in March this year. The Government has not yet taken a final decision on the proposals although we expect to put a bill before parliament by next spring.

The proposals include several concrete amendments which I would like to describe briefly here.

First, of course, the matter of dual or multiple nationality. The commission proposes that Sweden should abandon its present position of avoiding dual nationality and, instead, accept it fully. I must emphasise that the Government has not yet taken a final decision in this matter. There is very strong opinion in favour of permitting dual nationality among both immigrant organisations and organisations for Swedes living abroad.

To a certain extent, this issue is connected with the interesting question of whether we consider acquisition of citizenship to be part of the process of integration of immigrants or whether citizenship should rather be viewed as a sign of having attained full integration. Personally I feel that citizenship is of great importance for the process of integration, although the real answer probably contains some of both. We can therefore make a strong case for facilitating the acquisition of citizenship, particularly for children and young people.

We also know that the obligation to renounce previous citizenship in connection with naturalisation stops many people from applying for citizenship of their country of settlement, which in its turn impedes integration into the new country.

I mentioned just now the importance of facilitating acquisition of citizenship for children and young people. The commission's proposal for a new law contains several measures to achieve such an aim. In my view, there are strong reasons for showing children born in the country or who come to it at an early age that they are welcome as full members of the community.

It is also important to ensure that children born in the country stateless or who come to the country without a nationality of their own are given an opportunity to obtain citizenship in a simple way. Fighting statelessness, particularly in the case of children, is a very urgent task for all countries.

In connection with our work on a new Nationality Act, we have also taken up a discussion on the status and importance of nationality. I mentioned earlier our view of nationality as part of the process of integration of immigrants. It is essential that immigrants who become nationals of their country of settlement feel fully accepted by their new country. Nationality must never be reduced to merely the chance to get a new passport. There must be a clear link – an effective and genuine link – to the country of which one is a national.

I think we need discussion about the status and meaning of nationality as a basis when we are considering major changes to nationality rules. An essential starting-point is that nationality has no connection with ethnic origin. This might mean that a stronger status for nationality could diminish the breeding ground for ethnic conflict.

Ladies and Gentlemen, these have been two very fruitful days. Important issues have been discussed. We have seen that extensive reform work is in progress in the nationality sphere in many of our countries. Cooperation in this area has also extended beyond the circle of Council of Europe member states.

Over these two days we have been able to exchange experience and draw conclusions that should be of major importance for future work. I am also convinced that continuing international co-operation is necessary – not least within the framework of the Council of Europe – if we are to reach fundamental goals in this area. Only together and in co-operation can we guarantee all people the right to a nationality and minimise cases of statelessness. Only together can we solve problems of misuse of nationality laws and find a suitable balance between the interests of states and individuals. The special problems that arise in connection with state succession must also be solved through international co-operation.

In light of this, it is natural to view this first European Conference on Nationality as the beginning of continued fruitful international co-operation in this field.

In closing, I would like to thank the Council of Europe and particularly the responsible secretariat for a well-organised conference. I also wish to thank all the rapporteurs for the considerable effort you have devoted to the conference, the interpreters for your painstaking work and last but not least, all the other participants for your contributions and the interest you have shown.

Thank you.





**CLOSING SPEECH****by****Guy DE VEL**Director General for Legal Affairs  
Council of Europe, Strasbourg

Madam State Secretary,  
Mr Chairman,  
Rapporteurs,  
Ladies and Gentlemen,

At their second summit, held in Strasbourg on 10 and 11 October 1997, the Heads of State and Government drew attention to the Council of Europe's key role in establishing human rights standards, and its contribution to the development of international law through its European conventions. They also emphasised their commitment to ensuring that these standards and conventions were fully implemented, particularly by strengthening co-operation programmes aimed at consolidating democracy in Europe.

Moreover, at its meeting in Budapest in May 1999 to mark the Council of Europe's 50th anniversary, the Committee of Ministers adopted a declaration in which the ministers reaffirmed their determination "fully to use the potential of the Council of Europe, as the pre-eminent political institution capable of bringing together, on an equal footing and in permanent structures, all the countries of Greater Europe". They also undertook to build a greater Europe "without dividing lines".

To achieve this, they agreed to continue to consolidate the stability of our continent and search for the peace that has been promised and so much desired for fifty years. Such stability can only be based on democratic institutions and countries' respect not just for their mutual commitments but also their commitments to the Council of Europe and the 700 million women and men who inhabit this continent.

Stability is also achieved by helping member states currently involved in establishing democratic institutions and drawing up political guidelines and legal reforms, with a view to achieving the same level of democratic development throughout Europe.

The ministers also expressed their commitment to strengthening political, legal, social and cultural cohesion in Greater Europe, particularly by expanding the common legal area shared by our member states, currently represented by 174 conventions and more than a thousand recommendations to governments.

In these years of various commemorations and anniversaries, we need to remind ourselves that the Council of Europe's founding fathers set it the fundamental goal of consolidating peace, by defending human rights, pluralist democracy and the rule of law. I personally believe that the law of nationality has a major role to play in achieving this objective.

First of all, peace.

Nationality issues are intimately bound up with the very notion of identity and the nation. This century has taught us only too well that we should not treat such matters lightly. In every war and conflict that comes to mind, issues relating to nationality have played a critical role.

Nationality law therefore has a considerable impact on the defence and development of human rights, pluralist democracy and the rule of law.

While it may at first sight seem very technical, nationality law is nonetheless one of the essential safeguards of the rule of law, in that it defines the principal and obvious link between individuals and the state. Nationality shapes the way the latter protects the former. It plays a large part in determining individuals' personal and legal status and as such is a decisive factor governing the enjoyment of many of their rights.

Issues relating to nationality also have a major impact on regional and international stability. In this century, for example, there have been numerous examples of state succession, accompanied by varying levels of violence, which have had significant consequences for the nationality of millions of citizens. In Europe, the reconstruction effort that has followed the fall of the Berlin Wall and the need to settle the fate of the millions of victims of the legal vacuum that has ensued will be one of the major challenges of the coming millennium.

Historically, the law of nationality for long remained the prerogative of individual governments and states, which led to many abuses and certain decisions that were totally absurd and sometimes criminal. I am pleased to say that member states are now aware that, while it quite legitimately remains one of the bedrocks of their sovereignty, this law must now be conceived in a spirit of international solidarity and dialogue. I also welcome the fact that the countries concerned are increasingly intent on adapting nationality law to reflect the profound aspirations of the men and women of this vast continent and their undertakings to develop the rule of law.

Statelessness and multiple nationality, and between the two the acquisition, loss and registration of nationality, state succession and non-discrimination are some of the difficult and often sensitive issues with repercussions for individuals' daily lives, as well as for governments with responsibility for laying down nationality policy. The Council of Europe devotes part of its activities to this field by setting out common standards and seeking appropriate responses to these problems and to what are by their nature constantly changing circumstances. This conference has been one of the stages in this process.

From the Council of Europe's inception fifty years ago, human beings and their rights have been at the very heart of its activities and concerns. Nationality is undoubtedly one of these rights. The Committee of Ministers and the Assembly have been very actively concerned with the many issues it throws up. For example, the Committee of Ministers has adopted several international treaties, such as the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality, and its additional protocols.

However, the organisation's decisive contribution to the development of nationality law in Europe and beyond, particularly in terms of preventing statelessness, protecting the rights of persons normally resident in the territories of contracting parties and prohibiting discrimination, is the European Convention on Nationality. The Convention, opened for signature on 6 November 1997, covers all the main nationality issues in a single text. In my view, it offers the basis for and the promise of a genuine legal code. So far 18 countries have signed the Convention and two have ratified it. I would like to take this opportunity to make an urgent appeal to countries that have not yet signed and/or ratified this treaty to do so as soon as possible.

This Convention, Recommendation No R (99) 18 on the avoidance and reduction of statelessness, which was adopted by the Committee of Ministers a few weeks ago, and the 1961 United Nations Convention on the Reduction of Statelessness have been – and will continue to be – valuable legal instruments setting out principles and rules for striking a reasonable balance between individual interests and those of the state in the nationality field – a balance it would have been difficult to envisage just a few decades ago.

I also wish to take the opportunity offered by this conference to draw attention to the Council of Europe's nationality-related activities in the context of bilateral and multilateral co-operation with European countries such as Bosnia and Herzegovina, the Russian Federation, Latvia, Ukraine and Romania, to name but a few. This co-operation has enabled us – and will continue to do so – to provide those who request it with technical assistance concerning the domestic and international effects of existing legislation, other nationality provisions and proposed new laws, and to encourage co-operation between parties to the European Convention on Nationality, as provided for in its article 23. On a number of occasions, such activities have been undertaken in conjunction with the United Nations High Commission for Refugees. I welcome this opportunity to highlight the importance of collaboration between the Council of Europe and the HCR in this field.

The complementary nature of the two institutions and their respective conventions, as well as their common approach in several countries, have enabled us to secure significant results that would not have been possible without this synergy or an awareness on the part of states of their shared interests regarding nationality law.

This conference has looked at such varied and important topics as the possible drafting of a European nationality code, the need to strike a reasonable balance between individual interests and those of the state and the misuse of nationality legislation. It has also drawn attention to the absolute and pressing need to reduce the number of cases of statelessness, and to relations between European and non-European states. Throughout, participants have borne in mind the goal set 50 years ago by the organisation's founding fathers, that of achieving "a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress".

To achieve this ideal, the Council tries to help countries to co-operate, in order to find peaceful solutions to problems and promote stability in Europe. In our future

activities, we will be particularly concerned to act as a forum for joint discussions on nationality questions of basic concern to both individuals and governments.

After drawing up the 1997 Convention and the 1999 Recommendation on statelessness, the Committee of Experts on Nationality (CJ-NA) has turned its attention to two issues affecting the interests of individuals and states: the misuse of nationality laws and multiple nationality. These are both areas where international co-operation is – again – essential.

In the days following this conference, the Committee should adopt a report on the misuse of nationality laws. The report concludes that no country operating in isolation can offer the ideal solution to problems linked to misuse, some of which are clearly of a cross-border nature. The proper response will come from exchanges of information and experience, from which solutions can then emerge.

The Committee of Expert's second focus of activities is multiple nationality, to which this conference has made a significant contribution in terms of expertise and information. Several countries have embarked on reforms in this area. Since cases of multiple nationality are sometimes inevitable, its consequences must be assessed in order to find solutions to the problems raised. In this context, the Council of Europe, and more specifically its highly experienced Committee of Experts, could also be the appropriate forum for the European Union's member states to discuss nationality issues. It needs to be recognised that multiple nationality could have an impact on Community law.

Allow me once more to emphasise the influence the Council of Europe's activities could have beyond Europe's frontiers. They may incite other regional and international organisations to approve similar initiatives, in other words draw up declarations or conventions, accede to existing treaties and incorporate new principles into international law.

Finally, I would like to point out that article 23 of the European Convention on Nationality requires governments to co-operate within the framework of the relevant Council of Europe intergovernmental body, that is the Committee of Experts on Nationality, on which every European country and the relevant international institutions are represented, either as members or as observers.

Ladies and gentlemen,

It is time for Europe to acknowledge fully its history and identity, made up of invasions and internal migration, as well as migration linked to its colonial past, in other words continual interbreeding, all of which contribute to its wealth, beauty and vitality. Today, therefore, the face of Europe is inevitably multiethnic, multicultural and multi-religious, like the men and women who inhabit it. Nationality law has to reflect our countries' demographic reality and respect the aspirations of the peoples themselves, failing which peace and social cohesion will be impossible.

I am sure that this conference has given an decisive impetus to making full use of the Council of Europe and its dynamic expert forum, the Committee of Experts, in which domestic and international problems relating to nationality can be examined

and recommendations on the best practices to follow drawn up and submitted to governments.

In conclusion, I wish to express our gratitude to the rapporteurs and the chairs of each session, and to the ministerial representatives, including yourself, Madam State Secretary, who have done us the honour of participating in the conference.

Ladies and gentlemen,

The conference is over; you – and we – must now take immediate action in accordance with the guidelines it has set out. Naturally, we have an obstacle course before us. It is important to set off on time and make gradual but continuous progress towards establishing a constructive dialogue between individuals and states, and between states themselves, on the subject of nationality. This is a *sine qua non* of stability in Europe and beyond. For its part, the Council of Europe will continue to make its contribution, based on half a century's experience. Let us hope that this experience will help us to avoid, in the approaching third millennium, the conflicts and disasters that have riven the millennium now drawing to an end.

I declare the conference closed.