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CONSEQUENCES OF STATE SUCCESSION FOR NATIONALITY

D R A F T R E P O R T

Preliminary Remarks

1. This consolidated report is essentially based upon replies to a questionnaire on consequences of State succession on nationality prepared by the European Commission for Democracy through Law.

2. The Commission has received replies from the following European countries: Albania, Austria, Belarus, Bulgaria, Croatia, Estonia, Finland, Germany, Georgia, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Moldova, the Netherlands, Romania, Russia, Slovakia, Slovenia, Ukraine and Turkey and Japan, Kyrgyzstan, non-European States represented in the Venice Commission. The United States of America have provided some information on their domestic legislation in this field[1]. The replies were given by members, associate members and observers to the Commission.

3. The Commission has taken note of the draft European Convention on Nationality and Military Obligations in the Cases of Multiple Nationality[2] which had been prepared by the *Committee of experts on nationality of the Council of Europe* (CJ-NA). Two members of this Committee, Mr Kojanec (Italy) and Mr Schaerer (Switzerland), have participated in the work of the Commission.

4. The Commission has also taken note of the work of the *International Law Commission* on the topic of "State succession and its impact on the nationality of natural and legal persons"[3].

5. The present report demonstrates the diversity of 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 nationality. It is the object and purpose of this report to go beyond a mere repertoire of legislative practice in several European and non-European States and to establish some general principles which emerge as common standards to be followed in future cases of State succession. In this respect, the principles contained in the draft European Convention on Nationality and Military Obligations in cases of Multiple Nationality which has been prepared by the Committee of experts on nationality (CJ-NA) within the Council of Europe have been taken into account.

I. Introduction

1. The concept of nationality

a) Nationality in international law

6. For the purposes of the present study "nationality" is - in accordance with the draft European Convention on Nationality and Military Obligations in cases of Multiple Nationality - understood to mean "the legal affiliation of an individual to the population of a sovereign State. It does not indicate the ethnic origin of a person and therefore has the same meaning as the term 'citizenship' which is used in many Central and Eastern European States" (Article 3.a). Nationality of an individual is his quality of being the subject of a certain State[4], or, according to the much-quoted dictum of the International Court of Justice in the *Nottebohm case*:

> "... a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties"[5].

7. Current international law leaves ample leeway for States to enumerate the conditions for the granting of citizenship. The Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930[6] stipulates that it is "for each State to determine under its own law who are its nationals" (Article 1). It is essentially a matter falling within the domestic jurisdiction of each State[7]. However, the discretion is not absolute. Certain limits on the broad powers enjoyed by States in this area are imposed by international law and in particular by international human rights standards[8].

8. In the *Nottebohm* case, the International Court of Justice stated that:

> "... a State cannot claim that the rules [pertaining to the acquisition of nationality] it has thus laid down are entitled to recognition by another State unless it has acted in conformity 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"[9].

9. The limitations imposed by international law relate to the territorial and personal competence of States as well as to the international protection of human rights (see paras. 27 et seq.). One of the fundamental principles generally recognised is that nationality should not be granted arbitrarily. It is widely accepted that international law requires some sort of link between the State granting its nationality and the individual concerned, although the precise nature of this link remains in dispute[10]. Such a link is clearly established in cases of nationality legislation based on either *jus sanguinis* or *jus soli*. Birth, domicile and residence are indeed among the criteria which have generally been applied in this context.

10. Disregard for the limitations imposed by international law on the competence of States does not lead to the automatic nullity of a domestic enactment. It may however be invoked by third States as a grounds for not giving effect to a nationality granted in violation of these limitations. A State responsible for violations of international human rights standards incurs international responsibility and exposes itself to international enforcement action under the applicable human rights treaties.

b) Nationality in domestic law

11. The nationality concept straddles international and national law. Given that it binds a person politically and legally to a sovereign State, its consequences vary according to the individual case.

12. The domestic law of a number of States already draws a distinction between various categories of persons within the population, and accordingly grants them special rights[11]. The national and/or citizen of a State therefore has a range of rights and special protection differing from those granted, for example, to "second-class citizens", foreigners or stateless persons.

13. In the Commonwealth the most important criterion for international law is citizenship vis-a-vis the various Commonwealth States, whereas the status of British subject or Commonwealth citizen is basically only of relevance to the domestic law of the countries in question.

14. The distinction between French citizens and French subjects, later citizens of the French Union and lastly citizens of the "Community" was only relevant under domestic law.

15. Under the terms of the German declaration appended to the EC Treaty, for the purposes of the Community "nationals" of the Federal State must be taken as meaning not only any person who holds German nationality but also any person who held it at 31 December 1937 (cf. Article 116, paragraph 1, of the Basic Law).

16. Federal States in the former Eastern bloc had several categories of nationality. For instance, in Czechoslovakia Law No 165/1968 set out a formal distinction between (Federal) Czechoslovak citizenship based on *jus sanguinis* and the nationality of each of the two constituent republics, based on *jus soli*.

17. The ensuing comments are based on consideration of national legislation on nationality and the States' replies to the questionnaire they received on State succession:

18. The legislation of most States apprehend nationality on the basis of the principles of *jus sanguinis* and *jus soli*, and nationality is either open or closed and is conceived either in a monistic manner or in a manner facilitating the coexistence of multiple nationalities. All in all, the criteria for granting nationality depend on both objective (religion, race or ethnic origin, usual place of residence, birth, language) and subjective considerations (adequate knowledge of a language, respect for the values, laws and Constitution of the State, national service, services rendered to the nation, degree of integration, absence of criminal record, legal means of subsistence).

19. Nevertheless, it would seem that the criteria of descent, birth and usual place of residence are gradually becoming more important than the others. For instance, nationality now refers not so much to race, ethnic belonging or religion (which are often criteria for discrimination) as to the concept of citizenship afforded on the basis of descent or personal status (birth, permanent place of residence, or a combination of both factors, etc).

20. Lastly, it should be noted that the *European Union* has made the conventional concept of nationality slightly obsolete. Article 8 of the Maastricht Treaty provides that "every person holding the nationality of a Member State shall be a citizen of the Union". Citizens of the Union are thus afforded rights of a constitutional nature which are traditionally linked to nationality (including the right to travel and settle freely within the Union and the right to vote and be elected in municipal elections)[12].

21. At the current stage of development of Community law, however, citizenship of the Union is still purely derivative in nature. In a declaration on nationality appended to the Maastricht Treaty the Member States reaffirmed that "the question whether an individual possesses the nationality of a member State shall be settled solely by reference to the national law of the Member State concerned".

22. However, Community law is already having an impact on national legislation relating to nationality. In the case of *Micheletti against Delegaci?n de Gobierno en Cantabria*, the Court of Justice of the European Communities had to deal with a person who had dual Argentinean and Italian nationality. In the judgment which it delivered before the Maastricht Treaty had even come into force, the Court rejected the Spanish Government's argument that the applicant's Italian nationality was not effective:

> **"Once a Member State has, in compliance with Community law, attributed its nationality to an individual, it is unacceptable for another Member State to restrict the effects of such attribution by imposing an additional condition on recognition of such nationality with a view to the exercise of a fundamental freedom laid down in the Treaty"[13].**

2. State succession in international law

23. As far as the concept of "State succession" is concerned, guidance may be drawn from the 1978 Vienna Convention on Succession of States in respect of Treaties which gives the following definition (Article 2, paragraph 1.*b*)[14]:

> "the replacement of one State by another State in the responsibility for the international relations of territory".

24. Temporary occupations or annexations of territory which occur during a state of war do not entitle the occupant to change the nationality of the inhabitants and have therefore not been taken into account for the purpose of this study. Although they clearly constitute cases of State succession, instances of *decolonisation* have not been considered by the Commission. The process of decolonisation was characterised by special features, consideration of which would go beyond the Commission's usual scope of activities. Exceptions have, however, been made for the cases of *Algeria* and *Surinam* since both territories were considered parts of the respective European State before their independence.

25. In the case of territorial transfers, the question of the nationality of the inhabitants of the territory subject to the change of sovereignty ceases to be solely a matter of domestic law. Since at least two States are concerned, rules of international law affect the conferment and withdrawal of nationality. However, these rules do not in principle have a direct effect on the nationality of individuals which remains to be determined by the domestic law of the

States directly concerned and, where applicable, by self-executing provisions of international treaties concluded among them[15].

26. A distinction should be drawn between cases of universal succession (e.g. dissolution or uniting of States), where at least one of the predecessor States is extinguished and its nationality consequently ceases to exist, and cases of partial succession (e.g. transfer of part of the territory of a State), where at least two nationalities are involved. In the latter case arises not only the question of acquisition of the new nationality, but also that of the loss of the old one.

3. The impact of international human rights standards

27. Another set of limitations in the area of nationality legislation is derived from the international protection of human rights [16] Universal Declaration of Human Rights (Article 15, paragraph 1) and the American Convention on Human Rights (Article 20, paragraph 1) proclaim the basic principle that "everyone has the right to a nationality", a formula which is also taken up by the draft European Convention on Nationality and Military Obligations in cases of Multiple Nationality. The 1966 UN Covenant on Civil and Political Rights (Article 24, paragraph 3) and the 1989 UN Convention on the Rights of the Child stipulate that children have a right to acquire citizenship.

28. A great number of States have entered into international obligations to avoid statelessness. Article 8 of the UN Convention on the Reduction of Statelessness provides that Parties "shall not deprive a persons of its nationality if such deprivation would render him stateless". Article 9 of the same Convention prohibits States from depriving "any person or group of persons of their nationality on racial, ethnic, religious or political grounds".

29. Another principle, established by both the 1957 UN Convention on the Nationality of Married Women and the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women, is that neither marriage nor the dissolution of marriage, nor the change of nationality by one of the spouses during marriage shall automatically affect the nationality of the other spouse. These Conventions had a considerable impact on national legislation.

30. One should also mention Article 1, paragraph 3, of the UN Convention on the Elimination of all Forms of Racial Discrimination which states that nothing in the Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality or naturalisation, provided that such provisions do not discriminate against any particular nationality.

31. Unlike the Universal Declaration of Human Rights and the Inter-American Convention, the *European Convention on Human Rights* does not secure the right to nationality as such[17]. The acquisition and loss of nationality are not directly regulated by the Convention. Nevertheless, some of its provisions may be relevant to the subject.

32. For instance, the Convention provides safeguards which might be applied in cases of refusal or arbitrary deprivation of nationality. Such measures may be followed by acts such as a prohibition on entry into the country whose nationality has been requested or withdrawn, or expulsion from its territory, which acts are subject to scrutiny by the organs of the Convention.

33. According to Article 3 of the Fourth Protocol to the ECHR "no one shall be expelled ... from the territory of the State of which he is a national" and 'no one shall be deprived of the right to enter the territory of the State of which he is a national". In that connection the European Commission of Human Rights has not ruled out the possibility that a link between the withholding of nationality and the expulsion order against an applicant may create a presumption that the national authorities' sole aim in refusing to grant nationality was to enable him to be expelled. In this case the deprivation or refusal of nationality may constitute a violation of Article 3 of the Fourth Protocol[18].

34. *A fortiori*, collective deprivations or refusals of nationality to a group of persons with the sole aim of the collective expulsion of aliens from the national territory are liable to violate Article 4 of the Fourth Protocol to the ECHR, which reads: "Collective expulsion of aliens is prohibited".

35. Lastly, arbitrary deprivation or refusal of nationality, especially if they are followed by the expulsion or extradition of the person in question, may raise questions vis-a-vis Article 8 of the ECHR, which protects private and family life. Since the refusal to grant a foreign spouse the permission to reside in a country or a relative the right to join his or her child, and the expulsion of a permanent resident from a given country in which he or she has all his or her family connections, are not necessary in a democratic society or proportionate to a legitimately pursued aim, they may infringe due respect for family life and therefore violate Article 8[19].

36. Moreover, any actions whose nature and context diminish the status, position or dignity of an individual, and which are aimed at lowering him "in his own eyes" or "grossly humiliating him before others or driving him to act against his will or conscience"[20] constitute a violation of Article 3.

37. In this connection, the European Commission of Human Rights has recognised that "quite apart from any consideration of Article 14", discrimination based on race may be considered as degrading treatment: "publicly to single out a group of persons for differential treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity"[21].

38. Moreover, in the case of the Kalderas Gypsies the European Commission of Human Rights accepted the principle that discrimination on ethnic grounds may give rise to a problem vis-a-vis Articles 3 and 14, in connection with respect for human dignity[22]. This case concerned the refusal to deliver identity documents to members belonging to a nomad group.

39. As a result, arbitrary deprivation or refusal of nationality, especially if they cause the person in question to become stateless, might in certain circumstances be considered as inhuman or degrading treatment within the meaning of Article 3[23].

40. Furthermore, the refusal to grant a nationality to a person on the grounds, for instance, that he has a criminal record might constitute a retrospective aggravation of the penalty[24] initially imposed for a crime or offence when perpetrated, a situation which is contrary to the prohibition on *reformatio in peius* and which therefore violates Article 7 of the ECHR[25].

41. Lastly, the unreasonable deprivation of a person's nationality for the sole purpose of preventing him from enjoying freedom of opinion, expression or association with others, particularly if it has the effect of preventing him from discharging official or other duties, is obviously incompatible with the principles set out in Articles 9, 10 and 11 of the Convention

42. Even though the Commission recently held that in one specific case in one specific country the procedure for deprivation of nationality did not concern the determination of the applicant's civil rights and obligations, or of any criminal charge against him within the meaning of Article 6 of the Convention[26], the applicability of the safeguards set out in Article 6 cannot be ruled out, particularly if such deprivation or refusal has direct effects on the individual's civil rights and obligations.

43. At all events, even if Article 6 were not applicable, Article 13, which secures the right of appeal to anyone claiming to have suffered violation of a right or freedom recognised by the Convention, is germane to the matter. Taken in combination with the aforementioned articles, it requires the national legislator to provide an effective remedy before a national authority, enabling the person concerned to adduce that the refusal or deprivation of his or her nationality is in violation of the European Convention on Human Rights.

4. Nationality, State succession and the concept of the rule of law

44. The "original" character of the subject of nationality, an essential prerogative of State sovereignty in the determination and identity of its constitutive population, requires a distinct reference to the notion of the rule of law, in particular in the case of State succession.

45. Both the Statute of the Council of Europe (Article 3) and the Preamble to the European Convention on Human Rights refer to the principle of the rule of law. Reference to the concept of the rule of law necessitates much more than mere compliance with minimum human rights standards. According to the common constitutional traditions of the States represented in the Venice Commission, the components of the State governed by the rule of law include the separation of powers, the independence of the judiciary, the lawfulness of administration, judicial protection from acts by the public authorities and the right to compensation for unlawful acts by the same authorities. In addition to these formal principles, there is also the implementation of "justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression"[27]. The law must crystallise this new conception of the political link by regulating the exercise of power and safeguarding the fundamental rights and individual freedoms.

46. Extending the control to the constitution, treaties and the general principles of law leads the judge to conduct increased supervision, notably for the protection of human rights and the fundamental freedoms. Basically, effective judicial supervision of administrative acts is the main criterion for effective protection of the rule of law, as the extension of legality is insufficient to counterbalance the increasing scope for autonomous action enjoyed by government and administration on the law-making front.

47. If judicial review is to be reinforced, judges will require greater independence and the status of both judicial and administrative courts must be gradually incorporated into Constitutions. It must be made possible to commence legal proceedings within a reasonable time and at reasonable cost. Administrative decisions must be fully reasoned and must mention available judicial remedies. The extent of the supervision may vary depending on the case, but it must aim to reduce cases of restricted supervision and judicial immunity which might be applied to certain administrative acts (government acts still protected by the reason of State). Administrative acts or decisions affecting the legitimate rights and interests of citizens must be subject to supervision vis-a-vis the need for and proportionality of the measures adopted.

48. The bedrock of the State governed by the rule of law is made up of a set of fundamental rights and individual freedoms which have been gradually absorbed into constitutions, unaided by any legislative activity.

49. In periods of State succession it is even more important to tackle the uncertainty experienced by those involved in the succession, by guaranteeing a number of substantial qualities of legislation: laws must be clear, coherent, future-oriented, they must be published, exclude any unforeseeable surprises and comply with the fundamental rights and freedoms.

50. The concept of the rule of law involves:

- **codifying the nationality issue with legislation accessible and comprehensible to the citizen;**
- **providing legislation applicable prior to any deprivation, revocation or refusal or nationality;**
- **removing any discriminatory elements in terms of human rights and the fundamental freedoms from the definition of nationals;**
- **observing the proportionality principle in the granting, refusal or change of nationality;**
- **providing an effective judicial remedy for acts involving deprivation of nationality;**
- **seeking the optimum solution for compliance with the principles of the Constitution and the fundamental rights in implementing and interpreting the law;**
- **ensuring that individual decisions comply with international law in the human rights field.**

II. National and International Practice

1. Practice until 1914

51. Already prior to 1914 it was the usual practice that inhabitants of a territory which was acquired by another State or became the territory of a new State lost their original nationality and became nationals of the successor State.

52. However, when *Greece* became independent in 1830, the non-christian population was initially excluded from the otherwise automatic acquisition of the Greek nationality by all inhabitants. This exclusion was later abandoned. Following the union with the Ionian Islands (1864) and the incorporation of Thessalia and parts of Epiros (1881), all inhabitants of these territories became Greek nationals. *Albanian* nationality was acquired by nationals of the Ottoman Empire who were born or domiciled in Albania immediately before its independence in 1912.

2. Practice following the First World War

53. The First World War brought about numerous territorial changes within Europe. It resulted in the dismemberment of the Austrian and Turkish Empires, the detachment of various territories from Germany as well as the creation of new State entities (e.g. the Czecho-Slovak State, Poland, the Serb-Croat-Slovene State and the Free City of Danzig).

54. The Versailles and associated treaties contained a number of provisions, more or less uniform in content, relating to the nationality of inhabitants of transferred territory. The treaties provided for an automatic acquisition of the nationality of the successor State, usually coupled with a right of option which had to be exercised within a specified period of time (generally two years). It was usually the criterion of "*habitual residence*" which was retained for the purpose of determining the acquisition of nationality where a change of territorial sovereignty occurred. The Belgian Court of Cassation defined the meaning of habitually resident in Article 36 of the Versailles Treaty as meaning "fixed, enduring and permanent". According to this Court, a person's habitual residence is where "he has his family, his home and the centre of his interests and affections"[28].

55. The Versailles Treaty restored French sovereignty over the territories of *Alsace-Lorraine* which had previously been ceded to Germany in accordance with the Preliminaries of Peace signed at Versailles on 26 February 1871 and the Treaty of Frankfurt of 10 May 1871. Only certain categories of persons were automatically reinstated in French nationality, in particular those who had lost French nationality by the application of the Franco-German Treaty of 10 May 1871 and their descendants and all persons born in Alsace-Lorraine of unknown parents, or whose nationality was unknown[29]. Other categories could claim French nationality within the period of one year (persons, including husbands and wives, not restored to French nationality with French ascendants, non German foreigners who had acquired the status of a citizen of Alsace-Lorraine before 1914, Germans domiciled in the territories before 1870, Germans domiciled in Alsace-Lorraine who had served in one of the Allied or Associated armies, persons born in the territories of foreign parents, including their descendants). Germans born or domiciled in Alsace-Lorraine could acquire French nationality only by way of naturalisation.

56. Special attention was given to the presence of *national minorities* in the territories which were subject of a change of sovereignty. The Polish Minorities Treaty of 28 June 1919, concluded between the Principal Allied and Associated Powers on the one hand and Poland on the other provided in Article 4, paragraph 1:

> "Poland admits and declares to be Polish nationals *ipso facto* and without the requirement of any formality persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present treaty they are not themselves habitually resident there".

57. According to the Permanent Court of International Justice, these treaties aimed at preventing States "from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States"[30]. It therefore rejected a claim to impose additional conditions for the acquisition of nationality[31].

58. The post-1918 treaties which regulated the *dismemberment of the Austro-Hungarian Empire* (the Treaties of St. Germain-en-Laye and Trianon) based nationality on the possession of "rights of citizenship" (*Heimatrecht, pertinenza*) in the territory concerned. "Rights of citizenship" were conferred by municipalities of the former Austro-Hungarian Monarchy. As a rule, inhabitants became automatically nationals of the State which had acquired the territory in which they possessed "rights of citizenship". However, the acquisition of a new nationality by persons who had been given "rights of citizenship" relatively recently was sometimes made subject to a prior approval by the successor State[32].

59. The Treaties of St. Germain-en-Laye and Trianon also introduced various forms of options in favour of the nationality of a State other than that to which the person was linked by "rights of citizenship". In addition to options in favour of a previously held nationality, persons living in areas whose final attribution was decided upon by referendum could opt for the nationality of the State to which the area was not assigned. Finally, the Treaties envisaged a new form of option based on ethnic criteria. Article 80 of the Treaty of St. Germain provided as follows:

> "Persons possessing rights of citizenship in the territory forming part of the former Austro-Hungarian Monarchy and differing in race and language from the majority of the population of such territory, shall, within six months of the coming into force of the present Treaty severally be entitled to opt for Austria, Poland, Romania, the Serb-Croat-Slovene State or the Czecho-Slovak State, if the majority of the population of the State selected is of the same race and language as the person exercising the right to opt".

60. A similar provision was introduced into the Treaty of Lausanne of 24 July 1923, the Peace Treaty between the Allied and Associated Powers on the one hand and Turkey on the other (Article 23).

61. Following the separation of *Ireland* from the United Kingdom, Irish citizenship was conferred on persons of whatever nationality who on 6 December 1922 were either (1) domiciled in the area of jurisdiction of the Irish Free State (including Northern Ireland) and were themselves born in Ireland or were born of a parent born in Ireland or (2) continuously resident within the area and had been so resident for at least seven years. Persons born in Ireland who were not domiciled there on the relevant date did not acquire citizenship.

62. The solution of an automatic extension of the nationality of the successor State to all inhabitants of a transferred territory was also chosen by Turkey when it annexed the province of Hatay in 1939.

3. Practice following the Second World War

63. Territorial changes in the aftermath of the Second World War affected mainly *Germany*, *Italy*, *Poland* and the *Soviet Union*.

64. *Germany* lost all territories east of the Oder and Neisse, including Danzig and the Memel territory, to Poland and the Soviet Union. Acquisition of nationality of the successor States remained largely a theoretical problem because the vast majority of the German population had either fled the territories during the last months of the war or were later forced to leave. Questions of citizenship were not regulated by the treaties which the Federal Republic of Germany concluded during the '70s with Poland and the Soviet Union[33], but exclusively by domestic legislation of the States concerned[34]. According to this legislation, Polish and Russian citizenship were not granted automatically, but only by individualised procedures. Persons of German origin were largely excluded from these procedures.

65. In 1945, when *Austria* regained its independence, the Austrian authorities considered that their country had never ceased to exist. Consequently, only persons who had been Austrian nationals in 1938 and their descendants were considered to possess Austrian nationality in 1945. However, according to German practice, almost all Austrian citizens had validly acquired the German nationality following the *Anschluß* in 1938. A German law enacted in 1956[35] clarified this situation by stating that none of those who where considered Austrian nationals by Austria could any longer claim the German nationality. Only persons who had acquired German nationality in 1938 and had permanent residence in Germany since 1945 were entitled to regain German nationality by declaration, with retroactive effect.

66. The Treaty of Peace between the Allied and Associated Powers with Italy (1947) provided, *inter alia*, for the cession of territory by *Italy* to France, Yugoslavia and Greece. As a general rule, it declared that Italian citizens domiciled, in the sense of habitual residence, in territory transferred shall become citizens of the transferee in accordance with legislation to that effect to be introduced by each of the successor States respectively. In addition two types of options were given. Firstly, inhabitants of the transferred territories "whose customary language is Italian" should be entitled to opt for the Italian nationality. Secondly, Italian nationals residing in Italy but who used habitually the Serbian, Croatian or Slovene language could opt for the Yugoslavian nationality. Persons taking advantage of these options could be required to move to the State of their choice.

4. Recent instances of State succession

a) Succession in respect of part of territory

67. The exchanges of territories between *Germany* on the one hand and *Belgium* and the *Netherlands* on the other affected only a relatively small number of persons. They were regulated by Treaties on Border Corrections in 1956 and 1963 and corresponding internal legislation which left the choice of nationality to the discretion of the inhabitants. They could either apply for the nationality of the respective successor State (Belgian or Netherlands) or retain their original nationality without having to leave the territory in question.

b) Uniting and Separation of States

aa) Surinam

68. When *Surinam* became independent in 1975, questions of nationality were regulated by the Netherlands-Surinam Nationality Agreement of 25 November 1975. Broadly speaking, this Agreement distinguished between:

- **Netherlands nationals born in Surinam and resident there at the relevant time (25 November 1975) who automatically acquired Surinamese nationality;**
- **Netherlands nationals not born in Surinam but resident there at the relevant time who acquired Surinamese nationality only if they had some (well defined) additional link with this country;**
- **Netherlands nationals born in Surinam but not resident there at the relevant time remained Netherlands nationals with a right to opt for Surinamese nationality before 1 January 1986, while they may also acquire Surinamese nationality as of right provided that they establish residence in Surinam for a period of two years**

bb) Germany

69. Due to the fact that the Federal Republic of Germany maintained a common German nationality based on the Imperial Nationality Act of 1913, the German reunification on 3 October 1990 did not create particular problems. According to the Nationality Act of 1913, which was based on *jus sanguinis*, all descendants of German nationals had automatically to be regarded as Germans. According to a ruling by the Federal Constitutional Court, even the isolated acquisition of the nationality of the former German Democratic Republic (e.g. by naturalisation) was deemed, subject to limits of *ordre public*, to have the effect of acquiring the common German nationality under the Nationality Act simultaneously[36]. Thus, citizens of the former GDR did not acquire a new nationality when Germany was reunited. International treaties concluded by the former GDR in regard of matters of citizenship (e.g. treaties on the avoidance of double citizenship) were considered to have automatically lapsed on 3 October 1990, which was confirmed by exchanges of notes with the respective Parties.

c) Dissolution of States

aa) Yugoslavia

70. Yugoslavia gradually disintegrated over a certain period of time. On 25 June 1991, the former Yugoslav Republics of Slovenia and Croatia declared their independence.

71. The citizenship laws of *Slovenia* and *Croatia* were adopted immediately after independence. They are based on the "republican citizenships" which had already existed in the former Yugoslavia. Only persons who had previously possessed the citizenship of the respective Republic according to Yugoslavian legislation became automatically citizens of the newly independent State. Croatia granted an additional right to apply for citizenship for persons belonging to the "Croatian people" **irrespective of their place of residence**. Under Slovenian legislation, all former citizens of other Republics of the former SFRY having permanent residence in Slovenia could apply for citizenship.

bb) USSR[37]

72. Even before the formal dissolution of the Soviet Union, the Baltic States of *Estonia*, *Latvia* and *Lithuania* achieved independence at the end of August 1991. These three States represent a special case since their claim to be identical with the three Baltic States annexed by the Soviet Union in 1940 was accepted by the international community. After having restored their statehood, the Baltic States based their nationality legislation to a large extent on nationality legislation which had been in force in each of the countries before 1940. Estonia has even re-enacted, temporarily until 1995 when new legislation came into force, the Law on Citizenship of 1938 as amended in 1940. *Estonia* and *Latvia* restricted automatic acquisition of the new nationality to persons who either had been Estonian or Latvian citizens prior to the annexation by the USSR (including their descendants) or who were linked to the territory of the respective State by their origin. Mere residents, including many former USSR nationals who had settled in the Baltic States after 1940, had to apply for the new nationality according to special procedures.

73. In December 1991, the rest of the Soviet Union fell apart. The solutions adopted by the different States established on the territory of the former USSR were not identical. The *Russian Federation* granted its nationality to all citizens of the former USSR who resided permanently in its territory or who had returned thereto as well as to those who served abroad in the military forces of the Russian Federation or the Unified Armed Forces of the CIS. *Belarus*, *Moldova* and *Ukraine* accorded their citizenship to all permanent residents. *Kyrgyzstan* **and *Georgia*** on the other hand linked **their new citizenship** to the citizenship of the respective former **soviet republic**. **Under Soviet law, this citizenship was held by all Soviet citizens permanently residing in the territory of one of the constituent republics. All USSR nationals residing in one of the successor States thus acquired automatically its nationality.**

cc) Czechoslovakia

74. The Czech and Slovak Federal Republic was officially dissolved with effect on 1 January 1993. The successor States, the Czech Republic and Slovakia, adopted their Laws on Citizenship only on 29 December 1992 and 19 January 1993 respectively. Both States based their legislation on **laws on nationality** which had previously existed in the „SFR. In 1968 the Federal Assembly had introduced, in addition to the "federal citizenship" of Czechoslovakia, separate **nationalities** for the Czech and Slovak Republics[38]. Following the dissolution of the „SFR, each of the successor States conferred their **citizenship** primarily upon all persons possessing the respective **nationality**. Other permanent residents and in particular citizens of the former „SFR could under certain circumstances opt for the new nationality. The Czech legislation required certain periods of uninterrupted residence ranging from two years for former citizens of the „SFR to five years for other persons **as well as a so-called "clear criminal record" during the last five years**.

III. General Principles emerging from the practice

1. Acquisition of the nationality of the successor State

75. International practice confirms the rule according to which population goes with the territory. While there may not yet be a binding rule of customary international law prescribing the automatic acquisition of the nationality of the successor State in situations of State succession, the successor State has certainly the *right* to grant its nationality at least to those persons who continue to be domiciled in the transferred territory. Already in 1892, Chief Justice Fuller declared in *Boyd* v. *The State of Nebraska*, a decision by the Supreme Court of the United States of America:

> "The nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part, to retain their former nationality by removal or otherwise, as may be provided"[39].

76. It should be emphasised, however, that the change of nationality is never automatic. It has to be provided for in either the domestic law of the successor State or in international treaties. Where the territorial transfer is based on treaty, the treaty frequently contains regulations concerning the nationality of the inhabitants of the territory. Such treaty stipulations may affect the nationality of the persons concerned only in so far as they become part of the domestic law of the State whose nationality is to be acquired or lost[40].

77. As a rule, successor States have adopted **specific** legislation conferring their nationality on former nationals of the predecessor State who continued to have their habitual residence in the transferred territory. Under this legislation, the conferment of nationality operates *automatically* and only exceptionally upon application or registration. Nationals of third States, the so-called alien residents - are normally excluded from the automatic acquisition of the nationality of the successor State.

78. In many cases, the nationality of the successor State has been conferred on all *permanent residents*, subject to certain rights of option[41]. This was the solution adopted not only in most cases of transfer of territory since 1918, but also by some of the countries which gained their independence **since then: *Lithuania* (1918), *Ireland* (1921),** *Belarus* (1990), *Moldova* (1990/1991), ***Ukraine*** (1991).

79. There have, however, been cases in which the new nationality was not conferred to all residents of the transferred territory:

- When the former *German territories east of the Oder and Neisse* were incorporated into Poland and the USSR following World War II, Polish citizenship was granted only to persons of Polish ethnicity who were asked to make an oath of allegiance to the Polish people and State. It must be taken into account, however, that most of the population of German origin had either fled during the last stages of the war or was later evicted.

80. There are also many instances where the nationality of the successor State was granted only to *nationals* of the predecessor State who resided in the territory at the time of the transfer.

- **The *United States of America* usually conferred nationality on the nationals of the predecessor State who resided in the territory at the time of the transfer[42].**

- **Particularly complex regulations were adopted when *Cyprus* and *Malta* gained their independence. Under the Treaty concerning the Establishment of the Republic of Cyprus (1960), automatic acquisition of Cypriot citizenship was limited to certain categories of residents who were either British subjects or born in the island. Other persons had to apply individually for the new nationality. When Malta became independent in 1964, it granted its nationality only to citizens of the United Kingdom and Colonies who were either born in Malta prior to 21 September 1964 or whose father became a Maltese citizen on 21 September 1964. Certain other categories could apply for Maltese citizenship individually.**

- **The new citizenship laws of** the *States emerging from the dissolution of Czechoslovakia, Yugoslavia and the USSR* are largely influenced by pre-existing citizenship laws, either those of the constituent parts of Czechoslovakia **and** Yugoslavia or, in the case of the *Baltic States*, by laws adopted prior to their annexation by the USSR.

  In the successor States of *Czechoslovakia and Yugoslavia,* only persons possessing the citizenship of the respective predecessor entity and their descendants **acquired *ipso facto* the new citizenship.** Other residents had to go through individualised procedures ranging from individual registration to naturalisation. There were usually simplified procedures for residents possessing the citizenship of other constituent parts or of the former central State itself (Czech Republic, Croatia, Slovakia, Slovenia).

  In the case of the *Baltic States*, acquisition of the new citizenship by mere residents who were neither citizens of the States existing prior to their annexation by the USSR or their descendants nor otherwise linked to the territory (for example by birth) has been made subject to certain conditions which were sometimes difficult to fulfil for many of the former USSR citizens.

81. If the initial body of citizens is defined in a restrictive manner, it becomes very important which conditions are imposed on other habitual residents of the territory who would like to become citizens of the successor State. Even if they are nationals of third States and therefore do not risk becoming stateless, they may have an interest in acquiring the new nationality in order to avoid the status of alien with its attendant application of rather restrictive legislation. It must be emphasised that a refusal of the new citizenship can have potentially far-reaching effects for the enjoyment of fundamental and social rights (including the right to work, to purchase or sell property, to receive health, retirement and education benefits, etc.).

82. The solutions adopted by successor States which have restricted the acquisition of their nationality to certain categories of habitual residents vary considerably. The procedures adopted range from mere registration to the application of ordinary naturalisation procedures (see in particular the legislation adopted by the former USSR with respect to the *Klaipeda/Memel* and *Kaliningrad/K?nigsberg* territories as well as the legislation adopted by *Estonia* and *Latvia* following the restoration of their sovereignty in 1990).

83. Successor States have imposed *inter alia* the following conditions:

- permanent residence: *Lithuania (independence 1990)*; some States required permanent residence during a certain time prior to the relevant date: *Czech Republic (independence 1993)* - 2 years, *Estonia (independence 1991)* - 3/5 years, *Italy (incorporation of Fiume/Rijeka 1919/1920)* - 5 years, *Croatia (independence 1991)* - 5 years;

- knowledge of the national language: *Italy (incorporation of Fiume/Rijeka 1919/1920)*, *Latvia (independence 1990)*, *Estonia (independence 1991)*, *Croatia (independence 1991)*;

- legal means of subsistence: *Estonia (independence 1991*), *Lithuania (independence 1990)*;

- no conviction of an intentional crime against a person or other intentional offence: *Czech Republic (independence 1993*); in the case of naturalisation procedures: *Estonia (independence 1991)*, *Latvia (independence 1990)*;

- some sort of allegiance to the new sovereign: *Poland (incorporation of German territories 1945*), *Estonia (independence 1991)*, *Croatia (independence 1991*);

- exclusion of persons who had been employed by the armed forces, security and intelligence services of the previous sovereign: *Estonia (independence 1991*), *Latvia (independence 1990*).

84. The position of nationals of the predecessor State who originate from the transferred territory but who, at the time of the transfer, are *resident outside the territory* has not been regulated uniformly. If the predecessor State ceases to exist, the successor State may, subject to acquiescence by the State which exercises territorial jurisdiction over them, grant its citizenship to nationals of the defunct State residing outside the transferred territory[43]. When the two *Germanies* united in 1990, citizens of the former German Democratic Republic residing abroad were automatically regarded as Germans since they qualified as such under the Nationality Act of 1913 which had always been in force in the Federal Republic of Germany. According to the 1991 Citizenship Law of *Ukraine*, all individuals working or studying abroad, who were born in the country, or can prove their permanent place of residence there provided that they are not citizens of another State and that they have expressed their will to become citizens of Ukraine qualified as nationals. *Belarus* also allowed former residents to register as nationals.

85. A different situation arises in cases of partial succession. Here, the predecessor State continues to exist. The conferment of citizenship on persons residing outside the transferred territory constitutes an act purporting to have extraterritorial effects and **may not be recognised** by the State of residence. **According to one author,** such nationality may not be conferred against the will of the individual who must decide whether to become a national of the successor State or to retain his or her original nationality[44]. **A possibility to acquire the new nationality for persons who had been born in a territory which later passed under a new sovereignty, but who did not reside there at the relevant date, was *inter alia* provided for in the following cases of partial State succession: incorporation of Macedonia, Ipiros, Crete and Northern islands of the Aegean Sea by *Greece* (1913), annexation of former Polish territories and the Baltic States by the *former USSR* (1939/1940).**

2. Loss of the nationality of the predecessor State

86. Inhabitants of a territory which is subject to a change of sovereignty usually lose the nationality of the predecessor State. An obligation by the predecessor State to withdraw its nationality from inhabitants of the transferred territory may be seen as a corollary of the obligation to recognise the validity of the transfer under international law[45]. Such a reasoning does not apply, of course, when no other nationality is conferred on them as a result of the transfer and they therefore run the risk of becoming stateless (cf. the situation of some of the former USSR citizens in the Baltic States).

87. States have also refused to withdraw their nationality where the new sovereign's title over the territory remained in dispute. This had been the situation as far as the former German territories east of the Oder and Neisse were concerned. Although Poland and the USSR had exercised since 1945 *de facto* control over these territories, they were for a long time not recognised by the West German authorities as the territorial sovereigns. Under German law, German citizens living in these territories could therefore retain their status and were considered as Germans when they returned to Germany (cf. Article 116 of the German Constitution).

88. In some recent cases of transfer of territory it was agreed that the nationality of the predecessor State should not be withdrawn automatically. The treaties on border corrections concluded in 1956 and 1963 between Germany on the one hand and Belgium and the Netherlands on the other left the choice of nationality entirely to the discretion of the inhabitants. They could either apply for the nationality of the successor State or retain their original nationality without having to leave the territory.

3. Right to opt for a particular nationality

89. The modern right of option or election is generally understood as the right, to be enjoyed by all persons affected by territorial changes, to make a declaration of refusal to acquire the nationality of the acquiring State and to retain their original nationality (*option of nationality*)[46]. Such a right of option is in line with Article 15, paragraph 2, of the Universal Declaration of Human Rights which provides that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality".

90. A right of option has been accorded in most of the recent cases of *partial State succession*, either by treaty or by domestic legislation. One exceptions is however, the incorporation of the South Dobroudja territory into Bulgaria which occurred during the Second World War.

91. In the case of an automatic acquisition of the nationality of the successor State, a *right to opt for the previously held nationality* was generally recognised. In the past such a right was usually coupled with an *obligation to leave the transferred territory* (cf. *inter alia* the post-1918 Peace Treaties; the Treaty of 12 August 1922 between Finland and Russia on repatriation of their nationals, giving effect to Article 35 of the 1920 Peace Treaty of Dorpat; the 1947 Peace Treaty with Italy). In the case of the *Acquisition of Polish Nationality* (1924)[47], Arbitrator Kaeckenbeck expressly recognised the right of the successor State to require the emigration of such persons who had opted against the new nationality. He held that Poland was entitled to order those inhabitants of Upper Silesia who had opted for the German nationality to leave at the end of a specific period. The requirement of emigration together with a form of declared option has sometimes been justified to avoid a fraudulent exercise of the right to opt.

92. In more recent cases of transfer of territory, however, the inhabitants could choose between the nationality of the successor State and their original nationality without having to fear any negative consequences. Under the 1956 and 1963 treaties on exchange of certain territories between *Germany* on the one hand and *Belgium* and the *Netherlands* on the other, the decision to opt against the nationality of the new sovereign did not entail an obligation to leave the territory in question.

93. In addition to the right to retain a previously held nationality, there are several instances of *options according to ethnic, linguistic and religious criteria*. The post-1918 Peace Treaties allowed persons differing in race and language from the majority of the population of the territory in which they lived to opt for the nationality of another State if the majority of this State's population was of the same race and language as the person exercising the right. The 1947 Peace Treaty with Italy based the option on "customary language" and granted a real choice between retaining the nationality of the ceding State or acquiring that of the successor. **Italian nationals residing in Italy who used the Serbian, Croatian or Slovenian language could opt for Yugoslavian citizenship. On the other hand, when part of the "Free Territory of Trieste" became part of Yugoslavia (1954), members of the Italian minority were allowed to move to Italy, thereby losing their Yugoslavian citizenship.**

94. Some of the newly independent States provided for a *right of option to repudiate the nationality* of the State concerned. Such a negative option can be found in the laws of *Moldova*, *Russia* and *Ukraine*. Under the new *Lithuanian* Law on Citizenship, the fact of not applying for a passport within two years of the entry into force of the Law was considered an implicit rejection of Lithuanian citizenship.

95. However, an important number of States which gained their independence did not allow for a right to opt, either for or against, the nationality of the new State: *Greece* (1830), *Finland* (1917), *Cyprus* (1960), *Malta* (1964), *Croatia* (1991), *Slovenia* (1991), *Kyrgyzstan* (1993), the *Czech Republic* (1993) and *Slovakia* (1993). As far as the successor States of Czechoslovakia, the USSR and Yugoslavia are concerned, the absence of a **negative** option can be explained by the disappearance of the predecessor State the nationality of which had consequently ceased to exist. Persons rejecting the nationality of the successor State would have become stateless.

4. Prohibition of arbitrary deprivation of nationality

96. Article 15 of the 1948 Universal Declaration of Human Rights declares

> "Everyone has the right to citizenship. No-one shall be arbitrarily deprived of his or her citizenship".

97. This right which had been disregarded in the past by many of the countries of the Eastern and Central Europe is now firmly recognised in the legislation of virtually all European States[48]. It is envisaged to include it in the European Convention on Nationality and Military Obligations in cases of Multiple Nationality which is currently being drafted within the Council of Europe.

98. Some of the countries emerging from totalitarian rule have even adopted specific legislation in order to give citizens who were deprived of their nationality against their will the opportunity to regain it (f.e. Germany after 1945, Latvia and Russia in 1991).

5. Avoidance of Statelessness

99. The avoidance of cases of statelessness constitutes a legitimate concern of the international community. There have been frequent attempts to reduce or eliminate statelessness through the adoption of appropriate international treaty law.

100. As far as cases of State succession are concerned, Article 10 of the *1961 UN Convention on the Reduction of Statelessness* provides that:

> "Every treaty between Contracting States providing for the transfer of territory shall include provisions to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.
>
> In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition".

101. On the whole, an analysis of the legal regulations adopted during recent cases of State succession shows that the creation of new cases of statelessness has in most cases been avoided. When *Cyprus* became independent and adopted its own citizenship law, persons who might have become stateless by reason of the adopted regulation were given an enforceable right to apply for citizenship.

102. However, the practice by which the initial body of citizens was limited to persons possessing the citizenship of a predecessor State or federated entity has not proved to be conducive to the avoidance of new cases of statelessness. Such a restrictive practice was in particular adopted by some of the States emerging from the dissolution of *Czechoslovakia*, *Yugoslavia* and the *USSR*.

103. Prior to their dissolution, the legal situation in *Czechoslovakia* and *Yugoslavia* was characterised by the coexistence of one "national citizenship" and several "republican citizenships" or "nationalities". Since the predecessor State was effectively extinguished, the "national citizenship" ceased to exist. In some of the successor States which developed out of preexisting "republics" only persons (including their descendants) who possessed the corresponding "republican citizenship", or in the case of the *Baltic States*, the citizenship which had been in force prior to their annexation by the USSR in 1940, became automatically citizens of the new State. Other habitual residents had to go through individualised procedures ranging from mere registration to ordinary naturalisation. In some cases, this process has had the paradoxical result that habitual residents became aliens in their own country. It should not be forgotten that, for example in Yugoslavia, not every citizen of the Federal Yugoslavia possessed simultaneously the citizenship of one of the republics (e.g. those born outside the national territory).

104. Most of the individuals concerned theoretically had the right to apply for the citizenship of one of the other successor States. The effective realisation of this right was, however, often made very difficult by the political situation prevailing in the countries concerned, especially as far as the successor States of the former Yugoslavia were concerned.

- In the case of the *Baltic States*, acquisition of the new citizenship by mere residents who were neither citizens of the States existing prior to their annexation by the USSR or their descendants nor otherwise linked to the territory (for example by birth) has been made subject to certain conditions (see above under 1):

  In *Latvia* and *Estonia*, former USSR citizens resident in the country have to apply for naturalisation. Certain categories of former USSR citizens are excluded from naturalisation, *inter alia* those who have acted anti-constitutionally, who have been members of the security and armed forces of the USSR, or who have been convicted of serious crimes. Applicants for naturalisation have to prove their knowledge of the national language.

  Under the rather restrictive legislation of *Estonia* and *Latvia* many former USSR citizens who did not originate from the Baltic States were prevented from acquiring the new nationality and became effectively stateless[49]. The practice adopted by these two countries can be explained by the need to preserve their national identity following more than fifty years of foreign annexation and the resulting massive influx of USSR citizens. It must be born in mind that these States recovered a political and legal identity which had been suppressed during the time of annexation.

- In *Croatia*, the continuity between the republican citizenship in the former Yugoslavia and the new citizenship of the Republic of Croatia had the effect of relegating to the status of aliens many inhabitants of Croatia who did not possess that republican citizenship. They had to apply for naturalisation in respect of which the law distinguished between persons of Croatian and other nationality. Whereas "Croatians" (even those living abroad) could obtain the new citizenship immediately, persons of other nationality had to fulfil additional criteria (registered place of residence for not less than five years, proficiency in the Croatian language and Latin script, attachment to the legal system of the Republic and acceptance of Croatian culture). However, most of the problems which were initially caused by rather complex and slow administrative procedures have now been solved. According to a report by a Council of Europe delegation which examined the problem in 1993, 415,324 out of 417,957 applications had been processed (of which 394,733 applications were granted and 20,591 refused), only 2,633 applications were still under consideration[50].

- Under Law No. 40 of 29 December 1992 on acquiring and losing citizenship of the *Czech Republic*, only persons of Czech nationality automatically became citizens of the Czech Republic. Citizens of the former „SFR possessing Slovak nationality could obtain the new Czech citizenship only if they fulfilled certain conditions, in particular if they had a permanent residence for a period of at least two years and had not been convicted during the past five years of an intentional criminal offence ("clean criminal record"). In a certain number of cases, applications for Czech citizenship made by persons of Slovak nationality have been rejected, touching in particular the Roma community. Theses persons could however obtain permanent residence permits under a simplified procedure[51].

105. It must be deplored that instances of State succession have only rarely been used to reduce existing cases of statelessness. It is rather exceptional that the adoption of new legislation following a transfer of sovereignty was used to give stateless persons an opportunity to apply for the nationality of the successor State. In this respect one should mention the 1991 Law on Nationality of the Russian Federation which gave stateless persons residing in Russia the possibility to acquire Russian citizenship.

106. There have also been efforts to mitigate the consequences of statelessness by *improving the status of stateless persons*. Following its independence, Latvia adopted in 1995 a Law on the Status of Former USSR Citizens who are not Citizens of Latvia or any other State which guarantees certain rights to stateless persons, including the right to select freely a place of residence and to leave and return to Latvia and protects them against arbitrary expulsion. Lithuania has adopted similar legislation[52].

6. Multiple Nationality

107. In the past, considerable efforts have been undertaken, both in domestic and international law, to reduce cases of multiple nationality. Within the Council of Europe, the 1963 Convention on Reduction of Cases of Multiple Nationality and Military Obligations (ETS No. 43) provided that nationals of the Contracting States who acquire the nationality of another Party should lose their former nationality (Chapter I, Article 1). The countries of the former socialist bloc have also been averse to multiple nationality which was reflected both in domestic legislation prohibiting dual nationality and the conclusion of an important number of treaties for the avoidance of dual or multiple nationality.

108. In cases of State succession, the creation of cases of dual or multiple nationality was usually avoided. As a rule, the inhabitants of transferred territory lost the nationality of the predecessor State automatically. Rather exceptional was the case of *Slovakia* where, following the dissolution of the Czech and Slovak Federal Republic, all citizens of the former „SFR, including those who were not citizens of the Slovak Republic, could apply for Slovak citizenship until 31 December 1993. Since applicants did not have to prove that they had been released from any other nationality, the application of the law resulted in a certain number of cases of dual citizenship (in particular Czech and Slovak)[53].

109. In general there is a growing tendency to accept dual or multiple nationality in certain cases, especially when it is acquired automatically by birth or marriage (*Albania, Austria, Belgium, Croatia, Czech Republic, France, Greece, Hungary, Ireland, Italy, Malta, Netherlands, Portugal, San Marino, Spain, Slovakia, Switzerland, United Kingdom*)[54]. The new draft European Convention on Nationality and Military Obligations in Cases of Multiple Nationality postulates that State Parties shall allow

"children having different nationalities acquired automatically at birth, to retain these nationalities;

its nationals to possess another nationality where the other nationality is automatically acquired by marriage".

110. However, **there is an important number of States which are still reluctant** to accept dual or multiple nationality. **They** tolerate it only in exceptional cases, in particular when it is provided for in international agreements on the basis of reciprocity (*Belarus, Estonia, Finland, Germany, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Moldova, Norway, Poland, Romania, Russia, Slovenia, Sweden, Ukraine*).

111. In cases of State succession, the creation of cases of dual or multiple nationality has usually been avoided. Persons exercising the right to opt for a certain nationality were normally excluded from the otherwise automatic acquisition of the nationality of the successor State or had to renounce it. This was the practice established by, *inter alia*, the peace treaties concluded after the First World War, the 1947 Peace Treaty with Italy and by the nationality laws of the successor States of Czechoslovakia, Yugoslavia and the USSR.

IV. Guidelines for State practice

A. Rules and recommendations (M. ECONOMIDES)

1. In all cases of State succession, the successor State shall confer its nationality on all citizens of the predecessor State who live or permanently reside in the transferred territory[55].

2. The successor State shall as far as possible take all appropriate measures to avoid cases of statelessness. In particular it should confer its nationality:

a. on those persons who live or permanently reside in the transferred territory who are stateless at the time of State succession;

b. on persons who originate from the transferred territory who live or reside outside the territory and who are stateless.

3. In all cases of succession, except unification of States, the successor State shall grant those persons referred to in Rule No. 1 who have ethnic, linguistic or religious links with the predecessor State the right to choose the nationality of the latter State.

The right to choose should be exercised within 18 months from the date of succession by all persons having reached the age of 16, 18. The choice made by both parents, the guardian or the father alone, as appropriate, prevails over the choice expressed by unmarried minors under the age of 16, 18.

The exercise of the right to choose the nationality of the predecessor State shall not have any prejudicial consequences for those making that choice, in particular with regard to their residence in the successor state and their moveable and immovable property located therein.

4. The successor State should make provision for conferring its nationality on a voluntary basis:

a. on persons who originate from the transferred territory who have the nationality of the predecessor State and who, at the time of succession, live or reside outside this territory;

b. on inhabitants or permanent residents of the transferred territory who, at the time of succession, hold the nationality of a third State.

5. Legal persons whose headquarters are located in the transferred territory shall acquire upon succession the nationality of the successor State.

6. The rules and recommendations contained in the preceding paragraphs shall apply exclusively to State successions occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations (cf Articles 6 and 3 of the two Vienna Conventions on succession of States of 1978 and 1983).

B. PROPOSED RECOMMENDATIONS (Giorgio MALINVERNI)

1. In the event of State successions, the conferring of nationality shall fall under the jurisdiction of the States involved in the succession. The latter shall not however enjoy absolute discretionary power. They must in particular respect the human rights of all persons concerned, as guaranteed by international instruments.

2. The States in question shall respect in particular the principle whereby all persons have a right to a nationality. They shall therefore avoid creating any cases of statelessness.

3. States shall not refuse to confer their nationality on anyone on the grounds of ethnic origin, race, religion or language, notwithstanding the real and effective link such persons have with the territory ceded.

4. The successor State shall have the right to confer nationality on those persons permanently resident in the territory it has acquired and who held the nationality of the defunct State.

In principle, these persons shall have the right to acquire such nationality.

5. Those persons not residing in the territory ceded at the time of the State succession shall have the right to acquire the nationality of the successor State if they would otherwise become stateless persons.

6. In cases where the State which is subject to a loss of sovereignty does not cease to exist, persons resident in the territory ceded shall have the right to choose between the nationality of the successor State and that of the ceding State, *without fear of any negative consequences arising from their choice* (e.g. obligation to leave the territory).

C. Recommendation (M. KLUCKA)

The relevant legal regulations adopted by a successor State should be stable. Legal principles which have originally been adopted as a basis on which nationality has been granted in the case of State succession should not to subject to subsequent modifications.

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[1] Sections 301 et seq. of the US Immigration and Nationality Act.

[2] The draft Convention has been declassified by the Committee of Ministers of the Council of Europe (Doc. DIR/JUR (95) 2 of 15 February 1995). When the European Committee on Legal Co-operation has finalised the text, it will be submitted to the Committee of Ministers for adoption.

[3] *V. Mikulka*, First report on State succession and its impact on the nationality of natural and legal persons, UN Doc. A/CN.4/467, 17 April 1995; Report of the Working Group of State succession and its impact on the nationality of natural and legal persons, UN Doc. A/CN.4/L.507, 23 June 1994.

[4] L.V. *Oppenheim*, International Law, vol. I, 1955, p. 644.

[5] *Nottebohm Case (Second Phase)* , Judgment of 6 April 1955, I.C.J. Reports 1955, p. 4 (23). See also Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A No. 4, p. 95: "Nationality can be deemed to be the political and legal bond that links a person to a given state and binds him to diplomatic protection from that state".

[6] LNTS, Vol. 179, p. 89.

[7] International Court of Justice, *ibid.*, pp. 20-21.

[8] Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A No. 4, p. 94; *Mikulka* (supra note 3), paras. 57 et seq.

[9] I.C.J. Reports 1955, p. 23.

[10] Cf. *Mikulka* (supra note 3), para. 76 et seq.

[11] See *Oppenheim*, "International Law" (supra note 4), pp. 856-857. Oppenheim mentions the example of a number of Latin American countries in which the word "citizenship" has been used to designated all the political rights of which an individual can be deprived as a penalty or other measure, so that the said individual loses his citizenship without being deprived of his nationality from the angle of international law. Again, in the United States, even though the words citizenship and nationality are often used interchangeably, the word citizen is generally used to designate those persons who enjoy full political and individual rights in the United States of America, while some individuals - such as those from territories or possessions which are not one of the States making up the Union - are referred to a nationals. They owe allegiance to the United States of America and are nationals within the meaning of international law, but they do not possess all the rights of United States citizenship. The relevant aspect vis-?-vis international law is their nationality in the broad sense of the term, not their citizenship.

[12] See the Commission of the European Communities Report on Citizenship of the Union, 21.12.1993, Document, COM (93) 702 final.

[13] Case C-369/90, judgment of 7 July 1990, Collection 1990 I, p. 4239.

[14] The same definition is included in Article 2, paragraph 1.a of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts of 7 April 1983.

[15] Cf. P. *Weis*, Nationality and Statelessness in International Law, 2nd edition 1979, p. 135.

[16] Inter-American Court of Human Rights, Advisory Opinion OC-4/84 of 19 January 1984, Series A No. 4, p. 94

[17] See *X against Austria* , Application No. 5212/71, decision of 5 October 1972, *Collection of Decisions of the European Commission of Human Rights* , Vol. 69 (1973).

[18] See *X against FRG* , Application No. 3745/68, *Collection of Decisions of the European Commission of Human Rights* , Vol. 31 (1970). Nevertheless, only in very obvious cases can the conclusion be drawn that the national authorities refused to grant the applicant the nationality in question with the sole aim of enabling him to be expelled. In the above-mentioned application the Commission considered that such a conclusion was unjustified. More recently, the Commission's decision of 14 December 1989 in the case of *Habsburg - Lothringen against Austria* , Application No. 15344/89, does not rule out this solution

either, even though it concentrates exclusively on examining the validity of Austria's reservation to this article.

[19] Cases of *Abdulaziz, Cabales and Balkandali* , judgment of 28 May 1985, Series A, Vol. 94; *Berrehab*, 21 June 1988, Series A, Vol. 138; *Beldjoudi*, 26 March 1992, Series A, Vol. 234-A; case-law confirmed by the case of *Nasri against France* , 19 July 1995, Series A, Vol. 324. According to the report of the Commission in the case of *Riza G?l against Switzerland* (Application No. 23218/94), adopted on 4 April 1995, the Swiss authorities' refusal to allow the applicant's son to join his family in Switzerland by issuing him a humanitarian residence permit was a violation of Article 8 of the ECHR.

[20] See case of *Tyrer*, judgment of 25 April 1978, Series A, Vol. 26, and case of the *East African Asians* , Application No. 4403/70 et al., Commission's decision of 10 October 1970, Yearbook of the European Convention on Human Rights, Vol. 13, p. 929.

[21] See case of the *East African Asians* , op. cit., p. 994.

[22] See case of *Kalderas Gypsies*, Application Nos. 7823 and 7824/77, decision of 10 October 1977, Decisions and Reports, Vol. 11, p. 221.

[23] J.M.M. *Chan*, "The right to a nationality as a human right", Human Right Law Journal, Vol. 12 (1991), Nos. 1 and 2, p. 1 (6).

[24] An autonomous concept in the case-law of the Court. See case of *Jamil against France* , judgment of 8 June 1995, Series A, Vol. 298.

[25] Case of *Jamil against France* , op. cit.

[26] Case of *Salahaddin Galip against Greece* , Application No. 17309/90, decision of 30 August 1995.

[27] Document of the Copenhagen meeting of the CSCE Conference on the Human Dimension, point I.2.

[28] Judgment of 9 March 1936, *Re Stoffels*, Annual Digest and Reports of Public International Law Cases 9 (1938-1940) No. 107, 339.

[29] Cf. the Appendix to Article 79 of the Versailles Treaty and the corresponding French regulation of 1920.

[30] *Acquisition of Polish Nationality* , Advisory Opinion of 15 September 1923, PCIJ, Series B, No. 7, at p. 15.

[31] *Ibid.*, pp. 17 et seq.

[32] The Treaty of St. Germain contained such an exception with regard to the Serb-Croat-Slovene State and the Czecho-Slovak State for persons having acquired "rights of citizenship" after 1 January 1910.

[33] See the decision by the Federal Constitutional Court on the treaty concluded with Poland in 1970, *Entscheidungen des Bundesverfassungsgerichts - BVerfGE* 40, 141.

[34] Cf. the Law of 28 April 1946 relating to the Polish citizenship of persons of Polish ethnicity, domiciled in the regained territories, and two supplementary orders of the Polish government.

[35] Second German Law regulating certain Questions of Citizenship of 17 May 1956.

[36] Decision of 21.10.1987 - *Teso*, BVerfGE 77, 137.

[37] See the contributions to the Workshop on International Law and Nationality Laws in the Former USSR, 25-26 April 1995, published in Austrian Journal of Public and International Law 49 (1995) No. 1.

[38] Cf. Act No. 165/1968 of the Federal Assembly and Law No. 88/1990 of the former „SFR.

[39] 143 U.S. 135 at p. 162 (1892).

[40] Cf. *Exchange of Greek and Turkish Populations,* Advisory Opinion of 21 February 1925, PCIJ Series B, No. 10, at p. 19.

[41] See below under (3.).

[42] Cf. *Weis* (supra note 15), p. 138.

[43] *Weis* (supra note 15), p. 144.

[44] *Weis* (supra note 15), p. 149.

[45] *Weis* (supra note 15), pp. 147-148.

[46] *Weis* (supra note 15), p. 156.

[47] Decision by the Upper Silesia Arbitral Tribunal of 10 July 1924, RIAA, Vol. I, 401 (427).

[48] See the exhaustive overview of nationality legislation of European States contained in the *European Bulletin on Nationality* , Strasbourg, January 1995 [DIR/JUR. (95) 1].

[49] According to reports by the OSCE Missions to Estonia and Latvia, the number of non-citizens in the two countries totals about 380,000 (Estonia) and 700,000 (Latvia).

[50] "Report on the legislation of the Republic of Croatia" prepared by Mr Matscher and Ms Thune for the Parliamentary Assembly (Doc. AS/Bur/Croatia (1994) 2 of 24 January 1995, pp. 32-33.

[51] A written question has been put by Mrs Verspaget to the Committee of Ministers of the Council of Europe (No. 358). In its reply, the Committee of Ministers has charged a group of legal experts "to study the combined effects of the Czech and Slovak laws on citizenship and of their implementation, as well as other legal rules relating to the status of citizens of the former Czech and Slovak Federal Republic on the territory of the Czech Republic" (Parliamentary Assembly Doc. 7246).

[52] Cf. the Law on the Legal Status of Foreigners of 4 September 1991.

[53] J. *Malenovsk?*, Probl?mes juridiques li?s ? la partition de la Tch?coslovaquie, Annuaire fran?ais de droit international, Vol. 39 (1993), 305 (326).

[54] Comp. the *European Bulletin on Nationality* (supra note 47).

[55] The successor State may choose not to consider as inhabitants or permanent residents within the meaning of this provision, public servants, members of the armed forces and other persons having the nationality of the predecessor State who are resident in the transferred territory for reasons of service.