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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

CONSEQUENCES OF STATE SUCCESSION FOR NATIONALITY

DRAFT REPORT

Draft finalised on 30 August in Geneva.
The modifications with regard to the previous version (CDL-NAT (96) rev.1) are shown in bold, deletions by *.**

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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 **which have a practice in the field of State succession:** *Albania, Austria, Belarus, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, the Netherlands, Norway, Poland, Romania, Russia, Slovakia, Slovenia, "the former Yugoslav Republic of Macedonia", Turkey and Ukraine and Japan, Kyrgyzstan,* non-European States represented in the 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. Messrs Economides, Klučka and Malinverni have been appointed as rapporteurs. **M. Steinberger has submitted a very useful working document to the rapporteurs.**

3. The Commission has taken note of the draft European Convention on 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 Schärer (Switzerland), have participated in the work of the Commission.

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

5. The present report demonstrates 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. Given the scarcity of practice in this field, the Commission decided to exclude the study of problems concerning the nationality of legal persons from the present report. 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.

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

[2] A draft Convention has been declassified by the Committee of Ministers of the Council of Europe (Doc. DIR/JUR (96) 8 of 12 July 1996). 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; Second report on State succession and its impact on the nationality of natural and legal persons, UN Doc. A/CN.4/474, 17 April 1996; 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.

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 - understood to mean "the legal bond between an individual and a State" (Article 3.*a*). It does not indicate the ethnic origin of a person and therefore has in this report the same meaning as the term "citizenship". 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].

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[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. 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 (*supra* note 5), pp. 20-21; *Nationality Decrees issued in Tunis and Morocco*, Advisory Opinion of 7 February 1923, PCIJ, Series B, No. 4, at p. 24.

[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), First report , paras. 57 et seq.

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. 28 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.

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 certain number of States already draws a distinction between various categories of persons within the population, and accordingly grants them special

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

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

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"***.

13. In the Commonwealth the most important criterion for international law is citizenship vis-à-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, all Germans as defined in the Basic Law shall be considered nationals of the Federal Republic of Germany. A German within the meaning of the Basic Law is anybody who possesses German citizenship or who has been admitted to the territory of the German Reich within the frontiers of 31 December 1937 as a refugee or expellee of German ethnic origin or as their spouse or descendant (cf. Article 116, paragraph 1, of the Basic Law).

16. Federal States **may have** 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 republican 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 **States grant** nationality at birth 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 uniform manner or in a manner facilitating the coexistence of multiple nationalities. The criteria for granting nationality at another time than birth depend on both objective (religion, language, race or ethnic origin, usual place of residence, **marriage**, domicile) 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, **lawful** means of subsistence).

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[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 as 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-à-vis international law is their nationality in the broad sense of the term, not their citizenship.

19. Nevertheless, it would seem that the criteria of descent, birth, marriage 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***.

20. Lastly, the impact of Community law should be noted. Indeed, 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. In the case of *Micheletti v. Delegación 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. Recognizing the competence of Member States in the field of nationality law under international law, the Court has emphasized that this competence must be exercised in compliance with Community law. It is thus unacceptable that another Member State restricts 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".

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[12] See the Commission of the European Communities Report on Citizenship of the Union, 21 December 1993, Document, COM (93) 702 final, and the Act on European Citizenship, Contribution of the Venice Commission for the 1996 Intergovernmental Conference, 25 March 1996, CDL-INF (96) 5.

[13] Case C-369/90, judgment of 7 July 1992, Collection 1992 I, p. 4258 (§ 10).

[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.

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. The same applies *a fortiori* to occupations or annexations which result from resort to the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations. The two Vienna Conventions on State succession provide in fact that they apply only to the effects of a State succession occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

25. 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.

26. 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].

27. A distinction should be drawn between cases where the predecessor State continues to exist (e.g. cession of part of the territory of a State, separation), and cases where one or several States succeed to a predecessor State which disappears (e.g. dissolution or uniting of States). In the first hypothesis arises not only the question of acquisition of the new nationality, but also that of the loss of the old one. In the second hypothesis, the nationality of the predecessor State ceases to exist, but the attachment of the persons concerned with one or the other of the successor States may give rise to problems.

3. The impact of international human rights standards

28. Another set of limitations in the area of nationality legislation is derived from the international protection of human rights[16]. Both the 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. 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.

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[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

29. 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".

30. 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.

31. 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.

32. 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 regulated by the Convention. It has however happened that applicants have complained before the European Commission of Human Rights about violations of the Convention resulting from the withdrawal or refusal to grant nationality[18].

33. The European Commission of Human Rights has so far not accepted such applications. In one particular case, it held that the procedure for withdrawal 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[19]. It should however be mentioned that withdrawals of nationality may give rise to a violation of the Convention, in particular because of their discriminatory character.

34. 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 "under Articles 3 and 14 of the Convention concerning the respect for their human dignity and concerning

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[17] See *X v. Austria*, Application No. 5212/71, decision of 5 October 1972, *Collection of Decisions of the European Commission of Human Rights*, Vol. 43, p. 69.

[18] See, in particular, *Kafkasli v. Turquie*, No. 21106/92, decision of 22 May 1995; *Salahddin Galip v. Grèce*, No. 17309/90, decision of 30 August 1995.

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

their treatment"[20]. This case concerned the refusal to deliver identity documents to members belonging to a nomad group. In another case, the Commission 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].

35. Lastly, it should be mentioned that Article 8 of the ECHR, which protects private and family life, may be invoked against measures of expulsion which are often linked to withdrawals of citizenship. According to the case-law of the European Court of Human Rights, the expulsion of a permanent resident from a given country in which he or she has all his or her family connections, and which is not necessary in a democratic society or proportionate to a legitimately pursued aim, may infringe due respect for family life and therefore violate Article 8[22].

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

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

37. 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 submission of administration under the principle of legality, 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"[23]. 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.

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[20] See case of *Kalderas Gypsies*, Application Nos. 7823 and 7824/77, decision of 6 July 1977, Decisions and Reports, Vol. 11, p. 221 (§ 57).

[21] See case of the *East African Asians*, Application No. 4403/70 et al., decision of 10 October 1970, Yearbook of the European Convention of Human Rights, Vol. 13, p. 928 (994).

[22] Cases of *Abdulaziz, Cabales and Balkandali*, judgment of 28 May 1985, Series A, Vol. 94; *Berrehab v. the Netherlands*, judgment of 21 June 1988, Series A, Vol. 138; *Beldjoudi v. France*, judgment of 26 March 1992, Series A, Vol. 234-A; *Nasri v. France*, judgment of 13 July 1995, Series A, Vol. 320-B.

[23] Document of the Copenhagen meeting of the CSCE Conference on the Human Dimension (29 June 1990), point I.2.

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38. 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.

39. The concept of the rule of law involves in particular:

- 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

40. 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.

41. However, when *Greece* became independent in 1830, the question of nationality depended on the right to emigrate. Moslems who did not choose to remain in Greece acquired the Hellenic nationality, whereas moslems who emigrated retained the ottoman nationality. 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. In all cases, the criterion of *jus soli* was applied. *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

42. 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 States and other international entities (e.g. the *Czecho-Slovak State*, *Poland*, the *Serb-Croat-Slovene State* and the *Free City of Danzig*).

43. 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"[24]. Polish internal legislation qualified the meaning of the term "habitual residence" with regard to German nationals. In accordance with the executive regulation of 13 July 1920 only German nationals who had been domiciled in the territories which became part of Poland at least from 2 January 1908 until 10 January 1920 were entitled to acquire Polish citizenship automatically. Those who did not fulfill this requirement had to ask for a special permission from the Polish authorities.

44. 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[25]. 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). Other Germans born or domiciled in Alsace-Lorraine could acquire French nationality only by way of naturalisation. The difficulties, in the application of this rigid system, in particular for the descendants of persons affected by the Treaty who were unable to show the short-form certificate of reinstatement has led the authorities to grant, by virtue of the Law of 22 December 1961 modified by the Law of 29 June 1971 and under certain conditions, nationality in a "subsidiary manner" if those persons had benefited in a constant way from the factual possession of French status. Consequently, only persons born in the three departments of Haut-Rhin, Bas-Rhin and Moselle between 20 May 1817 and 11 November 1918 and having no factual possession of French status since that date, would be obliged to show a short-form certificate from the reinstatement register.

45. 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,

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

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

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".

46. 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"[26]. It therefore rejected a claim to impose additional conditions for the acquisition of nationality[27].

47. 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[28].

48. 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".

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

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

[28] 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.

49. 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).

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

51. 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

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

53. *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[29], but exclusively by domestic legislation of the States concerned[30]. According to this legislation, Polish and **Soviet** citizenship were not granted automatically, but only by individualised procedures. Under Polish legislation, only persons of Polish origin who had been domiciled in the territories before 1 January 1945 could acquire Polish citizenship. They had to make a declaration of allegiance to the Polish nation and State.

54. 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[31] 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

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

[30] 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.

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

acquired German nationality in 1938 and had permanent residence in Germany since 1945 were entitled to regain German nationality by declaration, with retroactive effect.

55. 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 **who had their habitual residence in the** 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

56. 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) Algeria

57. The independence of *Algeria* in 1962 was not followed by the drawing up of any Convention on questions of nationality between the States involved. The Evian Agreements have however provided for some transitional provisions, inspired more by the principle of option than by that of double nationality. Those persons who at the time of the self-determination had French ordinary civil status[32] and fulfilled certain conditions of residence in Algeria could benefit by right from Algerian civil rights, by remaining French nationals, for 3 years. After this period they had to choose between Algerian and French nationality.

58. Law No 63.96 of 27 March 1963 contains the Algerian Nationality Code, under which nationality can be of origin or by acquisition.

A person is of Algerian origin when born of an Algerian father or Algerian mother and Stateless father, or born in Algeria of unknown parents, or born in Algeria of an Algerian

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[32] **Since 1 June 1946, all inhabitants of the overseas territories (including Algeria) were "French citizens", like French nationals of the mother country and of overseas territories, but kept their own personal status, i.e. the civil status under local law for Muslims and the ordinary civil status for French people living in Algeria ("Europeans").**

mother and father born in Algeria, unless Algerian nationality is renounced in the two years prior to his or her majority (21 years). A person is called "Algerian" when he or she has at least two ascendants on the father's side born in Algeria, and has Muslim status.

Algerian nationality can also be acquired

- on the basis of the participation in the fight for liberation;
- by exercising the option provided for citizens of French civil status under the Evian agreements; or
- by following the naturalisation procedure.

59. Furthermore, Ordinance No 62-825 of the 21 July 1962 regulated the question of French nationality as follows: People of French nationality having ordinary civil status and domiciled in Algeria at the date of the official announcement of the results of the ballot on self-determination (3 July 1962) could keep their French nationality, whatever their situation regarding Algerian nationality. Those persons having the civil status under local law as natives of Algeria and their children (also called "French Muslims" of the former departments of Algeria) could, by settling in France, have their French nationality recognised under the conditions provided for in the Nationality Code.

bb) Surinam

60. 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

cc) Germany

61. 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[33]. Thus, citizens of the former GDR did not acquire a new nationality when Germany was reunited.

62. 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 Parties to these treaties.

c) Dissolution of States

aa) Yugoslavia

63. Yugoslavia gradually disintegrated over a certain period of time. On 25 June 1991, the former Yugoslav Republics of Slovenia and Croatia declared their independence. ***Bosnia-Herzegovina* and *"the former Yugoslav Republic of Macedonia"* followed on 15 October 1991 and 20 December 1991 respectively.**

64. The laws on citizenship of *Slovenia*, *Croatia* and *"the former Yugoslav Republic of Macedonia"* 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" who on the date of entry into force of the law on citizenship had a registered place of residence in Croatia for a period of not less than 10 years. Under Slovenian legislation, all former citizens of other Republics of the former SFRY having permanent residence in Slovenia could apply for Slovenian citizenship. The law on citizenship of "the former Yugoslav Republic of Macedonia" provides for the same possibility on condition that the persons in question are older than 18 years, have a permanent personal income and at least 15 years of residence in the country.

65. According to the legislation of the *Republic of Bosnia and Herzegovina*, all persons who on 6 April 1992 had the citizenship of the former SFRY and residence in the territory of the Republic became citizens of the new State[34]. The Constitution of Bosnia and Herzegovina contained in Annex 4 of the Dayton Peace Agreements introduced separate citizenships of the two "Entities", the Federation of Bosnia and Herzegovina and the Republic Srpska. All citizens of either "Entity" are citizens of Bosnia and Herzegovina. According to the Constitution, all persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of the Constitution are now citizens of Bosnia and Herzegovina. The Parliamentary Assembly has been authorised to regulate the question of naturalisations made on the basis of prior legislation. So far, no relevant legislation has been adopted to implement the Constitution. However, the Republic Srpska had already in 1992,

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

[34] Decree having force of law on the citizenship of the Republic of Bosnia and Herzegovina of 6 October 1992, as amended by Article 5 of Decree having force of law of 23 April 1993.

when it was not yet internationally recognised, adopted a "Law on the Serb Citizenship" which is based on ethnic criteria. Its compatibility with the Dayton Peace Agreements remains doubtful.

66. The Parliament of the *Federal Republic of Yugoslavia (Serbia and Montenegro)* adopted a new law on citizenship on 16 July 1996. Under the law, individuals who had the citizenship of the Yugoslav republics of Serbia and Montenegro on 27 April 1992, when the Constitution was promulgated, and their children born thereafter will automatically be considered Yugoslav citizens. Former citizens of other republics of the Socialist Federal Republic of Yugoslavia may be granted Yugoslav citizenship upon application which must be made within one years's time if they had permanent residence on the latter's territory on 27 April 1992 and have no other citizenship.

bb) USSR[35]

67. 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 legislation which had been in force in each of the countries before 1940.**The Law on Citizenship of Estonia of 1938 and the Law on Citizenship of Latvia of 1919 have been re-enacted temporarily[36]. These two States** 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.

68. 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

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[35] 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.

[36] **See the resolution of the Supreme Council of the Republic of Latvia of 15 October 1991 and the resolution of the Supreme Council of the Republic of Estonia of 26 February 1992.**

69. 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 ČSFR. In 1968 the Federal Assembly had introduced, in addition to the "federal citizenship" of Czechoslovakia, separate nationalities for the Czech and Slovak Republics[37]. Following the dissolution of the ČSFR, 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 ČSFR 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 ČSFR to five years for other persons as well as a so-called "clean criminal record" during the last five years.

70. In 1996, the Czech Parliament adopted some amendments to the Law on Citizenship which provided *inter alia* that the clean criminal record requirement may be dispensed with as a condition for the acquisition of Czech citizenship by applicants who are citizens or former citizens of the Slovak Republic and who have been continuously living on the territory of the Czech Republic since 31 December 1992 at the latest. The amendments entered into force on 24 May 1996[38].

III. General Principles emerging from the practice

1. Acquisition of the nationality of the successor State

71. International practice confirms the rule according to which population goes with the territory. While there may not yet be a binding rule of codified 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 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].

72. 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

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[37] Cf. Act No. 165/1968 of the Federal Assembly and Law No. 88/1990 of the former ČSFR.

[38] Law no. 139/1996 of 26 April 1996.

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

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.

73. 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.

74. In many cases, the nationality of the successor State has been conferred on all *permanent residents*, subject to certain rights of option[40]. 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).

75. 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 a declaration of allegiance to the Polish nation 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.

76. 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 **(e.g. annexation of Alaska and the Virgin Islands). However, in the cases of Hawai and Texas, all citizens of the predecessor State acquired United States citizenship, regardless of their residence.**

- **Detailed** 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.

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[40] See below **para. 87 et seq.**

77. 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 **federated** entity **which had become independent*** ** 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*, *"the former Yugoslav Republic of Macedonia"*). *Bosnia-Herzegovina* granted its citizenship to all persons who on 6 April 1992 had the citizenship of the former SFRY and residence in the territory of the Republic.

- 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.

78. 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 should be emphasised that even where such permanent residents do not acquire the new citizenship, they should, except for some strictly limited exceptions, enjoy the same fundamental and social and economic rights as nationals (including the right to work, to purchase or sell property, to receive health, retirement and education benefits, etc).

79. The provisions of many Council of Europe treaties and other instruments give non-nationals many rights. In addition the right to respect for private and family life, protected by Article 8 of the ECHR, is of particular importance in the case of stateless persons as permanent residents, who can show that their family life is in the country of residence and that there would be obstacles to establishing family life in another country. Interferences with this right must be strictly limited to cases which are in accordance with the law and necessary in a democratic society, in the interest of national security, public safety or the economic well-being of the country. **The draft European Convention on Nationality requires that nationals of a predecessor State who were habitually resident in the transferred territory and who have not acquired the nationality of the successor State shall have the right to remain in that State and shall enjoy equality of treatment with nationals of the successor State in relation to social and economic rights (Article 21).**

80. The solutions adopted by successor States which, departing from the general practice, 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/Königsberg* territories as well as the legislation adopted by *Estonia* and *Latvia* following the restoration of their sovereignty in 1990).

81. **These** successor States have imposed *inter alia* the following conditions:

- *** 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, *"the former Yugoslav Republic of Macedonia" (independence 1991)* - 15 ans;

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

- **lawful** means of subsistence: *Estonia (independence 1991), Lithuania (independence 1991), "the former Yugoslav Republic of Macedonia" (independence 1991)*;

- 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 1991)*;

- **expression of some sort of allegiance to the new sovereign: declaration of allegiance to the nation - *Poland (incorporation of German territories 1945)*, oath to the Republic - *Estonia (independence 1991)*, attachment to the legal system and culture - *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 1991)*.

82. 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. *** 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.

83. 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[41]. 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

84. 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[42]. 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).

85. 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, persons of German origin living in these territories could retain their status and were considered as Germans (cf. Article 116 of the German Constitution).

86. 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.

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

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

3. Right of option

87. The right of option is understood as the right of persons affected by territorial changes to choose, by making a declaration, between either the nationality of the successor State and that of the predecessor State or between the nationalities of several successor States (*option of nationality*)[43]. It is used in a broad sense, covering both the positive choice of a certain nationality and the refusal of a nationality acquired *ex lege*.

88. A right of option, mostly in favour of the nationality of the predecessor State, has been accorded in most cases of partial State succession, either by treaty or by domestic legislation. The practice following the First World War is particularly rich in this respect. One may refer, for example, to the relevant provisions of the Versailles Treaty (Articles 37, 85, 91, 113), the Treaty of Saint-Germain-en-Laye (Articles 78-80), the Treaty of Neuilly-sur-Seine (Articles 40 and 45), the Peace Treaty of Tartu (Article 9) and the Treaty of Lausanne (Articles 21 and 31-34). However, when the South Dobroudja territory was incorporated into *Bulgaria* during the Second World War, no right of option was granted.

89. **In the above-mentioned cases,** the right to opt in favour of the previously held nationality was usually coupled with an *obligation to leave the transferred territory****. In the case of the *Acquisition of Polish Nationality* (1924)[44], 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. **Today, such an obligation appears to be incompatible with international human rights standards. Although a change of nationality in the case of State succession is not as such arbitrary, the power of States to attribute nationality against an individual's will has been put into question.**

90. In some of the more recent cases of border corrections 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.

91. In State practice, the exercise of the right of option has been made conditional on the existence of *effective links, in particular ethnic, linguistic or religious* with the State the nationality of which the optants wanted to retain or to acquire. Such links exist normally with the predecessor State, but sometimes also with other States. 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

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

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

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.

92. When *new States* were created, regulations concerning the right of option tended to be more restrictive. 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. The affected persons could only implicitly repudiate the new nationality by choosing to emigrate: *Malta* (1964), *Croatia* (1991), *Slovenia* (1991), *Bosnia-Herzegovina* (1991/1992), *Kyrgyzstan* (1993), the *Czech Republic* (1993) and *Slovakia* (1993). As far as the dissolutions 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.

93. In some of these cases, certain options were available to the individuals concerned. Permanent residents of one successor State who were linked by their previous republican nationality to the territory or people of another successor State could under certain circumstances become citizens of one or two of the successor States: *Croatia/Slovenia/"the former Yugoslav Republic of Macedonia"/Bosnia-Herzegovina* (1991/1992); *Czech Republic/Slovakia* (1993). It is, however, doubtful whether one can speak of a right of option in these cases. The possibility of options did not result from a deliberate decision by the legislatures, but rather from the combined application of legislative provisions which were adopted by the different successor States without any coordination. In addition, the practical exercise of any option was considerably hampered due to either the absence of a right of option with regard to the nationality which was acquired automatically in the State of residence or to the existence of domestic legislation prohibiting dual nationality.

94. Certain of the recently constituted States provided for an explicit right of option to repudiate their nationality. 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.

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4. Avoidance of Statelessness

95. 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.

96. 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".

97. 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.

98. However, the practice by which the initial body of citizens is 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*.

99. 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 "republican 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).

100. 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 **para. 77 et seq.**).

In *Estonia* and *Latvia*, 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[45]. 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 January 1996, Estonia started issuing aliens' passports to long-time residents which provides them with a viable identification and travel document. The passport also contains the bearer's residency permit for which most non-citizens had applied.

- 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). Some of the problems which were initially caused by rather complex and slow administrative procedures have been solved[46]. However a number of questions still remain to be examined in particular in the light of recent events.

- Under Law No. 40 of 29 December 1992 on acquiring and losing citizenship of the *Czech Republic*, only persons of Czech republican nationality automatically became citizens of the Czech Republic. Citizens of the former ČSFR 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

[45] According to reports by the OSCE Missions to Estonia and Latvia, following the introduction of the new legislation, the number of non-citizens in the two countries totalled about 380,000 (Estonia) and 700,000 (Latvia).

[46] "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.

particular the Roma community[47]. Although theses persons could in principle obtain permanent residence permits under a simplified procedure, it has been alleged that some expulsions took place[48]. Following criticism of the Czech legislation by international human rights organisations, the Czech government accepted that experts of the Council of Europe carried out a legislative expertise concerning the respective citizenship laws of the Czech Republic and Slovakia and their implementation[49]. Partly as a result of the report of the experts, some amendments to the Law on Citizenship were adopted which provided *inter alia* that the clean criminal record requirement may be dispensed with (see above para. 70).

101. 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.

102. 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[50].

6. Multiple Nationality

103. 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 in cases

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[47] There are conflicting estimates as far as numbers are concerned. According to the Czech Authorities, applications rejected between 1 January 1993 and 31 December 1995 total approximately 200, nongovernmental organisations estimated that there were as many as 24,000 or more "unresolved" cases, cf. Report of experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation and replies of the Governments of the Czech Republic and Slovakia, Strasbourg, 2 April 1996 (DIR/JUR (96) 4, p. 113; Country Reports on Human Rights Practices for 1995, Report submitted to the Committee on International Relations, US House of Representatives, and the Committee on Foreign Relations, US Senate, by the Department of State (April 1996), p. 845.

[48] Country Reports on Human Rights Practices for 1995, *ibid.*

[49] 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). The findings are published in Report of experts of the Council of Europe on the citizenship laws of the Czech Republic and Slovakia and their implementation and replies of the Governments of the Czech Republic and Slovakia, Strasbourg, 2 April 1996 (DIR/JUR (96) 4.

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

of multiple nationality (ETS No. 43) deals with the cases of loss of nationality when nationals of a Party acquires the nationality of another Party. The countries of the former socialist bloc have 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.

104. 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 ČSFR, including those who were not citizens of the Slovak Republic, could apply for Slovak citizenship until 31 December 1993. Neither has *"the former Yugoslav Republic of Macedonia"* taken any measures to prohibit or limit cases of double nationality.

105. 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*.

105.Although there is a growing tendency to accept multiple nationality in a greater number of cases (see the legislation of the following States: *Albania, Belgium, Croatia, Czech Republic, France, Greece, Hungary, Ireland, Italy, Malta, Netherlands, Portugal, San Marino, Slovakia, Switzerland, "the former Yugoslav Republic of Macedonia", United Kingdom)* many States are still reluctant to accept multiple nationality as a general principle (*Belarus, Estonia, Finland, Germany, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Moldova, Norway, Poland, Romania, Russia, Slovenia, Sweden, Ukraine*)[51]. In these States, multiple nationality may only arise in a very limited number of cases for example where there is an automatic transmission of different nationalities of the parents to the children; under international agreements on the basis of reciprocity; or States may choose to tolerate certain cases of multiple nationality such as when refugees cannot take the necessary administrative steps in their own countries in order to lose their nationality.

106. The new draft European Convention on Nationality postulates in Article 14 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".

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[51] Comp. the *European Bulletin on Nationality*, Strasbourg, March 1996 [DIR/JUR (96) 1).