

Nationality in public international law and european law

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1.1 The concept of nationality in public international law

1.1.1 Nationality and the sovereign state

Nationality in a historic perspective is a somewhat new phenomenon. Replacing the traditional system of overlord and subject (Cassuto 2001: 41; Hansen & Weil 2001: 34 ff.), nationality can no longer be determined as a personal relationship of allegiance, but rather as a legal status embracing a set of mutual rights and obligations towards a political entity fulfilling certain requirements necessary for the existence of a sovereign state. Sovereign powers, a defined territory and the existence of a nation are generally considered necessary conditions for the existence of a state in the sense of public international law, entrusted with the competence and sovereign powers attributed to states.

Philosophical and social perception of what constitutes a nation may be different. Nationhood may not require statehood, but there is no statehood without a nation consisting of nationals and territorial sovereignty.

Under traditional international law of the nineteenth century, a 'right to exclude others' and to defend the territory of the nation from external aggression has been a predominant element of nationality. In a more modern understanding, the term 'nationality' defines the status of membership to a community based upon a common history, culture, ethnicity and common political convictions or values.

History teaches that the building of a nation as a political community, constituting a sovereign state, may well be based upon only some of these criteria. It follows that there is no generally recognised concept of nationality as the expression of membership of a political community. Even nations based upon a common ethnic origin will incorporate other criteria for membership and states based upon common political convictions and ideals, such as the republican 'citoyen', will require additional conditions for admission to the nation. Nationality as the expression of membership of a nation as a political community, therefore, is by and large the product of fairly fortuitous developments. This explains why public international law has very little to say about the scope and limits of a state's determination of nationality. Nevertheless, nationality has very important functions as a determining factor in international relations.

Nationality determines the scope of application of basic rights and obligations of states vis-a`-vis other states and the international community, such as personal jurisdiction, the application of treaties and diplomatic protection. In domestic law, nationality is a fundamental requirement

for the exercise of political rights and claims to protection and correlate duties, such as military or civil service obligations, which may, however, vary according to national law. The International Court of Justice in the famous *Nottebohm* case has described nationality as a 'legal bond having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state.'¹

The German Constitutional Court has described nationality as a legal status describing membership of a political community: 'Nationality is the legal requirement for an equal status implying equal duties on the one hand, equal political rights on the other hand, the exercise of which is the exclusive source of legitimacy of power in a democracy.'² Nationality as a determining factor in international relations is closely related to the concept of the sovereign state. With a changing perception of sovereignty as a result of a globalised interdependent world and international regimes, nationality has lost much of its delimiting function. Nationality can no longer be considered the only and exclusive legal bond between an individual and a home country. Although there are as yet no indications for a 'post-national' or 'trans-national' nationality, there are clear indications that states increasingly recognise that there may well be more than just one membership of a political community. The increasing number of dual nationals and the changing attitude of states dealing with multiple nationality indicates a change in traditional perceptions of nationality.

The state, in addition, has ceased to be the only protector of an individual's rights. There are a variety of international conventions and treaties providing for an individual right to file a complaint before international bodies against the violation of human rights at regional as well as universal level. The concept of diplomatic protection, based on the fiction of states asserting their own rights by protecting their nationals has therefore been criticised as obsolete (Garcia-Amador 1958: 421, 437). Dugard, in his first report on diplomatic protection, has rightly criticised this assumption as exaggerated. The exercise of diplomatic protection by a state for its nationals is still an indispensable tool for effectively enforcing an individual's rights, including his human rights against another state. Diplomatic protection may not only be more effective at international level than a complaint before an international body. It may in many cases be the only effective instrument for enforcing an individual's human rights. Here again, nationality has not lost its essential function as a legal requirement of a state to exercise diplomatic protection, although under exceptional circumstances diplomatic protection may be extended to non-nationals (see Dugard 2000: 11, 57).

European Union citizenship, in addition, has contributed to a somewhat changed perception of nationality. The concept of citizenship is usually described as a gradual substitution of important elements of the nationality of the Member States. Union citizenship is no longer limited to economic freedoms, but already implies – although to a limited extent – political rights and a right of residence, which is becoming increasingly independent from traditional requirements of alien law. Whether the assumption is true that Union citizenship has partly replaced the nationality of the Member States of the European Union will be examined in section 1.6.

In spite of globalisation and the approximation of political and social systems, the assumption of a rapid decline of the concept of nationality and its replacement by a ‘post-national’ or ‘trans-national’ nationality has so far not been reflected in the states’ practices. One reason for this may be the unexpected rise of ideologies and religions as attributes of states and nations, which has increased the traditional function of nationality as an element of exclusion and defence against external influences of all kinds and intervention.

1.1.2 Nationality as a human right

1.1.2.1 Acquisition of nationality for permanent residents

Art. 15, para. 1 of the Universal Declaration of Human Rights states that everybody is entitled to a nationality.³ It has been rightly remarked that this provision does not indicate under which provisions a person is entitled to a specific nationality (de Groot 2001: 67). State practice lends little support to the assumption that art. 15 has replaced the traditional understanding of nationality as a sovereign prerogative of the state with an individual rights-orientated approach that would be based upon an individual’s free choice in determining his or her destiny as a member of a community legally defined by nationality law (for a different view, see Cassuto 2001: 41, 59).

This does not mean that a state’s right to determine nationality law has remained unaffected by the development of human rights and human dignity, which has shifted the very foundation of public international law from a system of coordination of sovereign states to the wellbeing of human beings. Rather than making general assumptions about to what extent the sovereign rights of states are replaced or limited by human rights concepts of self-fulfilment and personal identity, it seems appropriate from a legal point of view to differentiate different areas in which human rights considerations influence the determination of nationality or have been recognised in the process of obtaining increasing recognition by states. As examples, we refer to the naturalisation of migrant workers, the issues of denationalisation and arbitrary

deprivation of nationality and, finally, discrimination in granting naturalisation. The right to a nationality as a human rights concept raises a number of issues with regard to the acquisition of nationality by second or third generation migrants (Chan 1991: 1). The Inter-American Court of Human Rights, in an advisory opinion, proclaimed that the right to nationality must be considered an inherent human right and that the powers of states to regulate matters relating to nationality are determined by their obligations to ensure the full protection of human rights.⁴ Under customary international law, neither a right to a specific nationality nor a right to change nationality to acquire an additional nationality exists. One may raise the question of whether the rule of unlimited discretion of states in deciding on the acquisition of nationality adequately reflects the human rights implications of second and third generation migrants.

There has as yet been no similar treaty provision for migrant workers and their families. Recent European state practice, however, shows a clear tendency to grant certain categories of migrants a right to acquire nationality either *ex lege* or on the basis of an application. Art. 6, para. 3 of the European Convention on Nationality (ECN) provides that internal law shall contain rules which make it possible for foreigners lawfully and habitually resident in the territory of a state party to be naturalised. The maximum period of residence which can be required for naturalisation is fixed at a maximum of ten years. This corresponds to a common standard in Europe, most countries requiring between five and ten years of residence. In addition, other justifiable conditions for naturalisation, in particular as regards language, lack of a criminal record and the ability to earn a living, may be required.⁵

Some other categories of foreigners generally receive preferential treatment in acquiring nationality in terms of an easier procedure, a reduction in the required length of residence, fewer integration requirements, etc. Art. 6, para. 4 ECN lists foreign spouses⁶ and adopted children in particular, as well as second and third generation migrants.

The Parliamentary Assembly of the Council of Europe recommended to make it easier for young migrants to acquire the nationality of the immigration country, if they have either been born or completed most of their education there.⁷

This recommendation has been taken up by the Committee of Ministers in a slightly weaker version. The Committee of Ministers to the Member States recommends that Member States, concerning second generation migrants:⁸ – ‘provide all the information needed by parents and second-generation migrants concerning the conditions on which nationality may be acquired and lost and also on the consequences thereof, as well as reinstatement of nationality of origin and the procedures to be followed;

– do everything that is necessary and possible to ensure that procedures regarding nationality or reinstatement of nationality of origin

are as simple and speedy as possible and that charges are as limited as possible and do not exceed administrative costs;

– ensure, within the framework of international agreements, that young migrants holding the nationalities of two or more Member States are subject to national service or military service obligations in only one state.’ (see Hannappel 1986: 58; de Groot 2001: 37).

A survey of the nationality laws in most Western European states shows a clear tendency towards privileged access by migrant workers to naturalisation, usually in connection with an increasing acceptance of dual nationality (for a comparative survey see Hailbronner & Renner 2005: 27 ff.; Hansen & Weil 2001: 34 ff.; Hecker 1999: 21). A comparative survey shows different techniques of easier access by migrant workers and their descendants to the nationality of the country of residence. A number of countries have introduced elements of *ius soli* by granting nationality to children of migrant workers who have either been born already in the country of permanent residence or who have had a permanent lawful residence for a specified number of years in the host country. Other European states have opted for simplification of the conditions for naturalisation, reducing the number of years of permanent residence necessary to acquire nationality.

The European Convention on Nationality has taken account of these developments in the rules relating to nationality in Chapter III. State parties, according to art. 6, para. 4, shall facilitate in their internal laws the acquisition of nationality for persons who were born on its territory and reside there lawfully and habitually as well as persons who are lawfully and habitually on its territory for a period of time beginning before the age of eighteen, leaving that period to be determined by the internal law of the state party concerned. The wording of this provision

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as well as its systematic context and the general principles regarding the acquisition of nationality, however, show that customary law rules on simplification have not yet evolved, resulting in an individual right to acquire the nationality of the host state for migrant workers and their descendants upon fulfilment of certain requirements. Art. 6, para. 4 obliges the state parties to ensure favourable conditions for the acquisition of nationality for the persons belonging to the categories of persons listed in the sub-paragraphs. However, the Explanatory Report makes clear that state parties ‘still retain their discretion whether to grant their nationality to such applicants’.⁹

1.1.2.2 Refugees

Art. 34 of the 1951 Convention relating to the status of refugees stipulates that the contracting states shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings. Art. 34 does not

provide for an individual right of naturalisation for refugees. The duty to facilitate implies an obligation for naturalisation authorities and courts to take into account the special situation of refugees in exercising their discretionary authority. According to the jurisprudence of the German Federal Administrative Court, not only does art. 34 have interstate effect. Art. 34 implies a directly applicable obligation which entitles refugees to rely upon the provision before administrative authorities and courts applying nationality law.¹⁰ The obligation to take into account the particular situation of refugees is derived from the human rights character of acquisition of nationality. The German administrative courts have therefore taken the view that in cases of discretionary naturalisations, an application can only be refused if predominant public interests are against the naturalisation of a refugee. The limitation of the discretionary authority is based on the fact that refugees are typically lacking the protection which a national usually receives from his home state. Therefore, the Federal Republic of Germany under public international law has a duty to protect refugees, including the appropriate regulation of their nationality. If, on balance, public interests are both in favour of as well as against the naturalisation of a refugee, the administrative authorities have to decide, within the framework of their discretionary authority, whether the naturalisation of a refugee is in the public interest. A refugee has an individual right to a discretionary decision, taking into account a proper evaluation of his particular situation.

¹¹ The Bremen Administrative Appeal Court has, therefore, held that German authorities are in violation of art. 34 of the Geneva Convention when refusing the naturalisation of a refugee exclusively on the grounds that he or she holds a humanitarian temporary residence permit.

To what extent art. 34 reflects a customary rule of public international law is doubtful. In the European sphere, however, there can be no question that a duty to facilitate the naturalisation of refugees is part of a common European standard. Art. 6, para. 4, g ECN contains a duty to facilitate the acquisition of nationality for stateless persons and recognised refugees lawfully and habitually resident on its territory. The term 'recognised refugees' includes, but is not limited to, refugees recognised under the 1951 Geneva Convention. State parties are free to include other types of refugees in this group. The requirement of a habitual residence should not be interpreted as an exclusion of those refugees who receive only a temporary residence permit. Unless there is a concrete assumption that refugees may find protection elsewhere, the reception of refugees recognised under the Geneva Convention can be generally considered as a habitual residence.

The duty to facilitate naturalisation means that the authorities and administrative courts have to take into account the particular situation of refugees when applying domestic law. This may also imply a duty to take account of the special difficulties of refugees in procuring documents in cooperation with the authorities of the country of origin of a

refugee, which would be generally required in order to naturalise an applicant. In addition, difficulties may arise with respect to the language knowledge required to naturalise a person. A similar principle applies with respect to the duty to renounce a previous nationality. While, generally also in case of refugees, such an obligation may be required, it must be taken into account that renunciation of a nationality may require particular cooperation with the country of origin which may pose difficulties for refugees resulting from the danger of persecution.

1.1.2.3 Other categories of persons

Other categories of persons also exist, who generally enjoy privileged treatment with respect to acquisition of nationality under international treaties and under domestic law of most European states. Art. 6, para. 4 of the European Convention on Nationality mentions as categories whose naturalisation is to be facilitated:

- spouses of its nationals,
- children of one of its nationals if, under an exception envisaged under internal law, such children born abroad do not possess at the time of birth the nationality of the state party,
- children, one of whose parents acquires or has acquired its nationality,
- children adopted by one of its nationals,

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- persons who were born on its territory and who reside there lawfully and habitually,
- persons who are lawfully and habitually resident on its territory for a period of time beginning before the age of eighteen, that period to be determined by the internal law of the state party concerned,
- stateless persons and recognised refugees lawfully and habitually resident on its territory.

A more detailed discussion of some of these categories will follow in the subsequent sections. In the general human rights context discussed in this section, one may note that the European Convention on Nationality - while recognising the right of each state to determine under its own law who are its nationals - does at the same time recognise a substantial duty to take into account the particular situation of human beings as being dependent on nationality as a fundamental legal status. Although the term 'facilitate' is not defined in the Convention, the jurisprudence of national courts indicates that facilitation implies a duty and not a mere procedural possibility to apply for naturalisation. Facilitation means not only a differentiation between different categories of persons but also, in the words of the Explanatory Report, ensuring favourable conditions for the acquisition of nationality for the persons belonging to each of the categories of persons listed in the sub-paragraphs. Examples include a reduction in the required length of residence, less stringent language requirements, an easier procedure, lower procedural fees.¹² Facilitation in this sense means making

the acquisition of nationality significantly easier than for foreigners generally (Hall 1999: 586).

Human rights implications of nationality law are traditionally most notably recognised in the treaty provisions on loss and deprivation of nationality. Although loss and deprivation are also generally considered a matter for the discretion of states, there has been early recognition of the limitations of such discretion. Art. 15 of the Universal Declaration of Human Rights already provides for a prohibition of arbitrary deprivation or refusal of the right to change one's nationality. Further details will be discussed in the section on loss and deprivation (see section 1.3).

1.1.2.4 Prohibition of discrimination

There are other implications of a human rights-oriented approach to nationality law. Various human rights treaties provide for equal protection before the law and a prohibition of discrimination. Art. 26 of the UN Covenant of Civil and Political Rights provides that the law 'shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. Art. 26 is interpreted as a clause precluding the legislation and administration from introducing arbitrary discrimination or differences in treatment without any objective justification whatsoever (Hall 1999: 593).¹³ Although it must be conceded that the application of this clause to the nationality law may be somewhat unclear since particular provisions frequently occur in treaties regulating nationality issues, there is no indication that art. 26 is generally inapplicable to laws, for instance, depriving persons of their nationality. However, some of the grounds mentioned in art. 26 may objectively justify discrimination in granting nationality by naturalisation to the extent that they are used to discern 'closer affinity' than others to the conferring states' 'value system and interest' or 'closer historical, cultural and spiritual bonds' with the people of the state concerned (Hall 1999: 593), following the quotations to the Inter-American Court of Human Rights on proposed amendments to the naturalisation provisions of the Constitution of Costa Rica.¹⁴

Art. 5 ECN prohibits distinctions in nationality legislations or practices which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. In addition, each state party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently. The provision is intended to take account of art. 14 of the European Convention on Human Rights (ECHR) and art. 2 of the Universal Declaration of Human Rights, although it must be noted that art. 14 ECHR applies only to human rights enshrined in the Convention. The Explanatory Report, however, makes clear that the very

nature of the attribution of nationality requires states to set certain criteria for defining their own nationals. These criteria can result in more preferential treatment in the field of nationality. Common examples of justified grounds for differentiation or preferential treatment include the requirement of knowledge of the national language in order to be naturalised and the facilitated acquisition of nationality due to descent or place of birth. Also, state parties may give more favourable treatment to nationals of certain other states, for example, a Member State of the European Union may require a shorter period of habitual residence for naturalisation of nationals of other European states than is required as a general rule. This would constitute preferential treatment on the basis of nationality and not discrimination on the grounds of national origin. The Report notes that it has been necessary to consider differently distinctions and treatment which do not amount to discrimination and distinctions which would amount to a prohibited discrimination in the field of nationality.

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In addition, in terms of discrimination criteria, the European Nationality Convention is more careful than art. 26 of the UN Covenant of Civil and Political Rights. The term 'national or ethnic origin' is based on art. 1 of the 1966 International Convention on the elimination of all forms of racial discrimination. It is also intended to cover religious origin. The ground of 'social origin', however, has deliberately not been included because the meaning was considered too imprecise. Since some of the different grounds for discrimination listed in art. 14 of the European Convention on Human Rights were not considered to amount to discrimination in the field of nationality, they were therefore excluded from the grounds of discrimination in art. 5, para. 1. In addition, the Report notes that the ECHR was not intended to apply issues of nationality; all the grounds for discrimination contained in art. 14 were appropriate only for the rights and freedoms under that Convention. 15 It follows that non-discrimination clauses in human rights treaties can only be applied to nationality issues with caution. It has to be borne in mind that objective reasons may exist for distinguishing on the grounds laid down in general non-discrimination clauses. In particular, art. 14 ECHR was not devised for nationality issues since it applies only to the human rights enshrined in the European Convention on Human Rights. The list in para. 1 of art. 5 ECN, therefore, can be considered as containing the core elements of prohibited discrimination in nationality matters.

Regarding the particular clause in art. 5, para. 2, providing for a prohibition of different treatment of a state's own nationals whether they are nationals by birth or have acquired nationality subsequently, it should be noted that the words 'shall be guided by' indicate only a declaration of intent and not a mandatory rule to be followed in all cases.

The provision is aimed at eliminating the discriminatory application of

rules. Generally speaking, it follows that there can be no difference in the substance of political, economic and social rights connected with nationality. The rule, however, may not exclude distinctions relating to the loss of nationality. The new German law on nationality contains a duty to opt for one nationality on reaching the age of eighteen only for specified categories of second generation migrants who have acquired German nationality, in addition to the nationality of their parents, by birth on German territory, while children of mixed marriages do not have to opt for one nationality on reaching the age of eighteen. Germany has entered a reservation with regard to art. 7 of the European Convention on Nationality with respect to this provision. It did, however, not consider it necessary to enter a formal reservation since art. 5, para. 2 does not contain a mandatory rule.

1.1.2.5 Administrative procedure and judicial review

Under public international law, administrative procedures and judicial review are within each state's domain, unless human rights provisions are applicable. Nevertheless, the recognition of human rights aspects of nationality implies procedural fairness and review. Recent state practice shows a tendency to submit nationality disputes to the ordinary administrative and judicial process. This is reflected in the provisions of art. 10-12 ECN. According to art. 10, state parties shall ensure that applications relating to the acquisition, retention, loss, recovery or certification of their nationality be processed within a reasonable time. The requirement of a reasonable time is to be determined in the light of all the relevant circumstances. The Explanatory Report notes as an example the case of state succession, where nationals of the predecessor state have not acquired the nationality of the state in which they reside. In this case, the successor state should process their applications very rapidly due to the urgency of the matter.

Decisions relating to nationality according to art. 11 must contain reasons in writing. As a minimum, legal and factual reasons need to be given. However, the mere registration of cases of ex lege acquisition and loss of nationality do not require reasons to be given in writing.¹⁶ For decisions involving national security, only a minimum amount of information has to be provided. In decisions which are in accordance with the wishes or interests of the individual, for example the granting of the application, a simple notification or the issue of the relevant document will suffice. Art. 11 cannot be considered a rule of customary law since there is clearly no uniform state practice. It has been noted that the internal law of some states stipulates that decisions concerning nationality may be taken by Parliament in which case no reasons are given in writing.

Art. 12, ensuring that decisions relating to nationality are open to administrative or judicial review in conformity with internal law, may raise some difficulties. Although the right of appeal may well be

judged a common European standard, it is doubtful whether in matters of nationality a right of appeal must be granted in every case. Exceptions are envisaged particularly when decisions relating to naturalisation are taken by act of Parliament.¹⁷

The procedural provisions of art. 10-12 ECN also support the human rights character of nationality law. The obligation to give a written reasoning as well as the right to judicial or administrative review, however, cannot yet be considered as customary international law, even within the European sphere.

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1.1.3 Abuse of nationality

Facilitating access to nationality for migrants has resulted in growing concern among states that more open access to nationality may be misused to evade immigration restrictions or escape expulsion or deportation. The misuse of nationality laws, therefore, has also become an issue of international co-operation. Thus, for instance, nationality has been renounced in order to escape deportation by acquiring the status of statelessness. States permitting this renunciation are generally acting in violation of public international law. A state's duty to respect the sovereignty of other states and their sovereign right to decide on the admission of foreigners implies a duty to accept a responsibility for a state's own citizens including an obligation to allow their return. This obligation could be easily overcome by a renunciation of nationality in order to prevent the return of a state's own citizens. In addition, state practice supports the rule of the avoidance of statelessness. Establishing statelessness for the main purpose of restricting a state's sovereign right to decide on the admission and residence of foreign nationals means acting against the community of nations. Such renunciation may therefore be considered as invalid for the purposes of executing immigration laws.

Whether the individual acquisition of nationality may amount to an abuse of law (*abus de droit*) is a highly controversial issue. States resort to the notion of abuse of rights in connection with marriages of convenience, evasion of tax obligations, acquisition of residence rights and the retention of dual nationality. Marriages of convenience have also been concluded to qualify either for automatic entitlement to nationality or facilitated access to naturalisation. New problems have surfaced concerning the recognition of registered partnerships entitling a person under national law to preferential access to nationality. Misuse may also occur through the legislation of certain states allowing a person claiming to be the father to recognise a child by a simple declaration, thereby establishing the parenthood relationship and transmitting nationality to a child (Walmsley 1999: 63).

The most prominent case in which an abuse of nationality has been argued is probably the Chen case.¹⁸ Mrs. Chen, in the absence of a residence

right in the United Kingdom, planned to go to Ireland in order to give birth to her second child in Belfast, with a view to obtaining Irish nationality for her. She then settled with her child in the UK and claimed the right of residence for the child as a European citizen and for herself as the mother. The UK government contended that Mrs. Chen was not entitled to rely on the Community provisions because her move to Northern Ireland with the aim of having her child acquire the nationality of another Member State would constitute an attempt to exploit the provisions of Community law. The aims pursued by those Community provisions are not, in the view of the UK government, served where a national of a non-Member country wishing to reside in a Member State, without however moving or wishing to move from one Member State to another, arranges matters in such a way as to give birth to a child in part of the host Member State to which another Member State applies its rules governing acquisition of nationality *iure soli*. Member States therefore were entitled to take measures to prevent individuals from improperly taking advantage of the provisions of Community law or from attempting, under cover of the rights created by the Treaty, illegally to circumvent national legislation. The court rejected this argument. It observed that none of the parties had questioned the legality of the child's acquisition of Irish nationality. Therefore, Member States were not allowed to restrict the effects of the granting of nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the treaty. The court of fraudulent use of nationality law was not discussed. The advocate general examined the issue but stated that in this case, 'there has not been a distortion of the purposes and the objectives of the Community provision which grants the right in question'.¹⁹

The theory of abuse of rights is based on the nineteenth century concept of a social function of rights (Reich 2001: 4, 21). In principle, the court has recognised that Community law cannot be relied on for purposes of abuse or fraud.²⁰ The court, however, has not supplied any clearly identifiable criteria for determining abuse of rights. In the *Lair* case it is incidentally mentioned that a Union citizen's move from one Member State to another as an employee, only to take advantage after very short period of employment of equal access to social rights, in particular maintenance assistance for students, may be considered an abuse not covered by the Community provisions on freedom of movement for workers.²¹ However, in *Paletta* as well as in the *Centros* case²², the court has primarily argued that reliance on a concept of abuse of rights should not limit in any way the exercise of Community rights. The case concerned the registration of a Danish branch of a company founded in accordance with British law, with the primary intention of doing business mainly in Denmark in order to circumvent the application of the national laws governing private companies intended to protect

its creditors. The court did not follow the defence arguing that the right to found a company in accordance with the law of a Member State and to set up branches in other Member States is an exercise of the freedom of establishment guaranteed by the treaty. It has been rightly observed that the argument misses the point (Reich 2001: 22), since the main purpose of using freedom of establishment was to avoid Nationality in public international law and european law 47 the more restrictive company legislation in the host country. We agree with the conclusion of Reich that the court verbally recognised the possibility of abuse of rights on the part of Union citizens who invoke rights guaranteed by the treaty but is not willing to develop more concrete criteria to apply the concept.

In order to find out whether use of a legal right granted under Community provisions implies a circumvention of the law, one may distinguish two categories of case. One category concerns the use of Community rights in a context not envisaged by Community law. The statement in the Lair-case may be an example of this category, where freedom of movement for workers is used for persons who, in reality, are not entitled to particular rights granted to workers under the treaty. One may argue that this case should be properly dealt with by applying a more restrictive interpretation of the term 'worker' within the meaning of Community law. In the context of nationality legislation the more important question is probably under what circumstances the circumvention of nationality law can be raised as an invalid title to acquire rights derived from Union citizenship. Circumvention may be characterised as using a legal right contrary to the general legislative purpose to be pursued by the collective exercise of such rights. Acquisition of a residence right, however, may be considered a legitimate purpose of acquiring nationality. Therefore, in the Chen case it is probably fair to conclude that the very idea of obtaining a residence right as such cannot be considered an abuse of nationality. If nationality is acquired, however, for the main purpose of circumventing immigration law by derived rights for family relatives, one may argue that this is hardly in the legislative purpose of granting nationality *iure soli* to persons born on the territory. Similarly, in the case of Turkish nationals giving up Turkish nationality in order to acquire German nationality and then immediately reacquiring Turkish nationality, one will reasonably conclude that this is a misuse of the German provision existing at that time, whereby German nationals resident on German territory did not lose their German nationality by acquiring a foreign nationality. This was clearly in conflict with the legislative purpose of the German nationality law to provide for the acquisition of German nationality on condition that the previous foreign nationality be renounced. It is generally up to the states to prevent misuse. International law does not exclude appropriate measures against the misuse of nationality laws. There may, however, be scope for increased international cooperation,

particularly in order to exchange information about techniques of fraud and the presentation of false documents and registering the renunciation and acquisition of nationality.

1.1.4 International treaties on nationality

The need for international treaties on nationality issues arose for the first time at the end of the nineteenth century, as a result of the emigration of nationals from many European states to North and South America. In order to resolve issues relating to compulsory military service and conflicting loyalties, a number of treaties were concluded between immigration and emigration countries, providing for acquisition and loss of nationality. The Bancroft Treaties of 1868 between the US and the Northern German Federation and various southern states provided for a balancing of interests between immigration and emigration countries. While the immigration countries were in principle interested in provisions regarding the loss of previous nationality, the emigration countries were seeking to maintain the nationality of their nationals. The Bancroft Treaties provided for a loss of nationality upon expiry of a certain period or depending on certain facts, such as entering the military service of the state of immigration.

A second set of provisions of international treaties dealing with nationality issues was contained in the peace treaties concluded after the First World War. As a result of territorial changes, the question of the nationality of the population in successor states had to be resolved. Most treaties provided for the right by the population to opt for the nationality of the successor state. Nevertheless, in the literature the predominant view was that, under rules of general public international law, the population of a territory would automatically lose the previous nationality as a result of a change of territorial sovereignty (see Jellinek 1951: 50 ff., Dubois 1955: 34 ff.; Brownlie 2003: 658; Münch 1983: 441, 447; for further details see section 1.2.4).

Special issues relating to renunciation or loss of nationality were dealt with in a number of bilateral treaties concerning extradition. Bilateral treaties concerning extradition frequently provide clauses whereby a state is obliged to refuse the naturalisation of persons whose extradition is requested by the other contracting state to an extradition treaty.²³ While these clauses could be justified under the argument that the renunciation or loss of nationality cannot be used to escape criminal prosecution under an extradition treaty, it is doubtful whether general clauses making naturalisation dependent upon the authorisation of another contracting state is in accordance with public international law concepts of nationality as an individual right to change nationality. Some bilateral treaties, such as the treaty between Germany and Iran of 1929, contain a clause whereby the contracting parties will not naturalise a national of another contracting state without the prior consent of the government of the other contracting state.²⁴ In an exchange of

notes in 1955, the contracting parties agreed in principle to abolish this Nationality in public international law and European law 49 clause. However, the agreement could not enter into force due to a lack of ratification by Iran (see Silagi 1999: 40 ff). Contrary to art. 15 of the Universal Declaration of Human Rights, the German authorities and administrative courts are still applying the bilateral agreement although in a somewhat restricted meaning.²⁵

The first multilateral treaty on nationality was concluded in 1930 at The Hague Codification Conference. The Hague Convention concerned certain questions relating to the conflict of nationality laws.²⁶ Its practical importance is low since the Member States could only agree on some principles. The basic principle was that it is up to each state to determine under its own law who are its nationals. This law shall be recognised by other states insofar as it is consistent with international conventions, international custom and the principles of law generally recognised with regard to nationality. The Convention contained a protocol on military duties in questions of dual nationality and additional protocols on particular issues relating to statelessness, as well as a final act containing further recommendations. The primary intention of the Convention was to reduce dual nationality and statelessness and to confirm certain general principles of nationality law.

After the Second World War bilateral treaties on nationality were concluded particularly relating to the legal status of stateless persons and the nationality of married women.

The Agreement on legal status of stateless persons of 29 September 1954 attempted to remedy the legal situation of stateless persons by providing, in a limited number of cases, for an obligation to grant nationality to persons who would otherwise be stateless.²⁷ A similar obligation had already been laid down in the Hague Convention of 1930 and subsequently in the United Nations Convention on the reduction of statelessness of 30 August 1961.²⁸ It has been observed that a critical review of these treaties must come to the conclusion that they have only modestly contributed to the struggle against statelessness since the treaties were binding only for a very limited number of states and dealt only with very few cases of statelessness (see Randelzhofer 2000: 501, 508).

The Agreement on nationality of married women of 20 February 1957²⁹ replaced the principle of a common family nationality with the principle of sexual equality. Art. 10 of the Hague Convention on Certain Questions relating to the Conflict of Nationality already stipulated that the naturalisation of the husband upon marriage shall not involve a change in the nationality of the wife except with her consent. The Convention on the Nationality of Married Women provided for more detailed regulations which have since been widely recognised.

Within Europe, the recommendations and treaties concluded within the framework of the Council of Europe became an essential element

in shaping the international law on nationality issues. Many recommendations by the Committee of Ministers as well as by the Parliamentary Assembly dealt with issues of the reduction of multiple nationality, the nationality of refugees, the nationality of spouses of different nationalities, the avoidance of statelessness and the right of minorities to acquire nationality.³⁰

The Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of May 1963³¹ was, until the adoption of the European Convention on Nationality, a major source of European standards on nationality issues although it has never been ratified by more than 13 European states. A number of European states, such as Finland, Greece and Portugal, have never ratified the Convention. One of the main purposes of the Convention was the principle of reducing cases of dual nationality. According to art. 1 of the Convention, nationals of the contracting states who acquire the nationality of another party through naturalisation shall lose their former nationality. Another important provision deals with military service. According to art. 5 and 6, military service must be fulfilled only in the state where the individual is ordinarily resident. The principle is also contained in art. 1 of the Protocol relating to military obligations in certain cases of dual nationality of 12 April 1930.³²

As a result of an increasing trend towards acceptance of dual nationality for second generation migrants, the Convention has lost some of its practical importance. A number of contracting states have denounced the Convention in connection with a declaration to apply the chapter on military service only. The agreement was changed by a first protocol of 24 November 1977.³³ The purpose of the first protocol was primarily the amendment of a number of provisions concerning the possibility of renouncing the nationality of a contracting party and the nationality of married women. An additional protocol to the Convention provided for a communication between the contracting parties about the acquisition of their nationality by the nationals of the contracting parties.³⁴ It was only ratified by three states.

A second protocol amending the Convention of 2 February 1993 entered into force on 24 March 1994 for only three states (France, Italy and The Netherlands).³⁵ Its main focus was on the facilitation of acquisition by migrant workers who have settled permanently in the Member States of the Council of Europe. Therefore, the preservation of the nationality of origin was promoted as an important factor in achieving the objective of integration. A second additional protocol, intended as an update to the Convention relating to the principle of avoidance of dual nationality, met with heavy resistance from some Council of Europe Member States. For that reason as well as because of the pending Nationality in public international law and european law 51 deliberations on a completely new convention on nationality, the protocol has not had wide practical significance.

With the European Convention on Nationality of 6 November 1997, an attempt was made to establish a new comprehensive treaty regulating all issues of nationality. The Convention has been signed by most European states with the exception of Belgium, Ireland, Luxembourg, Spain and the United Kingdom, and ratified by five states (entry into force on 1 March 2000). It was expected to replace the Convention of 1963 to a large extent, although a number of signatory states have made some reservations or interpretative declarations.

1.2 Conditions for the acquisition of nationality

1.2.1 General principles

The right of states to determine their own jurisdiction and who its nationals are can be considered a generally recognised principle of public international law (Brownlie 2003: 373; Berber 1975: 374; Randelzhofer 2000: 501, 502). The principle, first codified in art. 1 of the 1930 Convention on certain questions relating to the conflict of nationality laws, has been repeated in numerous standard works and court decisions. The leading case has been the advisory opinion of the Permanent Court of International Justice in its 1923 advisory opinion in nationality decrees, issued in Tunis and Morocco: 'The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question. It depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle reserved domain.'³⁶

General acceptance of the principle does not mean that the freedom of states to regulate their nationality is unlimited. Since nationality has many international aspects relating to diplomatic protection, international responsibility and personal sovereignty, limits are set by the rights of other states as well as human rights considerations. The first aspect has already been noted by the German government in its reply to the Territory Committee for the Hague Codification Conference 1930. The German government stated that the application of the principle that questions relating to the acquisition or loss of a specific nationality shall be governed by the laws of the state whose nationality is being claimed or contested, should not go beyond the limits where the legislation of one state encroaches upon the sovereignty of another. For example, a state has no power, through a law or administrative act, to confer its nationality on all the inhabitants of another state or on all foreigners entering its territory.

Further, if the state confers its nationality on the subjects of other states without their request, when the persons concerned are not attached to it by any particular bond, such as origin, domicile or birth for instance, the states concerned will not be bound to recognise such naturalisation.

37 Similarly, the British representative pointed to the restrictions imposed by duties which a state owes to other states. It follows that the right of a state to legislate with regard to the acquisition and loss of its nationality and the duty of another state to recognise the effects of such legislation are not necessarily coincident.³⁸

The approach taken by the British government was also taken up by the International Court of Justice in the *Nottebohm* case.³⁹ Attempts to distinguish municipal law effects of nationality from the international effects of nationality may raise some questions as to whether these aspects can be separated. Nevertheless, the principle that a state is not completely free to choose criteria for the conferment of its nationality and that other states may not recognise such conferment is undisputed. A second set of limitations follows from human rights considerations and related concepts even before human rights entered the sphere of public international law. The 1930 Hague Convention contained provisions on reducing statelessness. Expatriation, therefore, was not to result in denaturalisation, unless the person in question possessed or required another nationality; rules were laid down in subsequent international treaties and recommendations of the Council of Europe regarding the nationality of women as a consequence of marriage, dissolution of marriage or a change in their husband's nationality. The rights of children of unknown or stateless parents and foundlings to receive the nationality of the state of birth or the state where they were found had already been laid down in the 1930 Hague Convention. All these treaties and recommendations did to some extent influence existing international law on the acquisition of nationality although – as the European Convention on Nationality indicates - there is considerable divergence as to the rules and practices of the modes of acquisition as well as the loss of nationality.

Chapter 2 of the European Convention describing the general principles relating to nationality therefore very cautiously states that the rules on nationality of each state party shall be based on the following principles:

- everyone has the right to nationality,
- statelessness shall be avoided,
- no-one shall be arbitrarily deprived of his or her nationality,
- neither marriage nor the dissolution of a marriage between a national of a state party and an alien, nor a change in nationality by Nationality in public international law and european law 53 one of the spouses during the marriage shall automatically affect the nationality of the other spouse.

The Convention confirms the principle of sovereignty by stating in art. 3 that each state shall determine under its own law who are its nationals. This law shall be accepted by other states in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality. The wording 'shall be based' is intended to indicate an obligation

to regard the principles as the basis for national rules on nationality. On the other hand, the principles are not to be taken as absolute. Their precise content is to be determined by more detailed rules laid down in the Convention and elsewhere. Therefore, concerning the right to a nationality, the Explanatory Report makes clear that the right to any particular nationality is determined by the rules on nationality of each state party, consistent with art. 3 of the Convention.

1.2.2 Acquisition by descent (*iure sanguinis*) or by birth on territory (*iure soli*)

Acquisition of nationality by descent from a national or by birth within state territory are the predominant modes of acquisition of nationality. Scarcely any dispute exists that the two criteria are sanctioned by customary international law as commonly recognised criteria which must be recognised by other states as bases for acquisition of nationality (see Panhuys 1959: 160; Brownlie 2003: 378). A survey of states' practice leads to the conclusion that the legal systems of states are based either on *ius sanguinis* or *ius sanguinis* along with *ius soli*. It seems that these criteria are not used interchangeably. There is no state which bases its nationality law exclusively on *ius soli*. The systems differ only to the extent to which *ius soli* or other criteria are accepted as equally valid modes of acquisition of nationality. The systems may also differ in terms of the extent to which birth abroad may limit the acquisition of nationality by descent.

The only exception seems to be the acquisition of nationality of the Vatican City state, where nationality is acquired only by holding office and residing in the Vatican City. The particular circumstances of this case are hardly suitable to refute the argument that there is a widespread acceptance of the principle of the acquisition of nationality of a child, one of whose parents possess the nationality of that state party at the time of the child's birth (art. 6, para. 1 ECN).

Although, originally, the rule in some systems had been limited to acquisition of the nationality of the father, with the development of rules on the prohibition of discrimination based on gender, the nationality laws of European states were uniformly adapted to the equal treatment requirement, extending the *ius sanguinis* principle to the mother of the child.

Problems may arise in cases of the acquisition of nationality in mixed marriages and concerning children born out of wedlock. The Council of Europe's Parliamentary Assembly Recommendation 1081 regarding problems of nationality in mixed marriages⁴⁰ recommends that children born from mixed marriages should also be entitled to acquire and keep the nationality of both of their parents. The 1998 Recommendation implies a certain change of attitude regarding the position taken eleven years earlier in the Council of Europe Committee of Ministers Resolution 7713.⁴¹ The Committee had recommended the insertion of provisions in national legislation for the purpose of avoiding

dual nationality resulting either directly or indirectly from descent or resulting from the place of birth. States should grant the right to their nationals who hold another nationality to renounce their nationality and permit their nationals who acquire another nationality to make a declaration in favour of their new nationality. The different wording of the later Recommendation, as well as art. 14 of the European Convention on Nationality, indicate a shift of attitude towards acceptance of dual nationality by children having different nationalities acquired automatically at birth. Under art. 14, para. 1 ECN, state parties shall allow retention of these nationalities. No reservation so far seems to have been entered against this provision by any contracting state.

Art. 6, para. 1 ECN does not distinguish between married and unmarried mothers concerning the acquisition of nationality by descent.

The only exception is made for internal law restrictions as regards children born abroad. Whether, under the general principle of non-discrimination on the grounds of sex, the same applies to the father may be doubtful. Art. 6 already provides for a distinction with respect to children whose parenthood is established by recognition, court order or similar procedures. Each state party in this case may stipulate that the child acquires that nationality following the procedure determined by its internal law. Regarding this provision, Austria has declared that the term 'parent', used in art. 6 of the Convention, does not include the father of children born out of wedlock according to the Austrian legislation on nationality. While the requirement of a special procedure seems to be justified by the different conditions under which parenthood is established ('mater semper certa est') the total exclusion of a father with regard to the acquisition of nationality for children born out of wedlock seems to be a doubtful proposition in the light of art. 5 on non-discrimination.

Acquisition by birth on the territory (*ius soli*) is equally recognised as a criteria for the conferment of nationality. To varying degrees, the Nationality in public international law and european law 55 laws of a large number of states rest on both principles. In Europe, *ius soli* as an additional reason for acquisition of nationality for second generation migrants has received growing support. The second protocol amending the 1963 Convention on the Reduction of Cases of Multiple Nationality has introduced a rule whereby nationals of a contracting party, acquiring the nationality of another contracting party on whose territory they were either born and were resident or have been ordinarily resident for a certain period of time, may accept dual nationality. Although the focus is on a broader acceptance of dual nationality, the protocol is based on the assumption that migrants who had settled permanently in the Member States of the Council of Europe, particularly in the case of second generation migrants, should acquire the nationality of the host state *ex lege*.

The rule, however, did not receive general approval and the second

protocol was only ratified by a small number of contracting states. The European Convention on Nationality is somewhat more careful in providing that each state party shall 'facilitate' in its internal law the acquisition of its nationality for persons who were born on its territory and reside there lawfully and habitually – thus leaving it up to the states to either introduce *ius soli* or provide for naturalisation. An obligation to grant *ex lege* acquisition at birth is only provided for children born on the territory of a contracting state who do not acquire another nationality at birth (see art. 6, para. 2).

Conferment of nationality to persons born on territory in countries applying a general *ius soli* rule is not usually dependent upon the length of time a person has spent on the territory of birth of a child or upon the residence permit acquired. There are, however, certain limitations generally accepted in customary international law to the principle. One exception is the rule that children of persons with diplomatic immunity do not acquire the nationality of the state where they are born. The rule is applied to diplomats covered by the Vienna Convention on diplomatic relations of 18 April 1961, as well as to persons enjoying diplomatic immunity under the Vienna Convention on consular relations of 24 April 1963.⁴² Another exception is sometimes made with respect to the children of persons exercising official duties on behalf of a foreign government (see Brownlie 2003: 380).

More recently, the tendency is towards somewhat limiting the application of the *ius soli* rule for persons having illegally entered the territory or having entered only for the purpose of a temporary stay. In reaction to the European Court's judgement in the *Chen* case discussed in section 1.3 above, Ireland, a traditional *ius soli* country, voted by a clear majority in a referendum for a restriction of the *ius soli* rule to persons possessing a residence permit.

States applying a *ius soli* concept sometimes also confer nationality *ex lege* on children born on vessels or aircraft flying their flag. It appears that the extension of *ius soli* to vessels or aircraft is a consequence of a somewhat obsolete concept of vessels and aircraft as the fictitious territory of the state whose flag they fly. It is difficult to see an actual link for conferring nationality since there is no genuine connection between the person born and the state. However, the same criticism could be made with regard to a temporary visit to a state in a globalised world with millions of travellers.

The *ius soli* concept is considered by some writers as a preferable system, relatively simple in outline. The principle may have had its justification in the nineteenth century and first half of the twentieth century since, in principle, only people intending to emigrate were travelling abroad and giving birth to children abroad (for a different view see Brownlie 2003: 379). In a highly mobile world, however, the mere fact of birth within the state territory, which may be either accidental or intentionally chosen by parents, and the mere purpose of 'nationality

shopping' can hardly be considered a sufficient link for the attribution of nationality compared, for instance, to other criteria which are generally used for conferring nationality by naturalisation. However, there are no indications that the intentional use of nationality laws in order to acquire nationality during temporary or illegal residence does establish nationality that is invalid in international relations. In the Chen case, the European Court of Justice has confirmed that it is up to each Member State to determine the conditions for acquisition and loss of nationality. With respect to Community law, however, the reservation is that the competence of Member States is to be exercised with respect to the requirements of Community law.⁴³ The Court was in no doubt that Irish nationality with effect for other Member States of the European Union had been acquired by the child of a Chinese national travelling to Ireland for the purpose of giving birth.

In line with the principle that each state shall determine, under its own law, who are its nationals, various other criteria are used in state practice and recognised by international law for the conferment of nationality. Sometimes entry into state service will result in an acquisition of nationality *ex lege*. Sometimes nationality is also acquired automatically upon a change in civil status such as adoption, legitimisation, affiliation or marriage to a national of that state (see Randelzhofer 2000: 504). The European Convention, in art. 6, para. 4, does mention some of these categories in the context of a duty to facilitate the acquisition of nationality, leaving it, however, to the contracting states whether facilitation is to be achieved by naturalisation or by conferment *ex lege*.

With regard to the acquisition of nationality of spouses, the trend goes clearly against an automatic conferment of the nationality of the Nationality in public international law and european law 57 other spouse. The Council of Europe Resolution of 1977 on the nationality of spouses of different nationalities⁴⁴ has not only confirmed the principle of legal equality between the sexes which should lead to equal treatment of men and women with regard to the conditions under which one of the spouses can acquire the nationality of the other, but has also recommended the possibility for spouses who so wish to acquire the nationality, under a privileged procedure, of the husband or the wife.⁴⁵

The principle that marriage does not result in an automatic change of nationality, which had never been applied to men, can now be considered a general principle of law. It is implicit in art. 6, para. 4 ECN.⁴⁶

1.2.3 Acquisition through naturalisation

Naturalisation, meaning the granting of nationality to an alien by a formal act, is also generally recognised as a mode of acquiring nationality. There are many reasons why naturalisation may be granted, ranging from service for a state or ethnic or other group affiliations to residence,

this being the most common reason for voluntary acquisition of nationality. Municipal law is different, not only regarding the conditions for acquisition of nationality by naturalisation, but it also distinguishes frequently between naturalisation as an individual right and naturalisation by discretion. With increasing recognition of the human rights implications of nationality, there is clearly a trend within most European states to grant certain categories of foreigners an individual, judicially enforceable right to acquire nationality by naturalisation. The European Convention on Nationality is careful to avoid any language which could be interpreted as a clear individual right to acquire nationality for the persons mentioned in art. 6, para. 4. However, the duty to facilitate acquisition of nationality must have some individual rights connotations since art. 12 of the Convention obliges each state party to ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality be open to an administrative or judicial review in conformity with its internal law. Admittedly, this does not amount to a change of substance of the obligations laid down in art. 6. It does imply, however, that the discretion of states cannot be considered as unlimited and that individuals are entitled to challenge a decision taken on such grounds.

The criteria used by states for conferring nationality by naturalisation have sometimes given rise to conflicting claims to nationality. It is fairly clear that certain criteria, such as prolonged residence, marriage, adoption and other kinds of particular link, including immigration with the intent to remain permanently, create sufficient grounds for the acquisition of nationality. Conflicts have occasionally arisen in connection with the right of states to exercise diplomatic protection for certain persons on the basis of temporary residence with the intent of an individual to associate himself with a state. In the famous *Nottebohm* case,⁴⁷ the International Court developed this theory of a genuine link as a requirement for an international entitlement by states to exercise diplomatic protection against other states in favour of its nationals. The Court required 'a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties' as a precondition for filing an internationally recognised claim for a national. It made clear, however, that its theory of genuine connection did not in any way limit the freedom of states to lay down the rules governing the granting of its own nationality. The Court argued: 'The reason for this is that the diversity of demographic conditions has thus far made it impossible for any general agreement to be reached on the rules relating to nationality, although the latter by its very nature affects international relations. It has been considered that the best way of making such rules accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each state. On the other hand, a state cannot claim that the rules 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 a state which assumes the defence of its citizens by means of protection against other states.'⁴⁸

In the wake of this decision, much discussion has taken place in jurisprudence and literature on the function of a genuine connection requirement as a restriction on the freedom of states to regulate nationality.

It is frequently asserted that, as a matter of principle, a state may only grant its nationality to those persons connected with the state by a certain link recognised in the state practice. The German Federal Constitutional Court held in 1952 that a state must confer its nationality only to persons having an actual close connection to it.⁴⁹ Other German federal courts have held that an arbitrary conferment of nationality without respecting the existence of generally recognised connections are a violation of public international law.⁵⁰

A survey of the literature and state practice indicates that conflicts concerning nationality issues between states have arisen primarily in the context of involuntary or *ex lege* naturalisations of certain categories of persons. The United States has protested against naturalisations by Latin American states of people who were naturalised exclusively on the basis of acquiring real estate in the territory or having resided there for a certain period of time (see Weis 1979: 103). German courts in the context of collective involuntary naturalisations under Nazi rule have held that these naturalisations were a violation of public international law in the absence of any true connection with the German state. In addition, it is generally recognised that, according to the principles of the laws of war, an occupying power must not confer its nationality on the inhabitants of the occupied territory.⁵¹ In the literature it is also frequently assumed that a state would exceed its competence by naturalising a certain category of persons on the basis of a particular political or religious conviction or affiliation (Randelzhofer 2000: 504).

In state practice, very little can be found on the practical application of a genuine connection requirement when it comes to the voluntary acquisition of nationality by way of naturalisation. It seems that state practice has been very generous in recognising the criteria for the conferment of nationality. Foreigners have often been naturalised in a very rapid procedure exclusively on the basis of performance on a national sports team or based on other somewhat temporary connections with the state in which certain services have been performed. This supports the assumption that there is little, if any, restriction on the freedom of states to confer nationality provided, however, no conflict may arise when it comes to filing a claim or exercising diplomatic protection.

Whether *Nottebohm* is in fact a reliable precedent is a matter of controversy in the literature. It has been argued with some justification that the *Nottebohm* decision has wrongly transferred the genuine connection

principle belonging to the realm of dual nationality to the area of diplomatic protection for a national possessing only one valid nationality (Randelzhofer 2000: 504). In any case, after Nottebohm no comparable case amounting to a refusal of diplomatic protection has ever been decided by international courts amounting to a refusal of diplomatic protection. It would seem to follow that the genuine connection requirement has its proper application in cases of group naturalisations and naturalisations effected without the consent of the persons affected. The European Convention on Nationality does not mention any criteria for the acquisition of nationality by naturalisation apart from a maximum period of ten years of residence. Genuine connection is only mentioned in the context of the loss of nationality. Lack of a genuine link between the state party and the national habitually residing abroad is recognised as a legitimate reason for loss of nationality.

1.2.4 Special rules applying to state succession

The rules on acquisition and loss of nationality applying to a change of territorial sovereignty are probably among the most controversial issues of nationality-related public international law. The question of the nationality of a population following a transfer of territory arose after the First World War and was dealt with in a variety of peace treaties. The rules contained in the European Convention on Nationality to some extent reflect the experience of states in connection with the dissolution of the Soviet Union and Yugoslavia.

There is considerable support for the view that the population follows the change of sovereignty in terms of nationality (Brownlie 2003: 628). This principle was developed at the end of the First World War in various peace and minority treaties. The minority treaties signed at Versailles stipulated that Poland must admit and declare Polish nationals ipso facto German, Austrian, Hungarian or Russian nationals who were born in the said territory of parents habitually resident there, even if on the date of the entry into force of the respective treaty they were not themselves habitually resident there. Nevertheless, according to the relevant treaty provisions they were given a right to make a declaration stating that they renounced Polish nationality.⁵²

Whether the principle of an automatic change of nationality in cases of state succession represents customary law is a matter of dispute. It is argued that, since the First World War, Treaty practice and other relevant state practice have not been sufficient and uniform enough for a rule of customary international law to have emerged (Randelzhofer 2000: 505; Weis 1979: 343). Art. 18 of the European Convention is rather reluctant to state any general principle on nationality in cases of state succession. The Explanatory Report assumes that there is a presumption under international law that the population follows the change of sovereignty over the territory in matters of nationality.

There is, however, no explicit confirmation of the principle in the Convention. In art. 18, the Convention states certain principles which must be complied with when nationality is regulated within the context of state succession. Thus, the rule of law, rules concerning human rights and principles contained in art. 4 and 5 of the Convention and in para. 2 in particular, concerning avoidance of statelessness, must be observed. Remarkably, the genuine and effective link arises only in connection with the principles that a state party must consider when deciding on the granting or retention of nationality in cases of state succession. In addition, the habitual residence of the person concerned at the time of state succession, the will of the persons concerned and the territorial origin of the person concerned must be taken into account. A survey of more recent state practice does not indicate unequivocal support for the theory of an automatic change of nationality following the change of sovereignty. Successor states have tried to define their concept of the nation in a different manner on the basis of history, the composition of the population and migration movements. The Baltic states have interpreted a requirement of habitual residence in the sense that residence must have existed even before the military occupation Nationality in public international law and european law 61 and subsequent integration into the Soviet Union. Other successor states have based their nationality law on the principle of a change of nationality for acquiring a habitual residence on the respective territory. A right to opt has sometimes been granted, but no uniform practice can be determined.⁵³ The work of the International Law Commission on 'draft articles on nationality of natural persons in relation to the succession of states'⁵⁴ as well as the Declaration on the consequences of state succession for the nationality of natural persons, by the European Commission for Democracy through the Law (also known as Venice Commission) of 15 September 1996⁵⁵ has tried to draft principles taking into account the legitimate interests of the persons concerned as well as state interests sometimes opposed to the naturalisation of a substantial part of the population acquiring nationality, without – according to the majority – identifying itself with the state and its history and culture.

Some rules can be identified which are also largely incorporated into the European Convention on Nationality. One is that statelessness as a result of state succession must be avoided. Another rule is that the state concerned shall grant a right to acquire its nationality to persons concerned who have had their habitual residence on the territory or have appropriate connection with that state. The International Law Commission (ILC) recognises that there is no general recognition of a right to opt. In the view of the Commission, however, the respect for the will of the individual should be taken into account as a paramount factor. This, however, does not mean that every acquisition of nationality upon the succession of states must have a consensual basis.⁵⁶

The European Convention is extremely cautious in prescribing principles for conferring nationality in a situation of state succession. Following the overwhelming practice, the basic rule is that the state parties concerned shall endeavour to regulate matters amongst themselves by agreement and, where applicable, in their relationships with the other states concerned. The agreements under art. 19 shall respect the principles and rules contained in chapter 6. Beyond the general reference to the rule of law and human rights in art. 18, para. 1, the principles laid down in art. 18, para. 2 in particular provide some guidance on the regulation of nationality matters by the states concerned. The criteria to be taken into account include:

- the genuine and effective link between the person concerned and the state;
- the habitual residence of the person concerned at the time of state succession;
- the will of the person concerned;
- the territorial origin of the person concerned.

None of these criteria is considered exclusive. Each of the factors has to be weighed up in the light of the particular circumstances of the case.⁵⁷ The order in which the different factors are mentioned, however, seems to indicate a certain ranking. There is no definition of the meaning of the genuine and effective link between the person concerned and the state. The Explanatory Report only mentions the ICJ's judgement in the *Nottebohm* case, interpreting the criteria as a substantial connection. The legal bond of a nationality, therefore, has to correspond to the individual's genuine connection with the state. The reference to the genuine and effective link in the context of state succession clearly leaves a wide margin of appreciation to the states concerned. Besides the traditional factors of *ius soli* and *ius sanguinis*, it enables consideration of other criteria, such as ethnic affiliation or historical attachments. Habitual residence is probably the most commonly used factor in determining nationality in a situation of state succession. Most agreements provide for such a rule, frequently in connection with a right to opt for the nationality of the predecessor state or the successor state. That there is no duty to grant nationality to all habitually resident persons unless they become stateless as a result of succession is apparent from art. 20 of the Convention. Art. 20 makes it clear that nationals of a predecessor state who are habitually resident but who have not acquired its nationality shall have a right to remain in that state and shall enjoy equality of treatment in relation to social and economic rights. This clause implies that there may be a legitimate reason to withhold the nationality of a successor state from the persons habitually resident on its territory.

The Venice Commission⁵⁸ seems to go somewhat further by obliging the successor state to grant its nationality to all nationals of the predecessor state residing permanently on the transferred territory. A similar

rule is contained in the Report of the ILC with the exception, however, of persons opting otherwise or who are not prepared to give up their previous nationality. Whether the rule reflects customary international law, however, may be doubtful, since state practice cannot be considered unanimous in this respect.

The will of the person concerned does also find its basis in many nationality laws and agreements following the collapse of the Soviet Union.

Yet, it is scarcely possible to argue that certain categories of persons habitually resident must be given a right of option. The Venice Commission has pointed out that the successor states may make the exercise of the right of option conditional on the existence of effective links, in particular ethnic, linguistic or religious links, with the predecessor state. The International Law Commission has pointed out that:

'Although there have been a number of instances where the right to Nationality in public international law and European law 63 opt for the retention of the nationality of the predecessor State was granted only to some categories of persons residing in the transferred territory, the Commission considers that all such persons should be granted this right, even if this were to entail a progressive development of international law. The Commission does not believe that it is necessary to address in article 20 the question whether there are any categories of nationality of the predecessor State having their habitual residence outside the transferred territory who should be granted a right to opt for the acquisition of the nationality of the successor State. Naturally, the successor State remains free, subject to the provisions of article 8, to offer its nationality to such persons when they have an appropriate connection with the transferred territory.'

Concerning the term 'territorial origin' the Explanatory Report makes it clear that this term refers to neither the ethnic nor the social origin of a person, but rather to where the person was born, where the parents and grandparents were born, or to a possible internal nationality.

It is considered, therefore, similar to the criteria used to determine the acquisition of nationality under the *ius soli* and *ius sanguinis* principles.

To sum up, it may be premature to say whether these principles will eventually emerge into customary international law. It is, however, clear that public international law requires at least that a balance between the legitimate interests of individuals and the interest of states be drawn and that the human rights aspects of nationality be taken into account. Nationality – as the Parliamentary Assembly of the Council of Europe has pointed out in its Recommendation 1081 of 1988 – is not only an administrative matter, but also an important element of the dignity and the cultural identity of human beings.⁶¹

1.2.5 Statelessness

The avoidance of statelessness is probably the oldest and most commonly recognised principle of nationality law. Prior to the recognition

of the fact that nationality is an essential element of the possession of individual rights, states have recognised the need to avoid statelessness since unprotected stateless persons may feel obliged to move from the territory of one state to that of another state and therefore might become a burden for these states.⁶² In addition, statelessness raises questions of legal certainty and a clear attribution of responsibility in international relations.

The issue of statelessness has been of great concern to European states. A number of treaties deal with the legal status of stateless persons, as well as various recommendations by the Council of Europe, the most recent being the Recommendation no. R (99.18) on the avoidance and reduction of statelessness.⁶³ Stateless persons have been defined by the Convention relating to the status of stateless persons of 28 September 1954, as well as by the 1961 UN Convention on the reduction of statelessness, as persons who are not considered as nationals by any state under the operation of its law. Persons may become stateless at birth or later, as a consequence of the loss of nationality. They may become stateless against their will or they may have renounced their nationality without having acquired a new nationality. Statelessness occasionally arises as a consequence of conflicting legislation. Generally speaking, a number of conventions contain obligations to avoid statelessness. The Convention on the status of stateless persons as well as conventions such as the 1957 UN Convention on the status of married women, the 1966 International Covenant on Civil and Political Rights and the 1966 Convention on the Elimination of all Forms of Racial Discrimination, the 1979 Convention on the Elimination of all Forms of Discrimination against Women and the 1989 UN Convention on the Rights of the Child all try to reduce cases of statelessness, particularly by providing for an obligation to grant nationality to a person who, under the operation of its regular provisions would otherwise be stateless. The treaties are binding upon only a restricted number of states and deal only with specific instances of statelessness with respect to special requirements and conditions.

Although it is correct to say that statelessness as such is not contrary to customary international law (Randelzhofer 2000: 508) the principle of avoiding statelessness laid down in art. 4 is enshrined in numerous international treaties and recommendations. Therefore, it seems correct to note that it has become part of customary international law.⁶⁴

The European Convention contains a number of provisions which seek to prevent statelessness. Nationality under art. 6, para. 1 shall be acquired ex lege by foundlings found on the territory who would otherwise be stateless. In addition, state parties shall provide for the acquisition of nationality by children born on its territory who do not acquire another nationality by birth. Art. 6, para. 2 stipulates that the child concerned may submit an application for the acquisition of nationality. Nationality must be granted to children who remained stateless upon

an application being lodged with the appropriate authority, by or on behalf of the child concerned. It can only be made subject to the lawful and habitual residence on the territory for a period not exceeding five years immediately preceding the lodging of the application.

Facilitated acquisition of nationality must be provided in spite of the general freedom of states to regulate the nationality of stateless persons.

Facilitation does not mean an unconditional duty, but implies

that there must be more favourable conditions than for other persons resident on the territory. Recommendation no. R 99 of 15 September

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1999 of the Committee of Ministers describes a number of potential

requirements in order to acquire nationality, including knowledge of language. The Recommendation indicates that, as far as stateless persons

are concerned, an adequate knowledge of the language should be

sufficient. This concept is regarded as relative and should be determined

in accordance with the specific circumstances of the case. Oral

knowledge of the language could be considered sufficient, the exact level,

however, must be judged in the light of the social and economic

conditions of the stateless person concerned as well as of his or her

age and medical condition.⁶⁵

Regarding the criminal record, the Recommendation notes considerable

differences in the states' practice. In the case of stateless persons,

the Recommendation underlines the need to find a balance when evaluating

a criminal record between the gravity of the offence committed

and the negative consequence of statelessness (principle of proportionality).

Account has also to be taken of the need to respect the fundamental

right of individuals to possess a nationality.

Persons who have deliberately become stateless, disregarding the

principles of the ECN, shall not be entitled to acquire nationality in a

facilitated manner.

The principle avoiding statelessness is also contained in the provisions

on loss of nationality. Art. 7, para. 3 ECN stipulates that a state

party may not provide in its internal law for the loss of its nationality if

the person concerned would thereby become stateless. Statelessness is

tolerated, however, when the nationality has been acquired by fraudulent

conduct, false information or concealment of any relevant facts attributable

to the applicant. The provision, therefore, goes further than

that provided under art. 8 of the 1961 Convention on the reduction of

statelessness.⁶⁶ The principle is also contained in art. 8, para. 1, that

each state party shall permit the renunciation of its nationality provided

the persons concerned do not thereby become stateless.

Problems may arise where persons are allowed or required to renounce

their nationality before they have acquired the nationality of another

state. If the acquisition of nationality is subject to certain conditions

which have not been fulfilled and the persons concerned fail to

acquire the new nationality, the state whose nationality has been renounced

must allow them to recover their nationality or must regard them as never having lost it, in order to avoid statelessness.⁶⁷ In art. 18 on state succession and nationality, avoidance of statelessness is also mentioned as a general principle that must be respected in matters of nationality.

In conclusion, this principle is considered as a common European standard. It is reflected in a number of conventions and recommendations that have been codified in the European Convention on Nationality.

1.3 Loss of nationality

Limitations on the freedom of states to determine its nationals are most notably recognised in the international literature and jurisprudence on the loss and deprivation of nationality. As a rule, loss of nationality may occur as result of a declaration of renunciation of nationality which, however, is valid in any case only with the acceptance of the state. Most municipal laws provide for the possibility to renounce nationality subject, however, to certain conditions such as paying taxes or performing military service or other duties connected with nationality. It is doubtful whether there is a natural human right to renounce nationality as claimed in a resolution by the American congress of 17 July 1868 (see Dahm 1958: 480). It is frequently asserted that international law does not contain a rule limiting the possibility of renouncing nationality, nor does it oblige states to provide this possibility in municipal law (Randelzhofer 2000: 506). In international jurisprudence, treaty provisions making renunciation dependent upon the agreement of both states concerned are often taken as an indication that there is no duty to prevent loss of nationality on the basis of voluntary renunciation. Art. 7 ECN states that each state party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless. The rule reflects the recent development of recognition of nationality as a human right. Art. 15, para. 2 of the Universal Declaration contains the right to change nationality. Even if the binding character of this provision is disputed (see Randelzhofer 2000: 506), one could conclude from state practice the rule that renunciation of nationality must at least not be refused arbitrarily. This conclusion is also supported by art. 12 of the Covenant on Civil and Political Rights of 19 December 1966, containing a right to leave the country, including a person's own country. If this provision is to be given reasonable meaning, it must imply that a state is not entitled to maintain a legal bond with reciprocal duties and loyalties if a person has chosen to leave his or her former country of origin permanently. More recent state practice does support the view that a basic right to be released from a nationality does at least exist, provided certain reasonable conditions are met. One of the reasonable conditions is explicitly laid down in art. 8, para. 2 ECN, whereby a state party may stipulate that renunciation may be effected only by nationals who are habitually

resident abroad. The Explanatory Report, however, seems to indicate that no further conditions are allowed. According to the Explanatory Report, it is not acceptable under art. 8 to deny the renunciation of nationality merely because persons habitually resident in another state still have military obligations in the country of origin or because civil or penal proceedings may be pending against the person in that country of origin. Civil or penal proceedings were independent of nationality and could be pursued normally even if the person renounces his or her nationality of origin.

It is doubtful whether this interpretation has sufficient basis in public international law. A number of contracting states have made reservations, such as Austria, which declares the right to retain the right of permitting renunciation of its nationality only if no criminal procedure or execution of a criminal sentence is pending in Austria or if the national is male and is not a member of the federal armed forces or if he has fulfilled his regular military or civilian service obligations or fulfilled equivalent obligations in another state. Germany has also set forth in a reservation that release will not be granted to officials, judges, military personnel and other persons employed in a professional or official capacity under public law or persons liable for military service.

The legal situation concerning the loss of nationality may be somewhat clearer with regard to involuntary loss of nationality. There are a number of reasons which are clearly recognised in state practice and codified in art. 7, para. 1:

- voluntary acquisition of another nationality;
- acquisition of nationality by fraudulent conduct;
- voluntary service in a foreign military force;
- conduct seriously prejudicial to the vital interest of the state party;
- lack of genuine link between the state party and the national habitually residing abroad;
- where it is established that the preconditions which led to the ex lege acquisition of a minor are no longer fulfilled;
- adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.

The list is considered exhaustive. It allows for automatic loss of nationality or a loss of nationality at the initiative of a state party. Art. 7, however, does not preclude the right of a state party to allow persons to retain its nationality even in such cases.

The loss of nationality in cases of fraudulent conduct or false information is regulated in many municipal laws. There may be differences concerning the meaning of fraudulent conduct. The Explanatory Report requires a deliberate act or omission, which was a significant factor in the acquisition of nationality. As an example it mentions the case of a person acquiring the nationality of a state party on condition that

the nationality of origin be subsequently renounced, but the person does not do so voluntarily. If nationality was the result of improper conduct according to art. 7, para. 1., a, states are free either to revoke that nationality or to consider that the person never acquired their nationality (void ab initio).

It may be more difficult to interpret the wording of d, 'conduct seriously prejudicial to the vital interest of the state party'. The wording is taken from art. 8, para. 3 a ii of the 1961 Convention on the Reduction of Statelessness. Usually, it is assumed to include treason and other activities directed against the vital interest of the state concerned, like working for a foreign secret service, but would not include criminal offences of a general nature, however serious.

The case of voluntary service in a foreign military force does also largely correspond to the practice of states. Employment in a multilateral force on behalf of the state of which the person concerned is a national and military service in another country in accordance with bilateral or multilateral conventions cannot be considered service in a foreign military service. The provision refers only to professional soldiers, not to persons performing their military service. The case of dual nationals choosing between the obligations of different states of which they are nationals is dealt with in art. 21, para. 3 a.68

The term 'lack of a genuine link' may also raise difficulties of interpretation. The aim of the provision is to allow a state to prevent its nationals habitually living abroad from retaining its nationality generation after generation. Loss is only possible for persons possessing another nationality. In addition, however, the provision requires the absence of a genuine and effective link. As examples the Explanatory Report mentions the omission of one of the following with the competent authorities of the state party concerned:

- registration;
- application for identity or travel documents;
- declaration expressing the desire to retain the nationality of the state party.

It is questionable whether this can be regarded as exhaustive. Lack of a genuine link may also be determined by objective factors although, according to the provision, it is not sufficient for the person to have a habitual residence abroad. Nevertheless, one may well argue that failure to maintain any connections after extended residence abroad also constitutes the absence of a genuine link.

Art. 7 f ECN deals with the change of civil status of children which would entail the loss of the prerequisites for the possession of nationality. If, for instance, a child acquired nationality on the basis of ties to the mother or father and it is later discovered that these parents are not the true mother and/or father, nationality may be withdrawn from the child, provided that statelessness does not occur. States are entitled

to determine the legal effect of such a loss.

The Convention allows loss in cases where children acquire or already possess the nationality of an adopting parent. This provision reflects art. 11, para. 2 of the European Convention on the adoption of children⁶⁹, stipulating that 'a loss of nationality which could result from an adoption shall be conditional upon possession or acquisition of another nationality'. In addition, state parties may provide for a loss of nationality for adopted children as a result of a loss of nationality by their parents. Certain exceptions are made where children lose their nationality due to the conduct of parents. In this situation, the conduct of parents according to the Convention shall have no adverse consequences on the children. It is furthermore provided that a child shall not lose his or her nationality if at least one of the parents retains that nationality.⁷⁰

One of the basic principles laid down in art. 4 is the prohibition of arbitrary deprivation of nationality. This prohibition goes back to the development of public international law, particularly as a result of the collective expatriations of large population groups after the First World War and the withdrawal of German nationality under Nazi rule from German Jews (Hailbronner & Renner 2005: 83). There is substantial authority for a general recognition of the principle of prohibition of arbitrary deprivation of nationality as part of customary international law.

The principle is laid down in a number of conventions on human rights. Art. 5 d of the International Convention on the Elimination of all Forms of Racial Discrimination and a number of other human rights treaties, such as the 1989 UN Convention on the Right of the Child, confirm the principle. Recommendation no. R 99/18 also notes that nationals should not be arbitrarily deprived of their nationality. An 'arbitrary' deprivation of nationality may be regarded as deprivation related to facts, behaviour or attributes falling under the protection of fundamental human rights. Deprivations of nationality may also raise issues surrounding the European Convention of Human Rights. The European Court for the Protection of Human Rights in a decision dated January 1999 concerning the question of whether an applicant had acquired Finnish nationality by birth (rather than Russian nationality by descent from a national of the former Soviet Union) asserted that: 'Although right to a citizenship is not as such guaranteed by the Convention or its Protocols (see no. 11278/84, Dec. 1 July 1985; D. R. 43, pp. 216, 220), the Court does not exclude that an arbitrary denial of a citizenship might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such a denial on the private life of the individual [...]. Therefore, it is necessary to examine whether the Finnish decisions disclose such arbitrariness or have such consequences as might raise issues under Article 8 of the Convention.'

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State practice distinguishes between collective and individual denationalisations.

While considerably wider discretion exists with respect to individual expatriations, collective expatriations have generally been regarded as violations of the fundamental principles of justice.⁷² It must be noted, however, that the literature and state practice are not uniform. According to some authors, collective expatriations are not as such a violation of public international law, although it seems that, in more recent state practice, there must at least be a reason justifying such a measure (see Makarov 1962: 99; Seidl-Hohenveldern & Stein 2000: 241; Hudson 1952: 3; Weis 1979: 125).

1.4 Rights and duties related to nationality

1.4.1 Diplomatic protection

Diplomatic protection is the right of a state, under customary international law by the state of nationality of an injured person, to secure protection for that person and to obtain reparation if an internationally wrongful act is inflicted.⁷³ The exercise of diplomatic protection is linked by a special bond between the protecting state and the protected individual. Normally, e.g. in cases involving a natural person, this bond is nationality. This nationality must, according to leading opinion, be present both at the time when the practice in breach of international law took place as well as at the time protection is to be exercised. In treating a foreign national contrary to international law, a state is simultaneously violating the person and the rights of the state (see Kimminich & Hobe 2000: 219). Thus, the right to diplomatic protection documents the traditional structure of international law as a regulatory scheme between states. From the perspective of international law, the individual appears as an integral part of the acting sovereign state (Geck 1992: 1059). Sovereignty is present in the outward implementation of the good faith and protective relationship characterising nationality (Williams 1959: 54; Doehring 1959: 57).

Accordingly, a state may not, in principle, protect foreign or stateless individuals, even if they have taken up prolonged residence on its territory or if close links of another kind exist to that state (Doehring 1959: 59; Brownlie 2003: 658). Territoriality forms the basis of the subjection of an alien to the sovereignty of a state over its territory. However, the special relationship only emerges with regard to personal sovereignty over nationals, which justifies the subjection of a state's nationals in a foreign country to continuing links of responsibility on the one hand and the granting to them of special international legal protection from their state of origin on the other hand.

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The traditional picture of diplomatic protection as a test of state unity is, in many different respects, being called into question by the development of international law and international relations. The most

decisive and, in terms of long-term effects, most important development, concerns the legal position of the individual in international law.

The individual may no longer be understood to be the mere object of interstate rights and duties. International law empowers the individual with rights and duties that, with the development of human rights, may even be directed against his or her home state.

From this point of view, it seems only logical to attribute significantly less importance to nationality as a precondition for diplomatic protection and consider instead those factors which do justice to the requirements of protection of the individual and the safeguarding of his or her international rights.

A brief look at state practice, however, shows that the exercise of diplomatic protection places limits on excessively far-reaching conclusions.

Diplomatic protection has so far remained primarily influenced by interstate interests in power and possession. It is a reflection of an international order, full of gaps and inconsistencies, which finds itself in a state of radical change and which has yet to cross the line from the law of the jungle to a power monopoly of the international community.

The hope that the traditional instruments of diplomatic protection could, as a relic of an interstate order, be converted into a system for enforcing individual rights and superseded by international dispute settlement mechanisms and institutionalised enforcement procedures within the international community has, at least at a universal level, not been fulfilled. Apart from regional legal codes, for example the European Convention on Human Rights, the usual diplomatic protection of home state nationals remains an indispensable instrument for restricting the arbitrary treatment of foreign nationals by a state (Geck 1992: 1064).

Undoubtedly, the development of human rights has deeply influenced the concept of state sovereignty from which the rights of states to protect 'their nationals' is derived (for the principle *protectio trahit subiectionem et subiectio protectionem*, see Doehring 2004: 38). Numerous conventions and agreements entitle an individual to file a complaint before international bodies against a violation of his or her human rights and, in some cases, even commercial rights at regional as well as universal level. If the individual has standing on his or her own to enforce internationally guaranteed rights not by virtue of nationality but as a human being, one may argue that the concept of diplomatic protection, based on the fiction of states asserting their own rights by protecting their nationals, has become obsolete (Garcia-Amador 1958: 421, 437).

Dugard (2000) explains why this criticism overstates the influence of international human rights development. The availability and effectiveness of international instruments on behalf of individuals differs greatly. While in some regions of the world there may be effective remedies against human rights violations, in other regions no real alternative

exists in practice to the diplomatic protection of an individual's home state.

Diplomatic protection is still linked to nationality. State practice does not support the assumption that in the age of globalisation and mass migration nationality has been replaced by other criteria, such as residence or genuine connection. The ICJ's judgement in the case *Nottebohm*⁷⁴ may under exceptional circumstances, such as the absence of any recognised connection with the state of nationality (thereby indicating bad faith by the claimant state), limit the right to exercise diplomatic protection. The 'effective and genuine link' requirement, however, cannot be used as an instrument for excluding large groups of nationals, having taken up permanent residence abroad, from the protection of their home countries (Dugard 2000: 41). Nationality is still to be considered a decisive element as long as states continue to be the principal actors in international relations.

Under special circumstances, the requirement of nationality for the exercise of diplomatic protection may, however, be dispensed with and protection extended to a non-national (Dugard 2000: 11). Such particular circumstances may arise in the cases of injured persons who are stateless or in the cases of recognised refugees when those persons are ordinarily legal residents of the claimant state, provided the injury occurred after that person became a legal resident of the claimant state (Dugard 2000: 57). There is also a good deal of state practice supporting the claim that diplomatic protection may be exercised in favour of permanent residents if there is no danger of a conflicting exercise of claims or if the person concerned cannot avail himself or herself of the protection of his or her home state (Dugard 2000: 60; Vicuña 2000: 631, 636). There is much to be said in favour of an extended right to exercise diplomatic protection if the individual concerned would otherwise be excluded from any effective protection. The enforcement of human rights as part of *ius cogens* can hardly be made dependent upon the exercise of state sovereignty if a lack of protection would amount to a denial of such rights. If there are humanitarian concerns, where an individual would have no other alternative to claim his rights (Vicuña 2000: 637), there must be an option to exercise protection by the state having assumed the role of a home state. However, whether state practice indicates an emerging rule of customary international law or Nationality in public international law and European law⁷³ whether it can be considered an indication of the progressive development of public international law is still an open question (Dugard 2000: 60).

– The International Law Commission, in its most recent report on draft articles on diplomatic protection, has formulated a number of general principles in an attempt to codify customary international law:

– 'The state entitled to exercise diplomatic protection is the state of

nationality. However, diplomatic protection may be exercised in respect of non-nationals, in respect of stateless persons and recognised refugees who, at the time of the injury and on the date of the official presentation of the claim, are lawfully and habitually resident in that state.

– For the purposes of the diplomatic protection of natural persons, the state of nationality means a state whose nationality the supposedly protected individual has acquired by birth, descent, succession of states, naturalisation or in any other manner not inconsistent with international law.

– A state is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national on the date of the official presentation of the claim. Notwithstanding this provision, a state may exercise diplomatic protection in respect of a person who is a national on the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for reasons unrelated to the submission of the claim, the nationality of that state in a manner not inconsistent with international law. Diplomatic protection shall not be exercised by the present state of nationality in respect of a person against that person's former state of nationality for an injury inflicted when that person was a national of the former state of nationality and not of the present state of nationality.'

An increasing number of multiple nationals may give rise to more international disputes resulting from conflicting rights and obligations.

A traditional rule of customary international law, laid down in art. 4 of the Hague Convention of 1930, provides that a state may not afford diplomatic protection to one of its nationals against the state whose nationality such a person also possesses. The rule, however, although maintained in state practice, has been gradually diminished in its importance due to a number of exceptions. One exception concerns the raising of claims in case of human rights violations, although the development of human rights has not rendered the institution of diplomatic protection of a state in favour of its nationals obsolete (Dugard 2000: 10).

Another exception relates to the application of the genuine and effective link theory for multiple nationals. Although the theory is doubtful if interpreted as a general requirement for acquisition of nationality or even diplomatic protection, it has gained acceptance in the context of multiple nationality. International tribunals have frequently accepted a claim of diplomatic protection even in cases of dual nationals if the nationality of the state making the claim can be considered the genuine and effective, in contrast to the more formal nationality of the other state (for further references see Hailbronner 2004a: 204; Dugard 2000: 42). The rule that, in cases involving multiple nationals, conflicting

claims may be solved by recourse to the more effective connection test may well be regarded as an emerging principle in spite of the somewhat reluctant attitude of the ECN to provide for exceptions to the traditional rules (Hailbronner 2004a: 204, 205).

In more recent literature, the customary recognition of the nationality rule is being increasingly called into doubt, to be replaced by the theory of dominant or effective nationality (Leigh 1961: 453; Mahoney 1983/1984: 695; Rode 1959: 139; Leurent 1985: 477, 482). In the Third Restatement of the Law of 1987, the exercise of protection in favour of a dual national against his or her own state is held as admissible 'if the nationality of the claimant state is dominant, e.g. if the individual has stronger links to that state such as an extended residence or sojourn or ties of family or property in that state.'⁷⁶

As substantiation, the representatives of this theory rely for their part on a string of decisions by international courts of arbitration and, above and beyond this, on the change in the structure of the international legal order. The related arbitral decisions in fact show that it is not possible to speak of a unanimous legal conviction according to which protection against a state whose citizenship the national already possesses is completely excluded.

In the case of Canevaro, the Permanent Court of Arbitration had to rule on a claim by an Italian-Peruvian dual national concerning the non-honouring of Peruvian state stocks.⁷⁷ The plaintiff, Italian by descent, Peruvian by virtue of birth on Peruvian state territory was, according to the view of the Court, restricted from complaining against Peru because he had effectively taken advantage of his Peruvian citizenship and had even become active in political life in Peru. It was considered, under such circumstances, that it was not possible to speak of a dominant Italian nationality.

A second precedent tending towards effective nationality is the ruling by the Italian-American Arbitrary Commission of 10 June 1955 in the case of Merge´.⁷⁸ Mrs. Merge´, an American national, had married an Italian in 1933 and acquired Italian nationality by law. She had also subsequently made intensive use of this nationality although she continued to renew her American passport. In 1948 she asserted claims against Italy due to the loss of property in Italy resulting from acts of war. She based her claim on a peace treaty with Italy. The Italian government rejected all of Mrs Merge´'s claims on the grounds of her dual nationality. The Arbitration Commission convened by the American government ruled in Italy's favour. It was considered that the United States was prevented from exercising diplomatic protection, since American nationality could not be regarded as predominant. In this respect, the court of Arbitration stated: 'The principle based on the equality of states, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality

whenever such nationality is that of the claiming state. But it must not yield if such predominance is not proved because the first of these two principles is generally recognised and may constitute a criterion of practicable application for the elimination of any impossible uncertainty.’⁷⁹.

The doctrine developed in the case of *Merge*⁷ has subsequently been applied in numerous other proceedings involving claims asserted by persons of more than one nationality.⁸⁰

However, the practical field of application of the new doctrine has certainly remained limited. As the wording of the *Merge*⁷ ruling clearly shows, the validity of the exemption rule was not generally called into question. The criterion of effective nationality did not completely drive out the ground rules set down in art. 4 of the Hague Convention, but merely supplemented them in cases where one nationality must be seen as predominant. Only a purely formal nationality should be unable to hold its ground against the dominant nationality. In order to judge this, the *Merge*⁷ Commission wanted to include habitual place of residence as well as further socio- economic and political factors and effective living conditions. As shown in practice, relatively tight requirements are set on the conditions of dominant nationality. The claims for protection in favour of dual nationals faltered without exception because the state against which the claim was asserted was able to refute the dominance of the other nationality. In the cases of both *Canevaro* and *Merge*⁷, the result would not have been any different had the exception rule been strictly observed.

A new era in the discussion of the diplomatic protection of individuals of more than one nationality began when the Iran-US claims tribunal was confronted with a string of court actions from persons with both Iranian and American nationality. In the case of *Esphahanian vs. the Bank of Tejarat*, the plaintiff, a citizen of both Iran and the US, born and raised in Iran and later naturalised in the US, who occasionally lived and worked in Iran, brought an action for payment of a dollar cheque issued by a nationalised Iranian bank.⁸¹ The competent division of the court and later the plenum rejected the Iranian protests over the dual nationality of the plaintiff and, in so doing, relied on the theory of dominant nationality. In justification, the court made reference to the criticism against the doctrine of absolute exclusion of a state’s responsibility for its own national in cases of dual nationality. According to the court, the theory is not sufficiently covered by Arbitrary Court practice and not representative of the development of modern international law. In particular, too much weight is attributed to the respective national concept of citizenship which, in the case of Iran, makes it practically impossible to renounce nationality and bases nationality on purely non-objective links, e.g. descent. The international assertion of rightful claims of individuals was thus, according to the tribunal, made more difficult, often impossible. It was pointed out by the

tribunal that the dual nationality of US-Iranian nationals resulted from Iranian legal codes of nationality which are in breach of international human rights, whereby the tribunal pointed to the acquisition of Iranian nationality of wives and children of Iranian men born in the USA.⁸²

Furthermore, the court deals with the exception rule of 1930 and with international legal practice. After fifty years, art. 4 of the Hague Convention only retains limited value as a proof of a sense of legal obligation. In the meantime, the concept of the exercise of diplomatic protection would appear to have changed considerably. For this reason, it would seem necessary to distinguish different types of exercise of protection, especially between assertions of claims before international courts and the exercise of protection through states in a more restricted sense. In the outcome, the court came down to a qualification of its fundamental statements on the validity of the exception rule. In the present cases, a judgement would have to be passed only on the claims of the individual before an international Arbitration Court not, however, on the real question of the exercise of diplomatic protection by states on behalf of their own nationals where the rights of the plaintiff state itself are concerned. Notwithstanding this, however, the court relies heavily in its argumentation on the practice of courts of arbitration and literature of 'the most competent lawyers' in order to assert interstate claims in favour of individuals of more than one nationality before international courts of arbitration. According to the Court, an interpretation of international practice shows a clear trend towards modification of the exclusion rule by the concept of dominant and effective nationality, also confirmed by the ruling of the ICJ in the case of *Nottebohm*. This trend should be less surprising, 'as it is consistent with the contemporaneous development of international law to accord legal protection to individuals even against the state of which they are nationals.'⁸³

The theory of predominant nationality is also supported by the ILC in its 2004 draft.⁸⁴ Although the principle is upheld that a state of nationality may not exercise diplomatic protection in respect of a person against a state of which that person is also a national, an exception is made unless the nationality of the former state is predominant, both at the time of the injury and at the date of the official presentation of the claim. The ILC points to the more recent state practice by the Iran-US Claims Tribunal and the UN Compensation Commission to provide for compensation for damages caused by Iraq's occupation of Kuwait. The condition applied by the Compensation Commission is that they must possess bona fide nationality of another state.⁸⁵ The Commission, therefore, is of the opinion that the principle which allows a state of dominant or effective nationality to bring a claim against another state of nationality reflects the present position in customary international

law.

1.4.2 Residence rights of nationals and obligations regarding readmission Of a state's own nationals

Nationality in general implies, as a constitutional law principle, a right of entry and residence in the state of nationality. The conditions under which a residence right may be restricted may, however, vary according to the internal law of each state and according to its constitutional provisions. In Western Europe, the right of residence is in principle not subject to limitations as far as expulsions and deportations are concerned. The same rule applies in most European states to the right not to be extradited to foreign countries for criminal prosecution. There are exceptions, however, concerning the prohibition of extradition particularly in Britain and countries based upon an Anglo-American legal tradition. In addition, the rule of non-extradition of a state's own nationals has also been abandoned in relations between EU Member States as a result of the European Arrest Warrant (see also section 1.6.1).

In international relations, nationality carries a duty of responsibility implying an obligation to readmit a state's own nationals. Although there have often been difficulties and barriers to enforcing such duties, state practice supports the assumption of a duty of states under public international law to readmit their own nationals. In addition, there is an individual right of return under art. 13 sect. 2 of the UN Declaration of Human Rights, whereby any human being possesses the right to leave any country, including his own, as well as to return to his own country. The provision is developed further in art. 12 of the International Covenant on Civil and Political Rights. According to art. 12, sect. 2, an individual is free to leave any country, including his own. Para. 4 states that nobody may be arbitrarily denied the right to enter his or her own country. The prevailing opinion in the literature is that the right guaranteed in art. 12, para. 4 refers to a state's own nationals only, although it is sometimes argued that the right also refers to persons who, in accordance with national law, hold a right to permanent residence even though they may have never acquired nationality (Hannum 1987: 56).

The basis of the obligation of a state to readmit its own nationals is primarily to be found in the personal sovereignty of the state. International order presupposes that each state should care, if not for others, at least for its own nationals. If the latter are abroad, they enjoy the diplomatic protection of their state of origin which in this respect is entitled, where necessary, to complain to the state of residence. The state of residence, through the principle of reciprocity, does on the other hand possess the right to request that the return of those aliens whom, for valid reasons, it does not want to keep on its territory be made possible. The obligation of a state to readmit its nationals, when they are

expelled from a foreign country abroad, therefore results from the responsibility of a state for the welfare of its nationals.

Recent state practice confirms the thesis that there is a general obligation of states to readmit their own nationals. The EU model bilateral readmission agreement⁸⁶ and numerous subsequent bilateral resolutions and recommendations by international organs are based on a general principle of readmission of a state's own nationals. The UNHCR Executive Committee explicitly recognised in two conclusions in 1995⁸⁷ the obligation of all states to accept the return of their nationals and the responsibility of all states to accept and facilitate the return and reintegration of their nationals respectively. The fact that these recommendations are focused upon international protection and the exercise of a right of (voluntary) repatriation does not limit their value as precedent for a confirmation of the basic principle that every state is obliged to readmit its own nationals. While it is true that repatriation in the context of these resolutions is primarily seen from the perspective of voluntary repatriation, there can be no doubt that state participation in the UNHCR Executive Committee deliberations did not exclude involuntary repatriation as an alternative to voluntary return. The real issue therefore seems to be whether a duty of readmission under public international law can be made dependent on formal and administrative requirements which have to be met in executing a return obligation. Bilateral readmission agreements do state a number of conditions concerning proof of nationality and additional requirements

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as to the procedure and time limits for readmission requests. It is obviously not possible to derive detailed rules of customary international law from these agreements. Administrative practices and provisions differ widely. This does not mean, however, that states have unlimited discretion concerning procedural and administrative regulations. A general obligation to readmit must not be frustrated by unjustified formalities and burdens of proof. Criteria as to what requirements are unjustified can be found in the more recent state practice concerning readmission agreements. It follows that, as a rule, full proof of nationality cannot be required while substitution by documents or other evidence of the individual's nationality is generally held to be sufficient. Purely formal reasons are generally not considered sufficient for a refusal of admission if the nationality is sufficiently substantiated. In principle, states may require travel documents; there must however be a procedure for issuing substitutive documents if the individual in question does not dispose of any valid travel document. Disproportionately long delays and excessive administrative procedures for the issue of travel documents may constitute an abuse of the exercise of rights. The European Union more recently has concluded a number of readmission agreements on behalf of the European Community, such as the Treaty with Hong Kong of November 2001, Sri Lanka, May

2002 and Macau, October 2002. The core part of each agreement provides that the contracting parties have to take back their own nationals and that the parties must also readmit nationals of non-contracting parties or stateless persons who have legally entered a state on their territory, subject to certain conditions. The European Council has also adopted conclusions providing that each future EU association or cooperation agreement should include a clause on compulsory readmission in the event of illegal immigration.⁸⁸

It follows that, in public international law, nationality implies an individual right by a state's own nationals to return to the state of nationality.

In international relations it implies a duty to readmit.

The international legal situation concerning the readmission of former nationals seems less clear. Bilateral readmission agreements of the twentieth century have not covered former nationals. Whether a duty to readmit a state's former nationals can be found in modern state practice of the twenty-first century may be somewhat doubtful. There are, however, sufficient precedents in more recent state practice indicating at least a basic obligation of states to readmit those nationals who have lost their nationality while being temporarily abroad. Recently, certain states have developed a practice of releasing nationals at short notice in order to frustrate any return to their state of origin. Under public international law, this may constitute an abuse of rights and an unlawful exercise of a state's sovereign rights to regulate its nationality. The EU Model Agreement states that the readmission obligation shall also apply to persons who have been deprived of the nationality of the requested party since they entered the territory of the requesting party without having at least been promised naturalisation. In international doctrine, there is wide recognition that, under certain conditions, a renunciation of citizenship, whether voluntarily or involuntarily, violates the right of the state of residence by unilaterally shifting the responsibility of a now stateless person to the receiving state. The loss of nationality under these conditions is considered irrelevant since the state of residence would otherwise be deceived in expecting the state whose nationality the individual possessed to be under obligation to receive the individual (for further details see Hailbronner 1997: 1 f.).

The view that a state may not, by withdrawal or renunciation of nationality, withdraw from its international obligations resulting from nationality can be seen as widely recognised. The Federal Court of Switzerland, for instance, stated in 1891 that the Canton of Tessin was not obliged to accept aliens made stateless through the renunciation of Italian nationality and that Italy was obliged to take back these former nationals.

⁸⁹ This, however, cannot be considered proof of an obligation under customary law, since Italy had previously assumed an express obligation to readmit former nationals in an agreement of 1890.

The thesis that a state may not withdraw from its obligation to readmit resulting from the withdrawal of citizenship from its nationals

while they are abroad is widely accepted in literature (Weis 1979: 54; Randelzhofer 2000: 21; Doehring 1984: 355). In this respect, it is irrelevant whether the loss of citizenship takes place with the agreement of the person concerned or if nationality is withdrawn. Since the obligation of the state to readmit depends, to a large extent, on considerations towards the other state, it does not matter by what means the release from nationality took place. The former state of origin is therefore obliged to readmit, if the person has relinquished his or her nationality or has neglected certain formalities which are necessary for the retention of nationality (Castreñn 1942/1943: 385; Lessing 1937: 125). In the Encyclopaedia of Public International Law, published by the Max Planck Institute of Heidelberg, the actual state of valid international law is described as follows: 'If denationalisation occurs after the individual has abandoned his state and is in the territory of another state, the duty of admission persists, because otherwise the other state would be deceived in its expectation that the state whose nationality the individual possessed is obliged to receive the individual.' (Bernhardt 1985: 422)

1.5 Multiple nationality

Increasing numbers of persons hold multiple nationalities, despite efforts to avoid multiple nationality. The principle which can be found in the European Convention of 1963 on the Reduction of Cases of Multiple Nationality and Military Obligations in Case of Multiple Nationals, where multiple nationalities are generally undesirable, has been abandoned by subsequent legal instruments, in particular the Second Protocol amending the 1963 Convention and the European Convention on Nationality of 1977. The present state of public international law is correctly reflected in art. 15 ECN. The Convention does not limit the right of states to determine in its internal law whether nationals who acquire or possess the nationality of another state retain its nationality or lose it or whether the acquisition or retention of its nationality is subject to the renunciation or loss of another nationality.

Art. 15 ECN clearly marks a shift in the attitude of states towards multiple nationality although no general principle against or in favour of multiple nationality can be derived from the Convention. The 1963 Convention on reducing cases of multiple nationality already only provided for the loss of a previous nationality for a limited category of persons. It covered the special case of voluntary acquisition of another nationality, obliging states in such cases to provide for the renunciation or loss of their previous nationality.

One major reason for the change of legislation has been the recognition of the interests of immigrants in maintaining links with their country of origin, while attribution of the host state's nationality was also considered an essential requirement for full integration. On the other hand, there is no general consensus on whether multiple nationality

is an adequate tool for promoting integration or whether it may obstruct integration by facilitating the formation of separate cultural and political interest groups, identifying with their country of origin rather than with the country of residence.

Although there is no evidence that problems of failed integration are linked to the issue of multiple nationality, the conclusion of Kojanec (2000: 35) is correct, that the attitude of international law in relation to the problem of multiple nationality is the result of historical, philosophical and social facts which lay at the basis of the legislative approach in each state and determine its finalities.

Nevertheless, there is a clear tendency towards a more liberal tolerance of multiple nationality. A large number of European states have changed their legislation in order to accept multiple nationality for certain categories of immigrants, thereby taking account of an immigrant's connections with his or her country of origin. Even those countries maintaining the principle of avoiding dual nationality, such as Germany, have largely facilitated the retention of a previous nationality if renunciation of nationality meets with serious obstacles or must be considered as unreasonable for other reasons. Art. 14 ECN provides for multiple nationality in the cases of children having different nationalities acquired automatically at birth and in the cases of automatic acquisition of another nationality through marriage. In addition, multiple nationality under art. 16 is accepted when renunciation or loss is not possible or cannot reasonably be expected.

An increasing number of multiple nationals may give rise to more international disputes resulting from conflicting rights and obligations. A traditional rule of customary international law, laid down in art. 4 of the Hague Convention of 1930, stipulates that a state may not afford diplomatic protection to one of its nationals against a state whose nationality such a person also possesses. The rule, however, although maintained in state practice, has been gradually reduced in importance due to a number of exceptions (see section 1.4.2).

Multiple nationals in general are accorded the same rights and obligations as any other national holding only one nationality. Conflicting obligations or loyalties may create difficulties if there are no special agreements providing for a mutual recognition of military service.⁹⁰ Art. 21 ECN states that multiple nationals shall fulfil their military obligations in relation to one of the state parties only. Normally, that state party will be the state of habitual residence. The Convention, however, leaves it to the person concerned to submit voluntarily to military obligations in relation to any other state of which they are also a national, unless there are special agreements.

In the absence of a special agreement, art. 21 states a number of principles for solving potential conflicts if persons possess multiple nationality. The Convention mentions firstly the principle that any such person shall be subject to military obligations in relation to the state

party on whose territory they are habitually resident. Nevertheless, they shall be free to choose, until they reach the age of 19, to submit themselves to military obligations as volunteers in relation to any other state party of which they are also nationals. The same principle is laid down in the Convention concerning persons who are habitually resident on the territory of the state party of which they are not nationals or in that of a state which is not a state party. Such persons may choose to perform their military service on the territory of any state party of which they are nationals. In this case, the military service shall be deemed to have been fulfilled in relation to any other state party or parties of which they are also nationals. In principle, the same rules apply to persons who have been exempted from their military obligations or have fulfilled civilian service as an alternative. Concerning persons who are nationals of a state party which does not require compulsory military service, they shall be regarded as having satisfied their military obligations if they have their habitual residence on the territory of that state party. Nevertheless, they should be deemed not to have satisfied their military obligations in relation to a state party or parties of which they are equally nationals and where military service is required unless the said habitual residence has been maintained up to a certain age. Opinions differ and some reservations exist concerning this provision. Austria has stated that it will retain the right whereby a person who has been exempted from his military obligations in relation to one state party is not deemed to have fulfilled his military obligation in relation to the Republic of Austria. A number of other states have submitted statements that a habitual residence resulting in exemption from military service must be maintained up to a certain age in order to rule out the abuse of the provision as an escape clause from military service. Some contracting states have also reserved a general right to subject dual nationals to military service provided that they live on the territory of the country and are subject to military obligations.⁹¹ Germany has also entered a reservation to art. 22 to prevent dual nationals living in Germany from invoking exceptions relating to military service which are not provided for under German law. As a result, these persons would in principle be privileged in relation to holders of only one nationality who are liable for military service. No customary international law can be drawn from the state practice. Some of the rules laid down in art. 21 and art. 22 and particularly the rule of avoiding dual military service in cases of dual nationality can be considered emerging standards of European nationality law. Some other principles laid down in the Convention meet with substantial resistance. It is particularly doubtful whether the principle of free choice does reflect a proper balance between the interests of the individual and of society. Recognition of multiple nationality should not undermine the legitimate integration concerns of states. Voluntary military

service in a state other than the state of residence is hardly suitable for promoting integration and may even be regarded by internal legislation as a reason for loss of nationality.

Larger numbers of multiple nationals may also create difficulties and conflicts in connection with the exercise of the political rights of non-residents and the potential interference of external interests in the political process. Political rights should generally be attached to the state of permanent residence; permanent residence should also be the decisive factor in deciding legal conflicts, rather than relying exclusively upon the nationality of the forum state (Martin & Hailbronner 2003: 383; for a different view see Spiro 2003: 135).

Although multiple nationality in general does not imply problems of conflicting loyalty, there may be situations in which such conflicts, at least in the public perception, cannot be excluded. It is a legitimate concern of states to require that such nationals surrender their other nationality before taking up high office in the government or in the public domain (Martin & Hailbronner 2003: 385). As for civil service, experience with multiple nationals does not indicate any need to exclude multiple nationalities from lower civil service.

Since public international law is largely silent on the question of resolving conflicts arising from the exercise of multiple nationalities, it is up to the states concerned to conclude special agreements on issues of the conflict of laws, exercise of political rights, military and other obligations. A guiding principle is supposed to be that primary obligations of dual nationals should be with the state of residence and that state should also serve as a primary protector of the individual. Consequently, in the case of dual nationals, issues of civil status and legal conflicts should be resolved by reference to the laws of the country of habitual residence. In addition, dual nationals should focus their political activities in the state of residence and, generally, should vote only there. It would be advisable to devote some effort to the conclusion of international agreements which would facilitate the management of multiple nationality and effectively deal with the issues related to the exercise of multiple rights and obligations (Martin & Hailbronner 2003: 383).

1.6 Nationality and Union citizenship

1.6.1 The concept of Union citizenship and its relationship to nationality

The introduction of Union citizenship by the Maastricht Treaty has been a significant step towards a political European Union, serving the interests and the well-being of all its citizens regardless of whether they are engaged in economic activities or not. Although the right to move freely within the European Community had already been extended before the introduction of citizenship into the Treaty by three directives

dating from 1990 and 1992 on the free movement of students, retired persons and other non-economically active nationals of Member States, the definition of Union citizenship and determination of a set of rights acknowledged for the first time that the EC Treaty had in fact reached a new potentially political dimension by combining political and military cooperation with an individual legal status, carrying with it the association of a common European identity and belonging to a community connected by more than mere economic freedoms and the harmonisation of economic laws. In addition, the formula of an 'ever closer Union of the peoples of Europe', although sufficiently vague to disguise the political disagreement regarding Europe's final political destination, seemed to embrace Union citizenship as a new dynamic concept suitable for expansion in content and meaning and thereby making nationality of the Member States necessarily increasingly less important. There is in fact an inherent link between Union citizenship and nationality. The extent of the rights an individual may have is limited. The more essential rights are attached to Union citizenship, the less important relate to the nationality of a particular EU member state.

A closer look at the Treaty, however, shows that EU Member States have tried to limit the dynamic dimension of Union citizenship. Since the Treaty of Amsterdam, art. 17 EC, after repeating the Maastricht principle that every person holding the nationality of a Member State shall be a citizen, adds that 'citizenship of the Union shall complement and not replace' national citizenship.

In addition, the content of Union citizenship was clearly limited by the rights conferred by this Treaty and subject to the limitations thus imposed. It would therefore follow that Union citizenship is not a concept open to extension by secondary legislation, as is nationality under constitutional law. True, art. 17-22 form only the core of the rights, other rights may appear elsewhere in the Treaty.⁹² Yet, no additional rights as such may be derived from Union citizenship and, in particular, no rights amounting to a replacement of national citizenship.

As a political concept, art. 17 EC serves to clarify that Union citizenship is not to be equated with traditional concepts of nationality and that Union citizenship is not to be understood or interpreted as a step towards a European federal state. Nationality under public international law is an integral element of national sovereignty. There is no statehood without a state's authority over its nationals, internally or externally. Complementing national citizenship means that Union citizenship is transferring 'additional' rights (and possibly duties resulting from the exercise of such rights) without limiting the sphere of rights and duties traditionally related to national citizenship.

The limited political content of citizenship is clearly expressed in the Danish declaration on citizenship of the Union attached to the Danish

ratification of the Maastricht Treaty: 'Citizenship of the Union is a political and legal concept that is entirely different from the concept of citizenship within the meaning of the Constitution of the Kingdom of Denmark and of the Danish legal system. Nothing in the Treaty establishing the European Union implies or foresees an undertaking to create citizenship of the Union in the sense of citizenship of a nationstate. The question of Denmark participating in any such development does, therefore, not arise.'⁹³

Replying to the Danish statement, the heads of state or government in the European Council session of 11-12 December 1992 at least did not contradict this interpretation by reiterating the previous declaration on nationality attached to the Maastricht Treaty: 'The provisions of part two of the Treaty establishing the European Community relating to a citizenship of the Union give nationals of the Member States additional rights and protection as specified in that part. They do not in any way take the place of national citizenship. The question whether an individual possesses the nationality of a member state will be settled solely by reference to the national law of the member state concerned.'⁹⁴

The legislative history of the provision thus supports the assumption that citizenship of the Union is to be interpreted as a legal status which is not on the same level as nationality, but an accessory status describing a conglomerate of additional rights as determined by the Treaty.

Whether citizenship of the Union on the basis of the wording of art. 17 EC and its legislative history can be considered 'destined to be the fundamental status of nationals of the Member States', as the European Court has repeatedly argued in its recent judgements on citizenship⁹⁵, is at least unclear, if not dubious, if one interprets the term 'fundamental status' as a kind of 'European nationality' at the same level or even at a higher level than nationality of a Member State.

This may be one of the reasons why the Draft Constitution replaced the complementary wording by 'additional'.⁹⁶

The additional function of Union citizenship does also have a legal meaning, restricting its dynamic interpretation as the nucleus of a European Union 'nationality' as a prerequisite for the establishment of European statehood. Yet, the task of drawing a line between complementing or replacing national citizenship is obviously much more difficult than a mere reference to the evident elements of national citizenship (political rights, military service, etc.) indicates. In the absence of common criteria and a common concept for defining the essentials of national citizenship, it is by no means clear under what circumstances rights or duties attached to Union citizenship may result in replacing rather than complementing national citizenship.

The task of drawing a line is facilitated if one accepts that Union citizenship, unlike nationality, is not an open concept but rather a term describing a set of additional rights as determined by the Treaty. Assistance in determining the content of such rights may be drawn from international

and constitutional law and perceptions of EU Member States about the essentials of nationality. Arguably, Union citizenship cannot in any way diminish the rights of nationals to internal and external protection and the corresponding duties of allegiance, traditionally expressed in military service⁹⁷ and political duties and similar rights and obligations.

One may argue that no conflicts are readily predictable as a consequence of the additional character of rights derived from Union citizenship. Nationality in public international law and European law⁸⁷ ship. Yet, a closer look at some of the more recent developments in the area of judicial cooperation shows that even additional rights may have a tendency to create additional obligations. Thus, the Council framework decision on a European Arrest Warrant⁹⁸ relies upon Union citizenship to explain that nationals of Member States are no longer protected against extradition in another Member State if a European Arrest Warrant is issued on the basis of a defined list of punishable offences. At least in some EU Member States, the right not to be extradited to a foreign jurisdiction has long been considered an important element of nationality. Therefore, constitutional laws had to be changed to implement the framework decision on a European Arrest Warrant.⁹⁹

Extradition of a Member State's own nationals may not amount to replacing nationality as long as constitutional provisions permit such amendments. It indicates, however, that the perception of Union citizenship as a mere improvement of Union citizens' rights may be too simple. There is at least a 'creeping' diminution of rights traditionally attached to nationality resulting from Union citizenship.

The German Constitutional Court in its judgement of 18 July 2005¹⁰⁰ has derived from the concept of German nationality a right of protection against extradition based upon the European Arrest Warrant. The court did however acknowledge that this right is not unlimited, given the background of general developments in public international law and European Community law, particularly with respect to the establishment of a European area of freedom, security and justice.¹⁰¹

However, the Court argued that in implementing the European framework decision on an arrest warrant, the German legislator did not properly take into account the high importance of the right of protection as an inherent element of nationality.¹⁰²

On the whole, the court concluded that the German legislator should have used the scope of discretion left by the European Arrest Warrant decision for state reservations and to limit the extradition of German nationals, for instance if a criminal activity has been committed wholly or partly on German territory or if, on balance, the interests of a German national in being tried by German courts will not be sufficiently taken into account.¹⁰³

The terminology of art. 17 (1) EC raises some difficulties. Art. 17

seems to use the term 'nationality' to mean the same as 'national citizenship'. It has been rightly observed that in some Member States these terms are used in a different sense. In the United Kingdom, the term 'nationality' indicates the formal relation between a person and the United Kingdom, which does not necessarily include the right to reside within the United Kingdom, while the term 'British citizenship' is used to describe a more privileged status, similar to nationality in other EU Member States. In most other Member States the terms 'nationality' and 'citizenship' are used basically in the same sense. The reasons for using one or the other term are rooted primarily in historical traditions.¹⁰⁴ Art. 17, in referring to the somewhat vague terms 'nationality' and 'citizenship' through national citizenship, takes account of the different terminology of the Member States by combining both terms into 'national citizenship' pointing to the legal status granted by the legislation of Member States and describing a set of rights and obligations traditionally determined under international law rules as 'nationality'. The Treaty does not attempt in any way to determine the concept of nationality or citizenship by the Member States. Art. 17 EC, however, makes clear that Union citizenship is different from nationality or national citizenship because of its confinement to a set of traditional rights under Community law.

1.6.2 Legislative competence of EU Member States in determining their nationality and possible limits

According to art. 17 (1) EC, every person holding the nationality of a Member State shall be a citizen of the Union. It follows that citizenship is acquired exclusively by the nationality of an EU Member State. In a declaration on nationality attached to the Maastricht Treaty Member States have unequivocally stated that the question of whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned. Member States, therefore, may state, for information purposes, which persons are to be considered their nationals for Community purposes by lodging a declaration with the presidency and may amend any such declaration when necessary.¹⁰⁵

In the *Manjit Kaur* case¹⁰⁶ the Court relied heavily upon the declaration in deciding that Ms. Kaur, who had acquired the status of a British overseas citizen under the British Nationality Act 1981, which does not grant the right under British law to enter or remain in the United Kingdom, was to be considered a national of the United Kingdom. Ms. Kaur claimed that United Kingdom legislation infringed fundamental rights in as much as it had the effect either of depriving Britons of Asian origin of a right to enter the territory of which they are nationals, or of rendering them effectively stateless. The Court, however, accepted the UK explanation that many people had some form of link with the United Kingdom even though they had never lived there or visited the

country and had no close connection with that state and therefore the law on British nationality recognised various categories of nationals to whom different rights are attached. The Court argued that the British Declaration of 1972, defining the UK nationals who would benefit from the provisions relating to the free movement of persons, must be taken into consideration as an instrument relating to the Treaty for the purpose of its interpretation and, more particularly, for determining the scope of the Treaty *ratione personae*. Therefore, the Declaration did not have the effect of depriving any person who did not satisfy the definition of a national of the UK of rights to which that person might be entitled under Community law. The consequence was rather that such rights never arose in the first place for such a person (see no. 25). De Groot (2003a) concludes that, contrary to art. 17 EC, not all nationals of a Member State are European citizens. The exclusion of 'British overseas citizens', who are not entitled under United Kingdom law to enter or remain in the United Kingdom, from the scope of application of the Treaty does not support this conclusion. Art. 17 EC (previously art. 8) refers to national legislation, thereby allowing a certain amount of discretion by Member States as to who is to be considered a state's own national in the sense of art. 17. The European Court¹⁰⁷ has repeatedly argued that 'under international law, it is for each member state, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'. The fact that, due to the particular imperial and colonial history of the United Kingdom, a number of persons were identified as a special category of British overseas citizens, does not therefore in any way imply an obligation to such persons as 'nationals' in the sense of Community law.

Whether the autonomy of the Member States to determine nationality for the purpose of application of Community law is unlimited, may be a different issue. In the *Micheletti* case the ECJ has somewhat vaguely indicated that there may be some limits for Member States when regulating their nationality laws: 'Under international law it is for each Member State, having due regard to Community law, to lay down the conditions for the acquisition and loss of nationality'.¹⁰⁸

In *Micheletti*, an Italian-Argentine dual national, who had acquired Italian nationality as the son of an Italian father, was to be regarded as an Italian for Community purposes. The Court did not accept the Spanish argument according to which, in cases of dual nationality, the nationality corresponding to the habitual residence of the person concerned before his arrival in Spain is to take precedence, which was Argentine nationality in the case of *Micheletti*. The Court said that it is not permissible for Member States to restrict the effects of the granting of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty. Consequently,

it is not permissible to make recognition of the status of a Community national subject to a condition such as the habitual residence of the persons concerned in the territory of the first Member State.

Apart from the somewhat vague reference to Community law, the Court has not explained what limits might be derived from Community law upon Member States' autonomy in nationality legislation. As a possible limit, the obligation of solidarity is frequently noted if, for instance, a Member State were to grant its nationality to an important part of the population of a non-EU Member State without prior consultation with the European Community organs (Hall 1995: 64 ff.; de Groot 2003a: 21). De Groot mentions as an example a proposal by the Netherlands to grant Dutch nationality to the entire population of Surinam or an important part thereof. Another example is the hypothetical granting of Greek nationality to all Cypriots of Greek ethnicity in Cyprus (Kotalakidis 2000: 299).

The issue, however, seems to be theoretical although the December 2004 referendum on dual nationality for three million Hungarians in neighbouring countries shows that it may be less theoretical for some of the new EU Member States. De Groot rightly observes that recently, when a substantial number of British overseas citizens from Hong Kong became European citizens through being granted British citizenship, neither the European Commission nor any other Member States voiced any protest, nor have amendments to treaties on dual nationality, concluded between Spain and Latin American countries, which resulted in a substantial increase in Union citizens with dual Spanish-Latin American nationality, led to protests from other Member States (de Groot 2003a: 22).

Even beyond the limits which public international law imposes on the power of states to legislate on nationality, one may infer a particular obligation to take into account the interests of the European Community and the other Member States when determining the scope of application of the Treaty by nationality legislation. Thus, it would seem a violation of the obligation of loyalty to the Community if a Member State were to grant nationality to a category of persons who obviously do not intend to make use of their nationality in the Member State of nationality, but in another Member State. In addition, nationality as determined for the purposes of art. 17 EC cannot be separated from the essential content of nationality under constitutional law or general principles of public international law. Therefore, the limitation of nationality by British legislation and the exclusion of 'citizens' who did not have the right of abode under British law was clearly not only the right of the British authorities but also an obligation, since it would not be consistent with the concept of nationality as laid down in art. 17 to designate as nationals persons who are not accepted for residence in the Member State granting nationality.

It has been argued that there are, in fact, no cases in which the obligation

of solidarity has ever become practical in determining limits for Nationality in public international law and European law 91 the right of Member States to legislate in matters of nationality (see Jessurun d'Oliveira 1999: 406, 407). Jessurun d'Oliveira has quoted the example of Germany which, in its Declaration of Nationality of 1957, declared that it regards as German nationals not only German nationals in the sense of the German nationality law of 1913 (which already includes all German nationals under the nationality law of 1913 then living in the German Democratic Republic), but also Germans of ethnic origin entitled to privileged access to German nationality as a result of their expulsion after the Second World War. However, the German Declaration on Nationality is only another example of the Treaty taking into account the particularities of each Member State and its right to legislate nationality under the general principles of international law. German nationality law has, from the very beginning, adopted a determination of nationality which takes into account the separation of Germany after the War on the one hand and the particular responsibility for ethnic Germans who had been expelled and suffered persecution on the other hand. The German case, therefore, is hardly suitable for proving the unlimited discretion of states with regard to their nationality legislation.

A second set of limits of Member States' competence in nationality matters is frequently derived from public international law and in particular fundamental rights relating to nationality (de Groot 2003a; Kotalakidis 2000: 312 f.; Hall 1996: 129 f.). It is correct that the jurisprudence of the ECJ refers to the right of states to legislate in matters of nationality 'under national law'.¹⁰⁹ One could well argue that if a state exceeds its limits under international law, any other Member State is not obliged to recognise such determination. However, there are very few limits under international law setting clearly identifiable limits to the granting of nationality (see Hailbronner & Renner 2005: 21 ff.). Whether the deprivation of nationality by a Member State in violation of public international law leads to an obligation to treat that person as continuing to possess European citizenship, it may be somewhat doubtful since a violation of public international law rules does not necessarily mean that third states are obliged to consider such withdrawal of nationality as not having taken place (see de Groot 1989: 22). De Groot, however, comes to a different conclusion within the framework of the European Union, arguing for a different, more effective approach (de Groot 2003a; O'Keeffe & Bavasso 1989: 251 ff.) Whether European Community law requires a different interpretation, however, seems to be doubtful. One may argue that once a person has acquired Community status he or she is no longer exclusively dependent upon the exercise of territorial and personal sovereignty of states under international law.

Another, more important limitation may be drawn from the exercise

of market freedoms by persons within the European Union (see also Greenwood 1987: 185; de Groot 2003a). As an example, the nationality legislation of a Member State providing for a loss of nationality upon taking up residence for a certain amount of time outside the territory of the state of nationality may be quoted (de Groot 2003a: 24-27; for a different view, see Jessurun d'Oliveira 1999: 406, 407). One may object that the reference to nationality law according to the general principles of international law does also imply a loss of nationality. Since, under Community law, Union citizenship is only attached to nationality law, it would seem to follow that anyone who is no longer a national of a national state is no longer a Union citizen as a logical consequence of the Community concept, whereby Union citizenship follows nationality (Jessurun d'Oliveira 1999: 406, 407). The objection, however, is unfounded. De Groot rightly notes that the exercise of rights granted by Community law, in particular taking advantage of freedom of movement, must not result in disadvantages or sanctions. Making use of a market freedom as such cannot result in a loss of that very status, which is the basis of making use of market freedoms. This does not deprive states of their right to provide for a loss of nationality under generally accepted conditions. However, Member States, in acceding to the European Community, have accepted that their nationals are entitled to move freely not only for a temporary period but also for a longer period. Simultaneously imposing a right which deprives them of their nationality as a result of making use of that freedom would contradict their commitment to the Single European Market.

Another limitation may be derived from the loss of Union citizenship as a result of a lack of coordination of nationality laws between EU Member States. On 3 June 2003 the German Federal Administrative Court had to decide on the appeal by an Austrian who had lost his Austrian nationality as a result of acquisition of German nationality. When it subsequently became known that he had not fully informed the German authorities of a pending criminal procedure at the time he applied for nationality, German nationality was withdrawn. As a result of the withdrawal of German nationality, he may have lost Union citizenship since he did not automatically reacquire Austrian nationality. He claimed a violation of Community law by the German authorities due to his loss of Union citizenship as a consequence of losing German nationality. The German Federal Administrative Court did not take up the issue of Community law but argued that the German authorities, making a discretionary decision on the withdrawal of German nationality, did not properly take into account the constitutional decision to avoid statelessness as far as possible.¹¹⁰ It argued that all EU Member States are obliged to respect the principle of avoiding statelessness laid down in the European Nationality Agreement, as well as in the Agreement on reducing cases of dual nationality of 30 August

1961. Although exceptions exist, where nationality has been acquired by fraud or false information, such exceptions are applicable only if the nationality of an EU Member State was first acquired by naturalisation or by another means. A different situation exists, however, if the nationality of an EU Member State is lost as a result of a failed change of nationality from one EU Member State to another EU Member State. From an isolated perspective, however, the Austrian and German legislation on the acquisition and loss of nationality are bound by public international rules on acquisition and loss. However, if the interplay between Austrian and German legislation is taken into account, one has to acknowledge that the loss of German nationality without automatic acquisition of nationality results in a loss of Community citizenship as the result of insufficient coordination between the nationality laws of both EU Member States. German nationality law as such must not result in a deprivation or loss of Union citizenship. The intention of the legislation upon withdrawal in cases of false or insufficient information is to re-establish the situation as it had been before the acquisition of German nationality. Simultaneously, the Austrian legislator provides for loss of Austrian nationality without taking into account whether the acquisition of nationality of another Member State is only of a temporary nature. Therefore, one may argue that EU Member States are obliged to coordinate their nationality legislation to some extent so that Union citizens are not deprived of their status as Union citizens if the general requirements imposed on both Member States for the loss or deprivation of nationality are not fulfilled. Under art. 7 of the European Convention on Nationality, however, a withdrawal of nationality for pending criminal procedures is not admissible. Therefore, loss of Union citizenship occurs in this case only as a result of a lack of coordination among nationality legislations of different EU Member States.

1.6.3 The substance of Union citizenship

To determine the substance of Union citizenship, the Treaty and particularly art. 17-22 EC are the exclusive source of 'additional rights' acquired through Union citizenship. Neither the description of Union citizenship, destined as the fundamental status of EU Member States' nationals, nor all the concepts of Union citizenship as the nucleus of a European identity, are suitable for deriving new rights or obligations for nationals of EU Member States. According to art. 17-22 EC, citizenship includes the right to move and reside freely; the right to vote and to stand in local assemblies and European Parliament; the right to diplomatic or consular protection by other Member States on territories of third countries in which he would otherwise have no representation by his or her home state, the right to petition to the European Parliament; the right to apply to the European Ombudsman and to address Community institutions in his or her own language. The Charter of Fundamental Rights of the European Union (Chapter V, Citizens' Rights) essentially repeats this list with certain extensions in terms of who is able

to make use of such rights and some additional rights, such as the right of access to documents and to correct administration.¹¹¹ The most important rights laid down in art. 17-22 EC are not directed against the Union but against the Member States. Therefore, they are hardly suitable for establishing a basis for the fundamental legal status of a Union citizen with respect to the European Union as such. In addition, the other rights contained in the Treaty in art. 194 and 195 and the Charter of Fundamental Rights are also granted to resident third country nationals. If selectivity of a set of rights is an essential element of nationality, one cannot but note that the set of rights established by Union citizenship is clearly substantially lagging behind the fundamental responsibility a national state has towards its citizens (Nettesheim 2003: 428, 430). The use of the term citizenship, carrying with it the association of a European nationality, therefore, has been criticised as misleading and inappropriate to describe the present content of Union citizenship (Nettesheim 2003: 428).

Attempts have been made in the literature to interpret the restricted concept of Union citizenship as a dynamic principle and a starting point for developing the idea of a European identity. A more traditional view would consider Union citizenship as a forerunner to a European nationality in which a Union citizen owes allegiance to the Union and is entitled to protection by the Union, corresponding to the traditional idea of the nation-state. From a legal perspective, it is evident that this concept is presently excluded by the provision that Union citizenship must not replace the nationality of the Member States but complement it.

Most writers, therefore, have developed different ideas for explaining and developing Union citizenship as a new concept of 'post-national' membership, based upon a new sense of identity arising from the experience of belonging to different communities. Political identity, thus, would be created by the role of the European Union as guarantor of certain rights of Union citizens, linked by a common commitment to openness, inclusion, freedom and equality (see Zuleeg 1997: 505, 524; Preuss & Requejo 1998: 11 f.; MacCormick 1999: 186; Walker 2002: 317; Monar 1997: 203; Weiler 1999: 324).

As a corollary, it is frequently requested that the Treaty be amended in order to release Union citizenship from its connection with nationality of the Member States. Thus, it would be possible to grant Union citizenship in public international law and European law⁹⁵ irrespective of a Member State's nationality – which would enable resident third country nationals to acquire Union citizenship (see Nettesheim 2003: 437; Soysal 1994; Kostakapoulou 1996: 337; for a legal debate see Closa 1992: 1137; O'Keefe 1994: 87; de Groot 2002: 67).

One of the most important rights constituting the substance of Union citizenship is the right to move and reside freely within the territory

of the Member States subject to the limitations and conditions laid down in this Treaty and the measures adopted to implement it. Together with art. 12 EC, prohibiting any discrimination on grounds of nationality 'within the scope of application of this Treaty' and without prejudice to any special provisions contained therein, the Court has used both provisions to develop a concept of 'social citizenship' characterised by the right of all Union citizens, regardless of their economic activity, to take advantage of the social systems of the Member States subject, however, to the limitations of secondary Community law (sufficient means of subsistence, health insurance) which are interpreted in a restrictive manner by the Court. In a sequence of judgements, the Court has relied upon Union citizenship as an instrument to overcome the distinction between economically active and non-economically active citizens. In *Grzelczyk*¹¹² and more recently in *Bidar*¹¹³ the Court awarded assistance for students in the form of a minimum income under Belgian law and for a subsidised loan provided under British law to cover maintenance costs. In *Trojani*, the Court decided that a French national residing in Belgium for some time at a campsite and subsequently in a Salvation Army hostel is entitled to the Belgium *minimex*, a kind of social welfare payment, although his work for the Salvation Army could clearly not be considered work in the sense of art. 39 EC.¹¹⁴ Finally, in *Collins*¹¹⁵ the Court decided that an Irish-American dual national was entitled to claim a job-seeker's allowance according to British law 'in view of the establishment of a citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union', subject, however, to making entitlement to job-seeker's allowance conditional on a residence requirement.

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The reasoning of the Court has been basically following the same line. Union citizenship is declared to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law, irrespective of their nationality.¹¹⁷ The Court concludes from the fundamental status of citizenship that a citizen lawfully resident in the territory of a host member state can rely on the non-discrimination clause of the Treaty in all situations which fall within the scope *ratione materiae* of Community law. The Court then usually goes on to point to some provisions, whereby the particular activity of the persons in question is covered by some Treaty provisions, in the case of students, by the harmonisation of laws and regulations aimed at encouraging the mobility of students and teachers. The Court argues that the situation of such persons is within the scope of application of the Treaty, in the case of students for the purpose of obtaining assistance whether in the form of a subsidised loan or a grant intended to cover maintenance costs.¹¹⁸ Similarly, in case of job-seekers, the Court argues in *Collins* that in view of the establishment

of citizenship of the Union, 'it is no longer possible to exclude from the scope of art. 48 (2) of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by art. 6 of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member States'.¹¹⁹ In *Trojani*, although briefly referring to the limitations under secondary Community law, the Court holds that a social assistance benefit, such as the Belgian minimum income, falls within the scope of application of the non-discrimination clause of the Treaty. Therefore, a citizen of the Union who is not economically active may rely on art. 12 EC when he has been lawfully resident in the host Member State for a certain time or possesses a residence permit.

In all the aforementioned decisions, the Court has not gone as far as to declare all limitations as non-existent. The Court has also avoided declaring secondary Community law provisions requiring sufficient means of subsistence as void or not in accordance with art. 18 EC. Starting from the basic assumption of equal treatment, however, new limitations and conditions are established, which do not go along with the principles laid down by the Member States in Council Directive 2004/38/EEC of 29 April 2004.

In *Collins* the Court points to the right of a Member State to make the award of job-seeker's allowance dependent upon a 'genuine link' between the person seeking work and the employment market of that state.¹²⁰ In the case of students, the award of assistance covering maintenance costs requires a 'certain degree of integration into the society of that state' as a legitimate condition.¹²¹

The most remarkable feature of the Court's reasoning is the absence of a convincing methodology. Even if clear rules exist in secondary legislation for the exclusion of a specific type of social benefit, the Court has few scruples in attributing to Community law a different meaning than would be derived from an interpretation on the basis of the objective wording of the provision, its systematic context and its purpose (for a criticism of the methodology of the Court, see Hailbronner 2004b, 2005; Niemann 2004: 946; Martin & Hailbronner 2003: 136, 141 f.; Bode 2005: 279). Union citizenship and the principle of proportionality are used to promote something which looks more like an as-
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sumption of migration policy than an interpretation of relevant primary and secondary Community law (for a more detailed analysis of the Court's jurisprudence on student maintenance grants, see Bode 2005: 326). The reasons given for disregarding secondary Community law are frequently unconvincing. In *Grzelczyk* the Court relies on the Preamble to Council Directive 93/96/EEC of 29 October 1993 on the Right of Residence for Students (Students Directive) which has explicitly made a reference to the previous Court's jurisprudence to clarify that maintenance grants for students do not fall within the scope of application

of the Treaty. The Court takes this explanation in the Preamble as a principle of a 'certain degree of financial solidarity between nationals of a host member state and nationals of another member state' (see para. 44).

It remains to be seen whether Member States will follow the Court's line of developing Union citizenship into a social citizenship. The Freedom of Movement Directive 2004/38 of 29 April 2004 regulates the right of Union citizens to be granted social benefits under the equal treatment clause in art. 24.122

The principle of equal treatment of all Union citizens and their family members who hold a right of residence or permanent residence is waived for the first three months of residence generally or, where appropriate, for a longer period to which job-seekers may be entitled, provided they are continuing to seek employment and they have a genuine chance of being employed.123

The same rule applies with regard to students concerning maintenance aid, including student loans, prior to acquisition of a right of permanent residence. The only exception is made – according to the established jurisprudence of the Court – with regard to workers or selfemployed persons or their family members or persons retaining such status.

It would be premature, however, to conclude from this system a right to terminate the residence of Union citizens who become dependent upon social security benefits. Art. 14 of Council Directive 2004/38/EEC of 29 April 2004 on the retention of the right of residence stipulates that the right of residence for up to three months is retained provided they do not become an 'unreasonable burden' on the social security system of the host Member State. The Preamble to the Directive provides little guidance as to the interpretation of this provision. According to the Preamble, it is left to the Member States to decide whether they will grant assistance. In fact, however, a Member State will often have little choice since an 'unreasonable burden' on the social security system will be difficult to demonstrate. Under national law, Member States will generally have to provide social assistance. What criteria could be used to determine whether a burden is unreasonable? In any individual case, it will be hardly ever possible to show the unreasonable nature of a burden. The social system as such cannot be substantially affected by an additional beneficiary. 'Unreasonableness' indicates a requirement to make a comparison between private and public interests. In cases of dispute, however, the courts will not exactly be spoiled for choice when deciding quickly on a preliminary residence right.

As for the residence rights for Union citizens following the initial three-month period, art. 14 of the Directive in accordance with art. 7 on the conditions of entry and residence (sufficient resources), makes the 'retention' of the residence right dependent upon the conditions of art.

7, 12 and 13 ('as long as they meet the conditions therein'). Again, however, this does not mean that residence may be terminated if non-economically active Union citizens no longer fulfil the requirements of art. 7. An expulsion measure shall not be the 'automatic consequence' of a Union citizen's or his or her family members' recourse to the social assistance system of the host member state.¹²⁴ The phrase, taken literally from the Grzelczyk judgement, is not explained further. The preamble repeats the phrase in connection with the 'unreasonable burden test'. The host Member State, therefore, should examine whether it is a case of temporary difficulties and take into account the duration of the residence, the personal circumstances and the amount of aid granted when considering whether the beneficiary has become an unreasonable burden on its social security system. In conclusion, the Directive has taken up some of the European Court's decisions concerning the applications of Union citizenship to access to social benefits. Art. 24 of the Directive states that all Union citizens residing on the basis of this Directive shall enjoy equal treatment alongside nationals of that Member State 'within the scope of the Treaty'. Notwithstanding the repetition of this reservation concerning the scope of the Treaty, which is laid down in art. 12 EC, to that extent the Directive is based upon the Court's assumption that access to all social benefits including welfare grants and maintenance grants for students in principle falls within the scope of application of the nondiscrimination clause of the Treaty. However, in clear contrast to the European Court's jurisprudence, the Directive tries to maintain the traditional distinction between economically and non-economically active Union citizens, making the residence right of the latter category dependent upon proof of sufficient means of subsistence and comprehensive medical insurance. In addition, for the first three months of residence, Union citizens are excluded from access to social assistance, job-seekers for an even longer period. Students are not entitled to maintenance aid for studies before they acquire a permanent right of residence.

1.6.4 Harmonisation of nationality legislation by the European Community

The increasing impact of EU law on the nationality law of Member States and the close connection between some of the areas in which the EU has legislative competence, such as migration policy and the legal status of third country nationals, and nationality issues, have prompted many observers to reflect on the competence of the EU to harmonise acquisition and loss of nationality in the Member States (de Groot 2003a; Kotalakidis 2000: 316). They argue that there are many differences in the treatment of persons originating from the territory of a Member State with respect to access to European citizenship through the acquisition of their ancestors' nationality and as a result of

the close relationship between immigration regulations and nationality law, in particular the rules on naturalisation. Therefore, it is likely that the Union will increase its influence upon the nationality legislation of the Member States. Antonio Vitorino, the former commissioner for justice and home affairs, has suggested that migrants should be granted an alternative status to nationality, known as 'civic citizenship' (Vitorino 2000: 62).¹²⁵ Other authors have also suggested establishing citizenship of the Union determined by the nationality of a Member State or by lawful residence on the territory of a Member State for five years (Staples 1999: 335).

Interesting as these proposals may be from a political point of view, they are in conflict with the existing Treaty law, in particular art. 17 EC. Art. 63 EC does not provide a basis for an extension of rights traditionally limited to nationality. The power to adopt measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in another Member State does not grant the right to create a 'quasi-citizenship', containing the ingredients of Union citizenship. This does not rule out granting third country nationals the right to move freely within the European Union as determined by the Directive of 15 November 2003 concerning the status of third country nationals who are long-term residents.¹²⁶ The limit, however, would be the extension of the essential rights attached to Union citizenship, such as local political rights in the Member States and the right to stand for election in the European Parliament. The present legal situation is determined not only by the definition of citizenship as a set of additional rights complementing nationality, but also by observance by the Union of the national identities of its Member States (art. 6, para. 3 EU). Jessurun d'Oliveira has pointed out that nationality law 'belongs to the hard core of identity and independence of the states as subjects of international law. If there is no state population that "belongs", there is no state. If there is no competence to define who the state population is, there is no independence' (Jessurun d'Oliveira 1999: 411). It follows that the EU has competence neither to harmonise nationality legislation of the Member States nor to establish a 'civic citizenship' for third country nationals unless civic citizenship is intended as an alternative to granting some rights of residence.

Notes

1 ICJ Reports 1955: 4, 23. For a similar definition see art. 2 of the European Convention on Nationality; see also the Decision of the British-Mexican Claims Commission of 8 November 1929 in the case Robert John Lynch vs. United Mexican States: 'A man's nationality is a continuing legal relationship between the sovereign state on the one hand and the citizen on the other' (Reports of international arbitral awards vol. V, 17, 18).

2 Decisions of the German Constitutional Court, vol. 83, 37, 51.

- 3 Resolution 217 A (III) UN General Assembly (UNGA).
- 4 See Amendments to the Naturalization Provisions of the Constitution of Costa Rica, OC-4/84, Human Rights Law Journal 1984, vol. 5, p. 14.
- 5 See ECN, Explanatory Report, 177.
- 6 See Council of Europe Res. (77), 12.
- 7 Recommendation 841 (1978), in: Council of Europe Achievements, 2000, p. 80.
- 8 Recommendation no. R (84/9) of 20 March 1984.
- 9 Explanatory Report, p. 8.
- 10 Explanatory Report, p. 8.
- 11 See Federal Administrative Court, vols. 45, 47, 49; vols. 75, 86, 89; see also Administrative Appeal Court of Bremen of 18 May 1999, Neue Zeitschrift für Verwaltungsrecht-Rechtsprechungs-Report Verwaltungsrecht 2000, 58.
- 12 Explanatory report, p. 8.
- 13 Capotorti, in 1982 ECR 3927, 3943, case 13-28/82.
- 14 4th Advisory Opinion of 19 January 1984, 1984 Human Rights Law Journal 161, p. 173.
- 15 Explanatory Report p. 7.
- 16 Explanatory Report p. 13.
- 17 See also the Reservation of the Republic of Hungary to the ECN, Council of Europe, list of declarations made with respect to Treaty no. 166.
- 18 Case C-200/02, Chen, ECR 2004, I-3887.
- 19 Opinion of 18 May 2004, para. 115; see also Carlier (2005:1121 ff.).
- 20 Case 206/94, Paletta, 1996 ECR I-2357.
- 21 Case 39/68, Lair, ECR 1988, 3161, 3201.
- 22 Case 212/97, Centros, 1999 ECR, I-1459.
- 23 See for instance German-French Extradition Treaty of 29 November 1951; German-Canadian Extradition Treaty of 1977; German-US Extradition Treaty of 20 June 1987; for further details see Hailbronner 2005.
- 24 See Declaration on Application of 15 August 1955, Bundesgesetzblatt 1955 II 829.
- 25 See Silagi 1999: 40 ff and Federal Administrative Court Vol. 80, 233, 246.
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- 26 League of Nations Treaty Series (LNTS) vol. 179, p. 89; the Convention entered into force on 1 July 1937, having been ratified by 19 states. 27 states signed but did not ratify.
- 27 UN Treaty Series (UNTS) vol. 360, p. 130.
- 28 See UN Doc A/Conf. 9/15.
- 29 UNTS vol. 309, p. 65.
- 30 For a survey of the Council of Europe achievements, see Council of Europe Achievements in the field of law, Nationality, Strasbourg, September 2000, Dir/jur (2000), 3.
- 31 European Treaty Series (ETS) no. 43.
- 32 League of Nations Treaty Series (LNTS) vol. 178, p. 227.
- 33 ETS no. 95, entered into force on 8 September 1978.
- 34 ETS no. 96.
- 35 ETS no. 149.
- 36 Publications of the Permanent Court of International Justice (PCIJ) series B no. 4, 24.
- 37 League of Nations, Conference for the Codification of International Law, 1929, V.1.13 as quoted by Brownlie 2003: 376.
- 38 See 17, 169, quoted by Brownlie 2003: 376.
- 39 International Court of Justice (ICJ) Reports 1955, 4.

40 See Council of Europe Achievements, p. 97.
41 Council of Europe Achievement, p. 27.
42 See art. 2 of the Optional Protocol concerning acquisition of nationality to both Conventions, UNTS vol. 500, p. 223; UNTS vol. 596, p. 469.
43 See also ECJ of 7 July 1992, C-369/90, Micheletti, ECR 1992, I-4239.
44 Resolution (77, 12), Council of Europe Achievements, p. 26.
45 For a predecessor recommendation focussing on the nationality of married women, see Recommendation 519/1968 of the Consultative Assembly of the Council of Europe recommending the right of a woman to acquire the nationality of her husband, see Council of Europe Achievements, p. 70.
46 See also the UN Convention on the nationality of married women of 20 February 1957, UNTS, vol. 309, p. 65.
47 ICJ Report 1955, p. 1 f.
48 ICJ Reports 1955, 23.
49 Decisions of the Federal Constitutional Court, vol. 1, 322, 329; see also Schnapp & Neupert 2004: 167; Hannappel 1986: 26.
50 Decisions of the Supreme Court, vol. 5, 230, 234.
51 See art. 52-56 of the 1907 Hague Regulations on respecting the customs of war on land.
52 See Laws Concerning Nationality, 1954, 586 ff.
53 See, for nationality laws and state practice in Eastern European states, Hailbronner 2005: 70.
54 ILC Rep A/54/10, 1999, chapter 4.
55 Commission for Democracy through Law, CDL-NAT (96.7).
56 See 2nd Report of the ILC.
57 Explanatory Report, p. 17.
58 European Commission for Democracy through Law, Declaration on the consequences of state succession of 13-14 September 1996, Council of Europe Achievements, p. 197.
59 See ILC Report A/54/10 1999, to art. 20 no. 5; see also Hailbronner 2005: 78.
60 Explanatory Report, p. 17.
61 Recommendation 1081 (1988) on problems of nationality in mixed marriages, Council of Europe Achievement, p. 97.
62 Explanatory Memorandum on Recommendation no. R 99, 18 of the Committee of Ministers, Council of Europe Achievement, p. 39.
63 Council of Europe Achievements, p. 36.
64 Explanatory Report, p. 6.
65 Explanatory Memorandum to the Recommendation no. 81, Council of Europe Achievements, p. 49.
66 Explanatory Report, p. 12.
67 Explanatory Report, p. 12.
68 See Explanatory Report, p. 10.
69 ETS no. 58.
70 Explanatory Report, p. 12.
71 See Request no. 31314/96, Karassev vs. Finland, Informationsbrief Ausländerrecht, 1999, 321 f.
72 See German Constitutional Court, 158, 105.
73 International Law Commission, Report of the 56th Session, A/59/10, General Assembly, Official Records, supplement no. 10, 2004, pp. 25 ff.
74 1955 ICJ Reports, p. 24.
75 ILC 2004: 1 f., 17 f..

76 American Law Institute, Restatement of the Law Third, 1987, para. 713 C and Reporter's Note no. 2, p. 222.

77 RIAA 11 (1961), 397 f.; Benedek 1981: 527; Bo'ck 1913: 317.

78 RIAA 14 (1965), 236 ff.; Klein 1981: 185; Rode 1959: 139.

79 RIAA 14 (1965), p. 247.

80 See, e.g. the Mazonis case, RIAA 14, 249.

81 Judgement of 6 April 1984, no. A/18, International Labour Migration (ILM) 1984, p. 489; Mahoney 1983/1984: 695.

82 Judgement of 6 April 1984, no. A/18, ILM 1984, p. 496.

83 Judgement of 6 April 1984, no. A/18, ILM 1984, p. 501.

84 ILC 2004: 40 ff.

85 S/AC. 26/1991/Rev. 1, para. 11.

86 See Bundestagsdrucksache 13/4379 of 17 April 1996.

87 Resolution no. 77(46) and 1996 Resolution no. 79(47).

88 Seville European Council Summit of June 2002.

89 See decisions of the Swiss Federal Court of Justice, Official Collection of decisions, vol. XVII (1891), Decision of February 7, 1891, Bundesrat vs. Tessin, p. 97.

90 See The European Convention of 1963 on the Reduction of Multiple Nationality; Legomsky 2003: 79 ff.

91 See Reservation of Hungary of 21 November 2001.

92 See report of the European Commission on Citizenship of the Union, COM (2001) 506, p. 6.

93 Official Journal 1992, C-348/1.

94 Official Journal 1992, C-348/1.

95 See for instance ECJ of 2 October 2003, C-148/02 - Garcia Avello; C-184/99 - Grzelczyk, (2001) ECR I-6193; C-209/03 - Bidar of 16 March 2004.

96 See art. I-10(1) of the Draft Constitution for Europe, Official Journal 2004, C-310/1: 'citizenship shall be additional to national citizenship and not replace it'.

97 In most EU Member States compulsory military service, however, has been abolished in peace time.

98 Official Journal 2002, L 190/1.

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99 See for instance the amended art. 16, para. 2 of the German Basic Law providing that German nationals may be extradited to another EU Member State.

100 2 BVR 2236/ 04.

101 Art. 16 para. II of the Basic Law therefore had been amended in order to allow extradition within the EU and to the International Penal Court.

102 Op cit. no. 65/66.

103 Op cit. no. 83 ff.

104 Contrary to the assumption of de Groot, the German term 'Staatsangeho'rigkeit' is not avoided due to its ethnic dimension, but due to the fact that the legislation had been based until 1999 upon the 'Reichs -und Staatsangeho'rigkeitsgesetz' of 1913.

105 Conference of the representatives of the governments of the Member States adopting the Treaty on the European Union, Declaration no. 2, Annex to the Final Act of the Treaty on the European Union.

106 Judgement of 20 February 2001, C-291/99 (2001) ECR-01237.

107 C-192/99, no. 19.

108 Judgement of 7 July 1992, C-369/90, ECR 1992, I-4239, no. 10; see also Judgement of 19 October 2004, C-200/02 - Chen vs. Secretary of State for the Home

Department, ECR 2004, I-3887.

109 See for instance Judgement of 19 October 2004, C-200/02 - Chen vs. Secretary of State for the Home Department, ECR 2004, I-3887.

110 See German Administrative Court of 4 June 2003, 1 C 19.02, Neue Zeitschrift für Verwaltungsrecht 2004, p. 489 f.

111 See also art. I-8 of the Draft Constitutional Treaty and art. II-42 which provides a right of access to documents; see Hilson 2004: 640 f.

112 C-184/99 (2001) ECR I-6193 - Grzelczyk.

113 Judgement of 15.3.2005, C-209/03, Bidar/London Borough of Ealing.

114 Judgement of 7 September 2004, Case C-456/02, ECR 2004, not yet published.

115 Judgement of 23 March 2004, Case C-138/02, Collins, not yet published.

116 119 Judgement of 23 March 2004, Case C-138/02, Collins, para. 63.

117 C-184/99 (2001) ECR I-6193 - Grzelczyk, para. 31.

118 Judgement of 15.3.2005, C-209/03, Bidar/London Borough of Ealing, para. 42.

119 Judgement of 23.3.2004, C-138/02, Collins/Secretary of State for Work and Pensions, para. 62.

120 Judgement of 23.3.2004, C-138/02, Collins/Secretary of State for Work and Pensions, para. 62.

121 Judgement of 15.3.2005, C-209/03, Bidar/London Borough of Ealing, para. 69.

122 Official Journal L 229/35.

123 Art. 24, para. 2, 1st sentence.

124 Art. 14, para. 3.

125 See Communication of the Commission on a Community Immigration Policy of 22 November 2000, COM(2000)757, and on Immigration, Integration and Employment of 3 June 2003, COM(2003)336 final.

126 Official Journal L 16/45 of 23 January 2004.