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**NATIONALITY OF THE CHILD  
- FEASIBILITY STUDY**

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## INTRODUCTION

The right to a nationality, proclaimed among the main principles of the European Convention on Nationality of 1997 and listed among the principal human rights by other international instruments, has been especially underlined in relation to one category of human beings, i.e. in relation to children. This has been done in such important international treaties as the International Covenant on Civil and Political Rights of 1996 and the United Nations Convention on the Rights of the Child of 1989.

The first, in its Article 24 para.3, clearly states that “*Each child has the right to acquire a nationality*”. Similarly the UN Convention of 1989, in its Article 7, declared that “*The child (...) still have (...) the right to acquire a nationality*” and obliged states to ensure the implementation of this right “*...in particular where the child would otherwise be stateless*”.

One cannot overestimate the importance of the acquisition of nationality by all children as an initial basis enabling them to possess and enjoy other human rights. Simultaneously, however, we have to be conscious of the fact that children are the most vulnerable human group with regard to various violations of their rights and freedoms, a group which has very limited opportunities to defend these rights by itself. In this connection, there is an objective necessity to take special care of children, as it concerns the elimination of possible negative effects for them, deriving from the application of international and national rules and practices concerning nationality.

The purpose of this Study is to identify issues concerning the nationality of the child, for the resolution of which adoption of Council of Europe legal instrument(s) could eliminate gaps in the existing international/European legal regulation and to harmonize approaches in the Council of Europe member States. The nationality of the child is one of the areas where there is already a rich collection of documents elaborated and adopted under the auspices of the Council of Europe. This Study will therefore concentrate on the presentation and summing up of the opinions already formulated in this area with a view to drawing conclusions as to the necessity of further work in this area.

The particular problems, connected with nationality and the child, have already been identified at the 3<sup>rd</sup> European Conference on Nationality, organized by the Council of Europe in Strasbourg, on 11-12 October 2004, which included questions of such crucial importance as:

- 1) The child’s acquisition of the nationality of his or her country of immigration and whether it should be considered as a means of integration;
- 2) The change of the nationality of the parents and its effects on the nationality of the child;
- 3) Nationality of children in connection with international adoption (including cases where adoption fails);
- 4) Problems relating to the registration of children and the consequences that the absence of registration might have for their acquisition of a nationality, in particular that it might lead to statelessness.

The European Convention on Nationality of 1997 pays a lot of attention to the question of protection of the right of children to acquire, to possess and to enjoy the right to a nationality. There are, however, a variety of areas where the provisions of the 1997 Convention are not sufficient for the appropriate protection of the rights of children. The Convention did not, for instance, take into consideration the rights of children between the ages of 16 and 18 years in connection with the acquisition and loss of nationality. In particular, the relation between Articles 7 and 8 of the

Convention, dealing with “*Loss of nationality ex lege or at the initiative of a State Party*” and “*Loss of nationality at the initiative of the individual*”, needs to be clarified with respect to children. In connection with the nationality of children, the topic of multiple nationality might also be examined further since the 1997 Convention allows children to acquire the nationality of both parents, which might lead to the possession of multiple nationalities by the perpetuation of a nationality through generations. It may be appropriate to examine whether it would be necessary to introduce certain limits where multiple nationality was transmitted to descendants from generation to generation and where there were no longer any effective links with one or more of the States concerned.

There is also a problem of developing existing provisions of the European Convention on Nationality towards a full equalization of rights of children born within legal marriages, born out of wedlock, as well as adopted children. Any discrimination against the last two categories no longer seems to be acceptable, especially in the light of developing rules concerning non-discrimination in enjoying human rights (see, for instance the Protocol 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms).

Another problem which should be raised is the misuse of multiple nationality in connection with illegal trafficking, in particular when the possession of multiple nationality by children is used for the purpose of trafficking.

The identification of these and other additional aspects of the question discussed may be helpful for strengthening the position of children and better protection of their rights in the sphere of national and international law of nationality. There appears to be a visible tendency, both in legislation and in practice, to develop legal and practical measures to that extent.

## **PART I -LEGAL STATU QUO**

### **A. Universal treaty regulations on children and nationality**

Although already in Article 15 of the Universal Declaration of Human Rights of 10 December 1948 it was stated that “*Everyone has the right to a nationality*”, there are a rather small number of universal treaties dealing directly with children in the context of matters connected with the nationality. Among them we could quote the following treaties:

#### ***1. International Covenant on Economic, Social and Cultural Rights***

This treaty (adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966) contains only one provision which directly deals with the question of children and nationality, although it confirms a very important human right:

“**Article 24** (...)3. *Every child has the right to acquire a nationality.*”

It does not connect, however, this right and the obligation deriving from it with any specific State, which weakens this right in its practical application.

#### ***2. Convention on the Rights of the Child***

Among other rights of children, this universal convention (adopted and opened for signature, ratification and accession by UN General Assembly resolution 44/25 of 20 November 1989)

proclaims a right of each child “to acquire a nationality” and, in particular, an additional obligation of each State-party to protect children against statelessness:

**“Article 7**

*1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.*

*2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless”.*

These universal instruments, as we will see below, have had some impact on the European approach to the problems connected with nationality of children. However, it seems rather more preferable and practicable to concentrate on legal instruments elaborated and adopted by the European States, especially those adopted within the framework of the Council of Europe. These instruments are based on the practice of European States and their legal regulations concerning nationality.

**B. European legal instruments.**

***1. European Convention on the Adoption of Children***

Before the adoption of the 1997 European Convention on Nationality, some important provisions concerning children and nationality were already included in a few earlier Council of Europe conventions dealing with various kinds of children’s rights, such as the European Convention on the Adoption of Children (Strasbourg, 24 April 1967):

**“Article 11**

*1 Where the adopted child does not have, in the case of an adoption by one person, the same nationality as the adopter, or in the case of an adoption by a married couple, their common nationality, the Contracting Party of which the adopter or adopters are nationals shall facilitate acquisition of its nationality by the child.*

*2 A loss of nationality which could result from an adoption shall be conditional upon possession or acquisition of another nationality.”*

It is also necessary to recall that on 26 January 2000 the Parliamentary Assembly adopted Recommendation 1443 (2000)<sup>1</sup> “*International adoption: respecting children’s rights*”, where it asked the Committee of Ministers to revise the European Convention on Nationality in order to make it easier for foreign children to acquire the nationality of the receiving country in the event of the adoption falling through, or the adoption procedure not being completed.

***2. European Convention on the Exercise of Children's Rights***

This Convention (Strasbourg, 25 January 1996), although not dealing directly with a child’s right to nationality, facilitates the exercise of the substantive rights of children – including their right to nationality – by strengthening and creating procedural rights which can be exercised by children themselves or through other persons or bodies. In particular, this convention emphasises the idea of

promoting children's rights as the term "promotion" used by this convention is broader than "protection."

### ***3. European Convention on Nationality***

There are a number of provisions in the European Convention on Nationality (Strasbourg, 6 November 1997) dealing directly with the children. They are contained in the following Articles of the Convention:

#### ***“Article 2 – Definitions***

*For the purpose of this Convention:*

*(...) c. "child" means every person below the age of 18 years unless, under the law applicable to the child, majority is attained earlier”;*

#### ***“Article 6 – Acquisition of nationality***

*1. Each State Party shall provide in its internal law for its nationality to be acquired ex lege by the following persons:*

*a. children one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party, subject to any exceptions which may be provided for by its internal law as regards children born abroad. With respect to children whose parenthood is established by recognition, court order or similar procedures, each State Party may provide that the child acquires its nationality following the procedure determined by its internal law;*

*b. foundlings found in its territory who would otherwise be stateless.*

*2. Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality. Such nationality shall be granted:*

*a. at birth ex lege; or*

*b. subsequently, to children who remained stateless, upon an application being lodged with the appropriate authority, by or on behalf of the child concerned, in the manner prescribed by the internal law of the State Party. Such an application may be made subject to the lawful and habitual residence on its territory for a period not exceeding five years immediately preceding the lodging of the application.*

*3. (...)*

*4. Each State Party shall facilitate in its internal law the acquisition of its nationality for the following persons:*

*a. (...);*

*b. children of one of its nationals, falling under the exception of Article 6, paragraph 1, sub-paragraph a;*

*c. children one of whose parents acquires or has acquired its nationality;*

*d. children adopted by one of its nationals;*

*e. persons who were born on its territory and reside there lawfully and habitually;*

*f. persons who are lawfully and habitually resident on its territory for a period of time beginning before the age of 18, that period to be determined by the internal law of the State Party concerned;*

*g. (...)*”.

**“Article 7 – Loss of nationality ex lege or at the initiative of a State Party**

*1. A State Party may not provide in its internal law for the loss of its nationality ex lege or at the initiative of the State Party except in the following cases:*

*a – e. (...)*

*f. where it is established during the minority of a child that the preconditions laid down by internal law which led to the ex lege acquisition of the nationality of the State Party are no longer fulfilled;*

*g. adoption of a child if the child acquires or possesses the foreign nationality of one or both of the adopting parents.*

*2. A State Party may provide for the loss of its nationality by children whose parents lose that nationality except in cases covered by sub-paragraphs c and d of paragraph 1. However, children shall not lose that nationality if one of their parents retains it.*

*3. A State Party may not provide in its internal law for the loss of its nationality under paragraphs 1 and 2 of this article if the person concerned would thereby become stateless, with the exception of the cases mentioned in paragraph 1, sub-paragraph b, of this article.”*

**“Article 14 – Cases of multiple nationality**

*1. A State Party shall allow:*

*a. children having different nationalities acquired automatically at birth to retain these nationalities;*

*b. (...).*

*2. The retention of the nationalities mentioned in paragraph 1 is subject to the relevant provisions of Article 7 of this Convention.”*

**4. Council of Europe Convention on the avoidance of statelessness in relation to State succession**

This latest Council of Europe legal instrument in the field of nationality, opened for signature on 19 May 2006, deals with the particular aspects of nationality connected with State succession. However, it also pays attention to the necessity of avoidance of statelessness in the case of children born following State succession. In this respect, the Convention actually obliges the “State concerned” to grant its nationality to a child threatened by statelessness:

***“Article 10 – Avoiding statelessness at birth***

*A State concerned shall grant its nationality at birth to a child born following State succession on its territory to a parent who, at the time of State succession, had the nationality of the predecessor State if that child would otherwise be stateless.”*

**PART II – IDEAS FOR FUTURE WORK CONCERNING THE NATIONALITY OF THE CHILD**

**A. Conditions for the acquisition and loss of nationality**

In 2002, the Committee of Experts on Nationality (CJ-NA) of the Council of Europe adopted a Report on conditions for the acquisition and loss of nationality<sup>1</sup>, which indicated a number of gaps in the European Convention on Nationality, in particular with regard to the nationality of children. Subsequently, the CJ-NA decided to hold the above-mentioned 3<sup>rd</sup> European Conference on Nationality on the theme “Nationality of the Child”.

This CJ-NA Report examines whether the current Council of Europe standards concerning the acquisition and loss of nationality are sufficient and whether there are any gaps in the European Convention on Nationality which could be filled by the preparation of additional instrument(s). On the basis of the analysis of the nationality laws in the member states, the Report suggests that there is a need for further coordination and harmonization in several areas connected with the acquisition and loss of nationality, among others concerning the right of the child to a nationality.

According to the Report, the areas for consideration should include: *“the nationality of children, in particular children conceived through reproductive technology; children born to parents of different nationalities; children “born out of wedlock”; children born abroad; children born to foreign parents lawfully and habitually resident in a State; adopted children, in particular those children for whom the adoption fails or the adoption procedure breaks down.”*

It is worthwhile to quote here in full the observations made by the CJ-NA, based on the analysis of national laws and practice, and its suggestions (presented in bold here) concerning possible future action:

***“ B. ACQUISITION OF NATIONALITY***

*5. Article 6 of the European Convention deals with the rules relating to the acquisition of nationality and this section of the report aims to follow the order of those rules.*

***i. By birth (Article 6.1.a)***

***(a) children born to one of a State’s nationals***

*6. The Convention states that “Each State Party shall provide in its internal law for its nationality to be acquired ex lege by ...children one of whose parents possesses, at the time of birth of these children, the nationality of that State Party ...”. Most States have provisions in their legislation for a child born on their territory to acquire their citizenship provided that one of the parents possesses the nationality of the State. In some cases acquisition only occurs if the mother is a citizen or, if the father is the citizen, the child is legitimate. Not many States define the terms “parent” or “mother”*

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<sup>1</sup> Report on Conditions for the Acquisition and Loss of Nationality adopted by the Committee of Experts on Nationality on the basis of a draft prepared by Mr. Andrew Walmsley, Strasbourg, 14 January 2003, Doc. CJ-NA (2002).



or “father” in their citizenship legislation. On the surface this may not seem to be required, perhaps because the terms may be defined in other areas of national legislation, but this is an area which requires consideration. Leaving aside the position of adoptive parents, not all legal parents may have genetic links to the child. New reproductive technologies, for example, which appear to be in use more and more, can lead to a child being born without genetic links to the mother or father. Should the child therefore acquire the citizenship of that parent?

***Since the frequency of this problem is likely to increase in the future it would be appropriate to consider defining what is meant by “parents” in the Convention and producing an instrument regarding children conceived through reproductive technology.***

*In this respect the situation regarding adopted children might be a useful pointer. In general, when a child is adopted, the biological parents give up their legal rights concerning the child and the adoptive parents become the legal parents. Where individuals participate in reproductive technology they usually do so in order to allow another individual to be parent of the child. That is a parallel with the parent giving up a child for adoption, and it would be useful to consider whether the child’s nationality should come from the biological or the legal parents. In particular, should the nationality of the child’s legal parents be the basis on which the child’s nationality is determined as they are the parents at the time of the child’s birth, and should the rules regarding legal parents be the ones applicable in the case of new reproductive technologies?*

***7. Problems may exist concerning children whose parents have different nationalities. For example, in the legislation of the country of the parent who is not in his or her country of origin the child might only acquire the citizenship of that parent if both parents agree. It might also occur in the country of birth where the State might require both parents to agree to the child acquiring its nationality at birth. This could be regarded as being contrary to the principles behind Article 6.1 and consideration needs to be given to whether further advice should be offered to States.***

*For example, if the parents do not agree on the nationality, should the child automatically acquire the citizenship of the country in which he or she was born and of which one parent is a national in order to avoid statelessness? In such cases the child would have links with the State in which he or she was born both through *ius soli* and *ius sanguinis*. In cases, where the parents do not agree on the child acquiring one nationality, another solution to the problem might be that the child should acquire the citizenships of both parents, with the possibility of needing to opt for one or the other on reaching majority. Other problems might arise where the parents of the child are of different nationalities but the child is born in a third country. These are discussed in paragraphs 20 – 22. One solution, which is relevant to Article 6.1.a, would be to delete “... Subject to any exceptions which may be provided for by its internal law as regards children born abroad”. However, such an amendment to a State’s law could result in many generations of foreign nationals acquiring the nationality of an ancestor at birth and thereby failing to acquire the nationality of the country in which they are born. Any amendment to this part of Article 6.1.a should therefore take into account the need to assist the integration of foreign nationals in their new country of residence including the ideas at the basis of the double *ius soli* rule.*

***8. There does not appear to be any major problems in European nationality laws concerning acquisition of nationality at birth if the mother is a national of the country in which the child is born, although there may be a requirement in some countries for the mother to formally recognize her child if the child is “born out of wedlock”. Nor are there any problems regarding the acquisition of nationality at birth from the father if he is a national of the country in which the child is born provided that the child is legitimate. The real problems concern children “born out of wedlock” and children born abroad.***

***(b) children “born out of wedlock”***

9. *One of the main problems regarding the application of the Convention in some member States concerns children who are “born out of wedlock”, although many States do allow such children to acquire their citizenship ex lege. The final draft of the Convention approved by the CJ-NA allowed States to make exceptions to the Article for children “born out of wedlock” but this was amended before the Convention was referred to and accepted by the Committee of Ministers. The provisions of Article 6.1.a now make no reference to children “born out of wedlock” but allow a State which requires parenthood to be established by “recognition, court order or similar procedures” to grant its nationality to the child only if procedures determined by its internal law are followed. There is no indication of what these “procedures determined by its internal law” should or should not include. However, in some countries which allow the relationship of the child and the father to be established by recognition or court order this does not necessarily permit the acquisition of the nationality of the father as a legal consequence. The State may require further additional requirements to be met before the child can acquire the father’s citizenship.*

10. *Furthermore, in some countries in which “recognition” is a means by which a male can establish a family relationship with a child and by which the child can obtain citizenship, it is not unknown for some males to use “recognition” as a means of obtaining citizenship for children to whom they are not biologically connected. This can lead to the abuse or misuse of nationality laws (see for example consideration of this problem in CJ-NA (99)1 rev.2) which casts some doubts on whether children should acquire citizenship ex lege solely on the grounds of recognition.*

11. *In other States, parenthood might not be established by such procedures. For example, couples who are not married but who have co-habited for a number of years might not need to seek a court order to establish parenthood and the State’s laws might not contain provisions regarding “recognition”. The Convention refers to “similar procedures” but contains no indication of what procedures would be acceptable. In some States, such decisions are at the discretion of the nationality authorities who might wish to determine that a family relationship exists between the father and the child. In cases where it does not exist, it might be unlikely that there would be much pressure from the father for his child to acquire his citizenship but it is possible that in some cases he might wish his child to acquire his nationality because of differences with the mother. In other cases States have provisions for the acquisition of their citizenship by children “born out of wedlock” upon their (biological) parents marrying each other and the child being legitimized under their family law.*

12. *In many States today the number of marriages is reducing and the number of children “born out of wedlock” is consequently increasing. In other cases some polygamous marriages are not recognized in their law and any children born from that relationship would not be regarded as being legitimate.*

***The acquisition of nationality by children “born out of wedlock” therefore requires more detailed examination. In drafting the Convention, it proposed to allow States to make exceptions to the acquisition of citizenship for children “born out of wedlock”, but now that the Convention says, in essence, that such children should acquire the citizenship of both their parents further advice should be offered to States on how to apply Article 6.1.a.***

*One of the determining factors regarding the grant of citizenship should be whether the child would remain stateless if he or she did not acquire the citizenship of his or her father.*

**(c) children born abroad**

13. Following the completion of its drafting of the Convention on Nationality, the CJ-NA drafted a Recommendation on the avoidance and reduction of statelessness which was adopted by the Committee of Ministers on 15 September 1999 (R99(18)) which said that “Exceptions made with regard to children born abroad should not lead to situations of statelessness” and this should be a determining factor in the application of a State’s legislation. However problems can arise where one State, basically giving relevance to the principle of *ius soli*, will only allow the first generation born abroad of one of its nationals to acquire its citizenship on the basis of *ius sanguinis*. The second generation born abroad will be assumed to have a claim to the nationality of the country in which he or she is born, especially if that is the State in which his or her parent was born. However, if that country applies the principle of *ius sanguinis* before that of *ius soli* the child might be stateless.

***Both States might regard it as being the duty of the other State to grant its citizenship to the child, especially if both accept the Recommendation on the avoidance of statelessness. This conflict between laws based on *ius sanguinis* and those which are a combination of *ius sanguinis* and *ius soli* is a matter which would merit further examination.***

*Ius sanguinis* calls into question whether citizenship should depend on what is essentially the ethnicity of the family and raises what is meant by “a genuine and effective link” with the State and how foreign nationals could establish such a link.

**(d) children born abroad to one of its nationals also born abroad**

14. Where States do not grant their nationality to such children *ex lege* they need to consider providing facilitated access to their citizenship. Most States require any application to be made before the child reaches the age of majority but in some cases descent from a national might not be established until after the child has reached that age. In some States that person is able to make an application for citizenship after a limited period after the descent was established.

**(e) children one of whose parents acquires or has acquired the State’s nationality**

15. In most States children acquire nationality if one of their parents acquires it, although residence in the State by the child is often required. Where acquisition by this means does not occur *ex lege* children usually have the right to acquire the parent’s nationality through option or registration.

**(f) adoption**

16. Most States provide for the acquisition of their nationality by foreign children adopted by one of their nationals. Many of the requirements are similar to those concerning the acquisition of citizenship by birth, especially in cases where the adoptive parents are of different nationalities, and any provisions concerning acquisition through adoption should be considered in a similar light. Most provisions relate mainly to children adopted in the State by one of its nationals. It is however worth noticing that the 1993 Hague Convention on Adoption provides that in the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship (full adoption), children adopted abroad in a signatory country should have the same rights as a foreign child adopted in the State. At the present time this would not appear to produce many problems requiring further consideration. Full adoption should be regarded basically as birth through legal channels and the right to acquire citizenship should be similar to that of a child born naturally to his or her parents. Entitlement to citizenship in such cases is likely to have already been determined in the enactment of the State’s nationality laws.

17. Problems might however arise where a child has come from the country of its origin to a member State to be adopted by a national or nationals of that State and then the adoption process fails. In such cases the child might become stateless.

**The issue was considered by the Parliamentary Assembly when it made its Recommendation on international adoption: respecting children's rights, and requested the Committee of Ministers to revise the European Convention on Nationality in order to make it easier for foreign children to acquire the nationality of the receiving country in the event of the adoption falling through or the adoption procedure breaking down. In responding to the Parliamentary Assembly, the Committee of Ministers referred to the opinion delivered by the CDCJ, after consultation with the CJ-NA, which accepted that these problems deserved further attention and that the possible introduction of new rules in this regard, supplementing the European Convention on Nationality, should be deliberated in the context of the current work of the CJ-NA on the conditions for acquisition and loss of nationality.**

Details of this are contained in the Committee of Ministers' reply to Parliamentary Assembly Recommendation 1443(2000) (CJ-NA GT (2002) 10).

**(g) children born on the State's territory and lawfully and habitually resident**

18. The principle of *ius soli* is no longer strictly applied in most European States but it can be applied where the parents of a child, both being foreign nationals, are permanent residents in the State. In some States acquisition of citizenship for such children can be facilitated after birth of the child as soon as the parents are granted permanent (or lawful and habitual) residence, and in other States after a defined period of residence.

**Given that *ius soli* is no longer applied unrestrictively by most European States it may be helpful to consider whether specific rules are needed concerning the citizenship of children born on the territory of a State and who are resident there.**

**(h) foundlings (Article 6.1.b)**

19. The Article provides that States should provide for its nationality to be acquired *ex lege* by foundlings found in its territory who would otherwise be stateless. This follows the provision in the 1961 Convention on the Reduction of Statelessness and generally there is no problem for most States in applying the provision. However in some States there are provisions in their legislation which only apply to new born infants rather than minors, whilst in others nationality can be lost if descent of the child is discovered even after the child has become an adult. Whilst it might be considered whether it would be helpful to provide further advice regarding the nationality of children found on the territory of a State, cases of foundlings are so few that it would not be necessary at this time to devote further attention to this matter.

**ii. Children born on the territory who do not acquire another nationality at birth (Article 6.2)**

20. Problems might arise concerning a child of parents of the same or different nationality born in a country of which neither parent is a national. The child might not automatically acquire citizenship of that State and yet the non-possession of the State's nationality or the non-agreement of the parents to the child acquiring one or other of their nationalities might lead to the child remaining stateless for a period of time. In other cases, where the parent or parents are refugees, they might not have the necessary documentation to establish the child's right to acquire one or both of their nationalities, and the State from which they have moved might not be willing to

*provide them with the necessary information. In such cases it would be beneficial if the State in which the child is born would grant the child citizenship through birth rather than allowing he or she to remain stateless, as provided for in Article 6.2. The Article provides that where children are born on the territory of the State but do not acquire another nationality at birth, the State concerned should grant its nationality to the child at birth ex lege or, for children who remained stateless, upon an application being lodged on behalf of the child. The Article permits States to make the outcome of such applications dependent upon lawful and habitual residence on its territory, but for no longer than 5 years preceding the application being lodged. The legislation in many countries provides for the first option whilst in others the grant of citizenship is dependent upon an application being made. There would not appear to be any major problems concerning this Article of the Convention.*

*21. There is no provision however concerning children born on the territory of a State who become stateless during their minority. Article 6.4.e provides that persons born on a State's territory and lawfully and habitually resident there should have facilitated access to the nationality of the State and Article 6.4.g extends this to stateless persons and recognized refugees, but the position of a child should be different.*

***The 1989 Convention on the Rights of the Child sets out that a child has the right to a nationality, and the provisions of Article 6.2.b should therefore be extended to children born on the territory and resident there who become stateless during their minority provided the application is made whilst the child is still a minor.***

*22. Regarding children, the Convention deals with their acquisition of nationality through specified situations regarding the nationality of their parents and the place of birth of the child. It does not, however, refer to the voluntary acquisition of nationality by a child or on behalf of a child. The 1989 Convention on the Rights of a Child states that every child has the right to a nationality but the legislation of most States requires applications for nationality for the child to be made by his or her parents or legal guardian. Should children be entitled to apply for nationality on their own behalf, regardless of whether or not their parents are also seeking a change of citizenship? Should young persons have the right to remedy any decisions regarding their nationality which were taken by their parents during their minority or through the child's adoption by parents of a different nationality?*

***Under the 1989 Convention on the Rights of the Child a minor has the right to a nationality but should the child also have the right to recover a nationality lost through decisions in which he or she had no input? The 1997 Convention contains no reference to the voluntary acquisition of nationality by children nor their legal ability to recover nationality they have lost through actions in which they have no legal input."***

## **B. Possible amendments to the European Convention on Nationality**

In connection with the European Convention on Nationality and its provisions on the nationality of children, interesting suggestions have been formulated by Waltraud Fuchs-Mair and Michaela Staudigl in their Report<sup>2</sup> presented at the above-mentioned 3<sup>rd</sup> European Conference on Nationality, held in October 2004 in Strasbourg. They include proposals to modify the Convention on the basis of the following principles:

<sup>2</sup> European Convention on Nationality – Best Practices for children - Doc. CONF/NAT(2004)Rap3) of 5 October 2004.

***“Preamble - basic principle***

*As an expression of the basic principle, the preamble to the European Convention on Nationality should be extended to include the following item: “Convinced that the best possible support should be given to the integration of children in the community at the level of nationality law ....”*

***Four principles to ensure best practice nationality rules for children:***

*The following amendments need to be made to the principles formulated in the European Convention on Nationality:*

***Principle 1 - General preferential treatment rule***

*Children are to be given preferential treatment with regard to the rules governing the acquisition and loss of nationality regardless of the nationality held by their parents, including the right to multiple nationality.*

***Principle 2 - Close ties with the country of residence***

*A prerequisite for preferential treatment is the existence of close ties between the child or the child’s parents and the country of residence, in particular in the form of a certain minimum period of uninterrupted residence.*

***Principle 3 - No automatic link between the nationality of the parents and that of the child***

*Changes in the nationality of the parents do not automatically affect the nationality of the child.*

***Principle 4 - Possible restrictions on parents’ rights in nationality procedures***

*The rules for preferential treatment for children may include restrictions on parents’ legal rights to speak for their children on nationality matters.”*

Additional amendments in the form of “*Proposed rules for the preferential treatment of children for inclusion in the European Convention on Nationality*” have also been formulated in subsequent chapters of the above-mentioned Report, dealing with the acquisition and loss of nationality, procedures relating to nationality, and multiple nationality:

***“ 5. Proposed rules for the preferential treatment of children for inclusion in the European Convention on Nationality***

***5.1 Preamble - additional item***

*Convinced that the best possible support should be given to the integration of children in the community at the level of nationality law.*

***5.2 Principles - additional item***

*European Convention on Nationality, Chapter II, Article 4.*

*Children shall be accorded preferential treatment in the rules relating to the acquisition and loss of nationality regardless of the nationality of their parents, including the right to hold multiple nationality. In order to qualify for preferential treatment, children shall have close ties with the country of residence, in particular in the form of a certain period of uninterrupted residence. Children shall not be automatically affected by changes to the nationality of their parents. The rules for preferential treatment for children may include restrictions on parents' legal rights to speak for their children on nationality matters.*

### **5.3 Acquisition of nationality - additional item**

*European Convention on Nationality, Chapter III, Article 6*

*1c) children born in the territory of a State Party whose parents are in possession of a residence permit pursuant to internal law and have completed the prescribed period of residence.*

### **5.4 Loss of nationality**

*European Convention on Nationality, Chapter III, Article 7 - Loss of nationality ex lege or at the initiative of a State Party.*

#### **Article 7 (2) - current text:**

*A State Party may provide for the loss of its nationality by children whose parents lose that nationality except in cases covered by sub-paragraphs c and d of paragraph 1. However, children shall not lose that nationality if one of their parents retains it.*

#### **Article 7 (2) - proposed amendment:**

*Children whose parents lose the nationality of a State Party do not themselves lose that nationality.*

*European Convention on Nationality, Chapter III, Article 8 - Loss of nationality on the initiative of the individual.*

#### **Article 8 (3) - additional item:**

*Renunciation of a child's nationality through a declaration of will by the child's parents shall only be permitted if it can be proved that renunciation is in the interests of the child.*

### **5.5 Procedures relating to nationality - Article 10a - additional item**

*Each State Party shall ensure that in nationality procedures children are accorded independent rights to file applications, to consent and to be heard.*

### **5.6 Multiple nationality**

*European Convention on Nationality, Chapter V, Article 14 - Multiple nationality*

#### **Article 14(1) subpara. a - current text:**

*A State Party shall allow children having different nationalities acquired automatically at birth to retain these nationalities.*

**Article 14(1) subpara. a - proposed amendment:**

*A State Party shall allow children to retain all nationalities once acquired.”*

The principles set out above as well as the proposed rules for preferential treatment could be included in a future document dealing with nationality and children if elaborated within the Council of Europe.

**C. Feasibility of new Council of Europe instruments**

At the eve of the 3<sup>rd</sup> European Conference on Nationality (Strasbourg, 11-12 October 2004), the Working Party of the Committee of Experts on Nationality (CJ-NA-GT) formulated ideas to be discussed at the Conference as well as for the subsequent follow-up work in this area. They included, among others, the following suggestions<sup>3</sup>:

*“48. ... It was not excluded that the results of the Conference might indicate the need for the elaboration of an additional protocol to the European Convention on Nationality on the rights of children in relation to nationality. The Convention did not, for instance, take into consideration the rights of children between the ages of 16 and 18 years in connection with the acquisition and loss of nationality. In particular, the relation between Articles 7 and 8 of the Convention needed to be clarified in respect of children.*

*49. In connection with the nationality of children, the topic of multiple nationality might also be examined further since the Convention allowed children to acquire the nationality of both parents which could lead to the possession of multiple nationalities by the perpetuation of a nationality through generations. It might be appropriate to examine whether it was necessary to introduce certain limits where multiple nationality was transmitted to descendents from generation to generation and where there were no longer any effective links with one or more of the States concerned.*

*50. Another problem raised was the misuse of multiple nationality in connection with illegal trafficking, in particular when the possession of multiple nationality by children was used for the purpose of trafficking.”*

This 3<sup>rd</sup> European Conference on Nationality dealt with the integration and nationality of children, the position of children in decisions regarding their nationality, nationality of children in connection with international adoption and problems relating to the registration of children and its implications for the acquisition of nationality. The participants of the Conference called on the Council of Europe, through its Committee of Experts on Nationality (CJ-NA), to take account of the discussions at this Conference and in particular to<sup>4</sup>:

*“1. Develop the principles and rules of the European Convention on Nationality with regard to:*

- acquisition of nationality of the country of residence by first- and second-generation migrant children,*
- change of nationality of the parents and its effects on the nationality of the child,*
- avoidance of statelessness of children in particular,*
- the acquisition of nationality by foreign children in the event of their international adoption falling through or the adoption procedure braking down, in particular when there is a risk of their being stateless.*

<sup>3</sup> Report of the 25<sup>th</sup> meeting of the CJ-NA-GT, 9-11 June 2004.

<sup>4</sup> Report of the 21<sup>st</sup> plenary meeting of the Committee of Experts on Nationality (CJ-NA), 13-15 October 2004.



2. Pay particular attention in its future work to:

- *the relationship between the acquisition of nationality by migrant children and their integration,*
- *the best interests of the child as stipulated in the Convention on the Rights of the Child,*
- *the right of children/minors to be heard in decisions affecting their nationality,*
- *the effect of absence of birth registration on the acquisition of nationality by children,*
- *equal treatment of children “born in and out of wedlock” with regard to their nationality.”*

These suggestions are also of great value for future possible work of the Council of Europe on any additional instrument in this field designed to complement the European Convention on Nationality.

Subsequently, the CJ-NA included the questions related to the nationality of children in its draft terms of reference for 2006-2007<sup>5</sup>. They aimed at providing a follow-up to the ideas expressed at the 3<sup>rd</sup> European Conference on Nationality on elaboration of legal rules concerning conditions for the acquisition and loss of nationality by children. Although the implementation of these terms of reference was never started because of the subsequent discontinuation of the CJ-NA, these CJ-NA proposals concerning the future Council of Europe work on nationality are worth recalling:

*“...a. Conditions for the acquisition and loss of nationality of the child*

- *to prepare principles and rules on this issue based on the 2002 report on conditions for the acquisition and loss of nationality and the conclusions and proposals for follow-up to the 3rd European Conference on the theme “Nationality of the Child”. Focus will be placed on the child as part of the overall theme of conditions for the acquisition and loss of nationality due to its topicality and the outcome of the Conference held in 2004...”.*

## CONCLUSION

On the basis of the documents referred to above, it is justified to state that there are at present a number of issues related to the nationality of children, which are not – in my opinion – sufficiently regulated and therefore constitute an interesting area of activity for further consideration by the Council of Europe.

These are, in particular, questions concerning acquisition and loss of nationality by:

- a) children conceived through reproductive technology;
- b) children born to parents of different nationalities;
- c) children “born out of wedlock”;
- d) children born abroad;
- e) children born to foreign parents lawfully and habitually resident in a State;
- f) adopted children, in particular those for whom the adoption procedure is not completed.

It is worth recalling that in the process of developing the principles and general provisions contained in the European Convention on Nationality of 1997, the Council of Europe has already adopted, in 2006, a complementary treaty – the Council of Europe Convention on the avoidance of statelessness in relation to State succession” (CETS 200, 19 May 2006). Article 10 of this Convention, dealing with the avoidance of statelessness at birth, was quoted above.

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<sup>5</sup> Report of the 27<sup>th</sup> Report of the 27<sup>th</sup> meeting of the Working Party (CJ-NA GT), 21-23 March 2005.

Taking into account this experience, it seems feasible to suggest the elaboration, under the auspices of the Council of Europe, of a new legal instrument dealing in a comprehensive manner with the above-mentioned and other matters concerning children and nationality. As to the legal form of such an instrument, it could either be a recommendation of the Committee of Ministers, or if a more ambitious approach is accepted, a new treaty, such as an additional protocol to the 1997 Convention, or even a separate convention like the above-mentioned Convention on the avoidance of statelessness in relation to State succession.

There is also a possibility of a step-by-step procedure, as in the case of the Convention of 2006, which was preceded by Recommendation No. R (99)18 on the avoidance and the reduction of statelessness, adopted on 15 September 1999, which also dealt, among others, with the question of State succession and nationality. Similarly, it should be possible now to prepare first, as an introductory step, a recommendation setting out guidelines to the States in the field of nationality matters where they are connected with children or where they affect children. Then, the next logical step will be to consider an instrument of binding nature. Setting up an appropriate structure building on the experience and expertise of the former CJ-NA will be necessary for carrying out this work.