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(CJ-NA)

REPORT ON MISUSE OF NATIONALITY LAWS[1]

Extract from the report of the 16th meeting of CJ-NA (20-22 October 1999)

[1] This report has been adopted by the Committee of Experts on Nationality (CJ-NA) at its meeting on 4-6 October 2000 on the basis of a draft prepared by Mr Giovanni KOJANEC, Italy, former Chair of the CJ-NA. The initial draft of report has been prepared by Mr Andrew WALMSLEY, former Head of the Nationality Directorate of the United Kingdom and former member of CJ-NA

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SECTION I – INTRODUCTION: The Notions of Misuse and Abuse

1. At its 66th meeting, during the week beginning 25 November 1996, the European Committee on Legal Co-operation (CDCJ) approved new terms of reference for the Committee of Experts on Nationality (CJ-NA) which instructed the CJ-NA, amongst other things, "to consider the necessity of any additional measures to deal with problems regarding nationality, in particular in order to .... iii. prevent misuse of nationality laws" and "..... iv. deal with documents and certificates related to nationality". This report has been written to assist the CJ-NA's deliberations on this subject. It attempts to highlight the problems and indicate the "action which, having regard to the provisions of the European Convention on Nationality and other appropriate international instruments, including the European Convention on Human Rights, can be taken by States to prevent the misuse of their nationality laws (eg. improper acquisition of nationality, in particular by marriage to avoid the application of immigration laws, voluntary statelessness and other problems)".

2. What is meant by "misuse" (in the French text the word ”abus” is used), or "abuse" (in the French text the word “fraude” is used), as it is sometimes referred to? These terms might seem synonymous but there is an important, but subtle, difference. "Misuse" means using the law for an improper purpose whereas "abuse", whilst having that meaning, also refers to the violation of the law. In the context of this report the term "misuse" is used to refer to the framework in which nationality laws are drafted and to those circumstances where people meet the requirements of the law to obtain a nationality status legally but do so in order to circumvent, or avoid the operation of, other laws, notably immigration laws, which would otherwise apply to them. "Abuse" is used where the individual produces false evidence or assumes a false identity to meet prima facie the requirements of nationality law.

3. In considering the question of the misuse or abuse of nationality law, it should be remembered that the overwhelming majority of applicants for citizenship, or those people who want to establish their citizenship status, do so legally. However, because many rights and privileges and benefits flow from a particular nationality status, some people, a tiny minority, who do not qualify for citizenship try to exploit the laws to gain access to those rights and benefits. In seeking to guard against this potential exploitation a proper balance needs to be struck between the interests of the State and those of the individual. States should not require such absolute evidence from applicants that would deter the ordinary, honest, applicants from seeking citizenship or place unnecessary administrative obstacles in their way.

4. In general, there must be a presumption that democratic countries which subscribe to the European Convention on Human Rights would not misuse their nationality laws to deny individuals the citizenship of those countries for improper reasons. But occasionally States do enact legislation which is contrary to principles in international treaties and instruments. Article 3 of the European Convention on Nationality re-states the principle first enunciated in Article 1 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws, that each State shall determine under its own law who are its nationals. But the two Conventions limit this acceptance by going on to say that this law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality. This recognises that occasionally a State might enact nationality legislation whose provisions are not generally acceptable to other States. One such example could be where a State has provided for an individual to lose its nationality without the acquisition of the nationality of another

State, thereby rendering the person stateless. This and further examples are discussed in more detail in this report.

SECTION II: REVIEW OF SITUATIONS RELATING TO THE MISUSE OR ABUSE OF NATIONALITY LAWS

PART I – Situations in which the legislation may favour the misuse of nationality laws

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

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

A. Acquisition of nationality

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

8. Some countries have granted their nationality for Treaty purposes to inhabitants of their former colonies or overseas territories on a non-reciprocal basis. What is meant by this is that an inhabitant of State A's former colonies or overseas territories has citizenship of that country and the right of abode in its main territory, but a citizen whose nationality derives from a connection with the main territory does not have the right of abode in the former colony or overseas territory. And for European Union purposes, for example, nationals of both the

territory and the former colony or overseas territory have freedom of movement rights within the Union, but other EU citizens do not have the right of free movement to the former colony or overseas territory. The reason for this distinction and limitation of Treaty rights is quite clear: most of these former colonies or overseas territories are small and have a unique identity and culture which would be damaged by the influx of a large number of people from outside.

9. Another example of where such a link might be considered not to exist is where an individual is allowed to purchase a country's nationality by investing a large sum of money in the country. Most countries normally require a minimum number of years' residence on their territory before someone is eligible to apply for naturalisation as one of its citizens. This residence establishes the link between the individual and the State prior to the legal bond which the grant of nationality establishes. The grant of citizenship to an individual who has only minimum residential qualifications and who has no other effective link with the State, allows the individual to obtain a status to which he would not otherwise be entitled, ahead of others who might have a stronger link falling short of the normal requirements for naturalisation. Acquisition of nationality in these circumstances could make other laws inoperable so far as the individual is concerned. It might allow the renunciation of their previous nationality to take place or prevent their extradition to their country of origin because some countries do not allow their nationals to be extradited. The grant of citizenship to a privileged few in these circumstances could be regarded as a misuse of nationality law.

B. Renunciation of nationality

1. The situation which most often allows the misuse of nationality laws is where States permit their nationals to renounce their citizenship without first acquiring the nationality of another country or the guarantee of acquisition. Most cases of this nature involve individuals who are living outside the territory of the State concerned, sometimes only temporarily. Renunciation of their citizenship makes them stateless persons if they do not possess another nationality and can create problems for the State in which they are residing, especially if they do not have permanent residence or settled status under that State's immigration laws. Any renunciation which took place without the individual possessing either another nationality or the promise of acquiring one would not be consistent with the relevant principles of customary international law, as well as with international treaties and the principles of law generally recognised with regard to nationality. (See in particular the Council of Europe 1997 Convention on Nationality, and the United Nations 1961 Convention on the reduction of statelessness and Recommendation No. R(99)18 on the Avoidance and the Reduction of Statelessness). Article 4 of the European Convention on Nationality states that the rules on nationality shall be based on the principle inter alia that statelessness shall be avoided, whilst Article 8 states that each State party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless. Article 7 of the 1961 Convention on the reduction of Statelessness provides that if the law of a contracting State permits renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality.

C. Deprivation of nationality

11. There have been occasions, when during political, religious and ethnic conflicts, groups of individuals have been deprived of their citizenship because of their race, national or ethnic origin, religion or political beliefs. Arbitrary deprivation whether de jure or de facto, is unacceptable and should not be tolerated by other States. Discrimination is covered in Article 14 of the European Convention on Human Rights but, so far as nationality law is concerned, Article 5 of the European Convention on Nationality specifically provides that the rules of a State party on nationality "shall not contain distinctions or include any practise which amount

to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin". Reference should also be made to the procedural guarantees contained in Chapter 4 of the European Convention on Nationality. Occasionally an individual might be deprived of his nationality for political reasons but Article 4 of the European Convention on Nationality provides that "no one shall be arbitrarily deprived of his or her nationality". To do so, being a misuse of nationality law, contravenes the Convention.

PART II – Misuse by individuals

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

A. Marriage

(i) Marriages of convenience

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

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

15. The fact that marriage to a national allows a foreigner to circumvent a country's immigration control or acquire its citizenship has encouraged some individuals to set up rackets in which they will either marry, or arrange for someone else to marry, a foreigner for money without any intention of having a normal married life, to assist them in such an aim. However, the time it might take for the spouse to achieve permanent residence or settled status or acquire citizenship, and thus allow the dissolution of the marriage, can restrict the opportunity for such racketeers to contract lawful marriages, so many contract bigamous or polygamous marriages. These marriages by a national may render them unlawful, but they may not come to the attention of the nationality authorities until some time after citizenship has been granted to the supposed spouse, and when it did a view would need to be taken on whether the citizenship was acquired by means of fraudulent conduct which justified the loss of nationality at the initiative of the State.

ii) Polygamous marriages and "marriages récognitifs"

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

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

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

iii) Registered partnerships

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

B. Adoption

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

21. Certain problems may arise from the distinction which exists in some countries between simple and full adoption. In France, according to the new nationality law of 1998, children adopted abroad by French nationals by "*adoption simple*" may acquire French nationality by a simple declaration (children subject to "*adoption pleniére*" by a French national acquire ex lege French nationality). This could give rise to misuse of nationality laws, even though the foreign judgement has to be subject to an exequatur procedure. However, the procedures for full adoption and recognition of foreign adoptions are very detailed in most States, and these procedures are usually generally sufficient to ensure that misuse does not take place.

C. Recognition

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

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

D. Stateless persons

24. Many States, following their obligations under the 1951 Convention relating to the Status of Refugees and the 1954 Convention on the Reduction of Statelessness, facilitate the naturalisation of refugees and stateless persons resident on their territory. This could encourage some individuals to become stateless in order to avail themselves of these provisions, especially if they would not qualify for a non-facilitated naturalisation. Sometimes this statelessness has been brought about by either the person concerned or the parents of a child making a declaration to that effect and thus voluntarily and actively becoming stateless in order to obtain this advantage. Or the individual concerned could have the nationality of another country confirmed simply by filling in an application for registration or by opting for it, but chooses not to do so in order to benefit from the facilitated naturalisation procedures. Failure to carry out a simple administrative procedure and thereby render oneself stateless for the sole purpose of applying for naturalisation on more beneficial terms than would otherwise be the case is a misuse of nationality law. These situations should not be confused with the cases of persons who are not able to acquire the nationality of any State, owing to the absence of appropriate provisions in the nationality laws of the State or States concerned or because the individuals have no appropriate connection with any State. Sometimes involuntary statelessness occurs because States, when drafting their legislation, do not accurately foresee how it will apply in all cases.

E. False acquisition of nationality

25. The above examples of the misuse of nationality laws mainly refer to individuals notionally going through the process of meeting the statutory requirements of the law in order to obtain nationality of another State when they do not have the genuine and effective link which otherwise would be required of them. Another common problem is the fraudulent use of documents in order to establish a prima facie entitlement to nationality. These documents might be genuine documents falsely acquired or the personal details on which have been

altered, or false or forged documents. In France, for example, cases of fraud most often involve civil status certificates for minors who can benefit from the effect of the acquisition of French nationality by one of the parents (application of the principle of the collective effect - "*effet collectif*"). For the application of the law before 1993, it is sufficient to establish a parenthood relation of minors with their parents who became French, in order for them to become automatically French as well. Fraudulent acts of recognition and establishment of the parenthood relation, which were easy to establish in certain countries, will thereby determine the conditions for the acquisition of French nationality by those minors. Since 1993, the obligation to declare minors, who have to live with the applicant in order to benefit of the so-called "collective effect", has considerably limited the number of cases of fraud. The latter however still exists in the form of false documents concerning divorce or death abroad of one of the spouses. Applicants to French nationality would thereby be able to state that they have lost any relation with their country of origin.

26. The nature of nationality work is such that many of the documents produced are foreign in origin or of considerable age, making it difficult to check their authenticity. Nationality authorities can of course challenge the authenticity of the documents produced but, in general terms, most apply the rule that any document produced by a foreign country is authentic if it is drawn up in accordance with the usual formal requirements of the country in question. Countries can and do request their diplomatic or consular staff to verify the content and legality of all foreign civil-status certificates if there is doubt as to their authenticity, but such work can be time consuming without any conclusive proof one way or the other. Questioning a document merely because of its foreign origin can be discriminatory. Corruption does unfortunately exist in some States, but the fact that the authenticity of documents emanating from them is always challenged can create diplomatic problems and decisions are therefore often taken by nationality authorities on false or inaccurate documentation. Where the document is supposedly aged, especially those supposedly emanating from a zone of conflict or national disaster or over which there has been a change of sovereignty, checking their authenticity becomes doubly difficult. In addition, in certain countries, foreign documents are not recognised unless they are legalised. In this context, reference should be made to the Hague Convention of 1961 Abolishing the Requirement of Legalisation of Foreign Public Documents, to the 1977 Convention on the Exemption from Legalisation of certain Records and Documents (unofficial translation from French) and the 1957 Convention on the Free Delivery and Exemption from Legalisation of Delivery (unofficial translation from French) of Civil Status Documents of the International Commission on Civil Status.

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

assessment of the risk of increased instances of fraud. The proposal of the Committee is now part of the Swedish citizenship act.

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

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

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

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

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

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

32. The situation created by State succession allows for the possibility of the misuse of nationality laws. Nationals of one succeeding State resident in the other may try to persuade the authorities of the State in which they reside that they have not retained or acquired the nationality of the other State in order to gain a more beneficial position in acquiring the nationality of the State in which they are residing, or in order to avoid removal to the country of which they are legally a national. Or the State itself refuses to give its nationality to a person on its territory because it argues that the individual is a national of another State. In considering problems of this nature a proper balance needs to be struck between the interests of States and those of individuals in the context of a State succession situation and to invite States which are involved in State succession situations to co-ordinate their legislation and practice relating to nationality, in particular with a view to avoiding statelessness (eg. by concluding bilateral and/or multilateral agreements). Special attention should be paid also in the context of State succession to the prohibition of arbitrary decisions concerning nationality issues. This prohibition should not only be limited to the deprivation of nationality, but should be extended also to arbitrary denial of the right to acquire the nationality of the successor State or any right of option to which persons concerned are entitled. Such a rule has been adopted in 1999 by the United Nations International Law Commission in its Draft Articles on Nationality of Natural Persons in relation to the Succession of States with the purpose of preventing abuses which may occur in the application of any law or treaty.

H. Other possible sources of misuse of nationality laws

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

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

SECTION III – Measures adopted by States in order to prevent the misuse or abuse of Nationality Laws

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

A. Situations in which the legislation may favour the misuse of nationality laws

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

B. Marriages of convenience

37. With marriages of convenience it is much easier to misuse the nationality laws of States which grant foreign spouses the right to acquire their nationality ex lege than the laws of those States which only provide for a facilitated naturalisation procedure for foreign spouses. States which restrict multiple nationality also have less problems than others regarding marriages of convenience in order to acquire their nationality. However, introducing restrictions concerning multiple nationality is not an appropriate solution to fight against the misuse of nationality laws. One remedy concerning marriages of convenience would be to remove the entitlement to citizenship and make the grant discretionary. This happened in the United Kingdom when the British Nationality Act 1981 came into force. It removed the right of wives of British subjects to register as such themselves and required them and the husbands of British citizens to apply for naturalisation, albeit on more favourable terms than those normally required. When enacting such a fundamental change the entitlements of one Act should be carried forward for a period of grace; in the United Kingdom's case it was 5 years. Another remedy would be to require that the marriage must subsist at the time of acquisition of citizenship. In Austria, if person A (a foreigner and divorced) marries person B (Austrian national), person A may acquire Austrian nationality in a facilitated manner. However, if person A divorces again and marries the former spouse, person C (foreigner), according to the recent amendments to the Austrian legislation, the transmission of the nationality in a facilitated manner to person C is prohibited.

38. An alternative approach would be to make it harder to contract sham marriages. In the United Kingdom, registrars are to be given the power to request evidence of name, age, marital status and nationality from couples seeking to be married. They will be given the power to halt any marriage where they have doubts about its legality and will be under a statutory duty to report to the immigration authorities any suspicious marriage applications. Those wishing to marry will in future have to give 15 days notice of their intentions rather than the current 24 hours. In France, a recent legislation allows civil status officials, who have serious suspicions that the consent of one of the spouses to a marriage was not true or simulated, to bring the case before the Public Prosecutor, who may oppose to the marriage. This decision may be subject to a judicial review. This procedure has to take place within a very short period of time. In Belgium, a new provision has been introduced in the Civil Code and will enter into force on 1 January 2000. This text reads as follows: "There is no marriage when, even if the consent has been given, it is shown by a combination of circumstances that the intention of at least one of the spouses is manifestly not the creation of a lasting conjugal community, but aims only at

obtaining an advantage relating to the stay or the status of the other spouse" (*unofficial translation from French*). A combination of the following circumstances constitutes a serious indication of the risk of a marriage of convenience:

- the parties do not understand each other or make use of an interpreter,
- one of the parties lives with another person in a stable manner,
- a great difference of age,
- the parties manifestly do not know each other,
- one of the parties exercises prostitution activities.

An appeal against the decision of the civil status official to refuse to celebrate marriage is of course possible.

39. Any such restrictions like these need to be considered alongside the fundamental human right set out in Article 12 of the European Convention on Human Rights that men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right. Ensuring that a couple are free to marry each other is one thing : that ensures that the requirements of the national laws are fulfilled. But trying to prevent two parties who are free to marry from marrying solely because their motives in marrying are doubted could be said to be denying them their fundamental human right. Marriages of convenience have to be seen in their proper context. The vast majority of couples who marry do so for age old reasons which have stood the test of time. Some marriages may be convenient, but that does not mean that they are a sham. Any powers which are taken to limit the right to marry should be carefully considered against Article 12 referred to above. Furthermore, controls of this nature could open up new scope for racial or ethnic discrimination. What will trigger the suspicion that a marriage may not be genuine except for the fact that one of the parties is not a national? What criteria will be applied to determine whether the proposed marriage is a "sham"? What evidence will be required to prove that a party is not married already? (How do you prove a negative?) What about cultural differences? These are all matters which need to be taken into account if any new powers are not to be seen as discriminatory.

40. So far as registered partnerships are concerned, as these are a new phenomenon which, at the present time, do not appear to confer nationality or the right to apply for it as the foreign partner, there is little evidence of them being used to evade immigration controls or misuse nationality laws. Discussion about such partnerships has so far focused on such matters as the conditions for entering into such partnerships, the rights and obligations to each other and to others, separation and dissolution and so on. There has been little discussion about the nationality aspects of such partnerships but, if a registered partnership is to become a legally regulated form of cohabitation which is equivalent to marriage, then consideration needs to be given by those States who are preparing to acknowledge them to the nationality consequences of a registered partnership. Should the foreign partner be entitled to citizenship on exactly the same basis as a foreign spouse? If the answer to that question is in the affirmative, then this will give rise to the possibility of abuse, as is the case with marriage, and adequate safeguards will need to be taken to prevent such misuse.

C. <u>Adoption</u>

41. The abuse of the adoption system may have been curtailed by the Hague Convention drafted in 1993 by a special commission of the Hague Conference on Private International Law. The Convention seeks to ensure that inter-country adoptions take place only after the best interests of the child have been properly assessed, and after the appropriate authorities in the "receiving

State" (ie the country in which the adopters are habitually resident) have indicated that the child will be permitted to enter and remain in the country. Adoptions carried out in accordance with the terms of the Convention will be known as "Convention adoptions" and in each State there will be a "central authority" which will oversee the transfer process. The central authority will have a power of veto over whether the adoption takes place at all, since the Convention does not allow the country of origin to make an adoption order until it has received confirmation that the child will be permitted to enter and remain in his new country. Other safeguards are that States ratifying the Convention will be responsible for ensuring that the standards and procedures in all inter-country adoptions between Convention countries comply with the Convention's principles and that any contracting State may withdraw recognition of adoptions in another contracting State where it is known or suspected that that other State is not fully discharging its Convention obligations. One of the means to fight effectively against the use of adoption procedures to misuse nationality laws would be to sign and ratify existing international legal instruments in the field of adoption such as the Council of Europe 1967 Convention on the adoption of children (ETS 58), the 1993 Hague Convention on protection of children, the United Nations Convention of 1989 on the Rights of the Child and co-operation in respect of inter-country adoption. Again, the problem needs to be seen in context. Full adoption procedures are very complex in most States and do not give rise to any significant misuse of nationality laws. Working Party No.2 of the Committee of experts on family law (CJ-FA-GT2) at its 3rd meeting from 11-15 March 1998 considered that "upon recognition of an adoption of a foreign child by one of its nationals, the State concerned should grant ex lege its nationality to the adopted child". However, the Working Party recognised that "nationality is a very sensitive and political matter which has important implications in practice" and that therefore the Committee of experts on family law decided not to formulate any recommendations to States on this question.

D. Recognition

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

43. The legal consequences of recognition vary in different States. While in certain States recognised children have the same rights to nationality as children born in wedlock, in other States this is not the case. Within marriage, the presumption is that the husband is the father of any child born within the marriage unless, on the basis of strong contrary indications, such presumption is no longer applicable. But outside of marriage better evidence may be required to stop the abuses exampled above. Article 6 of the European Convention on Nationality provides that with respect to children whose parenthood is established by recognition, court order or similar procedures, each State Party may provide that the child acquires its nationality following the procedure determined by its internal law.

E. Stateless persons

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

F. Fraudulent conduct, false acquisition and presentation of false documents

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

G. Criminal Offences

46. Where States require applicants for their nationality to have a clean criminal record they might wish to bear in mind the procedure adopted in certain States to require applicants to sign declarations to the effect that they had not committed any criminal offence or been convicted of the same during a certain period before applying for citizenship. If the authorities concerned later discover that an applicant had made a false declaration then their nationality could be said to have been acquired fraudulently and withdrawn. This procedure would cover criminal acts committed prior to the acquisition of a nationality but prosecuted at a later stage, and also to crimes committed abroad.

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

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

H. New reproductive technologies

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

I. Acquisition of a second nationality

50. In cases where the national of one State voluntarily acquires the nationality of another, or resumes a previous nationality which has been renounced in order to acquire that State's nationality, a solution to the problems this creates for single nationality countries would be for the authorities in the State granting citizenship to notify the authorities of the State or origin of their new citizen of the acquisition of their citizenship. In this respect, reference should be made to the 1964 Convention No 8 on the Exchange of Information on the Acquisition of Nationality of the International Commission on Civil Status. However, such action mainly benefits only the country whose nationality laws are based on the principle of single nationality. Countries who adhere to the principle of multiple nationality are required to set aside their principles in order to assist single nationality countries maintain their principles. It is probably for this reason that few bi-lateral agreements covering notification of the grant of citizenship have been entered into, and the matter is becoming more complicated because of the requirements of legislation concerning personal privacy, data protection and the unauthorised disclosure of information. In some cases the person acquiring citizenship might be a refugee who did not want his or her home authorities to know of their whereabouts, even in general terms.

51. One approach to this problem has been applied by many Asian countries who adhere to the principle of single nationality. Where one of their nationals is permanently resident abroad and applies to renew his or her passport, the consular authorities require him or her to produce a letter from the authorities of the country in which they are permanently resident confirming that they have not acquired the citizenship of that country. The letter may be obtained either by the individual or by the consular authorities on production of written consent from the individual to such information being disclosed. In most cases the consular authorities of a State will quickly recognise from a passport whether the individual is permanently or temporarily resident in the country. Few individuals who have obtained the nationality of the country in which they are living are likely to seek renewal of their passports because disclosure of this information would reveal their abuse of their home country's nationality laws, and these procedures would help to bring home to people the consequences of their actions.

52. Not all States are willing or able, however, to issue such letters, making the procedure difficult to implement. Moreover, these procedures would not necessarily assist in those cases where an individual has renounced his nationality of origin in order to obtain another nationality and then resumed that first nationality. However, in many of these cases the individual would be living in the country of which he or she had voluntarily acquired citizenship and in relationship to that country this citizenship would then prevail.

SECTION IV – CONCLUSIONS AND PROPOSALS FOR FURTHER ACTION

A. Conclusions

53. Most, if not all, States have over the centuries benefitted from the flow of migrants into their countries. These migrants have greatly enriched their new societies, not only as entrepreneurs, scholars, artists and scientists, but also generally, by adding cultural diversity and broadening the horizons of their new society. Many have positively sought to show their commitment to their new homes by seeking to acquire its nationality. Most do so lawfully and it should not be assumed that because this paper deals exclusively with the misuse of nationality law that all applicants for citizenship seek to misuse or abuse the nationality laws of their adoptive State.

The number of cases of misuse of nationality laws does not seem to be unduly high, but the number of such cases could increase and could have negative effects on normal procedures relating to nationality and disproportionately cloud the manner in which migrants are regarded. It is therefore important that States should be aware of the problems linked to the misuse of their nationality laws and take any appropriate action to limit the opportunities for abuse.

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

55. The problems of fraud and the presentation of false documentation are not unique to nationality questions. They are experienced on a far greater scale by the immigration authorities in most countries. Within a State there should be close co-operation between the immigration and nationality authorities in order to minimise the opportunities for the misuse of nationality laws. Internationally there is also scope for greater co-operation and the exchange of information, and this report recommends that States, where appropriate, should conclude bilateral and/or multilateral agreements in order to regulate matters of common interest and thereby prevent the misuse of their nationality laws. Such agreements are commonplace in the immigration field. For example, within the European Union there are proposals in hand for joint action on the provision of equipment for the detection of false or falsified documents in the visa departments of representatives abroad and in the offices of domestic authorities dealing with the issue or extension of visas, and for improved exchange of information to combat counterfeit travel documents. The Committee of Experts on Nationality already provides a forum in which information can be exchanged informally but unfortunately, by its very nature, this tends to be about documentation and procedures within European States whereas problems also arise in countries from outside the Council of Europe.

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

B. Proposals for further action

57. The problems States face in relation to the misuse or abuse of their nationality laws are not unique to them, either internally, where the immigration and civil status authorities face similar problems, or externally, where other States are encountering the same sorts of problems. No one State

has a monopoly on the right solution to these problems, some of which require co-operation between States. The real answer to the problem lies in the exchange of information and experiences between States out of which possible solutions might emerge for States to consider. To that end, this report recommends the following action :

(a) the CJ-NA should hold, at each meeting, an exchange of views on the new trends or the types of misuse or abuse of nationality laws on the basis of the problems and the possible remedies indicated in the Report, including any preventive measures which are being taken by the States,

(b) the CJ-NA should consider the possibility of proposing which matters might be, where appropriate, the object of regulation by agreement, including the possibility of concluding model agreements,

(c) the CJ-NA, while appreciating the ongoing co-operation with the International Commission on Civil Status, considered that this co-operation might, whenever necessary, be intensified through appropriate means in the field of the fight against the misuse or abuse of nationality laws (e.g. by an intensified exchange of documents and information on this matter).