Recommendation CM/Rec(2009)13 and explanatory memorandum

Legal instruments

The nationality of children

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and explanatory memorandum

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The nationality of children

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adopted by the Committee of Ministers
of the Council of Europe
on 9 December 2009
and explanatory memorandum

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1. Recommendation CM/Rec(2009)13, adopted by the Committee of Ministers of the Council of Europe on 9 December 2009, on the proposal of the European Committee on Legal Co-operation (CDCJ).

2. This document contains the text of Recommendation CM/Rec(2009)13 and its explanatory memorandum.

Introduction

The Council of Europe has strived for many years to set minimum standards in the field of nationality and has produced a number of legal instruments in the field. The 1997 European Convention on Nationality (ETS No. 166) was the first international legal instrument to develop important standards on general principles of nationality law as well as on the acquisition of nationality.

Today children are at the centre of our attention: they are seen as subjects possessing their own rights and obligations, rather than mere objects of international law. In this perspective, Recommendation CM/Rec(2009)13 on the nationality of children aims at avoiding statelessness of children and facilitating their acquisition of the nationality of their parents and of their state of birth and residence.

High priority has been given to continuing to reduce the number of cases of statelessness, on the one hand, and, on the other hand, developing more precise and detailed rules on the position of children in nationality law. The present recommendation thus develops rules and principles aiming at the reduction of statelessness of children, and formulates others aimed at improving the access of children to the nationality of their parents and their country of birth and residence.

The recommendation was adopted by the Committee of Ministers of the Council of Europe on 9 December 2009.

Recommendation CM/Rec(2009)13 of the Committee of Ministers to member states on the nationality of children

(Adopted by the Committee of Ministers on 9 December 2009 at the 1073rd meeting of the Ministers' Deputies)

The Committee of Ministers, under the terms of Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Reaffirming its keen interest in issues of nationality and their adequate solution in member states;

Stressing the key activities of the Council of Europe in the field of nationality law, including activities for avoiding and reducing statelessness, and its competence in these matters;

Recalling the 1948 Universal Declaration of Human Rights according to which every individual has the right to a nationality, and emphasising the importance of an effective nationality for the individual's protection and for the exercise of his or her personal rights and freedoms;

Recalling also the 1989 United Nations Convention on the Rights of the Child according to which children have the right to acquire a nationality, which is a firm element of their identity;

Welcoming the amendments which member states have made to their laws on nationality in recent years, in particular those aimed at reducing statelessness and those granting children better access to the nationality of their parents and of their state of birth and residence;

Noting that children of parents of foreign origin born or growing up in their state of residence are in the particular situation of becoming increasingly familiar with the language(s), habits, customs and culture(s) of their state of residence, which contributes to their integration into that society;

Noting that foreign children adopted by nationals are in a particular situation leading to their integration into the culture of the country of their adoptive parents;

Recalling its Recommendation No. R (99) 18 on the avoidance and reduction of statelessness;

Taking account of the work carried out in the area of nationality by the United Nations and other international institutions;

Having regard to the other relevant international instruments, in particular the 1930 Hague Convention on Certain Questions relating to Conflict of Nationality Laws and its Protocol on Statelessness; the 1954 United Nations Convention Relating to the Status of Stateless Persons; the 1961 United Nations Convention on the Reduction of Statelessness; the 1966 International Covenant on Civil and Political Rights; the 1965 International Convention on the Elimination of All Forms of Racial Discrimination; the 1973 Convention to reduce the Number of Cases of Statelessness of the International Commission on Civil Status; the 1979 United Nations Convention on the Elimination of All Forms of Discrimination against Women and the 1990 United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families;

Taking into account in particular the importance of the principles and rules of the 1997 European Convention on Nationality (ETS No. 166), the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession (CETS No. 200) and the 2008 European Convention on the Adoption of Children (revised) (CETS No. 202);

Expressing the hope that all member states will sign, ratify and fully implement these conventions as soon as possible;

Realising the need for further measures, at national and international levels, in order to avoid and reduce cases of statelessness, in particular of children, and to improve the access of children to the nationality of their parents and of their state of birth and residence;

Recalling the usefulness of co-operation and, where appropriate, the obligation to exchange information on the nationality of children among member states in order to ensure that a child has access to a nationality;

Emphasising the definition of child as a person below the age of 18 years unless, under the law applicable to the child, majority is attained earlier;

Taking into account the importance of birth registration to ensure the right to a nationality and avoid statelessness,

Recommends that governments of the member states be guided in their legislation, policies and practice by the principles contained in the appendix to this recommendation.

Appendix to Recommendation CM/Rec(2009)13

Principles concerning the nationality of children

With a view to reducing statelessness of children, facilitating their access to a nationality and ensuring their right to a nationality, member states should:

I. Reducing statelessness of children

1. provide for the acquisition of nationality by right of blood (*jure sanguinis)* by children without any restriction which would result in statelessness;

2. provide that children born on their territory who otherwise would be stateless acquire their nationality subject to no other condition than the lawful and habitual residence of a parent;

3. provide that children on their territory who are stateless despite the provisions contained in principles 1 and 2 above, and who have the right to acquire the nationality of another state, be provided with any necessary assistance to exercise that right;

4. provide that children who, at birth, have the right to acquire the nationality of another state, but who could not reasonably be expected to acquire that nationality, are not excluded from the scope of principles 1 and 2 above;

5. provide that stateless children have the right to apply for their nationality after lawful and habitual residence on their territory for a period not exceeding five years immediately preceding the lodging of the application;

6. co-operate closely on issues of statelessness of children, including exchanging information on nationality legislation and public policies, as well as on nationality details in individual cases, subject to applicable laws on personal data protection;

7. treat children who are factually (de facto) stateless, as far as possible, as legally stateless (de jure) with respect to the acquisition of nationality;

8. register children as being of unknown or undetermined nationality, or classify children's nationality as being "under investigation" only for as short a period as possible;

9. treat children found abandoned on their territory with no known parentage, as far as possible, as foundlings with respect to the acquisition of nationality;

10. provide that the revocation or annulment of an adoption will not cause the loss of the nationality acquired by this adoption, if statelessness would be the consequence;

II. Nationality as a consequence of a child-parent family relationship

11. provide that children whose parentage is established by recognition, by court order or similar procedures acquire the nationality of the parent concerned, subject only to a procedure determined by their internal law;

12. apply to children their provisions on acquisition of nationality by right of blood if, as a result of a birth conceived through medically assisted reproductive techniques, a child-parent family relationship is established or recognised by law;

13. subject the granting of their nationality to children adopted by a national to no other exceptions than those generally applicable to the acquisition of their nationality by right of blood, if as a consequence of the adoption the family relationship between the child and the parent(s) of origin is completely replaced by the family relationship between the child and the adopter(s);

14. facilitate the acquisition of their nationality by children adopted by a national in the case of an adoption in which the family relationship between the child and the parent(s) of origin is not completely replaced by the family relationship between the child and the adopter(s);

15. provide that revocation or annulment of an adoption will not cause the permanent loss of the nationality acquired by the adoption, if the child is lawfully and habitually resident on their territory for a period of more than five years;

16. provide that foreign children lawfully residing on their territory with a view to adoption have the right to file applications for the acquisition of their nationality if the adoption is not finalised. States should not in this

case require a period of more than five years of habitual residence on their territory;

III. Children born on the territory of a state to a foreign parent

17. facilitate the acquisition of nationality, before the age of majority, by children born on their territory to a foreign parent lawfully and habitually residing there. Enhanced facilitation should be offered in cases where that parent is also born on their territory;

IV. Position of children treated as nationals

18. provide that children who were treated in good faith as their nationals for a specific period of time should not be declared as not having acquired their nationality;

V. Rights of children in proceedings affecting their nationality

19. ensure that, as far as possible, in proceedings affecting their nationality, children are consulted and their views and wishes are taken into account, having regard to their degree of maturity. Applications for nationality made on behalf of children should include the opinion of children considered by law as having sufficient understanding. A child should be considered as having sufficient understanding upon attaining an age, prescribed by law, which should not be more than 14 years;

20. give children the right to file applications for the acquisition or loss of nationality if they are considered by law as having sufficient understanding and are, where necessary, legally represented as required by domestic law;

21. grant children, where necessary, legally represented as required by domestic law, the right to challenge decisions regarding their nationality;

22. provide that children who have lost their nationality have the right to apply for recovery of it before the age of majority, or within at least three years after reaching the age of majority, and that they shall be, where necessary, legally represented as required by domestic law;

VI. Registration of birth

23. register the birth of all children born on their territory, even if they are born to a foreign parent with an irregular immigration status or if the

parents are unknown, in order to safeguard their right to a nationality. The registration of birth should be free of charge and be performed without delay, even if the period within which the birth should have been declared has already expired.

Explanatory memorandum

Introduction

1. The 1997 European Convention on Nationality (ETS No. 166, hereinafter referred to as the ECN) was the first international legal instrument to develop important standards on general principles of nationality law as well as on the acquisition of nationality. In addition, an exhaustive list of acceptable grounds for loss of nationality was set out alongside principles regarding procedural issues with respect to nationality. Moreover the ECN includes provisions on multiple nationality in general, on military obligations in case of multiple nationality, on nationality issues related to state succession and on co-operation between states in nationality matters. The increasing number of member states having ratified this important convention is to be welcomed and member states not having yet done so are invited to accede to the ECN in the near future.

2. Nevertheless, several rules of the ECN need further development, and to this end the principles of the ECN regarding state succession and nationality were built upon in 2006 within a new international convention: the Convention on the avoidance of statelessness in relation to State succession (CETS No. 200).

3. High priority has been given to continuing to reduce the number of cases of statelessness, on the one hand, and, on the other hand, developing more precise and detailed rules on the position of children in nationality law. The present recommendation thus develops principles aiming at the reduction of statelessness of children and formulates others, aimed at improving the access of children to the nationality of their parents and of their country of birth and residence.

I. Reducing statelessness of children

Principle 1

4. The acquisition of a nationality by right of blood is prescribed by Article 6 of the ECN. The acquisition of nationality by right of blood is hereafter called: acquisition *jure sanguinis*, and includes *jure sanguinis a matre* (by descent from the mother) as well as *a patre* (from the father). According

to paragraph 1 of Article 6 of the CEN, each state party shall provide in its internal law for its nationality to be acquired automatically (*ex lege*) by a child, one of whose parents possesses at the time of the child's birth the nationality of that state party. However, states are allowed to make exceptions for children born abroad and to provide for special procedural rules for the acquisition of nationality *jure sanguinis* for children whose parenthood is either established by recognition, by court order or by similar procedures.

Children born abroad

5. Several member states of the Council of Europe use the possibility to make an exception to the principle of the acquisition of their nationality *jure sanguinis* for children of nationals who were born abroad. The reason for this is the presumption that the child born abroad is unlikely to develop strong enough ties with the state of the nationality of the parent to justify the possession of that nationality. This exception reflects that a nationality should be a manifestation of a genuine and effective connection between a person and the state concerned. Nevertheless, with regard to children born abroad such an exception should never lead to situations of statelessness. In all cases where a legal child-parent family relationship exists, *jus sanguinis* provisions should be applied, if otherwise the child would be stateless. If the child born abroad otherwise would be stateless, the acquisition of the nationality of the parent *jure sanguinis* should take place by operation of the law without any necessity for registration. This is already underlined in Recommendation No. R (99) 18 on the avoidance and the reduction of statelessness in rule II.A.*a*., and is repeated in this recommendation. Principle 1 only applies in cases where a parent is already a national of the state concerned and therefore not if the parent only has the right to register as a national, but has not yet used this right.

Children born to parents of different nationalities

6. In the vast majority of member states of the Council of Europe children acquire the nationality of a parent *jure sanguinis* if one parent possesses this nationality, independent of whether the child was born in the state concerned. However, some states provide that children born to parents of different nationalities do not always acquire the nationality of a parent *jure sanguinis*. These states require, for example, the parents to lodge a declaration wherein the nationality of the child is chosen from one of their nationalities. States opt for this approach in order to avoid multiple nationality.

However, this approach can lead to difficulties if both states involved oblige the parents to make a choice between their nationalities and no such declaration is made, for example because of the inability of the parents to reach an agreement on this issue. The above-mentioned limitation of the acquisition of nationality *jure sanguinis* should never lead to statelessness. It should be borne in mind that the reduction of cases of multiple nationality is less important than the avoidance of statelessness. Consequently, if both states involved require a declaration from the parent, the child should acquire both nationalities *ex lege* in order to conform with the right of the child to a nationality.

Children whose parentage is established by recognition, court order or similar procedures

7. The clear majority of member states of the Council of Europe provide for the acquisition of nationality *jure sanguinis* independently from the way in which the family relationship between child and parent is established. A child whose parentage is established either by recognition, by establishment of parentage or by similar procedures is treated in the same way as a child whose parentage is, for instance, based on the presumption that the husband of the mother is the father of the child (*pater est quem matrimonium demonstrat)*.

8. However, a considerable number of states do not provide in all cases for an *ex lege* acquisition of nationality by a child whose parenthood is established by recognition, court order or similar procedures. In most of these countries the nationality can be acquired via a special procedure. Nevertheless, no procedural restriction on the acquisition of nationality *jure sanguinis* by recognised children should apply if this would result in statelessness. If the child would otherwise be stateless, the nationality of the parent has to be acquired *ex lege* without any procedure or requirement of registration. The same statelessness-avoiding rule should apply if the parenthood has been established by court order or similar procedures.

9. The rule contained in principle 1 has priority over a default rule based on birth on the territory (*jus soli*), which would only apply if the child would otherwise be stateless (see principle 2). A state has a responsibility towards its nationals with regard to the nationality status of their children in order to avoid situations of statelessness. The responsibility which the state concerned has in regard to the parent national of that state must also have

consequences for the nationality status of the children of that national, if statelessness would otherwise be the result. This responsibility is stronger than the obligation of a state to grant nationality to children born on its territory in order to avoid the statelessness of those children. However, this principle does not have priority over a general rule with regard to the right to acquire the nationality of the country of birth (*jus soli*), a double *jus soli* principle or a general *jus soli* approach in which the residence of a parent in the state is a condition.

Principle 2

Avoiding statelessness of children at birth

10. According to the ECN, states are obliged to grant their nationality to children born on their territory who would otherwise be stateless, either *ex lege* at birth or, subsequently, to children who remain stateless upon application. The granting of nationality by application may be made subject to the requirement for a child to have lawful and habitual residence in the state for a period not exceeding five years immediately preceding the lodging of the application (Article 6, paragraph 2, of the ECN). The desirability of avoiding statelessness of children is also a major concern of Recommendation No. R (99) 18, which indicates (under point II.A.*b*.) that each state should provide in its legislation for the acquisition of its nationality by children born on its territory, who would otherwise be stateless. A clear majority of member states of the Council of Europe simply grant nationality in order to protect children born on their territory, thereby countervailing the danger of statelessness: they grant their nationality to otherwise stateless children with no other condition than birth on their territory, or with the only additional condition that the parents have lawful and habitual residence in the state at the time of birth of the child. Most other states provide for a right of registration as a national or acquisition of nationality via lodging a declaration of option after a certain period of lawful and habitual residence. However, it is evident that the above-mentioned regulation of Article 6, paragraph 2, of the ECN allows for a child born on the territory to remain stateless for a maximum period of five years. It is therefore necessary to develop additional rules.

11. Statelessness up to the age of 5 years for children born on the territory of a state where their parents have lived should not be allowed. This statelessness is particularly striking because states have the possibility to

provide for the loss of their nationality acquired by birth *jure soli* in order to avoid statelessness if it is discovered that the child has acquired another nationality (see Article 7, paragraph 1, *f* of the ECN). It is therefore preferable to provide for children born on the territory of a state, who otherwise would be stateless, to acquire the nationality of that state. Ideally, the acquisition of nationality should occur at birth or shortly after birth with retroactivity. However the principle allows for the acquisition of nationality without retroactive effect. In that latter case, it should be ensured that the child concerned enjoys the same rights as children born as nationals. A decision on such an application should be given as soon as possible in order to terminate the statelessness of the child (see principle 8).

12. In order to avoid the situation where mere accidental birth on the territory also would give the right to acquire the nationality of the state of birth and to avoid abuse of such a situation, a state may make the acquisition of its nationality by potentially stateless children conditional on the lawful and habitual residence of a parent on its territory. States which do so, will – in order to meet the standards of Article 6, paragraph 2, of the ECN – also have to provide for the granting of nationality by application for those children who do not acquire the nationality of their country of birth, due to the fact that their parent did not reside lawfully and habitually in that country.

It should be noted that the interpretation of "lawful residence" as mentioned in this principle is used in the United Kingdom to refer to the concept of being "settled", as in the British Nationality Act.

Principle 3

Assistance

13. In cases where it can be expected that the child should exercise his or her right to acquire the nationality of a parent either by registration or by using a right of option, states should provide the child with any necessary assistance to exercise their right to acquire the nationality involved. This obligation can be exercised by agencies, under the final responsibility of the state. It may, for instance, be necessary to appoint a special guardian, who represents the child (*guardian ad litem*) for nationality procedure purposes and who can, *inter alia,* apply for registration on behalf of the child or lodge a declaration of option as representative of the child. Furthermore, in some cases it may be necessary to present an official document confirming that

the person concerned did not acquire the nationality of their country of birth.

Principle 4

Children who cannot reasonably be expected to exercise their right of option

14. Article 1 of the United Nations Convention on the Status of Stateless Persons (1954) defines a stateless person as a person "who is not considered as a national by any State under the operation of its law". This definition of a legally (de jure) stateless person is frequently followed in domestic nationality laws. According to this definition a person not considered as a national by any state under the operation of its law is stateless even if he or she could acquire the nationality of a state by simple registration. For example, several states provide that the child of a national born abroad does not acquire the nationality of the parent *jure sanguinis* by operation of the law, but only after registration of that child in, for example, the registers of the competent consulate of the state involved, without any discretion of the authorities of that state. If a parent does not register such a child, the nationality will not be acquired. The consequence is that the child will be stateless if he or she does not acquire the nationality of the other parent or of the state of birth. If the state of birth provides for the acquisition of nationality at birth *jure soli* for children who otherwise would be stateless, the question has to be asked whether, under Article 6, paragraph 2.*a* of the ECN, the child will *ex lege* acquire the nationality of that state. A similar question arises if the state of birth of a stateless child provides for a right to opt for its nationality under Article 6, paragraph 2.*b* of the ECN only after a certain period of residence subsequent to birth: may the parent claim that right for the child?

15. In order to avoid the acquisition of nationality *jure soli* or any other preferential access to the nationality of their state of birth by children who could easily acquire the nationality of one of their parents, some states restrict their rules for avoiding statelessness to children of stateless persons or by expressly excluding children who could acquire the nationality of a parent by registration. This is in line with the object and purpose of rules for avoiding statelessness in international instruments, like the 1961 United Nations Convention on the Reduction of Statelessness and the ECN. The rules of these conventions clearly do not lead to an obligation for the contracting

states to grant their nationality to a person who has decided for strictly personal convenience not to exercise a right to acquire the nationality of another state. It may be expected from children and their legal representatives that they use, as far as possible, all means to acquire a nationality by declaration of option or registration.

16. However, where serious obstacles prevent a person from exercising such a right, it is not correct to speak of a relevant omission to exercise that right. For instance, in cases where a parent whose nationality could be acquired by registration (to be made only by this parent) has disappeared or is, for any other serious reason, in no position to register, it would not be reasonable to exclude a child from the benefits of the rules formulated in principles 1 and 2. Moreover, under certain circumstances a parent may have good reasons for not registering his or her child (even through a representative) as a national of his or her state of origin. This is, for example, the case if the parent left that state as a refugee. Consequently, in those cases the child should be able to enjoy the advantages of principles 1 and 2.

Principle 5

Facilitation of naturalisation of stateless children

17. Despite rules aimed at avoiding statelessness, some children do not possess any nationality. This happens in cases where, for instance, a condition for the application of the rules was not fulfilled or where a child was born stateless abroad. The ECN contains no provision on the individual naturalisation of children. Thus, states are free to determine that only persons having reached the age of majority can apply for naturalisation. Many member states of the Council of Europe do not permit children to acquire their nationality individually. Consequently, children, who either were already stateless at birth and did not acquire the nationality of their state of birth or children who became stateless after birth, often have to wait until reaching the age of majority before they can apply for naturalisation in their state of residence. Such a long period of statelessness is contrary to the best interests of the children concerned. Stateless children should be able to apply individually for naturalisation – in principle represented by their legal representative – before reaching the age of majority. Furthermore, preferential treatment of these children in regard to the conditions of naturalisation is appropriate. The situation of these children differs from that of other children of foreign origin because of

their increasing familiarity with the language(s), habits, customs and culture of their state of residence, and, to that extent they are already, or will become, integrated into society. Moreover, states have a strong obligation to remedy the statelessness of such children. Consequently, their naturalisation should be possible after a period of habitual residence which is not too long, and is determined by principle 5 as a period not exceeding five years. This principle is also in accordance with Article 32 of the 1954 UN Convention on the Status of Stateless Persons, which prescribes the facilitation of the naturalisation of stateless persons, in particular by expediting naturalisation procedures.

Principle 6

Co-operation

18. In nationality law co-operation between states is very important. This is already underlined in Article 23 of the ECN in respect to information on national legislation on nationality law and general developments in this field. Not only is the exchange of information on legislation of importance, but also the exchange of information on concrete cases is important if one wants to avoid statelessness effectively. In order to render principles 1 and 2 operational, it is often necessary that detailed and concrete information be exchanged, in particular on the acquisition or non-acquisition of a certain foreign nationality. Not providing the relevant information in such a case could cause legal (de jure) or factual (de facto), statelessness of the child. The balance between the need to access nationality for the child in question and the protection of his or her personal data according to national and international laws should follow the best interests of the child.

Principle 7

De facto statelessness

19. The application of any rules avoiding statelessness depends on the definition of statelessness itself. As already mentioned above, a person is regarded to be de jure stateless, "who is not considered as a national by any State under the operation of its law". In addition to cases of de jure statelessness, states also may be confronted with cases where persons do possess a certain nationality, but where either the state involved refuses to

give the rights related to it, or the persons involved cannot be reasonably asked to make use of that nationality. In both cases the persons involved do not benefit from an effective nationality and are, de facto, stateless.

20. According to Resolution I, adopted by the General Assembly of the United Nations on 30 August 1961 on the occasion of the Final Act of the 1961 Convention on the Reduction of Statelessness, persons, who are de facto stateless should, as far as possible, be treated as de jure stateless to enable them to acquire an effective nationality. This is repeated in this principle.

21. De facto statelessness implies that a person theoretically possesses a certain nationality, but that a relevant tie no longer exists between the person and the state concerned and consequently that the person will not enjoy the protection of this state. De facto statelessness is closely related to the definition of statelessness and to proof of statelessness. For example, a person may be considered as de facto stateless if he or she possesses solely the nationality of the state, which he or she left as a refugee, while he or she is recognised by his or her country of habitual residence as a de jure refugee. The state of habitual residence should apply its rules with regard to avoiding statelessness to the children born to such persons, in particular principles 1 and 2. The same situation could also arise if a state continues to hesitate about whether a child is de jure or de facto stateless. However, it has to be underlined that it is up to the states concerned to determine what de facto statelessness is and thus which persons are to be covered by this principle.

Principle 8

Unknown or undetermined nationality

22. A borderline case of de jure and de facto statelessness exists if authorities register a person as being of unknown or undetermined nationality, or classify the nationality of a person as being "under investigation". Such classification is only reasonable as a transitory measure during a brief period of time. This is in line with the spirit, for example, of Article 8 of the Convention on the avoidance of statelessness in relation to State succession, requesting states to lower the burden of proof. It urges states to implement their obligations under international law by not indefinitely leaving the nationality status of an individual as undetermined.

Principle 9

Children found abandoned

23. Article 6, paragraph 1.*b* of the ECN prescribes the obligation of a state to grant nationality to a foundling found on its territory if he or she would otherwise be stateless. The wording "foundling(s) found in its territory" is taken from Article 2 of the 1961 United Nations Convention on the Reduction of Statelessness. If at any date during his or her minority the child's parents are discovered and the child is deemed to have the nationality of for example, (one of) the parents, or has acquired the nationality of the place of his or her birth, the nationality acquired as a foundling may be lost. This is allowed by Article 7, paragraph 1.*f* of the ECN. The nationality legislation of many member states of the Council of Europe is in conformity with Article 6, paragraph 1.*b* of the ECN. However, in a number of countries a foundling also loses his or her nationality if his or her descent is discovered after the age of majority. Such loss of nationality is contrary to the provisions of the ECN.

24. National regulations differ considerably on the scope of application of their provisions on foundlings. In some member states these provisions can be applied to all children below 18 years found abandoned with no known parentage. In some other member states the corresponding provisions only apply to newborn babies found abandoned. This latter restrictive interpretation is in line with the obligation of Article 6, paragraph 1.*b* of the ECN (see the explanatory report on that provision). However, this restriction leaves a gap with regard to the avoidance of statelessness of children found abandoned with no known parentage if it is obvious that the child concerned is not a newborn baby, although they are in a similar situation to that of abandoned newborn babies. Therefore, principle 9 underlines that these children should be treated, as far as possible, as foundlings.

25. It is up to member states to determine which children qualify as being in a similar situation to foundlings. Of course, a state could decide to extend the treatment reserved for foundlings to all minors found abandoned on their territory with no known parentage, as do some member states. However, a state could also determine an age limit and, for example, provide that children found abandoned on their territory with no known parentage are treated in the same way as foundlings, if they obviously have not yet reached the age of three.

Principle 10

Revocation or annulment of adoption

26. In some countries a revocation or annulment of an adoption has a retroactive (*ex tunc*) effect. Consequently, a loss of nationality will – in principle – be covered by Article 7, paragraph 1.*f* of the ECN: loss of nationality may be the consequence of such revocation or annulment, but no statelessness may be caused. The situation is different in the case of a revocation or annulment of the adoption *ex nunc* (non-retroactive). Due to the fact that no retroactive effect exists, loss of nationality is not accepted under Article 7 of the ECN. Principle 10 repeats a principle already enshrined in Article 7, paragraph 1.*f* of the ECN. This proves to be necessary given the fact that some member states have a different interpretation of this provision. However, it has to be stressed that principle 10 has a declaratory, not a constitutive character.

27. On the loss of nationality in the case of a revocation or annulment of an adoption see also principle 15, which prescribes that the nationality acquired by the adoption should not be lost if the child has already been lawfully and habitually resident in that state for a period of more than five years. See also principle 18.

II. Nationality as a consequence of a child-parent family relationship

Principle 11

Parentage by recognition, etc.

28. Principle 11 repeats the provision of Article 6 paragraph 1.*a* of the ECN. This repetition of an existing provision proves to be necessary because several member states, including member states which have ratified the ECN, do not completely implement the rules enshrined in that provision of the convention. As already indicated in the explanatory remarks on principle 1, several states provide that a child whose parentage is established by recognition, court order or similar procedures does not acquire *ex lege* the nationality of his or her parent, but only if a certain procedure is followed. During that procedure it can, for example, be established whether a valid recognition took place or whether a foreign decision on parentage can be recognised. However, some states require additional conditions to be fulfilled. These additional conditions, for example, based on the assumption that a child whose family relationship with her or his father is not based on

marriage will be less likely to develop genuine and effective ties with the state of nationality of this father or based on the desire to avoid fake recognition, are not in line with the ECN. For instance, requiring that the child concerned has her or his habitual residence in the state before she or he can be registered as a national or requiring proof with regard to the biological evidence of the recognition is not in conformity with the provisions of the ECN.

29. In some countries the acquisition of nationality by recognition, court order or similar procedures by an older minor is conditional on the consent of the minor involved. It should be underlined that this condition is not discriminatory but desirable in order to respect the opinion of the minor involved (see principle 19).

30. Principle 11 also applies in cases where a state provides that under certain circumstances a mother has to recognise the child to which she gave birth; it provides for the possibility of establishing legal maternity by court order or similar procedures.

Principle 12

Children conceived through medically assisted reproductive techniques

31. Most births of children conceived through medically assisted reproductive techniques do not cause particular problems in the field of nationality law. Births resulting from medically assisted reproductive techniques between both biological parents are covered by the other provisions of the recommendation. However, certain nationality problems may arise if a third person is involved, in particular with regard to the growing number of cases of children being born to surrogate mothers. Consequently, there is a risk of statelessness for a child, if the state of the surrogate mother's nationality does not attribute that nationality to the child, and the state of the commissioning mother does not attribute its nationality because the commissioning mother did not give birth to the child. In some cases the child may be able to acquire the nationality of the husband or partner of the commissioning mother following the recognition by the partner of paternity, but this is not always the case. Such risk of statelessness particularly exists if the state of the surrogate mother's nationality makes it possible to mention the commissioning mother and her husband or partner as parents on the

birth certificate of the child instead of the surrogate mother, who gave birth to the child, and the biological father.

32. In order to avoid cases of statelessness, the following rules should be observed. If the child-parent family relationship is recognised in the state of nationality of the commissioning mother or father the provisions of that state on the acquisition of nationality *jure sanguinis* have to be applicable. The child will be fully integrated into the family of the commissioning parents, which justifies – as in the case of adopted children – the acquisition of the nationality of the parents. Moreover, in many cases the authorities of the state of the commissioning parents will not be informed about the fact that the woman mentioned as the mother on the birth certificate did not give birth to the child. If this fact is discovered by these authorities after a considerable period of time, it should not lead to loss of nationality.

33. It should be stressed, however, that principle 12 does not oblige the recognition of the child-parent relationship as an automatic consequence of the use of surrogacy. Whether such recognition takes place depends on the private international law and, if applicable, the domestic law of the country of the commissioning parents. The principle simply underlines that if recognition takes place this should also have consequences in nationality law.

Principle 13

Adopted children

34. The ECN provides that states shall facilitate the acquisition of their nationality for children adopted by one of their nationals (Article 6, paragraph 4.*d*) and that the adoption of a child should not lead to statelessness (Article 7, paragraph 1.*g*, *juncto* paragraph 2). The same rules are also included in Article 12 of the 2008 European Convention on the Adoption of Children (revised) (CETS No. 202). However, neither convention prescribes concrete ways for this to take place. Therefore, more concrete rules concerning the nationality of adopted children are needed.

35. In the case of adoption, a family relationship is created between the adopted child and her or his adopter(s). As a consequence of this newly created legal parentage, the adopted child's legal position should, in respect of nationality law, be, as far as possible, identical to the position of a biological child of the parent(s). This is, *inter alia,* prescribed by the Hague Convention

on Protection of Children and Co-operation in Respect of Intercountry Adoption of 29 May 1993 (Hague Adoption Convention), as well as by Article 11, paragraph 1 of the European Convention on the Adoption of Children (revised). This provision states that: "Upon adoption a child shall become a full member of the family of the adopter(s) and shall have in regard to the adopter(s) and her, his or their family the same rights and obligations as a child of the adopter(s) whose parentage is legally established."

36. As a result, the following principles should be respected in nationality law: because of the adoption, an adopted child should acquire *ex lege* the nationality of the adoptive parents without any additional conditions or procedures. However, domestic nationality law may provide for restrictions similar to those applicable to biological children in cases of birth abroad, if these restrictions do not lead to statelessness (see principle 1). It should be irrelevant whether the adoption decree was issued in the state involved or abroad. In the latter case, the mere fact of the recognition of the foreign adoption in the state of the nationality of the adoptive parents should have consequences on the adopted child's nationality.

37. This principle should apply to all full adoptions, that is, where the legal relationship between the child and her or his father, mother and family of origin is terminated and replaced by the legal relationship with the adopter(s) (see Article 11 of the European Convention on the Adoption of Children (revised)). It should be applicable to adoptions by spouses, but also – if legally possible – to non-married couples or single people. If a state provides for other forms of adoption with more limited effects (for instance simple adoption), it may also provide for the acquisition of its nationality *ex lege*, but should at least facilitate the acquisition of its nationality (see principle 15). The latter rule should also apply if a foreign simple adoption is recognised as a simple adoption, for example, based on the rules of the 1993 Hague Adoption Convention. However, the state concerned may attach nationality consequences to the conversion of a recognised simple adoption to a full adoption.

Principle 14

38. The rule set out in principle 13 should always apply to "full adoption" (which terminates the legal relationship between the child and her or his family of origin), in addition, access to the nationality of (one of) the adoptive parents by the adopted child should also be facilitated in cases of "simple

adoption", which has more limited effects. As children adopted by a simple adoption procedure will also integrate into the family of their adoptive parents, acquisition of the adoptive parents' nationality is justified. Only a minority of member states provides for the possibility of a simple adoption. However, due to the 1993 Hague Adoption Convention many member states can be confronted with the obligation to recognise a simple adoption. In that case, they should facilitate the access of the adopted children concerned to their nationality.

Principle 15

Revocation or annulment of adoption

39. A special situation arises if revocation or annulment of an adoption takes place. According to Article 7, paragraph 1.*f* of the ECN this may not cause loss of nationality if the adopted child has already reached the age of majority. Furthermore, revocation or annulment shall never result in loss of nationality if statelessness would be the consequence. In line with principle 14, principle 15 provides that revocation or annulment of adoption should not lead to a loss of nationality of a state acquired by the adoption if the child is already lawfully and habitually resident in that state for a period of more than five years. In order to fulfil principle 15 a state could provide that, after a certain period of residence, no loss occurs as a consequence of the revocation or annulment. However, it also would be in line with the principle if the annulment or revocation as such causes the loss of nationality, but that the state concerned avoids a permanent loss of this nationality by providing for the immediate recovery of that nationality at the moment of loss, for example, by a naturalisation prepared beforehand.

Principle 16

40. If a child is residing in a state with a view to an adoption and the adoption is not finalised (that is, not granted or not completed), the child should be entitled to apply for the acquisition of the nationality of the state of her or his residence. In this exceptional case, the state shall not require a period exceeding five years of habitual residence on its territory counted from the arrival of the child on the territory of that state. As a result of the child's residence on this territory he or she acquires a genuine link with the state involved, whereas insufficient ties are developed with her or his country of origin. Furthermore, due to the residence of the child on its territory the

state has a special responsibility for the future of this particularly vulnerable child. These facts have to be recognised and, consequently, the child should have the possibility to apply for the nationality of the state of residence. Of course, in cases where the adoption is not granted or the procedure is not completed, the highest priority should be to find another (adoption) family for the child.

III. Children born on the territory of a state to a foreign parent

Principle 17

Children born on the territory

41. If a parent has been residing lawfully and habitually in a state, the child born on the territory of that state should have facilitated access to its nationality. In this case it is extremely likely that the child will be integrated into that state and this fact alone justifies facilitation. The facilitated access to nationality for persons born on the territory of a state and residing there is already prescribed by Article 6, paragraph 4.*e* of the ECN. This principle implies that a state should not delay the facilitated access to its nationality until the child reaches the age of majority. States are free to determine how they want to facilitate the access to their nationality for the children concerned. They may for example, provide that a child acquires *ex lege* their nationality if the parent has resided lawfully and habitually in the state in question for an uninterrupted period of ten years immediately preceding the birth of the child, and is in possession of a permanent residence permit. But it would also be in line with this principle to require that the parents may apply for naturalisation of their child as soon as the parent fulfils certain conditions or, for example, when the child has resided habitually and lawfully in the state of birth for a specified period and has reached a certain age.

42. Enhanced facilitation of the acquisition of the nationality of the country of birth and residence should be provided in the case where a child is born in a country to foreign parents, one of whom was also born in that country. If a child is born to a second generation immigrant on the territory while her or his parents and grandparents have spent a considerable part of their lives residing in this country, the child will usually be integrated. Consequently, an enhanced facilitation of the acquisition of the nationality of the state of birth is justified. A state could decide to attribute under these circumstances its nationality *ex lege* at birth. However, another possibility is to grant the

right to register the child as a national on application by the parents, or to reduce the conditions for the acquisition of the nationality of the state of birth in other ways. States enjoy a wide margin of appreciation concerning means to provide this enhanced facilitation, and may, for instance, where facilitating the acquisition of their nationality, require the renunciation of the other nationality or nationalities acquired by birth.

IV. Position of children treated as nationals

Principle 18

43. Article 7, paragraph 1.*f* of the ECN provides for the loss of nationality in cases of non-fulfilment of the preconditions which led to the acquisition of the nationality *ex lege*, whilst the child was a minor. Several different situations are covered by this provision: firstly, the provision applies to situations where a child has acquired a nationality as a foundling and later, after discovery of her or his parent(s), appears to have the nationality of the parent(s) *jure sanguinis.* Secondly, the rule also applies in the event that a child has acquired the nationality of her or his state of birth because he or she would have otherwise been stateless, but further evidence shows that he or she has also acquired another nationality *jure sanguinis*. In both cases, the loss of nationality involved is a correction of a default *jure soli* acquisition.

44. The loss of nationality can, however, also be the consequence of an *ex tunc* (retroactive) loss of the family relationship on which the acquisition of nationality *jure sanguinis* was based, for example because of a successful denial of paternity, annulment of a recognition of paternity or an *ex tunc* annulment of an adoption.

45. It has to be stressed that Article 7, paragraph 1.*f* of the ECN also applies if it is established that, for instance, the family relationship which constituted the basis of the acquisition of the nationality of the child, was registered by mistake. The latter may be the case if, for example, the identity of the parent, which is relevant for the *jure sanguinis* acquisition of nationality, is discovered to be wrong, or in situations where it is discovered, after acquisition of the nationality by an *ex lege* extension of naturalisation, that no family relationship ever existed between the parent and the child.

46. Article 7 of the ECN limits this type of loss of nationality in two ways. Firstly, no loss should take place on this ground after the person involved

has reached the age of majority. Secondly, statelessness should not be the consequence of such situations.

47. In the past few years serious doubts have arisen in several states regarding the age limit mentioned in Article 7, paragraph 1.*f* of the ECN. It is doubtful that the loss of nationality can still be justified when the child involved has been, in a completely legal way, in possession of a nationality for a considerable number of years. This is in particular the case if the child was treated as a national for a period exceeding the period of residence required for naturalisation, which according to Article 6, paragraph 3 of the ECN should not exceed ten years. Furthermore, the desirable preferential treatment of children could even justify a much shorter limit. This principle does not prescribe a maximum period after which the non-fulfilment of the preconditions for the acquisition, or the fact of no longer fulfilling them, should have no consequences. Domestic law has to specify the required period of time. However, it is obvious that this period should be shorter than 18 years (see Article 7, paragraph 4.*f* of the ECN).

48. This principle does not apply if treating the child as a national is based on fraudulent behaviour or fraudulent information provided about the child. Such is, for instance, the case if the full identity of the child, including existing family relationships, is not disclosed by her or his legal representative.

V. Rights of children in proceedings affecting their nationality

Principle 19

49. Respect for the independent personality of the child and taking account of his or her views and wishes could imply restrictions on the parents' rights to speak for their children in nationality matters. In particular, rules have to be designed in order to increase the relative weight assigned to the will of the child in the form of the right to be heard and the right to give her or his opinion. The non-observation of the right of the child to be heard in cases of acquisition and loss of nationality can – under certain circumstances – violate Articles 8 and 12 of the United Nations Convention on the Rights of the Child. If a child is considered by law as having sufficient understanding, her or his nationality should not be decided without taking into account her or his opinion. Domestic law has to determine the age at which a child is

deemed to have sufficient understanding. However, this age should not be more than 14 years (compare Article 5, paragraph 1.*b* of the 2008 European Convention on the Adoption of Children (revised)). An exception to this rule is reasonable if the child has mental disability.

50. The right to be heard is of particular importance in cases of application for naturalisation on behalf of the child and in cases where a request for extension of the naturalisation of a parent to the child is being made. In order to give the nationality authorities involved a good overview of the situation and allow them to take a decision in the best interests of the child, it can also be useful to hear the other parent of the child, in particular if the child would lose the nationality of this other parent by the naturalisation or the extension of the naturalisation. Furthermore, the right to be heard is of importance in the case of an application for loss of nationality made on behalf of the child, or a request for extension of the loss of nationality by a parent to the child.

51. This principle only applies in case of nationality procedures and not in cases where a child acquires or loses a nationality *ex lege*.

Principle 20

52. Legislators should also make it possible for children considered by law as having sufficient understanding to file independent applications requesting the granting of nationality. Moreover, these children should also be allowed to apply for loss of nationality, within the boundaries of Article 8 of the ECN. These children should be represented – as required by domestic law – by their legal representative or by a *guardian ad litem* (see paragraph 13). States may prescribe that parents with joint parental responsibility have to represent their children together. States may also provide that a child having attained a certain age determined by domestic law may file applications for the acquisition or loss of nationality independently without being represented.

53. Domestic law has to determine the age at which a child is deemed to have sufficient understanding. However, this age should not be more than 14 years (compare Article 5, paragraph 1.*b* of the 2008 European Convention on the Adoption of Children (revised)).

Principle 21

Access to a court by children in nationality matters

54. A child should have access to a court – when necessary according to domestic law represented by their legal representative or by a special *guardian ad litem* (see paragraph 13) – in order to remedy decisions of authorities regarding her or his nationality. This is particularly important if the acquisition of nationality is denied and in cases of loss of nationality. In cases of deprivation of nationality, the decision on the nationality status of the child should always be made independently from the decision regarding the nationality of a parent and special weight should be given to the vulnerability of the person concerned, who is a child. Access to a court should also be possible in cases where the competent authorities conclude that the child involved never acquired the nationality.

55. This principle is complementary to Article 12 of the ECN. The aim of this principle is to give children the same rights as adults in this respect.

Principle 22

Right to apply for recovery of nationality

56. A minor who has lost her or his nationality during her or his minority due to the acts of her or his legal representative or due to an extension of the loss of this nationality by a parent should be given the right to apply for the recovery of the nationality concerned within a certain period of time – which should not be shorter than three years – after having reached the age of majority, or before having reached that age when represented by a legal representative or a *guardian ad litem* (see paragraph 13). States can set additional conditions which have to be fulfilled, for example, the habitual residence of the person concerned on the territory of the state at the moment of application for recovery.

VI. Registration of birth

Principle 23

57. States should register the birth of every child born on their territory, even in cases of the illegal presence of foreign or stateless parents, or when the parents of the child are unknown. States should not refuse the registration because of the foreign nationality of the child. The registration should

be free of any charge and take place without delay if the period within which the birth of the child should have been registered has already expired. The registration of birth should take place in accordance with the domestic legislation of the state concerned in all cases where a child is discovered on the territory of the state and no evidence exists that the child was born abroad. It should be stressed, that the term "child" applies – as is the case in the ECN – to every person who has not yet reached the age of majority. The birth certificate can be subject to later adjustments in accordance with the law. This registration of birth is crucial for the implementation of the rules on avoidance of statelessness and is essential for giving the child access to the rights guaranteed in the United Nations Convention on the Rights of the Child. The mere registration of birth does not necessarily mean that the state of birth must grant its nationality to such a child, but it is an essential step that is necessary to give the child access to the protection of a state with which a legal bond in terms of nationality exists.

Appendix

Glossary

de facto	factually; in fact
de jure	legally
ex lege	by operation of the law, automatically
ex nunc	without retroactivity
ex tunc	with retroactivity
guardian ad litem	representative appointed by a court in order to represent a minor in certain legal proceedings
jure sanguinis	by *jus sanguinis*
jure soli	by *jus soli*
jus sanguinis	right of blood: a person acquires the nationality of a parent at birth or by the establishment of a child-parent family relationship
jure sanguinis a matre	by right of blood from the mother: a person acquires the nationality of the mother at birth or by the establishment of a child-mother family relationship
jure sanguinis a patre	by right of blood from the father: a person acquires the nationality of the father at birth or by the establishment of a child-father family relationship
jus soli	right of the soil: a person acquires the nationality of his country of birth
pater est quem matrimonium demonstrat	the husband of the mother is the legal father of the child

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