

## INTERNATIONAL INSTRUMENTS ON NATIONALITY MATTERS IN RELATION TO STATE SUCCESSION

### *I. Introduction*

The succession of states, that is, the replacement of a state by another in the responsibility for the international relations of a territory, essentially entails the transfer of certain rights and obligations of the predecessor state to the successor state. From the point of view of transferred rights and obligations, state succession may have an effect on international treaties, state property, archives and debts, nationality and other rights of the population as well as the internal legal order of the state. State succession is governed, *inter alia*, by two well-known international instruments: the 1978 Vienna Convention of the Succession of States in Respect of Treaties, and the 1982 Vienna Convention on the Succession of States in Respect of Property, Archives and Debts.

A comprehensive international treaty on the succession of states in respect of nationality, however, has never been adopted till this year. The apparent failure by the international community to adopt such an instrument made it abundantly clear that this particular issue can well be regarded as one of the most difficult problems within the domain of the law of state succession. Related documents have been prepared both in the United Nations (Draft Articles on Nationality of Natural Persons in Relation to the Succession of States) and in the Council of Europe (Convention on the Avoidance of statelessness in Relation to State Succession). The Convention on the Avoidance of statelessness in Relation to State Succession dated on 19 May, 2006 in Strasbourg was signed by 5 states (Hungary, Moldova, Montenegro, Norway and Ukraine), and the condition to entry into force was ratification of 3 member states; till now 3 member states (Moldova, Norway and Hungary) have already ratified the Convention, which accordingly has entered into force on 1 May, 2009.

A change of nationality in the wake of state succession is a matter of importance owing to its numerous serious consequences for the persons affected. Problems emerge, for example, from the fact that nationality and the exercise of civil and political rights, the possession of a vote in national election, the ownership of land, or the entitlement to a pension are frequently inseparably intertwined. Besides, the loss of nationality of the predecessor state and the acquiring of a new might as well lead to human tragedies as it may tear families or communities apart. Instances of collective naturalisation raise more difficulties than naturalisation under normal circumstances due to the number of people (sometimes the entire of population) affected by the change. The complexity and urgency of such problems depend on both the nature of the change (for example, secession, dissolution or unification of states) and the way in which it takes place (for example, peaceful or violent).

### *II. Statelessness of Persons Affected by State Succession*

Each state has the sovereign right to determine and enact its domestic rules pertaining to nationality, but international law does provide guidance on how states should exercise their sovereignty in this field.<sup>1</sup> The Permanent Court of International Justice stated in its advisory opinion in 1923 that “The question

---

<sup>1</sup> Carol A. Batchelor: *Transforming International Legal Principles into National Law: the Right to a Nationality and the Avoidance of Statelessness*. In: *Refugee Survey Quarterly* 2006. no. 3. 9. p.

whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations.”<sup>2</sup> Later, the Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws provided that “It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.” Accordingly the determination of nationality matters essentially fall under domestic jurisdiction, however governed by rules of international law, so far as state discretion might be limited by obligations undertaken towards other states.<sup>3</sup>

The acquisition, retention, change and loss of nationality of persons affected by state succession depends completely on domestic laws of predecessor state(s) and successor state(s), and previous international obligations undertaken by predecessor state, possibly agreements on nationality matters in point of the succession between the states concerned by state succession.<sup>4</sup> There are certain cases, in which the concerned states have no appropriate nationality laws in their domestic law.<sup>5</sup> However, bilateral agreements between the states concerned by state succession can solve the problems of nationality matters. Inappropriate domestic rules on nationality and the absence of an agreement between the states concerned can easily result statelessness which in turn causes serious problems for the affected persons. The comprehensive international instruments could overtake and eliminate these consequences. Accordingly, the practical importance of rules of international law concerning nationality in relation to state succession should not be underestimated.

Statelessness may arise from the effect of numerous circumstances in the life of a person. In the case of state succession the loss of nationality of predecessor state and the difficulties or inability of acquisition of nationality of successor state can result statelessness in numerous cases. The purpose of this chapter to reveal the legal problems, which can cause large proportion of the population may become stateless.

Statelessness may particularly arise from inaccurate definition of groups of persons concerned by state succession, conflict of domestic laws related to the loss of nationality of the predecessor state and the acquisition of nationality of the successor state, inappropriate regulation of nationality of children born around the state succession and of a right of option, or discrimination.

Inappropriate definition of groups of persons affected by state succession in domestic rules of states concerned or in international agreements between these states can result in huge problems. Thus those people, to whom domestic or international rules do not apply, can easily become stateless.

Statelessness can be resulted by conflicts of domestic nationality laws - on the loss of nationality of the predecessor state and the acquisition of nationality of the successor state - of the states concerned by state succession. It can occur that the conferment of nationality by the successor state is possible if the person previously renounced from nationality of predecessor state. If the person cannot acquire the nationality of the successor state at all or only after a long time, he becomes stateless peremptorily or for a long period.

Children born around the state succession can often become stateless, since successor states usually confer their nationality to children born after a determinate date. A distinction shall be made in cases, in which child born in the successor state acquires the nationality upon the principle of *ius sanguinis* - that is his parents are nationals of the state -, or upon the principle of *ius soli* - that is he was born on the territory of that state. Thus the *ius sanguinis* successor states in their domestic rules often recognize the nationality

---

<sup>2</sup> Permanent Court of International Justice, *Advisory Opinion on the Tunis and Marocco Nationality Decrees*, Ser. B, No. 4, 1923. 23.

<sup>3</sup> See e.g. Carol A. Batchelor: *Statelessness and the Problem of Resolving Nationality Status*. In: *International Journal of Refugee Law* 1998. no. 1-2. 160. p. Besides the International Court of Justice in the *Nottebohm Case* stated that international law regulates the recognition of nationality by other states and granting diplomatic protection for nationals. See International Court of Justice, *Nottebohm Case* (Liechtenstein v. Guatemala), Second Phase, Judgement of 6 April 1955. I.C.J. Reports 1955. 23.

<sup>4</sup> See e.g. John O'Brien: *International law*. Cavendish Publishing Ltd., London - Sidney - Portland, 2001. 597. p.

<sup>5</sup> See e.g. Johannes M. M. Chan: *The Right to a Nationality as a Human Right. The Current Trend Towards Recognition*. In: *Human Rights Law Journal* 1991. no. 1-2. 13. p.; William Samore: *Statelessness as a Consequence of the Conflict of Nationality Laws*. In: *The American Journal of International Law* 1951. no. 3. 477. p.

of children born from its nationals in general or after a determinate date, and the *ius soli* successor state grant its nationality for children born on their territory after a determinate date.

Problems also arise from the child inheriting the status of the parent, who becomes stateless through state succession, if the *ius sanguinis* successor state applies strictly the principle of *ius sanguinis*. If the domestic rules of the state do not make it possible for place of birth, residence or other factors to replace the principle of *ius sanguinis*, generations inherit statelessness from previous generations.<sup>6</sup>

According to laws of certain states,<sup>7</sup> if a woman marries a foreign national, she loses her nationality automatically. In case of state succession, this woman can easily get into stateless status, if she cannot acquire the new nationality of her husband, granted by the successor state, or if her husband becomes stateless.

States often grant for persons affected by state succession the right of option. In international law right of option means that the persons concerned by state succession has the right – generally within a limited period of time – to choose, which successor states' nationality they acquire. Hereby the affected person determines his nationality with unilateral declaration. Formerly the definition of right of option was interpreted narrowly, namely it was such a right, which guaranteed for persons through a regulation of an international treaty to retain his nationality in the case of *cessio*.<sup>8</sup> The Hungarian history also contains an example for the right of option; the Article 63 of Treaty of Trianon provided the right of option for persons living on transferred territories, and acquiring new nationality through state succession.<sup>9</sup> If rules concerning right of option are not adequately detailed, consequently the affected person and possibly his whole family can become stateless. It can occur namely that the optant renounce from his nationality, and he cannot acquire the chosen nationality at all, or can only acquire after a long period of time, and thus become stateless, or get stateless status for a long period of time.

Stateless status may also arise from discriminatory rules or law enforcement with distinction to national or ethnic origin, race, colour, or political ground. If the domestic law of successor state makes distinction between persons in relation to acquiring nationality, they can easily become stateless through the above mentioned discrimination. Besides acts of authorities on the ground of discrimination aiming loss of nationality can occur, which also cause statelessness, and expulsion from the state is often a consequence of this. Examples for breach of non-discrimination rule can be found at the case of Baltic States – particularly in Latvia<sup>10</sup> – after their independence from the Soviet Union. As we could see at the dissolution of the former Yugoslavia where some of the newly established states have, by means of various legal devices, attempted to exclude from their nationality or at least delay the acquisition of their nationality by persons who have been residing in their territories for considerable lengths of time. Such cases have involved persons belonging to an ethnic minority, and these populations still may find

---

<sup>6</sup> See Samore: *ibid.* 477. p.

<sup>7</sup> See e.g. Afghanistan, India, Iraq, Iran, Egypt, Peru, ect.

<sup>8</sup> See Karl M. Meessen: *Option of Nationality*. In: Encyclopedia of Public International Law. Vol. 8. Human Rights and the Individual in International Law, International Economic Relations (ed.: Rudolf Bernhardt). North-Holland Publishing Co. – Collier Macmillan Publishers, New York – London, 1982. 424-425. p.

<sup>9</sup>The Article 63 of Treaty of Trianon on right of option reads as follows: "Persons over 18 years of age losing their Hungarian nationality and obtaining *ipso facto* a new nationality under Article 61 shall be entitled within a period of one year from the coming into force of the present Treaty to opt for the nationality of the State in which they possessed rights of citizenship before acquiring such rights in the territory-transferred. Option by a husband will cover his wife and option by parents will cover their children under 18 years of age. Persons who have exercised the above right to opt must within the succeeding twelve months transfer their place of residence to the State for which they have opted. They will be entitled to retain their immovable property in the territory of the other State where they had their place of residence before exercising their right to opt. They may carry with them their movable property of every description. No export or import duties may be imposed upon them in connection with the removal of such property."

<sup>10</sup> Cf. *Sisojeva and Others v. Latvia*, ECtHR, Application no. 60654/00, judgment of 15 January, 2007.; *Kaftailova v. Latvia*, ECtHR, Application no. 60654/00, judgment of 7 December, 2007.

themselves compelled to leave the territory of a new state because of the practical consequences of the application of citizenship laws. Such solution is unacceptable on both humanitarian and legal grounds.<sup>11</sup>

Regulation on nationality matters in relation to state succession depends on the domestic rules and the international obligations undertaken by the states concerned. Accordingly the risk exists that persons affected by state succession become stateless en masse in the future.

International obligations should be incumbent on states to avoid statelessness and to confer nationality for persons affected by state succession; however the number of related international provisions and documents is really narrow.<sup>12</sup> Currently states concerned by state succession are obliged by the provisions of some human rights documents, as well as some rules of conventions on nationality matters, of which the concerned states are state parties.<sup>13</sup>

### *III. International Provisions on Nationality in Relation to State Succession*

There are general rules in human rights documents and in conventions on nationality matters which can be applied in the case of state succession; however these provisions cannot provide high protection to avoid statelessness resulting from state succession. Besides some international conventions contain obligations on states in the specific context of state succession, which can ensure higher protection to eliminate statelessness. Last but not least there are two comprehensive documents, the universal United Nations Draft Articles on Nationality of Natural Persons in Relation to the Succession of States, and the regional Convention on the Avoidance of statelessness in Relation to State Succession, which has entered into force on 1 May, 2009.

#### *1. General Rules on Nationality and Avoidance of Statelessness in International Instruments*

The right to a nationality is the most obvious human rights principle bearing on cases of state succession. In this context it should be recalled that Article 15 of the Universal Declaration of Human Rights - a resolution adopted in 1948 by the United Nations General Assembly, yet widely regarded as a document constituting legal obligations for states - was the first document which provided the right to a nationality.<sup>14</sup> Other international legal instruments dealing with the right to a nationality include the 1957 Convention on the Nationality of Married Women,<sup>15</sup> the 1966 International Covenant on Civil and Political Rights,<sup>16</sup> the 1989 Convention on the Rights of Child.<sup>17</sup> The main problem of these provisions is, that they do not specify which state has a duty to grant to the person/child nationality, thus in case of state succession the successor state can shift off the obligation granting nationality to other state concerned by succession.<sup>18</sup> The 1961 Convention on the Reduction of Statelessness,<sup>19</sup> and two regional conventions,

---

<sup>11</sup> Country Reports: *Citizenship and Statelessness in the Former Yugoslavia: the Legal Framework*. In: *Refugee Survey Quarterly* 1995. no. 3. 2. p.

<sup>12</sup> Albrecht Randelzhofer: *Nationality*. In: *Encyclopedia of Public International Law*. Vol. 8. *ibid.* 420. p.

<sup>13</sup> Václav Mikulka: *The Impact of International Rules on Nationality*. In: *Dissolution, Continuation and Succession in Eastern Europe* (ed.: Brigitte Stern). Martinus Nijhoff Publishers, The Hague - Boston - London, 1998. 94-95. p.

<sup>14</sup> Article 15 of the Declaration states that: „Everyone has the right to a nationality.”

<sup>15</sup> Preamble of the Convention recall the Article 15 of the Universal Declaration of Human Rights, and Articles 1-3 contain specific provisions on how the wife's nationality is to be addressed.

<sup>16</sup> Article 24 (3) of the Covenant provides that: „Every child has the right to acquire a nationality, ” which is concerned with the initial acquisition of a nationality on the part of children. It addresses the right to a nationality in a sense of the right to acquire a nationality; it is not concerned with general questions of change of nationality and denationalisation of persons (including children) as a result of territorial change.

<sup>17</sup> Article 7 of the Convention provides for the right of a child to acquire a nationality after birth, besides states van determine the procedure for the acquisition or loss of nationality, albeit the limits of their international obligations and with the special attention to situations where the child would otherwise be stateless.

<sup>18</sup> See James Crawford: *Territorial Change and the Status of Inhabitants*. In: *Seoul Law Journal*/1986. no. 1. 48-49.

the 1969 American Convention on Human Rights<sup>20</sup> and the 1997 European Convention on Nationality<sup>21</sup> dissolve this problem with granting nationality for those, who were born on the territory of the state, if they would otherwise be stateless.

The prohibition of discrimination is the other principle which is stated in general or in particular to nationality matters in international instruments. The Universal Declaration of Human Rights do not state the non-discrimination rule expressis verbis in relation to nationality, but “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, ...” include also the right to a nationality provided in Article 15.<sup>22</sup> The 1965 Convention on Elimination of All Forms of Racial Discrimination indicates the right of all persons without distinction to equality before the law in the right to a nationality,<sup>23</sup> while provisions for equality and non-discrimination in 1966 International Covenant on Civil and Political Rights are not confined in application to the rights set forth in the Covenant – as the Universal Declaration of Human Rights regulates it; but shall be applied to all legislative acts by states.<sup>24</sup> It is a significant provision in the context of nationality, because this obligation includes nationality legislation. The 1979 Convention on the Elimination of All Forms of Discrimination Against Woman<sup>25</sup> provides that states shall grant equal right women with men in relation to nationality matters. The 1961 Convention on the Reduction of Statelessness prohibits states from depriving persons of their nationality on discriminatory grounds.<sup>26</sup> The 1989 Convention on the Rights of Child also contains non-discrimination rule concerning the right of the child to preserve his identity, including nationality.<sup>27</sup> The 1997 European Convention on Nationality includes a general prohibition of discrimination in matters of nationality, prohibiting states from adopting nationality legislation that makes distinction on grounds of sex, religion, race, colour, national or ethnic origin.<sup>28</sup>

The provisions concerning the principle of reduction of statelessness can be also applied in case of state succession to solve the problems in relation to nationality. The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws was the first attempt to impose obligations on state with respect to statelessness, but it has never entered into force.<sup>29</sup> It contained a range of issues that frequently caused statelessness resulting from the negative conflict of law, including technical matters such as the issuance of expatriation permits (Article 7), matters related to marriage and divorce (Articles 8-II),

---

<sup>19</sup> See below Article 1 of the Convention.

<sup>20</sup> Article 20 of the Convention provides that „Every person has the right of nationality,” and “every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality...”

<sup>21</sup> Article 4 of the Convention contains the right to a nationality as a principle. Article 6 of the Convention states detailed rules concerning nationality of children, requiring that nationality is granted, if a child, who was born on the territory of the state, would otherwise be stateless.

<sup>22</sup> Article 2 of the Declaration reads as follows: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>23</sup> Article 5 d) iii) of the Convention states that „States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... the right to nationality.”

<sup>24</sup> Article 26 of the Covenant states that „All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>25</sup> Article 9 of the Convention provides that states parties shall grant women equal rights with men to acquire change or retain their nationality; besides nationality status of a woman should not be automatically altered in relation to marriage, the dissolution of marriage, or a change of nationality by the spouse during marriage.

<sup>26</sup> Article 9 of the Convention provides: „A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political ground.”

<sup>27</sup> Article 8 of the Convention provides “the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”

<sup>28</sup> See Article 5 of the Convention.

<sup>29</sup> See James T. Kenny: *Manley O. Hudson and the Harvard Research in International Law*. In: *International Lawyer* 1977. no. 2. 319-329. p.

matters related to the effect of naturalisation on dependent children (Article 13), the birth of a child to unknown or stateless parents (Articles 14-15), the legitimization of illegitimate children (Article 16), and the adoption of children (Article 17).<sup>30</sup> The purposes of 1954 Convention on the Status of Stateless Persons are mainly to regulate and improve the legal status of stateless persons, not to avoid statelessness.<sup>31</sup> Only the Article 32 states the reduction of statelessness, which contains that states “shall facilitate the assimilation and naturalization of stateless persons,” and “in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” The 1961 Convention on the Reduction of Statelessness spell out principles and rules which the states are required to apply when determining nationality in order to reduce statelessness. There are some general provisions, which can be applied in case of state succession to avoid statelessness. Article 1 of the Convention provides that state shall grant its nationality to a person born in its territory who would otherwise be stateless. Article 4 extends the obligation of the state to a person born outside its territory, who would otherwise be stateless, if one of his parents at the time of the person’s birth is a national of that state. Articles 5-6 deal with the loss of nationality of the spouse and children. Article 7 spells out the circumstances whereby renunciation resulting in statelessness would be permitted, which can dissolve some problems resulting from inappropriate regulation of right of option. Articles 8-9 contain prohibition of deprivation of nationality. Article 10 imposes an obligation on states to prevent statelessness in specific context of state succession, to which I will get back below.

## *2. Special Rules on Nationality and Avoidance of Statelessness in Context of State Succession*

The 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws was the first attempt to regulate the nationality matters in relation to state succession, but has not entered into force. The Article 18 of the Convention contains provisions only on the case of transfer of the entire or the part of the territory.<sup>32</sup>

There are some special provisions in the 1961 Convention on Reduction of Statelessness, which is a universal international treaty and in the European region in a regional treaty, the 1997 European Convention on Nationality.

Article 10 of the Convention on Reduction of Statelessness states that every treaty between contracting states providing for the transfer of territory<sup>33</sup> shall include provisions designed to secure that no person shall become stateless as a result of the transfer. Besides the states party shall use its best endeavours to secure that any such treaty made by it with a state which is not a party to the convention includes such provisions. If treaty lacks such provisions or such treaty is not concluded, the state to which the territory is transferred shall confer its nationality on persons who would otherwise become stateless as a result of the transfer or acquisition. The lack of this provision is that it regulates only the case of transfer of territory; however state succession has other cases, such as uniting of states, dissolution of a state, or separation of part of territory.

---

<sup>30</sup> See Blackman: *State Succession and Statelessness: The Emerging Right to an Effective Nationality under International Law*. In: *Michigan Journal of International Law* 1998. no. 3. 1177-1178. p.

<sup>31</sup> See Paul Weis: *The Convention Relating to the Status of Stateless Persons*. In: *The International and Comparative Law Quarterly* 1961. Part 2. 4th Series. 255-264. p.

<sup>32</sup> Article 18 of the Convention states: „When the entire territory of a state is acquired by another state, those persons who were nationals of the first state become nationals of the successor state, unless in accordance with the provisions of its law they decline the nationality of the successor state. When a part of territory of a state is acquired by another state or becomes the territory of a new state, the nationals of the first state who continue their habitual residence in such territory lose the nationality of that state and become nationals of the successor state, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor state they decline the nationality thereof.” See the Article 18 of the Convention and its Comment: *Research in International Law, Harvard Law School*. In: *American Journal of International Law* 1929. Special Supplement, 15, 60-69. p.

<sup>33</sup> The state succession has many cases, such as uniting of states, dissolution of a state, transfer of territory, separation of territory, but the lack of the convention, that it regulates only the case of the transfer of territory. However the complexity and urgency of nationality problems depend on both the nature of the change (the above mentioned cases of state succession) and the way in which it takes place (peaceful or violent).

Article 18 of the European Convention on Nationality contains principles concerning state succession, for example the principle of rule of law, the rules concerning human rights and the prohibition of discrimination. It states the facts to be taken into consideration in deciding on the granting or the retention of nationality in cases of state succession. The first criterion concerns the “genuine and effective link of the person with the state,” another criterion is the “habitual residence of the person at the time of state succession,” which has a direct link with the first criterion. Both of them are restrictions on the use of an arbitrary approach to the rules of nationality in general.<sup>34</sup> The next aspect which must be considered by the states is the “will of the person,” which refer to the right of option. The last criterion is expressed by the phrase “the territorial origin of the person,” which is important when a person has no habitual residence at the time of state succession in the territory of the successor state.

The European Convention on Nationality also contains provisions applicable to cases where the acquisition of nationality is subject to the loss of a foreign nationality. As the Convention of Reduction of Statelessness, this convention in Article 19 also regulates the agreement between states concerned; it provides that states concerned by state succession shall endeavour to regulate matters relating to nationality by agreement amongst them. Furthermore the Article 20 of the European Convention on Nationality contains principles concerning non-nationals in relation to state succession.

### *3. Comprehensive International Regulatory Efforts Concerning Nationality in Relation to State Succession*

The basis of the future international regulation can be two documents, the Draft Articles on Nationality of Natural Persons in Relation to the Succession of States<sup>35</sup> produced by the International Law Commission of the United Nations and the Convention on the Avoidance of statelessness in Relation to State Succession, which has already entered into force.

The purpose of this chapter is to introduce the regulations - in relation to avoidance of statelessness - of the two documents compared. Both of them define the right to a nationality, as quote “every individual who, on the date of the succession of states, had the nationality of at least one of the states concerned.” The Convention adds to this definition: “who has or would become stateless.” Both documents detail in other provisions the obligation of states to eliminate statelessness in case of state succession. The Draft Articles and the Convention also states the general requirement of prevention of statelessness and both of them contain the prevention of statelessness of children born following state succession. The Draft Articles and the Convention also provide the prohibition of discrimination; however the Draft Articles adds to this the prohibition of arbitrary decisions concerning nationality issues. Furthermore the Draft Articles contains the requirement of exchange of information, consultation and negotiation, and the Convention provides that states shall endeavour to regulate matters relating to nationality by international agreement, as we could see in the Convention on Reduction of Statelessness.

We can clearly state that the particular obligations of the states concerned are more detailed in the Draft Articles. It contains the presumption of nationality, as quote persons concerned having their habitual residence in the territory affected by state succession are presumed to acquire the nationality of the successor state. Another general provision states that renunciation of the nationality of another state is a

---

<sup>34</sup> See Tanel Kerikmäe: *European Convention on Nationality and States' Competence: The Issue of Human Rights*. In: *Juridica International* 1997. no. 2. 27. p.

<sup>35</sup> At its forty-fifth session, in 1993, the International Law Commission decided to include in the Commission's agenda, subject to the approval of the General Assembly, the topic “State succession and its impact on the nationality of natural and legal persons” See Mikulka: *ibid.* 97. p. At its forty-sixth session, in 1994, the Commission appointed Václav Mikulka as special rapporteur for the topic. By its resolution 55/153 of 12 December 2000, the Assembly took note of the articles, which were annexed to the resolution, invited Governments to take into account, as appropriate, the provisions contained in the articles in dealing with issues of nationality of natural persons in relation to the succession of States and recommended that all efforts be made for the wide dissemination of the text of the articles. In resolution 59/34 of 2 December 2004, the General Assembly reiterated its invitation to Governments to take into account, as appropriate, the provisions of the articles in dealing with issues of nationality of natural persons in relation to the succession of States.

condition for attribution of nationality, such requirement shall not be applied in a manner which would render the persons concerned stateless.

The Draft Articles contains the obligations of the concerned states in the special cases of state succession.

At the case of transfer of part of territory, the successor state shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor state shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted. The predecessor state shall not, however, withdraw its nationality before such persons acquire the nationality of the successor state.<sup>36</sup>

At the uniting of states the successor state shall attribute its nationality to persons who, on the date of state succession, had the nationality of a predecessor state.

The obligations of the states concerned are the same at the case of dissolution of a state and at separation of part of territory in the Draft Articles.

The successor state shall attribute its nationality to persons who, at the time of state succession, had the nationality of the predecessor state, if a) they have their habitual residence in its territory, or b) they were not habitually resident in any state concerned, but: i) have an appropriate legal connection with the state concerned, or ii) not entitled to a nationality of any state concerned under subparagraphs a) and b) i) but who were born in, or had their last habitual residence in the affected territory or having any other appropriate connection with that successor state; c) the persons have habitual residence in another state, the concerned state shall not attribute nationality against their will, unless they would become stateless. Besides the successor states shall grant the right of option for the persons concerned by the state succession.

On the other hand the Convention contains only general obligations of the predecessor and the successor states. The definition of the obligation of the predecessor state in the Convention is similar to the obligation of it in the case of transfer of territory in the Draft Articles, as quote the predecessor state shall not withdraw its nationality from its nationals, who have not acquired the nationality of a successor state.

The same similarity can be seen in the obligations of the successor state, but regard to dissolution and separation in the Draft Articles. Accordingly the successor state shall grant its nationality to persons who at the time of state succession had the nationality of the predecessor state, if a) they were habitually resident in the territory affected by state succession, or b) they were not habitually resident in any state concerned, but had an appropriate connection with the successor state. The Convention, when defining the appropriate connection mentions the same group of persons as the Draft Articles, but we can clearly say that the Draft is wider in two ways: first by stating “any other appropriate connection” and second with having point c) saying that if the persons have habitual residence in another state, the concerned state shall not attribute nationality against their will, unless they would become stateless.

There are articles in both documents, which have no respective provisions in the other document. The Draft Articles contains rules of the right of option; it states that the acquisition of nationality, following the exercise of the right of option, shall take effect on the date of state succession. When persons entitled to the right of option have exercised such right, the state whose nationality the persons have opted for shall attribute its nationality to such persons and the state whose nationality they have renounced shall withdraw its nationality from such persons, unless they would thereby become stateless. At the case of dissolution of a state or separation of part of territory the successor states shall grant a right of option to persons concerned who are qualified to acquire the nationality of two or more successor states. The innovation of the Convention, that it provides the rules of proof. According to this the successor state shall not insist on its standard requirements of proof necessary for the granting of its nationality in the case of persons who have or would become stateless as a result of state succession. Besides the successor state shall not require proof of non-acquisition of another nationality before granting its nationality to

---

<sup>36</sup> This rule is not only the prevention of statelessness, but the prevention of dual nationality too.

persons who were habitually resident on its territory at the time of state succession and who have or would become stateless as a result of state succession.

As a conclusion we can say, that the International Law Commission has adopted a rather sophisticated approach, suggesting a number of conditions to identify nationals and accommodate different circumstances of each state. On the other hand the Convention of the Council of Europe is less detailed and the main deficiency of it is the absence of the right of option. As critical remarks we should mention, that both documents leave aside the crucial question of which one of several successor states should have the primary responsibility to grant nationality in order to avoid statelessness of persons affected.<sup>37</sup> And the other huge problem is that the process of adopting these documents seems to be uneasy because of the sensitivity of states in this region.

#### *IV. The Case of Kosovo*

Recent practical problems in the case of Kosovo can reveal the complexity of the question of nationality. Serbia - the predecessor state - is not state party of any international treaty on state succession in respect of nationality, neither the Convention on Reduction of Statelessness, nor the European Convention on Nationality. Consequently the domestic law and an agreement between Serbia and Kosovo can regulate the nationality issues in relation to the separation of the territory. The possibility of concluding an agreement does not seem to be possible in this case, because of the relations of Serbia and Kosovo.

Accordingly the Constitution of Kosovo, adopted on 9 April 2008, can serve as a basis of the acquisition of nationality of Kosovo.

The Article 155 [Citizenship] of the Constitution of Kosovo states that:

- “1. All legal residents of the Republic of Kosovo as of the date of the adoption of this Constitution have the right to citizenship of the Republic of Kosovo.
2. The Republic of Kosovo recognizes the right of all citizens of the former Federal Republic of Yugoslavia habitually residing in Kosovo on 1 January 1998 and their direct descendants to Republic of Kosovo citizenship regardless of their current residence and of any other citizenship they may hold.”

These deficient regulations can result in many problems. For example Kosovo can use discrimination through definition of “legal resident.” Besides the Constitution does not contain provisions about the children born after 1 January 1998, who are not legal residents of Kosovo at the date of the adoption of Constitution; consequently these children can easily become stateless. Finally it does not contain the right of option, which would be important for Serbian inhabitants of Kosovo to keep Serbian nationality. They can determine their nationality only according to the eligibility under the laws of Kosovo and Serbia, thus they should renounce from their acquired nationality of Kosovo, and request for acquiring Serbian nationality.

#### *V. Summary*

In recent cases of state succession, bilateral or multilateral agreements between the states concerned have played an extremely limited role, since the issue of nationality was resolved chiefly by the domestic law of the successor state. There are certain cases, in which the concerned states has not appropriate nationality laws in their domestic law, and are not parties of the above mentioned international documents concerning the protection of human rights. The effect in these cases can be easily statelessness, which can

---

<sup>37</sup> Ziemele: *ibid.* 216. p.

cause serious problems for the related persons. The international instruments can overtake and eliminate these consequences. Accordingly the impact of rules of international law is concerning nationality in relation of state succession has great importance. Entering into force of the Convention on the Avoidance of Statelessness in Relation to State Succession is a huge improvement of regulation on state succession; however universal international document should be in force to ensure widely the elimination of statelessness. The Convention of the Council of Europe is not enough detailed, and the main deficiency of it is the absence of the rules concerning right of option. The Draft of the International Law Commission would be an appropriate universal regulation on nationality matters in relation to state succession. However neither the Convention on the Avoidance of Statelessness in Relation to State Succession, nor the Draft Articles on Nationality of Natural Persons in Relation to State Succession of States regulates the crucial question of which one of several successor states should have the primary responsibility to grant nationality in order to avoid statelessness of persons affected. The international regulatory efforts concerning nationality in relation to state succession and the practical problems in Kosovo also makes it absolutely clear, that the nationality issue can well be regarded as one of the most difficult problems within the domain of the law of state succession.