INTERNATIONAL LAW ASSOCIATION

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COMMITTEE ON FEMINISM AND INTERNATIONAL LAW

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Final Report on Women's Equality and Nationality in International Law

1) Introduction

1.1) Activities of the Committee

This report is the final of the Committee's three reports on women's equality in the context of nationality under international law. The Committee's work on the topic began at the 66th ILA Conference in Buenos Aires with the consideration of a report prepared by Professor Christine Chinkin, then Rapporteur of the Committee, and Mr Urfan Khaliq (Faculty of Law, University of Southampton) entitled "Preliminary Study and Comparative Analysis of the Immigration and Nationality Laws of Different States and their Impact Upon Women" (Preliminary Study). The plenary meeting of the Conference took note of this Preliminary Study and requested the Committee to continue its work.

At the 68th ILA Conference in Taipei, the Committee considered the further Preliminary Report "Women's Equality and Nationality in International Law" (Preliminary Report). The Preliminary Report built on the Preliminary Study,

but shifted the field of the Committee's work from comparative to international law and narrowed its focus to nationality. The Preliminary Report was considered by the plenary meeting of the 68th Conference, which invited the Committee to continue its work, taking into account the comments made at the 68th Conference.

Among the comments made in the Committee's working session at the 68th Conference was the suggestion that the Preliminary Report be widely circulated in order both that it might serve as a resource for international organizations, nongovernmental organizations (NGOs), women's groups and others seeking to advance women's equality in nationality law, and that it might attract useful feedback from such hands-on users. This has proved to be invaluable advice. In accordance with the specific suggestion of Professor Andrew Byrnes,[1] Professor Christine Chinkin, the Chair of the Committee, sent a copy of the Preliminary Report to the United Nations Human Rights Committee and the Committee on the Elimination of Discrimination Against Women (CEDAW). The Preliminary Report was publicized in the American Society of International Law Women and International Law (WILIG) Newsletter and is listed in Women's Human Rights Resources, a web-based bibliography on women's human rights.[2] It is hoped that inclusion in this website, in particular, will help to bring the Committee's work to the attention of those who might not be familiar with the International Law Association or think to consult its publications. The Preliminary Report was made available to some of the advocates involved in litigation in South Asia around women's equality in nationality law through Interights, a London-based international NGO which monitors and assists the domestic litigation of human rights issues.

In October 1999, Professor Chinkin delivered a key-note address based on the Preliminary Report, entitled "Nationality in International and Regional Human Rights Law," at a plenary session of a Judicial Colloquium organized by the United Nations Division for the Advancement of Women held in Vienna and attended by nearly 100 judges from around the world. Professor Karen Knop, the Rapporteur of the Committee, drew on the report in her paper "Relational Nationality: On Gender and Nationality in International Law," prepared for the conference "Citizenship: Comparisons and Perspectives," co-sponsored by The International Migration Policy Program, Carnegie Endowment for International Peace and the Fundação Luso-Americana para o Desenvolvimento, held in Lisbon in June 1999 (forthcoming in collection from the Carnegie Endowment for International Peace). At the request of the UN Division for the Advancement of Women, Professor Chinkin will author a version of the Final Report aimed at a more general audience, which will be published by the United Nations in its "Women 2000" series.

An informal meeting of the Committee was held in Washington, D.C. in

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1 International Law Association, *68th Conference Report* (1998) at 320.

2 http://www.law-lib.utoronto.ca/Diana/nation/documents.htm

April 1999. In addition to the Chair and Rapporteur of the Committee, Professor Hilary Charlesworth, Professor Virginia Leary, Ms Jenny Huei-yi Shyu and Dr. Lilly Sucharipa were in attendance. Other Committee members sent regrets. Professor Chinkin had occasion to speak separately with Professor Savitri Goonesekere, former Chair of the Committee and currently a member of CEDAW, about the direction of the Final Report. Professor David Berry made available to the Committee his paper "International Law and the Violation of Women's Rights to Nationality: A Caribbean Perspective," and Dr. Maria Laeticia Loenen forwarded comments on the Preliminary Report by the Dutch Working Group on Feminism and International Law. Other Committee members brought various national developments to the Committee's attention.

Since the 68th Conference in 1998, the Committee's work on equality and nationality has also benefitted from the assistance of a number of outside institutions, organizations and individuals. Through the International Human Rights Programme at the University of Toronto Faculty of Law, the Committee was able to establish two student internships related to its work. Ms Alison Symington (LL.B. student, University of Toronto) spent the summer of 1999 as an intern with Ms Sara Hossein of Interights, London; and Ms Sandra Raponi (LL.B. student, University of Toronto) was a summer intern under the supervision of Ms Carol Batchelor (ILA Headquarters member) at the United Nations High Commission for Refugees (UNHCR) in Geneva. Professor Knop conveyed in writing the Committee's gratitude to Professor Rebecca Cook (Faculty of Law, University of Toronto) and Ms Valerie Oosterveld (then Director of the International Human Rights Programme at the Faculty of Law, University of Toronto) for making these internships possible. The Committee is grateful to the two host organizations and especially to Ms Hossain and Ms Batchelor for their respective supervision of the interns. Ms Hossain and Ms Symington have been of ongoing assistance to the Committee in keeping it apprised of domestic developments in South Asian countries and in providing the Committee with documentation in this regard. Ms Raponi contributed several regional studies of women and nationality law based on her research at UNHCR. The Committee also acknowledges with thanks comments on the Preliminary Report by Carol Batchelor, Rebecca Cook, Zdenka Machnyikova and Johanna Myyra.[3]

[3] Due to the Committee's focus on women's equality and nationality in international law, the Final Report uses domestic laws and cases only as examples. While the Final Report therefore does not make reference to the full wealth of information received by the Committee on specific countries and regions, its formulation of the issues, priorities and recommendations attempts to reflect the entire range of information at its disposal. Readers who are having difficulty locating any of the sources mentioned in the Final Report are welcome to contact the Rapporteur by mail at Faculty of Law, University of Toronto, 84 Queen's Park Crescent, Toronto, Ontario, Canada M5S 2C5; facsimile (416-978-7899); or electronic mail (k.knop@utoronto.ca).

1.2) Final Report of the Committee

The Final Report updates and revises the Preliminary Report to reflect the assistance and advice received by the Committee. The most significant revision is the addition of a conclusion which proposes a set of general recommendations for discussion at the 69th ILA Conference in London and identifies related subjects in international law deserving of separate study.

The primary goals of the Preliminary Report were to develop a framework for analyzing the various issues of women's equality in nationality law and to use this framework to evaluate the relevant international legal regimes. With respect to the first of these goals, the Preliminary Report introduced the idea of successive "generations" of equality issues, where reforms to nationality law eliminated one set of equality issues only to leave or give rise to another. This idea of generations offered a clearer picture of the progress, past and present, toward women's equality in nationality law. The goal of examining the full range of international legal regimes available to promote equality in matters of nationality was intended to bridge the gap that often exists between international lawyers, who tend to emphasize concerns of statelessness and dual nationality; and human rights lawyers, who tend to focus on women's equality and sometimes on the nexus between women's and children's rights.

The Final Report maintains the Preliminary Report's aim of enhancing the understanding of how international law and international human rights law may promote women's equality in domestic nationality law; that is, like the earlier report, it concentrates on what is essentially the potential of one legal system to operate upon another. By increasing the importance of nationality and decreasing its effectiveness, globalization highlights both the value and the limitations of such an approach. It is conventionally thought that the rise of international human rights, many of which flow from residence or simply presence within the jurisdiction of a state, has diminished the importance of nationality as the basis for rights.[4] But the political disintegration of states and widespread economically motivated migration of individuals symptomatic of globalization have shown the importance of nationality as a means for individuals to become full members of the societies in which they find themselves or to obtain assistance in returning to the societies they voluntarily or involuntarily left. Under these conditions, the study of discrimination against women in nationality law and its operation assumes even greater significance. Indeed, women are among the profiles of statelessness that have been identified.[5]

The resources of the Committee did not, however, permit it to broaden the study to include the discriminatory effects of how nationality laws are administered. The Final Report therefore does not deal with problems of registration,

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[4] See S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996) at c.3; Y.N. Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994).

[5] See C.A. Batchelor, "UNHCR and Issues Related to Nationality" (1995) 14 Refugee Survey Q. 91 at 105-106.

documentation and so on that may have a significant effect on women due to globalization. In this regard, the Committee draws attention to the valuable work being done by the UNHCR, the UN Special Rapporteur on Violence Against Women and a number of NGOs. For example, the UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, has reported problems of *de facto* statelessness[6] among Polish women who are part of the recent wave of women trafficked from Central and Eastern Europe into Western Europe to work in the sex trade.[7] For these women, nationality is not a means to diplomatic assistance because often their passports are taken away by the pimp or brothel owner, and they are unable to prove their nationality.[8] The UN Secretary General has since recommended that any barriers for trafficked women to return to their countries, with or without passports or identification documents, be eliminated.[9] Thai women who work abroad are another example of the gendered problems of nationality in practice. According to one Thailand-based NGO, many of these women are unregistered in Thailand and have no identity papers to document their nationality. Among the difficulties they face on their return to Thailand is that without proof of nationality, their children born abroad have ambiguous or no nationality.[10]

The Final Report is organized as follows. Part 2 provides an historical perspective on the problems of women's equality in nationality law. Part 3 treats the concept of nationality and the bases on which nationality may be conferred. Part 4 develops a framework for analyzing the various issues of women's equality in matters of nationality, in light of which Part 5 describes and assesses the various international legal regimes available to address these issues. The Conclusion proposes for discussion a set of general recommendations and identifies areas of international law related to the broader issue of women's equal membership in the state.

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6 On *de facto* statelessness, see C.A. Batchelor, "Statelessness and the Problem of Resolving Nationality Status" (1998) 10 Int'l J. Refugee L. 156 at 172-174.

7 United Nations Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy. Addendum: Report on the Mission of the Special Rapporteur to Poland on the Issue of Trafficking and Forced Prostitution of Women (24 May to 1 June 1996), UN Doc. E/CN.4/1997/47/Add.1 (1996) at paras. 6, 44-45.

8 *Ibid*. at paras. 23, 66, 105. See also G. Caldwell, S. Galster & N. Steinzor, *Crime & Servitude: An Exposé of the Traffic in Women for Prostitution from the Newly Independent States* (Global Survival Network, 1997), available at <http://www.globalsurvival.net/femaletrade/9711russia.html>. Similar problems are encountered by women in the "maid trade": the temporary legal migration of unaccompanied women from less developed Asian states to Western Asia (the Middle East) or to prosperous East Asian states (for example, Hong Kong and Singapore) to take positions as live-in domestic servants. J. Fitzpatrick & K.R. Kelly, "Gendered Aspects of Migration: Law and the Female Migrant" (1998) 22 Hastings Int'l & Comp. L. Rev. 47 at 79-80 (seizure of passports by employers).

9 United Nations Secretary General, Report of the Secretary General: Trafficking in Women and Girls, UN Doc. A/53/409 (1998) at para.34.

10 Development and Education Programme for Daughters and Communities, "Nationality Problems Add to Child Exploitation in Thailand" (February - March 1997) 1:6 Connect 6.

2) Historical Background

With the 1991 judgment of the Botswana High Court[11] and 1992 judgment of the Court of Appeal[12] in *Unity Dow* v. *Attorney General of Botswana*, issues of nationality regained their historical prominence in the struggle for women's equality in international and domestic law. In *Unity Dow*, both the lower court and the appeal court used international standards and obligations to find that a law allowing only a father or an unmarried mother to pass Botswana citizenship to his or her children born in Botswana[13] was unconstitutional on grounds of sex discrimination.* The applicant, Unity Dow, was a citizen of Botswana married to an American citizen. Although she was born in Botswana, the couple lived in Botswana and their children were born and were growing up in Botswana, Unity Dow, as a woman, was unable to pass Botswana citizenship to her children. Had the children instead been born in Botswana to a Botswana father and a non-Botswana mother, they would have been Botswana citizens. Without citizenship, Unity Dow's children could remain in Botswana as legal aliens only if they formed part of their father's residency permit, which Botswana granted for no more than two years at a time. Since the children would have to travel on their father's passport, Unity Dow would not be entitled to return to Botswana with her children in the absence of their father. While she was jointly responsible with her husband for the education of their children, her children, as non-citizens, did not qualify for financial assistance for university education. In arguing that the citizenship law was unconstitutional, Unity Dow successfully invoked the right of nondiscrimination on the basis of sex contained in the *Convention on the Elimination of All Forms of Discrimination Against Women* (the *Women's Convention*),[14] the *African Charter on Human and Peoples' Rights*,[15]and other international instruments.

In other countries, the outcome of cases challenging nationality laws on

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[11] *Unity Dow* v. *Attorney General of Botswana*, [1991] L. R. Commonwealth (Const.) 574 (Botswana H. Ct.).

[12] *Unity Dow* v. *Attorney General of Botswana*, [1992] L. R. Commonwealth (Const.) 623; 103 Int'l L.R. 128 (Botswana C.A.) [citation will be to the L.R. Commonwealth (Const.)].

[13] Unity Dow also challenged an identical provision of the law regarding the citizenship of children born outside Botswana and a provision for application for naturalization by a woman married to a Botswana man which had no counterpart for the naturalization of a man married to a Botswana woman. The High Court did not rule on the latter provision. While the High Court did declare the former *ultra vires*, the Court of Appeal deleted that part of the High Court's declaration due to lack of *locus standi*.

* It is important to note that "sex", the term used in the cases and international conventions relevant to women's equality and nationality, is not the same as "gender". "Sex" refers to a biological distinction between female and male, while "gender" is a broader term which includes socially or culturally constructed different roles for women and men. Since "sex" appears in the existing cases and conventions and continues to be more widely used and understood than "gender," the Committee ultimately concluded that it would be more helpful for advocacy purposes if the current report and resolution employed the more familiar "sex." However, the Committee draws attention to the progressive example of the South African constitution, which refers to both "sex" and "gender".

[14] *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 U.N.T.S. 13.

[15] *African Charter on Human and Peoples' Rights (Banjul Charter)*, 27 June 1981, 21 I.L.M. 58.

grounds of discrimination against women has varied over the past decade.[16] In 1994, the Zimbabwe Supreme Court used the *Unity Dow* case, along with *International Covenant on Civil and Political Rights* and *European Convention on Human Rights* jurisprudence, to find that the freedom of movement guaranteed by the Constitution of Zimbabwe entitles a female citizen of Zimbabwe married to a foreign citizen to reside permanently with her husband in Zimbabwe.[17] In a later case, the Court expanded this ruling to the foreign husband's right to work in Zimbabwe.[18] Although the Constitution of Zimbabwe was subsequently amended to provide that freedom of movement does not prevent the imposition of restrictions on the movement or residence in Zimbabwe of any person who is neither a citizen nor a permanent resident or the expulsion of any person who is not a citizen "whether or not he is married or related to another person who is a citizen of or permanently resident in Zimbabwe," the Court interpreted this amendment as leaving untouched the two earlier decisions.[19] In contrast, *Unity Dow* and the *Women's Convention* and European Court of Human Rights case-law failed to persuade the High Court Division of the Bangladesh Supreme Court that a law preventing Bangladeshi women from passing their citizenship to children born from marriage to a foreign husband was unconstitutional and a violation of fundamental human rights.[20] Whereas the Supreme Court of Canada in 1997 ruled that the stricter treatment under the Canadian *Citizenship Act* of persons seeking Canadian citizenship who had Canadian mothers, as compared to those who had Canadian fathers, was unconstitutional,[21] the Supreme Court of the United States in 1998 upheld a provision of the US *Immigration and Nationality Act* that, based

[16] See *e.g.* S.W.E. Goonesekere, "Nationality and Women's Human Rights: The Asia/Pacific Experience" in A. Byrnes, J. Connors & L. Bik, eds., *Advancing the Human Rights of Women: Using International Human Rights Standards in Domestic Litigation* (Papers and Statements from the Asia/South Pacific Regional Judicial Colloquium, Hong Kong, May 20-22, 1996) (London: Commonwealth Secretariat 1997) 86 at 94-96; Economic and Social Commission for Asia and the Pacific, *Human Rights and Legal Status of Women in the Asian and Pacific Region* (New York: United Nations, 1997) at 31-32.

[17] *Rattigan* v. *Chief Immigration Officer, Zimbabwe* 1995 (2) SA 182 (ZS).

[18] *Salem* v. *Chief Immigration Officer, Zimbabwe* 1995 (4) SA 280 (ZS).

The Zambian High Court has ruled that it is unconstitutional for the government to require the consent of the father before a mother can include her children in her passport or they can obtain their own passport. *Nawakwi* v. *Attorney General of Zambia*, [1993] 3 L.R. Commonwealth 231 (Zambian H. Ct.).

[19] *Kohlhaas* v. *Chief Immigration Officer, Zimbabwe* 1998 (3) SA 1142, 1998 (6) BCLR 757 (ZS). On this line of cases, see also the South African Migration Project at <http://www.queensu.ca/samp/policy-dev/legal.htm>.

[20] *Malkani* v. *Secretary of the Ministry of Home Affairs of Bangladesh* (1 September 1997) Writ Petition no.3192 of 1992 (Bangladesh Supreme Court, High Court Division, Dhaka) [uncertified copy on file with the Rapporteur].

A recent Pakistani case upheld the provisions of the Pakistani *Citizenship Act* that entitle a foreign woman married to a Pakistani man to the citizenship of Pakistan, but do not grant citizenship to a foreign man married to a Pakistani woman. *Sharifan* v. *Federation of Pakistan* (1998) 50 All Pakistan Legal Decisions 59 (Lahore).

[21] *Benner* v. *Canada (Secretary of State)*, [1997] 1 S.C.R. 358.

on stereotypes about the different parenting roles of men and women, makes it harder for American fathers than American mothers to pass citizenship to their children born abroad.[22]

The uncertain progress toward equal rights for women with respect to nationality is confirmed by states' positions on article 9 of the *Women's Convention*. A significant number of states have made reservations to article 9, which gives women equal rights with men to acquire, change or retain their nationality and equal rights with respect to the nationality of their children. Although Jamaica, Liechtenstein, Republic of Korea and Thailand have withdrawn their reservations since 1990,[23] eight states that ratified or acceded to the *Women's Convention* during the same period entered reservations to article 9.[24] Algeria, Bahamas,[25] Cyprus, Egypt, Fiji, France, Iraq, Jordan, Kuwait, Lebanon, Malaysia, Morocco, Singapore (without explicit reference to article 9), Tunisia, Turkey and the United Kingdom, also on behalf of its dependent territories, currently maintain reservations or interpretive declarations with respect to all or part of article 9. Moreover, this list includes neither those states party to the *Women's Convention* that have made other reservations which potentially affect the nationality rights of women[26] nor those with discriminatory nationality laws that have not reserved.[27] Nor, of course, does it include states that are not party to the *Women's Convention*. A recent NGO survey gives Kenya, Monaco and Venezuela as examples of states with discriminatory nationality laws,[28] none of which is identifiable as such through reservations to the *Women's Convention*.

Cases such as *Unity Dow* represent the most recent efforts to achieve full equality for women in matters of nationality, but discrimination against women in the laws governing nationality and citizenship has been an issue internation-

[22] *Miller* v. *Albright*, 118 S. CT. 1428 (1998). For commentary, see C.T.L. Pillard & T.A. Aleinikoff, "Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in *Miller* v. *Albright*" [1998] Supreme Court Review 1; R. Natarajan, "Amerasians and Gender-Based Equal Protection Under U.S. Citizenship Law" (1998) 30 Colum. Hum. Rts. L. Rev. 123. But see *United States* v. *Ahumada-Aguilar*, 189 F 3d 1121 (9th Cir. 1999) (ruling this statutory distinction unconstitutional by reading the Supreme Court's decision as based on nonjusticiability and a majority of the Justices as finding that the provision relied impermissibly on gender stereotypes).

[23] In 1996, the United Kingdom withdrew part of its reservation to article 9.

[24] Algeria, Bahamas, Fiji, Jordan, Kuwait, Lebanon, Malaysia, Morocco.

[25] See D. Berry, "International Law and the Violation of Women's Rights to Nationality: A Caribbean Perspective" (2000) [unpublished] (on file with the Rapporteur).

[26] Pakistan might be an example.

[27] Malawi and Nepal might be examples. With respect to Malawi, see S. Muthali, "We are Still 2nd Class? Citizenship Laws of Malawi" (March 1999) 11:1 Women and Law in Southern Africa Research Trust Newsletter 4. The Nepal Supreme Court in 1994 struck down provisions of the citizenship law that discriminated against foreign spouses of Nepalese women. Goonesekere, *supra* note 16 at 95. However, the Forum for Women, Law and Development (Nepal) is working to change other discriminatory aspects of Nepalese nationality law. Personal communication of the Forum for Women, Law and Development (Nepal) with the Rapporteur (20 April 2000).

[28] Equality Now, "Words and Deeds. Holding Governments Accountable in the Beijing + 5 Review Process." (1999) 16:1 *Women's Action* at 10-14, available at <http://www.equalitynow.org/action_eng_16_1.html>.

ally since the beginning of the twentieth century.[29] In fact, the International Law Association at its 31st Conference in 1922 unanimously carried the resolution "it would be desirable to fix uniformly by treaty the nationality of married women, reserving to a married woman, so far as possible, the right to choose her own nationality."[30] In a paper presented to the 32nd Conference the following year, Ernest Schuster limited the ILA's interest in the question of married women's nationality to the ILA's two objectives of promoting "uniformity of legislation in matters affecting international intercourse" and determining "means for the avoidance of conflicts between the laws of different countries."[31] Dr. Schuster argued, however, that these objectives supported a married woman's right to choose her own nationality, independent of her husband's nationality, because this was the trend rapidly emerging in domestic legislation and encouragement of the trend would serve to promote uniformity and minimize conflicts between the nationality laws of different states.[32] Moreover, he personally endorsed this view on the grounds that no individual should be required to change her nationality without her consent and that an individual should truly bear allegiance to the state of which she is a national.[33] At the same Conference, the British feminist and pacifist Chrystal Macmillan[34] lay before the Conference a draft convention on the nationality of women proposed by the International Women's Suffrage Alliance.[35] The consideration of this draft convention, based on the general principle that married women should have the same right as men to keep or change their nationality, led to the ILA's adoption at its 33rd Conference in 1924 of a model domestic statute and set of provisions for inclusion in international treaties. Seeking the solution most likely to be consistent with "the happiness of family life, remembering that a wife joins a new family with her eyes open," the Committee responsible concluded that "the old rule, which has come down from early Christian times,[36] should be the dominant rule still; that is to say, that the wife should, as a rule, follow the nationality of her husband."[37] In terms of women's interests, the most that can be said for the ILA model statute and treaty

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[29] See C. Macmillan, speaking at the 32nd International Law Association Conference. International Law Association, *32nd Conference Report* (1923) at 40-41.

[30] International Law Association, *31st Conference Report* (1922) at 257. Quoted in E.J. Schuster, "The Effect of Marriage on Nationality" in *32nd Conference Report*, *supra* note 29 at 9.

[31] Schuster, *supra* note 30 at 9.

[32] *Ibid*. at 10.

[33] *Ibid*. at 23-24.

[34] On Macmillan, see generally A. Wiltsher, *Most Dangerous Women: Feminist Peace Campaigners of the Great War* (London: Pandora, 1985).

[35] *32nd Conference Report*, *supra* note 29 at 45-47.

[36] There is some debate as to whether this nationality rule was long implicit in the patriarchal ethos of the common and civil law or a more recent addition. See *32nd Conference Report*, *supra* note 29 at 9-38.

[37] International Law Association, *33rd Conference Report* (1924) at 24. For Macmillan's response, see *ibid.* at 40. The Institut de Droit international also tackled the issue of married women's nationality. See A.N. Makarov, "La Nationalité de la Femme Mariée" (1937-II) 60 Rec. des Cours 115 at 141-145.

provisions is that they addressed the problem of women's statelessness resulting from conflicts among the nationality laws of different states.

Women and others who supported the principle of independent nationality for married women were also active at the 1930 Hague Codification Conference,[38] which was similarly reluctant to go much beyond problems of women's statelessness. In contrast, the work of the Inter-American Commission of Women[39] led to the 1933 *Montevideo Convention on the Nationality of Women*, which provided that there should be no distinction based on sex as regards nationality.[40] The disillusionment of international women's organizations with the *Convention on the Conflict of Nationality Laws*[41] which emerged from the 1930 Hague Codification Conference resulted in the creation of the Women's Consultative Committee on Nationality within the League of Nations.[42] There would be no universal convention, however, until the United Nations Commission on the Status of Women produced[43] the *Convention on the Nationality of Married Women*[44] in 1957.

Since the ILA's consideration of women's equality and nationality in the early 1920s, the issues for women have largely shifted from the first generation equality issue of a married woman's right to a nationality independent of her husband to second generation equality issues, such as those in *Unity Dow*, associated with the possibility that spouses have different nationalities. On the horizon may be yet a third generation of equality issues.

3) Nationality

3.1) The Concept of Nationality

"In the past, nationality was viewed largely as a privilege, of a somewhat rigid and almost mystical character, conferred by the State," Hersch Lauterpacht wrote, "It is now increasingly regarded as an instrument for securing the rights of the individual in the national and international spheres."[45] As the "right to have rights",[46] nationality is amongst the most important rights a state can assign to individuals.

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[38] Makarov, *supra* note 37 at 149-150.

[39] See J.B. Scott, "The Seventh International Conference of American States" (1934) 28 AJIL 219.

[40] *Montevideo Convention on the Nationality of Married Women*, 26 Dec. 1933, (1934) 28 AJIL Supp. 62, art.1.

[41] *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*, 12 April 1930, 179 L.N.T.S. 89.

[42] C.A Miller, *Lobbying the League: Women's International Organizations and the League of Nations* (Ph.D. Thesis, University of Oxford, 1992) at 193-209.

[43] United Nations, *Convention on the Nationality of Married Women: Historical Background and Commentary* (1962), UN. Doc. E/CN.6/389, UN Sales No. 62.IV.3 at c.2.

[44] *Convention on the Nationality of Married Woman*, 20 February 1957, 309 U.N.T.S. 65.

[45] H. Lauterpacht, "Foreward to the First Edition" in P. Weis, *Nationality and Statelessness in International Law*, 2nd ed. (Alphen aan den Rijn: Sijthoff & Noordhoff, 1979) at xi.

[46] *Perez* v. *Brownell* (1958), 356 U.S. 44 at 64 (Warren, C.J., dissenting) ("Citizenship *is* man's basic right for it is nothing less than the right to have rights.").

In international law, nationality secures rights for the individual by linking her to a state. Traditionally the subjects of international law are states; individuals are not subjects of international law. By forging a link between individual and state, nationality makes one state's interference with the national of another a violation of the other state's sovereignty. Nationality thereby provides the state of nationality with the standing to make a diplomatic claim with respect to the harms constituting violations of international law caused to that individual.[47]

This right of the state to grant its nationals protection in relation to other states is a key function of nationality in international law. It may be that in the long term, this function will decrease in importance as the individual herself is increasingly recognized as a subject of international law.[48] In the short term, however, the traditional protective function of nationality has assumed even greater importance as the large-scale movement of workers, refugees and others seen in the late twentieth century means that significant numbers of people live outside their state of nationality.[49]

The other key function of nationality in international law is the duty of the state to admit its nationals and allow them to reside within its territory.[50] While this is primarily a question for domestic law, it becomes an international legal obligation insofar as relations between states are affected. Under international law, states have the sovereign discretion to admit aliens and, subject to certain safeguards, to expel them. But, by not admitting its national expelled from another state, the state of nationality infringes the expelling state's sovereign right to choose which aliens reside in its territory. A state therefore has the duty, as between states, to admit its nationals into its territory. This duty of admission and non-expulsion of nationals is recognized in a number of international human rights instruments.[51]

Each state determines under its own law who are its nationals. In the *Nottebohm* case, the International Court of Justice stated: "...international law leaves it to each state to lay down the rules governing the granting of its own

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[47] For a recent example, see *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Application of 28 December 1998, International Court of Justice, available at <http://www.lawschool.cornell.edu/library/cijwww/icjwww/idocket/igc/igc_orders/igc_iapplication_19981228.pdf>.

[48] See R. Donner, *The Regulation of Nationality in International Law*, 2nd ed. (Irvington-on-Hudson, N.Y.: Transnational Publishers, 1994) at 13-15.

[49] With respect to women in the Asia Pacific region, see Goonesekere, *supra* note 16 at 86.

In such contexts as the European Union, nationality also assumes importance because EU nationals enjoy a range of benefits in EU states that other non-nationals do not.

[50] See generally Weis, *supra* note 45 at 45-61.

[51] *Universal Declaration of Human Rights*, GA Res. 217A(III), UN GAOR, 3rd Sess., Pt.I, Resns 71 (1948), art.13(2); *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, art. 12(4); *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 U.N.T.S. 195, art.5(d)(ii); *African Charter on Human and Peoples' Rights*, *supra* note 15 at art.12(2); *American Convention On Human Rights*, 22 November 1969, 1144 U.N.T.S. 123, art.22(5); *Protocol No.4 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 16 September 1963, E.T.S. No.46, art.3.

nationality." [52] A state's discretion is limited by customary international law and *jus cogens*, and is also limited where the state has entered into human rights treaties, whereby it binds itself under international law to provide particular safeguards under its domestic law.[53]

In addition, a state's grant of nationality may be challenged when it attempts to raise a diplomatic claim against another state. The *Nottebohm* case[54] stressed that the absence of a genuine link between a state and its claimed nationals may lead to its having no standing to make a claim with respect to the harms caused to those individuals.[55]

Closely connected to the legal concept of nationality is citizenship. The term "nationality" is often used interchangeably with the term "citizenship". In international law, as well as in many domestic jurisdictions,[56] however, nationality and citizenship technically relate to different aspects of membership in a state. Nationality corresponds to membership in a state vis-à-vis other states; that is, it stresses the international protections afforded by membership. Citizenship is associated with full membership within the state. It follows from the distinction between nationality and citizenship that, as Paul Weis puts it, "every citizen is a national, but not every national is necessarily a citizen..."[57] While the laws of a state may distinguish between different classes of nationals, these distinctions are not relevant in international law.[58]

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[52] *Nottebohm Case (Liechtenstein v. Guatemala)*, [1955] ICJ Rep. 4 at 23. See also *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*, *supra* note 41 at art.1; *European Convention on Nationality*, 6 November 1997, E.T.S. No.166, art. 3(1).

[53] Is has been argued, for example, that the deprivation by the South African apartheid government of the nationality of Africans in the so-called independent Bantustans (Transkei, Bophuthatswana, Venda and Ciskei) during the apartheid era violated the prohibition on denationalization on the grounds of race. See J. Dugard, *International Law - A South African Perspective*, 2d ed. (JUTA, 2000) at 451.

[54] *Nottebohm*, *supra* note 52.

[55] The concept of "effective nationality" has been stated in a number of decisions and can be seen to be accepted as international law. Some of the most important decisions where the concept has been discussed include: *Nottebohm*, *supra* note 52; *Canevaro Case (Italy v Peru)* (1912), 11 R.I.A.A. 397, 6 AJIL 746; *Salem Case (Egypt v U.S.)* (1932), 2 R.I.A.A. 1161; *Iran v. United States, Case No. A/18* (1984), 5 Iran-U.S. Claims Tribunal Reports 251.

[56] Where international law and most Western European states use the term "nationality," most Eastern European states use the term "citizenship." Council of Europe, *European Convention on Nationality and Explanatory Report*, ISBN 92-871-3470-7 (Strasbourg: Council of Europe Publishing, 1997) at 3.

For some, nationality may also mean membership in a non-state group. Indigenous participants in the ongoing drafting of a United Nations Declaration on the Rights of Indigenous Peoples have interpreted the right of every indigenous individual to a nationality, contained in article 5 of the draft Declaration, as the nationality of the indigenous nation, whereas state participants have interpreted it as the nationality of the encompassing state. "Working Group on the Draft Declaration of the Rights of Indigenous Peoples, 3rd Session (Geneva, 27 October - 7 November 1997)" (1997) No. 39-40 Hum. Rts. Monitor 23.

[57] Weis, *supra* note 45 at 5-6.

[58] *Ibid*. at 3-7.

Within the state, the citizenship rights that flow from nationality are a passport to a series of other rights and duties which may range from the right to vote to the requirement of military service. In a General Recommendation interpreting the *Women's Convention*, CEDAW stated: "Nationality is critical to full participation in society...Without status as nationals or citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and a choice of residence."[59]

While nationals within the state potentially enjoy full citizenship rights, non-nationals are regarded as aliens. The treatment of aliens depends, among other things, on whether the state in question accepts that there is an "international minimum standard" of treatment which must be accorded to all aliens by the state, irrespective of how it treats its own nationals, or takes the position that aliens may only insist on those rights which the state grants to its own nationals.[60]

In this connection, it should be stressed that a woman's equal right to membership in a community within the state, such as an indigenous people or ethnic minority, raises different issues from a woman's equal right to the membership in the state that nationality in the traditional international legal sense represents. This is borne out by the divided reaction of indigenous women in Canada to the United Nations Human Rights Committee's views in the *Lovelace* case.[61] Sandra Lovelace was born and registered as a "Maliseet Indian", which gave her the rights and privileges of Indian status under Canada's *Indian Act*. In accordance with Section 12(1)(b) of the *Act*, she automatically lost her Indian status, and thereby her right to live on the reserve, by marrying a non-Indian. Under the *Act*, a male Indian who married a non-Indian would not have lost his Indian status. Lovelace claimed that the *Indian Act* thereby discriminated on the grounds of sex and violated the rights of equality and nondiscrimination, rights of minorities and several other rights guaranteed by the *International Covenant on Civil and Political Rights*. Since the *Covenant* had not come into force in Canada at the time of her marriage, the Committee found that the *Covenant* only applied to the continuing effects of her loss of status and not to the event of her marriage, which had caused that loss. It concluded that the ongoing denial of her Indian status, and therefore her right to return to the reserve following the break-up of her marriage, violated her rights as a person belonging to a minority as read in the context of her right to equality and nondiscrimination. For Sandra Lovelace, and the other women from her reserve who were in the forefront of the campaign to change the discriminatory rules on status in the *Indian*

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[59] General Recommendation 21 on Equality in Marriage and Family Relations, in *Report of the Committee on the Elimination of Discrimination Against Women (Thirteenth Session)*, UN GAOR, 49th Sess., Supp. No.38, UN Doc. A/49/38 (1994) at 2.

[60] See *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live*, GA Res.144(XL), UN GAOR, 40th Sess., Supp. 53 (1985) at 253 (adopted by consensus).

[61] *Lovelace* v. *Canada*, UN Human Rights Committee, Selected Decisions, vol.2 (1981) 28.

Act,[62] the struggle for equality between women and men within the terms of the *Act* took priority over the larger movement to replace the *Act* with indigenous self-government.[63] However, there are also indigenous women who see *Lovelace* as little more than the amendment of a colonial statute to incorporate a Western idea of gender equality. For them, the issue of gender equality cannot be isolated from the political environment for indigenous beliefs and existence in Canada. Mary Ellen Turpel (Aki-Kwe), for instance, has asked rhetorically: "Before imposing upon us the logic of gender equality (with White men), what about ensuring for our cultures and political systems equal legitimacy with the Anglo-Canadian cultural perspective which dominates the Canadian State?"[64] As the larger context of the *Lovelace* case illustrates, the issue of women's equal right to membership in a community within the state involves the additional issues of that community's right to determine its membership[65] and the equal participation of women in this determination.[66]

3.2) Bases for Nationality

Nationality can be obtained by a number of means. The two principles on which nationality is awarded at birth are *jus sanguinis* and *jus soli*. Where the state in question follows the principle of *jus sanguinis*, an individual's nationality is determined by descent from a national. Historically, this principle took the patrilineal form of tracing the individual's nationality only through the father's line.[67] Where the principle is instead *jus soli*, the individual is a nation-

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[62] For the story of this group of women, told by them in a series of conversations stretching from memories of growing up on the reserve to their political getting of wisdom, see J. Silman, ed., *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women's Press, 1987).

[63] *Ibid*. at 244, 247. This is not to say, of course, that they do not support self-government. See *e.g*. *ibid*. at 224.

[64] M.E. Turpel (Aki-Kwe), "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 Can. J. Women & L. 174, 183. See also R. Johnson, W. Stevenson & D. Greschner, "Peekiskwetan" (1993) 6 Can. J. Women & L. 153, 159, 170-171; "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" in P. Monture-Angus, *Thunder in my Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) 216. See generally D.S. Berry, "Conflicts Between Minority Women and Traditional Structures: International Law, Rights and Culture" (1998) 7 Soc. & Legal Studies 55.

[65] Developments in international law place increasing emphasis on self-identification. See *e.g*. *Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries*, in *International Labour Conventions and Recommendations, 1919-1991* (Geneva, International Labour Organisation, 1992) art. 1(2).

[66] Cf. *Report of the First Asian Indigenous Women's Conference*, 24-30 January 1993, Baguio, reprinted in "Osaka Gathering of Minority and Indigenous Women" Executive Committee, *Minority and Indigenous Women in Japan and Fourth World Conference on Women* (1995) 134-135:

> [A] situation which concerned us is the fact that Asian indigenous women do not have any visibility in conferences of women nor of indigenous peoples. Indigenous women in general are hardly seen nor heard of in women's conferences. Neither do we have significant presence in indigenous peoples' conferences which are highly male-dominated.

[67] The Israeli *Law of Return* is a notable exception in this regard. See A. Shachar, "Whose Republic?: Citizenship and Membership in the Israeli Polity" (1999) 13 Georgetown Immigration L.J. 233 at 244-246.

al of the state simply by being born within the state's territory, irrespective of the parents' nationalities. While this principle is superficially neutral, it favours the father's nationality insofar as women have traditionally tended to reside in their husband's state. The vast majority of states have adopted an approach which is a combination of these principles.

Other than at birth, nationality may be acquired by naturalization. It is for the state to stipulate the requirements that must be satisfied before a non-national can apply to be naturalized. The philosophy behind the requirements, which generally include the passage of time and the establishment of residence within the state, is expressed by the Inter-American Court of Human Rights in its 1984 Advisory Opinion on amendments to the naturalisation provisions of the Constitution of Costa Rica. "In these cases," the Inter-American Court of Human Rights stated, "nationality no longer depends on the fortuity of birth in a given territory or on parents having that nationality; it is based rather on a voluntary act aimed at establishing a relationship with a given political society, its culture, its way of life and its values."[68] Traditionally, this notion of naturalization as the voluntary establishment of a relationship with the state had to be reconciled, however, with the fact that marriage to a national was a basis for automatically granting nationality to a non-national woman. One way that the two were reconciled was through the idea that women consented to membership in the polity not directly, but indirectly as part and parcel of their consent to marriage.[69] As Anne McClintock observed: "For women, citizenship in the nation was mediated by the marriage relation within the family."[70]

Where nationality is acquired by naturalization, it is clear that the rules for entry to a state control who will in future be eligible to be a national. The immigration law of each state lays down the requirements for admission. In many states, nationality law is therefore entangled with, and even based upon, the law of immigration. There is no uniformity in the principles upon which states have based their criteria for admission. The factors which may be taken into account include a person's language, religion, political beliefs, place of birth, connections to the state, the closeness of family relatives who already reside there, financial position, ethnicity, colour, existing nationality and sex. Since each state has a large discretion in its choice of such factors, its history, economic situation, culture and political climate will determine which individuals will be granted immigration clearance and possibly nationality in the future.[71]

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[68] *Amendments to the naturalization provisions of the Constitution of Costa Rica*, Advisory Opinion of 19 January 1984, Inter-American Court of Human Rights, (1984) 5 Hum. Rts. L.J. 161 at para.35 [hereinafter *Costa Rica* Advisory Opinion].

[69] *MacKenzie* v. *Hare* (1915), 239 U.S. 299.

[70] A. McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Context* (New York: Routledge, 1995) at 358.

[71] Sexual discrimination in immigration rules is beyond the scope of this report, but it is obvious that the prospects for gender equality in nationality law are affected by immigration rules and that progress toward gender equality in nationality law can be undermined by changes to the immigration rules.

Individuals may be perceived as undesirable, for example, if they are considered likely to be a burden upon the resources of the state. In fact, the vast majority of states grant "primary immigration" clearance only to those who can sustain themselves and bring some benefit to the state. Women have until recently almost always been viewed either as a burden, and therefore unworthy of citizenship on their own merits, or as the appendages of men.

4) Equality Issues

This part divides the issues of women's equality in nationality law into three generations. The first generation issue is defined as the issue of a married woman's right to an independent nationality. The second generation of issues involve those inequalities that come to the fore once a married woman has a nationality independent of, and hence potentially different from, her husband's nationality. Although a third generation of equality issues has not yet taken shape, this part suggests some remaining areas of concern for women.

Since women's nationality is governed by both domestic and international law, the issues will differ from state to state and region to region. Although independent nationality for married women is now widely accepted, there are still states that maintain reservations or interpretive declarations to article 9(1) of the *Women's Convention*, which provides that women have equal rights with men to acquire, change or retain their nationality and, in particular, that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband. While the second generation of issues is most prominent in the contemporary case-law, these successes may be compromised in ways that raise a third generation of issues.

4.1) First Generation Issue of Equality: Nationality of Married Women

Until the First World War, the nationality laws of virtually all countries made a married woman's nationality dependent on her husband's nationality.[72] The first of Virginia Woolf's three clarion phrases in her 1938 political work *Three Guineas* - "as a woman, I have no country. As a woman I want no country. As a woman my country is the whole world" - is a bitter allusion to British nationality laws of the day which deprived a woman of British nationality on her marriage to a foreigner.[73] The principle of dependent nationality, also called the principle of the unity of nationality of spouses, rested on the conviction that a

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For an example, see Shachar, *supra* note 67 at 256-257 (pointing to the serious bureaucratic obstacles before alien *men* who wish to establish permanent residency in Israel based on their marriage to Israeli women, especially Palestinian men from the West Bank or Gaza who are married to Arab Israeli women).

[72] Makarov, *supra* note 37 at 119.

[73] V. Woolf, *Three Guineas*, M. Barrett, ed. (1938) (London: Penguin, 1993) 234. See also *ibid*. at 277, n.12.

family should have the same nationality and on the patriarchal notion that the husband should determine that nationality.[74]

On this principle, a woman who married a foreign national lost her own nationality and acquired that of her husband simply by virtue of marriage. If her husband's nationality changed or was lost during the marriage, her nationality altered accordingly. Particularly galling to women was the situation where the woman after marriage continued to live in her own country, but without the civil, political, economic and social rights which depended upon nationality. For feminists of the time, this situation reproduced the second-class citizenship of all women in society.[75]

A woman who was abandoned or widowed did not have the right to return to her own country since that right is a function of nationality. If she were able to re-enter, she would find herself without the rights attached to nationality. In Canada, this sort of problem may still arise, for instance, in the context of certain health care benefits for women who have lost their Canadian nationality on marriage to a non-Canadian and return to Canada later in life to be cared for by a child, usually a daughter.[76] On the principle of dependent nationality, moreover, divorce could render a woman stateless. In many cases, women became stateless without even being aware of it.

Given that the principle of dependent nationality created problems of both practicality and principle, it was open to reformers to address the practical problem of women's statelessness and leave aside the problem of women's inequality. Indeed, the ILA at its 33rd Conference in 1924 chose to deal with the nationality of married women as a problem of conflicts among the nationality laws of different states and not, as Chrystal Macmillan had hoped, as a problem of inequality. In contrast, the International Women's Suffrage Alliance draft convention introduced by Macmillan at the Conference provided not only for the prospective application of the principle of independent nationality, but for the restoration of women's nationality lost through the principle of dependent nationality.[77]

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[74] See *Costa Rica* Advisory Opinion, *supra* note 68 at para.64; *Historical Background*, *supra* note 43 at 3.

[75] Miller, *supra* note 42 at 193.

[76] Barbara Jackman, Interview, 10 February 1998. A married woman's loss of her original nationality may result from the operation of the principle of dependent nationality of married women or from problems of statelessness or dual nationality, which, as will be seen, often compel a woman to take her husband's nationality alone.

[77] *32nd Conference Report*, *supra* note 29 at 46. For a state that has amended its laws to include such a proposition, see *Initial Report of States Parties. Italy*, UN Doc. CEDAW/C/5/Add.62 (30 November 1989) at 52.

4.2) Second Generation Issues of Equality

4.2.1) Ability to Pass Nationality to Children

In arguing for the independent nationality of women at the 32nd ILA Conference in 1923, Dr. Schuster could assure the Conference that no claim had been made that "the wife, being allowed independence as regards her own nationality, might as a result claim that the children's nationality should also depend on hers."[78] As the *Unity Dow* case indicates, this claim is precisely the sort of equality issue that followed from the recognition of independent nationality for women.

Traditionally, the husband's nationality determined the nationality of the children of the marriage, as well as the nationality of the wife. As can be seen from the Parliamentary debate in Britain, this law was for some bound up with a stereotype of women as devoted to "the preservation and care of life" and therefore incapable of demonstrating the love of country that would entitle them to pass its nationality on to their children. In opposing a mother's right to pass her nationality on to her children, finally recognized in Britain in the 1981 *Nationality Act*, Conservative Member of Parliament Enoch Powell stated: "Nationality, in the last resort, is tested by fighting. A man's nation is the nation for which he will fight".[79] Ayelet Shachar argues that even now, the Israeli paradigm of the citizen as soldier means that women are, to some degree, lesser citizens of Israel because although both men and women are obliged to perform military service, women can be exempted if they are wives or mothers.[80]

In states where nationality is determined wholly or partly by descent from a man of that nationality, a woman's legal inability to convey her nationality to her child is one of the main issues of women's equality and nationality. In a comment on the *Malkani* case, Lubna Mariam writes:

Mothers may croon Bangla ghoom pardani lullabies at their child's cradle, guide them through their first Bangla rhymes, enjoin them to love Sonar Bangla; mothers may even send their sons and daughters to lay their lives for Bangladesh, if need be; but mothers, in Bangladesh, cannot give their children the right to call themselves Bangladeshis.[81]

From a practical perspective, moreover, if a mother cannot give her national-

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[80] Shachar, *supra* note 67 at 259-263.

Ironically, U.S. Supreme Court Justice Stevens recently relied precisely on the value of motherhood to justify provisions of the US *Immigration and Nationality Act* that make it easier for an American mother to pass citizenship to a child born abroad and fathered out of wedlock by a non-American than for an American father in the same position:

If the citizen is the unmarried female, she must first choose to carry the pregnancy to term and reject the alternative of abortion - an alternative that is available by law to many, and in reality to most, women around the world. She must then actually give birth to the child. Section 1409(c) rewards that choice and that labor by conferring citizenship on the child.

Miller, *supra* note 22 at 1437.

[81] L. Mariam, "Whither Equal Rights?" [on file with the Rapporteur].

ity to her child, then a child born outside of marriage or of an unknown or stateless father will be stateless. This problem of statelessness potentially affects, among others, single mothers[82] and lesbian couples. While children of a marriage have the father's nationality, and are therefore not stateless, the mother's inability to pass on her nationality to the children may nevertheless cause problems of residency, mobility and access to state benefits such as those presented in *Unity Dow*. In the *Malkani* case, a court-appointed *amicus curiae* argued that another consequence of denying Bangladeshi citizenship to the child of a Bangladeshi mother and foreign father was the effective denial in the event of separation or divorce of the mother's preferential rights of custody of children of tender years because the children would not be assured of the visas and visa renewals necessary for them, as non-citizens, to reside with her in Bangladesh.[83] Ruth Donner points to the possibility for "legal kidnapping" in the situation where divorced parents have different nationalities and the mother has custody of the child in her state of nationality. If the child has only the father's nationality, then the mother's state of nationality has no standing to intervene diplomatically where the child is concerned. Thus, if the father abuses his visitation rights by taking the child back to his state of nationality, the mother's state cannot exercise its right of diplomatic protection to recover the child.[84]

As increasing numbers of women work abroad due to the economic pressures of globalisation[85] or seek refuge abroad from civil war or other emergencies, [86] the problems caused by this unacceptable discrimination between the ability of mothers and fathers to pass nationality to their children will only become more acute.

4.2.2) Naturalization Procedures

Since it was traditionally assumed that a wife would live in her husband's state,[87] some states replaced the regime of dependent nationality for married

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[82] Even if the children of a single mother have her nationality, there may still be nationality-related problems stemming from the role of the father as head of the family in some legal systems. See *e.g. Nawakwi*, supra note 18 (A single mother successfully challenged the requirement that she obtain the father's consent before she could include her children in her passport or they could obtain their own passport.).

[83] *Malkani*, *supra* note 20, written submission of Dr. Kamal Hossain as *amicus curiae* at 2, para.3(c) [Uncertified copy on file with the Rapporteur].

[84] Donner, *supra* note 48 at 200. For one such narrative, see A. Djebar, "A Sentence of Love" (Autumn 1997) 59 Granta 49 (issue on "France: The Outsider"). It should be noted that dual nationality for the child does not solve this problem (unless, perhaps, an argument can be made based on the child's effective nationality). Resort must instead be had to other international conventions.

[85] See generally S. Sassen, "Toward a Feminist Analytics of the Global Economy" (1996) 4 Global Legal Stud. J. 7.

[86] The current report does not deal with the implications of refugee status upon the nationality and status of women.

[87] See Macmillan at *33rd Conference Report*, *supra* note 37 at 39. For an indication of U.S. statistics that support this assumption factually, see J. Fitzpatrick, "The Gender Dimension of U.S. Immigration Policy" ((1997) 9 Yale J. L. & Feminism 23 at 24.

women with a special procedure for a foreign wife to acquire her husband's nationality by naturalization or to acquire residency status[88] in her husband's state.[89] The 1957 *Convention on the Nationality of Married Women*, in fact, envisages "specially privileged naturalization procedures" for foreign wives.[90] In several international[91] and domestic cases over the last two decades, however, these rules have been found to violate the right of nondiscrimination. It is this discrimination against foreign husbands seeking nationality or residency that has become the other second generation equality issue.

At the same time, it is important to bear in mind that even identical naturalization procedures for women and men may discriminate against women. In practice, many states require, among other things, personal interviews to test a person's competence in the language of the state before nationality is granted. This may be especially burdensome for women who have not had the opportunity to learn a language because they have remained within the home while the men have gained employment and pursued outside interests, thereby affording them greater opportunity to learn the language.[92] Discussing why elderly immigrants to the United States have much lower rates of naturalization than younger immigrants, Joan Fitzpatrick points to such obstacles to citizenship as a lack of knowledge of U.S. civics and English, a reluctance to adjust to a new culture, emotional problems stemming from redefined roles within the family, increased difficulty in acquiring a second language at an advanced age, and age-related impediments to access to language or civics classes. She notes that these obstacles may be even greater for those elderly female immigrants who are illiterate in their first language and have little or no formal education.[93]

4.3) Possible Third Generation Issues of Equality

In addition to a patriarchal idea of the family, the principle of dependent

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[88] Although the case law has involved both naturalization and residency status, the focus here will be on naturalization.

[89] United Nations, *Nationality of Married Women*, UN Doc. E/CN.6/254/Rev.1, UN Sales No. 64.IV.1 (1963) at 15-18.

[90] *Convention on the Nationality of Married Women*, *supra* note 44 at art. 3.

[91] Discussed below in section 5.3.

[92] See *e.g.* Council of Europe Parliamentary Assembly, Recommendation 1261 (1995), para 3:

> 3. The Assembly is concerned by the situation of immigrant women, a large number of whom live on the margins of society and are confronted by more serious difficulties than those facing immigrant men. When they are married, they are often confined to the home doing housework and isolated from the local community, without real opportunities to learn the language of the host country, thus further aggravating their isolation. When they are employed, they are often doing menial jobs unconducive to greater autonomy or to their integration into the host society available at <http://stars.coe.fr/ta.ta95/erec1261.htm>.

According to the Dutch Working Group on Feminism and International Law, the Dutch citizenship requirements regarding proficiency in Dutch and sufficient integration into Dutch society make it generally harder for foreign women, especially those from Islamic countries who are often more isolated, to become Dutch citizens than it is for foreign men.

[93] See Fitzpatrick, *supra* note 87 at 41.

nationality of married women rested on the conviction that the family should have the same nationality. However quaint or outmoded this conviction, it served the practical purpose of securing the unity of the family legally through a common nationality. It is conceivable that ridding nationality law of its patriarchal foundation may have come at some cost to the unity of the family.

Where one spouse is a national of the state where the family lives and the other is not, the foreign spouse will always lack the security, entitlements and benefits which that state attaches to nationality. Depending on the rights extended to non-nationals by that state, the only viable option for the foreign spouse may be to become a national by naturalization. If the two states involved do not both permit dual nationality, however, naturalization amounts to the forced renunciation of the spouse's own nationality.

This scenario suggests that the achievement of equality in nationality law may involve three related concepts: the rights of non-nationals; the right of one spouse to acquire the nationality of the other or to the facilitation of the acquisition of that nationality; and the right to dual nationality, at least for families of mixed nationality.

A discussion of the first of these concepts, the rights of non-nationals, is beyond the scope of this report. As regards the second concept, current international law does not recognize the right of one spouse to acquire the nationality of the other or to the facilitation of the acquisition of the other spouse's nationality,[94] although a number of states do facilitate that acquisition.[95] The United Nations Human Rights Committee, Inter-American Court and European Court of Human Rights have all found discriminatory the special treatment for foreign wives that often replaced the prior legal regime of dependent nationality for married women. But while a state must provide such treatment to foreign wives and foreign husbands equally if it provides it to either, the state is under no obligation to provide special treatment in the first place. Legal challenges may therefore not result in the extension of special treatment to foreign husbands, but in its withdrawal altogether. In response to a case challenging British immigration rules as discriminatory under the *European Convention on Human Rights*,[96] the British government changed the immigration rules so that it became as hard for foreign wives to join their husbands settled in Britain as it already was for foreign husbands to join their wives.[97]

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[94] Donner, *supra* note 48 at 239. Cf. *Costa Rica* Advisory Opinion, *supra* note 68 at para.59.

[95] Examples of countries that have specific provisions on marriage include Austria, Belgium, Finland, France, Germany, Ireland, Israel, Italy, Luxembourg, Mexico, The Netherlands, Portugal, Russia, Spain, South Africa, Sweden, the United Kingdom and the United States. P. Weil, "Access to Citizenship" (Paper presented at the conference "Citizenship: Comparisons and Perspectives" co-sponsored by the International Migration Policy Program, Carnegie Endowment for International Peace and the Fundação Luso-Americana para o Desenvolvimento, Lisbon, Portugal, June 4, 1999) at 6.

[96] See *infra* note 189 and accompanying text.

[97] This is not to say that there are no international law standards on family reunification. See *e.g.* I. Brownlie, "The Application of Contemporary Standards of International Law to Cases involving

Moreover, anything short of an automatic right to acquire the other spouse's nationality involves some waiting period, during which the spouse seeking nationality is excluded from the protection and benefits of that nationality,[98] and may be vulnerable to, for example, deportation and separation from his or her children. Relatedly, as the U.S. example shows with respect to immigration status, any facilitation of the acquisition of nationality that depends on marriage to a national gives the national spouse control over the non-national spouse and thus creates the risk that the non-national spouse, most often the wife, may endure domestic abuse in order to acquire residency status. In the context of U.S. immigration law, where only the citizen or permanent resident spouse could petition for the foreign spouse to become a resident, critics have documented this risk:

> A woman from the Philippines was abused by her U.S. citizen spouse. He threatened to have immigration authorities deport her to the Philippines if she tried to leave him. She stayed. He later cut her all over her back, head, and hands with a meat cleaver. A U.S. citizen never filed a petition for his Ecuadorian wife even though he had been married to her for three years and she was pregnant. She therefore could not gain legal status.
>
> A Dominican woman fled from her U.S. citizen husband's violent assaults only after being hospitalized for the fifth time as a result of his beatings. Her husband bashed her head against the wall and threatened to kill her if she told her doctor what happened. She had been afraid to leave him because he controlled her immigration status.[99]

Such risks have been diminished by changes to U.S. law that allow the foreign spouse to pursue her immigration status independently if she can demonstrate that she or her child was abused and she meets the extreme hardship and other additional criteria.[100]

Remarkably, the International Women's Suffrage Alliance draft convention presented to the ILA in 1923 contains a provision that special facilities should be given to one spouse to acquire the nationality of the other.[101] In current international law, however, there are few grounds to argue for the right of one spouse to the nationality of the other or to a fast-track naturalization procedure. The 1997 *European Convention on Nationality* is unusual in providing that each

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Separation of Husband and Wife as a Consequences of Administrative Action by the Israeli authorities in the Occupied Territories" (1990/91) 6 Palestine Y.B. Int'l L. 113.

98 Cf. *Costa Rica* Advisory Opinion, *supra* note 68 at para.46.

99 J.M. Calvo, "Spouse-Based Immigration Laws: The Legacy of Coverture" in A.K. Wing, ed., *Critical Race Feminism: A Reader* (New York: New York University Press, 1997) 380 at 380. See also National Association of Women and the Law, *Gender Analysis of Immigration and Refugee Protection Legislation and Policy* (Submission to Citizenship and Immigration Canada. Ad Hoc Committee on Gender Analysis of the Immigration Act) (Ottawa, 1999) at 5-6 (discussing negative impact of sponsorship).

100 Calvo, *supra* note 99 at 384.

101 *32nd Conference Report*, *supra* note 29 at 46.

state party shall facilitate in its internal law the acquisition of its nationality for spouses of its nationals.[102] To argue more generally, the right to family life would have to be interpreted so as to require a state to accept the spouses of its nationals as its nationals. Using feminist theory,[103] it might also be possible to argue that a woman's right to equality in nationality law must be interpreted relationally; that is, incorporating her interdependency with others. Along relational lines, the Supreme Court of Zimbabwe found that a woman's freedom of movement was impaired if her foreign husband was not legally able to reside permanently with her in Zimbabwe or to work there.[104] The Botswana Court of Appeal in *Unity Dow* similarly accepted that Unity Dow's mobility rights were limited if she could not travel with her children absent their father because the children had his nationality and not hers. Judge President Amissah wrote, "the courts are not entitled to look at life in a compartmentalised form, with the misfortunes and disabilities of one always kept separate and sanitised from the misfortunes and disabilities of others."[105] The Zambian High Court also relied on the mother's constitutionally guaranteed freedom of movement in finding it unconstitutional to require the consent of the father before a mother can include her children in her passport or they can obtain their own passport.[106]

To the extent that arguments for a right to acquire the nationality of the other spouse or to the facilitation of that nationality rely on some idea of the family, discrimination in the idea of the family becomes an issue. Some authors argue that what constitutes a family is taken for granted and tends, in fact, to be the traditional Western idea of a nuclear family.[107] This may create problems for same-sex relationships, unmarried couples and marriages according to non-Western cultures (for example, "arranged marriages"). In a 1999 case, for example, the South African Constitutional Court found that legislation facilitating the issuance of an immigration permit to foreign spouses of South Africans, where "spouse" referred to a marriage under civil or customary law, was unconstitutional because it discriminated against same-sex couples.[108] Insofar as nationality might be based on some expanded notion of family, however, it is important to note that not all lesbian women would favour legal changes that require

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[102] *European Convention on Nationality*, *supra* note 52 at art. 6(4)(a).

[103] See *e.g.* J. Nedelsky, "Law, Boundaries and the Bounded Self" in R. Post, ed., *Law and the Order of Culture* (1991) 162.

[104] *Rattigan*, *supra* note 17; *Salem*, *supra* note 18; *Kohlhaas*, *supra* note 19.

[105] *Unity Dow* (C.A.), *supra* note 12 at 659.

[106] *Nawakwi*, *supra* note 18.

[107] Mullen, "Nationality and Immigration" in McLean & Burrows, eds., *The Legal Relevance of Gender* (Basingstoke: Macmillan Press, 1988) at 162.

[108] *National Coalition for Gay and Lesbian Equality* v. *Minister of Home Affairs* 2000 (1) BCLR 39 (South African Constitutional Court), confirming *National Coalition for Gay and Lesbian Equality* v. *Minister of Home Affairs* 1999 (3) BCLR 280 (C), 1999 (3) SA 173 (C) ((Cape of Good Hope Provincial High Court). As the Cape High Court pointed out, common-law marriages and Muslim and Hindu marriages would also be excluded from preferential immigration treatment, although this exclusion was not challenged.

them to identify their relationships as family. In the North American debate over family status for lesbian and gay relationships, some lesbians and gays take the position that their relationships should be recognized as family and accorded the same rights and benefits. But others argue that lesbian and gay relationships should not be legally defined as family, for reasons ranging from the obscuring of important differences between these and heterosexual relationships to the rejection of the family as an institution oppressive for women.[109]

"Arranged marriages" and other forms of family found in non-Western cultures raise similarly complex issues. In the context of lobbying to change British immigration policy, for instance, women of colour criticized the mainstream women's movement for its implicit condemnation of "arranged marriages." Hazel Carby wrote:

> We would not wish to deny that the family can be a source of oppression for us but we also wish to examine how the black family has been a site of political and cultural resistance to racism...The media's "horror stories" about Asian girls and arranged marriages bear little relation to their experience. The "feminist" version of the ideology presents Asian women as being in need of liberation, not in terms of their own herstory and needs, but into the "progressive" social mores and customs of the metropolitan West.[110]

The third concept relevant to equality in nationality law is dual nationality. States have traditionally been opposed to dual nationality and have taken various international legal measures to reduce or eliminate cases of dual nationality. Insofar as this aversion relates to such practical problems as which of two states is entitled to represent an individual in an international claim, it may be lessened by the development of rules for dealing with such situations.[111] Insofar as the state's concern with dual nationality is divided loyalty - on the dubious assumption that reducing dual nationality, in fact, reduces torn loyalties - it will not necessarily be persuasive to point to a trend primarily among Western states or between friendly states toward the acceptance of multiple nationality.[112] At

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[109] See *e.g.* B. Cossman, "Family inside/out" and J. Freeman, "Defining family in *Mossop v. DSS*: The challenge of anti-essentialism and interactive discrimination for human rights litigation" in (1994) 44 U. Toronto L.J.

[110] H. Carby, "White Women Listen: Black Feminism and the Boundaries of Sisterhood" in *The Empire Strikes Back: Race and Racism in 70s Britain* (Centre for Contemporary Cultural Studies/Hutchinson University Library, 1982), quoted in Bhabha *et al.*, eds., *supra* note 79 at 58. Regarding immigrant cultures, see also National Association of Women and the Law, supra note 99 at 7-8 (noting that for immigrant women, the skills and resources of extended family members are particularly important as essential support in terms of child care, social and emotional support and financial income).

[111] On such rules, see note 55 and accompanying text.

[112] See T.M. Franck, "Clan and Superclan: Loyalty, Identity and Community in Law and Practice" (1996) 90 AJIL 359 at 378-382.

the same time, it is important to attend to who tends to raise concerns of divided loyalties - women or men - and whether these concerns are raised wherever applicable or primarily where they work to the disadvantage of women.

5) Approaches of Nationality Laws Toward Women

The principle that the nationality of the wife follows that of the husband (examined in section 5.1) was not a principle of international law. It was a principle that governed the nationality of married women in the vast majority of domestic legal systems at the turn of the century and had already slowly and in piecemeal fashion begun to change by the time that international law began to regulate the issue in the 1930s.

International law did not readily approach the issue of women's nationality on the basis of gender equality. It first approached women's nationality as a problem of statelessness and dual nationality caused by conflicts among the nationality laws of different states (section 5.2), an approach that is still found, for example, in states' reservations to the *Women's Convention* article on nationality. Gradually, international law, and particularly international human rights law, came to deal with women's nationality as an issue of equality (section 5.3). Most recently, the conclusion of the *Convention on the Rights of the Child* (the *Children's Convention*)[113] and two regional conventions on children's rights suggest the need to pursue the intersection of women's and children's rights of nationality (section 5.4).

5.1) Inequality

According to a United Nations study, the nationality of the wife followed the nationality of the husband in all domestic legal systems in the world at the end of the first decade of the twentieth century, with the exception of a few Latin American states.[114]

If strictly applied, this principle operates so that

> The alien woman marrying a national automatically acquires her husband's nationality; the woman national marrying an alien automatically loses her original nationality.
>
> The alien woman whose alien husband acquires the nationality of the country during marriage acquires automatically his new nationality; the woman national whose husband, a national, loses his nationality during marriage, automatically loses her nationality.
>
> The alien woman, married to a national, loses her nationality acquired through marriage, upon dissolution of the marriage; the woman national

[113] *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3.
[114] *Historical Background*, *supra* note 43 at 3.

> married to an alien reacquires automatically her original nationality (lost through marriage), upon dissolution of the marriage.[115]

This legal regime for the nationality of married women rests on two premises. The first premise is that all members of a family should have the same nationality, and the second that the husband determines what that nationality is.[116] Strictly speaking, the first premise does not depend on gender. At the 33rd ILA Conference in 1924, Dr. G.M. Palliccia of Italy remarked jocularly, "let us have one nationality, and, if you like, let us choose the nationality of the wife, instead of that of the man. There will be perhaps a certain return to the period of matriarchy, but, after all, the world was not so bad under matriarchy."[117] The second premise relies on a patriarchal notion of the family, entrenched in the law of the period, which gave the husband a privileged status and the power to make decisions affecting the family.

The first premise, that a family should have the same nationality, was deeply bound up with a vision of the international order as a power struggle between states. Husband and wife should not have different nationalities because through the powerful attachment of nationality, the rivalries, tensions and hostilities that existed between states would be projected onto the marriage. Trinh Dinh Thao quotes Varambon's description of the household with two nationalities:

> a rivalry of nation to nation, interests opposed between persons united, different affections, diverse fatherlands, enemy wishes for countries perhaps at war, and this between persons who have sworn to love one another, between whom everything is common and who must never leave one another.[118]

Not only would a marriage between people of different nationalities tend to reproduce the antagonism between states, it would, in turn, give rise to conflicts between states as the protectors of the respective spouses.[119]

From the premise that a family should have the same nationality, it followed, to the male mind of the day, that the husband should determine that nationality. In his manual on private international law, published in 1923, René Foignet writes: "[i]t is in conformity with the spirit of marriage that spouses have the same nationality. From that moment, it is natural that the nationality of the husband spread to the wife."[120]

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[115] *Nationality of Married Women*, *supra* note 89 at 8.

[116] See *Costa Rica* Advisory Opinion, *supra* note 68 at para.64; *Historical Background*, *supra* note 43 at 3.

[117] *33rd Conference Report*, *supra* note 37 at 43.

[118] [Rapporteur's translation] Trinh Dinh Thao, *De l'Influence du Mariage sur la Nationalité de la Femme* (Aix-en-Provence: Editions Paul Roubaud, 1929) 15, quoting from Varambon, *Revue pratique de Droit Français* (1859) v.8, at 50 (Presumably the author would not quote from an 1859 work unless in his estimation its argument still enjoyed some currency.).

[119] *MacKenzie* v. *Hare*, *supra* note 69.

[120] [Rapporteur's translation] R. Foignet, *Manuel élémentaire de droit international privé* 7th ed.

Conversely, the premise that the family should have the same nationality can be derived from the idea of the *pater familias* reflected in the premise that the husband decides the family's nationality. If the wife has a different nationality, then she will feel a duty of obedience to her country that rivals her duty of obedience to her husband. She must acquire his nationality so that he will have no rival for her obedience.[121]

If the intertwined concerns of divided loyalty and the preservation of patriarchy were used to oppose the first generation equality issue of a woman's right to choose her nationality independent of her husband, these concerns, somewhat transmuted, continue to figure in the second and third generations of equality issues in nationality law. Once the members of a family can have different nationalities, the concern with divided loyalty becomes a concern with the prospect that some or all of them will be dual nationals and therefore subject to conflicting allegiances. As will be seen,[122] this concern is used as a justification for the law that only a father can pass nationality to a child. Since the other second generation equality issue, equal naturalization procedures for foreign husbands and foreign wives, does not in and of itself necessitate allowing the foreign spouse to retain his or her original nationality, it does not raise the concern of divided loyalty. However, a third generation equality analysis points to the possibility that absent the right to become a dual national, a spouse of one nationality living in the state of the other spouse's nationality, still most often the wife living in the husband's state, may effectively have no choice but become a national of that state and renounce her own nationality, her nationality thereby following his and reproducing the very situation that the campaign for the independent nationality of married women was intended to redress.

The patrilineal justification used historically to justify the unequal regime of dependent nationality for married women reappears in later generations of equality issues as a cultural defence, primarily in the second generation context of nationality laws that entitle only a father to pass nationality to a child. In *Unity Dow*, the Attorney General of Botswana conceded that the *Citizenship Act* discriminated against Botswana women because it allowed only Botswana men to transmit citizenship to their children, but argued that this discrimination was not unconstitutional when the constitution was properly interpreted as a reflection of a patrilineal society. Both customary law and the Roman Dutch common law in Botswana, the

(Paris: Librairie Arthur Rousseau, 1923) 83. The brevity of Foignet's treatment may be due to the fact that his manual is aimed at students in law and candidates for diplomatic and consular careers, but the intended readership does not explain why the recognition that spouses must have the same nationality leads naturally to that nationality being the husband's. Foignet's conclusion may have reflected a wife's legal duty under the Civil Code to obey the husband and follow him in all his changes of residence, however other French international lawyers maintained that the Code did not apply this duty of obedience to the wife's nationality because the Code accepted that the husband's nationality could change over the course of the marriage without the wife's also changing.

[121] See Makarov, *supra* note 37 at 166, citing E. Audinet, La nationalité française, Revue, 1928, at 30 and Pelletier, *La nationalité de la femme mariée* (1925) at 9.

[122] Section 5.2, below.

Attorney General argued, were based upon the *pater familias* as the head of the family.[123] Dealing with this argument on its own terms, Judge Amissah, President of the Court, concluded that the development of citizenship law does not support the premise that citizenship must follow the customary or traditional systems of a people. In particular, no claim had been made that the British *jus soli* principle that prevailed in Botswana prior to independence had interfered with the male orientation of Botswana customary society. Judge President Amissah reasoned that Botswana nationality in the civic sense need not be the same as Botswana nationality in the sense of the Botswana people, which would be a matter of descent through the father. Although Botswana could base its citizenship law on descent, there was no strong historical reason for it to do so. On the contrary, the constitutional and international guarantee of equality was a compelling reason for the citizenship law not to follow custom. Along similar lines, Lubna Mariam, in a comment on the *Malkani* case, argues that citizenship is a secular concept and should be determined separate from personal laws based on religious predicates.[124]

A different internal criticism of the culture justification for tracing nationality through the father is given by a Brussels-based Pakistani woman journalist married to a Spanish man and unable, as a woman, to pass her Pakistani nationality to her children. She argues that if anything, Pakistani women raising their children by a foreign husband outside Pakistan are more likely than Pakistani men bringing up their children with a foreign wife abroad to ensure that the children speak Urdu, know about Islam and visit Pakistan as often as possible. If the logic is preservation of culture, then, on this logic, Pakistani women are more deserving than Pakistani men of the right to pass their nationality to their children.[125]

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[123] *Unity Dow* v. *Attorney General of Botswana*, Heads of Argument, *reprinted in* U. Dow, ed., *The Citizenship Case: The Attorney General of the Republic of Botswana v. Unity Dow* (Gaborone: Lentswe La Lesedi, 1995) at 20-21, 63-65.

[124] Mariam, *supra* note 81. See also Salma Sobhan's criticism of the *Malkani* decision, discussed in *ibid*. M. Rafiqul Islam also describes Bangladesh nationality law as secular. M. Rafiqul Islam, "The Nationality Law and Practice of Bangladesh" in K. Swan Sik, ed., *Nationality and International Law in Asian Perspective* (Dordrecht: Martinus Nijhoff, 1990) 1 at 2.

Even if citizenship is not a secular concept, there is an ongoing discussion in the literature and within CEDAW on the reinterpretation of Islamic law in ways supportive of women's equality. For a sense of the literature, see A.A. An-Na'im, "State Responsibility Under International Human Rights Law to Change Religious and Customary Laws", A.M.A. Halim, "Challenges to the Application of International Women's Human Rights in the Sudan" and S. Hossain, "Equality in the Home: Women's Rights and Personal Laws in South Asia" in R.J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994). An example of CEDAW's engagement with the issue is found in its questioning of the Libyan Arab Jamahiriya, *Report of the Committee on the Elimination of Discrimination Against Women (Thirteenth Session)*, UN GAOR, 49th Sess., Supp. No.38, UN Doc. A/49/38 (1994) at para.132..

[125] "Why Can't a Woman be Treated Like a Man?" (1997) 9:1&2 Women Living Under Muslim Law Newsletter 1. Paradoxically, then, the preservation of a patrilineal culture is better secured by a matrilineal nationality law. But if a patrilineal nationality law would dilute the culture, a matrilineal one would evolve it, since the author educates her children to see Pakistan as a modern Islamic state that aspires to equality for women.

Also within the framework of respect for culture, Unity Dow argued successfully that the Botswana *Citizenship* Act actually introduced a tension between respect for culture and respect for marriage because the *Act* made an exception to the patrilineal rule for children born outside wedlock. By permitting a single mother to give citizenship to her child, the *Act* created an incentive for women to live and bear children outside wedlock.[126]

5.2) Statelessness and Dual Nationality

By the time that Alexandre Nikolaevitch Makarov lectured on the nationality of the married woman at the Hague Academy of International Law in 1937,[127] the nationality laws of states ranged from those that were still based on the principle of dependent nationality for married women to those that had adopted the principle of independent nationality, and covered a variety of intermediate options. As a result of conflicts between these different nationality laws, women at the time of marriage or divorce were increasingly[128] likely to become either stateless or dual nationals. If a woman from a state that automatically deprived her of her nationality on marriage (based on some form of dependent nationality) married a man from a state that did not automatically grant her nationality on marriage (based on some form of independent nationality), then she became stateless. Conversely, if marriage, under the nationality laws of her state, had no effect on her nationality (independent nationality) and marriage, under the laws of her husband's state, gave her his nationality (dependent nationality), then she became a dual national. Similarly, if the state traced the child's nationality only through the husband (the patrilineal form of *jus sanguinis*), then the child of a stateless, unknown or unmarried father would be stateless. It was these "evils of statelessness and dual nationality," rather than women's equality, with which the ILA's Committee on Nationality and Naturalisation was concerned in 1924.[129]

While some solution to the problem of stateless women and children was clearly needed, the solution of the 1930 Hague Codification Conference was capable of reproducing the effect of dependent nationality.

The *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*,[130] which emerged from the 1930 Hague Codification Conference held under League of Nations auspices, is significant as the first international attempt to give every person a nationality.[131] The right to a nationality is also recognized by the *Universal Declaration on Human Rights*,[132]

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[126] *Unity Dow* (H.C.), *supra* note 11 at 588; *Unity Dow* (C.A.), *supra* note 12 at 588 at 630.
[127] Makarov, *supra* note 37.
[128] Statelessness was also caused by other types of conflicts between nationality laws. For a series of examples, see 33rd Conference Report, *supra* note 37 at 26-28. For an overview of the contemporary causes of statelessness, see C.A. Batchelor, supra note 5.
[129] 33rd Conference Report, *supra* note 37 at 26.
[130] *Hague Convention on Conflict of Nationality Laws*, *supra* note 41.
[131] J.M.M. Chan, "The Right to Nationality as a Human Right" (1991) 12 Hum. Rts. L.J. 1 at 2.
[132] *Universal Declaration on Human Rights*, *supra* note 51 at art. 15.

Convention on the Reduction of Statelessness,[133] *International Convention on the Elimination of All Forms of Racial Discrimination*,[134] *American Convention on Human Rights*[135] and *European Convention on Nationality*,[136] although the *International Covenant on Civil and Political Rights*, *African Charter on Human and Peoples' Rights* and *European Convention on Human Rights* make no mention of the right. The *International Covenant on Civil and Political Rights* does, however, include a child's right to a nationality,[137] as do the *Children's Convention*[138] and the *African Charter on the Rights and Welfare of a Child*.[139] While the right to a nationality is probably not part of international customary law, there does seem to be a customary trend toward the elimination of statelessness. The only other right of nationality where some sort of customary consensus seems to exist is the right to change one's nationality, but different states attach different conditions to its exercise.[140]

As concerns the nationality of married women, only one of the four articles on the subject in the *Hague Convention* appears to reflect the principle of women's equality, as opposed to the aim of reducing statelessness and dual nationality. Namely, article 10 provides that "naturalisation of the husband during marriage shall not involve a change in the nationality of the wife except with her consent." [141]

In contrast, article 8 of the *Hague Convention* reads: "[i]f the national law of the wife causes her to lose her nationality on marriage with a foreigner, this consequence shall be conditional on her acquiring the nationality of the husband."[142] The effect of article 8 is that so long as the husband's state subscribes to the principle of dependent nationality, the wife's state is also free to apply it. If states increasingly abandon the principle of dependent nationality, then article 8 would operate so as to require those states that still accept the principle to increasingly make exceptions to its application. In and of itself, however, article 8 is neutral as between the principles of dependent and independent nationality.[143]

In a similar vein, a protocol to the *Hague Convention* gives a mother the right

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[133] *Convention on the Reduction of Statelessness*, 30 August 1961, 989 U.N.T.S. 175.
[134] *International Convention on the Elimination of All Forms of Racial Discrimination*, *supra* note 51 at art. 5(d)(iii).
[135] *American Convention On Human Rights*, *supra* note 51 at art. 20.
[136] *European Convention on Nationality*, *supra* note 52 at art. 4(a).
[137] *International Covenant on Civil and Political Rights*, *supra* note 51 at art.24(3).
[138] *Children's Convention*, *supra* note 113 at art. 7(1). See further section 5.4 below.
[139] *African Charter on the Rights and Welfare of a Child*, OAU Doc. CAB/Leg/153 (1990), (1993) 1 Afr. Y.B. Int'l L. 295, art.6(3).
[140] Chan, *supra* note 131 at 8,11.
[141] On the one hand, a United Nations study states that the purpose of article 10 is actually to avoid statelessness and dual nationality. *Historical Background*, *supra* note 43 at 10. On the other, Weis maintains that the principle of equality motivates not only article 10, but also, to some extent, article 11. Weis, *supra* note 45 at 97.
[142] See also *Hague Convention on Conflict of Nationality Laws*, *supra* note 41 at art. 9.
[143] *Historical Background*, *supra* note 43 at 10.

to pass on her nationality to her child where the child would otherwise be stateless:

> In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State.[144]

In these respects, the relevant provisions of the *Convention on The Reduction of Statelessness*, concluded some three decades later, do not differ significantly.[145]

Thus, developments in international law aimed at solving problems of statelessness, including those created by the state-by-state reform of laws on the nationality of married women, did not necessarily promote the equality of men and women in matters of nationality. Indeed, from the perspective of women's statelessness, the principle of dependent nationality was basically as satisfactory as the principle of independent nationality. Problems arose only when the nationality laws of states were not uniformly based on one principle or the other.

Even now, some states give statelessness as the reason for their reservations or declarations to article 9 of the *Women's Convention*. Turkey's declaration states that article 9(1) does not conflict with the Turkish *Law on Nationality* since the intent of the law's provisions regulating acquisition of citizenship through marriage is to prevent statelessness." Morocco's reservation to article 9(2), which gives women equal rights with respect to the nationality of their children, is necessitated by its nationality law, which, similar to the *Protocol* to the *Hague Convention*, "permits a child to bear the nationality of its mother only in the cases where it is born to an unknown father, regardless of place of birth, or to a stateless father, when born in Morocco, and it does so in order to guarantee to each child its right to a nationality."

While statelessness is clearly an important problem for both states and women themselves, dual nationality is more complicated. Moreover, while the problem of statelessness admits of nondiscriminatory solutions, the problem of dual nationality does not insofar as states seek a rule that choooses or forces a choice between the mother's or the father's nationality, in the case of a child; or between the husband's or the wife's nationality, in the case of spouses. This makes dual nationality an obstacle to both second and third generation equality issues.

States' ingrained opposition to dual nationality generally continues their concern with divided loyalty, which was used to support the principle of dependent nationality. This antipathy to dual nationality is clearly articulated in the preamble to the *Hague Convention*, which reads in part:

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[144] *Protocol Relating to a Certain Case of Statelessness* (The Hague, 1930), L.N. Doc. C.26.M.15.1931.V, art. 1.

[145] See *Convention on the Reduction of Statelessness*, *supra* note 133 at arts.4-6, 8.

> Being convinced that it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only;
>
> Recognizing accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality;

Although there are some indications that states are becoming more tolerant of dual nationality,[146] this is not a universal trend.

On the assumption that the international order is perpetually on the verge of war, dual nationality might ill serve the individual as well as the state. Wyndham Bewes introduces the 1924 report of the ILA Committee on Nationality and Naturalisation with the observation that

> [d]ouble nationality is ... a serious inconvenience, for, if one of the competing States is at war with the other competing State, the unfortunate victim would be shot in the chest by one of them and in the back by the other, and he doubtless would not survive.[147]

Indeed, the international regulation of dual nationality deals with, among other things, the military obligations owed by dual nationals.[148] Commentators have argued, however, that the assumption of antagonistic states is out-dated and should no longer prevent the recognition of dual nationality.[149]

For women, moreover, dual nationality is used as a reason why only men can convey their nationality to their children. Egypt explains its reservation to article 9(2) of the *Women's Convention* in these terms:

> This is in order to prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future. It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality between men and women, since it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality.

In this connection, Judge President Amissah in *Unity Dow* disposes of the dual nationality justification as follows:

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[146] Franck, *supra* note 112.
[147] 33rd Conference Report, *supra* note 37 at 23.
[148] *E.g. European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, 6 May 1963, E.T.S. No.43.
[149] See *e.g.* P.J. Spiro, "Dual Nationality and the Meaning of Citizenship" (1997) 46 Emory L.J. 1411.

> ... the fact that different states follow different criteria in conferring citizenship means that whatever Botswana provides in its citizenship laws may not achieve the objective of eliminating dual citizenship, if that indeed is what is desired ... In this very case, the respondent's eldest child, Cheshe, who acquired Botswana citizenship at birth because her parents were not married at the time, also became, and presumably still is, an American citizen by descent. Such a child may continue with this dual citizenship for the rest of his or her life. But those states which want to avoid dual nationality would then require the child to opt for the citizenship which he or she wishes to continue with upon attaining majority. The device for eliminating dual citizenship does not, therefore, appear to me to lie in legislation which discriminates between the sexes of the parents.[150]

In a 1983 judgment, the Italian Constitutional Court considered whether the avoidance of dual nationality justified a 1912 law providing that the child of a male Italian citizen was an Italian citizen by birth, but making no such provision for the child of a female Italian citizen. The Court, which found the law unconstitutional, concluded that the need to avoid dual nationality was not a valid reason to ignore the articles of the Constitution on equality before the law without distinction as to sex and on the moral and legal equality of spouses. According to the Court, the need to realize the constitutional principle of equality as regards the acquisition of citizenship by birth must take precedence, despite the serious inconveniences caused by dual nationality. Difficulties arising from children's dual citizenship could be minimised by legislation.[151]

If the opposition of states to dual nationality is an obstacle to women's equal right with men to convey their nationality to their children, a second generation issue of equality, it also relates to the third generation issue of the relationship between women's equality and the protection of the family. Where a woman retains her original nationality on marriage and chooses to acquire her husband's nationality as well, the state interest, as evidenced by the 1963 *European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*,[152] has traditionally been to require her to renounce one of the two nationalities. Based on the millions of mixed marriages between Europeans, the Council of Europe has found, however, that if the wife chooses her original nationality, the family may be divided by discrimination, in particular as regards residence permits, work permits, foreign travel and, in case of separation, the right to see the children regularly.[153]

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[150] *Unity Dow* (C.A.), *supra* note 12 at 643-644.

[151] Judgment No.30 of January 28, 1983, 62 Raccolta Ufficiale delle Sentenze e Ordinanze della Corte Constituzionale 157 (Italian Constitutional Court) (unofficial translation provided by Alessandra Prioreschi).

[152] *European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, *supra* note 148.

[153] Cited in Donner, *supra* note 48 at 215-216.

But if these concerns cause the wife instead to acquire her husband's nationality and, as a condition, to renounce her own, then the effect is no different than that of the old principle of the dependent nationality of married women.[154]

For these reasons, the Parliamentary Assembly of the Council of Europe in 1988 adopted Recommendation 1081, which encourages a right to dual nationality in the case of mixed marriages. Recommendation 1081 reads in part:

> 4. Reaffirming the principle of equality of the spouses before the law;
>
> 5. Considering that, in view of the gravity of the economic and social problems affecting spouses in mixed marriages, that is to say marriages where the spouses have a different European nationality, it is desirable that each of such spouses may have the right to acquire the nationality of the other without losing his or her own nationality of origin;
>
> 6. Considering that the children born from mixed marriages should also be entitled to acquire and keep the nationality of both of their parents;
>
> ...
>
> 8. Considering that it is only in exceptional cases that the fact that a person has several nationalities may render difficult the application of other Council of Europe conventions and that this can hardly be considered an argument against the multiple nationality principle;[155]

Several years later, a protocol was concluded amending the 1963 *European Convention on the Reduction of Multiple Nationality* to the same effect (the *Second Protocol*).[156]

Whereas the 1963 *Convention*, like the earlier *Hague Convention*, treats dual nationality as the twin evil of statelessness, Recommendation 1081 and the *Second Protocol* thus carve out mixed marriages as an exception. The 1997 *European Convention on Nationality* goes even further in that it eliminates the principle of avoiding dual nationality altogether. The *European Convention on Nationality* reduces dual nationality to a problem of co-ordination and bases nationality law instead on the principles of the avoidance of statelessness and equality. Articles 4 and 5 of the *Convention* read:

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[154] Although both foreign husbands and foreign wives may find themselves faced with this choice, it stills seems to be more often the case that a wife will come to live in her husband's state.

[155] Council of Europe Parliamentary Assembly, Recommendation 1081 (1988) on Problems of Nationality in Mixed Marriages, *reprinted in* Council of Europe, *Council of Europe Achievements in the Field of Law: Nationality*, Doc. DIR/JUR(98)1 (Strasbourg: Council of Europe, 1998) at 76.

[156] *Second Protocol Amending the Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality*, 2 February 1993, E.T.S. No.149.

Article 4 - Principles

The rules on nationality of each State Party shall be based on the following principles:

a everyone has the right to a nationality;
b statelessness shall be avoided;
c no one shall be arbitrarily deprived of his or her nationality;
d neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

Article 5 - Non-discrimination

1. The rules of a State Party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour, or national or ethnic origin.

2. Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.

Under the *European Convention on Nationality*, it is possible to achieve equality other than at the expense of family life. Because a state may permit a family to choose dual nationality, the family can have unity of nationality, with the security that provides, without sacrificing the nationality of one spouse or the other. In the first place, article 6(1)(a) provides that a state party shall grant its nationality at birth to children born to a national within the state, and article 6(4) that a state party shall "facilitate in its internal law the acquisition of its nationality" for spouses of its nationals and those children of its nationals who are not already nationals by birth. In the second, article 14(1) requires states to allow dual nationality in the case of spouses and children who have automatically acquired more than one nationality by operation of law and article 15 permits states to allow dual nationality generally.

The European Union offers an alternative way to reconcile equality and the protection of family life in that it guarantees to the non-national spouse and family members[157] of an EU national[158] the right of free movement, the right of residence and to remain, as well as economic and social rights. The non-national spouse is therefore not confronted with the choice between the security of the family and the retention of his or her own nationality. Moreover, there

[157] Who come within the Community definition as laid down in secondary legislation and elaborated on by the European Court of Justice in a series of preliminary rulings.
[158] Who comes within the Community definition of workers, self-employed, service provider/recipient, student, of independent means or retired - laid down in the EC Treaty, secondary legislation and elaborated on by the European Court of Justice in a series of preliminary rulings.

is a proposal in the EU to grant in the event of the dissolution of the marriage an independent right of residence and right of work for the family members after a residence period of 3 years.[159] That is, provided that the non-national family members satisfy the three-year residency requirement, the rights they enjoyed by virtue of their relationship to an EU national are not immediately lost on the break-up of the marriage. As will be seen,[160] the *Children's Convention* provides another example of guaranteeing certain family-related rights to non-national family members and thus providing a functional equivalent to their becoming nationals. As was noted at the Committee's working session at the 68th Conference, the viability of this functional approach depends on whether the rights involved can readily be made effective.

5.3) Equality

Women in the Americas were the first to succeed internationally in having women's nationality treated as an issue of equal rights. Created by resolution of the Sixth Pan American Conference in 1928, the Inter-American Commission of Women was charged with "the preparation of juridical information and data of any other kind which may be deemed advisable to enable the Seventh International Conference of American States to take up the consideration of the civil and political equality of women in the continent."[161] At the Seventh Pan American Conference, the Commission presented a draft convention that became the 1933 *Montevideo Convention on the Nationality of Married Women*. Its single substantive provision was contained in article 1, in which the parties declare that "[t]here will be no distinction based on sex as regards nationality, in their legislation or in their practice." [162]

Subsequent international instruments that pertain to women's equality in nationality law may be divided into those dealing with women's equality in the context of nationality (discussed in section 5.3.1) and those guaranteeing women's equality generally and in the context of other rights relevant to nationality (discussed in section 5.3.2).[163]

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[159] COM (1998) 394 final (which would amend regulation 1612/68 and 1408/81 as well as directive 68/360). The proposal also includes extending the definition of spouse to include the partner assimilated to the spouse where the host Member State recognizes the situation of unmarried couples for its own nationals. The Rapporteur is grateful to alternate Committee member Patricia Conlan for this account of EU developments.

[160] Section 5.4, below.

[161] Quoted in Scott, *supra* note 39 at 219.

[162] *Montevideo Convention on the Nationality of Married Women*, *supra* note 40. See also *Montevideo Convention on Nationality*, 26 December 1933, *International Conferences of American States - Supplement 1933-1940* (Washington: Carnegie Endowment for International Peace, 1940) 108, art.6; *American Declaration on the Rights and Duties of Man*, OAS. Res. XXX, adopted by the Ninth International Conference of American States (March 30-May 2, 1948), OASOR OEA/Ser.L/V/I.4 Rev. (1965), art. II.

[163] It should be noted that some of the latter instruments provide for an autonomous equality right, which applies independent of whether another right in the instrument is violated, while others have

5.3.1) Equality Rights in Nationality Law

The 1948 *Universal Declaration of Human Rights* proclaims both the right of non-discrimination on the grounds of sex[164] and the right to a nationality.[165] By reading the two together, it can be argued that the *Universal Declaration* prohibits sexual discrimination in the laws awarding nationality. The 1969 *American Convention on Human Rights* also includes both the right to equality[166] and the right to a nationality.[167] In a 1984 Advisory Opinion,[168] the Inter-American Court of Human Rights held that Costa Rica's proposal to amend the naturalisation provisions of its constitution such that a foreign woman who marries a Costa Rican would be accorded special consideration for obtaining Costa Rican nationality constituted discrimination contrary to article 24 of the *American Convention* on equality before the law and article 17(4) on the equality of spouses.

Although not directly violating the right to a nationality guaranteed by article 20 of the *American Convention*,[169] the proposed constitutional amendment also raised issues bearing on that right.[170] In particular, the amendment was drafted so that

> foreigners who lose their nationality upon marrying a Costa Rican would have to remain stateless for at least two years because they cannot comply with one of the obligatory requirements for naturalization unless they have been married for that period of time. It should also be noted that it is by no means certain that statelessness would be limited to a period of two years only. This uncertainty results from the fact that the other concurrent requirement mandates a two-year period of residence in the country. Foreigners forced to leave the country temporarily due to unforeseen circumstances would continue to be stateless for an indefinite length of time until they will have completed all the concurrent requirements established under this proposed amendment.[171]

Despite this result, however, the proposed constitutional amendment did not violate the women's right to a nationality because her statelessness was technically brought about by the nationality laws of her own state and not the Costa Rican Constitution.

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only a subordinate equality right, which only applies to discrimination with respect to other rights in the instrument. See A.F. Bayefsky, "The Principle of Equality or Non-Discrimination in International Law" (1990) 11 Hum. Rts. L.J. 1 at 3-4.

[164] *Universal Declaration*, *supra* note 51 at art. 2.

[165] *Ibid*. at art.15.

[166] *American Convention On Human Rights*, *supra* note 51 at arts. 1(1), 17(4) and 24.

[167] *Ibid*. at art.20.

[168] *Costa Rica* Advisory Opinion, *supra* note 68.

[169] *Ibid*. at para.48.

[170] *Ibid*. at para.43.

[171] *Ibid*. at para.46.

In this connection, the Inter-American Court refers to the *Convention on the Nationality of Married Women* and the *Women's Convention* as reflecting "current trends in international law."[172] The *Convention on the Nationality of Married Women*,[173] which came into force in 1958, establishes the independent nationality of a married woman,[174] but neither a woman's equal right to pass on her nationality to her child nor that of a foreign husband to special naturalisation procedures where such procedures have been established for foreign wives. On the contrary, by providing that the foreign wife of a national may, at her request, "acquire the nationality of her husband through specially privileged naturalization procedures,"[175] the *Convention* reinforces the assumption that a wife will follow her husband. "I think probably a very great number of international marriages are the other way about," Chrystal Macmillan remarked at the 33rd ILA Conference in 1924, proposing that a foreign husband and a foreign wife be given the same special treatment.[176]

The 1979 *Women's Convention* goes further than the *Convention on the Nationality of Married Women* in several respects. Article 9 of the *Women's Convention* reads:

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Like the *Convention on the Nationality of Married Women*, the *Women's Convention* entrenches the first generation equality principle of independent nationality for married women. Article 9(1) also protects women against statelessness and ensures that they are not forced to take the nationality of their husband. Since separate reference is made in article 9(1) to an automatic change of the wife's nationality, the term "force" may mean something other than *de lege*. On a strong reading, it may prohibit the situation on which the third generation

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[172] *Ibid*. at para.49. In Donner's view, *supra* note 48 at 209-210, the *Convention on the Nationality of Married Women* is not declaratory of customary international law. She cites in support *Mejia* v. *Regierungsrat des Kanton Bern*, 19 May 1963, 32 I.L.R. 192. Compare *Airola* v. *Commission (No. 21/74)*, [1975] 1 C.J.E.C. Rep. 221 and *van den Broeck* v. *Commission (No. C37/74)*, [1975] 1 C.J.E.C. Rep. 235.

[173] *Convention on the Nationality of Married Women*, *supra* note 44.

[174] *Ibid*. at arts. 1-2.

[175] *Ibid*. at art. 3. For the drafting history of article 3, see *Historical Background*, *supra* note 43 at 40-44.

[176] *33rd Conference Report*, *supra* note 37 at 40.

of equality issues is based, where a wife has no practical option but to take her husband's nationality.

Unlike the *Convention on the Nationality of Married Women,* the *Women's Convention* also addresses the second generation of equality issues associated with nationality. Whereas the *Convention on the Nationality of Married Women* is silent on the nationality of children, article 9(2) grants women and men equal rights in this regard.

While the *Convention on the Nationality of Married Women* envisages specialised naturalisation procedures for foreign wives, it is generally assumed that the *Women's Convention* requires the same procedures for both wives and husbands. Moreover, it may be argued, given the attention to *de facto* unions in CEDAW's General Recommendation dealing with articles 9, 15 and 16 of the *Women's Convention*, that whatever procedures apply to wives and husbands should apply to *de facto* partners as well. The interpretation of equality in article 9 of the *Women's Convention* as requiring identical naturalisation procedures for wives and husbands, and arguably also *de facto* partners, is consistent with the Inter-American Court's advisory opinion on the Costa Rican constitution and also with the jurisprudence of the UN Human Rights Committee and European Court of Human Rights on gender equality in immigration procedures. This interpretation is also consistent with CEDAW's commentary on article 15(4) of the *Women's Convention*, which gives women and men "the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile." In CEDAW's view, article 15(4) requires that migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them.[177] It should be noted, however, that article 15 refers to the "same" rights, while article 9 involves the more complex notion of "equal" rights.

While the *Women's Convention* requires states to equalize the procedures for the acquisition of nationality by the spouse of a national, it does not go so far as to oblige states to facilitate a spouse's acquisition of nationality.

The progress represented by article 9 of the *Women's Convention* is hampered by the large number of reservations, made by a range of states, to all or part of that article.[178] Although a number of states have entered objections,[179] these objecting states maintain that the *Women's Convention* remains in force as between them and the reserving states.[180] Similarly, while CEDAW has ques-

[177] General Recommendation 21 on Equality in Marriage and Family Relations, *supra* note 59 at 3.
[178] For a list, see above at p.10.
[179] Denmark, Finland, Germany, Mexico, the Netherlands, Norway, Portugal and Sweden. There have also been objections to other reservations which might affect article 9.
[180] Committee Chair Professor Christine Chinkin has therefore characterized these reservations as "little more than an official record of displeasure." C. Chinkin, "Nationality in International and Regional Human Rights Law" (see p.2) at 15. Committee Member Dr. Alpha Connelly has stressed, however, that the reservations have some effect since in its relations with the reserving state, the objecting state may argue that the *Women's Convention* is fully in force; that is, as though the reservation to article 9 had never been made. Should the objecting state seek to take some action against

tioned states on their application of article 9 in the state reporting process and has referred to states' nonimplementation of article 9 in its concluding comments,[181] there is no procedure for hearing individual complaints since the *Optional Protocol* to the *Women's Convention* is not yet in force.[182]

5.3.2) Equality and Other Rights Related to Nationality

In international human rights instruments that include a right of equality or non-discrimination, but not specifically in the context of nationality,[183] resort may be had to the right of equality or non-discrimination, right to family life, right to freedom of movement, right to leave a country, and right to enter one's own country.

In the *Mauritian Women's Case*,[184] a number of Mauritian women submitted a communication to the UN Human Rights Committee, in which they argued that amendments to the Mauritian immigration and deportation laws violated their right to equality and right to family life under the *International Covenant on Civil and Political Rights*. Up to 1977, spouses, that is, both husbands and wives, of Mauritian citizens had the right of free access to Mauritius and enjoyed immunity from deportation. Spouses had the right to be considered *de facto* as residents of Mauritius. The amendments limited these rights to the foreign wives of Mauritian citizens. As a result, foreign husbands had to apply to the Minister of the Interior for a residence permit and had no right to appeal to the courts should the permit be refused.

Article 17(1) of the *Covenant* gave Mauritian citizens the right not to be subjected to arbitrary or unlawful interference with their family. The Committee found that there had been interference with the family of those of the Mauritian women who were actually, as opposed to hypothetically, affected by the changes to the law. They and their husbands clearly constituted a "family", a common residence was normal for husband and wife, and the precariousness of the husband's residence in Mauritius amounted to interference with the family.

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the reserving state in respect of the reserving state's obligations under article 9, for instance, the objecting state may argue that the reservation is invalid, is not opposable to it since it objected or both.

[181] For a recent example, see Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Jordan, UN Doc. CEDAW/C/2000/I/CRP.3/Add.1/Rev.1 (2000).

[182] *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, adopted by G.A. resolution A/54/4 on 6 October 1999, (2000) 39 I.L.M. 281, available at <http://www.un.org/womenwatch/daw/cedaw/protocol/op.pdf>. As of April 3, 2000, 34 countries had signed the *Optional Protocol*. See <http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm>.

[183] *International Covenant on Civil and Political Rights*, *supra* note 51; *African Charter on Human and Peoples' Rights*, *supra* note 15; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221.

[184] *Aumeeruddy-Cziffra* v. *Mauritius*, Communication No.35/1978, 9 April 1981, in U.N. Human Rights Committee, Selected Decisions, vol. 1.

These families were unsure of whether and how long they could continue their life together in Mauritius. Moreover, the delay in processing the application for a residence permit, a delay of several years in the case of Shirin Aumeeruddy-Cziffra, prevented the husband from receiving a work permit and therefore from contributing to the family income. Regardless of whether these restrictions would otherwise have been permissible under article 17(1), they were not permissible because they discriminated on the grounds of sex. The Committee therefore found a violation of *Covenant* articles 2(1) and (3), on non-discrimination and the equal rights of men and women respectively, in conjunction with article 17(1).

The Committee similarly found a violation of these equality provisions, as well as the provision in article 26 on equality before the law, in conjunction with the provision in article 23(1) on the protection of the family. While the legal protection of the family may vary from country to country and may depend on different social, economic, political and cultural conditions and traditions, it cannot vary with the sex of the spouse.

The greatest number of decisions bearing on nationality and citizenship rights have been made under the *European Convention on Human Rights*,[185] most emanating from the European Commission and a few major decisions from the European Court of Human Rights. Since the *European Convention on Human Rights* does not include an explicit right to nationality,[186] the decisions have involved immigration and the right to family life.[187] Of the different rights to family life in the *European Convention*, the right of men and women of marriageable age to marry and found a family, contained in article 12, is unlikely to provide a basis for any type of immigration case. According to Storey, "its interpretation has been dominated by an 'elsewhere' approach which assumes no Article 12 infringement can occur so long as an applicant is not prevented from marrying (or adopting, etc.) abroad."[188]

The right to respect for family life in article 8 of the *European Convention* in conjunction with the right of non-discrimination on grounds of sex in article 14 was successfully argued in the case of *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*,[189] the most important decision concerning immigration law

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[185] *European Convention on Human Rights*, *supra* note 183.

[186] *Protocol No.4 to the European Convention on Human Rights*, *supra* note 51 does, however, stipulate some related rights. In 1988, the Committee of Experts examined the question of inserting such a right into the *European Convention*, but the idea did not come to fruition. Information Sheet No. 22 at 54.

[187] See, *e.g.*, A.M. Connelly, "Problems of Interpretation in Article 8 of the European Convention on Human Rights" (1986) 35 Int'l & Comp. L. Q. 567; J. Liddy, "Current Topic: The Concept of Family Life Under the ECHR" [1998] Eur. Hum. Rts L. Rev. 15; H. Storey, "The Right To Family Life and Immigration Case Law at Strasbourg" (1990) 39 Int'l & Comp. L.Q. 328; C. Warbrick, "The Structure of Article 8" [1998] Eur. Hum. Rts L. Rev. 32.

[188] Storey, supra note 187 at 342.

[189] *Abdulaziz, Cabales and Balkandali* v. *United Kingdom*, 94 Eur. Ct. H.R. (Ser.A) (1985), 81 I.L.R. 139.

and the right to family union handed down by the Strasbourg Court. In *Abdulaziz, Cabales and Balkandali*, three women - one either stateless or a Malawi citizen, one a Filipino citizen and one a citizen of the United Kingdom and Colonies - challenged the 1980 United Kingdom *Immigration Rules* on the grounds of sex discrimination[190] and interference with family life. These *Rules*, which restricted who could join a spouse or intended spouse already settled in the United Kingdom, made it more difficult for a husband or fiancé to come to the United Kingdom than for a wife or fiancée. The United Kingdom conceded that the *Immigration Rules* discriminated on the ground of sex, but justified the decision as necessary to protect the domestic labour market in a time of high unemployment.[191] The Court rejected this justification, finding that the prospective difference in impact on the labour market between male and female immigrants was insufficient to justify discriminatory treatment on the basis of

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[190] Other grounds, including racial discrimination and inhuman and degrading treatment, were also argued.

[191] Cf. Singapore's general reservation to the *Women's Convention*:

> Singapore is geographically one of the smallest independent countries in the world and one of the most densely populated. The Republic of Singapore accordingly reserves the right to apply such laws and conditions governing the entry into, stay in, employment of and departure from its territory of those who do not have the right under the laws of Singapore to enter and remain indefinitely in Singapore and to the conferment, acquisitions and loss of citizenship of women who have acquired such citizenship by marriage and of children born outside Singapore.

In upholding the constitutionality of a provision of the 1956 Irish *Nationality and Citizenship Act* that entitled the foreign wife of an Irish citizen to obtain citizenship if she lodged a declaration accepting Irish citizenship as her post-nuptial citizenship, but allowed the foreign husband of an Irish citizen to obtain Irish citizenship only by naturalization, which is at the discretion of the Minister of Justice, the High Court held that the provision had

> regard to the social, economic and political conditions which might prevail in the various jurisdictions from which alien aspirants for citizenship might come. It was open to the Legislature to take the view that, in some at least of these jurisdictions, the likelihood of females being engaged on any of the activities which might be relevant in considering an application for citizenship was sufficiently remote to justify the automatic granting of citizenship to female aliens upon their marriage to Irish citizens.

Mohammed Ali Somjee and Margaret Somjee v. *The Minister for Justice and The Attorney General*, [1981] Irish Law Reports Monthly 324 at 326.

Although the Court did not specify what activities it had in mind, it sought, like the United Kingdom and Singapore, to justify the preferential treatment of foreign wives on the basis of assumptions about the different activities of men and women. Several years after this decision, however, the law was changed to make the conditions for the naturalization of foreign spouses the same, irrespective of the sex of the spouse. In 1986, after this change became law, Ireland accordingly withdrew its reservation to article 9 of the *Women's Convention*. See A. Connelly, ed., *Gender and the Law in Ireland* (Dublin: Oak Tree Press, 1993) at 7-8.

Another justification used by states for discrimination in citizenship laws regarding foreign husbands of nationals is the prevention of "marriages of convenience". See *CEDAW Report (Thirteenth Session)*, *supra* note 124 at para.331 (Zambia) and para.695 (Senegal). However, even assuming that marriages of convenience always involve women marrying foreign men - an assumption that is highly questionable - it would be overbroad to target all women marrying foreign men rather than to take measures aimed specifically at marriage fraud.

sex. The United Kingdom also argued that immigration control was not subject to the rights in the *European Convention*; only the *Fourth Protocol* to the *European Convention* applied to immigration control, and the United Kingdom was not a party to the *Fourth Protocol*. The Court responded that because the advancement of the equality of the sexes was a major goal for the Council of Europe, differentiation on the grounds of sex would only be compatible with the aims of the *Convention* if very weighty reasons were advanced. The essence of the Court's response was that although certain areas such as nationality and immigration were outside the scope of the *Convention*, the legislation which controlled these areas must be compatible with the aims and purposes of the *Convention* itself. The response of the British government is instructive. In 1985, after the European Commission had found that there was a case for the British government to answer, the government equalized the immigration rules downward.[192] That is, rather than making it equally easy for husbands and fiancés to come to the United Kingdom, these changes made it equally hard for wives and fiancées to come.

A woman's right to freedom of movement may also be violated by discriminatory nationality laws. In *Unity Dow*,[193] the Botswana Court of Appeal found that the law that allowed a Botswana father, but not a Botswana mother, to convey Botswana nationality to the children of the marriage infringed a mother's right to freedom of movement. Because children of a Botswana mother and a non-Botswana father are aliens in Botswana, they could be denied re-entry into or residence in Botswana. Given the nature of the relationship between mother and child, the state's discretion to exclude such children from Botswana amounts to interference with the mother's right to freedom of movement. A similar analysis of the relationship between mother and child is implicit in the High Court of Zambia's decision in *Nawakwi*[194] and informs the Supreme Court of Zimbabwe's decisions in *Rattigan, Salem* and *Kohlhaas* with respect to the relationship between wife and husband.[195]

5.4) Children's Rights

The current momentum behind children's rights in international law suggests that they may be an effective way to approach the second generation equality issue of a woman's right to pass her nationality to her child and possibly also certain third generation equality issues. As with any strategy not centered on the advancement of women's equality, however, the risk is that effectiveness will come at the cost of subordinating women's interests to children's interests.

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[192] T. Mullen, "Nationality and Immigration" in S. McLean & N. Burrows, eds., *The Legal Relevance of Gender: Some Aspects of Sex-Based Discrimination* (Atlantic Highlands, N.J.: Humanities Press International, 1988) 146 at 159-160.
[193] *Unity Dow*, *supra* note 12.
[194] *Nawakwi*, *supra* note 18.
[195] *Rattigan*, supra note 17; *Salem*, supra note 18; *Kohlhaas*, supra note 19.

As early as the 1930 *Protocol Relating to a Certain Case of Statelessness*,[196] the prevention of statelessness among children served as a reason to give the mother's nationality to the child where the child would otherwise be stateless. Since then, a number of international human rights instruments have recognized the child's right to acquire a nationality. The right is found in the *International Covenant on Civil and Political Rights*,[197] as well as in the newer, specialized conventions such as the *Children's Convention*[198] and the *African Charter on the Rights and Welfare of a Child*.[199]

This growing recognition of the child's right to acquire a nationality does not, by itself, amount to the recognition of the mother's equal right to pass her nationality to the child. The UN Human Rights Committee has identified the purpose of the child's right to acquire a nationality contained in the *International Covenant on Civil and Political Rights* as "to prevent a child from being afforded less protection by society and the State because he is stateless."[200] As such, the child's right to acquire a nationality would be satisfied by any nationality. Nothing in the right would prohibit a state from ordinarily tracing the child's nationality through the father.

Savitri Goonesekere argues, however, that, at least as far as the *Children's Convention* is concerned, the child's right to acquire a nationality may not be realized by tracing nationality through the father alone. In Goonesekere's view, the *Children's Convention's* general articles on gender equality, family and parental rights and responsibilities, and its norm of the best interests of the child require that if the child's nationality is traced through the parents (*jus sanguinis*), then it must be traced equally through both parents.[201]

Similarly, the Supreme Court of Canada in *Benner*[202] ruled unanimously that provisions of the Canadian *Citizenship Act* which treated individuals claiming citizenship on the basis of their mother's Canadian citizenship differently from individuals whose claim was based on their father's Canadian citizenship vio-

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[196] *Protocol Relating to a Certain Case of Statelessness*, *supra* note 144.

[197] *International Covenant on Civil and Political Rights*, *supra* note 51 at art. 24(3).

[198] *Children's Convention*, *supra* note 113 at art. 7(1).

[199] *African Charter on the Rights and Welfare of a Child*, *supra* note 139 at art.6(3). There is also a *European Convention on the Exercise of Children's Rights*, 25 January 1996, E.T.S. No.160, the object of which is

> in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or rhrough other persons or bodies, informed and allowed to participate in proceedings affecting them before a juducial authority.

Ibid. at art.1(2).

[200] UN Human Rights Committee, General Comment 17, Article 24 (35th session, 1989), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 at 23 (1994) at para.8.

[201] Goonesekere, *supra* note 16 at 89-90. The child's right to a nationality may also be read in light of the *Women's Convention*.

[202] *Benner*, *supra* note 21.

lated their equality rights as guaranteed by the Canadian constitution. The first *Citizenship Act*, passed in 1947, enabled Canadian fathers to pass Canadian citizenship to their children born abroad. Except in the case of a child born out of wedlock,[203] Canadian mothers did not have the same ability. A new *Citizenship Act*, which came into force in 1977, removed this distinction for children born outside Canada after the *Act* came into force, making them Canadian citizens if either parent was Canadian. For children born abroad earlier, however, the new *Act* lessened, but did not entirely remove, the distinction made by the earlier *Act*. Children born to a Canadian father retained their automatic entitlement to citizenship upon registration, while children born to a Canadian mother could now apply to become citizens. But whereas children of a Canadian father could claim citizenship simply by registering within a certain time, children of a Canadian mother were required to apply and, as part of the application process, to undergo security and criminal record checks and to swear an oath.[204] If the checks showed that they had been charged with an offence, then the *Act* prevented them from taking the oath, and therefore from becoming Canadian citizens, until the charges were resolved. If convicted of an indictable offence, they could not become Canadian citizens for three years after the conviction. Certain convictions might bar them from ever becoming Canadian citizens.[205]

The particular relevance of *Benner* is the Supreme Court's recognition that a child may have standing to bring an equality challenge to nationality laws. In this respect, *Benner* differs from, for example, the U.S. case of *Miller* v. *Albright*.[206] Benner was born in 1962 in the United States to a Canadian mother and American father. The Canadian government argued that he lacked standing because any discrimination imposed by the *Citizenship Act* was not imposed on him, but on his mother. The *Act* did not discriminate against him based on his sex - the *Act* does not refer to the sex of the applicant for citizenship - but against his mother based on her sex. The Supreme Court rejected this argument, finding that there was a connection between Benner's rights and the *Act's* distinction between men and women. Under the *Act*, Benner's right to citizenship depended on whether his Canadian parent was male or female. Therefore, he was the real target of the provisions and the one with the greatest interest in

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[203] For the sake of brevity, the following account of *Benner* will refer simply to Canadian fathers and Canadian mothers, as opposed to Canadian fathers and unmarried Canadian mothers, on the one hand, and married Canadian mothers, on the other.

[204] *Benner*, *supra* note 21 at 377-380.

[205] *Ibid*. at 394.

[206] In *Miller*, Justice O'Connor, joined by Justice Kennedy, found that the non-American daughter of an American father had no standing to challenge the differential treatment of American fathers and American mothers under U.S. citizenship legislation and, in any event, the daughter would not have had a challenge based on gender discrimination. *Miller*, *supra* note 22 at 1442-1446. Another problem that non-nationals (whether spouses or children of nationals) may encounter in bringing a challenge is that the rights guaranteed by the constitution do not apply to them as non-nationals. See *Kohlhaas*, *supra* note 19.

challenging their constitutionality. In addition, given the unique link between parent and child, it was appropriate to thus extend the standing to raise discrimination on grounds of sex. Where "something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent" can restrict access to benefits such as citizenship, the applicant may invoke the constitutional guarantee of equality.[207]

Children's rights offer an alternative approach not only to the second generation equality issue of a woman's right to pass nationality to her child, but also to emerging third generation equality issues. The root of these third generation issues is the possibility that the independent nationality of women has left the unity of the family less legally secure because the family is no longer protected by a common nationality. In the example given earlier,[208] where the husband is a national of the state where the family lives and the wife is not, the family lacks the security and the wife herself lacks the entitlements and benefits which that state bases on nationality. Depending on the rights extended to non-nationals by that state, the only viable option may be for the wife to become a national by naturalisation. If the state does not permit dual nationality, however, then her naturalisation amounts to the forced renunciation of her own nationality. As a result, the unity of the family and the wife's capacity to function in the state where the family lives come at the expense of her nationality.

On these facts, the approach of the *European Convention on Nationality* is, as already seen,[209] to facilitate the wife's naturalization and to permit her to retain her nationality of origin. The *Children's Convention* seems to take an alternative approach. Instead of protecting the relationship between mother and child through dual nationality, the *Children's Convention* does so through extensive family-related rights for non-nationals.[210] The more general approach to third generation equality issues suggested by the *Children's Convention* is to reconcile women's independent nationality and family unity by granting to non-nationals those rights functionally necessary to the unity of families with different nationalities.

6) Conclusion

Based on the analysis in this report, the Committee recommends:

1. The rules of states on nationality should be based on the following principles of international law:

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[207] *Ibid*. at 397-401.
[208] Section 4.3, above.
[209] See section 5.2, above.
[210] *Children's Convention*, *supra* note 199 at arts. 7(1) (the right of the child to know and be cared for by his or her parents), 8(1) (the right of the child to preserve his or her identity, including family relations), 10(2) (the right of the child whose parents reside in different states to maintain on a regular basis personal relations and direct contacts with both parents, and, towards that end, the right of the child and his or her parents to leave any country, including their own, and to enter their own country), art.16(1) (the right of the child to protection from arbitrary or unlawful interference with his or her family).

a. the right of everyone to a nationality;
b. the avoidance of statelessness; and
c. nondiscrimination on the basis of sex.

These principles are incorporated in the European Convention on Nationality.

2. The principle of nondiscrimination on the basis of sex should require, as in article 1 of the *Convention on the Elimination of All Forms of Discrimination Against Women*, the elimination of any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, on a basis of equality of men and women, of their nationality and the rights associated with that nationality.

3. In designating the personal relationships that form the basis for preferential treatment under immigration and nationality rules, states should not discriminate on the grounds of sex, sexual orientation, culture, marital status or any combination thereof.

4. As provided for in article 9(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women* and other international human rights treaties, states should grant women equal rights with men to acquire, change or retain their nationality. In particular,

   a. states should ensure that neither marriage to a foreign national nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband; and
   b. the recommended prohibition in (a) on forcing upon a woman the nationality of her husband should extend to requiring states to ensure that any incentives for a woman to acquire the nationality of her husband or partner do not effectively deny her right to choose her nationality.

5. In the case of a family of mixed nationality living in a state of which one or more, but not all, of its members is a national,

   a. the state in which the family is living should recognize the right of the non-national family members to enjoy equal treatment with nationals in relation to certain civil rights and social, economic and cultural rights, including the right of residence and right to work; or
   b. the states involved should recognize

      i. the right of each spouse or partner to acquire, after a short waiting period, the nationality of the other spouse or partner without losing his or her own nationality; and
      ii. the right of the children to acquire and keep the nationality of both parents.

6. Where a state facilitates the acquisition of nationality by the spouse or partner of a national, the state should ensure that the method of facilitation does not subject the foreign spouse or partner to the risk of abuse by the national spouse or partner.
7. As provided for in article 9(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* and other international human rights treaties, states should grant women equal rights with men with respect to the nationality of their children. In a case where a child's parents are of different nationalities, each parent should have the right to transmit her or his nationality to the child, even if this would result in the child's holding dual nationality.
8. States should provide effective remedies for individuals who have lost or been denied that state's nationality due to discrimination on the basis of sex, whether that discrimination is on the basis of the individual's sex or as a result of the individual's relationship to a spouse, partner or parent.
9. States should develop and implement mechanisms for studying the effect of the administration of their rules of nationality on women and ensuring that nondiscrimination in the rules of nationality is not compromised by the administration of these rules. This might involve, for example, the provision of gender-sensitivity training for those involved in the administration of the state's rules on nationality.
10. Women should have effective representation in all reforms to nationality law, whether at the domestic or international level.

The analysis in the report also points to the need to pursue the study of women's equality in the following areas of international law, including the relationship between the treatment of women in these areas and their achievement of equality in nationality law:

migrant workers,

refugees, and

private international law.[211]

Christine Chinkin, Chair
Karen Knop, Rapporteur

[211] Although the study of women's equality in immigration law and its relationship to the achievement of women's equality in nationality law is outside the jurisdiction of the Committee, this study is clearly of related importance.