

## Expert Meeting

# Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality

### Summary Conclusions

*Expert meeting convened by the Office of the United Nations High Commissioner for Refugees, Tunis, Tunisia, 31 October-1 November 2013*

The fourth in a series of expert meetings on statelessness convened by the Office of the United Nations High Commissioner for Refugees, this event focused on interpreting Articles 5 to 9 of the 1961 Convention on the Reduction of Statelessness (1961 Convention) and the safeguards contained therein for avoiding statelessness resulting from loss and deprivation of nationality.<sup>1</sup> Professor Gerard-René de Groot prepared a background paper for the meeting. Thirty-three participants from eighteen countries with experience in government, NGOs, academia, the judiciary, the legal profession and international organizations contributed to the debate and conclusions.

The meeting began by examining the meaning of “loss” and “deprivation” of nationality and of “arbitrary deprivation of nationality” as prohibited *inter alia* by the 1948 Universal Declaration of Human Rights. The discussion then turned to loss of nationality as a result of change in personal status and due to extension of loss or deprivation of nationality to the spouse or children. This was followed by examination of loss and deprivation due to prolonged residence abroad, and deprivation of nationality on the basis of fraudulent acquisition of nationality and conduct inconsistent with the duty of loyalty to the State or evidence of allegiance to another State. The meeting ended with discussion of the prohibition of deprivation of nationality on racial, ethnic, religious or political grounds. For each topic, participants looked at both the 1961 Convention and relevant provisions of universal and regional human rights treaties.

The following summary conclusions do not necessarily represent the individual views of participants or those of UNHCR, but reflect broadly the key understandings and recommendations that emerged from the discussion.

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<sup>1</sup> UNHCR has convened a series of Expert Meetings on statelessness in preparation for the drafting of guidelines under UNHCR’s statelessness mandate. Previous expert meetings examined the following issues: (i) the definition of a “stateless person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons; (ii) the concept of *de facto* statelessness; (iii) procedures for determining whether a person is stateless; (iv) the status (in terms of rights and obligations) to be accorded to stateless persons under national law; and (v) the scope of international legal safeguards for preventing statelessness among children.

## **International Human Rights Norms and the 1961 Convention**

1. Article 15 of the 1948 Universal Declaration of Human Rights (UDHR) establishes the right of every person to a nationality and prohibits arbitrary deprivation of nationality. The right to a nationality is fundamental for the enjoyment in practice of the full range of human rights. The object and purpose of the 1961 Convention is to prevent and reduce statelessness, thereby ensuring every individual's right to a nationality. The Convention does so by establishing rules for Contracting States on acquisition, renunciation, loss and deprivation of nationality.
2. Under the general rules of treaty interpretation (1969 Vienna Convention on the Law of the Treaties, Articles 31-33), the ordinary meaning of the terms used in the 1961 Convention must be read in their context and taking into account the object and purpose of the Convention. They must also be read in light of subsequent developments in international law, in particular, international human rights law. Universal human rights treaties of relevance include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1989 Convention on the Rights of the Child (CRC) and the 2006 Convention on the Rights of Persons with Disabilities (CRPD). Regional human rights instruments are also relevant, including the 1969 American Convention on Human Rights, the 1990 African Charter on the Rights and Welfare of the Child, the 1995 CIS Convention on Human Rights and Fundamental Freedoms; the 1997 European Convention on Nationality, the 2004 Arab Charter on Human Rights, the 2005 Covenant on the Rights of the Child in Islam, and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State succession. Several participants asserted that as a result of State practice, such as ratification of the treaties mentioned above and adoption by consensus of many international resolutions on nationality, the prohibition of arbitrary deprivation of nationality and the related principle that statelessness is to be prevented have crystallized as norms of customary international law.

### *Impact of gender equality norms on the interpretation of provisions of the 1961 Convention*

3. The principle of gender equality enshrined in the ICCPR and CEDAW must be taken into account when interpreting the 1961 Convention. In particular, CEDAW Article 9(1) guarantees that women shall enjoy equality with men in their ability to acquire, change or retain their nationality. Of particular importance for the interpretation of the loss provisions of the 1961 Convention is the fact that Article 9 prescribes that the States Parties shall ensure 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. Under CEDAW Article 9(2) States must also grant women equal rights with men with respect to the nationality of their children.
4. Prior to the adoption of the ICCPR (1966) and CEDAW (1979), many nationality laws discriminated on the basis of gender. The 1961 Convention acknowledges that statelessness can arise from conflicts of laws in cases of marriage between nationals of different States. Article 5(1) of the 1961 Convention therefore prohibits statelessness

caused by marriage or termination of marriage. Article 6 provides that no statelessness may be caused by an extension of loss or deprivation of nationality to the spouse of the person concerned. It is evident that these rules are now supplemented by Article 9 of the CEDAW, which prescribes that a woman's nationality status is completely independent of that of her spouse.

## **When is a Person “Stateless”?**

### *Definition of “stateless” for the 1961 Convention*

5. Articles 5-8 of the 1961 Convention establish a basic rule that loss or deprivation shall not cause statelessness. The Convention, however, does not define the term “stateless”. Rather, Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (1954 Convention) establishes the customary international law definition of a “stateless person” as a person “who is not considered as a national by any State under the operation of its law.”<sup>2</sup> Where the 1961 Convention requires that a person shall not lose or be deprived of nationality if this would render him or her stateless, States are required to examine whether the person possesses another nationality at the time of loss or deprivation, not whether they could acquire a nationality at some future date.

### *Determination of the non-possession of any foreign nationality*

6. A Contracting State must accept that a person is not a national of a particular State if the authorities of that State refuse to recognize that person as a national. A Contracting State cannot avoid its obligations based on its own interpretation of another State's nationality laws which conflicts with the interpretation applied by the other State concerned.

### *Burden of proof*

7. As a general rule, the responsibility for substantiating a claim lies with the party which advances that claim. As a result, the burden lies primarily with authorities of a State that is seeking to apply rules for loss or deprivation of nationality to show that the person affected has another nationality, or that the person is covered by one of the exceptions allowed for in Article 7 of the 1961 Convention with respect to loss, or Article 8 with respect to deprivation of nationality. On the other hand, some relevant information may be in the possession of, or can only be acquired by the individual concerned. Each individual therefore has a duty to provide a truthful and as full an account of his or her position as possible, and to submit all evidence reasonably available.
8. Situations of renunciation of nationality are different: here, the burden lies with the individual to establish that he or she possesses or will acquire another nationality, because the individual is the party claiming that the renunciation will not result in statelessness.

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<sup>2</sup> UNHCR Guidelines on Statelessness No. 1: The definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons.

## Definitions of “Loss” and “Deprivation” of Nationality

### *Distinction between “loss” and “deprivation” of nationality*

9. The 1961 Convention uses the expression “loss of nationality” (“perte de la nationalité” in French) in Articles 5-7 to describe withdrawal of nationality which is automatic, by operation of law (“*ex lege*”). The term “deprivation” (“privation” in French) is used in the Convention in Article 8 to describe situations where the withdrawal is initiated by the authorities of the State. UDHR Article 15 forbids “arbitrary deprivation” and makes no mention of loss of nationality. However, resolutions of the UN Human Rights Council clearly establish that “deprivation” in the UDHR also includes arbitrary *ex lege* loss of nationality.<sup>3</sup>
10. In these Conclusions, “withdrawal of nationality” will be used in a broad sense to refer to both loss and deprivation of nationality.

### *What types of acts qualify as “loss” or “deprivation”?*

11. Articles 5-9 of the 1961 Convention address all situations in which individuals who were considered nationals of a State under the operation of its law are no longer so considered due to automatic loss of nationality or a decision of nationality authorities. Much of the meeting focused on loss and deprivation through formal legal acts of the State but it was also agreed that the scope of the 1961 Convention and related human rights provisions includes situations in which individuals who were previously documented as nationals are denied all identity documents which prove nationality. This includes situations in which there is no formal act of the State but the practice of the authorities competent for nationality clearly shows that they have ceased to consider a particular individual (or group) as a national; for example where authorities fail to issue or renew documents, but do not provide any explanation for this omission. In addition, actions by officials that do not have formal legal authorisation, such as confiscation or destruction of identity documents and/or expulsion from the territory, together with statement by authorities that a person is not a national, would also be evidence of withdrawal of nationality.
12. Where a State repeals or restricts with retroactive effect a legislative ground for acquisition of nationality, persons who possessed the nationality of the State concerned may be deemed by the State never to have acquired its nationality. The effect is that the nationality of these persons is withdrawn. The same applies for loss or deprivation of nationality in a concrete case with retroactive effect (e.g. deprivation of nationality due to fraud during the naturalisation procedure with retroactivity to the moment of naturalisation). Participants agreed that such withdrawal is still loss or deprivation rather than non-acquisition of nationality. These situations therefore fall under the Articles 5-8 of the 1961 Convention, a conclusion supported by the *travaux préparatoires*.
13. The same conclusion is to be drawn in all cases where a State *ex post* claims that the conditions for acquisition were never fulfilled, for example where it is established that the

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<sup>3</sup> Reference was made to the manner in which Article 15 of the UDHR is viewed by the UN Human Rights Council in its Resolutions on Human Rights and Arbitrary Deprivation of Nationality, the most recent of which is A/HRC/RES/20/5 of 2012.

conditions which led to the automatic (*ex lege*) acquisition of the nationality were not satisfied.

14. This approach is specifically required to give effect to Article 5(1) of the 1961 Convention in cases of recognition, legitimation, denial of paternity, annulment of recognition, legitimation or adoption, or annulment of marriage, which in many legal systems are regulated by rules which have retroactive effect. It was submitted that Articles 5-8 of the 1961 Convention would apply where it is discovered or alleged after a reasonable period of possession of a nationality that the conditions for acquisition of that nationality were not fulfilled.

### **Arbitrary deprivation of nationality**

15. The loss and deprivation provisions of the 1961 Convention need to be read and interpreted in light of the general prohibition of arbitrary deprivation of nationality, whether or not it results in statelessness, enshrined in UDHR Article 15(2). As set out in the resolutions of the Human Rights Council and reports of the UN Secretary General on this question, several principles can be identified as following from this prohibition.

#### Established by law

16. Loss or deprivation of nationality needs to have a firm basis in national law. Loss and deprivation provisions must be predictable. They may not be interpreted by analogy (i.e. applied to facts which are not evidently covered by the wording of the provisions concerned). As a result, a legal provision regarding loss or deprivation of nationality may not be enacted or applied with retroactivity, nor may a provision regarding the acquisition of nationality be repealed or restricted with retroactivity.
17. To establish whether a person acquired or had a nationality withdrawn on account of certain acts or circumstances, the legislation which was in force at the moment these acts occurred is to be applied. Where a new ground for loss or deprivation of nationality is introduced in national law, the State must include a transitional provision to avoid an individual losing his or her nationality due to acts or facts which would not have resulted in loss or deprivation of nationality before the introduction of the new ground.<sup>4</sup>

#### Non-discriminatory

18. Loss or deprivation of nationality may not be based on discrimination on any ground prohibited in international human rights law, either in law or in practice. These include, *inter alia*, all the grounds established in Article 2 of the ICCPR: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. Participants noted the *jus cogens* character of the prohibition of racial discrimination as well as the specific prohibition of racial discrimination in relation to nationality in the CERD and underlined its relevance in many situations of deprivation of nationality. International law prohibits deprivation of nationality on other grounds, including under Article 9 of the 1961 Convention which refers specifically to religious

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<sup>4</sup> For example, if a State introduces voluntary acquisition of a foreign nationality as a new ground for loss of nationality, no such loss should occur if the foreign nationality is acquired after the introduction of this ground, but the application to acquire the nationality was already made prior to its introduction.

and political as well as ethnic and racial grounds, Article 9 of the CEDAW in relation to discrimination against women and Article 18 of the CRPD which explicitly addresses deprivation on the ground of disability. The resolutions on nationality of the Human Rights Council have also set out a broad range of prohibited grounds for discrimination.

*Serves a legitimate purpose and is proportionate*

19. The deprivation of nationality must serve a legitimate purpose that is consistent with international law and, in particular, the objectives of international human rights law. Deprivation of nationality must be the least intrusive means of those that might achieve the desired result.
20. Deprivation of nationality must be proportionate to the interest which the State seeks to protect. This requires a balancing of the impact on the rights of individual and the interests of the State.
21. In assessing the impact on the individual, consideration must be given to the strength of the link of the person with the State in question, including birth in the territory, length of residence, family ties, economic activity as well as linguistic and cultural integration. The time that has passed since the act in question is also relevant for the assessment as to whether the gravity of the act justifies deprivation of nationality. The longer the period elapsed since the conduct, the more serious the conduct required to justify deprivation of nationality. Some States therefore provide for a limitation period in respect to the time elapsed between commission of an act and its discovery by the authorities, and between the discovery and the issuance of the deprivation decision.
22. Also relevant are the consequences of the deprivation of nationality for the person concerned and his/her family members, in particular loss of the right to reside in the country of which the person held nationality, as well as of the rights which attach to residence.
23. Loss and deprivation that result in statelessness will generally be arbitrary because the impact on the individual far outweighs the interests the State seeks to protect. The 1961 Convention sets out a narrow set of exceptions under which this would not be the case, striking a balance between the rights of individuals and the legitimate interests of States. The Convention does not allow reservations to these provisions or for States to otherwise exclude individuals from the scope of the Convention due to specific types of conduct. These exceptions are to be interpreted in a restrictive manner.
24. Where it is permissible to deprive an individual of nationality under the 1961 Convention and international human rights law, it may be appropriate to postpone the act of deprivation until the person involved has acquired, re-acquired or confirmed nationality or a permanent residence status elsewhere.

*Due process of law requirements under international human rights law and Article 8(4) of the 1961 Convention*

25. Procedural safeguards are essential to prevent abuse of the law. As a result of developments in international human rights law, such procedural guarantees apply in all cases of loss and deprivation of nationality and not only to deprivation of nationality as

set out in Article 8(4) of the 1961 Convention. These principles – derived from the prohibition of arbitrary deprivation of nationality – must be observed in all cases whether or not loss or deprivation could result in statelessness.

26. Accordingly, loss and deprivation of nationality may only take place in accordance with law and accompanied by full procedural guarantees, including the right to a fair hearing by a court or other independent body. It is essential that the decisions of the body concerned be binding on the executive power. The person affected by deprivation of nationality has the right to have the decision issued in writing, including the reasons for the deprivation. Deprivation decisions are only to enter into effect at the moment all judicial remedies have been exhausted.
27. Given the serious criminal nature of many of the acts which give rise to deprivation of nationality, participants underlined that where criminal conduct is alleged, it is strongly advisable that deprivation of nationality only occur following a two-step process, logically beginning with a finding of guilt by a criminal court. A decision by the competent authority (preferably a court) on deprivation of nationality would follow.

*The right to an effective remedy for wrongful acts of loss or deprivation of nationality*

28. If loss or deprivation of nationality took place in violation of international law, including the rules of the 1961 Convention, the State has an obligation to restore, to the extent possible, the situation existing before the violation occurred. The principal remedy for loss or deprivation of nationality contrary to the 1961 Convention and international human rights law is restoration of nationality. In order to be effective and to address all persons affected, restoration of nationality generally must be automatic and preferably with retroactivity to the moment of deprivation. Requiring the persons concerned to reacquire nationality through regular naturalization procedures would not fulfil these requirements. Participants highlighted a range of relevant State practices, including in relation to violations of the right to a nationality which occurred many years prior or to previous generations. Where reacquisition of nationality requires an application, factors such as lack of information on procedures, costs, administrative requirements and corruption may exclude many of the individuals concerned. Remedies must ensure also the enjoyment of rights acquired while the person was a national.
29. In some circumstances, arbitrary deprivation of nationality may be linked to past persecution against a specific population. In such cases, following a change in circumstances in the country concerned, it may be appropriate to provide for a simple, non-discretionary application procedure so that those individuals can reacquire nationality.

## **Loss of Nationality: Analysis of Articles 5-7 of the 1961 Convention**

*Basic rule: Article 7(6) – No loss of nationality if this causes statelessness*

30. The main principle of Articles 5-7 of the 1961 Convention is codified in Article 7(6): “Except in the circumstances mentioned in this Article, a person shall not lose the nationality of a Contracting State, if such loss would render him stateless,

notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.” This provision remains important due to conflicts of law between States, coupled with increased migration.

31. As mentioned above, and in light of the object and purpose of the Convention, the principle of Article 7(6) applies regardless of whether the loss of nationality is retroactive.

*Loss on the basis of possession or acquisition of a foreign nationality*

32. Articles 5(1), 6 and 7(1) allow for loss of nationality where the individual concerned *possesses* another nationality at the moment of loss. They also allow for loss if the person concerned “*acquires*” another nationality. Statelessness may result when the new nationality is not acquired upon loss of the former nationality. If States allow for loss before another nationality is acquired, they may meet their obligations under the 1961 Convention by providing that the loss is void if the individual concerned fails to acquire the new nationality within a fixed period of time. This time period could be set to one year, with the possibility of extension in cases where it is known that acquisition of a foreign nationality takes more than one year. It is appropriate that the reacquisition be automatic and the relevant authorities not enjoy discretion regarding issuance of identity documents proving the nationality of the person concerned.

*Article 5: No loss of nationality upon change of personal status if it results in statelessness*

33. Article 5 of the 1961 Convention prohibits loss of nationality resulting from change of personal status unless the person concerned possesses or acquires another nationality. For the purposes of Article 5, change of personal status includes events such as marriage and termination of marriage and recognition, legitimation and adoption of a child.
34. Insofar as loss of nationality as a result of marriage and termination of marriage is concerned, Article 5(1) is supplemented by CEDAW Article 9(1), which prohibits any automatic effect of marriage and termination of marriage on the nationality of women.
35. In light of the introduction of equal treatment of men and women in respect of the transmission of nationality to their children as prescribed by CEDAW Article 9(2), States moreover should not provide for loss of nationality in cases of legitimation or recognition of a national by a foreign State.
36. States which provide for loss of nationality in cases of full adoption of a child by a foreigner must restrict this ground for loss to cases where a child acquires the nationality of the adopting parent(s) by the mere fact of the adoption. On the other hand, forms of adoption which do not dissolve the legal relationship with (one of) the (biological) parents, must never cause loss of nationality.
37. Where States do provide for loss of nationality as a result of recognition, legitimation or adoption, the 1961 Convention requires that this never results in statelessness as loss must be conditioned on possession or acquisition of another nationality. According to Article 5(1), *no* change in the personal status of a person may cause statelessness. The list of changes in personal status contained in Article 5(1) is not exhaustive. In addition to the situations explicitly listed in the Article, this rule would apply in case of a successful denial



of paternity, but also – if a legal system provides for such possibilities – to a denial of maternity as well as to annulment or revocation of a recognition or of an adoption. The range of situations which fall under Article 5(1) is likely to grow as a result of developments in the area of reproductive technology.

38. Article 5(1) also applies if it is established that the family relationship which constituted the basis of a child's acquisition of nationality was registered erroneously. This includes situations in which the identity of the parent (relevant for *jure sanguinis* acquisition of nationality) has been erroneously recorded, or where it is discovered, after acquisition of the nationality by an *ex lege* extension of naturalization from a parent to a child, that no family relationship ever existed between the parent and the child.
39. Under Article 8(2) of the Convention, an exception may be made to this rule if the child has been considered a national on the basis of fraudulent behaviour or fraudulent information provided about him or her; such as when the full identity of the child, including existing family relationships, is not disclosed by his or her legal representative. However, as in all decisions relating to children, in instances of fraud committed by a legal representative, State authorities must take into consideration the best interests of the child. In light of this overriding principle set out in the Convention on the Rights of the Child, a range of other factors will need to be examined (including the ties to country concerned), in light of the general principle of proportionality, and not solely whether the child acquired nationality on the basis of fraud conducted by an adult guardian.

*Article 6: No extension of loss or deprivation of nationality to spouses or children if they result in statelessness*

40. The rule of Article 6 of the 1961 Convention with regard to the nationality position of spouses is supplemented by CEDAW Article 9. The loss or deprivation of nationality of an individual may never have an automatic consequence for the nationality of the spouse.
41. Where a parent (or both parents) lose or are deprived of their nationality, Article 6 provides that an extension of the withdrawal of nationality to the children is never to result in statelessness. This rule applies regardless of the reason for the withdrawal of the parent's nationality, including where the conduct of the parent is so serious as to allow for deprivation of nationality even if it results of statelessness under Article 8(3) of the 1961 Convention.

*Article 7(1): No voluntary renunciation of nationality if it results in statelessness*

42. The right to change one's nationality is set out in UDHR Article 15. Most States provide for a right to renounce one's nationality, which may result in statelessness unless a safeguard is adopted to avoid it. Article 7(1) of the 1961 Convention limits loss of nationality by renunciation to situations where the individual concerned *possesses* another nationality but also allows renunciation on the basis of *acquisition* of a foreign nationality. States can ensure that the renunciation does not result in statelessness by providing for a lapse of the renunciation if the individual concerned fails to acquire the foreign nationality within a fixed period of time (e.g. of one year). Consequently, the renunciation is deemed never to have taken place and the person not to have been stateless. The higher likelihood that a woman will renounce her nationality upon marriage

to a foreign man than vice-versa makes this provision particularly important to prevent statelessness among women.

43. There was a strong consensus that the exceptions to this rule allowed by Article 7(1)(b) which refer to UDHR Articles 13 and 14<sup>5</sup> are of limited relevance and that they have largely been superseded by subsequent developments in international law, in particular the right to leave any country including one's own, as set out in ICCPR Article 12 and regional other instruments.

*Article 7(2): No loss of nationality upon application for naturalization in another State if it results in statelessness*

44. Article 7(2) of the 1961 Convention allows for loss of nationality when a citizen applies for naturalization in a foreign State. However, it conditions such loss on possession, or – if the other nationality has yet to be acquired – an assurance to acquire the other nationality. In the latter case, it is only acceptable to allow for loss of nationality if the assurance is unconditional and does not leave any discretion to the authorities of the country of the other nationality.

45. Some Contracting States require applicants for naturalization to have renounced their former nationality and give for that purpose an assurance that the naturalization will be granted upon submission of proof of renunciation of the foreign nationality. There is an implicit obligation under the 1961 Convention that once issued, assurances may not be retracted on the grounds that conditions of naturalization are not met, thereby rendering the person stateless. As an alternative to issuance of an assurance, some States provide that naturalization is granted against a pledge by the individual to renounce his/her foreign nationality, and set a fixed period for submitting proof of such renunciation. In the event the proof is not submitted, the naturalization decision is declared null and void.

*Article 7(3)-(5): Basic rule and exceptions relating to loss on the basis of prolonged residence and birth to a national abroad*

46. Article 7(3) of the 1961 Convention provides that loss of nationality as a result of departure, residence abroad, failure to register or similar reasons may not render persons stateless. Article 7 paragraphs (4) and (5) allow for two exceptions to this rule, namely that loss may occur on the basis of continuous residence abroad for seven consecutive years or more by naturalized citizens without registration with national authorities or for failure of citizens born abroad to take steps (residence on State territory or registration with a national authority), to retain their nationality within one year of reaching the age of majority.

47. As is evident in the Final Act of the 1961 Convention, persons who acquired nationality under the terms of Articles 1-4 of the 1961 Convention may not be considered as

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<sup>5</sup> These provisions read as follows:

Article 13. (1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14. (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

naturalized persons for the application of Article 7(4). The same applies for all persons who acquired nationality by operation of law or upon submission of an application which the authorities had no discretion to refuse.

48. There was a consensus that loss of nationality under Article 7(3) will generally not be permissible if the individual concerned is left stateless. Increasing international migration means that the character of the bond between the individual and the State has considerably evolved and often involves only sporadic contact with the authorities and visits to the country of nationality. As a result, the objective of ensuring strong links between the individual and the State is less relevant than at the time of drafting of the 1961 Convention. Consequently, such provisions have become increasingly rare in nationality laws. In most cases, loss of nationality resulting in statelessness will not meet the proportionality test because the impact on the individual far outweighs the objective sought by the State. States can achieve their policy objective of preserving strong links to their nationals by providing for loss of nationality in such situations only where the individuals concerned would not be left stateless.
49. Participants noted the difficulties faced by individuals in complying with the type of requirements for retention set out in paragraphs (4) and (5) of Article 7 (declaration, registration or residence). They noted that if States retain such provisions, they need to take all possible steps to ensure that the persons concerned are informed individually and in a timely manner of the formalities and time limits to be observed to retain their nationality, as recommended under the Final Act of the 1961 Convention.
50. If States retain provisions whereby nationality is lost by naturalized citizens on the basis of continuous residence abroad without registration with the authorities, renewal of a passport is to be considered as registration. It is desirable to impose a time limit for loss which is considerably longer than the validity of national passports. With the increasing use of machine readable passports, this will often be ten years.
51. Given the consequences for the individual, it was recommended that any State that seeks to retain this exception not provide for automatic loss of nationality in these cases, but for the possibility of deprivation of nationality. This would enable the authorities to take all relevant circumstances into account when making the deprivation decision, such as the strength of ties between the person and the State concerned.

## **Deprivation of Nationality: Analysis of Articles 8 and 9 of the 1961 Convention**

### *Article 8: deprivation of nationality*

#### *Basic rule: Article 8(1) – No deprivation of nationality if it results in statelessness*

52. Article 8(1) of the 1961 Convention sets out the basic rule that a Contracting State shall not deprive a person of his or her nationality if such deprivation renders him or her stateless.
53. Paragraphs (2) and (3) of Article 8 set out an exhaustive list of exceptions to this basic rule. While States may provide for deprivation of nationality on grounds other than those

set out in the 1961 Convention, they may not apply such provisions to individuals who would thereby be left stateless. In addition, the exceptions are drafted with restrictive language and as exceptions to a general rule they are to be interpreted narrowly. This approach is consistent with the object and purpose of the treaty and is confirmed by the intention of the drafters as evidenced in the *travaux préparatoires*. There was consensus that developments in human rights law have considerably narrowed the circumstances in which these exceptions may be applied.

54. In all cases, consideration is to be given to the person's responsibility for the act(s) which provide the basis for the deprivation as well as the circumstances in which they were committed, in line with the general requirement on proportionality.<sup>6</sup>

*Article 8(2)(a): Exception allowing deprivation of nationality based on prolonged residence abroad*

55. States may provide for deprivation of nationality due to prolonged residence abroad by a naturalized person or require registration to retain nationality by persons born to a national abroad. It is preferable to provide for deprivation as opposed to loss of nationality in such cases as the authority concerned will then be able to examine the circumstances of the individual concerned. Deprivation of nationality on these grounds is not justified where the result is statelessness because the impact on the individual far outweighs the objective sought by the State.

*Article 8(2)(b): Exception allowing deprivation of nationality due to misrepresentation or fraud*

56. It was stressed that based on the *travaux préparatoires*, "misrepresentation" in the context of this exception is to be read as "dishonest misrepresentation". Moreover, Article 8(2) only applies to nationality which is acquired through an application procedure – it would not extend to nationality acquired at birth or on the basis of Articles 1-4 of the 1961 Convention.
57. Under this exception, States may provide for deprivation of nationality due to failure to renounce a foreign nationality if the failure to renounce clearly can be classified as fraud. The deprivation only becomes effective if it is proven that the person involved did not renounce the former nationality. In this context, a State may not refuse documents proving the renunciation of the former nationality on the basis that they do not fulfil certain formal criteria, e.g. they have not been legalized or bear an apostille stamp.

*Causality and proportionality in the context of deprivation for misrepresentation or fraud*

58. In order for fraud or misrepresentation to be a basis for the deprivation of nationality (whether or not statelessness results), there must be causality between the fraud or misrepresentation and the grant of nationality. In other words, the fraud must be material to the acquisition of nationality. Deprivation is not permissible if the nationality would have been acquired even if the misrepresentations or concealment had not occurred.

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<sup>6</sup> See paragraphs 19-24, above.

59. Deprivation would not be justified if the person was not aware and could not have been aware that the information provided during naturalization was untrue. Several participants emphasized that due consideration must be given to the motivation of the individual such as why a person committed the act(s) in question. One example provided related to provision of incorrect information during a naturalization procedure because the applicant feared that use of their full and correct identity would endanger family members in another country. Another area of concern is the often poor quality of “feeder” or supporting documents from civil registration systems and other administrative registries in many countries which serve as proof for issuance of identity documents and passports. These documents often contain minor errors or discrepancies relating to the identity of individuals. These realities need to be taken into account in assessing cases of alleged misrepresentation or fraud.
60. Participants indicated that in light of Article 15 of the UDHR and, in the European context, Recommendation 99(18) of the Council of Europe and the European Court of Justice’s ruling in the case *Rottmann v. Freistaat Bayern*, deprivation procedures must apply the principle of proportionality.

#### *Individual decisions in deprivation cases*

61. The decision whether or not to deprive persons of their nationality needs to be made individually for each person involved. This is clear from the terms used in Article 8 (“a person”, “the person”) and also from the requirement in paragraph 4 of the Article that each individual is to be afforded a fair hearing. Hence, if two spouses acquired nationality on the basis of one naturalization decree, separate deprivation decisions have to be made for each.

#### Children

62. Where authorities are considering the deprivation of nationality of children due to misrepresentation or fraud, special attention needs to be given to the objective of preventing statelessness among children as set out in Articles 1-4 of the 1961 Convention and Articles 7 and 8 of the CRC, read in light of the principle of the best interests of the child of CRC Article 3. It is never in the best interests of the child to be rendered stateless.

#### *The type of deprivation construction in domestic law does not affect a State’s obligations under Article 8(2)(b)*

63. If a State uses an annulment procedure with retroactive (*ex tunc*) effect instead of a procedure with *ex nunc* effect in cases where it is found that the nationality was obtained through fraud or misrepresentation, such annulment may never have automatic consequences for the individual’s spouse or children. In cases of annulment, separate decisions must be made for all individuals involved.
64. In cases of alleged misrepresentation or fraud, a declaration that the acquisition of nationality was void *ab initio* (i.e. that the person never possessed the nationality) would be classified as arbitrary deprivation if the procedure fails to allow for a proportionality test. Furthermore, if the void *ab initio* construction has automatic consequences for the nationality of children and further descendants, whose nationality depends exclusively on

the fact that an ancestor acquired the nationality concerned by naturalization, this would conflict with Article 6 of the 1961 Convention if the result is statelessness.

*Article 8(3): Exceptions allowing deprivation of nationality resulting in statelessness due to conduct inconsistent with the duty of loyalty to the State or evidence of allegiance to another State*

65. Article 8(3) allows States to retain the right to deprive persons of their nationality on the grounds listed exhaustively in the paragraph, even if this results in statelessness. Specifically, these exceptions include where a national behaved inconsistently with the duty of loyalty to the State concerned, or has taken an oath or made a formal declaration or otherwise given definite evidence of allegiance to another State. A State may only use one or more of these exceptions if a declaration is made to that end at the time of signature, ratification or accession and the ground(s) concerned already exist(s) at that time in the nationality legislation of the State; legislation may not be amended to introduce the possibility at the time of ratification or thereafter (stand still clause). Only 15% of the Contracting States make use of the right to retain a specific ground for loss under Article 8(3) with statelessness as a result.

*Article 8(3)(a)(i): Exception allowing deprivation on the basis of services rendered to or emoluments received from foreign States*

66. If a State submits a declaration under Article 8(3)(a)(i) and provides for deprivation of nationality with statelessness as a consequence based on the fact that a person “has, in disregard of an express prohibition by the Contracting State rendered or continued to render services to, or received or continued to receive emoluments from, another State”, the prohibition must be provided for in national law and have been issued expressly to the individual concerned, the person individually informed and a time limit provided for ceasing the activities concerned.

67. The exception covered by Article 8(3)(a)(i) may not be applied where an individual rendered services to, or received emoluments from an entity which does not constitute a State, such as a non-State armed actor, an intergovernmental organization, a non-governmental organization or a business entity.

*Article 8(3)(a)(ii): Exception allowing deprivation on the basis of conduct seriously prejudicial to the vital interests of the State*

68. This exception to the basic rule establishes a very high threshold for deprivation of nationality resulting in statelessness. The ordinary meaning of the terms “seriously prejudicial” and “vital interests” indicate that the conduct covered by this exception must threaten the foundations and organization of the State whose nationality is at issue. The term “seriously prejudicial” requires that the individuals concerned have the capacity to impact negatively the State. Similarly, “vital interests” sets a considerably higher threshold than “national interests”. This interpretation is confirmed by the *travaux préparatoires*. The exception does not cover criminal offences of a general nature. On the other hand, acts of treason, espionage and – depending on their interpretation in domestic law – “terrorist acts” may be considered to fall within the scope of this paragraph. Finally, the acts concerned must be inconsistent with the “duty of loyalty” to the State of

nationality and the exception therefore applies only to conduct which is seriously prejudicial to the vital interests of that State, rather than those of other States with which it has friendly relations. The experience of some States indicates that governments do not gain from rendering individuals stateless through the application of this exception, in particular because it may be difficult in practice to expel the persons concerned.

*Article 8(3)(b): Exception allowing deprivation on the basis of an oath or formal declaration of allegiance to another State, or definite evidence to repudiate allegiance*

69. Article 8(3)(b) allows for an exception to the basic rule such that deprivation of nationality may cause statelessness where a person declares allegiance to another State or repudiates his/her allegiance to the Contracting States. This provision appears to be irrelevant in most circumstances, as the only opportunity for an individual to make a formal oath of allegiance to a State is at the final stage of a naturalization procedure, such that statelessness is no longer at issue. It has also been largely superseded by later developments in domestic nationality laws which increasingly place less importance on formal allegiance to the State, in particular due to the marked decline in compulsory military service and the increasing acceptance of dual nationality.

*Article 9: Deprivation of nationality on the basis of discrimination is prohibited*

70. Article 9 forbids Contracting States to deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds. It applies irrespective of whether statelessness would result from the deprivation. The provision was designed to give effect to Article 15 of the UDHR and is complemented by provisions of conventions such as the CERD, CEDAW and CRPD.

71. The line between deprivation on political grounds and deprivation due to conduct inconsistent with the duty of loyalty to the State will not always be clear. However, a consequence of Article 9 is that a State will need to establish that a deprivation decision is not being made on political or other discriminatory grounds. Furthermore, the deprivation must not be based on conduct which is consistent with an individual's freedom of expression, freedom of assembly or other rights guaranteed under international human rights law.