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INTERNATIONAL LAW AND EUROPEAN NATIONALITY LAWS

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International Law and European Nationality Laws

Lisa Pilgram

Motto: *'When examining the development of European understandings of citizenship... Brussels-centred students of Europeanization might be surprised to know it, but much of the more substantive and interesting work in this area has occurred elsewhere, in Strasbourg (Council of Europe)'* (Checkel 2001: 184)

1 Introduction

This paper on international law and European nationality laws is based on the findings from country reports produced within the framework of the EUDO Citizenship Observatory as well as further correspondence with country experts who participated in this project.¹ After a brief description of the history and sources of public international law on nationality, the domestic impact of international legal provisions in this field is being examined. To this end, the second part of this paper discusses the key factors which determine state receptivity towards international law on nationality. These include historical, regional and political factors, internal doctrinal preconditions, informal factors such as societal pressure as well as systems of reservations and the absence of independent review in international Treaty law. The regional influence of the European Convention on Nationality (ECN), as the most important multilateral instrument at present, is analysed in more detail in the last part of the paper including a description of common obstacles to ratification of the Convention.

2 History and sources of international law on nationality

2.1 The concept of nationality in public international law in historical perspective

There is no single generally recognised concept of nationality which could be understood as the expression of political membership (Wiessner 1988). On the contrary, 'nationality', as the expression of belonging to a nation as a political entity, is very much a product of its own very particular historical, social context (Hailbronner 2006).

Yet nationality lies at the very heart of the concept of a state. Its function is to define the initial body of citizens of a country, which is an essential element of state sovereignty (Van Goethem 2006: 3, Jellinek 1964: 406-427). As a legal status, it confirms the membership of an individual in a political community. The definition of who is a national of a state is almost exclusively a product of domestic developments. Since international law is designed to protect state interests and prevent inter-state conflict, it is not surprising that traditionally there have been very few limitations on state powers in nationality matters. Early public international law instruments confirm that it is the nation-states' sovereign prerogative

¹ Research project funded by DG JLS available at <http://eudo-citizenship.eu>.

A brief note on terminology: rather than referring to 'citizenship' like other comparative and country reports of the EUDO Citizenship Observatory, this paper uses the term 'nationality' synonymously to reflect the conventional use of this term in international law documents and scholarly work in this field.

to determine their citizens: ‘Each State shall determine under its own law who are its nationals.’ (Article 1 (a) The Hague Convention 1930).

The power of states to regulate issues of citizenship is nonetheless limited by international law. This is due to the interplay between the nationality rules of states. The effects of domestic rules on nationality may extend beyond national borders, potentially leading to interstate conflict and friction. Article 1 (b) of the Hague Convention thus reads: ‘This law shall be accepted by other states in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality law.’ (Article 1 (b) The Hague Convention 1930).

Interestingly enough, article 1 of the Convention, at the same time as confirming the principle of state autonomy in nationality matters, sets limits to the state’s prerogative to determine the members of its citizenry. However, when looking for actual examples of such limitations, one discovers that there are only a small number of cases involving issues of nationality which have in practice been resolved using mechanisms of dispute resolution rooted in international human rights law. To learn more about international rules that (may) constrain state discretion in nationality matters, one will have to refer to a wider variety of sources.

2.2 Sources of international law

International law provisions on nationality can be found in customary international law, in a very few instances of case law and arguably also within the universal human rights regime. Most importantly, however, international standards are being developed in bilateral and multilateral Treaties, supported by international bodies such as the United Nations. On the European level, standards have been set by the Council of Europe and to a certain extent also by the European Union (EU) through EU law, although the latter has no competence *per se* in nationality matters. This paper focuses exclusively on public international law leaving EU law aside.

2.3 Duties of states under customary law

There are relevant duties under customary international law constraining state autonomy in nationality matters. Important customary international law principles are the duty to avoid and reduce statelessness, the prohibition of arbitrary deprivation of nationality and the general obligation of non-discrimination (Van Goethem 2006: 4-5). The obligation of non-discrimination is however limited to instances of differential treatment ‘on the grounds of sex, religion, race, colour or national or ethnic origin’ (article 5(1) ECN). It does not yet prohibit treating differently those who became nationals by birth and those who became nationals of a state by naturalisation or otherwise. Article 5(2) of the ECN merely prescribes that ‘[e]ach 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’ (Article 5(2) ECN, emphasis added).

2.4 Case law of international courts

Although international courts have been dealing with nationality matters for a long time, there is generally very little case law in this field.² The most important and oft-cited case is *Nottebohm (Liechtenstein v. Guatemala)* which was decided by the International Court of Justice (ICJ) in 1955.³ This case was brought by Liechtenstein against Guatemala arguing that the latter state was treating one of its nationals contrary to international law. It was dismissed by the ICJ *inter alia* on the basis of Mr Nottebohm lacking a genuine link with the state of Liechtenstein, as claimed by Guatemala. Most importantly, the Court upheld the principle of ‘effective nationality’. This means that it is the genuine and effective link between a state and an individual which confers upon the state the opportunity to afford diplomatic protection. It was this which Liechtenstein was found to lack in the case of Mr Nottebohm. The principle of effective nationality as described in *Nottebohm* is often cited in definitions of the concept of nationality. In this context, it is important to remember that the ICJ ruling concerned primarily the question of a state’s opportunity and indeed duty to afford diplomatic protection and not the individual’s right to the nationality of a state.

2.5 Human rights

It has been argued that human rights concepts may also set limits to state autonomy in nationality matters (Faist et al 2004: 12-15, Chan 1991: 1-14). However, in practice State Parties have been reluctant to go this far as this would mean a significant loss of power over nationality attribution. Mole explains that initially restrictions to the power of the state to devise nationality rules were not framed in terms of rights of individuals to acquire a nationality or resist its revocation, but rather as restrictions on the obligations of other states to recognise domestic determinations of nationality in a particular instance (Mole 2001: 136). The development of an international human rights regime and, more generally, the emergence of a ‘rights culture’ have challenged but not (yet?) substantially altered a system that is governed by the logic of state sovereignty in nationality attribution.

At first sight, this appears to be confirmed by article 3 of the European Convention on Nationality, which defines the limits of state autonomy and which does not mention human rights; nor are they mentioned in the Preamble to the Convention:

1. Each State shall determine under its own law who are its nationals.
2. This law shall be accepted by other states in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality law.

It is Chapter VI on state succession and nationality alone which explicitly prescribes in article 18 (Principles) that ‘[i]n matters of nationality in cases of State succession, each State Party concerned shall respect the principles of the rule of law, the rules concerning human rights and the principles contained in articles 4 and 5 of this Convention and in paragraph 2 of this article, in particular in order to avoid statelessness’.

² For example, an early case before the Permanent Court of International Justice in 1923 dealt with the Nationality Decrees issued in Tunis and Morocco.

³ 1955 ICJ 4, judgment of 6 April 1955.

Article 4(a) ECN (Principles) confirms a general human rights principle as established under article 15 of UDHR that '[e]veryone has the right to a nationality'. However, the American Convention on Human Rights is the only convention to grant a right to the nationality of a *specific* state. Also state practice so far does not indicate a development towards an individual choice of nationality. This is still regarded as a sovereign prerogative of the state (Hailbronner 2006: 37).

Since international Treaties on nationality are to be understood as governing inter-state relations rather than matters between individuals and the state, human rights do not sit easily within this framework. Nevertheless, it is arguable that the ECN breaks with this pattern to a certain extent. Firstly, because it includes a mention of human rights at least in one chapter of the Convention and, secondly, because it has a more general focus on individual rights of nationals as well as of foreign residents without necessarily referring to 'human rights'. This characteristic is a novelty as regards normal practice in international Treaties on nationality and will be discussed in more detail below.

2.6 Treaties and soft law instruments⁴

Since the 19th century states have cooperated in nationality matters, mostly through bilateral agreements. This was necessary at a time when many Europeans emigrated to North and South America and when their legal bonds to a certain state had to be regulated. In the 20th century an increasing number of multilateral and regional conventions were concluded, the earliest of which was the Convention on Certain Questions relating to the Conflict of Nationality Laws (The Hague Convention) in 1930.⁵

The main purpose of earlier international legal instruments was to deal with a set of issues centring on statelessness as well as dual or multiple nationality. These instruments were governed by the idea that nationality is the legal expression of belonging and loyalty to a state and community and that, by nature, this bond could not exist with more than one unity. The preamble of the 1930 the Hague Convention reads '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' (1930 The Hague Convention, emphasis added).

Subsequently, the 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to the Status of Stateless Persons provide that the naturalisation of refugees and stateless persons shall be facilitated as much as possible by the contracting states. In addition, the 1961 Convention on the Reduction of Statelessness prescribes that '[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless' (article 1, Convention on the Reduction of Statelessness). The most recent soft law document in this context is the Committee of Ministers' Recommendation no. R (99) 18 on the avoidance and the reduction of statelessness.

Regarding the issue of dual nationality, the 1963 European Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality ('1963 Strasbourg Convention') was, for a long time, the principal Treaty

⁴ A detailed chronological list of relevant international law instruments and soft law provisions, including Treaty signatures, ratifications and reservations is available via the EUDO Citizenship website on www.eudo-citizenship.eu/international-legal-norms.

⁵ The third of three Protocols to the 1930 The Hague Convention, entitled Special Protocol concerning Statelessness, only entered into force 75 years after its opening for signature through ratification by Fiji and Zimbabwe.

establishing international rules on multiple nationality. However, important changes have been introduced by three Protocols to the Convention and by the ECN, which now remains neutral with regards to dual nationality. These changes will be discussed in more detail below. Suffice to say that, for a considerable period of time, international law served to organise inter-state relations according to a basic understanding that dual or multiple nationality was considered undesirable, problematic and deviant from the ideal of ‘one nationality for each and everyone’.

Another major concern of international law making was the issue of equality in nationality law. Against the background of shifting social realities in Europe that pushed for full equality of the sexes, the nationality rights of married women and children were brought into focus by conventions including the 1957 Convention on the Nationality of Married Women,⁶ the 1966 International Covenant on Civil and Political Rights, the 1967 European Convention on the Adoption of Children, the 1979 Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), the 1989 Convention on the Rights of the Child as well as, very recently, the Committee of Ministers’ Recommendation no. (09) 13 on the nationality of children which also deals with avoiding statelessness. Important rights introduced by the above Treaties are, firstly, that marriage, its dissolution or the change of nationality by the husband do not automatically affect the nationality of the wife. Secondly, international law now grants women equal rights with men regarding the nationality of their children. The latter means that children of mixed marriages are allowed to acquire both of their parents’ nationalities (see article 9(2) CEDAW).

Along with the banning of discrimination on grounds of sex an understanding developed that discrimination on grounds of race was also to be prohibited in international law on nationality. The 1966 Convention on the Elimination of All Forms of Racial Discrimination was part of a wider trend establishing equal rights in societies and erasing discrimination on grounds of race, sex and nationality, a principle which has now evolved into customary international law.

With the measures providing women and their children with equal access to nationality, the number of people holding dual or multiple nationalities was steadily increasing. Also, due to migratory activity the growing number of foreign permanent residents in European states demanded a durable solution integrating them into society. More international regulatory systems were necessary to deal with this situation, such as for example the so called Second Protocol amending the 1963 Strasbourg Convention, which allows for dual or multiple nationality in certain cases.⁷ Exemplifying this trend, it is noteworthy that on 3 June 2009 Italy renounced Chapter 1 on ‘reduction of cases of multiple nationality’ of the 1963 Strasbourg Convention. This is also interesting because it implies that Italy is also no longer Party to the Second Protocol as this Protocol exclusively concerns Chapter 1 of the Convention. In this case, the Netherlands is the only remaining Party to the Second Protocol which, according to Professor de Groot, nonetheless remains in force (see Diagram 1, Annex; de Groot 2009: 297).

As a side note, an emerging area of international coordination appears to be the attribution and loss of nationality in cases of state succession. The 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (CETS 200) entered into force on 1 May 2009. To date, it has been ratified by a total of four states, the

⁶ The Convention on the Nationality of Married Women (1957) is the only Treaty that has been signed without a single reservation by its Parties, which confirms the strength of the rights guaranteed in the document.

⁷ Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality (1993, CETS 149).

most recent of which is Montenegro on 28 April 2010, and signed by a further three states.⁸ It remains to be seen if future international legal instruments will continue to contribute to this area.

Clearly, the standards of international law on questions of nationality which developed in earlier years failed to adequately address all issues of contemporary citizenship regimes. As a consequence the European Convention on Nationality was developed by the Council of Europe.

2.7 The European Convention on Nationality (ECN) 1997

The first attempt to draft a Treaty on Nationality was made in the late 1980s and plans were made to introduce a Protocol to the European Convention on Human Rights (ECHR) (Jessurun d'Oliveira 1998). At a meeting, initially scheduled to negotiate further changes to the 1963 Strasbourg Convention, the Council of Europe proposed to draft a new comprehensive convention on the general principles on nationality and, in 1997, the European Convention on Nationality was adopted (de Groot 2000: 119).

Today, the Council of Europe Convention on Nationality can be considered the most influential and advanced international instrument in the field of nationality. It has been ratified by twenty and signed by nine states. Of the 37 states covered in this paper's sample, eighteen have ratified and a further eight have signed the Convention.⁹ This means that almost half of the states in this study have ratified the ECN and that almost three quarters have either signed or ratified the Convention.

The ECN contains the international standards on nationality that evolved over time in *distilled form*. However, it not only consolidates general principles of international law but clearly also expresses a certain activism aiming at setting new standards in the field. The fact that experts,¹⁰ sent as representatives of their states, external specialists and Council of Europe Secretariat staff were involved in developing and drafting the Treaty meant that they could do so away from the limelight of daily politics (Checkel 2001: 184-186). In many countries discussions of nationality issues are highly politicised, a fact which makes it difficult to advance progressive ideas that challenge the status quo. Another important factor determining the character and influence of the ECN is that the Convention has its intellectual roots in the human rights framework of the Council of Europe which promotes minority and individual rights in connection with citizenship.

In conformity with the 'rights culture' of our time, the Treaty therefore emphasises more than any international document before, the importance and legitimacy of individual

⁸ Hungary, Montenegro, Moldova and Norway ratified the Convention. Austria, Germany and Ukraine have signed but not ratified the Convention.

⁹ This paper is based on a sample different from other EUDO Citizenship comparative reports because it relies on information contained in country reports rather than building on questionnaires completed by country experts as part of the research project. At the time of writing this paper, reports on the following countries were available and thus included in the sample: Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, UK.

¹⁰ The Committee of Experts on Multiple Nationality (CJ-PL) later under the name of Committee of Experts on Nationality (CJ-NA) was dissolved in 2008. In April 2008 a small CJ-NA was appointed by the Secretary General of the Council of Europe. The Committee consisted of 10 members and one expert consultant, Professor de Groot. The Committee met in several sessions and one of the outputs was Recommendation no. (09) 13.

rights as opposed to rights of the state. Moreover, the rights of individuals are not limited to those of nationals. The rights of foreigners are strengthened implicitly through highlighting the importance of habitual residence in nationality rules.

Unlike previous Treaties, the ECN now remains neutral with regards to the question of multiple nationality. It thus allows for multiple nationality and leaves it to each state to decide whether or not to do so via national law, although there are some limitations. ECN article 14(1a, b) prescribes that a State Party ‘... shall allow children having different nationalities acquired automatically at birth to retain these nationalities [and shall allow] its nationals to possess another nationality where this other nationality is automatically acquired by marriage’. Highlighting the importance of this issue in international law an entire chapter, Chapter V, is dedicated solely to issues of multiple nationality.

The Convention further provides substantive provisions on the acceptable grounds for the acquisition and loss of nationality in articles 6, 7 and 8. It is very important to note that the list of grounds for loss of nationality is exhaustive. This represents an important limitation to states’ discretion in determining their citizenry and an important step towards protecting and enhancing individuals’ rights.

Article 5(2) introduces for the first time a *guiding* principle of non-discrimination between nationals by birth and by naturalisation; ‘guiding’ because the wording of the article still leaves the option not to apply this principle. Many states in fact continue to discriminate against *naturalised* nationals. Nonetheless, the importance of including this novel concept in an international instrument cannot be overstated. The list in 5(1) ECN, as mentioned above, can be considered as containing the core elements of prohibited discrimination in nationality matters (Hailbronner 2006: 44).

Finally, article 6(3) of the Convention takes ‘a significant step forward in nationality legislation and practice by recognizing habitual residence as a basis for the grant of nationality’ (Van Goethem 2006: 8). Furthermore, for the first time ever an international Treaty provides that a maximum of ten years residence may be required by states as the basis for naturalisation. Where implemented, this represents a substantial gain in rights for foreign residents in Europe.

3 Domestic impact of international law

It is important to recall, as noted above, that not all states have implemented the principles of international law on nationality prescribed by the relevant legal instruments. There are states which have not signed and/or ratified relevant international law instruments, and which do not comply with even the general standards of customary international law. Others have signed and ratified Treaties, but still fail to implement all key provisions, opening themselves up to political criticism and the possibility of legal action in the domestic courts depending upon the domestic effects of international Treaties. Other states again comply with certain international standards while not having signed and/or ratified the Treaty they are contained in. Slovenia, for instance, demonstrates compliance with standards of the European Convention on Nationality affecting modes of naturalisation of particular groups of persons such as refugees, stateless persons, persons born in Slovenia and those living in Slovenia since their birth. This is reflected in the 2002 amendments to the Citizenship of the Republic of Slovenia Act. In addition, Slovenia has been rather active in drafting the European Convention on Nationality from 1993. However, it did not become Party to the Treaty after its adoption in 1997 because

ratifying the ECN would raise new questions regarding the old and complex issue of social and economic rights of Slovenia's 'erased'.¹¹

This part of the paper offers, firstly, a broader conceptual reflection on potential factors determining the domestic impact of standards set by international law on nationality. These factors range from historical, doctrinal or informal factors to issues of reservations and the lack of independent reviewing bodies in important cases of international Treaty law. More could be added but due to limitation of space, this paper will only consider the factors mentioned here. Secondly, examples taken from EUDO Citizenship country reports will illustrate the extent of regional influence of international law by looking at the domestic reception of the ECN, and potential obstacles to it, in Council of Europe member states.¹²

Placed alongside more traditional international human rights instruments, those conventions dealing specifically with nationality or statelessness were for a long time the ones with the lowest numbers of ratification; the only exception being the Convention on the Nationality of Married Women 1957. It is true to say that many states were in any case bound by basic standards on nationality because many international human rights instruments also contain relevant provisions. However, the relative unpopularity of international instruments on nationality (as shown in Diagram 1, Annex) meant that fewer states were obliged to follow clear and comprehensive standards in designing their national citizenship regimes.

This lack of domestic impact of the majority of Treaties has been mitigated to some extent by higher rates of ratification of the 1997 European Convention on Nationality. However, it is a valid point of critique to ask whether it is appropriate to assess the impact of international Treaties simply by analysing rates of ratification, especially considering the lack of independent reviewing bodies for the majority of them. Apart from adopting Treaties, states clearly are also influenced by international law in indirect manner. Having said this, it is of course more difficult to assess indirect influence and to do so more detailed domestic case studies would be necessary. Individual cases mentioned in this paper thus serve to illustrate larger trends but do not represent a comprehensive analysis of domestic impact beyond rates of ratification.

3.1 Historical, regional and political factors governing state receptivity

Each state has its own particular historical background that informs the conceptual development of the 'citizen'. Conscious of the fact that a few paragraphs cannot do justice to the long histories which form the basis for many European citizenship regimes, this paper nonetheless attempts to cover the most important historical factors determining the degree of receptiveness towards international law.

States in some cases express their will to compensate for 'historical wrongs' they committed in the past by granting privileged access to naturalisation or restitution of citizenship under certain circumstances. This is the case for persons expelled under the Nazi rule in Austria and Germany, for instance, and is very evident in parts of post-1989 Central and Eastern Europe, especially the Baltic States.

In recent times some countries experienced war or conflict. This may lead to the breakup of states, the shifting of borders and the creation of entire states with the need to

¹¹ For a more detailed discussion see Medved 2010.

¹² All reports can be obtained via <http://eudo-citizenship.eu/country-profiles>.

legally define anew their citizenry. Often, this is not an easy task and complexities may arise as, for instance, in the successor states of former Yugoslavia, but has also strongly influenced policies in Hungary since the breakup of the Austro-Hungarian empire and Hungary's very substantial loss of territory under the Treaty of Trianon.

History shows it has been impossible to draw state borders exactly along the lines of language and ethnic boundaries. Co-ethnic populations resident outside of the state's territory are often treated preferably in the national legislation on nationality or with regards to other benefits such as access to education and the labour market.

Also, as part of many countries' colonial or imperial experiences large parts of their populations moved or have been moved. After the breakup of larger imperial entities or after the end of colonial rule, these groups of people may have remained resident 'abroad' but were granted special rights to citizenship in what was considered the 'homeland'. Furthermore, past colonial subjects were often considered to have special ties with the former colonial ruler and therefore received facilitated access to the body of the citizenry. Again, Hungary provides a good example of these practices.

As a matter of fact, states and legal systems although sovereign do not operate in a vacuum. Within regions or larger entities, one often observes a certain degree of 'policy imitation' and convergence towards best practices. In the past and present, states have been part of regional cooperations or supranational entities, such as the Nordic Council. This may have led to the individual citizenship regimes becoming increasingly harmonised and/or to the introduction of special regulatory mechanisms for dealing with neighbours. This was the case for socialist states which entered numerous bilateral Treaties amongst each other.

One of the most important regional factors today is without doubt the influence exercised by the European Union which is not limited to its actual Member States.¹³ Accession candidate states or states that look to become members of the Union in the future are often required to comply with human rights standards which also may be relevant for matters of nationality. Furthermore, without explicitly stating this, states seeking to access the European Union are expected to exhibit convergence more generally towards European trends. Signing and ratifying the ECN and other international instruments on nationality will in this context be viewed positively by existing Member States. The influence exerted by Member States onto (potential) applicant States is known as EU conditionality.

Also in the context of the EU, security concerns of Member States and issues of immigration control play a part in the design of citizenship regimes. Since membership of the EU and the Schengen zone means – on the long run at least – free movement for all EU nationals, some Member States have voiced their concerns that others were running too 'generous' citizenship regimes regarding, for example, co-ethnic populations in neighbouring non-EU Member States. Security concerns and recent terrorist threats also considerably influence nationality legislation in contemporary Europe. Thus contrary to the liberalising European trend predicted in the 1990s, certain restrictive measures are being introduced which are justified by national security concerns in some Member States.

¹³ On the relevance of EU membership see also Vink & de Groot (2010: 729-730). The CITSEE project 'Citizenship in Yugoslav Successor States' issues a Working Paper series which explores this phenomenon in detail. Working papers on Albania, Bosnia and Herzegovina, Croatia, Kosovo, Macedonia, Montenegro, Slovenia and Serbia can be downloaded via <http://www.law.ed.ac.uk/citsee/>.

3.2 Doctrinal factors of state receptivity – the hierarchy of internal and international norms

It is possible that doctrinal preconditions of a given state might influence the way in which international law is received. There are broadly speaking two different doctrinal approaches, monism and dualism, to regulating the relationship between internal and international legal norms.

At risk of over simplification, monists consider the internal and international legal systems as unity. International law does not need to be translated into national law. The act of ratifying a Treaty immediately incorporates its provisions into national law. International law, if formulated in a clear manner, can be directly applied by a national judge, and can be directly invoked by citizens, just like national law.

Dualists emphasise the difference between national and international law, and require the translation of the latter into the former. If a state accepts a Treaty but does not adapt its national law in order to conform to the Treaty or does not create a national law explicitly incorporating the Treaty, the Treaty has not become part of national law and citizens cannot rely on it nor can judges apply it.

In practice, however, there is not always a clear distinction between monist and dualist doctrines. The exercise of dividing states into two groups (see Diagram 2, Annex) is not without difficulties as most domestic legal regimes combine both monist and dualist elements. For the purpose of this paper, states have been placed into the two categories reflecting broad trends, by asking the question whether international Treaties, such as the ECN, could be directly applicable or whether they would have to be transformed through enabling legislation.

There appears to be a general assumption that states operating a dualist hierarchy of norms are more hostile to international law and therefore have lower rates of ratification of Treaties on nationality. In order to test this assumption, rates of ratification of the European Convention on Nationality have been compared between monist and dualist states.

The example illustrates that states of a dualist hierarchy are in fact more likely to adopt the ECN than those which can be classified as monist. One clearly sees that the number of states running a dualistic system is proportionally higher among those states that have ratified the Convention while monist countries are spread evenly across the three categories. Whereas about one third of monist states have ratified the Convention, eight out of thirteen dualistic states have done so (see Diagram 2, Annex). It needs to be considered, however, that the majority of dualist states that have signed the ECN are old EU Member States. This may also account for the high numbers in category 1 as opposed to categories 2 and 3.

A possible explanation is that states in which international law can be of direct and immediate applicability, taking precedence over domestic law, may hesitate to adopt certain Treaties. In contrast, states which need to incorporate a signed Treaty into national legislation before such can be called upon by its citizens might be more likely to adopt it. This is because a given Treaty, even though ratified, will not have direct applicability which leaves the state with more leeway to harmonise domestic rules on citizenship with its international obligations before integrating the Treaty provisions into the body of national law. At this point, it is suggested that more in depth research may be necessary to fully understand the relationship between doctrinal hierarchies and states' receptiveness towards international law.

3.3 Informal factors of state receptivity – knowledge, practice and societal pressure

Informal factors, such as societal pressure from lobbying groups, NGOs, grassroot-level organisations or other interest groups can play a part in how international law on nationality is received domestically. In order for these informal actors to exert this influence, they must have the relevant knowledge about the availability and character of international legal norms. This means there must be familiarity with the subject matter to some extent and a functioning network of communication and learning to spread this knowledge. These preconditions appear not to be present to the same degree in all states analysed. Moreover, detailed information regarding informal factors may not be systematically available in all cases.

For example, in Germany clearly societal pressure and groupings have played an important role in European norm-induced change on domestic level policies and legislation. Data collected by Checkel demonstrates how various actors such as the liberal press, the Churches or grassroots organisations assert influence over domestic debates on citizenship by referring to European norms, and in particular to the work of the Council of Europe of which the ECN is part. In this way, ‘Council of Europe norms act as an additional tool that could be used to generate pressure on government policymakers’ (Checkel 2001: 190).

It should be recalled at this point that the above is a two-way relationship. On the one hand, local or national informal actors may pave the way for change according to international standards. At the same time, international legal regimes provide domestic interest groups with points of reference or a framework within which they can more easily formulate their own, very particular, claims.

3.4 Reservations

In public international law, the system of reservations is an important tool for State Parties to regulate the application of international Treaties. When assessing the domestic impact of international standards one needs to take into consideration a state’s reservations, declarations and limits to territorial application entered with regards to specific legal provisions.

As an example, the ECN’s success due to its high rates of ratification is dampened by the fact that it also attracted the highest number of reservations compared to any of the other specialised or general human rights Treaties listed above (see Diagram 1, Annex). This may indeed raise questions as to the effectiveness of certain standards contained in the Convention. Numerous states have entered reservations to certain articles – mostly with regards to substantive conditions for acquisition or loss of nationality (articles 6-8), to procedural provisions (article 12) and to rules regarding military service (articles 21 and 22). The state that entered most reservations is Austria with multiple reservations to 5 articles of the Convention, followed by Bulgaria with reservations to 4 articles. Also the latest Party to the Treaty, Montenegro, entered a reservation with regards to article 16.

Diagram 3 (see Annex) shows all the reservations and declarations entered by State Parties to various articles of the European Convention on Nationality.

3.5 Lack of independent reviewing and enforcement mechanism

Another issue to be considered when assessing public international law's impact on European nationality regimes is the fact that the majority of Treaties lack any form of independent reviewing and enforcement mechanism. This paper seeks to offer an explanation for the absence of independent review by analysing documentation collected from past Council of Europe conferences on nationality.¹⁴

A report from the 1st Council of Europe Conference on Nationality explains that the convergence towards closer conformity will be the result of cooperation between State Parties and concludes that '[t]he structure and spirit of the Convention do not, therefore, call for a supranational body to be set up to ensure that it is applied' (Autem 2000: 33). Interestingly, this statement was made by Autem during a period before 2005 during which the CJ-NA met rather frequently and provided informal coordination in this matter. In the current context (of a reduced CJ-NA), an independent reviewing body is therefore arguably more necessary than in the past.

Review of the implementation of the ECN is thus left to the internal system of the State Party but the exchange of information among State Parties is of course of practical importance. Each state is obliged to provide the Secretary General of the Council of Europe, as well as other State Parties should they request so, with information on their national legislation and developments concerning the application of the Convention (ECN article 23(1)).

This system of inter-state information exchange is surely a good basis for developing best practices to be employed by states across Europe. The fact that no external reviewing body was established has already been criticised at an early stage but has, however, not been followed up with since then. Batchelor already makes the following comment in her contribution to the 1st Council of Europe Conference on Nationality: 'Formal provision for a review body to guide on interpretation of articles, particularly in the case of a treaty which is intended to address differences between national systems, would have been helpful not only for the individual, but also for the state, and might well have contributed to consistency, clarity, and close cooperation, while facilitating the resolution of conflicts in the attribution of nationality' (Batchelor 2000: 59).

In agreement with Batchelor, this paper argues that not providing for an independent monitoring body at the drafting stage was a missed opportunity to safeguard 'the progressive development of legal principles and practice concerning nationality and related matters' (ECN article 23(2)). It remains unclear what the sanctions under international law would be should a state violate its international obligations. Neither is there an international body specifically resolving nationality disputes between states nor any individual complaint mechanism at the international level designed to deal with nationality matters.¹⁵ The latter one being even more problematic as violations of nationality standards on a large scale are much more likely to attract international attention than individual cases.

¹⁴ 1st European Conference on Nationality: 'Trends and Developments in National and International Law on Nationality', Strasbourg, 18-19 October 1999; 2nd European Conference on Nationality: 'Challenges to national and international law on nationality at the beginning of the new millennium', Strasbourg, 8-9 October 2001; 3rd European Conference on Nationality: 'Nationality and the Child', Strasbourg, 11-12 October 2004.

¹⁵ Had the ECN been designed as a Protocol to the ECHR, cases involving nationality matters could have been brought before the ECtHR.

In the end, pragmatic considerations appear to have played a part in the decision to leave any review and enforcement of rules to the Member States themselves. Any other option was possibly deemed too ‘threatening’ to state autonomy in nationality matters and therefore as potentially inhibiting ratification. It is very telling in this regard that the report by Autem closes with the following words: ‘There is therefore no need for the 1997 European Convention on Nationality, a genuine European code, to cause alarm’ (Autem 2000: 33).

4 Regional impact of the European Convention on Nationality

The results of this section are taken from the individual EUDO Citizenship reports on the citizenship regimes of 37 states. The current analyses are temporally limited as states continue signing the ECN and also continue amending national citizenship legislation in increasingly shorter intervals. Most recently, for example, Montenegro ratified the Convention in June 2010 (see Diagram 4, Annex).

Of the 37 states covered in this paper, eighteen have ratified and eight have signed the Convention. Thus, almost half of the states have ratified the ECN and about three quarters have either signed or ratified the Convention.

4.1 Examples from Council of Europe Members States

Diagram 4 (see Annex) shows that while there are some regional patterns in how the ECN is received, the overall picture is rather mixed. To better understand the specific regional impact of the Convention, the Council of Europe Member States have been subdivided into 6 groups: the EU 15 minus the Nordic states, the Nordic states (including two non-EU Members States), the 2004 and 2007 acceding states, other Western European states, the Western Balkans and other European states.

Looking at the EU 15 minus the Nordic states, we find that, for example, Portugal as well as Germany explicitly referred to the ECN as an incentive for legal reforms and Austria declared its intention to eliminate the remaining discriminatory provisions in order to comply with ECN standards (Cinar 2010, Hailbronner 2010, Piçarra 2010). However, certain states exhibit an ambivalent approach to European harmonisation in nationality matters. For instance, while Austria was one of the first states to ratify the Convention, it is also the state that entered most reservations and declarations. An interesting example is offered by the Netherlands, where a Bill introduced by the former Minister of Alien Affairs and Integration in 2005 attempted to combat dual citizenship. However, the Dutch government made clear that these efforts faced important limitations set by the ECN. The Bill was withdrawn in 2007 and after the Minister of Justice introduced a new Bill in 2008, it was finally accepted in June 2010.

Among the Nordic states, Norway was last to ratify the ECN in 2009. It also performed a change in policy recommendations calling for dual nationality which means that Denmark is today the only exception to the trend in Nordic states to allow for dual nationality. One of the reasons for the change in Norway’s policy was the fact that an increasing number of immigrants come from countries which do not permit renunciation of original citizenship (Brochmann 2010). This is especially interesting as a future concern of European citizenship policies may lie with non-European citizenship laws of sending countries which affect

Europe's immigrant population in increasingly mobile societies. Still, it will remain to see whether – and if, how and to what extent – domestic nationality regimes will take them into consideration.

As already observed in the findings of the NATAC project in 2006,¹⁶ certain states of the EU 15 not only move towards more liberal regimes but also introduce new restrictive policies for naturalisation (Bauböck et al 2006: 6). For instance, the list of grounds for loss of nationality as provided by the European Convention on Nationality is exhaustive, no reservations being possible, and does therefore restrict states Party to the Treaty to a set of permitted modes of loss of nationality. On the one hand, states had to abolish various grounds of loss which were not covered by the Convention but, on the other hand, a number of states extended their laws to include fraudulent conduct with regards to acquisition of nationality as reason for withdrawal of citizenship, which is possible under ECN article 7(1b).

Thus, although we clearly observe a regional trend of convergence in certain areas, a number of exceptions in the EU 15 and Nordic states remind us that the predicted trend towards more liberal European rules on nationality may not be a one-way route.

Diagram 4 (see Annex) shows relatively lower rates of ratification for the states which acceded to the EU in 2004 and 2007. The context of potential impact of the ECN differs considerably among groups of states. In contrast to EU 15 + Nordic countries, emigration has played a more important role than immigration in recent nationality reforms in the 2004 and 2007 acceding states. Although over simplified generalisation should be avoided, comparative studies such as CPNEU on Citizenship Policies in the new Europe find that citizenship in the 2004 and 2007 acceding states is still 'closely linked to an ethnic interpretation of nationality, transmission to subsequent generations is exclusively based on descent, there is greater hostility towards multiple nationality, and greater emphasis is laid on citizenship links with ethnic kin-minorities in neighbouring countries and expatriates' (Bauböck, Perchinig & Sievers 2007: 5). One of the examples of linking nationality with ethnicity which is covered in the EUDO Citizenship country reports is the 2007-2009 Romanian citizenship restitution initiative. This initiative attracted considerable international attention and sparked debates around its compatibility with European standards on nationality (Iordachi 2010: 16-18).

An interesting example of regional influence of European norms leading to shifts in domestic policy is the termination of bilateral Treaties between former socialist states that prohibited dual nationality. Like Poland and Hungary, the Czech Republic terminated bilateral treaties with the former socialist states. This was 'partly because they were not compatible with the provisions of the 1997 European Convention on Nationality in regards to the preservation of dual citizenship for children whose parents have different citizenship' (Baršová 2010: 14).

An important factor determining the impact of the ECN in the 2004 and 2007 acceding states is the so called EU conditionality applied prior to EU membership. Estonia and Latvia (and to a lesser extent Lithuania) have internationally been heavily criticised for the restrictive access to Estonian and Latvian citizenship for Russian immigrants, creating problems of non-citizens and stateless populations on the territory. For some time before and immediately after 2004 naturalisation rates were relatively high. However, after accession 'the EU and other international actors virtually stopped issuing recommendations' on citizenship policy. Since then, citizenship debates have been dominated by internal issues (Järve & Poleshchuck 2010: 13).

¹⁶ NATAC project on the acquisition of nationality in EU Member States: rules, practices and quantitative developments (2004-2005).

EU conditionality also plays an important part in the Western Balkans. For example, during Croatia's membership negotiations with the EU, changes to the national legislation were announced in relation to Croatia's adoption of the ECN. The Croatian Parliament was expected to adopt the Convention in 2006 but was prevented from doing so in the end. This was due to fears that changes to the law regarding the privileged position of ethnic Croats would negatively influence relations between Croatia and the Croat ethnic diaspora, in particular in Bosnia-Herzegovina. Generally, the Croatian case confirms that 'the dominant paradigm of ethnic citizenship has not been radically challenged in the Balkans, except in those states (Bosnia-Herzegovina, Kosovo and, to a large extent, Macedonia) that are under direct international supervision' (Ragazzi & Stiks 2010: 14).

Regarding other European states there is very recent evidence of the ECN's impact on Turkish nationality law. One reason for introducing the new 2009 law on citizenship, as officially stated, was the harmonisation with the European Convention on Nationality (Kadirbeyoglu 2010). Also Moldova used the ratification of the Convention in 1999 as an opportunity to adjust national legislation on citizenship to the realities of the state at that time in which an increasing number of its nationals held more than one, and in particular Romanian, nationality. In 2003 an amendment to the citizenship law repealed the provisions prohibiting multiple citizenship. Notably the code even used the legal language of the ECN. Yet, in 2008 Moldova amended the national legislation excluding those Moldovan nationals who also possess the citizenship of another state from certain public positions (Gasca 2010: 18-19). In 2010 this provision was successfully challenged before the European Court of Human Rights in the Grand Chamber judgment on the case *Tanase vs Moldova*.¹⁷ The above example illustrates once more that the trend of convergence towards more liberal citizenship policies in the EU, as it was proclaimed in the 1990s, is not clear-cut.

4.2 Potential obstacles to ratification of the ECN

Out of 37 Council of Europe member states covered by the present study, eleven have neither signed nor ratified the ECN and are therefore not bound by the Convention's rules nor did they officially indicate an intention to comply with them. A further eight of the 37 states remain signatories only. Notably, a signature is to be interpreted as intention to ratify the Convention in the future.

The following section offers some insights into the reasons for why states have not ratified the European Convention on Nationality. The information provided by country experts shows particularities of different historical developments but also interesting commonalities and clearly identifiable trends among states.¹⁸

The single most prominent obstacle to ratification of the ECN appears to be the provision on non-discrimination. In their nationality Codes or laws, states still continue to discriminate on the grounds of ethnic origin, nationality (prohibited by ECN article 5(1)) as well as on the basis of whether a person became a national by birth or naturalisation (discouraged by ECN article 5(2)). Discrimination on the grounds of ethnic or national origin also includes preferential treatment of certain groups of people. Article 5(2) arguably

¹⁷ Grand Chamber judgment of the European Court of Human Rights on the case *Tanase vs Moldova*, 27 April 2010, Strasbourg.

¹⁸ Many thanks to Alberto Achermann, Eugene Buttigieg, John Handoll, Zeynep Kadirbeyoglu, Kristine Kruma, Egidius Kuris, Felicita Medved, Vadim Poleshchuk, Nenad Rava, Irene Sobrino, Nicos Trimikliniotis and Helena Wray for providing important information in email correspondence, May-June 2010.

represents no binding provision as the wording of the article can be interpreted as to allow for deviation from this rule. However, since no reservations are permitted to Chapter II on general principles relating to nationality of which article 5(2) is part, ratifying the Convention while continuing to discriminate between naturalised persons and nationals by birth might be seen by many states as not ‘compatible with the object and purpose of this Convention’ as required by article 29 on reservations.

For example, it is not uncommon that, as in Lithuania, only citizens by birth may run for the office of President or that, as in Cyprus, citizenship deprivation is possible only for citizens who acquired their nationality through registration or naturalisation.¹⁹

Also ethnic considerations continue to play an important part in certain states’ citizenship regimes. In Greece, for instance, even after the reforms of 2009/10 the law on nationality as well as the naturalisation procedures remain based on a conceptual distinction between *homogenis* (of Greek ethnic origin) and *allogeneis* (of non-Greek origin).²⁰

In some cases it can be observed that states do not ratify the European Convention on Nationality because the domestically applied grounds for loss of nationality extend beyond the *exhaustive* list of valid cases approved by article 7 of the Convention. The present rules on deprivation of nationality in the UK allow for it if ‘conductive to the public good’ (see section 56 Immigration, Asylum and Nationality Act 2006) whereas the Convention limits deprivation to instances of ‘conduct seriously prejudicial to the vital interests of the State Party’ (ECN article 7(1d)).

Another set of obstacles occurs in connection with procedures as established by the European Convention on Nationality. The right to an administrative or judicial review of nationality decisions (ECN article 12) is not possible in all states. Neither is it common standard to ‘ensure that decisions relating to the acquisition, retention, loss, recovery or certification of its nationality contain reasons in writing’ (ECN article 11).

Also a procedural obstacle, which does not yet feature prominently in present discussions, might be the amount of fees for nationality related procedures charged in some states. According to ECN article 13 such fees must be reasonable and must not constitute an obstacle for applicants. The UK country expert indeed mentions fees as potential difficulty should British nationality law be assessed with a view to ratification of the Convention.²¹

Furthermore, the incompatibility of Irish citizenship law with ECN articles 11 and 12 on procedures relating to nationality is the reason for Ireland refraining from becoming Party to the Treaty.²² Under the current system, nationality is conferred by *absolute Ministerial discretion*.

This example leads us to a more general lesson to be learned about obstacles preventing states from ratifying the ECN, namely that international law on nationality is undergoing a progressive gradual transition from an understanding of citizenship, or naturalisation, as *privilege* to an understanding of citizenship as *right*. Whereas the European Convention on Nationality was born out of a ‘rights culture’, not all national Codes have followed suit or, in fact, intend to do so. Many instances of incompatibility between national law and the Convention can thus be traced back to an emerging difference in the understanding of the concept of citizenship that informs individual legal provisions.

¹⁹ Email correspondence on file with the author.

²⁰ Email correspondence on file with the author.

²¹ Email correspondence on file with the author.

²² Email correspondence on file with the author.

5 Concluding remarks

It has been demonstrated that although international law is relevant for the manner in which states design and implement national legislation on citizenship, the extent of its influence is not the same for all states in this study. It differs depending on various factors which have been laid out in this paper. Apart from rates of ratifications and signatures, these factors include early and more recent history, regional factors such as policy imitation and other factors as for instance informal practices of domestic pressure groups or internal doctrinal preconditions.

Although it is surely not a one-way route, examples in this paper show that there is clear convergence towards European norms of nationality influenced by international law. However, these can be restrictive as well as liberalising in character. For instance, it may be argued that the permission, or extension, of multiple nationality in European domestic legislations is surely one of the most liberalising effects of international legal developments in recent times. However, one needs to be careful when assessing the trend towards increased presence of multiple nationality provisions as a necessarily liberal one. In states facing emigration and recently changed national borders, the introduction or extension of multiple nationality provisions might in fact express a process of re-linking nationality with ethnicity aimed at keeping ties with co-ethnic populations outside the territorial borders. This is in contrast to a process whereby acceptance of multiple nationality and the introduction of *ius soli* elements, is an expression of inclusiveness and de-linking of nationality from ethnicity to facilitate the integration of resident third country nationals (i.e. from non-EU Member States) and their descendants. Therefore the extension of multiple nationality provisions can only be interpreted as ‘liberalising’ if combined with substantial and comprehensive non-discrimination measures.

It is interesting to observe that there is a clear convergence not only towards European standards but also convergence towards a certain set of obstacles to ratification. The most important obstacle to ratification appears to be the prohibition on discrimination on the basis of race, national or ethnic origin and also between nationals by birth and those who acquired nationality subsequently (as introduced by the ECN), although the latter principle constitutes a recommendation rather than a clear prohibition. The fact that this guiding principle has been included as general principle relating to nationality in the most influential Convention on nationality to date, is a clear indication of the importance of this issue.

Finally, significant procedural obstacles to ratification, such as the right to review and the requirement to state reasons for decisions in nationality matters tell us more about a general issue that in many states acquisition of nationality is considered a privilege rather than a ‘right’. This does not sit easily with an increased emphasis on rights of the individual, including foreign residents, in international law. The following statement by Damian Green MP (now UK Immigration Minister) made during the passage of the Borders, Citizenship and Immigration Bill illustrates this very well: ‘We believe that UK citizenship is a privilege, not a right. Anyone who is here on a temporary leave to remain should not assume that that gives them the right to remain here permanently or to become a British citizen.’²³

²³ *Hansard*, HC 14 July 2009, Col. 223.

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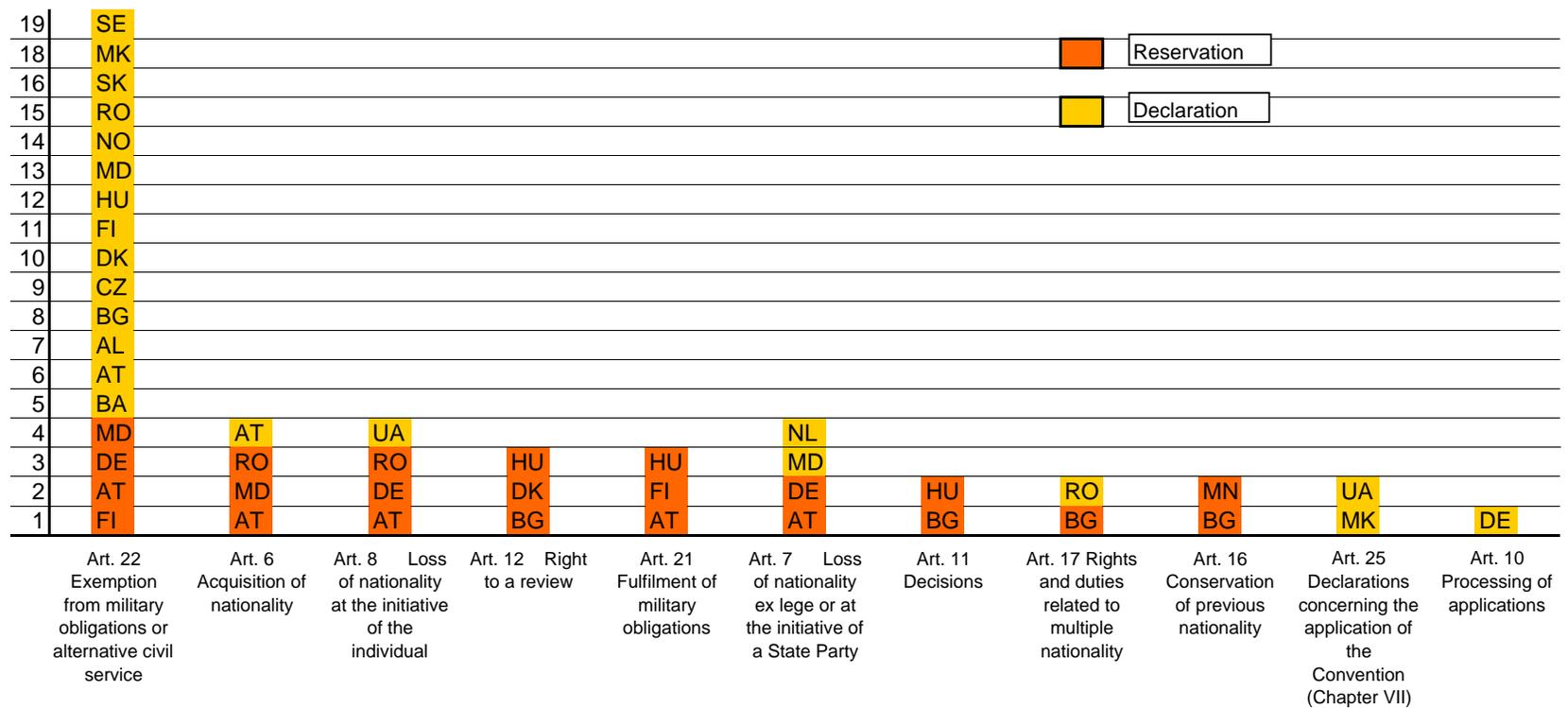
ANNEX

Diagram 2: Patterns of ratification of monist and dualist states

	Ratified the ECN		Signed the ECN		Neither signed nor ratified the ECN	
9	Bulgaria					
8	Czech Rep.	Austria			Belgium	
7	Hungary	Denmark	Croatia		Cyprus	
6	Macedonia	Finland	France		Estonia	
5	Moldova	Germany	Greece		Lithuania	
4	Netherlands	Iceland	Latvia		Slovenia	
3	Portugal	Norway	Luxembourg		Spain	Serbia
2	Slovakia	Romania	Montenegro	Italy	Switzerland	Ireland
1	Ukraine	Sweden	Poland	Malta	Turkey	UK
	Category 1		Category 2		Category 3	

Monist
 Dualist

Diagram 3: Reservations and declarations made with regards to the ECN



AL	Albania	DK	Denmark	NL	Netherlands
AT	Austria	FI	Finland	NO	Norway
BA	Bosnia and Herzegovina	HU	Hungary	RO	Romania
BG	Bulgaria	MD	Moldova	SE	Sweden
CZ	Czech Republic	MK	Macedonia	SK	Slovakia
DE	Germany	MN	Montenegro	UA	Ukraine

Diagram 4: Ratifications and signatures of the ECN

