



UNIVERSITY OF  
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# **DE JURE STATELESSNESS IN SERBIA**

**A Critical Analysis of the Legal Framework with Regards to Combating  
Statelessness and the Protection of Stateless Persons**

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## **Declaration Form**

The work I have submitted is my own effort. I certify that all the material in the Dissertation which is not my own work has been identified and acknowledged. No materials are included for which a degree has been previously conferred upon me.

Signed: *Natasa Nikolic*

Date: *23 May 2013*

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## ***Abstract***

*In the age of proclamation of universalism of human rights, the interrelation between citizenship and human rights still raises concerns. Statelessness, a condition of having no nationality, affects more than 12 million people worldwide causing a legal limbo in which those who are denied a political membership are deprived of access to basic human rights. Being in the shadow of refugee and migration issues, statelessness has not only been neglected on the international arena but in academia, as well. In light of political changes in Eastern Europe during the '90s, statelessness came into the spotlight of the international community, as thousands of people remained stateless after the collapse of the USSR and SFRY. Lacking nationality suddenly was equated with being rightless.*

*As international law explicitly addresses the so-called “de jure statelessness”<sup>1</sup> this study examines its nature, causes and effects in a national context. Hence, the compliance of Serbian legislation with its international obligations regarding the prevention and reduction of statelessness and protection of stateless persons is the subject matter of the upcoming discussion. The research explores the extent to which the law serves as mechanism for creating and combating statelessness, as well as the level of interrelation of citizenship and human rights in the given framework.*

*The findings show that, although generally in line with international norms, the Law on Citizenship of the Republic of Serbia still contains several gaps which may lead to statelessness. Moreover, an in-depth analysis indicates that rather than being a human, the requirement of one’s “lawful stay” is a prerequisite of access to citizenship and range of available rights. Finally, in lack of a statelessness determination procedure, rights otherwise guaranteed are at risk of remaining rights without right holders.*

## **KEY WORDS**

*Statelessness, de jure statelessness, right to a nationality, citizenship, human rights, Serbia.*

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<sup>1</sup> A *de jure* stateless person is “... a person who is not considered as national by any State under the operation of its law” (Article 1 of the 1954 Convention Relating to the Status of Stateless Persons, available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b3840> [accessed 10 September 2012]).

## **LIST OF ABBREVIATIONS**

CRC	Convention on the Rights of the Child
FRY	Federal Republic of Yugoslavia
ICJ	International Court of Justice
NGO	Non-Governmental Organisation
SFRY	Socialist Federal Republic of Yugoslavia
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
USSR	Union of Soviet Socialist Republics
WWII	World War II

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# CHAPTER 1

## 1. Introduction

### 1.1. General Background

Although initially being characterised as a moral set of norms, human rights have become international legal rights. While contemplating their substance, it becomes inevitable to question their scope. If human rights are “the rights that one has simply because one is a human being” (Donnelly 2003, p.10), then should not we *all* be entitled to the enjoyment of human rights by the virtue of our existence? In the light of this question, Arendt urged for protection of stateless persons: of those who were deprived of their political membership during the World Wars as many countries misused their legislative power to punish the unwanted citizens by revocation of their nationality. Denationalisation was also the result of Peace Treaties of 1919, with the emergence of new states and the collapse of old ones as the treaties, although designed in good faith, consisted of contradictory norms which left many people without nationality (Rürup 2011, pp. 118-119).

Deprivation of political membership led to an unprecedented vulnerability which the Nazis were well aware of: the extermination of Jews was preceded by the deprivation of their legal status, so as to make sure that no State would claim these people. The other feature of statelessness was reflected in invisibility: being detached from the community, stateless persons became rightless, they were denied the right to residence, the right to work, they were ignored to the extent that nobody even wanted to oppress them. In this way, stateless persons were denied the “right to have rights”, i.e. the right to belong to a community and to benefit from it (Arendt 1986, pp. 286, 287, 295, 296).

As indicated, Arendt’s reflections highlighted the interconnection of citizenship and human rights. She drew attention to the fact that being a human without State protection is a vulnerable condition, a condition in which one is humiliated, annulled and rightless. In a word, deprivation of nationality equates to the deprivation of human rights.

Rooted in political membership and civic commitment, civil rights rely on strong social solidarity and State protection. On the other hand, human rights are not subject to boundaries, they apply to everyone but it is their universality that sets the limits of the human rights regime as it lacks an effective enforcement mechanism and global solidarity (Shafir and Brysk 2006, pp. 277, 283, 284). Although deriving from different traditions, the concept of citizenship and human rights are not mutually exclusive. In fact, most human rights instruments aim to suppress the importance of citizenship by expansion of a range of rights to those who are not nationals. Even the words “citizen” and “citizenship” are rarely used. In that sense, citizenship can be considered as the initiating point of human rights, not their precondition (Cahn 2003, p.1). However, despite this tendency, universality of human rights is a cause that has to be worked on, since, in practice, non-citizens are still subject to human rights violation (Weissbrodt and Meili 2010, pp. 57-58).

Although the international community invested efforts to promote and implement the principle of universalism of human rights, there are more than 12 million stateless persons worldwide (amongst whom 600.000 in Europe).<sup>2</sup> Recognising the danger that accompanies statelessness, the General Assembly of the United Nations adopted two conventions: *Convention Relating to the Status of Stateless Persons* (1954)<sup>3</sup> and *Convention on the Reduction of Statelessness* (1961).<sup>4</sup> A stateless person, as defined in the *1954 Convention*, is “a person who is not considered as a national by any State under the operation of its law.”<sup>5</sup> In the light of this provision, nationality implies one’s legal and political bond with a State, i.e. citizenship. Although referring to “any State”, determination of the fact of statelessness is not unlimited: the subjects of investigation are only those States a person has a substantial tie with (birth on its territory, descent, marriage, habitual residence).<sup>6</sup>

The notion of statelessness as set forth in the *1954 Convention* is known as *de jure* statelessness, although no such reference is made in the *Convention* itself. The essence of *de jure* statelessness

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<sup>2</sup> See <http://www.statelessness.eu/> [accessed: 1 October 2012].

<sup>3</sup> Hereinafter *1954 Convention*.

<sup>4</sup> Hereinafter *1961 Convention*. Available at: <http://www.refworld.org/docid/3ae6b39620.html> [accessed 10 September 2012].

<sup>5</sup> Article 1(1) of the *1954 Convention*.

<sup>6</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*, 20 February 2012, para. 11, 45. Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4f4371b82> [accessed 10 October 2012].

“...is not whether or not the individual has a nationality that is effective, but whether or not the individual has a nationality at all”.<sup>7</sup>

While *de jure* stateless persons are not recognised by the law, *de facto* stateless persons lack protection in fact: they do possess nationality but they do not enjoy the protection of their country (Van Waas 2008, p.20). This may be due to various reasons like state of war in their country or State reluctance to offer protection, for example. In that sense, *de facto* statelessness is a reflection of ineffective nationality. A similar condition is that of undetermined or unknown nationality. In all these cases, individuals lack protection of the State.<sup>8</sup>

While the causes of statelessness may vary (racial or gender discrimination, state succession, conflict of laws, legal gaps), its scope is uncontested:

Statelessness is a highly complex legal and often political issue with a disproportionate impact on women, children and ethnically mixed families. It has serious humanitarian implications for those it affects, including no legal protection or the right to participate in political process, poor employment prospects and poverty, little opportunity to own property, travel restrictions, social exclusion, sexual and physical violence, and inadequate access to healthcare and education (Lynch 2005, p.1).

In most cases, the mechanisms through which statelessness is created are citizenship laws and the purpose they are aimed at. For example, acquisition of nationality solely through paternal descent, depending nationality (if wife’s nationality depends on the nationality of her husband), revocation of nationality, possibility of unconditional renunciation of nationality, gaps in the Constitution and citizenship laws (Weissbrodt and Collins 2006, pp. 253-262).

Despite the generally accepted view that statelessness should be avoided, States have been reluctant to ratify the “statelessness conventions”: there are only 77 State Parties to the 1954

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<sup>7</sup> UNHCR Expert Meeting: *The Concept of Stateless Persons under International Law* (“Prato Conclusions”), May 2010, available at: <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=4ca1ae002> [accessed 3 March 2013].

<sup>8</sup> According to UNHCR, “De facto stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.” See: UNHCR: *Legal and Protection Policy Research Series: UNHCR and De Facto Statelessness*, April 2010, p.61, available at: <http://www.refworld.org/pdfid/4bbf387d2.pdf> [accessed 20 February 2013].

*Convention* and 51 State Parties to the *1961 Convention*.<sup>9</sup> Formal reasons for such reluctance are manifold: perception of nationality issues as internal matters, lack of personnel within the UN system directly in charge of statelessness, criticisms on the content of “statelessness conventions” (as being outdated and rather in favour of States than of stateless persons), vagueness of the term “statelessness”, etc. However, despite decades of silence, statelessness drew attention of the international community in light of the political turbulence over the past twenty years, primarily in the process of disintegration of the USSR and Yugoslavia and the establishment of multiparty systems in African countries which, amongst others, resulted in statelessness of a significant size of the population. As a consequence, international efforts (especially within the UNHCR) have been intensified in order to address and resolve statelessness issues (Van Waas 2008, pp. 17-20).

## 1.2. Research Description

Instead of focusing on shortcomings of international law, the purpose of this research is to examine how the existing international framework is implemented in practice. As international protection refers to *de jure* statelessness, it will be the subject matter of this research as well, which in any case does not diminish the importance of both categories of stateless persons. Hence, in any further referring to statelessness, it will imply *de jure* statelessness only.

Although being a State Party to both “statelessness conventions”, there are at least 30.000 persons at risk of statelessness in Serbia.<sup>10</sup> Intensive efforts have been made by UNHCR and a local NGO Praxis to prevent statelessness among the affected population (raising awareness, lobbying, legal assistance and support). Their activities are of immense importance considering the vulnerability and marginalisation that statelessness implies.

In questioning the scope and effects of statelessness, this research aims to explore how Serbia meets its international obligations regarding statelessness and to which extent the lack of citizenship affects the enjoyment of rights of stateless persons in Serbia. Although the *Law on*

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<sup>9</sup> See <http://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&lang=en> [accessed 21 May 2013].

<sup>10</sup>This problem mostly affects the Roma, Ashkali and Egyptians due to loss or non-possession of documents resulting from destruction of archives and displacement in the war turmoil in former SFRY, marginalisation, legal gaps and administrative obstacles. See UNHCR: “Persons at Risk of Statelessness in Serbia”, June 2011, pp. 4-7. Available at: <http://www.unhcr.rs/media/statelessness.pdf> [accessed 1 October 2012].

*Citizenship of the Republic of Serbia* is considered as liberal and serving the purpose of avoidance of statelessness (Rava 2013, p.12), this research will discuss and challenge that view. In addition, an in - depth analysis of rights stateless persons are entitled to will highlight the scope of their protection.

Hence, the research aims to answer the following questions:

- a. What are the international obligations of Serbia regarding statelessness?
- b. How does Serbia comply with its international obligations in terms of prevention and reduction of statelessness?
- c. How stateless persons exercise the rights they are entitled to in Serbia?

Due to the complexity of statelessness matters and the limited space for discussion within a master dissertation the third research question aims to address only those rights that serve the inclusion of stateless persons into society. As it will be presented, the *1954 Convention* guarantees a minimum set of rights stateless persons should enjoy regarding their juridical status, gainful employment, welfare and administrative measures. My intention was to investigate in detail what it means to be a stateless person in Serbia, to what extent can one lead a “normal life” if lacking a citizenship? In that sense, the focus of my research is on freedom of movement and some economic and social rights of stateless persons in Serbia.

In answering the research questions, the dissertation has been divided into following chapters: Chapter 2 provides the conceptual framework (presenting the content of the right to a nationality, nationality vs. citizenship debate and statelessness in international human rights law) after which the adopted methodology is introduced in Chapter 3. Chapter 4 looks into prevention of statelessness in Serbia (a discussion on the *Law on Citizenship of the Republic of Serbia* and its compliance with the *1961 Convention*). Chapter 5 addresses the reduction of statelessness in Serbia (assessment of the naturalisation procedure). Protection of Stateless Persons in Serbia (analysis of the range and scope of rights stateless persons are entitled to in comparison to the *1954 Convention*) is discussed in Chapter 6. Finally, Chapter 7 introduces the conclusion and recommendations.

Regarding the significance of the research, its relevance for the field of human rights is unquestionable: in a world of nation states where citizenship appears to be a prerequisite for accession to most of the rights, statelessness is a litmus test of the contemporary human rights regime (Perks and De Chickera 2009, pp. 1-2). In addition, statelessness is a rarely discussed topic: it is mostly approached in the form of reports or as a part of wider concepts like alienage or citizenship.<sup>11</sup> Indeed, some progress has been made recently, however, not much research has been done to date and addressing statelessness appears to be in its initial phase (Blitz 2009, pp. 37-40). Although the lack of relevant literature makes the research process more difficult, I believe that every attempt to highlight this issue is thus even more valuable and challenging. In that sense, reflections and recommendations within this dissertation may represent a small but significant contribution in uncovering and understanding the statelessness phenomenon.

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<sup>11</sup> Kingston identifies three underlying causes of general reluctance towards statelessness: issue heterogeneity, lack of global solutions and lack of political will. See <http://statelessprog.blogspot.nl/> [accessed 14 May 2013].

# CHAPTER 2

## 2. Conceptual Framework

### 2.1. Right to a Nationality

Despite their character of being universal and applicable to everyone without any distinctions, the enjoyment and protection of human rights in practice often depend on the legal bond between the individual and the State, i.e. nationality. For the first time, a universal right to nationality has been articulated in Article 15 of the *Universal Declaration of Human Rights*: “Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”<sup>12</sup>

Although being an enormous step forward in international law, Article 15 fails to identify a duty bearer: it is not clear which State is obliged to grant nationality. Also, there is no mention of the requirements that should be met in order to qualify for citizenship (Blackman 1998, p.1172). Before any further discussion, it is necessary to emphasise that the term “nationality” under public international law is used interchangeably with the notion of “citizenship” in its narrowest sense as they both imply a legal link between the individual and a sovereign State (Goldston 2006, p.321). In other words, both “citizenship” and “nationality” represent different sides of the same coin, i.e. State membership. While the first refers to its national aspect, the latter emphasises the international relevance of State membership (Gargas in Weis 1979, pp. 4-5). This study follows that practice, although a differentiation between these two concepts is presented in sub-chapter 2.2.

Apart from the *UDHR*, the right to a nationality has been recognised in other international instruments as well: 1965 *Convention on the Elimination of All Forms of Racial Discrimination*,<sup>13</sup> 1969 *American Convention on Human Rights*,<sup>14</sup> 1997 *European Convention*

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<sup>12</sup>Article 15 of the *Universal Declaration of Human Rights*, 1948 (hereinafter *UDHR*). available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b3712c> [accessed 10 September 2012].

<sup>13</sup> Article 5 (d) (iii) “In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of



on Nationality,<sup>15</sup> 1966 *International Covenant on Civil and Political Rights*,<sup>16</sup> 1989 *Convention on the Rights of the Child*,<sup>17</sup> 1990 *African Charter on the Rights and Welfare of the Child*,<sup>18</sup> 1957 *Convention on Nationality of Married Women*,<sup>19</sup> 1979 *Convention on the Elimination of All Forms of Discrimination against Women*.<sup>20</sup>

Although being widely affirmed, the right to a nationality is marked with vagueness: apart from the solution envisaged in the *American Convention on Human Rights*, no specific State is held accountable for conferring nationality (Goldston 2006, p.339).<sup>21</sup>

The ambiguous formulation of the right to a nationality is not surprising if one bears in mind the role that nationality has on a local as well as on an international level. Being created under the auspices of domestic law, nationality represents the tool for exercising mutual rights and obligations between the individual and the State. In international terms, nationality is a matter of State sovereignty. Being reflected in State jurisdiction over individuals, nationality has a role similar to that of State borders: as in the case of violations of State borders, an attack on another State's national is considered as an attack on State sovereignty.

In addition, nationality is a pre-requirement for individuals to access the rights guaranteed under international law. Being on the crossroads of State responsibility, diplomatic protection and international human rights, matters of nationality are undoubtedly of immense interest for States (Blackman 1998, pp. 1149-1151).

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everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... *The right to nationality*;...” [emphasis added].

<sup>14</sup> Article 20 (1): “Every person has the right to a nationality.”

<sup>15</sup> Article 4 (1) (a): “The rules on nationality of each State Party shall be based on the following principles: a) everyone has the right to a nationality...”

<sup>16</sup> Article 24 (3): “Every child has the right to acquire a nationality.”

<sup>17</sup> Article 7 (2): “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality...”

<sup>18</sup> Article 6 (3): “Every child has the right to acquire nationality.”

<sup>19</sup> Article 1: “Each Contracting State agrees that neither the celebration nor the dissolution of marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife.”

<sup>20</sup> Article 9: “States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”

<sup>21</sup> Article 20 (2) of the *American Convention on Human Rights* 1969: “Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.”

However, although State discretion over nationality issues is broad, it is not absolute: nationality laws must be in line with international law.<sup>22</sup> The first indication in this regard was made in the *Advisory Opinion* of the Permanent Court of International Justice in *Tunis and Morocco* in 1923:

The question of whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relevant question; it depends on the development of international relations.<sup>23</sup>

Although not denying that nationality matters belong to the sphere of domestic jurisdiction, the aforementioned decision acknowledged the relevance of international law which may impose restrictions to exclusive rights of States in nationality matters (Weis 1979, p.66).

This principle has been confirmed in Article 1 of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*:

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.<sup>24</sup>

As indicated, although not interfering into the process of conferring nationality, the international community will deny recognition of such attribution if not being in line with international law (Van Waas 2008, p.38). Similarly, in its 1984 *Advisory Opinion*, the Inter-American Court held that States should consider *human rights* as a leading criterion in nationality matters.<sup>25</sup>

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<sup>22</sup> See Open Society Justice Initiative (2004) *Racial Discrimination and the Rights of Non-Citizens. Submission of the Open Society Justice Initiative to the UN Committee on the Elimination of Racial Discrimination on the occasion of its 64<sup>th</sup> session*, p.7. Available at: <http://www.opensocietyfoundations.org/reports/racial-discrimination-and-rights-noncitizens> [accessed 20 December 2012].

<sup>23</sup> *Advisory Opinion No.4, Nationality Decrees Issued in Tunis and Morocco*, 4, International Court of Justice (ICJ), 7 February 1923, available at: <http://www.refworld.org/docid/44e5c9fc4.html> [accessed 18 April 2013] .

<sup>24</sup> Article 1 of the *1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws* (hereinafter the *1930 Hague Convention*). Available at: <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=3ae6b3b00> [accessed 1 October 2012].

<sup>25</sup> *Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion, Inter-American Court of Human Rights, No. OC-4/84*, January 29, 1984, reprinted in 5 *Hum. Rts. L. J.* 161,167, para. 32 (1984): “Despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manner in which states regulate matters bearing on nationality

A groundbreaking judgment regarding the scope and effect of State discretion in nationality matters was the one of the ICJ in the *Nottebohm case* in 1955.<sup>26</sup> Nottebohm was a German migrant living and working in Guatemala for years since 1905. At one point, he acquired the citizenship of Lichtenstein (which resulted in revocation of his German citizenship) but continued his life in Guatemala whose government deported him to the US and confiscated his property on the grounds of being a German citizen or a stateless person of German origin (as Germany was considered “an enemy”). Guatemala did not recognise that Nottebohm was a national of Lichtenstein as no connection existed between Lichtenstein and Nottebohm and therefore there were no grounds for diplomatic protection. The ICJ upheld Guatemala by emphasising that no “genuine link” (such as permanent residence, professional or family ties, personal connection to a country, etc.) existed between Nottebohm and Lichtenstein (Zilbershats 2001, p.731). As indicated, although valid in Lichtenstein, Nottebohm’s nationality has not been recognised by Guatemala and ICJ, which was subject of intense debates.

For the purpose of admissibility before the ICJ, Blackman considers the requirement of the genuine link as “quite reasonable” (Blackman 1998, p.1160). Similarly, Zilbershats supports the ICJ’s reasoning but questions the rightfulness of its decision: a full implementation of the principle of genuine link would have led the ICJ to consider Nottebohm as a citizen of Guatemala, as he had lived there for decades. If that is so, Guatemala had a duty to protect him instead of considering him as an enemy alien (Zilbershats 2001, p.732).

The *Nottebohm decision* had far-reaching effects: some perceive the requirement of genuine, effective link as a part of customary international law (Brownlie, Van Panhuys, Fitzmaurice, Ruzié).<sup>27</sup> By contrast, other authors (Geck, Randelzhofer, Parry, Kuntz, Jones) emphasise that “[T]here is often little connection between the individual upon whom nationality has been conferred and *jus soli* or *jus sanguinis* principle and that it is difficult to limit the genuine link

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cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of *human rights*.” [emphasis added].

<sup>26</sup> *Nottebohm Case (Lichtenstein v. Guatemala)*, Second Phase, 6 April 1955 ICJ. Available at: <http://www.icj-cij.org/docket/index.php?sum=215&code=lg&p1=3&p2=3&case=18&k=26&p3=5> [accessed 10 November 2012].

<sup>27</sup> Customary international law refers to “... [O]bligations deriving from established state practice, as opposed to obligations arising from formal written international treaties”... It results from “a general and consistent practice of states that they follow from a sense of legal obligation.”

See [http://www.law.cornell.edu/wex/customary\\_international\\_law](http://www.law.cornell.edu/wex/customary_international_law)

requirement to cases of naturalisation.”<sup>28</sup> Furthermore, if widely applied, the genuine link theory would leave the individuals who live outside the country of their birth or descent without protection (Jones 1956, pp. 239-40).

Sloane even argues that the *rationale* of the *Nottebohm decision* was not a principle of genuine link but an aim to prevent violation of the principle of abuse of rights.<sup>29</sup> By referring to the principle of genuine link, the ICJ actually found an elegant solution to indirectly condemn the abuse of rights, as it was obvious that Nottebohm’s motive for acquisition of Lichtenstein’s nationality was to avoid the effects of the international law of war (Sloane 2009, pp. 4, 19, 20).

However, as there is no person without a genuine link to some country, relying on the social fact of attachment is considered as an effective way of realisation of the right to a nationality (Weissbrodt and Collins 2006, p.276). Bearing in mind the challenges mentioned above, maybe the principle of genuine link should be used flexibly or, as Brownlie suggests, in a not “too exacting manner”.<sup>30</sup>

State discretion in nationality matters is additionally limited by three prohibitions under international human rights law: the prohibition against racial discrimination, statelessness and arbitrary deprivation of nationality. Being recognised as a peremptory norm (*jus cogens*)<sup>31</sup> and a part of customary international law, the prohibition against racial discrimination refers to exercising and enjoyment of the right to a nationality, as well. As a complementing rule, the *1961 Convention* urges the State Parties to confer nationality in cases of being at risk of statelessness<sup>32</sup> and prohibits deprivation of nationality if that would result in statelessness.<sup>33</sup>

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<sup>28</sup> See International Law Commission (2000) *First Report on Diplomatic Protection* (prepared by John R. Dugard, Special Rapporteur), U.N. Doc A/CN.4/506 (March 7, 2000), p.39. Available at: [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_506.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_506.pdf) [accessed 20 February 2013].

<sup>29</sup> Being a consequence of violation of the principle of good faith, abuse of rights in international law denotes a situation when “...a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State” (Kiss, A. 1992 in Sloane 2009, p.20).

<sup>30</sup> See International Law Commission (2000) *First Report on Diplomatic Protection* (prepared by John R. Dugard, Special Rapporteur), U.N. Doc A/CN.4/506 (March 7, 2000), p.40. Available at: [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_506.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_506.pdf) [accessed 20 February 2013].

<sup>31</sup> Jus cogens denotes a “...peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” (Article 53, *Vienna Convention on the Law on Treaties* 1969).

<sup>32</sup> Article 1 - 4, 10 of the *1961 Convention*.

<sup>33</sup> Article 5-8 *ibid.*

Finally, although permitted in some cases (when obtained by deception, for example), deprivation of nationality must not be arbitrary. Although the notion of arbitrariness is not defined, it includes procedural fairness, justice and avoidance of racial discrimination and statelessness as a cause or effect of deprivation of nationality.<sup>34</sup>

In exploring the scope of Article 15 of the *UDHR*, Adjami and Harrington remind us that there are no guiding criteria for conferring nationality. Acquisition of nationality is nowadays either on the grounds of the principle of *jus sanguinis* (by descent), *jus soli* (by place of birth) or their combination. In addition, there is a possibility of naturalisation. Nevertheless, these traditional principles do not meet the needs of reality - they are often inadequate in contemporary life that is characterised by mobility of people in which case descent or place of birth do not necessarily represent an individual's most significant tie with a State. Therefore, application of the principle of a "genuine, effective link" (a social fact of attachment) could also serve as a decisive criterion in conferring citizenship (Adjami and Harrington 2008, pp. 104-107).

In the light of the aforementioned, a full range of the right to a nationality can be obtained only if States, apart from refraining of causing statelessness, proactively act on recognition of the legal tie between the individual and the State. In this sense, the right to a nationality can be qualified as a positive right (Batchelor 1998, p.181).

## 2.2. Nationality vs. Citizenship

In attempt to uncover the scope of Article 15 of the *UDHR*, a step beyond legal reasoning has to be made in order to understand its full range and significance.

Although often used as synonyms (like in Batchelor 1998, p.159, Adjami and Harrington 2008, p. 94, Gulyai 2010, p.10), the notions of *nationality* and *citizenship* do provoke debates amongst

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<sup>34</sup> See Open Society Justice Initiative (2005) *Citizenship and Equality in Practice: Guaranteeing Non-Discriminatory Access to Nationality, Protecting the Rights to be Free from Arbitrary Deprivation of Nationality, And Combating Statelessness*, pp. 7-9.  
Available at: [http://www.opensocietyfoundations.org/sites/default/files/citizenship\\_20051101.pdf](http://www.opensocietyfoundations.org/sites/default/files/citizenship_20051101.pdf) [accessed 20 December 2012].

scholars. Are these terms really synonyms and should they be used interchangeably? Some argue they should not. In that sense, Stratton refers to Weis who claims that *nationality* is a broader term of which *citizenship* is a part. Moreover, *citizenship* itself is not an indivisible category: different kinds of *citizenships* may be constructed under the *nationality* scheme of a particular country (Stratton 1993, p.196).

The interpretation in Oppenheim's *International Law* highlights the relevance of the term *national* in cases when an individual needs his or her country's protection on the international scene, contrary to *citizen* which has a domestic, local meaning and purpose. While a *citizen* is considered as a *national* in each case, the same does not apply to a *national*. For example, a *national* may enjoy a diplomatic protection on the international level but may not be entitled to take part in elections in the country whose *national* that person is (Zilbershats 2001, p.695).

In making distinctions between *nationality* and *citizenship*, Gardner reaches even further. Apart from differentiating *nationality* from *citizenship*, he identifies two additional concepts: *nationality citizenship* and *new citizenship*. In Gardner's view, *nationality* is individual's external relationship with a nation-state which recognizes the individual as its *national* and, therefore, acts on its behalf in the international arena. At the same time, the legitimacy of this external relationship lies in the consent of other nation-states. Therefore, *nationality* relies on double recognition: recognition of one's *nationality* by his or her nation-state and "recognition of that recognition" by the international community. Unlike *nationality*, the concept of *citizenship* reflects the internal relationship of the individual and the nation-state, i.e. the rights and obligations the individual has while being on the territory of the State whose *national* that person is. *Nationality citizenship* implies a category of nationals who are entitled to certain rights (active and passive suffrage, right to reside, property rights, eligibility for certain jobs and benefits, etc.). As not all *nationals* enjoy these rights, *nationality* appears to be a precondition for becoming a *citizen*. The bridge between *nationality* and *nationality citizenship* is a set of requirements that need to be met (like domicile, descent or age). Finally, the *new citizenship model* refers to a relationship that an individual has with any State, or more precisely, with a State in general, regardless of his or her *nationality*. In this respect, *new citizenship rights* are actually human rights because they apply to everyone, without any kind of discrimination (Gardner in Close 1995, pp. 74, 98-101, 106-107, 138).

By contrast to above-mentioned authors, Wallace uses one term, i.e. *citizenship* for both internal and external relations with one's State. However, her notion of *citizenship* is not a singular term. Wallace clearly makes a difference between *Buergerschaft* (the rights and obligations of a citizen) and *Staatsangehoerigkeit* (the right to belong to a State), which Close interprets as an indirect way of distinguishing between *citizenship* and *nationality* (Close 1995, p.114).

The terminological confusion regarding the use of the terms *nationality* and *citizenship* is not reflected in legal definitions as they brought together these concepts in their political sense (Heater 2002, p.80). However, while the meaning of the term *nationality* in public international law is uncontested (it refers to a legal bond between the individual and the State), the same type of relationship is named as *citizenship* in national laws worldwide. Moreover, *nationality* and *citizenship* mean different legal categories in some countries, whereby *nationality* refers to status and *citizenship* implies a set of rights.<sup>35</sup>

Another confusion regarding nationality is the understanding of its meaning in a legal and ethnological sense. As a legal term, in its simplest form, *nationality* implies political membership, while its ethnological meaning refers to one's racial, ethnical or linguistic background (Weis 1979, p.3). *Nationality* in legal and ethnological terms may coexist in a State but it is most likely that one prevails over the other. For instance, while *nationality* understood as an ethnic membership dominates over its legal meaning in Bosnia and Herzegovina, ethnicity is of no relevance in the perception of *nationality* in the US (Blackman 1998, p.1146).

In some countries, the terms *nationality* and *citizenship* are not used interchangeably: while *citizenship* refers to a legal bond between the state and the individual, *nationality* implies one's ethnic origin<sup>36</sup>. For the purpose of this dissertation, the terms *nationality* and *citizenship* will be used interchangeably whereby *nationality* implies the "legal bond between a person and a State and does not indicate the person's ethnic origin".<sup>37</sup>

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<sup>35</sup> See <http://eudo-citizenship.eu/databases/citizenship-glossary/terminology> [accessed 14 March 2013].

<sup>36</sup> In Albania, Belarus, Bosnia-Herzegovina, Croatia, Estonia, Hungary, Italy, Lithuania, Macedonia, Montenegro, Moldova, Romania, Russia, Serbia, Slovak Republic, Slovenia, Sweden, etc. See *ibid.*

<sup>37</sup> Article 2 (a) of the *European Convention on Nationality*.

## 2.3. International Human Rights Law and Statelessness

The international response to the issue of statelessness is reflected in three dimensions: a) addressing statelessness in general, in terms of its elimination; b) protection of stateless women and children and c) guaranteeing and protecting of rights of stateless persons (Dolidze 2011, p. 128). For the purpose of this dissertation, the instruments which serve as a main source of guidelines in addressing statelessness will be highlighted in order to see what general principles have been established so far.

### 2.3.1. 1930 Hague Convention

The first international treaty regarding statelessness dates back to 1930: the League of Nations urged the State Parties of the *Hague Convention* to abolish statelessness and declared that "...it is in the general interest of the international community to secure that all its members should recognise that every person should have a nationality..."<sup>38</sup> Although containing protective provisions aimed at prevention of statelessness among married women and children, neither the *1930 Hague Convention* nor its *Protocol*<sup>39</sup> define the term "statelessness" or "stateless person". Interestingly, the *1930 Hague Convention* has only 13 state parties, while its *Protocol* even less: 11 ratifications in total.<sup>40</sup> Serbia is not a State Party to the *1930 Hague Convention* but it ratified its *Protocol*.

### 2.3.2. 1954 Convention

Although addressing statelessness was intended to be within the *1951 Convention Relating to the Status of Refugees*<sup>41</sup> (as its *Protocol*), the arising awareness that not all stateless persons are

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<sup>38</sup> The *1930 Hague Convention*, Preamble.

<sup>39</sup> *Protocol Relating to a Certain Case of Statelessness*, 12 April 1930, No.4138.179 LNTS 115. Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b39520> [accessed 1 October 2012].

<sup>40</sup> See <http://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=512&lang=en> and <http://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=511&lang=en> [accessed 20 May 2013].

<sup>41</sup> Hereinafter *1951 Refugee Convention*. Available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 12 September 2012].



refugees nor a discriminated category paved the way for addressing the stateless issue independently. Not aiming to serve as a replacement for conferring nationality, the *1954 Convention*'s purpose has been reflected in the international protection of stateless persons who are not refugees, in case of failure of national protection (Batchelor 2002, pp. 5, 6).

The *1954 Convention* prescribes the minimum set of rights stateless persons are entitled to (non-discrimination, freedom of religion, personal status, property rights, right of association, access to courts, employment and welfare rights, administrative assistance, freedom of movement, identity papers, travel documents, fiscal charges, transfer of assets, naturalisation, prohibition of expulsion).

In terms of the right holder, as enshrined in Article 1 of the *1954 Convention*, a stateless person is “a person who is not considered as national by any State under the operation of its law”.<sup>42</sup> Being entirely focused on a legal bond with a State, without referring to content and quality of one's nationality, the definition of statelessness used in the *1954 Convention* is known as *de jure* statelessness (Weissbrodt and Collins 2006, p.251). In other words, *de jure* stateless persons are those who “have not received nationality automatically under the operation of any State's law” (Batchelor 1998, p.171).

Although offering protection for those with no formal tie with a State, a *de jure* definition of statelessness does not cover situations in which an individual, although in the possession of a nationality, does not enjoy protection of his/her home country and is exposed to similar hardships like *de jure* stateless persons. Known as *de facto* statelessness, its omission is a consequence of the initial intention to regulate statelessness within the *1951 Refugee Convention* as the drafters believed that all *de facto* stateless persons were refugees (Batchelor 1998, p.172).

This assumption was wrong. Most of stateless persons nowadays, whether *de jure* or *de facto*, are not refugees.<sup>43</sup> A person may be *de facto* stateless in his/her own country. Also, facing

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<sup>42</sup> Article 1 of the *1954 Convention*.

<sup>43</sup> The essence of the internationally accepted definition of a refugee is rather a matter of fact than law: besides non-protection, some other requirements should also be met in order to be considered as a refugee: “...[O]wing to well-founded fear of being *persecuted* for reasons of race, religion, nationality, membership of a particular social group or political opinion, *is outside the country of his nationality* and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, *not having a nationality* and being *outside the country* of his former habitual residence as a result of such events, is unable or, owing to such fear, in unwilling to return to it.” Article 1(2) of the *1951 Refugee Convention* [emphasis added].

persecution does not have to be an element of *de facto* statelessness. Moreover, it is very likely that a *de facto* stateless who is not a refugee and who cannot prove that he/she is a *de jure* stateless, will not enjoy protection neither under international refugee nor stateless regime (Batchelor 1995 in Weissbrodt and Collins 2006, p.252). However, *de facto* stateless persons can benefit from the human rights law and from the *1954 Convention*, as State Parties are suggested to extend its provisions to *de facto* stateless persons as well.<sup>44</sup>

Serbia is a State Party to the *1954 Convention* since 2001.

### 2.3.3. 1961 Convention

Serving as a safeguard against statelessness, the *1961 Convention* aims to prevent statelessness at birth, in case of changes of nationality status (loss, renunciation or deprivation of nationality) and transfer of territory. In that sense, State Parties are obliged to confer nationality at birth or upon request if otherwise a person would remain stateless.<sup>45</sup> This applies to foundlings and children born on ships and planes as well.<sup>46</sup> Even if born outside the territory of a State Party, conferring nationality will take place if that person would remain stateless and if at least one of his/her parents is a national of the State Party at the moment of child's birth.<sup>47</sup> If changes in personal status (marriage, adoption, etc.) result in loss of nationality, that loss is conditioned with a prior possession or acquisition of another nationality.<sup>48</sup> The same applies to loss and renunciation of nationality and the application for naturalisation in another country.<sup>49</sup>

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<sup>44</sup> *Final Act of the United Nations Conference on the Status of Stateless Persons*. "Each Contracting State, when it recognises as valid the reasons for which a person has renounced the protection of the State of which he is a national, considers sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons... Available at: <http://www.ehu.es/ceinik/tratados/16TRATADOSOBREREFUGIADOS/TR1615ING.pdf> [accessed 10 October 2012].

<sup>45</sup> Article 1 of the *1961 Convention*.

<sup>46</sup> Article 2 and 3 *ibid.*

<sup>47</sup> Article 4 (1) *ibid.*

<sup>48</sup> Article 5 (1) *ibid.*

<sup>49</sup> Article 7 (1), 7 (3) *ibid.*

Despite a general prohibition of deprivation of nationality if resulting in statelessness,<sup>50</sup> the *1961 Convention* provides several exceptions to this rule:

A naturalised person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality.

In the case of a national of a Contracting State, born outside its territory, the law of that State may make the retention of its nationality after the expiry of one year from his attaining his majority conditional upon residence at that time in the territory of the State or registration with the appropriate authority.<sup>51</sup>

In addition, the deprivation of nationality is permitted if “the nationality has been obtained by misrepresentation or fraud”.<sup>52</sup> Furthermore, if specified at time of signature, ratification or accession, deprivation of nationality is permitted in case of breach of duty of loyalty to the State<sup>53</sup> or if a person “has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State”.<sup>54</sup> However, even if permitted, deprivation of nationality must ensure “... the right to a fair hearing by a court or other independent body”.<sup>55</sup>

An important non-discriminatory norm is enshrined in Article 9: “A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds”.<sup>56</sup> Finally, State Parties are urged to ensure that no statelessness occurs in cases of transfer of territory.<sup>57</sup>

Interestingly, the *1961 Convention* does not reaffirm the Article 15 (1) of the *UDHR* (“Everyone has the right to a nationality”) nor does it emphasise State discretion in nationality matters.

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<sup>50</sup> Article 8 *ibid.*

<sup>51</sup> Article 7 (4), 7 (5) *ibid.*

<sup>52</sup> Article 8 (2) (b) *ibid.*

<sup>53</sup> Article 8(3) (a) (i), (ii) *ibid.*: (“...rendered or continued to render services to, or received or continued to receive emoluments from another State or has conducted himself in a manner seriously prejudicial to the vital interests of the State”).

<sup>54</sup> Article 8(3) (b) *ibid.*

<sup>55</sup> Article 8(4) *ibid.*

<sup>56</sup> Article 9 *ibid.*

<sup>57</sup> Article 10 *ibid.*

Instead, the *1961 Convention* imposes unambiguous obligations for State Parties in conferring nationality to persons who are at risk of statelessness. Although not defining the term “statelessness”, it is a general interpretation that the *1961 Convention* relates to *de jure* statelessness, as defined in the *1954 Convention*.

In addition, although a non-binding norm was made in favour of *de facto* stateless persons,<sup>58</sup> it remained unclear what exactly *de facto* statelessness means. Furthermore, the *1961 Convention* does not specify how to prove the fact of being at risk of statelessness, who should prove it and what kind of evidences are needed. By this omission, it is up to State discretion to determine how the risk of statelessness is to be proved, which may lead to intentional or unintentional manipulation (Van Waas 2008, pp. 43-46).

Serbia acceded to the *1961 Convention* in 2011.

#### **2.3.4. 1997 European Convention on Nationality**

The principles of the *European Convention on Nationality* rely on a clearly declared intention to avoid statelessness, as set forth in Article 4.<sup>59</sup>

Special provisions are aimed at the prevention of statelessness among children, facilitated naturalisation, and the prohibition of renunciation of nationality if resulting in statelessness.<sup>60</sup>

Serbia is not a State Party to the *European Convention on Nationality*.

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<sup>58</sup> Resolution 1 of the *Final Act of the 1961 Convention*: (“The Conference recommends that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality”). Available at: <http://treaties.un.org/doc/Publication/UNTS/Volume%20989/volume-989-I-14458-English.pdf> [accessed 11 October 2012].

<sup>59</sup> Article 4 of the *European Convention on Nationality*: “The rules on nationality of each State Party shall be based on the following principles: a) Everyone has the right to a nationality b) Statelessness shall be avoided c) No one shall be arbitrarily deprived of his or her nationality.

Neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.” Available at: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=166&CL=ENG> [accessed 10 January 2013].

<sup>60</sup> Article 6 and 8, *ibid*.

### 2.3.5. 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession<sup>61</sup>

As a result of general awareness that State succession is the main cause of statelessness, the *2006 Convention* urges the successor State to confer its nationality to persons who are at risk of being stateless if, at the time of the State succession, they had the nationality of the predecessor State and if they had habitual residence in the current successor State or an appropriate connection with it (i.e. with a predecessor State which became the territory of the successor State in the form of a legal bond, place of birth or last habitual residence).<sup>62</sup> Similarly, “A predecessor State shall not withdraw its nationality from its nationals who have not acquired the nationality of a successor State and who would otherwise become stateless as a result of the State succession.”<sup>63</sup> A State Party will facilitate the acquisition of nationality for persons who do not meet the above-mentioned requirements, if they habitually reside on its territory.<sup>64</sup> Aiming to avoid statelessness at birth, the State Party “shall grant its nationality at birth to a child born following State succession on its territory to a parent who, at the time of State succession, had the nationality of the predecessor State if that child would otherwise be stateless”.<sup>65</sup>

Unlike the *1961 Convention*, the *2006 Convention* clearly underlines that it applies to *de jure* statelessness.

Serbia is not a State Party to the *2006 Convention*.

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<sup>61</sup> Hereinafter the *2006 Convention*. Available at: <http://www.refworld.org/cgi-bin/telex/vtx/rwmain?docid=4444c8584&page=search> [accessed 10 January 2013].

<sup>62</sup> Article 5 of the *2006 Convention*.

<sup>63</sup> Article 6, *ibid.*

<sup>64</sup> Article 9, *ibid.*

<sup>65</sup> Article 10, *ibid.*

# CHAPTER 3

## 3. Methodology

For the purpose of this study, a doctrinal legal research (known also as a “black letter” legal research) has been conducted. Doctrinal legal research reflects in “analysis of legal rules, principles or doctrines” (Vibhute and Aynalem 2009, p.44) in order to answer “what the law is on a particular issue” (Mc Conville and Wing 2007 in Razak 2009, p.20). Essentially, legal research focuses on problem solving (Mac Crate Report in Barkan 2006, p.407). The research process firstly relies on secondary sources (textbooks, academic articles, reviews, etc.) as they highlight the current state, debates and controversies of the subject matter and also indicate the primary sources (laws, regulations, cases) (Razak 2009, p.22). In a word, traditional legal analysis is reflected in the IRAC model - issues, rules, analysis, conclusions (Morris 2011, p.42).

As a part of customary law, the provisions of the *Vienna Convention on the Law of Treaties* (1969) serve as a guideline in interpretation of international treaties (Mechlem 2009, p.910). In this regard, the understanding of norms of international treaties should be in light of their ordinary meaning within the given context and underlying object and purpose.<sup>66</sup> To confirm or clarify this kind of interpretation, additional tools may be used, such as preparatory work for the treaty or circumstances of its conclusion.<sup>67</sup>

Not being a construction *per se*, the purpose of legal research is reflected in the comprehension of law, uncovering its shortcomings, critical insight into cohesion of the existing legal framework, addressing the causes and effects of legal provisions and, finally, making recommendations for improvements of existing norms (Vibhute and Aynalem 2009, p.30).

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<sup>66</sup> Article 31(1) of the *Vienna Convention on the Law of Treaties*: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3ae6b3a10> [accessed 2 May 2013].

<sup>67</sup> Article 32 *ibid.*: “Resource may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: a) leaves the meaning ambiguous or obscure; or b) leads to a result which is manifestly absurd or unreasonable.”

# CHAPTER 4

## 4. Prevention of Statelessness

### 4.1. Introduction

The tools for addressing statelessness can be identified as those with pre-emptive, minimising and naturalising effect. While pre-emptive approach precludes the emergence of statelessness (like granting citizenship on the grounds of the *jus soli* principle and registration of children upon birth), the minimising tools provide certain rights to stateless persons but they do not resolve their status, just make it easier (issuing identity papers, for example). On the other hand, naturalisation, as a way of granting citizenship, is considered as the only effective solution for statelessness (Weissbrodt and Collins, pp. 271, 272; Batchelor 2002, p.6).

The *1961 Convention* highlights the prevention of statelessness in three major aspects: at birth, later in life and in case of transfer of territory. It provides clear instructions on how to avoid legal gaps that may cause statelessness. Although covering a wide range of situations, the *1961 Convention* is characterised with certain inconsistencies that are reflected in permitting the loss of nationality in some cases,<sup>68</sup> failing to appropriately implement the principle of non-discrimination,<sup>69</sup> inadequate regulation of statelessness in cases of State succession<sup>70</sup> and failing to address statelessness that arises as a consequence of human trafficking, irregular migration and shortcomings of the birth and marriage registration system. Moreover, it does not identify how

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<sup>68</sup> For example, Article 7(4) of the *1961 Convention*: “A naturalized person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality.”

<sup>69</sup> Article 1(3) *ibid.* makes a distinction between children born in and out of wedlock: “... [A] child born in wedlock in the territory of a Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless.” In addition, the *1961 Convention* omits to ban gender as a ground for deprivation of nationality: “A Contracting State may not deprive any person or a group of persons of their nationality on racial, ethnic, religious or political grounds” (Article 9).

<sup>70</sup> Article 10 of the *1961 Convention* contains only a general provision of avoiding statelessness without any details regarding situations that may occur in case of state succession: “1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions. 2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.”

the fact of statelessness should be proved. In that sense, the *1961 Convention* is not a tool for the solution of statelessness but rather, as its name suggests, a tool for its reduction. However, being the only universal instrument that imposes direct obligations to State Parties in order to avoid statelessness, the importance of the *1961 Convention* is invaluable. In sum, the prevention of statelessness is facing two main issues: there is no internationally agreed concept on how to prove one's stateless status which gives a broad discretion to relevant authorities in the process of decision making. In addition, in lack of an enforcing mechanism and the shortage of relevant case law, the obligation of prevention of statelessness appears to be vague (Van Waas 2008, pp. 194-198, 206-209).

According to UNHCR, prevention of statelessness implies "...the identification of domestic laws and practices that may lead to creation of statelessness and the introduction of concrete measures to prevent statelessness from occurring or from perpetuating across generations."<sup>71</sup> As the research tends to explore the legislative approach to statelessness, its prevention will be discussed in the light of the *Law on Citizenship of the Republic of Serbia*<sup>72</sup> and its compliance with the *1961 Convention*. Since the preventive provisions of the *1961 Convention* address statelessness in the context of acquisition of citizenship, its termination and in case of state succession, the upcoming discussion will follow the same path.

## 4.2. Acquisition of Nationality

### 4.2.1. Introduction

The *1961 Convention* urges the State Parties to confer citizenship to persons who "would otherwise be stateless", whether they are born in their territory (*jus soli* principle) or have a tie with the State concerned in the form of descent (*jus sanguinis* principle). At first sight, this obligation is vague: the *1961 Convention* does not provide the definition of statelessness nor does

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<sup>71</sup> See UNHCR (2008) *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, p.10. Available at: <http://www.unhcr.org/49a271752.html> [accessed 15 January 2013].

<sup>72</sup> *Law on Citizenship of the Republic of Serbia*, "Official Gazette of the Republic of Serbia", No.135/04, 90/07, 2004, 2007. Hereinafter *LCRS*. Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4b56d0542> and <http://www.refworld.org/country,...SRB,,4b5582932.0.html> [accessed 15 December 2012].



it explain how to establish the fact of being stateless.<sup>73</sup> Regarding the first concern, the *International Law Commission* refers to a *de jure* definition of a stateless person, as set forth in Article 1 of the *1954 Convention*,<sup>74</sup> emphasising that “This definition can no doubt be considered as having acquired a customary nature.”<sup>75</sup> As indicated, the *1961 Convention* refers to *de jure* statelessness, as it has become a part of international customary law. Concerning the requirement of “who would otherwise be stateless”, the UNHCR clarifies that a person is stateless if the State concerned directly declares the person as non-citizen or if it stays in silence regarding the submitted question whether a person is its national or not. The State Party cannot dispute the decision of the State concerned nor interfere in its interpretation of nationality laws. Therefore, if a person is proclaimed as a non-national of the State concerned as explained above, the State Party has to grant its nationality to that person, in line with the *1961 Convention*.<sup>76</sup>

However, the obligation to confer nationality if a person would otherwise remain stateless is not absolute. This applies to the acquisition of nationality on the grounds of *jus soli* but *jus sanguinis* principle as well, as it will be discussed in the upcoming sub-chapters (4.2.2. and 4.2.4.).

#### **4.2.2. *Jus soli* Principle and Acquisition of Nationality in the 1961 Convention**

As enshrined in the *1961 Convention*, granting citizenship on the grounds of the *jus soli* principle can be conditioned with one or more enumerated requirements (lodging an application during a period beginning not later than at the age of 18 and ending not earlier than the age of 21, habitual residence for a period not exceeding five years immediately before submitting the application nor ten years in all, not being convicted of an offence against national security nor sentenced to imprisonment on a criminal charge for minimum five years, being stateless since birth).<sup>77</sup>

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<sup>73</sup> See UNHCR (2012) *Guidelines on Statelessness No.4: Ensuring Every Child’s Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, pp. 4, 5. Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=50d460c72> [accessed 10 February 2013].

<sup>74</sup> Article 1 of the *1954 Convention*: “For the purpose of this Convention, the term “stateless person” means a person who is not considered as a national by any State under the operation of its law.”

<sup>75</sup> See International Law Commission (2006) *Draft Articles on Diplomatic Protection*, p.49. Available at: [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf) [accessed 20 April 2013].

<sup>76</sup> See *supra* note 73, p.5.

<sup>77</sup> Article 1 (2) of the *1961 Convention*.

If these conditions are required in the national legislation of the State Party and if they are met by the applicant, the application for granting nationality may not be rejected.<sup>78</sup> However, there are two exceptions to this rule: if otherwise remaining stateless, a legitimate child of a mother who is a national of the State Party will be granted a citizenship even if the above mentioned requirements are not met. Similarly, a person who does not fulfil the habitual residence or a time period requirement for submitting the application, will be granted a nationality if one of his/her parents was a national of the State Party at the time of the person's birth and if one or more conditions are met (to submit the application at the age of 23 at the earliest, habitual residence not exceeding 3 years before lodging the application, being stateless since birth).<sup>79</sup> If these conditions are required but not met, the person will not be conferred citizenship even if remaining stateless.

As regards to granting nationality on the grounds of the *jus soli* principle, a special protection is aimed at foundlings and birth on ship or in aircrafts. Concerning foundlings, there is an assumption that both *jus soli* and *jus sanguinis* links exist unless proven to the contrary.<sup>80</sup> Pursuant to Article 3 of the *1961 Convention*, "...birth on a ship or in an aircraft shall be deemed to have taken place in the territory of the State whose flag the ship flies or in the territory of the State in which the aircraft is registered, as the case may be."<sup>81</sup>

#### **4.2.3. *Jus soli* Principle and Acquisition of Nationality in Serbia**

The Serbian nationality legislation foresees only one case of acquisition of citizenship on the grounds of birth in its territory:

A child born or found in the territory of the Republic of Serbia (foundling) acquires

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<sup>78</sup> Article 1 (1) (b) *ibid.*

<sup>79</sup> Article 1 (3), (4), (5) *ibid.*

<sup>80</sup> Article 2 *ibid.*: "A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State."

<sup>81</sup> Article 3, *ibid.* See also Article 17 of the *Convention on Civil Aviation (1944)*: "Aircraft have the nationality of the State in which they are registered" (available at: <http://www.refworld.org/publisher/ICAO...3ddca0dd4.0.html>, accessed 15 May 2013) and Article 91 of the *United Nations Convention on the Law of the Sea (1982)*: "1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. There must exist a genuine link between the State and the ship. 2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect" (Available at: , <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=3dd8fd1b4> [accessed 15 May 2013]).

citizenship of the Republic of Serbia by birth if both his parents are unknown or of unknown citizenship or without citizenship or if the child is without citizenship.<sup>82</sup>

As indicated, the provision above aims to prevent statelessness among foundlings and children born in Serbia who are exposed to risk of statelessness. Apart from *LCRS*, this principle is embedded in the *Constitution of the Republic of Serbia* as well.<sup>83</sup>

As conferring nationality is *ex lege* (by virtue of law) since birth,<sup>84</sup> no additional conditions are required to qualify for Serbian citizenship. In that sense, granting citizenship to children on the grounds of the *jus soli* principle is simple, without any restrictions: the risk or fact of statelessness is the guiding criterion.

However, although covering a wide range of situations, some gaps can be identified in the Article 13 (1) of *LCRS*. Firstly, it does not offer a solution for a situation when a child of foreign national parents (or if a mother is a foreign citizen, and the father is unknown, or of unknown nationality or stateless) is abandoned immediately after birth in hospital in Serbia. In this case, the child is of undetermined citizenship until the nationality of parents or the mother is proven. Aiming to fill this gap, an interesting observation is that of Gulyai in his comments on the *Hungarian Citizenship Act*. In this respect, Gulyai highlights the possibility of false information about the mother's nationality due to false documents or statement. In addition, it may take time until this fact is proven (for example, if the authority in charge does not contact the relevant diplomatic representation in a reasonable time to check the presumptive nationality of the mother or if the diplomatic representation of mother's presumptive home country does not send any feedback, even for years).

Another obstacle is if only parents of the child are entitled to initiate the procedure regarding

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<sup>82</sup> Article 13 (1) *LCRS* ("Dete rođeno ili nađeno na teritoriji Republike Srbije (nahoće) državljanstvo Republike Srbije rođenjem stiče ako su mu oba roditelja nepoznata ili nepoznatog državljanstva ili bez državljanstva ili ako je dete bez državljanstva." Note: my translation).

<sup>83</sup> Article 38 (3) of the *Constitution of the Republic of Serbia* (2006): "A child born in the Republic of Serbia is entitled to Serbian nationality if the conditions to acquire citizenship of another country are not met" ("Dete rođeno u Republici Srbiji ima pravo na državljanstvo Republike Srbije, ako nisu ispunjeni uslovi da stekne državljanstvo druge države." Note: my translation). Available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=191258](http://www.wipo.int/wipolex/en/text.jsp?file_id=191258) [accessed 10 December 2012].

<sup>84</sup> Article 13 (2) *LCRS*.

child's nationality in the mother's home country. In this regard, Gulyai suggests the period of the child's first birthday as a reasonable time for establishing his/her foreign nationality and repatriation. In the case of no success within the proposed time-limit, the child should be granted nationality of the country of birth (Gulyai 2010, pp. 43-46). This reasoning is in line with the recommendation of UNHCR which suggests that prolongation of the child's undetermined nationality is not desirable and should not take more than five years.<sup>85</sup>

There is no reason not to apply a similar protective norm for children under the same circumstances in Serbia, especially bearing in mind the *Constitution* which prescribes that children born in Serbia are entitled to Serbian nationality if the conditions to acquire citizenship of another country are not met.<sup>86</sup> A fixed time-limit for establishing the child's foreign nationality and repatriation in situations described above would solve the possible prolongation of determination of the child's nationality status.

Another omission of *LCRS* is reflected in the lack of provisions regarding birth on a ship or in an aircraft, as set forth in Article 3 of the *1961 Convention*.<sup>87</sup> Although not being relevant for Serbian nationals (as the dominant principle of acquiring citizenship is *jus sanguinis*), this oversight may lead to statelessness of children of foreign citizens. For example, if due to the *jus soli* principle the nationality of parents cannot be transferred to a child born on a ship or in an aircraft that are registered in Serbia, the child will remain stateless.

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<sup>85</sup> See UNHCR (2012) *Guidelines on Statelessness No.4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness*, p.6. Available at: <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=50d460c72> [accessed 10 February 2013].

<sup>86</sup> Article 38 (3) of the *Constitution of the Republic of Serbia*.

<sup>87</sup> Article 3 of the *1961 Convention*: "For the purpose for determining the obligations of Contracting States under this Convention, birth on a ship or in an aircraft shall be deemed to have taken place in the territory of the State whose flag the ship flies or in the territory of the State in which the aircraft is registered, as the case may be."

#### **4.2.4. *Jus sanguinis* Principle and Acquisition of Nationality in the 1961 Convention**

Acquisition of nationality on the grounds of descent is a subject matter of only one provision of the *1961 Convention*. In that sense, if otherwise remaining stateless, a person born outside of the territory of the State Party will be granted a nationality of that country if at the time of the person's birth, at least one of his/her parents was a citizen of the State concerned. Nationality may be granted either since birth or upon application. In case of the latter, granting nationality may be conditioned with one or more requirements (lodging the application before reaching the age not less than 23, habitual residence not exceeding three years before application, not being convicted of an offence against national security, being stateless since birth).<sup>88</sup>

#### **4.2.5. *Jus sanguinis* Principle and Acquisition of Nationality in Serbia**

As the main principle of acquiring Serbian citizenship is by descent,<sup>89</sup> relevant provisions of *LCRS* are far more detailed than those relating to the principle of *jus soli*. A child acquires Serbian citizenship *ex lege* (by virtue of law) since birth, if at least one of his/her parents is a Serbian national, regardless of the place of child's birth (including when the other parent is unknown, of unknown nationality or a stateless person).<sup>90</sup>

A slight difference is made in Article 9 with regards to a child born abroad whose one parent is a Serbian national and the other a foreigner<sup>91</sup> in which case citizenship is not granted automatically at birth but only upon registration before the child reaches 18 years of age.

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<sup>88</sup> Article 4 of the *1961 Convention*.

<sup>89</sup> Article 6 (1) *LCRS*: "Citizenship of the Republic of Serbia is acquired by: 1) descent; 2) birth in the territory of the Republic of Serbia; 3) admission; 4) pursuant to international treaties." (Note: my translation)

<sup>90</sup> Article 7, *ibid.*

<sup>91</sup> Article 9, *ibid.*: "(1) Citizenship of the Republic of Serbia by descent is acquired by a child born abroad, whose one parent at the moment of the child's birth, is the citizen of the Republic of Serbia and another one is a foreign citizen, if the parent who is a citizen of the Republic of Serbia registers him until the age of 18 in the competent diplomatic or consular office of Serbia as citizen of the Republic of Serbia and if he/she applies to the competent state body in the Republic of Serbia for child's registration in the Register of citizenship. If the child has a guardian, the registration and application are to be submitted by the guardian. (2) A child born abroad, whose one parent at the moment of child's birth is the citizen of the Republic of Serbia, acquires by descent, the citizenship of the Republic of Serbia in case of remaining stateless even if the conditions from para. 1 of this Article are not met. (3) If a child is over 14 years old, he/she needs to give his consent for acquiring of citizenship pursuant to the paragraphs 1 and 2 of this Article." (Note: my translation).

However, in case of being at risk of statelessness, the child acquires Serbian nationality by descent even if the requirements of the registration are not met. Moreover, as the verb “acquires” (Serbian: “stiče”) is used without any modal verbs which indicate a possibility, this makes the presumption about the *ex lege* character of acquisition of nationality unquestionable.

An important provision regarding the acquisition of nationality following the *jus sanguinis* principle is reflected in the fact that all those who acquire citizenship by descent are considered as citizens of Serbia since birth.<sup>92</sup> In this way, the equal treatment of those who gained citizenship from the moment of birth and those who were granted citizenship later (after registration) is ensured. Acquiring citizenship by descent is enabled to adopted children too, regardless if the child already has a foreign nationality or is stateless.<sup>93</sup>

In addition, no preference is given to men or women in terms of rights and obligations that derive from their parental status concerning matters of citizenship. The fact that *LCRS* refers to “parent(s)” of the child (not to “mother” or a “father”) clearly indicates that men and women have equal rights to pass on their citizenship to their children, whether they are born in Serbia or abroad. This surely prevents inheritance of statelessness, as in many countries nationality cannot be transferred through the maternal bloodline, even if the child would remain stateless.<sup>94</sup> Unlike the *1961 Convention*, *LCRS* makes no distinction between legitimate and illegitimate children.<sup>95</sup> As the Serbian legislation equates cohabitation with marriage<sup>96</sup> and rights of illegitimate children to those of legitimate,<sup>97</sup> a child born out of wedlock is not discriminated in any sense, including nationality matters as well.

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<sup>92</sup> Article 12 *ibid.*

<sup>93</sup> Article 11 *ibid.*

<sup>94</sup> See IPU and UNHCR (2005) *Nationality and Statelessness. A Handbook for Parliamentarians*, p.32. Available at: [http://www.ipu.org/pdf/publications/nationality\\_en.pdf](http://www.ipu.org/pdf/publications/nationality_en.pdf) [accessed 15 October 2012].

<sup>95</sup> Article 1(3) *1961 Convention*: “...[A] child born in wedlock in the territory of the Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless”.

<sup>96</sup> Article 62 (5) of the *Constitution of the Republic of Serbia*.

<sup>97</sup> Article 6 (4) of *Family Law*, “Official Gazette of the Republic of Serbia” No. 18/2005, 72/2011. Available at: [http://www.paragraf.rs/propisi/porodicni\\_zakon.html](http://www.paragraf.rs/propisi/porodicni_zakon.html) [accessed 20 February 2013].

#### 4.2.6. Conclusion

The *jus sanguinis* principle is prevalent in the acquisition of nationality in Serbia, while the *jus soli* principle refers only to foundlings, stateless children and children born in Serbia to parents who are unknown, of unknown nationality or stateless. Prevention of statelessness is expressed in requirements for the acquisition of citizenship on the grounds of both *jus sanguinis* and *jus soli* principle. Furthermore, special attention is aimed at prevention of statelessness among children. The principle of non-discrimination in nationality matters is incorporated with regards to gender equality, adopted, legitimate and illegitimate children. A person who acquired Serbian nationality whether by descent or on the grounds of place of birth is considered as a national since birth.

Overall, *LCRS* is in line with the *1961 Convention*, even more generous in certain cases, as indicated. Still, despite the general tendency to avoid statelessness, some gaps have been identified: as discussed, acquisition of citizenship on the grounds of the *jus soli* principle does not cover a situation when a child of foreign national parents (or if a mother is a foreign citizen, and the father is unknown, or of unknown nationality or stateless) is abandoned immediately after birth in hospital in Serbia. Also, birth on a ship or an aircraft registered in Serbia is not regulated at all. The provisions regarding the acquisition of nationality on the grounds of descent (*jus sanguinis*) serve well in terms of statelessness prevention.

## 4.3. Termination of Nationality

### 4.3.1. Introduction

Termination of nationality may be a consequence of involuntary as well as voluntary acts. In some countries, residing abroad results in revocation of nationality.<sup>98</sup> States justify this action as “giving effect to the national’s desire for expatriation” (Hudson 1952, p.18). Marriage with a foreigner also leads to automatic loss of citizenship in some countries (Van Waas 2008, p.78). In other cases, deprivation of nationality is considered as a punishment for criminal acts, engagement in civil or military service abroad, disloyalty (avoidance of military service, defection, *lese majesty*<sup>99</sup> and other acts contrary to the interests of the State). While collective denationalisation takes place by virtue of law, individual denationalisation is a legal act of the relevant authority against a specific person. In addition, statelessness may occur as a consequence of denaturalisation due to an unsuccessful naturalisation process or revocation of nationality of a naturalised person (Hudson 1952, p.18).

Voluntary loss of citizenship is a consequence of an individual’s renunciation of nationality, especially when attempting to acquire citizenship of another country which conditions application for naturalisation with loss of current citizenship. In case the naturalisation process proves to be unsuccessful, a person may become stateless if no re-acquisition in the former home country is possible.<sup>100</sup>

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<sup>98</sup>See Inter-Parliamentary Union and UNHCR (2005) *Nationality and Statelessness: A Handbook for Parliamentarians*, p.33. As an example, naturalised citizens of Cyprus who reside abroad for 7 continuous years (unless being in international diplomatic service and formally expressing the intention to retain citizenship on annual basis) may lose their nationality even if remaining stateless. See <http://eudo-citizenship.eu/databases/protection-against-statelessness?p=&application=&search=1&modeby=country&country=Cyprus> [accessed 12 April 2013]. Similarly, data from 2010 show that in 13 European countries residence abroad may lead to loss of citizenship. See [http://eudo-citizenship.eu/docs/loss\\_paper\\_updated\\_14102010.pdf](http://eudo-citizenship.eu/docs/loss_paper_updated_14102010.pdf) [accessed 15 April 2013]. Living outside the country for a longer period results in loss of one’s nationality in Haiti, Malawi, Sudan and India (Van Waas 2008, p. 78).

<sup>99</sup> *Leser majesty* – “An offence or crime committed against the ruler or supreme power of a state.” See <http://www.thefreedictionary.com/l%C3%A8se+majest%C3%A9> [accessed 10 April 2013].

<sup>100</sup> See UNHCR (2012) *Guidelines on Statelessness no.3: The Status of Stateless Persons at the National Level*, p.9. HCR/GS/12/03, 17 July 2012. Available from: <http://www.unhcr.org/refworld/docid/5005520f2.html> [accessed 26 January 2013].



There are countries where renunciation of citizenship is permitted even if another nationality has not been acquired, as is the case in China (Van Waas 2008, p.80). This may lead to permanent statelessness if re-admission and re-acquisition of a former nationality are not permitted in one's home country.<sup>101</sup>

As set forth in Article 15 of *UDHR*, the right to a nationality is not a right *per se*. It implies refraining from certain State actions in order to enable the right to change one's nationality and to be free from its arbitrary deprivation.<sup>102</sup> In uncovering the notion of "arbitrary deprivation", it is necessary to understand what each of its constitutive parts means. "Deprivation" in this context means more than just denationalisation, it also implies access to citizenship at birth or later in life, through naturalisation (Van Waas 2008, p.94). The concept of arbitrariness implies unlawfulness, discrimination and lack of procedural guarantees such as a review or appeal (Chan 1991 in Goldston 2006, p.333).

#### **4.3.2. Termination of Nationality in the 1961 Convention**

The *1961 Convention* does not condemn loss of citizenship on the grounds of change in one's personal status (marriage, legitimation, recognition, adoption) nor in the case of dependent nationality (nationality depending on that of one's spouse or parent) but prescribes that "such loss will be conditional upon possession or acquisition of another nationality".<sup>103</sup> The same applies to renunciation, unless it would be inconsistent with freedom of movement and right to asylum.<sup>104</sup> Similarly, naturalisation is conditioned with prior possession of a foreign nationality or a formal guarantee that its acquisition will take place.<sup>105</sup>

Although the loss of nationality is prohibited if resulting in statelessness, there are two exceptions to this rule: if residing abroad for a period not less than seven consecutive years, a naturalised person loses his/her nationality if failing to declare the intention to retain it.

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<sup>101</sup> *Ibid.*, p.10.

<sup>102</sup> Article 15 *UDHR*: "(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."

<sup>103</sup> Article 5 and 6 of the *1961 Convention*.

<sup>104</sup> Article 7 (1), *ibid.*

<sup>105</sup> Article 7 (2), *ibid.*

Secondly, a nationality of a citizen born abroad may be lost if a person fails to meet the requirement of residence or registration in the year following his/her majority. Apart from these two exceptions, the *1961 Convention* prohibits loss of nationality (and, therefore, remaining stateless) on the grounds of leaving the country, residence abroad, failure to register or any similar grounds.<sup>106</sup>

Prohibition of statelessness<sup>107</sup> and prohibition of discrimination<sup>108</sup> are highlighted as the limiting factors in the deprivation of nationality. However, even if causing statelessness, deprivation is permitted in three cases: 1) under circumstances in which loss of nationality is permitted (as discussed above) 2) when nationality has been obtained by misrepresentation or fraud<sup>109</sup> 3) if at the time of signature, ratification or accession, the State Party expressed its intention to retain the right to deprive one's nationality in cases prescribed by internal law of that country: breach of duty of loyalty and allegiance to the State.<sup>110</sup>

Even when permitted, deprivation of nationality must not be arbitrary: it must be lawful and guarantee "...the right to a fair hearing by a court or other independent body".<sup>111</sup>

### 4.3.3. Termination of Nationality in Serbia

As enshrined in *LCRS*, there are three grounds of termination of Serbian citizenship: release, renunciation and under international agreements.<sup>112</sup> Both release and renunciation are voluntary ways of termination of citizenship. While in the case of release, a set of

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<sup>106</sup> Article 7 (3) - (6), *ibid.*

<sup>107</sup> Article 8 (1), *ibid.*: "A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless."

<sup>108</sup> Article 9, *ibid.*: "A Contracting state may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds."

<sup>109</sup> Article 8 (2), *ibid.*

<sup>110</sup> Article 8 (3), *ibid.*: "...[A] Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time: (a) that, inconsistently with his duty of loyalty to the Contracting State, the person (i) 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, or (ii) has conducted himself in a manner seriously prejudicial to the vital interests of the State; (b) that the person has taken an oath, or made a formal declaration of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State."

<sup>111</sup> Article 8 (4), *ibid.*

<sup>112</sup> Article 27 *LCRS*.

requirements need to be met,<sup>113</sup> renunciation is a simple way of termination of Serbian citizenship for those who live abroad and already possess a foreign nationality.<sup>114</sup> As the possession of another nationality is an indispensable condition for renunciation, it effectively prevents statelessness, which is not the case with the process of release as one of the requirements for release is possession of another nationality or a proof of its acquisition.<sup>115</sup> What may happen in practice is that another nationality is not acquired. *LCRS* offers only a partial safeguard against statelessness in this case, as it prescribes the following procedure:

#### Article 32

If a person who received release from citizenship of the Republic of Serbia does not acquire foreign citizenship within one year from the date of pronouncing of the decree on release, the authority who pronounced the decree shall cancel it at request in writing of such a person.

Application for cancellation of the decree on release from citizenship of the Republic of Serbia *can be submitted within three months upon expiry of the term as defined in the para. 1 of this Article.*<sup>116</sup>

What remains unclear is what happens if the application is submitted later? The *LCRS* stays silent in this matter. It is even more confusing that a person released from citizenship and

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<sup>113</sup> Article 28, *ibid.*: “A citizen of the Republic of Serbia can be deprived of citizenship of the Republic of Serbia by release upon application and if the following requirements are met: 1) majority (18 years of age); 2) that no obstacles regarding the military service exist; 3) that he/she settled the taxes and other legal liabilities in Serbia; 4) that he/she regulated property-legal obligations from matrimonial relations and relations between parents and children, to the persons living in Serbia; 5) that against him no criminal proceedings are instituted for criminal offences prosecuted *ex officio*, in Serbia and if he was convicted to imprisonment in Serbia-that he served such a sentence; 6) that he has foreign citizenship or possesses an evidence that he shall be admitted to foreign citizenship.” (Note: my translation).

<sup>114</sup> Article 33 (1), *ibid.*: “If being over 18, a citizen of the Republic of Serbia who was born abroad, lives outside the country and already possess a foreign nationality, can up to the age of 25 renounce the citizenship of the Republic of Serbia.” (Note: my translation).

<sup>115</sup> See *supra* note 113, clause 6).

<sup>116</sup> Article 32, *ibid.* (“Ako lice koje je dobilo otpust iz državljanstva Republike Srbije ne stekne strano državljanstvo u roku od godinu dana od dana donošenja rešenja o otpustu i ako to lice ostaje bez državljanstva, organ koji je doneo rešenje poništiće ga na pismeni zahtev tog lica. (2) Zahtev za poništenje rešenja o otpustu iz državljanstva Republike Srbije može se podneti u roku od tri meseca od isteka roka iz stava 1. ovog člana.” (Note: my translation, emphasis added).

acquired a foreign one, is entitled to apply for readmission without any time limit.<sup>117</sup> In this way, a person who has been released from citizenship and remained stateless has only one year and three months to apply for readmission, while a person who has also been released from citizenship but acquired a foreign one is entitled to readmission without any time limit. Moreover, even in case of deprivation of nationality on the grounds of fraud or misrepresentation, termination of citizenship will not take place if a person would remain stateless.<sup>118</sup>

As indicated, persons who legally terminated their citizenship and remained stateless, are in a far more disadvantaged position than those who broke the law. Although still being eligible for naturalisation in some cases (as it will be discussed in Chapter 5), “some cases” cannot be equated with “all cases”.<sup>119</sup> In that sense, abolition of the time limit for readmission of former nationals who remained stateless in the process of release would serve the aim of prevention of statelessness in its full capacity.

As regards to children, the principles of *CRC* are incorporated in the process of release and renunciation as well. A person may request release or renunciation of citizenship of his/her child (children), in which case the consent of a child who is over 14 is necessary. If the other parent disagrees or is legally unable to give his/her permission for the termination of a child’s citizenship by release or renunciation, the application will be accepted if it is “in the interest of a child” as determined by the competent guardian authority.<sup>120</sup> The same rules apply to adopted children.<sup>121</sup>

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<sup>117</sup> Article 34, *ibid.* “A person released from citizenship of Republic of Serbia who acquired foreign citizenship and a person whom citizenship has been terminated by release or renouncing at the request of his/her parents are eligible for readmission to Serbian citizenship if he/she submits an application, if being older than 18 years of age, not deprived of legal capacity and if a person submits a written statement that he/she considers Serbia his State” (“Lice koje je otpušteno iz državljanstva Republike Srbije i steklo strano državljanstvo i lice kome je na zahtev roditelja prestalo državljanstvo Republike Srbije otpustom ili odricanjem može ponovo steći državljanstvo Republike Srbije ako podnese zahtev za ponovno sticanje državljanstva Republike Srbije, ako je navršilo 18 godina života i nije mu oduzeta poslovna sposobnost i ako podnese pismenu izjavu da Republiku Srbiju smatra svojom državom.” Note: my translation).

<sup>118</sup> Article 45, *ibid.*

<sup>119</sup> For example, naturalisation is facilitated for persons with “an ethnical tie” to Serbia or in case of uninterrupted residence on the grounds of *jus soli*. See sub-chapter 5.2.

<sup>120</sup> Article 30 and 33 (2) *LCRS*.

<sup>121</sup> Article 31 (1), *ibid.*

Unlike the *1961 Convention*, loss and deprivation of Serbian nationality are rather an ultimate exception than a rule.

Pursuant to Article 38 (2) of the *Constitution of the Republic of Serbia*, “A Serbian national cannot be expelled, nor deprived of citizenship or the right to change it”.<sup>122</sup> In line with the *Constitution*, *LCRS* is protective towards Serbian nationals: the only case where deprivation of nationality is allowed is if citizenship has been acquired contrary to nationality regulations, especially if gained by misrepresentation or fraud. Even then, the decision on acquisition cannot be cancelled if the person would become stateless.<sup>123</sup>

With regards to termination of nationality on the grounds of international agreements: as in the case of its acquisition and in line with the principle of reciprocity, citizenship is lost on the day of ratification of the agreement (Rava 2013, p.13).

#### **4.3.4. Conclusion**

Serbian legislation aims to be restrictive concerning the termination of nationality. It ensures that no release, renunciation or deprivation occurs if leading to statelessness. *LCRS* is in line with the *1961 Convention* and even imposes more favourable provisions.

However, by imposing a deadline for application for cancellation of decree on release from citizenship, the legislator created a legal gap that may result in statelessness if a stateless person does not submit the application in time and if he/she does not meet the requirements for naturalisation.

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<sup>122</sup> Article 38 (2) of the *Constitution of the Republic of Serbia* (“Državljanin Republike Srbije ne može biti proteran, ni lišen državljanstva ili prava da ga promeni.” Note: my translation).

<sup>123</sup> Article 45 (1), (2) *LCRS*.

#### **4.4. State Succession and Prevention of Statelessness**

The *1961 Convention* is not detailed about statelessness in the context of State succession. In that sense, it urges the State Parties to incorporate statelessness preventive norms in treaties regarding transfer of territory. In case those provisions are lacking, the State Party is obliged to grant its nationality to persons who remained stateless due to process of state succession.<sup>124</sup>

In the light of this provision, Van Waas highlighted that "...[I]t simply proved too ambitious of the 1961 Convention on the Reduction of Statelessness to attempt to deal with the complex issue of statelessness arising from state succession in just one provision..." (Van Waas 2008, p.133). Following this, the requirements for acquisition of Serbian nationality for all those who possess a tie with territories that were subject to State succession in the context of former SFRY and later state formations that Serbia was a part of will be discussed in the upcoming chapter.

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<sup>124</sup>Article 10 of the *1961 Convention*: "(1) Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a party to this Convention includes such provisions. (2) In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition."

# CHAPTER 5

## 5. Reduction of Statelessness

### 5.1. Introduction

Although identification and protection do significantly improve the status of stateless persons, naturalisation is considered as the only permanent solution for statelessness (Gulyai 2010, p.47). In simple terms, naturalisation is “any acquisition after birth of a citizenship not previously held by the person concerned that requires an application to the public authorities and a decision by these” (Bauböck and Goodman 2010, p.1). In light of the *1954 Convention*, naturalisation of stateless persons should be facilitated.<sup>125</sup>

A confusing fact is that the *1954 Convention* offers no guidelines regarding the implementation of this requirement. As highlighted by UNHCR, facilitated naturalisation implies ensuring adequate facilities for access to citizenship, informing about the necessary requirements, shorter terms than those accorded to foreigners, not insisting on proof of loss of nationality, symbolic fees or fee waivers.<sup>126</sup>

Another set of criteria regarding facilitated naturalisation is interpreted by the *Council of Europe* and within the *European Convention on Nationality*.<sup>127</sup>

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<sup>125</sup>Article 32 of the *1954 Convention*: “The Contracting States shall as far as possible facilitate the assimilation and naturalisation of stateless persons. They shall in particular make every effort to expedite naturalisation proceedings and to reduce as far as possible the charges and costs of such proceedings”.

<sup>126</sup> UNHCR in Bosnia and Herzegovina as cited in Walker NA, p.10: “To facilitate naturalisation means that refugees and stateless persons should be given appropriate facilities for the acquisition of the nationality of the country of asylum and should be provided with the necessary information on the regulations and procedures in force. Furthermore, it implies that national authorities should adopt legal or administrative procedures for the benefit of refugees by which they are enabled to qualify for naturalisation earlier than aliens generally, they are not required to give evidence of loss of their former nationality and that the fees normally paid for naturalisation proceedings are reduced or waived.”

<sup>127</sup> Council of Europe, *Recommendation R (1999) 18 of the Committee of Ministers to Member States on the Avoidance and Reduction of Statelessness*, para 2(b): “Each State should facilitate the acquisition of its nationality by stateless persons lawfully and habitually resident on its territory, and in particular each State should: *a.* reduce the required period of residence in relation to the normal period of residence required; *b.* not require more than an adequate knowledge of one of its official languages, whenever this is provided for by the internal law of the state; *c.* ensure that procedures be easily accessible, not subject to undue delay and available on payment of reduced fees; *d.* ensure that offences, when they are relevant for the decision concerning the acquisition of nationality, do not

Although Serbia is not a State party to *European Convention on Nationality*, I have included its recommendations and those of the *Council of Europe* into my assessment,<sup>128</sup> as they are a useful tool in lack of any others besides the interpretation of the UNHCR. In that sense, the upcoming discussion aims to examine whether the material requirements for naturalisation in Serbia (residence, knowledge of official language, offences) and its procedural aspects are facilitated for stateless persons.

## 5.2. Acquisition of Serbian Nationality through Naturalisation

In terms of terminology, *LCRS* does not use the word “naturalisation” but “admission” for different modes of acquisition of citizenship by application. Therefore, the words “naturalisation” and “admission” will be used interchangeably, as synonyms (in lexical and legal sense as well).

*LCRS* recognizes 3 different categories of applicants who are eligible for acquisition of Serbian citizenship by admission: 1) foreigners and stateless persons; 2) persons with a “special tie” with Serbia (birth in its territory, emigrants, ethnic membership, birth in the territory of the former SFRY); 3) children of parent(s) who acquired Serbian nationality by admission.<sup>129</sup>

The general conditions for naturalisation of stateless persons are equated with those of foreigners, which is not surprising as stateless persons are, in most cases, treated like aliens in Serbian legislation, as it will be examined in Chapter 6. In this regard, requirements for naturalisation of stateless persons relate to permanent residence, majority, possession of legal capacity, uninterrupted residence for at least three years prior lodging the application and submission of a written statement that the person considers Serbia his/her State.<sup>130</sup>

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unreasonably prevent stateless persons seeking the nationality of a State”. Available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta69/erec564.htm> [accessed 20 February 2013]. Also, the 1957 *European Convention on Nationality* prescribes that nationalisation procedures should be “processed within a reasonable time” (Article 10), “contain reasons in writing” (Article 11), “be open to an administrative or judicial review” (Article 12), ensure reasonable fees (Article 13).

<sup>128</sup> As an independent State, Serbia is a member of the *Council of Europe* since 2003. See

<http://hub.coe.int/country/serbia> [accessed 12 April 2013].

<sup>129</sup> Article 14-23 *LCRS*.

<sup>130</sup> Article 14 (1) *ibid*: “A foreigner who, in line with the regulations on movement and residence of foreigners, obtained a permanent residence in the Republic of Serbia may, upon his own request, be admitted



In support of prevention of statelessness, foreigners applying for naturalisation are not obliged to submit a proof of loss of nationality (although it is required) “if that is impossible or cannot be reasonably expected.”<sup>131</sup> In this way, foreigners applying for Serbian citizenship are not at risk of being temporary stateless (while waiting for the decision) nor are they exposed to permanent statelessness (in case their application is refused).

As regards to children, requirements for naturalisation are liberal.<sup>132</sup>

Some applicants may acquire Serbian citizenship under even more favourable conditions: by submitting a written statement about considering Serbia as one’s “State” (emigrants, their spouses and descendants, if being over 18 and having legal capacity)<sup>133</sup> or in case of uninterrupted residence for at least two years and submission of a written statement if a person has been born in Serbia.<sup>134</sup>

An interesting solution is that in Article 23 of *LCRS* according to which persons of Serb ethnicity or any other ethnic nation or ethnic community from the territory of Serbia who are not residents are eligible for naturalisation if meeting the requirements of majority (18 years of age) and legal capacity.<sup>135</sup> It is worth noting that while applicants of Serb ethnicity “*have* the right to be admitted into citizenship”, applicants of other ethnicities “*may be* admitted into citizenship” (Rava 2013, p.17). As indicated, although the preferential requirements apply to all ethnicities, not only to Serbs, persons of other ethnicities will be considered for naturalisation but the decision will not necessarily lead to the acquisition of citizenship. Although not specifically

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to citizenship of the Republic of Serbia if:

1) he is 18 years old and not deprived of legal capacity; 2) he is released from foreign citizenship or he submits the evidence that he will be granted the dismissal if admitted to citizenship of the Republic of Serbia; 3) that until submitting the application for at least three years he has had uninterrupted residence in the territory of the Republic of Serbia; 4) he submits a written statement that he considers the Republic of Serbia his state.

The requirement from the point 2, para. 1 of this Article is fulfilled if an application is submitted by a stateless person or a person offering an evidence that, pursuant to the laws of his/her country, he/she will lose the citizenship if admitted to citizenship of the Republic of Serbia.” (Note: my translation).

<sup>131</sup> Article 14(4) *ibid.*: “Odricanje ili gubitak ranijeg državljanstva neće se zahtevati *ako to nije moguće ili se ne može razumno očekivati.*” (Note: my translation, emphasis added).

<sup>132</sup> Article 20 and 21 *ibid.*: Minored children of naturalised parents acquire citizenship *ex lege* or upon request (if only one parent is a naturalised Serbian citizen, in which case the consent of the other parent and the child if being over 14 are necessary). Similarly, naturalisation of the adopted child requires lodging an application by the child’s adoptive parent who is a Serbian national, residence in Serbia (for both the child and the adoptive parent) and the child’s consent, if being over 14.

<sup>133</sup> Article 18 *ibid.*

<sup>134</sup> Article 16 *ibid.*

<sup>135</sup> Article 23 (1), (2) *ibid.*

aiming to prevent statelessness, this provision may serve as a tool for granting citizenship to a stateless person who has an “ethnic tie” to Serbia. The problem that arises here is how to prove one’s ethnic belonging, however, that is not the subject matter of this study.

In terms of State succession and nationality matters, if meeting the requirements of majority (18 years of age) and legal capacity, a person born in another former Yugoslav republic, who had the citizenship of that republic or currently is a citizen of a State that has been created on the territory of former SFRY, *may be* admitted into citizenship if the person has fled abroad or temporary resides in Serbia as a refugee, expelled or displaced person. The only formal condition for naturalisation in this case is a written statement.<sup>136</sup> As indicated, if remaining stateless due to State succession, a person who had a citizenship of any former Yugoslav Republic may be naturalised easily.<sup>137</sup> The troublesome part is the verb “may” as it indicates a possibility, not an entitlement which does not fully serve the purpose of the prevention of statelessness.

Although *LCRS* clearly demonstrates its aim in the prevention of statelessness, whether explicitly or indirectly, it is not easy to say if the required conditions *facilitate* naturalisation as recommended in the *1954 Convention*. To answer this question, material and procedural requirements for naturalisation of stateless persons in Serbia (as recommended by the UNHCR and *Council of Europe*)<sup>138</sup> will be analysed in the upcoming chapter. In that sense, in light of the

discussion above, only provisions explicitly aimed at naturalisation of stateless persons will be considered as they clearly indicate (or not) the legislator’s intention in prevention of statelessness.

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<sup>136</sup> Article 23(2) *ibid.*

<sup>137</sup> In SFRY, people had two citizenships: a federal one and a citizenship of one of six member-republics (Slovenia, Croatia, Bosnia and Herzegovina, Serbia, Montenegro and Macedonia). As the federal citizenship was dominant, people, in most cases, did not consider it relevant to change their republican citizenship if moving from one republic to another. In the lack of a succession treaty addressing nationality matters after the disintegration of SFRY, republican citizenship gained importance as the Successor States relied on the principle of continuity of republican citizenship in drafting their new citizenship laws. See UNHCR (2011) *Report on Statelessness in South Eastern Europe*, pp. 7, 8. Available at: <http://www.refworld.org/country,...MNE,,514d715f2,0.html> [accessed 17 April 2013].

<sup>138</sup> See *supra* note 126 and 127.

## 5.3. Material Requirements for Naturalisation in Serbia

### 5.3.1. Residence

In the absence of a special guideline for stateless persons, the starting point for the upcoming analysis was the *1969 Council of Europe Recommendation 564 (1969) on the acquisition by refugees of the nationality of their country of residence* which, in order to facilitate naturalisation, suggests the member Governments to "...[R]emove, or at least reduce, legal obstacles to naturalisation, such as the minimum period of residence when it exceeds *five years*..."<sup>139</sup> and the *European Convention on Nationality* which states that:

Each State Party shall provide in its internal law for the possibility of naturalisation of persons *lawfully and habitually* resident on its territory. In establishing the conditions for naturalisation, it shall not provide for a period of residence exceeding *ten years* before the lodging of an application.<sup>140</sup>

In order to be eligible for naturalisation in Serbia, a stateless person has to meet the requirement of *permanent residence* and three years of uninterrupted residence before lodging the application.<sup>141</sup> As the minimum continuous residence necessary for issuing *permanent residence* does not exceed 5 years (or *three years* in case of being married to a Serbian national or a foreigner who is already in possession of *permanent residence*),<sup>142</sup> the law is in line with *1969 Council of Europe Recommendation 564*. Moreover, if previously obtaining a *temporary residence* permit, a stateless person may be granted a *permanent residence* for humanitarian reasons or if it is in the interest of the Republic of Serbia, even if the conditions of continuous residence are not met.<sup>143</sup>

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<sup>139</sup> Article 9 (i) (b) *1969 Council of Europe Recommendation 564 (1969) on the acquisition by refugees of the nationality of their country of residence* [emphasis added]. Available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta69/erec564.htm> [accessed 28 April 2013].

<sup>140</sup> Article 6 (3) *European Convention on Nationality* [emphasis added].

<sup>141</sup> Article 14 (1) (3) *LCRS*.

<sup>142</sup> Article 37(1), (1) (2) *Law on Foreigners* (2008), "Official Gazette of the Republic of Serbia" No. 97/2008. Available at:

<http://www.unhcr.org/refworld/country,,,LEGISLATION,SRB,,4b5d715a2.0.html> [accessed 16 March 2013].

<sup>143</sup> Article 37 (2), *ibid.*

As indicated, a *temporary residence permit* is a precondition for obtaining a *permanent residence*, and, indirectly, for naturalisation.<sup>144</sup> The problem arises from the fact that a *temporary residence permit* can be issued for the purpose of work, education, research, family reunion and “other legitimate reasons” in line with the law and international agreement.<sup>145</sup> In this way, “lawfulness of stay” appears to be an underlying criteria for eligibility to apply for a *temporary residence permit* and, therefore, for *permanent residence* and, finally, naturalisation. Although “other legitimate reasons” can be interpreted in favour of stateless persons, it is less likely to happen in the absence of mandatory norms, as the approval of *temporary residence* is a possibility, not an obligation of the authority in charge.<sup>146</sup>

“Lawfulness of stay” as a requirement for entitlement or enjoyment of rights is a controversial and debated issue. Without explicit protective norms in the international human rights regime regarding the unlawfully present stateless persons it would be too optimistic to expect that States would address this issue self-initiatively (Van Waas 2008, pp. 369, 370). The requirement of lawful stay is not in collision with the *1954 Convention* which, in most cases, emphasises the “lawfulness of stay” as relevant for entitlement to some rights. This requirement has been challenged in recent publications. According to Gulyai one should bear in mind the historical context when the *1954 Convention* was drafted: the nature and characteristics of statelessness after WWII were different to current ones and the *1954 Convention* should be understood in order to fulfil the challenges of the present, not of the past (Gulyai 2010, p.17). In addition, Van Waas highlights that although the requirement of lawful residence is not considered illegitimate under international law, procedural guarantees are not an exclusive right of foreigners lawfully residing in the State in question. Therefore, in addressing statelessness, one has to be aware of its interconnection with immigration and citizenship law (Van Waas 2008, pp. 172, 256, 370).

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<sup>144</sup> As *permanent residence* is a requirement for naturalisation (Article 14 (1) (3) *LCRS*).

<sup>145</sup> Article 26 (1) *Law on Foreigners*.

<sup>146</sup> Article 26 (1), *ibid.*: “Temporary residence *may* be approved...” (“Privremeni boravak *može* da se odobri...”  
Note: my translation, emphasis added).

Apart from lawfulness of stay, another requirement for obtaining *temporary residence* in Serbia that may be problematic for stateless persons is the proof of “sufficient means of subsistence, health insurance and justification of the request.”<sup>147</sup> It is possible but highly unlikely that a stateless person, as vulnerable as he/she may be, can meet this requirement. In that sense, it can be qualified as an “unreasonable impediment” which is contrary to instructions of the *Council of Europe*.<sup>148</sup>

Some requirements for naturalisation may seem not problematic at all but they are an obstacle for stateless persons, like requiring certain documents that a stateless person cannot possess due to his/her status (Van Waas 2008, p.368). Similarly, insisting on “sufficient means of subsistence” and health insurance may prevent stateless persons from obtaining *temporary residence* in Serbia.

### 5.3.2. Knowledge of Official Language

Language requirement is as an indispensable condition for naturalisation in many countries. The level of required knowledge of language varies from basic to proficiency. In addition, applicants for naturalisation are expected to demonstrate their knowledge of laws, history and culture of the concerned State.<sup>149</sup> However, these requirements should not be used as a tool for discrimination and prevention in acquiring citizenship. Instead, if required, they should serve the purpose of integration.<sup>150</sup>

In Serbia, knowledge of Serbian or any other official language is not a requirement for naturalisation. Likewise, no examination in Serbian history, culture or legal system is required.

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<sup>147</sup> Article 28 (1) *Law on Foreigners*.

<sup>148</sup> Council of Europe *Recommendation R (1999) 18 of the Committee of Ministers to Member States on the Avoidance and Reduction of Statelessness*, Art (1) (i) (d): “The acquisition of nationality by stateless persons should be facilitated and not subject to *unreasonable conditions*” [emphasis added].

<sup>149</sup> The language requirement is requested in naturalisation procedures in Australia, Austria, Canada, Denmark, France, Germany, Mexico, the Netherlands, the United Kingdom and the United States (Goldston 2006, p.337). Similarly, familiarity with history and the Constitution has been an impediment for naturalisation of the Russian minority in Latvia (Weil 2001 in Goldston 2006, p.337). The minimum language knowledge requirement in Estonia is B2 level. In addition, applicants for naturalisation have to demonstrate their familiarity with the *Constitution* in Estonia and Hungary (Mrekajova 2012, pp. 32, 33).

<sup>150</sup> Committee of Experts on Nationality: *Report on Conditions for the Acquisition and Loss of Nationality* (2003). para 35,36. Available at: [http://www.coe.int/t/dghl/standardsetting/nationality/CJ-NA\(2002\)1%20E%20conditions%20nationality%20%20final%20version.pdf](http://www.coe.int/t/dghl/standardsetting/nationality/CJ-NA(2002)1%20E%20conditions%20nationality%20%20final%20version.pdf) [accessed 19 March 2013].

### 5.3.3. Offences

Being of “good character” is another requirement States often impose to applicants for naturalisation. Although being vague, in most cases it refers to convictions for criminal offences, payment of taxes and other legal duties, loyalty to the country in order to prevent threats to public safety. What is of major interest here is whether a criminal record is a permanent obstacle for naturalisation. In most cases, it depends on the time and gravity of the committed crime and type of punishment.<sup>151</sup>

In light of *LCRS*, offences are not relevant for the process of naturalisation. Moreover, according to the *Law on foreigners*, the time period spent in prison does not count into the required time period necessary for approval of *permanent residence*.<sup>152</sup> In that sense, as not being an obstacle for obtaining *permanent residence*, offences are not a barrier in the process of naturalisation either.

### 5.3.4. Conclusion

At first sight, material requirements for naturalisation of stateless persons in Serbia appear to be liberal: the residence requirement does not exceed five years, there is no language, history or Constitution knowledge requirement as well. Criminal offences are not an obstacle for naturalisation either.

However, an in-depth analysis of the substance of the requirement of *permanent residence* highlights the barriers stateless persons may face in meeting the requirements for naturalisation (the condition of lawful residence and financial matters). Although not being an “unreasonable impediment” *per se*, the requirement of *permanent residence* may be unattainable for stateless persons. As indicated, although not illegitimate in international law, the condition of “lawful stay” is a subject matter of a wider human rights debate.

In terms of preferential treatment, there is no differentiation between foreigners and stateless persons regarding reduced duration for residence, as it is recommended by the *Council of*

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<sup>151</sup> *Ibid.* para 32,33.

<sup>152</sup> Article 37 (7) *Law on Foreigners*.

Europe.<sup>153</sup> A shorter period of residence for stateless persons would significantly facilitate their naturalisation.

## 5.4. Procedural Aspects of Naturalisation in Serbia

As recommended by UNHCR and *Council of Europe*, facilitated naturalisation procedure should neither be expensive nor lengthy.<sup>154</sup> Information about the naturalisation requirements should be visible and available to applicants. A proof of loss of nationality must not be a *conditio sine qua non* for naturalisation of stateless persons. The decision should be in a written form, containing reasons for such decision and ensuring administrative or judicial review.<sup>155</sup>

In Serbia, stateless persons are not required to submit a proof of loss of their nationality when submitting the application.<sup>156</sup> Regarding other documents, they are required to submit a travel document for stateless persons and photocopies of the *permanent residence permit*, birth and marriage certificate, a proof of continuous residence and of paid application fees.<sup>157</sup> What remains unclear is what happens if a stateless person cannot submit a birth or marriage certificate (due to their loss or non-existence)? Insisting on unavailable documents could be considered as “unreasonable impediment” for naturalisation.

The administrative fees for naturalisation are affordable: 8 EUR for refugees, expelled and displaced persons and 138 EUR for other applicants.<sup>158</sup>

The authority in charge of acquisition and termination of citizenship is the Ministry of Interior.<sup>159</sup> There is no procedural deadline for nationality matters but the procedure is considered as “urgent”.<sup>160</sup> Although being “urgent” is a vague term, the procedure should not

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<sup>153</sup> Council of Europe, *Recommendation R (1999) 18 of the Committee of Ministers to Member States on the Avoidance and Reduction of Statelessness*, para 2 (b): “Each State should facilitate the acquisition of its nationality by stateless persons lawfully and habitually resident on its territory, and in particular each State should: a. reduce the required period of residence in relation to the normal period of residence required...”

<sup>154</sup> See *supra* note 126 and 127(c).

<sup>155</sup> See *supra* note 126 and 127.

<sup>156</sup> Article 14 (2) *LCRS*

<sup>157</sup> See [http://www.mup.gov.rs/cms\\_lat/dokumenta.nsf/drzavljanstvo\\_h](http://www.mup.gov.rs/cms_lat/dokumenta.nsf/drzavljanstvo_h) [accessed 22 March 2013].

<sup>158</sup> *Ibid.* For the purpose of comparison, the fees for the naturalisation procedure are free of charge in Hungary, 12.78 EUR in Estonia, 663.50 EUR in Slovakia (Mrekajova 2012, pp. 48-50).

<sup>159</sup> Article 38 (1) *LCRS*.

<sup>160</sup> Article 38 (2), *ibid.*

take more than two months as that is the maximum general length for decision making in administrative procedures in Serbia.<sup>161</sup> However, practice shows that procedures in nationality matters in Serbia often last longer, for several months or even more (Rava 2010, p.18) which is similar to some other countries, as the naturalisation procedures in Hungary, Slovakia and Estonia last approximately 12 to 15 months (Mrekajova 2012, p.48).

The decision on naturalisation should be in a written form but it does not have to contain reasons for rejection as conferring nationality is a discretionary right of the Ministry of Interior. Even if all requirements are met, the application for naturalisation can be rejected if that is in the interest of the Republic of Serbia. Since the reasons for rejection are in public interest, concrete reasons need not be stated.<sup>162</sup> There is a possibility of filing a complaint before the Administrative Court against the decision on naturalisation.<sup>163</sup>

With regards to visibility and availability of information on the naturalisation procedure, the English version of the website of the Ministry of Interior contains all the relevant laws and regulations regarding foreigners and their rights in Serbia, but no information is given about nationality matters. For persons who speak the Serbian language, all the necessary information regarding acquisition of citizenship is provided.<sup>164</sup>

### **5.4.1. Conclusion**

The procedural aspects of the naturalisation procedure in Serbia are not complicated but not facilitated, either, for stateless persons. In terms of its length, stateless persons could have a priority. Regarding the required documents, the birth and marriage certificate should not be mandatory. On the other hand, the price of the naturalisation procedure is affordable. There is also a possibility of decision review. What needs to be improved is to include reasoning in all decisions regarding nationality matters, even if rejection of one's application is in public

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<sup>161</sup> Article 208 (1) *Law on General Administrative Procedure* ("Official Gazette of the Republic of Serbia" No. 33/97, 31/2001, 30/2010). Available at:

[http://paragraf.rs/propisi\\_download/zakon\\_o\\_opstem\\_upravnom\\_postupku.pdf](http://paragraf.rs/propisi_download/zakon_o_opstem_upravnom_postupku.pdf) [accessed 24 February 2013].

<sup>162</sup> Republic of Serbia, Administrative Court Judgement on June 10, 2011, No.9 U 4850/2011 (source of information: Paragraf Lex software).

<sup>163</sup> Article 14 (2) *Law on Administrative Disputes (2009)*, "Official Gazette of the Republic of Serbia" No. 111/2009. Available at: [http://www.paragraf.rs/propisi/zakon\\_o\\_upravnim\\_sporovima.html](http://www.paragraf.rs/propisi/zakon_o_upravnim_sporovima.html) [accessed 18 February 2013].

<sup>164</sup> See [http://www.mup.gov.rs/cms\\_cir/dokumenta.nsf/drzavljanstvo.h](http://www.mup.gov.rs/cms_cir/dokumenta.nsf/drzavljanstvo.h) [accessed 20 February 2013].



interest. Regarding the availability of information, the website of the Ministry of Interior should contain necessary data about the naturalisation procedure in English. A promotional campaign would also significantly improve the dissemination of information about naturalisation.<sup>165</sup>

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<sup>165</sup> A proactive approach in this regard is the one applied by the *Integration and Migration Foundation Our People* in Slovakia which launched a promotional campaign about naturalisation procedures. It also operates an information call centre, publishes informative materials and prepares the applicants for citizenship examination (Mrekajova 2012, p.52). There is no reason why the Ministry of Interior in Serbia could not implement similar measures.

# CHAPTER 6

## 6. Protection of Stateless Persons

### 6.1. Introduction

Protection of stateless persons did not get much attention in international law. The only direct source of law in this respect is the *1954 Convention* which guarantees a minimum set of rights stateless persons should enjoy (Gulyai 2010, p.12). The lack of other binding norms highlights the fact that protection of stateless persons is intended to be a temporary tool for ensuring their basic rights, until nationality is acquired.<sup>166</sup> However, as States have to comply with international human rights law which offers a wider range of protection to everyone without discrimination on the grounds of nationality, protection of stateless persons surely implies more than the *1954 Convention* imposes to State Parties.

In protecting stateless persons, two issues appear to be crucial: the identification of stateless persons and range of rights stateless persons are entitled to. Although the *1954 Convention* fails to suggest any procedure for the identification of the stateless status, the UNHCR urges the State Parties to identify stateless individuals in order to meet their obligations under the *1954 Convention*.<sup>167</sup> However, even if established, identification of statelessness is declaratory: a person who meets the criterion of the *1954 Convention* is stateless regardless of whether this status is confirmed by a public authority or not. Therefore, the rights guaranteed in the *1954 Convention* should be conditioned by the nature of the connection to the State in question, not by a formal recognition of one's stateless status.<sup>168</sup>

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<sup>166</sup> UNHCR (2010) *Protecting the rights of Stateless Persons: The 1954 Convention relating to the Status of Stateless Persons*, p.9. Available at: <http://www.unhcr.org/4ca5941c9.html> [accessed 26 December 2012].

<sup>167</sup> UNHCR (2012) *Guidelines on Statelessness no. 2: Procedures for Determining whether an Individual is a Stateless Person*, p.2. HCR/GS/12/02, 5 April 2012. Available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html> [accessed 26 January 2013].

<sup>168</sup> UNHCR (2012) *Guidelines on Statelessness no. 3: The Status of Stateless Persons at the National Level*, p.3. HCR/GS/12/03, 17 July 2012. Available at: <http://www.unhcr.org/refworld/docid/5005520f2.html> [accessed 26 January 2013].

Statelessness determination procedure is necessary for statelessness in a migratory context in order to ensure at least the minimum of rights for persons who would otherwise be left in a legal limbo. Protection of *in situ* statelessness (statelessness in a non-migratory context) serves its purpose by its reduction, i.e. by granting nationality on the grounds of a long-term existing tie (residence, for example) with the State in question.<sup>169</sup>

In light of the *1954 Convention*, rights that stateless persons are entitled to are not unconditional: the enjoyment of rights depends on fulfilment of certain conditions (being subject to the state's jurisdiction, physical presence, lawful presence, lawful stay and durable residence). Similarly, some rights are absolute, while in other cases the status of stateless persons is equated to those of nationals or foreigners (Van Waas 2008, pp. 229, 230).

## 6.2. Determination of Statelessness

### 6.2.1. International Standards

Although not required by the *1954 Convention*, the obligation of identification of stateless persons derives from its purpose: in order to ensure the enjoyment of guaranteed rights, those who qualify for the protection should be visible. Statelessness determination procedure leads to a formal recognition of one's stateless status, whether on group (on a *prima facie*) or individual basis. This procedure may be a procedure *per se* (serves only for determining statelessness) or an integral part of other, already existing, procedures, like those within aliens, immigration or refugee law.<sup>170</sup>

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<sup>169</sup> UNHCR (2012) *Guidelines on Statelessness no. 2: Procedures for Determining whether an Individual is a Stateless Person*, p.3. HCR/GS/12/02, 5 April 2012. Available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html> [accessed 26 January 2013].

<sup>170</sup> UNHCR and Open Society Justice Initiative (2010) *Expert Meeting: Statelessness Determination Procedures and the Status of Stateless Persons - Summary Conclusions*, pp. 1-3. 6-7 December 2010. Available at: [http://www.iarlj.org/general/images/stories/BLED\\_conference/papers/WP\\_Statelessness\\_Geneva\\_Meeting\\_Conclusions\\_L\\_Figg.pdf](http://www.iarlj.org/general/images/stories/BLED_conference/papers/WP_Statelessness_Geneva_Meeting_Conclusions_L_Figg.pdf) [accessed 15 March 2013]. In lack of comprehensive data, my research has found that the following countries have established the statelessness determination procedure: France, Hungary, Italy, Spain, Philippines, Latvia, Moldova, Georgia, United Kingdom. See: Gulyai 2012, p.287, also: <http://www.unhcr.org/pages/4ff2bdf6.html> , <http://www.unhcr.org/5163f0ba9.html>

Statelessness determination procedures are both protective and preventive in nature: by finding that a person is stateless, the procedure confirms one's special (stateless) status and enables him/her enjoyment of rights set forth in the *1954 Convention*; on the other hand, if the nationality of a person gets confirmed within the statelessness determination procedure, then the procedure serves its preventive role, i.e. the person is out of risk of being stateless.<sup>171</sup>

## 6.2.2. Determination of Statelessness in Serbia

Although stateless persons are recognised in Serbian legislation, the notion of a stateless person has not been defined. Instead, statelessness is equated with alienage: "Every person who does not possess Serbian citizenship is considered as a foreigner"<sup>172</sup> or "A foreigner is any person who is not a citizen of the Republic of Serbia, whether being a foreign national or a stateless person".<sup>173</sup> However, stateless persons are not completely equated with alienage as the *Law on Foreigners* provides for their preferential status: "If it is more favourable to stateless persons, the provisions of the *Convention Relating to the Status of Stateless Persons* will be applied."<sup>174</sup> In this way, a distinction has been made between "regular foreigners" and "stateless foreigners". In addition, the *Law on Foreigners* does not apply to foreigners who are asylum seekers, refugees and those who enjoy privileges and immunities under international law.<sup>175</sup>

What appears problematic, is that Serbia does not have a statelessness determination procedure. There were some cases of stateless status determination in *ad hoc* procedures, without any formal rules or criteria such a procedure should follow.<sup>176</sup>

According to an internal report of UNHCR in 2011, the Ministry of Interior has recognised

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<sup>171</sup> UNHCR (2012e) Procedures for determining whether individuals are stateless: an overview, p.NA. Available at: <http://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS%20kick-off%20seminar%202012%20-%20Statelessness%20Determination%20Procedures.pdf> [accessed 15 March 2013].

<sup>172</sup> Article 3 (1) (1) of *Law on Foreigners* ("Stranac je svako lice koje nema državljanstvo Republike Srbije." Note: my translation).

<sup>173</sup> Article 2 (1) (3) of *Law on Asylum 2007* ("Stranac je svako lice koje nije državljanin Republike Srbije, bilo da je strani državljanin ili lice bez državljanstva." Note: my translation). "Official Gazette of the Republic of Serbia" No. 109/2007. Available at <http://www.unhcr.org/refworld/docid/47b46e2f9.html.%20Do%201.%20aprila%202008> [accessed 24 March 2013].

<sup>174</sup> Article 2(2) *Law on Foreigners* ("Na lica bez državljanstva primenjuju se odredbe Konvencije o pravnom položaju lica bez državljanstva, ako je to za njih povoljnije." Note: my translation).

<sup>175</sup> Article 2 (1), *ibid.*

<sup>176</sup> See <http://www.statelessness.eu/blog/addressing-statelessness-western-balkans-%E2%80%93-ens-and-weblan-joint-workshop> [accessed 27 April 2013].

155 persons as stateless in an *ad hoc* procedure, out of which 146 have obtained *permanent residence* and 9 have been granted *temporary residence*.<sup>177</sup> There is no official information or statistics regarding *de jure* stateless persons in Serbia and the *ad hoc* procedures in which this status is determined.

## 6.3. Rights of Stateless Persons

As indicated, the *1954 Convention* contains a minimum set of rights the State Parties should guarantee to stateless persons.<sup>178</sup> The upcoming sub-chapters will explore to which extent Serbia complies with rights that I have found as most important regarding the inclusion of stateless persons into society, as guaranteed by the *1954 Convention* (right to travel documents, identity papers, wage-earning employment, self-employment, labour and social security, public education).

### 6.3.1. Travel Documents

Having recognised the importance of freedom of movement, the *1954 Convention* urges the State Parties to issue travel documents to all stateless persons, even if residing illegally in their territory:

The Contracting States *shall issue to stateless persons lawfully staying* in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the

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<sup>177</sup> UNHCR (2011) *Report on Statelessness in South Eastern Europe*, p.14. Available at: <http://www.refworld.org/country,...MNE,,514d715f2,0.html> [accessed 17 April 2013].

<sup>178</sup> The *1954 Convention* guarantees the rights regarding access to courts, non-discrimination, movable and immovable property, transfer of assets, rationing, education, fiscal charges, naturalisation (*if being subjected to the State's jurisdiction*), freedom of religion, identity papers (*if physically present in the territory of the State Party*), freedom of movement (*in case of one's lawful presence*), artistic rights and industrial property, administrative assistance, association, wage-earning employment, self-employment, practicing liberal professions, housing, public relief and assistance, labour and social security, travel documents, prohibition of expulsion, exemption from legislative reciprocity (*if meeting the requirement of lawful stay or habitual residence*). See Van Waas 2008, pp. 229, 230.

provisions of the schedule to this Convention shall apply with respect to such documents. The Contracting States *may* issue such a travel document *to any other stateless person in their territory*; they shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence.<sup>179</sup>

In line with the *1954 Convention*, stateless persons in Serbia are issued with a travel document (“putna isprava”) by a competent authority of their place of residence or stay. The travel document is valid for two years<sup>180</sup> and it is charged approximately 60 EUR.<sup>181</sup>

As the relevant authority is the one of the “place of residence or stay” of a stateless person, it indicates that travel documents are issued only to *lawfully* staying stateless persons.

Considering that no further regulations exist regarding issuing travel documents, its procedural aspects and necessary requirements remain unclear.

### 6.3.2. Identity Papers

Pursuant to Article 27 of the *1954 Convention*: “The Contracting States shall issue identity papers to *any* stateless person in their territory who does not possess a valid travel document”.<sup>182</sup>

Neither the *Law on Foreigners* nor other laws mention issuing an identity paper (identity card) for stateless persons. In this way, stateless persons who do not meet the requirements for issuing a travel document will remain “legally invisible” and without any proof of their identity (illegally staying stateless persons, stateless persons in transit or those who have not been granted a *temporary* or *permanent residence permit*).

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<sup>179</sup> Article 28 of the *1954 Convention* [emphasis added].

<sup>180</sup> Article 60, *Law on Foreigners*.

<sup>181</sup> *Law on Republic Administrative Fees*, Tariff number 37 (2003, 2005, 2009, 2011, 2012). “Official Gazette of the Republic of Serbia” No. 43/2003, 51/2003, 61/2005, 101/2005, 5/2009, 54/2009, 50/2011, 70/2011, 55/2012, 93/2012), available at:

[http://paragraf.rs/propisi/zakon\\_o\\_republickim\\_administrativnim\\_taksama.html](http://paragraf.rs/propisi/zakon_o_republickim_administrativnim_taksama.html) [accessed 20 February 2013].

<sup>182</sup> Article 27 of the *1954 Convention* [emphasis added].

### 6.3.3. Wage-Earning Employment

In light of the *1954 Convention*, stateless persons should have at least the same treatment as foreigners in the same circumstances regarding their *access* to wage-earning employment. In terms of *rights* arising from wage-earning employment, States are recommended to equate stateless persons to nationals.<sup>183</sup>

Serbia complies with its obligations under Article 17 of the *1954 Convention*: stateless persons enjoy the same rights as foreigners regarding the right to engage in wage-earning employment<sup>184</sup> and they are also entitled to the same rights, duties and responsibilities arising from employment as Serbian nationals (unless the law stipulates otherwise).<sup>185</sup>

However, an in-depth analysis shows that although foreigners and stateless persons have equal access to the labour market, the scope of its effect is very limited: they have to possess a *permanent* or *temporary residence permit* and a *work permit* unless being professionally engaged on the grounds of business and technical cooperation, long-term production cooperation, transfer of technology and foreign investments (in which case no *work permit* is needed but the condition of *permanent residence* or *temporary stay* is still required). In addition, a possibility of employing a foreigner or a stateless person for a certain position has to be previously foreseen in a general act of the employer.<sup>186</sup>

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<sup>183</sup> Article 17 of the *1954 Convention*: “1. The Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to *aliens* generally in the same circumstances, as regards *the right to engage* in wage-earning employment. 2. The Contracting States shall give sympathetic consideration to *assimilating the rights of all stateless persons with regard to wage-earning employment to those of nationals*, and in particular of those stateless persons who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.” [emphasis added].

<sup>184</sup> Article 1 of the *Law on the Conditions for the Employment of Foreign Citizens* (1978, 1989, 1992, 1994, 1996, 2005) “Official Gazette of SFRY” No. 11/78, 64/89, “Official Gazette of SRY” No. 42/92, 24/94, 28/96 and “Official Gazette of the Republic of Serbia” No. 101/2005. Available at:

[http://www1.nsz.gov.rs/live/digitalAssets/0/34\\_zakon\\_o\\_uslovima\\_za\\_zasnivanje\\_radnog\\_odnosa\\_sa\\_stranim\\_drzavljanima.pdf](http://www1.nsz.gov.rs/live/digitalAssets/0/34_zakon_o_uslovima_za_zasnivanje_radnog_odnosa_sa_stranim_drzavljanima.pdf) [accessed 20 February 2013].

<sup>185</sup> Article 2 (3) *Labour Law* (2005, 2005, 2009) “Official Gazette of the Republic of Serbia” No. 24/05, 61/05, 54/09. Available at:

<http://www.ilo.org/dyn/travail/docs/2403/Labour%20Law%20Republic%20of%20Serbia.pdf> [accessed 16 March 2013].

<sup>186</sup> Article 2, *Law on the Conditions for the Employment of Foreign Citizens*.

Another barrier in the access to the labour market is reflected in the fact that a *work permit* may be provided to a foreigner or a stateless person only if no registered job-seeker (citizen of Serbia) meets the requirements for the post the foreigner/stateless person is applying for. Otherwise, the *National Employment Service* may reject the application for a *work permit*.<sup>187</sup>

#### 6.3.4. Right to Self-Employment

The *1954 Convention* urges the State Parties to enable the stateless persons the same *access* to self-employment as foreigners generally in the same circumstances:

The Contracting States shall accord to a stateless person lawfully in their territory treatment *as favourable as possible and, in any event, not less favourable* than that accorded to *aliens generally in the same circumstances*, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.<sup>188</sup>

In line with the *1954 Convention*, foreigners and stateless persons are entitled to found a company in Serbia, to be its member or an employee, and also to be engaged in entrepreneurship (Privredna komora Srbije 2012, p.24).

#### 6.3.5. Rights regarding Labour and Social Security

Pursuant to Article 24 (1) of the *1954 Convention*, States should ensure the same treatment of stateless persons as to that of nationals regarding the main aspect of labour rights and social security.<sup>189</sup>

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<sup>187</sup> Article 5 of the *Rules on Conditions and Way of Issuing Work Permits to Foreigners and Stateless Persons* (2010). "Official Gazette of the Republic of Serbia" No. 22/2010. Available at: <http://www.podaci.net/z1/9116746/P-unidrs03v1022.html> [accessed 20 February 2013].

<sup>188</sup> Article 18 of the *1954 Convention* [emphasis added].

<sup>189</sup> Article 24 (1) *ibid.*: "The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment as is accorded to *nationals* in respect of the following matters: (a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: *remuneration*,



In Serbia, the provisions of the *Labour Law* apply to nationals, foreigners and stateless persons who are employed on the territory of the Republic of Serbia, unless the law stipulates otherwise.<sup>190</sup> In terms of labour related rights, there are no exceptions for stateless persons apart from the conditions for employment which are discussed in section 6.3.3.

Regarding unemployment, foreigners and stateless persons may register as unemployed at the *National Employment Service* and therefore, they are entitled to the same rights as nationals if provided with a *temporary* or *permanent residence permit* and a *work permit*.<sup>191</sup> Similarly, foreigners and stateless persons enjoy equal treatment as nationals regarding pension and disability insurance<sup>192</sup> and compulsory health insurance.<sup>193</sup>

Stateless persons who are not entitled to benefit from compulsory health insurance, whether residing in Serbia or being in transit, will bear the costs of treatments in public and private health institutions unless being granted asylum and being in financial need, suffering from certain diseases (smallpox, plague, cholera, viral hemorrhagic fever, malaria, yellow fever or other infectious diseases), suffering from sexually transmitted diseases (if being a crew

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*including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining; (b) Social security (legal provisions in respect of employment, injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which according to national laws or regulations, is covered by a social security scheme), subject to the following limitations: (i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition; (ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension". [emphasis added].*

<sup>190</sup> Article 2 (3) *Labour Law*.

<sup>191</sup> Article 85 (2) *Law on Employment and Unemployment Insurance* (2009, 2010) "Official Gazette of the Republic of Serbia" No. 36/2009, 88/2010. Available at:

[http://www.paragraf.rs/propisi/zakon\\_o\\_zaposljavanju\\_i\\_osiguranju\\_za\\_slucaj\\_nezaposlenosti.html](http://www.paragraf.rs/propisi/zakon_o_zaposljavanju_i_osiguranju_za_slucaj_nezaposlenosti.html) [accessed 20 February 2013].

<sup>192</sup> Article 11 (1), (6), (8) *Pension and Disability Insurance Law* (2003, 2004, 2005, 2006, 2009, 2010, 2012) "Official Gazette of the Republic of Serbia" No. 34/2003, 64/2004, 84/2004, 85/2005, 101/2005, 63/2006, 5/2009, 107/2009, 101/2010, 93/2012). Available at:

[http://www.paragraf.rs/propisi/zakon\\_o\\_penzijskom\\_i\\_invalidskom\\_osiguranju.html](http://www.paragraf.rs/propisi/zakon_o_penzijskom_i_invalidskom_osiguranju.html) [accessed 20 February 2013].

<sup>193</sup> Article 17 (1), (6), (10) *Law on Health Insurance* (2005, 2011, 2012) "Official Gazette of the Republic of Serbia" No. 107/2005, 109/2005, 57/2011, 110/2012, 119/2012. Available at:

[http://www.paragraf.rs/propisi/zakon\\_o\\_zdravstvenom\\_osiguranju.html](http://www.paragraf.rs/propisi/zakon_o_zdravstvenom_osiguranju.html) [accessed 20 February 2013].

member of a foreign vessel) or being a victim of human trafficking, in which case the treatment costs will be borne by the Republic of Serbia.<sup>194</sup>

In other cases, stateless persons have to pay for medical treatments, even if being in financial need which is not the case with persons who has been granted asylum or refugees, whose medical costs are covered by the State.<sup>195</sup>

### 6.3.6. Right to Education

As regards to *elementary education*, the *1954 Convention* insists that stateless persons are equated with *nationals*. At *other levels of education*, they should enjoy the same treatment as *foreigners* in the same circumstances, especially in terms of access to studies, recognition of education obtained abroad, financial support.<sup>196</sup>

In Serbia, stateless persons enjoy a wider range of rights in their access to public education than those prescribed in the *1954 Convention*.

Foreign citizens and stateless persons are entitled to education under the same conditions as Serbian nationals. As public education on a pre-school, elementary and secondary level is free of charge, this applies to stateless persons as well.<sup>197</sup> In addition, parents of stateless, expelled or displaced children are paying a reduced fee for childcare in pre-school institutions.<sup>198</sup>

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<sup>194</sup> Article 240 and 241 *Law on Health Protection* 2005, 2009, 2010, 2011, 2012) “Official Gazette of the Republic of Serbia” No. 107/2005, 72/2009, 88/2010, 99/2010, 57/2011, 119/2012. Available at: [http://www.paragraf.rs/propisi/zakon\\_o\\_zdravstvenoj\\_zastiti.html](http://www.paragraf.rs/propisi/zakon_o_zdravstvenoj_zastiti.html) [accessed 20 February 2013].

<sup>195</sup> Article 238 (3), 241 (1(3)) and 242 *ibid*.

<sup>196</sup> Article 22 of the *1954 Convention*: “(1) The Contracting States shall accord to stateless persons the same treatment as is accorded to nationals with respect to elementary education. (2) The Contracting States shall accord to stateless persons treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.”

<sup>197</sup> Article 6 (3) and 91 (1) of *Law on the Fundamentals of the Education System* (2009, 2011). “Official Gazette of the Republic of Serbia” No. 72/2009, 52/2011. Available at: [http://planipolis.iiep.unesco.org/upload/Serbia/Serbia\\_Law\\_fundamentals\\_education\\_system\\_eng.pdf](http://planipolis.iiep.unesco.org/upload/Serbia/Serbia_Law_fundamentals_education_system_eng.pdf) [accessed 16 March 2013].

<sup>198</sup> Article 14, *Law on Preschool Education* (2010), “Official Gazette of the Republic of Serbia” No. 18/2010. Available at: <http://www.impres.rs/assets/documents/zakon-o-predskolskom-vaspitanju-i-obrazovanju-en-US/lawofpreschoolserbiaENGLISH.pdf> [accessed 16 March 2013].

Foreigners and stateless persons are equated with nationals regarding primary and secondary education. Moreover, in case if stateless, foreign, expelled or displaced children do not speak the language of instruction, the schools organise additional language classes and other kinds of support to facilitate the child's inclusion into the education system.<sup>199</sup>

In terms of higher education, no reference is made to stateless persons, so provisions regarding foreigners have been analysed. A foreign citizen may be enrolled to a higher education institution under the same conditions as citizens of Serbia and if he/she speaks the language of instruction which is to be confirmed by passing a language proficiency test.<sup>200</sup>

As only nationals are entitled to free of charge studying at public universities, foreign students have to pay the tuition fee.<sup>201</sup> Since everyone who is not a national is considered as a foreigner in Serbia,<sup>202</sup> the above-mentioned requirements for foreigners apply to stateless persons as well.

Recognition of elementary and secondary school certificates obtained abroad is available and affordable to stateless persons: 17 EUR for elementary and 34 EUR for secondary school certificates.<sup>203</sup> By contrast, the fees for recognition of higher education degrees are substantial depending on one's legal interest: 90 EUR for the purpose of education and 430-1000 EUR for the purpose of employment (depending on the level of study).<sup>204</sup> Higher education degrees obtained before 27 April 1992 on the territory of the former SFRY are recognised automatically, which is certainly beneficial for stateless persons who lost their citizenship due to state succession.<sup>205</sup> In other cases, high administrative fees may prevent stateless persons to apply for recognition of higher education degrees.

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<sup>199</sup> Article 100, *Law on the Fundamentals of the Education System*.

<sup>200</sup> Article 82 (2), (3), (4) *Law on Higher Education* (2005, 2007, 2008, 2010, 2012) "Official Gazette of the Republic of Serbia" No. 76/2005, 100/2007, 97/2008, 44/2010, 93/2012. Available at: [http://www.paragraf.rs/propisi/zakon\\_o\\_visokom\\_obrazovanju.html](http://www.paragraf.rs/propisi/zakon_o_visokom_obrazovanju.html) [accessed 16 March 2013].

<sup>201</sup> Article 82 (6) *ibid*.

<sup>202</sup> Article 3 (1) (1) *Law on Foreigners*.

<sup>203</sup> See: [http://www.puma.vojvodina.gov.rs/etext.php?ID\\_mat=1102&PHPSESSID=61ijmmkv8go55cvs42kgb66k5](http://www.puma.vojvodina.gov.rs/etext.php?ID_mat=1102&PHPSESSID=61ijmmkv8go55cvs42kgb66k5)

<sup>204</sup> The costs of diploma recognition at the University of Belgrade and University of Novi Sad. See [www.bg.ac.rs](http://www.bg.ac.rs), [www.uns.ac.rs](http://www.uns.ac.rs)

<sup>205</sup> Article 104 (6) *Law on Higher Education*.

### 6.3.7. Conclusion

Overall, rights which are the subject matter of this research are guaranteed to stateless persons but some gaps and ambiguities have been identified.

First and foremost, the main problem in the protection of rights of stateless persons is the lack of a statelessness determination procedure in Serbia. As identification of stateless persons takes place in *ad hoc* procedures, without any rules or guidelines, it is more likely that decision making may be arbitrary and discretionary. In order to enable the access to rights stateless persons are entitled to, a transparent statelessness determination procedure should be established otherwise the right bearers will remain invisible.

Travel documents are issued only to legally residing stateless persons and not to “any other stateless person in its territory” as suggested by the *1954 Convention*. Identity papers are not issued at all. As indicated, illegally staying stateless persons or those in transit or those who do not meet the requirement for *temporary* or *permanent residence permit* are at risk of being without any identification document. In lack of such documents, stateless persons are denied their freedom of movement and other rights, as well, as they cannot prove their identity nor their entitlement.

As regards to wage-earning employment, Serbia complies with requirements of the *1954 Convention*, nevertheless, access to the labour market for stateless persons is limited as they are required to possess a *permanent* or *temporary residence permit* and a *work permit*.

Although enjoying a range of rights in terms of social security, those stateless persons who are not entitled to compulsory health insurance are bearing the costs of their treatments (unless granted an asylum, suffering from certain diseases or being a victim of human trafficking). As the costs of medical treatment for persons who have been granted asylum and refugees who are in financial need are covered by the State, an inclusive provision regarding stateless persons would meet their needs of protection as well.

The right to education of stateless persons in Serbia is far more inclusive than is required by the *1954 Convention*. Public education on the pre-school, primary and secondary level is free of charge for everyone, for stateless persons as well. Recognition of diplomas obtained abroad (for primary and secondary schools) is also affordable. In terms of higher education, stateless persons are equated with foreigners and, therefore, they are subject to payment of tuition fees and high administrative fees for the recognition of diplomas (unless having obtained them on the territory of former SFRY). Bearing in mind the vulnerability of stateless persons, costs of studying may be a barrier in their access to higher education.

# CHAPTER 7

## 7. GENERAL CONCLUSION AND RECOMMENDATIONS

### 7.1. Conclusion

This study is aimed at examining how Serbia complies with its international obligations in addressing statelessness. The guiding idea of the research was to do an in-depth analysis of the existing regulations in Serbia in order to reveal their scope and efficiency with regards to the prevention and reduction of statelessness and the protection of stateless persons. In this regard, the research process has evolved from general to specific, starting from the existing international framework, as a background for the study, followed by a local context.

As presented in Chapter 1, statelessness is a complex global phenomenon that came to the fore in aftermath of the World Wars. Although occurring in two forms (*de jure* and *de facto* statelessness), the core of statelessness is indivisible: denial of basic human rights, leaving the affected individuals excluded from political and societal membership. In most cases, statelessness is created through laws as a result of racial or gender discrimination, state succession, conflict of laws and legal gaps. As it has been neglected for decades, the research questions paved the way for exploring how statelessness is addressed on a national level, i.e. in Serbia.

Chapter 2 introduced the concepts of nationality and citizenship, their interrelation and the relevant international legal framework which highlighted the main obligations with regards to statelessness. Aiming to investigate *de jure* statelessness in the Serbian context, a traditional legal research method has been conducted, as described in Chapter 3.

Chapter 4 focused on the prevention of statelessness, i.e. it analysed whether *LCRS* incorporates effective safeguards against statelessness. Findings have shown that despite a general tendency to avoid statelessness, several gaps have been identified with regards to acquisition and termination of Serbian nationality.

As the only effective measure for the reduction of statelessness is conferring citizenship through naturalisation (Gulyai 2010, p.47), an evaluation of material and procedural requirements for naturalisation in Serbia has been the subject matter of Chapter 5. In those terms, the aim was to uncover to what extent the naturalisation process is facilitated to stateless persons. The findings indicate that requirements for naturalisation of stateless persons are liberal in their form but contain unreasonable impediments in their essence (lawfulness of stay, economic means, health insurance). Considering that stateless persons represent a vulnerable group, such requirements are rather exclusive than inclusive. As conferring nationality is a discretionary right of the Ministry of Interior, right to a nationality is not an entitlement, it is an “option”. Having such discretion ignores the fact that the right to a nationality is a positive right and it implies not only refraining of causing statelessness but requires proactive measures in recognition of the legal bond between the individual and the State, as well (Batchelor 1998, p.81).

In terms of preferential treatment, there is no differentiation between foreigners and stateless persons regarding reduced duration for residence. Still, the naturalisation process is facilitated for persons with an “ethnic tie” to the territory of Serbia which reflects the intricacy of nationality in legal and ethnological terms. Although not directly aiming to avoid statelessness, naturalisation on ethnic grounds can significantly contribute to the reduction of statelessness in the context of State succession and *in situ* statelessness,<sup>206</sup> as well.

Finally, protection of stateless persons has been addressed in Chapter 6. The aim of this section was to explore the “legal visibility” of stateless persons and to examine the implementation of several rights guaranteed by the *1954 Convention*. The study has shown that stateless persons are recognised in Serbian legislation. They are either included under the term “foreigner” or are mentioned separately. However, the main problem is that there is no statelessness determination procedure. Identification of stateless persons takes place in *ad hoc* procedures of the Ministry of

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Interior. Since there are no regulations on this matter, decision making on recognition of stateless status is discretionary and lacks in transparency. As a consequence, there are no official statistics on number of *de jure* stateless persons in Serbia. Similarly, the information about submitted (and rejected) applications for the determination of stateless status is not available. In order to comply with its international obligations, Serbia should establish a statelessness determination procedure: only if identified, stateless persons have access to rights they are entitled to.

In terms of their “legal visibility”, lawfully staying stateless persons are issued a travel document. With regards to identity papers, Serbia does not fulfil its international obligations as no such document is issued to stateless persons. In both cases, illegally staying stateless persons, stateless persons in transit or those who have not been granted a *temporary* or *permanent residence permit* remain without any proof of their identity which further prevents them in exercising freedom of movement and accessing the rights they are entitled to.

With regards to employment, stateless persons enjoy the same rights as Serbian nationals. What appears to be problematic is their access to the labour market as stateless persons are, in most cases, required to have a *permanent* or *temporary residence permit* and a *work permit*. In addition, a *work permit* can be obtained only if no nationals who meet the requirements of the job are applying for the same position. Once they are employed, stateless persons enjoy all the benefits like nationals (including pension and health insurance). As indicated, what is disputable is not the right to work but the access to employment. In that sense, the mentioned requirements are “unreasonable impediments” for stateless persons.

The right to education is accessible to stateless persons. Stateless persons are entitled to free of charge pre-school, primary and secondary education. Also, recognition of foreign primary and secondary school certificates is affordable. In terms of higher education, stateless persons, just like foreigners, are subject to payment of expensive tuition fees and administrative taxes for recognition of higher education degrees.

Overall, the intention to prevent and reduce statelessness in Serbia is unquestionable. Serbia is a State Party to both statelessness conventions. The *LCRS* aims to prevent statelessness, but several gaps have been identified. Although lack of citizenship is generally not an obstacle for



accessing the rights which were the subject matter of this research, the analysis showed that “unreasonable impediments” are imposed by other laws and bylaws. Therefore, the harmonisation of relevant legal acts needs to be made.

Finally, in order to exercise the rights they are entitled to, stateless persons should be legally visible. Therefore, it is essential to establish a statelessness determination procedure, otherwise the rights guaranteed will remain without right holders.

## 7.2. Recommendations

In light of this study, the following recommendations are proposed:

- Serbia to ratify the *European Convention on Nationality* and the *Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession*
- To establish a statelessness determination procedure
- To amend the *Law on Citizenship*:
  - to confer citizenship to a child of foreign national parents (or if a mother is a foreign citizen, and the father is unknown, or of unknown nationality or stateless) is abandoned immediately after birth in hospital in Serbia if the child’s nationality is not established or the child is not repatriated until the child’s first birthday
  - a child born on a ship or plane registered in Serbia should be granted Serbian citizenship if otherwise remaining stateless
  - to delete the deadline for the application for cancellation of decree on release from citizenship of the Republic of Serbia (Article 32 (2))
  - to make the requirement of residence for the naturalisation of stateless persons shorter than those for foreigners (Article 14)
  - not to insist on birth and marriage certificates from stateless persons when applying for naturalisation

- to supply the decision on naturalisation with reasoning
- To amend the *Law on Foreigners*:
  - to facilitate the requirements for obtaining a *temporary residence permit* for stateless persons in terms of their lawful stay, financial requirements and health insurance (Article 26 (1), 28 (1))
- To issue identity papers to stateless persons
- To issue travel documents to all stateless persons (not only to those lawfully staying)
- To facilitate the access to the labour market for stateless persons
- To improve the English version of the website of Ministry of Interior and raise awareness about statelessness and the naturalisation procedure
- In terms of further research, comparative studies (especially regarding statelessness determination procedure) would definitely contribute to the understanding of the statelessness phenomenon.

**Word Count: 16.980**

Justification: for the purpose of answering the research questions, it was necessary to refer to international and national legislation.

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**NOTE:** for the purpose of this dissertation, I have used a special legal software Paragraf Lex that contains the updated versions of laws and bylaws in Serbia. My analysis is a result of interpretation of regulations as contained in Paragraf Lex software (in Serbian language). The links I am referring to are informative, in case the reader is interested in the original version (I referred to English version where applicable).

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