EXPLANATORY REPORT

Adopted by the General Assembly at Interlaken on 12 September 1973

The aim of this Convention is to reduce the number of cases of statelessness.

Article 1 lays down the rule that a child whose mother holds the nationality of a Contracting State acquires that nationality if he or she would otherwise have been stateless. This rule applies to both legitimate and natural children.

The effect of the rule will be that a child who does not take nationality from his or her father and is not born in the territory of a country applying the *ius soli*, will acquire, at birth, his or her mother's nationality. Such a rule is already incorporated in the legislation of several member States of the ICCS but there are others which are reluctant to introduce it because they consider that in matters of nationality the child's links should preferably be with the father.

Nevertheless, there were indications that the latter States might accept such a child as one of their nationals if he or she was born in the territory of a Contracting State, which would guarantee a measure of reciprocity. That is why Article 4 (a) of the Convention affords the option of confining the application of the rule to children born in the territory of a Contracting State.

States whose legislation already conforms to Article 1 may contribute to the reduction of statelessness by ratifying the Convention. By ratification their territory becomes the territory of a Contracting State, which means that children who are born there may benefit from Article 1.

As has already been pointed out, Article 1 applies to natural children too. Under the legislation of some countries, a child's maternal filiation is established by the very fact of birth, while in other countries it is established only by a legal act, for example voluntary acknowledgment.

The Article takes both alternatives into account: in the first, the mother's nationality is acquired by the child at birth; in the second, provided that he or she is still a minor, on the date when maternal filiation takes effect as regards nationality.

By a process of reasoning *a contrario*, Article 1 might lead one to the conclusion that a child no longer follows the mother's nationality if he or she acquires *iure soli* a nationality at birth. This reasoning would be mistaken: the Convention's aim is certainly not to undermine rules in force whereby a child takes nationality from the mother. This is emphasised in Article 5.

Article 1 contains a rule on the acquisition of a nationality either at birth or at a later date, but says nothing about the retention of that nationality. The Convention therefore does not prevent a State from ceasing to regard a child as one of its nationals if it is established, during the child's minority, that he or she has acquired a foreign nationality.

Article 2 provides that, for the purposes of the Convention, the child of a father having refugee status is deemed not to hold the latter's nationality. It follows that a child, whether or not legitimate, whose mother is a national of a Contracting State and whose father is recognised as a refugee, is deemed not to possess the latter's nationality; accordingly, if the child does not hold some other nationality by virtue of the applicable legislation, for example by operation of the *ius soli*, Article 1 confers the mother's nationality on him or her.

The desirability of such a provision was disputed. It was argued that it created a fiction of statelessness hardly compatible with nationality law; that refugee status, unlike nationality, is often precarious in that it is based on political and philosophical views, sometimes tenuous, held by the persons concerned; and that the provision would lead to an increase in the number of cases of dual nationality.

It must be recognised, however, that a refugee's nationality is always imprecise because it is impossible to have it confirmed or established by his or her national authorities. Moreover, although the refugee holds a given nationality from a legal point of view, that nationality lacks an element regarded as essential, namely national protection of the person in question. It is for this reason that refugees are placed under international protection, afforded by the Office of the United Nations High Commissioner for Refugees, and are covered, as regards their rights, by the Geneva Convention of 28 July 1951, which provides that their personal status is no longer subject to their national law, but to the law of their domicile or residence. And on several occasions the competent organs of the United Nations and the Council of Europe have expressed the wish that in order to allow refugees to acquire the nationality of the country which grants them asylum, they should be regarded as stateless persons. Some countries have taken practical measures to that end. It cannot, of course, be denied that some refugees show signs of inconstancy in their convictions and in their attitude to their country of origin. It does seem, however, that such inconstancy is less frequent among those who want to found a family and be integrated in their host country. It is likely that a measure such as that provided for in the Convention will constitute an important factor in the settling and integration of refugees.

Dual nationality may prove disadvantageous for a refugee and his or her family, for instance when he or she acquires the nationality of the host country, by naturalisation for example. However, this situation appears to have only minor consequences in practice, especially as under the Council of Europe's Convention on Reduction of Cases of Multiple Nationality, signed at Strasbourg on 6 May 1963, several States allow their nationality to be renounced by a person holding dual nationality.

Finally, it is probably preferable to have two nationalities than to have none at all.

Application of Article 2 is subject to a special twofold condition: first, the father must be recognised as a refugee by the State of which the mother is a national or at least the decision recognising his refugee status and pronounced elsewhere must be accepted by that State, and secondly, the father must be a refugee at the time of the child's birth. The term refugee is defined in Article 1 of the Geneva Convention of 28 July 1951, as amended by the New York Protocol of 31 January 1967.

In order to facilitate acceptance of the Convention by States which may not yet be in a position to apply it without reservation, it was thought advisable to allow them to subscribe to it whilst making certain adjustments to the principles set out in Articles 1 and 2.

However, lest the Convention be rendered totally inoperative, the permissible reservations are restricted to the points mentioned at letters (a), (b), and (c) of Article 4.

Accordingly, provided it formally expresses such an intention, a Contracting State may grant its nationality, under Articles 1 and 2, only to children born in its territory or that of another Contracting State.

It was objected that this clause would be a step backwards in relation to the tendency of modern law, due to the freedom of movement and the ease of international travel, to consider the actual place of birth to be fortuitous or accidental in many cases, so that it no longer constitutes a valid connecting factor for the purposes of conferring a nationality. However, since the legislation of other States does not yet permit them to confer their nationality in the cases covered by the Convention without taking

any account of the place of birth and consequently their accession to the Convention might hinge on this point, the provision was inserted on an optional and provisional basis.

The Contracting States are not obliged to make this reservation and again, if they have done so, they can withdraw it at any time, with the result that the Convention will be applied without any geographical restrictions. Moreover, the greater the number of Contracting States, the less will be the practical effect of such a reservation.

Reservations (b) and (c) relate to the application of Article 2. The first allows it to be simply disregarded, while the second confines it to children of a father whom the Contracting State itself recognises as a refugee in its territory, which presupposes that the State concerned has itself had the opportunity to assess his status.

Article 3 limits the application of the preceding Articles to children who are born after the entry into force of the Convention or are still minors on the date of such entry into force. In the latter case, the minor will acquire his or her mother's nationality retroactively, but this is acceptable since, despite the retroactivity, legal acts performed by or in respect of the minor under his or her previous status will remain unaffected. International conventions or rules of domestic law which are more favourable to the conferment on the child of his or her mother's nationality may be applied, whether they are already in force or adopted at a later date.

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Article 5 stipulates that this Convention will not prevent that.

Articles 6 – 10 contain the final clauses.

Under **Article 9**, the Convention is open for accession by any State bound by the Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951, and the New York Protocol of 31 January 1967; it seemed desirable to allow as many countries as possible to accede to the present Convention, in view of its importance in social and humanitarian terms.