EXPLANATORY REPORT

Adopted by the General Assembly on 3 September 1980 in Munich

1. THE "RAISON D'ÊTRE" AND HISTORICAL BACKGROUND OF THE CONVENTION

1.1. Civil registrars often encounter difficulties in determining a person's surname and forenames. Many of these difficulties derive from the vagueness or lack of uniformity of the rules of private international law of the various States.

The International Commission on Civil Status was aware of these difficulties and felt that it was necessary to resolve them as far as possible. It prepared two Conventions: one (No. 4) on changes of surname and forenames, signed at Istanbul on 4 September 1958, which entered into force on 24 December 1961, and the other (No. 14) on the recording of surnames and forenames in civil status registers, signed at Berne on 13 September 1973, which entered into force on 16 February 1977.

1.2. Then, on 14 September 1973, the General Assembly discussed the utility of a new Convention which would determine the rules applicable to surnames and forenames. With the assistance of a list of the problems of private international law which had arisen in the Netherlands, the General Assembly was placed in a better position to reach a decision and, on 13 September 1974, it authorised the Bureau to investigate the matter and, if necessary, to appoint a sub-committee. The sub-committee was appointed on 2 April 1975 and met for the first time on the following 8 September. On 11 April 1978, it adopted a draft Convention which was submitted to the Bureau; the latter examined the draft on 11 September 1978 and, on 21-22 March 1979, submitted an amended draft to the General Assembly. The General Assembly adopted the Convention on 6 September 1979.

2. THE SCOPE OF THE CONVENTION

The Convention has as its purpose the establishment of common rules of private international law on surnames and forenames. The Contracting States will apply these rules to any natural person, whether or not he or she is a national of one of those States.

The Convention is open to accession by non-member States of the International Commission on Civil Status.

The Convention is based on the distinction between family names and forenames. Where names are concerned, terms are sometimes encountered which do not fall within this distinction *("Zwischennamen")*. The Convention does not resolve these problems directly; their solution must be derived from the principles which it lays down.

3. THE GUIDELINES OF THE CONVENTION

The Convention was framed on the basis of the following guidelines:

– surnames and forenames are to be the subject of an autonomous conflict-of-laws rule;

– a person's surnames and forenames are to be determined by the law of the State of which he or she is a national;

– "preliminary questions" are to be resolved in accordance with the private international law of that State;

– in case of a change of nationality, the rules of law of the State of the new nationality are to apply.

3.1. Names are to be subject of an autonomous conflict-of-laws rule. The adoption of this principle means that the subject of surnames and forenames will be or remain outside the scope of conflict-of-laws rules regarding filiation, the effects of adoption and the effects of marriage. Such a principle was found to be essential, as the Contracting States would otherwise have had to agree on conflict-of-laws rules regarding those matters in order to reach a uniform solution. It is hard to see how this could be achieved in the near or even distant future.

It would be difficult to avoid conflicts between conventions. Furthermore, in private international law as well as in public law, the subject of names is sufficiently distinct from that of the effects of marriage, of filiation and of adoption to warrant a special conflict rule. The fact that names are taken by this means outside the scope of several conflict rules can be considered as an important indication of this.

The domestic law designated by the autonomous conflict-of-laws rule determines the effects on a name of a family relationship whose establishment and content may, in appropriate cases, be governed by another law. If, for example, in State A the acknowledgment of a child born out of wedlock who is a national of that State is governed by law B, the name of that child will be governed by his or her own national law, namely law A. It may happen that an acknowledgment made in accordance with law B has, under that law, certain effects on the name of the child who has been acknowledged, but does not have such effects under law A, or vice versa. This result was fully appreciated when an autonomous conflict rule was created.

3.2. A person's surname and forenames are to be determined by the law of the State of which he or she is a national.

The choice of connecting factor was the subject of thorough consideration. It was asked, on the one hand, whether the problems encountered by a large majority of civil registrars in applying a law other than their national law were not too great and whether prudence did not dictate accepting that the national law of the registrar having to draw up a record should be applied, and, on the other hand, whether in the future one would not be led to abandon the traditional connecting factor of nationality in favour of that of domicile or even habitual place of residence.

It was, however, considered that the practical difficulties of civil registrars, however real they may be, should not be allowed to determine the basic rule of the Convention because the legitimate interests of individuals and of States cannot be subordinated simply to the interests, though these are not insignificant, of the proper functioning of civil registration. However, the difficulties in question are too great to be ignored in this Convention and accordingly the authors adopted a solution which does not sacrifice the basic rule of the Convention. This solution, which constitutes a satisfactory compromise, is to be found in Article 5 of the Convention, on which comments appear below.

The question therefore arises of determining the appropriate connecting factor, leaving aside the difficulties experienced by civil registrars in applying foreign laws. Names are a delicate matter. The name of a person means more to him or her than a number by which he or she is identified in a registration system. A name has a direct effect on an individual; it has a complex psychological function. Other people's names conjure up their personality (cf. to act in the "name" of someone). A name contributes to its bearer's awareness of his or her own identity. For one's name to be ignored, to be treated like a number, can be a humiliating experience. To have a name means to be someone in society. Some people suffer because they have ridiculous-sounding names, others embellish or latinise them, thinking that this will be advantageous; yet others imply noble or at least aristocratic origins by manipulating their names. Giving one's name is a way of taking part in social life. Only think of the

social and legal significance of a signature or of the bond existing in Christian tradition between baptism and the forename.

Certain bonds form constituent parts of a person's identity. These are family origins, belonging to a religion, a nation and a country. These bonds are often reflected in names. In this area, therefore, the administration's interest in a simple and sure means of identification does not take precedence.

The delicate nature of these problems has not deterred but, on the contrary, has stimulated the legislature: in the large majority of countries, it has acted to codify, clarify or amend rules of law which can be the expression of a certain conception of society and serve as an instrument for its realisation.

It follows, in private international law, that the question arises of which law should govern a person's name, in particular the name of persons who are domiciled or have their habitual place of residence in a country of which they are not nationals.

It became clear that an appropriate solution for the numerous cases which occur can be provided only by a precise and certain rule. It is, therefore, not practicable to formulate a principle which could be departed from were an evaluation of the circumstances to militate in favour of such a course. Differences in evaluation can readily be imagined. Circumstances tend to be forgotten and, after a certain time, it becomes difficult to verify them, all the more so as the rule in question will most often have to be applied outside the courts. Its success will derive from there being a small number of judicial decisions to be taken on the subject of names.

When it comes to determining the identity of a foreigner, the authorities of a country and all those with whom that foreigner comes into contact cannot avoid having recourse to the identity documents issued by the authorities of the country of which he or she is a national, without making any distinction according to his or her place of domicile or habitual place of residence. It is important for foreigners that, as regards their surname and forenames, their driving licence, diplomas, bank documents, etc., should be consistent with their passport. This can be in their interest both in their country of residence and in the country of which they are nationals as well as in third countries. What is important, therefore, is the rules to be observed by the authorities responsible for issuing passports and by diplomatic and consular representatives when they have to answer questions put to them. It was thought that it would be difficult for them not to treat all the nationals of their country on the same footing, especially as the concept of "habitual place of residence" is too vague to determine the precise moment at which the national law rules could give way to those of the law of the habitual place of residence. Persons who have lived abroad for a long time are not always willing to be assimilated, as regards their names, to the citizens of their country of residence, and the extent to which they are so willing can vary according to circumstances. Moreover, as far as names are concerned, the concept of "residence" should be defined more strictly than in relation to other matters, because of the particularly crucial need for continuity, stability and permanence; why then should the traditional connecting factor of nationality be abandoned? After discussions, it was decided to retain it. Only two possible exceptions were envisaged: first, agreement was reached on this point in the full awareness that the applicable law includes rules of private international law. It follows that a Contracting State will have the option to declare applicable to the names of its nationals, in general or in certain cases only, the law of their domicile, the law of their habitual place of residence or another law. It was realised that this margin for manoeuvre enables even a Contracting State to go back on the principle laid down by the Convention. If appropriate, a Contracting State may make the name – of its own nationals only – subject to the law that governs the family bond on which the name depends. The second possible exception consists of the reservation provided for in Article 6. This reservation is limited in scope. It is expressly laid down that it will be valid only in the territory of the Contracting State making it. In the

other Contracting States, the name of a person who has his or her habitual place of residence in the territory of the State which has made the reservation will, consequently, be determined in accordance with the rules of Article 1.

The reservation concerns all the rules of Article 1.

The problem of dual nationality was omitted from the scope of the Convention. Although it must be recognised that this is a topical problem, it was finally decided that the subject of names was too limited in scope for a rule to be laid down. Cases of dual nationality arise, for example, when a person acquires a nationality without losing the one he or she held previously.

3.3. Preliminary questions are to be resolved in accordance with the private international law of the State of which the individual concerned is a national. The provision contained in the second sentence of paragraph 1 of Article 1 is an essential component of the Convention. It is indispensable for guaranteeing uniformity between the Contracting States in the matter of names.

This rule is far-reaching in scope. For example, if a child holding nationality A is adopted in State A by a person holding nationality B and if, under the law of State A, the effect of the adoption is that the child will henceforth bear the name of the adopter, the authorities of State B will have to recognise that that is the name borne by the child, even if they do not recognise the adoption underlying the change of name. This is the price to pay for there to be uniformity between States A and B as regards the child's name. The advantage of the rule is clear: the solution will be the same both in States A and B and in the other Contracting States.

The Convention has the consequences that a foreigner will bear the name and forenames determined by his or her national authorities by applying their own rules of private international law to any questions that may arise, and that the name and forenames of a national, as determined by applying the rules of private international law of his or her own country, will be recognised abroad. Moreover, this is not a matter lying within the exclusive competence of the national authorities. Any other person will be able and will have to apply the same rules.

3.4. In case of a change of nationality, the rules of law of the State of the new nationality are to apply. The Convention refrains from laying down rules to provide a uniform solution of the thorny problems that can arise in the event of changes in the connecting factor or "Statutenwechsel"; paragraph 2 of Article 1 confines itself to referring to the rules of the State whose nationality has been acquired.

The effect of this provision is that all Contracting States, and in particular the State whose nationality the person concerned has lost, must accept names as they are determined in accordance with the law of the State whose nationality that person has acquired, whether or not that State has ratified the Convention. If a Miss Schuster has been called Schusterova since her naturalisation, that name will be recognised. If a person has acquired the foreign nationality of his/her spouse and has taken the name of the spouse, that name will be recognised in his/her country of origin. While it is desirable that acquired rights should be respected, exceptions must not be absolutely excluded. It has been left to the discretion of individual States to determine them and to encourage the assimilation of their new nationals by facilitating the adaptation of their surnames and forenames. The rule has a definite practical interest. Cases which present difficulties often involve a question of transitional provisions.

4. COMMENTARY ON THE ARTICLES

Article 1

The four guidelines of the Convention are expressed in the three sentences of this Article (see Chapter 3 of this Explanatory Report). The possibility of making a reservation is provided for in Article 6.

Article 2

The aim of the Convention is to harmonise the general rules of private international law of the Contracting States. Consequently, its scope is not confined solely to the nationals of those States or to persons who have their habitual place of residence therein.

Article 3

This Article aims at increasing the usefulness at the international level of extracts from records of birth. The point is that if the surnames of only the father and mother are given, the surname of the child has to be deduced by following the rules of law of the State of which he or she is a national. Often there is not sufficient knowledge of the foreign law to determine with certainty the surnames of persons who are natives of another country. In the majority of cases, the record of birth will be drawn up by a civil registrar of the State whose nationality the newly-born child possesses. In that event, the rule in Article 3 does not occasion any difficulties for registrars.

In cases where a record of birth of a child of foreign nationality has to be drawn up, civil registrars must apply the foreign law in accordance with the provisions of Article 1. To cope with the difficulties they might encounter, a special arrangement has been provided for in Article 5.

The Convention refrains from formulating any rule for the record of birth itself. The legislatures of the Contracting States will decide whether adaptations of domestic law are inevitable. The rule actually laid down will often merely make explicit for the foreigner what is implicit in the record of birth. The Convention (No. 1) on the issue of certain extracts from civil status records for use abroad, signed at Paris on 24 September 1956, and the Convention (No. 16) on the issue of multilingual extracts from civil status records, signed at Vienna on 8 September 1976, have already prescribed the method of indicating surnames and forenames in extracts from records of birth.

Article 4

Prudence dictated that the Convention should provide for an exception on grounds of public policy. Before recourse is had thereto, it should be borne in mind that the Contracting States have accepted the principles formulated in Article 1. Application of this Article can give rise to uncertainties and inconvenience for the persons concerned if it does not result in a court decision.

Article 5

When the Convention was being drafted, it was realised that for a large majority of civil registrars difficulties may arise from the obligation to apply of their own motion, in appropriate cases, a foreign law, including its rules of private international law. For cases where the urgency of the need to draw up a record prevents a registrar from obtaining the necessary information, Article 5 offers a provisional solution. The reference to “civil registrars” and not “authorities” is intentional, indicating that the higher authorities cannot have recourse to the option provided for in this Article.

The authors of the Convention preferred to leave open the possibility for a State initiating the rectification procedure to designate an authority which will act ex officio, although it is desirable to apply the rules contained in Article 1. It would be in accordance with the spirit of the Convention for an authority receiving information from a civil registrar in the case mentioned in paragraph 1 to endeavour to ensure that, if necessary, the record drawn up is rectified as soon as possible. Furthermore, any person concerned will have the option of initiating the free-of-charge procedure provided for in paragraph 2.

Article 6

The question of which connecting factor should be applicable to names was the subject of lengthy discussions. Retention of the factor of nationality was advocated with increasing firmness. Two possible exceptions were envisaged, one of which, enabling a reservation to be made, is contained in Article 6. As expressly stated therein, this is the only reservation permitted.

5. ENTRY INTO FORCE; TRANSITIONAL PROVISIONS

The Convention does not include any principles concerning transitional provisions. This does not mean that their formulation was deemed superfluous. The question arises whether, once the Convention has been ratified, its rules will apply henceforward to names deriving from facts that occurred prior to the entry into force of the Convention. It is consistent with paragraph 2 of Article 1 for Contracting States to be left with an option of laying down transitional provisions.

In so far as the system introduced by the Convention puts an end to a situation of uncertainty, its application to names deriving from facts occurring prior to its entry into force is to be recommended. It would, however, be preferable to refrain from interfering with situations which are firmly rooted in the past. Use of the name that ascendants ought to have borne had the rules of the Convention been in force at the time will have to be avoided.