

## Citizenship and National Identity

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For all but the first six years of her life, Yelena Permyekova had lived in Latvia, where her Russian parents settled in the mid-1940s. But after nearly half a century there, she was decreed an alien in 1991.<sup>1</sup> Soon after the Soviet Union fractured into fifteen states, the Supreme Council of Latvia proclaimed that only citizens of prewar Latvia and their descendants would be granted automatic citizenship in the newly independent state. With this, some half a million ethnic Russians in Latvia became instant aliens in the place they considered home.<sup>2</sup>

But if this seems insupportable, consider also Latvia's recent history: From 1918 to 1939, the Republic of Latvia was an independent state. Pursuant to a notorious secret protocol to the Soviet-German nonaggression pact of 1939, the Soviet Union annexed Latvia in violation of international law. Occupied by German forces from 1941 to 1944, Latvia reverted

I am grateful to participants in the Cornell Law School workshop on international law and ethnic conflict for helpful comments on an early draft of this chapter. I am also indebted to Susan Benda, Erika Schlager, and John Quigley for generously sharing information and insights about the subject of this chapter and to Michelle Domke, Ana Kocur, Rupal Kothari, and Mark Williams for excellent research assistance.

<sup>1</sup> Alessandra Stanley, *Divided Latvians Awaiting Clinton: Ex-Soviet Nation in a Battle Over Russian Citizenship*, N.Y. TIMES, July 6, 1994.

<sup>2</sup> At the same time, persons with few meaningful ties to Latvia were entitled to automatic citizenship. For example, Joachim Siegerist, who was entitled to Latvian citizenship because his father was Latvian, became a citizen in 1992 despite the fact that he had lived most of his life in Germany (and indeed was a member of the German parliament); did not speak Latvian; and had been convicted of hate crimes in Germany. Siegerist campaigned for the presidency of Latvia in 1995. Stephen Kinzer, *Fretful Latvians Turn to German with a Racist Past*, N.Y. TIMES, October 17, 1995, at A13.

to Soviet control in 1944. In the ensuing years Soviet authorities encouraged large numbers of Russian nationals to settle in Latvia and deported to Siberia thousands of Latvians who resisted Soviet policies. Under Soviet rule Russian was the lingua franca in Latvia, and in other consequential respects Russians enjoyed a privileged status while Latvian culture was repressed.<sup>3</sup> Yelena Permyekova's parents presumably were among those who settled in Latvia pursuant to Moscow's Russification policy.

That policy radically altered Latvia's demography: by 1991, ethnic Latvians made up less than 52 percent of the country's population—down from 75.5 percent in 1935.<sup>4</sup> Some 42 percent of the population were Russian speakers, most of whom settled in Latvia after World War II as a result of the USSR's Russification and Sovietization policies.<sup>5</sup>

Thus, just when Latvians regained their independence after half a century of annexation, they found themselves a bare majority in their own country. In response, the Supreme Council of Latvia acted to limit automatic citizenship in the revived state to those who had possessed Latvian citizenship as of June 17, 1940, and their descendants.

In the view of the Russian government, this was a sweeping infringement of the human rights of Russian nationals. With the proverbial stroke of a pen, a major portion of Latvia's population was denationalized. The Latvian government saw matters quite differently. In its view, Russian settlers could not lose a citizenship they never lawfully possessed: in the eyes of international law, their migration to Latvia was incident to an illegal occupation. Further, the long-term effects of Soviet policies on Latvia's demographic makeup presented a potent threat to its national identity—a precious resource for fostering civic loyalty to the newly independent state.

Similar concerns prompted neighboring Estonia to adopt a restrictive citizenship law in 1992 as it reclaimed independence following fifty-one years of Soviet rule. Like Latvia, Estonia, an independent state from 1918 to 1940, was annexed by the Soviet Union pursuant to a secret protocol to the 1939 Molotov-Ribbentrop Pact. During five decades of Soviet rule, Estonia's demographics changed dramatically as a result of Moscow's policies. While some 280,000 non-Estonians migrated to Estonia between

<sup>3</sup> Dzintra Bungas, *Latvia: Toward Full Independence*, RFE/RL RESEARCH REPORT 96, 98 (January 1993); COMMISSION ON SECURITY AND COOPERATION IN EUROPE, HUMAN RIGHTS AND DEMOCRATIZATION IN LATVIA 2 (September 1993).

<sup>4</sup> *Report of the Secretary-General on the Work of the Organization, The Situation of Human Rights in Estonia and Latvia*, U.N. Doc. A/47/748, Annex, at 3, para. 4 (1992) [hereinafter *U.N. Report on Latvia*]; RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 295 (2d ed. 1994).

<sup>5</sup> Bungas, *supra* note 3, at 98. The term *Russian speakers* refers to a group comprising mainly Russians, Belarusians, and Ukrainians. During the period of Soviet rule, less than one-quarter of these people learned the Latvian language. *Id.*

1944 and 1959, thousands of Estonians were deported to Siberia from 1944 to 1949,<sup>6</sup> and thousands of others were killed.<sup>7</sup> In 1939, ethnic Estonians constituted roughly 88 percent of Estonia's population, while approximately 8 percent were Russian. By 1989, ethnic Estonians had decreased to 61 percent of Estonia's population, with ethnic Russians constituting some 30 percent.<sup>8</sup> While most ethnic Estonians speak Russian, only 10 percent of the non-Estonian population learned to communicate in Estonian.<sup>9</sup>

Unlike Estonia and Latvia, the territory now constituting the Czech Republic did not endure a forcible dilution of its national identity by Soviet occupiers. Nevertheless, when it became an independent state upon its "velvet divorce" from Slovakia in December 1992, it, too, enacted a restrictive law excluding some long-term residents from citizenship.

The restrictive citizenship laws of Latvia, Estonia,<sup>10</sup> the Czech Republic, and other states raise profound dilemmas, implicating the deepest values of political community. These laws squarely present the question whether ethno-national models of citizenship comport with contemporary values of global society. The underlying policies raise the larger issue of how political communities *should* be constituted—a question that looms large at a time when popularly engineered rearrangements of territorial sovereignty seem the order of the day. May (should) states constitute their polity on the basis of explicitly national criteria? Even if national criteria generally may be used to define citizenship, do states nonetheless presumptively owe citizenship to persons who have long resided in their territory? Does the answer depend upon the circumstances surrounding their residence?

In light of the importance of these questions, it was inevitable that the restrictive policies of Latvia, Estonia, and the Czech Republic would provoke intense controversy. A raft of delegations from intergovernmental organizations, including the Council of Europe, the Conference (now Organization) for Security and Cooperation in Europe (CSCE/OSCE), and the United Nations, have visited these countries to assess their citizen-

<sup>6</sup> COMMISSION ON SECURITY AND COOPERATION IN EUROPE, HUMAN RIGHTS AND DEMOCRATIZATION IN ESTONIA 9 (September 1993).

<sup>7</sup> *Report of the Secretary-General, Situation of Human Rights in Estonia and Latvia*, U.N. Doc. A/48/511, Annex, at 6, para. 20 (1993) [hereinafter *U.N. Report on Estonia*].

<sup>8</sup> Riina Kionka, *Estonia: A Difficult Transition*, RFE/RL RESEARCH REPORT 89, 90 (January 1993).

<sup>9</sup> *U.N. Report on Estonia*, *supra* note 7, at 11, para. 48.

<sup>10</sup> In contrast to the restrictive policies adopted in Latvia and Estonia, most of the new states that emerged from the breakup of the USSR adopted a zero-option approach, granting citizenship to all persons living in their territory at the time of its independence or of the law's enactment. See HELSINKI WATCH, *NEW CITIZENSHIP LAWS IN THE REPUBLICS OF THE USSR* 2 (April 1992).

ship policies. Their assessments, summarized in this chapter, have laid bare a profound but heretofore largely subterranean shift in international legal doctrine governing matters of citizenship. Spanning a relatively short period, these assessments capture in microcosm the evolution across decades of legal paradigms governing citizenship determinations by states.

While evincing deep concern about the humanitarian implications of the restrictive citizenship policies described above, many of these delegations ostensibly reaffirmed international law's broad indulgence of state discretion in respect of citizenship. As a matter of law, they concluded, determinations of citizenship remain today, as in the past, largely the province of sovereign prerogative. This dimension of the legal assessments exemplifies the classic sovereign prerogative paradigm of citizenship, which largely denies international law the right to judge whether states' citizenship policies may be effective for purposes of municipal law.

Notably, however, this bottom-line judgment was overwhelmed by the reports' more resonant conclusions, whose basic thrust was radically to constrain states' discretion in respect of citizenship. The principal source of these constraints is the postwar law of human rights, which has progressively, indeed radically, diminished even this last great preserve of state privilege. This dimension of the various assessments is thus informed, above all, by a human rights paradigm.

Further, although human rights law generally permits states to deny full political rights to noncitizens, several of the reports suggested that the restrictive citizenship policies under scrutiny might run afoul of democratic principles. As I argue in this chapter, this strand of the experts' analysis, applying a democratic principles paradigm, presents an especially potent challenge to the discretion that states classically have enjoyed in respect of their citizenship policies.

A fourth and important theme in these assessments is their affirmation of a civic/territorial model of citizenship in preference to an ethnic model. This preference, I argue, has long been an influential subtext in various strands of international law concerning nationality. Significantly, however, two evaluations relating to the Czech law seemed to apply that preference as though it were a rule of international law—one that constrains governments in their fashioning of citizenship laws. In this and other respects, the recent assessments of the Czech law have been more forthright in recognizing profound doctrinal shifts, which had gone largely unnoted until the recent implosion of several multiethnic states placed the issue of restrictive citizenship policies squarely in the foreground of international concern.

## I. EXCLUSIONARY CITIZENSHIP LAWS

### A. Estonia

The three Baltic states were recognized by the Soviet Union on September 6, 1991, and were admitted to the United Nations eleven days later. Because their decades-long incorporation into the Soviet Union had been in violation of international law, these states are regarded as reemerging or revived states rather than as successor states to the former USSR;<sup>11</sup> and the government of Estonia relied on this status when it enacted a new citizenship law. On February 26, 1992, the Estonian Supreme Council issued a decree reestablishing the 1938 Citizenship Law of the Republic of Estonia and specifying which categories of people would automatically be considered citizens of the Estonian state.

Among those excluded from automatic citizenship were all persons who were not Estonian citizens as of June 16, 1940, the date when the Soviet Union established control over Estonia, and their descendants. In this way, the Estonian government "recogniz[ed] the de jure continuity of Estonian citizenship."<sup>12</sup> In principle, the law did not denationalize any Estonian citizens; it resumed the state's suspended sovereignty by declining to recognize as citizens those who migrated to Estonia pursuant to an illegal annexation.

The 1992 law established a two-year residency requirement, commencing on March 30, 1990, followed by a one-year waiting period for naturalization. Further, the law established a requirement of minimum competency in the Estonian language as a condition of naturalization.<sup>13</sup> Pursuant to the 1993 Law on Aliens, noncitizens are required to obtain residence permits, work permits, and aliens' passports in order to remain in the country.<sup>14</sup>

Russians excluded from automatic citizenship in Estonia would not necessarily become stateless by virtue of this law. The Russian Federation has offered Russian citizenship to all former citizens of the USSR regard-

<sup>11</sup> See DONNER, *supra* note 4, at 292.

<sup>12</sup> UBA/BATUN, THE "LAW ON ALIENS" CONTROVERSY IN THE REPUBLIC OF ESTONIA 8 (August 7, 1993) [hereinafter UBA/BATUN REPORT].

<sup>13</sup> See Kionka, *supra* note 8, at 90; *Easier Language Test for Citizenship in Force since Beginning of New Year*, BBC SUMMARY OF WORLD BROADCASTS, January 9, 1997. The post-independence citizenship law was preceded by various enactments, beginning in 1988, aimed at establishing Estonia's independence from the Soviet Union and asserting the preeminence of Estonian culture within the state. These laws are summarized in a report by Raimo Pekkanen and Hans Danelius on *Human Rights in the Republic of Estonia* to the Parliamentary Assembly of the Council of Europe, Doc. AS/Ad hoc-Bur-EE (43) 2 of December 17, 1991, reprinted in 13 HUM. RTS. L.J. 236 (1992) [hereinafter *Pekkanen-Danelius Report*].

<sup>14</sup> COMMISSION ON SECURITY AND COOPERATION IN EUROPE, REPORT ON THE MARCH 5, 1995, PARLIAMENTARY ELECTION IN ESTONIA AND THE STATUS OF NON-CITIZENS 3 (May 1995).

less of their residence.<sup>15</sup> In practice, however, the law has resulted in large numbers of people becoming stateless because many ethnic Russians in Estonia have not opted for Russian citizenship.<sup>16</sup>

## B. Latvia

Soon after Latvia regained independence, its Supreme Council enacted a resolution establishing principles governing citizenship while a draft law on the subject was being prepared. The resolution, adopted on October 15, 1991, provided: "Latvian citizenship belongs in principle only to those who held it on 17 June 1940 and their descendants, if they were resident in Latvia on 15 October 1991 and if they register before 1 July 1992; if they were not resident on 15 October 1991 or if they are citizens of another State, they may obtain it at any time on condition that they register and show proof of permission of expatriation."<sup>17</sup>

Proof of sufficient knowledge of the Latvian language was required of other categories of people who wished to be naturalized, including persons who would have been eligible for citizenship under Section 1 of the Latvian Citizenship Act of August 23, 1919, and their descendants.<sup>18</sup> For others, four further conditions to naturalization were imposed, of which a sixteen-year residency requirement proved to be particularly controversial.<sup>19</sup> Acquisition of citizenship by naturalization would, moreover, be limited by yearly quotas to be established by the parliament.<sup>20</sup> Several categories of people would be barred from acquiring citizenship, notably including members of the Soviet security forces.<sup>21</sup>

<sup>15</sup> Russian Federation Citizenship Law of February 6, 1992, art. 18, cited in UBA/BATUN REPORT, *supra* note 12, at 8.

<sup>16</sup> See U.N. Report on Estonia, *supra* note 7, at 9-10, para. 42. In addition, certain categories are excluded from applying for citizenship. These include foreign military personnel in active service, persons who have worked for the security and intelligence organizations of the Soviet Union, persons who have been convicted of serious criminal offenses, and persons lacking a steady income. *Id.* at 8, para. 34.

<sup>17</sup> Resolution Concerning the Restoration of the Rights of Citizens of the Republic of Latvia and the Fundamental Principles of Naturalisation, art. 2(1), October 15, 1991.

<sup>18</sup> *Id.* art. 3(3).

<sup>19</sup> *Id.* art. 3(4). The other conditions were familiarity with fundamental principles of the Latvian constitution, a loyalty oath to the Latvian Republic, and renunciation of previous citizenship. See Report by Jan De Meyer and Christos Rozakis on *Human Rights in the Republic of Latvia* to the Parliamentary Assembly of the Council of Europe, Doc. AS/Ad hoc.-Bur-EE (43) 4 of January 20, 1992, reprinted in 13 HUM. RTS. L.J. 244, 246, III, para. 3 (1992) [hereinafter *De Meyer-Rozakis Report*].

<sup>20</sup> U.N. Report on Latvia, *supra* note 4, at 4, para. 7.

<sup>21</sup> See *De Meyer and Rozakis Report*, *supra* note 19, at 246, III, para. 3. Dual nationality is not permitted. See *Latvia Replies to Human Rights Committee on Questions on Constitution, Citizenship, Legal Structure*, U.N. Information Service, HR/CT/418 (July 18, 1995).

On June 22, 1994, the Latvian parliament adopted citizenship legislation whose basic provisions were prefigured by this resolution. Apparently prompted by criticism from the Council of Europe and the OSCE, the president of Latvia returned the legislation to the parliament with recommendations for amendment; in response, the parliament amended the law to remove a harsh quota system for naturalization.<sup>22</sup> A new law was adopted on August 11, 1994,<sup>23</sup> and was amended in March 1995.<sup>24</sup> Under the new law persons not entitled to automatic citizenship—limited, as under the earlier resolution, primarily to persons who were citizens of Latvia as of June 17, 1940, and their descendants—must satisfy a five-year residency period beginning no earlier than May 4, 1990.<sup>25</sup>

While these laws seek to restore the ethnic preeminence of each country's titular national group, they do not explicitly adopt an ethno-national approach to citizenship. Among those entitled to automatic citizenship in both countries are ethnic minorities, including Russians, who lived in Estonia or Latvia on the relevant date in June 1940 or who are descended from such persons.

### C. The Czech Republic

Under the Czech Law on Acquisition and Loss of Citizenship,<sup>26</sup> the initial body of citizens in the new state—those entitled to automatic citizenship as of January 1, 1993—comprised persons who had been citizens of Czechoslovakia and had been registered as having Czech nationality. This latter qualification referred to an internal designation of nationality established in 1968–69, when Czechoslovakia became a federation of the Czech and Slovak republics. Under this prior law, nationality was assigned principally on the basis of the federal republic in which a Czechoslovakian citizen was born. These nationality designations had no legal significance internally in Czechoslovakia; nor were they relevant internationally.<sup>27</sup> Yet they became largely determinative of automatic citizenship

<sup>22</sup> Timothy Morris, *Latvia Amends Citizenship Law to Meet Europe Pleas*, REUTERS, July 22, 1994.

<sup>23</sup> Citizenship Law, August 11, 1994, reprinted in *Law of the Republic of Latvia on Citizenship*, BBC SUMMARY OF WORLD BROADCASTS, August 18, 1994.

<sup>24</sup> The amendment provided for restoration of citizenship to women who, under the 1919 law, lost Latvian citizenship upon marriage to a person from another country as well as to the descendants of such women. *Latvian Parliament Passes Amendments to Citizenship Laws*, BBC SUMMARY OF WORLD BROADCASTS, March 8, 1995.

<sup>25</sup> Citizenship Law, *supra* note 23, art. 12(1)(1).

<sup>26</sup> Law No. 40/1992.

<sup>27</sup> See *Report of the Experts of the Council of Europe on the Citizenship Laws of the Czech Republic and Slovakia and their Implementation and Replies of the Governments of the Czech Republic and Slovakia*, Doc. DIR/JUR (96) 4, at 7, para. 3, and 10, para. 21 (April 2, 1996) [hereinafter *Council of Europe Report on Czech/Slovak Laws*].

in both the Czech Republic and Slovakia when the two states attained independence. Under this approach, someone born in the Slovak federal republic who had lived in the Czech federal republic for decades would nonetheless be deemed a Slovak national and hence ineligible for automatic citizenship in the newly independent Czech state.

Although provisions establishing a right of option mitigate the exclusionary effects of the Czech and Slovakian citizenship laws,<sup>28</sup> the Czech law qualifies this right by establishing preconditions, including a requirement that applicants for citizenship must not have been convicted of an intentional criminal offense within the previous five years. Scarcely remarkable in the context of established states' naturalization laws, this requirement has proved highly controversial because it effectively bars thousands of long-term residents of the territory now constituting the Czech Republic from becoming citizens there, even if they had been citizens of Czechoslovakia. In contrast, citizenship in the former Czechoslovakia is the only precondition to exercising the right of option under Slovakia's new citizenship law.<sup>29</sup>

## II. INTERNATIONAL RESPONSES

The restrictive citizenship laws of Estonia and Latvia evoked profound anxiety among the states' Russian-speaking residents and elicited vigorous protests by Russian authorities. The Czech law also drew sharp criticism, including the charge that its restrictions disproportionately affected Roma who had been long-term—in many cases lifelong—residents of the territory. In response, each government invited certain intergovernmental bodies to assess its new or draft law in light of international legal standards; other bodies initiated their own inquiries, with which the governments cooperated.

Informed by human rights concerns as well as deeper assumptions about the nature of democratic societies, their assessments reflect an emerging trend favoring territorial/civic rather than predominantly ethnic models of citizenship. Above all, their conclusions signify how radi-

<sup>28</sup> Pursuant to this right, Slovak nationals could opt to become citizens of the Czech Republic, and Czech nationals could opt for citizenship in Slovakia.

<sup>29</sup> See Appendix II, *Council of Europe Report on Czech/Slovak Laws*, *supra* note 27, at 61, para. 243. For this reason, the new citizenship law of Slovakia has not been generally condemned and will not be addressed in this chapter. An amendment to the Czech citizenship law that entered into effect in May 1996 enables the minister of the interior on a discretionary basis to waive the clean-record requirement with respect to present or former Slovak citizens. See *Talking Points of the Delegation of the Czech Republic on the Czech Citizenship Legislation*, OSCE REF.PC/519/96 (August 22, 1996). Because this amendment did not eliminate the clean-record requirement, it has done little to blunt criticism of that requirement.



cally these doctrinal themes have circumscribed the province of state discretion in respect of citizenship determinations.

### A. Council of Europe

The Council of Europe was among the first international organizations to assess the Baltic states' citizenship policies. When these states applied for membership in the council, they had to satisfy its requirements that they be pluralist, parliamentary democracies that respect human rights, including minority rights.<sup>30</sup> The council designated a two-person team to study the human rights situation in each of these applicant states and to report to the council's Parliamentary Assembly.

With evident reluctance, the first team concluded that the course on which Estonia had set itself was in principle consistent with its obligations under pertinent human rights instruments. Noting with concern that strict application of the language requirement "could exclude large numbers of persons belonging to the [Russian and other] minorities from citizenship,"<sup>31</sup> the report continued: "As regards the human rights aspect of this problem, it should first be noted that neither the European Convention on Human Rights nor any other international human rights convention recognises the right to a certain citizenship as a human right. Consequently, it must in principle be left to each State to determine the conditions for acquiring its citizenship."<sup>32</sup> Yet having found that Estonia was in principle free to deny automatic citizenship to resident minorities, the team proceeded to express concern lest Estonia in practice exclude large numbers of residents. Manifestly eager to identify legal principles that would confine Estonia's discretion in this regard, the report noted several.

The nondiscrimination norm, a central pillar of the postwar system of international human rights law, was the most important. While major human rights conventions permit states parties to discriminate between citizens and non-citizens in respect of political rights, they proscribe other forms of discrimination among persons subject to the jurisdiction of a state on grounds such as nationality. This nondiscrimination norm would be breached, the council report cautioned, if the denial of citizenship to large numbers of residents resulted in their being disadvantaged in respect of employment and the like.<sup>33</sup> Further, whatever freedom states enjoy to deny their citizenship to those who do not yet possess it, they may not deny it on grounds that discriminate among noncitizens. It was

<sup>30</sup> See DONNER, *supra* note 4, at 293.

<sup>31</sup> Pekkanen-Danielius Report, *supra* note 13, at 239, para. 34.

<sup>32</sup> *Id.*, para. 35.

<sup>33</sup> *Id.*, para. 37; see also *id.*, para. 28.

apparently with this in mind that the report asserted: "Human rights problems could arise if citizenship was refused to residents on the ground of their membership of a certain minority group and not on the basis of an examination of each individual case."<sup>34</sup>

While these observations highlighted the extent to which well-established postwar human rights norms now constrain states' discretion in respect of their citizenship policies, the council report suggested a more novel and potentially far-reaching constraint: "[I]f substantial parts of the population of a country are denied the right to become citizens, and thereby are also denied for instance the right to vote in parliamentary elections, this could affect the character of the democratic system in that country. As regards the European Convention on Human Rights, the question could be raised whether in such a situation the elections to the legislature would sufficiently ensure the free expression of the opinion of the people, as required by Article 3 of the First Protocol to the Convention."<sup>35</sup>

In effect, the report implied, a state's democratic character may be vitiated by denying full citizenship rights to habitual residents. In view of the distinction traditionally drawn in human rights conventions between citizens and noncitizens in respect of the right of political participation, this was a notable, indeed quite potent, claim, whose implications I explore in Part VI.

The team charged to assess the human rights situation in Latvia produced a sparser report, couching its conclusions regarding Latvia's October 1991 resolution less in terms of legal standards than of reasonableness. Applying this standard, the team affirmed Latvia's right to restrict automatic citizenship to those who possessed it in June 1940 and their descendants, while granting it to others only through naturalization.<sup>36</sup> Yet, the report continued, the team found the resolution "less reasonable in other respects." In particular, "[t]here is room for misgivings about the provisions which, for naturalisation purposes, require sufficient knowledge of the Latvian language and at least sixteen years' residence in Latvia, and perhaps also with the requirement that applicants for naturalisation must be familiar with the fundamental principles of the Constitution."<sup>37</sup> With the exception of the sixteen-year residency requirement, the other conditions about which the team expressed concern are scarcely uncommon

<sup>34</sup> *Id.* para. 37.

<sup>35</sup> *Id.* para. 36. Article 3 of the First Protocol provides in full: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 1, March 20, 1952, 213 U.N.T.S. 262, E.T.S. 9.

<sup>36</sup> *De Meyer and Rozakis Report*, *supra* note 19, at 246, III, para. 4.

<sup>37</sup> *Id.*

conditions of naturalization. The report's misgivings about their reasonableness thus can perhaps best be explained as a reflection of the team's broader apprehension about Latvia's plan to exclude from automatic citizenship persons long resident there.

A team of experts representing the Council of Europe, who assessed the citizenship laws adopted by the Czech Republic and Slovakia, went farther in suggesting that international law now constrains governments' discretion regarding citizenship requirements in the context of state succession, even as their report ostensibly affirmed states' prerogatives in respect of citizenship. Echoing the council's assessments of the Baltic citizenship laws, the report affirmed that international law accords states "a wide-ranging power to decide who are, and who are not [their] citizens."<sup>38</sup> While regretting that neither the Czech Republic nor Slovakia had chosen to use the criterion of habitual residence to determine its initial body of citizens, the experts concluded "that the two States are not in breach of international law only for this reason."<sup>39</sup> Further, the experts opined that the two countries' "conditions for naturalisation are compatible with European legal standards in this area."<sup>40</sup> Yet the broad concessions thus made to the two states' discretion proved largely illusory in the context of state succession, as the experts' subsequent analysis made clear.

Their report noted that states' discretion in determining their initial body of citizens is "only limited in respect of protection of human rights . . . and by the principle of effective nationality according to which a nationality should be based on a genuine, effective link between the State and its citizens."<sup>41</sup> Focusing on the Czech Republic's requirement that applicants for naturalization have a clean criminal record for the previous five years, the experts drew a sharp distinction between states' discretion with respect to "real" foreigners and to long-term residents of the territory who possessed the predecessor state's citizenship.<sup>42</sup> Significantly, it framed its misgivings in terms of international law: "Admittedly, a State may decide who are its own citizens but it is doubtful whether, in a case of State succession, under international law, citizens that have lived for decades on the territory, perhaps are even born there, can be excluded from citizenship just because they have a criminal record."<sup>43</sup> The experts also found that the Czech law's requirement that applicants have a clean crimi-

<sup>38</sup> Council of Europe Report on Czech/Slovak Laws, *supra* note 27, at 19, para. 45.

<sup>39</sup> *Id.* para. 46.

<sup>40</sup> *Id.* at 23, para. 67.

<sup>41</sup> *Id.* (footnote omitted.)

<sup>42</sup> *Id.* at 25, para. 79. See also *id.* at 42, para. 149 (concluding that "[a]cquisition and loss of citizenship and the status of aliens cannot be considered according to the same criteria in the case of State succession and in the case of ordinary immigrants taking up residence in a State and eventually applying for citizenship").

<sup>43</sup> *Id.* at 25, para. 76.

nal record "is not proportional," thereby violating an element of the Rule of Law, "and could be considered discriminatory for this segment of the population which is already marginalized."<sup>44</sup> Further, the experts concluded that non-nationals who were citizens of Czechoslovakia on December 31, 1992, and who habitually resided on the territory of the Czech Republic "should have the right to permanent residence" there, without any further preconditions.<sup>45</sup>

## B. United Nations / UNHCR

At the invitation of the Estonian and Latvian governments respectively, the United Nations sent delegations to each country to assess its citizenship policy. Both reports concluded that the basic approach adopted by the newly independent states was compatible with international law.<sup>46</sup> Yet in both cases, the assessments evinced profound discomfort with the scope of discretion thus left to these states and made clear the authors' hope that the governments would foster full integration of long-term residents into the political life of the countries.

For example, the report on Latvia asserted that it would be "desirable if Latvia, for humanitarian reasons, would extend its nationality to the majority of its permanent residents who express a desire to be loyal citizens of Latvia."<sup>47</sup> The report recommended that the final version of the citizenship law reduce the residence requirement for naturalization from sixteen to five years, arguing that this would "have a very positive psychological effect on non-Latvian minorities and would certainly contribute to the consolidation of inter-ethnic harmony."<sup>48</sup> Further, the report urged that residents over fifty should be exempted from the language requirement imposed as a condition of naturalization.<sup>49</sup> But while thus seeking to alleviate the hardship on elderly residents of Latvia, the report noted that the government's affirmative steps to promote the national language "go along with the respect of minority languages."<sup>50</sup>

<sup>44</sup> *Id.* para. 77.

<sup>45</sup> *Id.* at 31, para. 102.

<sup>46</sup> See *UN Report on Latvia*, *supra* note 4, at 4, para. 9 ("As to generally accepted principles of international law concerning the granting of citizenship, Latvia is not in breach of international law by the way it determines the criteria for granting its citizenship."); *id.* at 5, para. 13 ("The language law itself is not incompatible with international law nor with generally accepted human rights standards, even if they [*sic*] cause a degree of hardship or inconvenience to the non-Latvian speaking population."); *U.N. Report on Estonia*, *supra* note 7, at 16, para. 87 ("The citizenship and language laws examined are . . . compatible with general principles of international human rights law.").

<sup>47</sup> *U.N. Report on Latvia*, *supra* note 4, at 4, para. 9.

<sup>48</sup> *Id.* at 7-8, para. 26(b).

<sup>49</sup> *Id.* at 8, para. 26(e).

<sup>50</sup> *Id.* at 5, para. 13.

Similarly, the U.N.'s report on Estonia reluctantly affirmed the government's right to adopt its 1992 citizenship law<sup>51</sup> and the basic thrust of its language law.<sup>52</sup> Nevertheless, the report made clear the authors' hope that the government would facilitate the naturalization of long-term residents. To this end, they recommended that the government waive language requirements as a precondition of naturalization for persons sixty years old and older as well as for invalids and endorsed recent amendments to Estonia's citizenship law that lowered the language competency requirement of other applicants for naturalization.<sup>53</sup> Most tellingly, the report asserted that, although most of the stateless people residing in Estonia are eligible to acquire citizenship in another state, "they should not be encouraged to do so if they intend to remain as permanent residents of Estonia."<sup>54</sup> Instead, they "should be encouraged to learn the Estonian language and to apply for Estonian citizenship" because "[i]t is in the interest of Estonia to take all necessary measures to facilitate their integration so as to maintain and preserve its traditionally peaceful and tolerant multicultural society."<sup>55</sup>

The United Nations' principal inquiry into the Czech Republic's citizenship law was undertaken by the office of the High Commissioner for Refugees (UNHCR), which issued a highly critical analysis.<sup>56</sup> Where analyses of the Baltic laws had seemingly affirmed states' discretion in respect of citizenship policy (while circumscribing its exercise), the UNHCR report unambiguously condemned the Czech law as incompatible with international law.

At the heart of its analysis was the concept of a "genuine effective link" between individuals and a particular state. In the view of the UNHCR, individuals possessing such a link to a state—established principally by long-term residence in its territory—are entitled to become citizens of that

<sup>51</sup> See *supra* note 46. The study seemed to regret international law's dearth of standards regarding citizenship in the special context prevailing in Estonia: "International law has traditionally left the issue of citizenship within the realm of a State's jurisdiction. Although human rights declarations and conventions contain relevant provisions on citizenship or nationality, there remains a gap in international human rights law. Indeed, the specific factual situation of annexation accompanied by the influx of very large numbers of persons into a small State with a different ethnic origin, followed by 50 years of settlement and multi-ethnic coexistence, followed by the re-emergence of the original State as an independent entity, does not seem to have been envisaged by drafters of the relevant instruments." *U.N. Report on Estonia*, *supra* note 7, at 7, para. 28.

<sup>52</sup> "Since the national identity of Estonians is intimately linked to their language, which is not spoken anywhere else in the world," the report observed, "it is important and legitimate for Estonians to give a high priority to the active use of the Estonian language in all spheres of activity in Estonia." *Id.* at 10, para. 46.

<sup>53</sup> *Id.* at 16–17, para. 88.

<sup>54</sup> *Id.* at 17, para. 90.

<sup>55</sup> *Id.*

<sup>56</sup> The Office of the United Nations High Commissioner for Refugees, *The Czech and Slovak Citizenship Laws and the Problem of Statelessness* (February 1996) [hereinafter *UNHCR Report*].

state when it emerges as an independent sovereign from the breakup of a predecessor state. In its view, the Czech law "contradicts international legal principles" because it excludes "from the initial body of citizens . . . long-time permanent residents, who had a genuine effective link and who had indicated their social attachment through exercise of civil and social functions."<sup>57</sup> Use of the former internal Czechoslovakian law on nationality was not, in the view of the high commissioner, a permissible basis for establishing citizenship in the new state.<sup>58</sup>

### C. CSCE/OSCE

Among the international organizations that have examined the Baltic states' citizenship policies, the CSCE/OSCE has been the most actively engaged, maintaining an ongoing dialogue with the Estonian and Latvian governments. The overwhelming thrust of its interventions has been to persuade these governments to facilitate naturalization of long-term residents who were denied automatic citizenship.

The organization's first recommendations were set forth in a January 1993 report by a delegation that visited Estonia, at the government's request, on behalf of the CSCE's Office of Democratic Institutions and Human Rights (ODIHR). The ODIHR report concluded that Estonian laws "meet the international standards for the enjoyment of human rights"<sup>59</sup> and that "no international human rights instrument recognizes the right to a nationality as a human right enjoyed by everyone."<sup>60</sup> The report elaborated: "Neither under Article 15 of the Universal Declaration of Human Rights nor under any of the CSCE documents is Estonia obligated to grant its citizenship to all residents without any preconditions."<sup>61</sup> Still, the report asserted a limited restraint on Estonia's discretion, relevant by virtue of its accession to the ICCPR: "However, international commitments flow from Article 24, paragraph 3, of the International Covenant on Civil and Political Rights, according to which every child has the right to acquire a nationality. By virtue of this provision, States are obligated to confer their nationality on any children who otherwise would remain stateless at birth."<sup>62</sup> This interpretation notably places a more exacting duty on states parties to the ICCPR than the text of Article 24(3) itself seems to mandate. While establishing a right on the part of children to acquire a nationality, the provision does not explicitly assure the right to acquire a

<sup>57</sup> *Id.* at 13, para. 53.

<sup>58</sup> *Id.*

<sup>59</sup> Report of the CSCE ODIHR Mission on the Study of Estonian Legislation, January 15, 1993, reprinted in 4 HELSINKI MONITOR 63, 74, para. 68 (1993) [hereinafter CSCE ODIHR Report].

<sup>60</sup> *Id.* para. 71.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

particular country's nationality. Although the Human Rights Committee established under the covenant has implied that states parties should confer their nationality on children born in their territory who would otherwise be stateless, it has stopped short of proclaiming a duty in this regard.<sup>63</sup>

Despite its conclusions regarding Estonia's compliance with international standards, the report made clear its authors' belief that Estonia should aspire to "facilitate the integration of the large majority of the persons remaining in the country and to provide them with equal rights including citizenship as soon as possible."<sup>64</sup> Acknowledging that Estonia's requirements for naturalization might be considered "liberal under conditions of continue[d] statehood," the report suggested that these same requirements do "not fully meet the requirements of a society whose ethnic composition has dramatically changed during 50 years of Soviet rule."<sup>65</sup>

Without finding Estonia in breach, the report also suggested several ways in which the government *could* run afoul of international law. With no apparent sense of the irony that might have been warranted by Estonian history, the report noted in reference to the country's Russian-speaking minority: "It is of course clear that mass expulsions of population groups are prohibited" by international law.<sup>66</sup> Further, the report suggested that, to remain in compliance with international standards, Estonia must assure that its citizenship, naturalization, and related policies not be applied in a manner that interferes with CSCE standards relating to family unification, general international standards relating to freedom to leave one's country, and the cultural rights of minorities.<sup>67</sup>

Subsequent CSCE recommendations came from the organization's high commissioner on national minorities, the highly respected Max van der Stoel, whose appointment to this post became effective in January 1993. His recommendations made a forceful case for extending full citizenship rights to the two states' resident aliens and for facilitating their naturalization.

Echoing the ODIHR report, van der Stoel noted that "massive expulsion of non-Latvian residents"—an option the government was not considering—"would be contrary to international humanitarian principles even

<sup>63</sup> See *infra* note 90.

<sup>64</sup> CSCE ODIHR Report, *supra* note 59, at 74, para. 72.

<sup>65</sup> *Id.* at 66, para. 23. Buttressing this suggestion, the report urged lenient application of the language-proficiency requirement for naturalization: "It appears questionable whether this fairly high degree of language proficiency should be made conditional for naturalization under the circumstances prevailing in Estonia." *Id.* at 68, para. 34.

<sup>66</sup> The report hastened to make clear, however, that such expulsions "are certainly not contemplated in Estonia." *Id.* at 70, para. 48.

<sup>67</sup> *Id.* at 75, paras. 73-75.

more so because the overwhelming majority of the non-Latvians living in your country have not been actively engaged in oppressive practices during the years of the Soviet occupation of Latvia."<sup>68</sup> In effect, then, the vast majority of non-Latvian nationals in Latvia had a presumptive right to be permanent residents.

From this legal toehold van der Stoel bootstrapped a presumptive entitlement to acquire Latvian citizenship, even while implicitly conceding that non-Latvian residents were not legally entitled to automatic citizenship. "To deny citizenship to hundreds of thousands [of] non-Latvians residing in Latvia," he wrote, "is tantamount to refusing to grant them political rights. . . . If the overwhelming majority of non-Latvian[s] . . . is denied the right to become citizens, and consequently the right to be involved in key decisions concerning their own interests, the character of the democratic system in Latvia might even be put in question."<sup>69</sup> In this connection, van der Stoel referred to the 1990 CSCE Copenhagen Document, "which states that the basis of the authority and legitimacy of all governments is the will of the people."<sup>70</sup>

Not surprisingly, the OSCE has also condemned the Czech law on citizenship. During a September 1994 seminar on Roma, van der Stoel pressed the Czech government to amend its law, urging: "In no case should new citizenship laws be drafted and implemented in such a way as to discriminate against legitimate claimants for citizenship, or even to withhold citizenship from possibly tens of thousands of life-long and long-term inhabitants of the state, most of whom are Roma."<sup>71</sup>

#### D. Shifting Paradigms

These assessments capture in microcosm a profound shift in legal paradigms governing issues of citizenship—one that has emerged, almost imperceptibly, across decades of doctrinal development. Classically, few matters have been more emblematic of sovereignty than the right of states

<sup>68</sup> Letter of CSCE High Commissioner on National Minorities to Georgs Andrejevs, Minister of Foreign Affairs of the Republic of Latvia, December 10, 1993, reprinted in 4 HELSINKI MONITOR 109, 110 (1993).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* In his recommendations to Estonia, van der Stoel noted—and strongly disapproved of—the option of addressing citizenship by establishing a privileged position for each state's titular national group. Such a policy, he wrote, "would scarcely be compatible with the spirit, if not the letter, of various international obligations Estonia has accepted" and would "involve a considerable risk of increasing tensions . . . which, in turn, could lead to a destabilization of the country." *Recommendations by the CSCE High Commissioner on National Minorities, Mr Max van der Stoel, upon His Visits to Estonia, Latvia and Lithuania* (April 6, 1993), reprinted in 14 HUM. RTS. L.J. 216, 217 (1993).

<sup>71</sup> Statement by Max van der Stoel, OSCE High Commissioner on National Minorities, Human Dimension Seminar on Roma in the OSCE Region, quoted in *UNHCR Report, supra* note 56, at 2.



to determine the incidents of their nationality. Yet international law has gradually narrowed the compass of state prerogative in respect of citizenship. The postwar emergence of international human rights law in particular has significantly constrained governments' choices.

Increasingly, moreover, international law has subtly reinforced territorial/civic conceptions of nationality. By virtue of this trend, states now bear special responsibilities toward those who have meaningfully become part of their territorial communities. The recent emergence of a democratic entitlement has accelerated this trend and presents a potentially powerful assault on the distinction long recognized in human rights law between the political rights of citizens and of other long-term residents.<sup>72</sup>

### III. THE SOVEREIGN PREROGATIVE PARADIGM

Notably, none of the analyses of the Baltic citizenship laws concluded that international law bars states from enacting legislation that excludes from automatic citizenship hundreds of thousands of long-term residents. This conclusion, reached with manifest reluctance by many of the interlocutors who assessed the Baltic laws, reflected a long-established principle of international law. "In the present state of international law," the Permanent Court of International Justice (PCIJ) advised in 1923, "questions of nationality are . . . in principle within [the] reserved domain" of the state.<sup>73</sup>

Control over matters of nationality has, in fact, long been regarded as "a concomitant of State sovereignty" itself.<sup>74</sup> Thus, successive editions of Oppenheim's classic treatise on international law reiterate, "It is not for International Law but for Municipal Law to determine who is, and who is not, to be considered a subject."<sup>75</sup> In practice, states have exercised this right by attributing citizenship at birth based on birth either within their territory (*jus soli*) or to parents who are nationals of the state (*jus soli*).

<sup>72</sup> The phrase "democratic entitlement" was coined by Thomas Franck to describe an emerging trend in international law and state practice in support of democratic government. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 80 AM. J. INT'L L. 46 (1986).

<sup>73</sup> *Tunisi and Morocco Nationality Decrees (Advisory Opinion)*, 1923 P.C.I.J., ser. B, no. 4 at 24. See also *Nottebohm Case (Liechtenstein v. Guatemala) (Second Phase)*, 1953 I.C.J. REUNION 4, 20.

<sup>74</sup> PAUL WEIR, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW* 61 (1981) [hereinafter *NATIONALITY*].

<sup>75</sup> I. OPPENHEIM, *INTERNATIONAL LAW* 841 (8th ed. 1955). This rule has been codified in the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (Hague Convention) (1930-38), 170 L.N.T.S. 80 (No. 2115), which provides that "[i]t is for each State to determine under its own law who are its nationals," 20, art. 1, and that "[t]he question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State," 20, art. 2.

guinis),<sup>76</sup> or on some combination of these two principles,<sup>77</sup> as well as by conferring citizenship through naturalization.

There have always been exceptions to the principle that states are free to determine the incidents of their nationality, but classically these reinforced the state-sovereignty paradigm that supported the basic rule. For example, it has long been recognized that states may not impose their nationality through involuntary naturalization (though consent may be presumed in respect of certain types of automatic acquisition of citizenship, as, for example, through marriage to a national).<sup>78</sup> Although some writers have explained this rule in terms of individuals' freedom of choice, "[i]t is not the freedom of the individual whose nationality is at issue, but the rights of the State of which he is a national, that are the primary consideration in international law."<sup>79</sup> If a state imposed citizenship on a large number of foreign nationals, its action "must be regarded . . . as an unfriendly or even hostile act against the State of nationality comparable to a violation of the State's territorial jurisdiction: it constitutes a threat to peaceful relations and is as such illegal."<sup>80</sup>

In keeping with the logic of state sovereignty, international law was, until recently, concerned with nationality principally in the context of states' right of diplomatic protection. Thus, in the *Nottebohm* case, the International Court of Justice drew a sharp distinction between a state's broad discretion as a matter of municipal law to determine conditions of nationality on the one hand, and its right to confer its nationality for purposes of exercising protection on the international plane on the other hand. As to the former, the court found it unnecessary even to determine whether international law imposes any limitations; as to the latter, it found international law decisive. Because diplomatic protection and protection through international judicial proceedings "constitute measures for the defence of the rights of the State" vis-à-vis another state, international law could concern itself with the criteria used by states to establish a link of nationality with persons on whose behalf they espouse international claims.<sup>81</sup>

In keeping with the state-sovereignty paradigm, the effect of changes of territorial sovereignty on the nationality of inhabitants was governed principally by domestic law except to the extent that states entered into treaties governing this issue. In practice, upon a transfer of territorial

<sup>76</sup> See Report by Manley O. Hudson, Special Rapporteur, to the International Law Commission, *Nationality, Including Statelessness*, U.N. Doc. A/CN.4/50 (1952), 2 Y.B. INT'L L. COMM. 3, 7 (1952).

<sup>77</sup> See WEIS, NATIONALITY, *supra* note 74, at 97.

<sup>78</sup> See *id.* at 104-19.

<sup>79</sup> *Id.* at 115.

<sup>80</sup> *Id.* at 116.

<sup>81</sup> *Nottebohm* Case, *supra* note 73, at 24.

sovereignty by cession, habitual residents typically have acquired the citizenship of the new sovereign; but international law did not compel this result.<sup>82</sup>

The principal legal conclusion of the assessments of Baltic citizenship policies—that the restrictive approaches of the proposed/enacted laws were permissible—reflects the longstanding rule that matters of citizenship are, in the main, subject to the sovereign discretion of states. Yet the assessments are notable less for their avowal of that principle than for the extent to which that affirmation is eclipsed by the reports' overriding thrust in favor of presumptive citizenship for longtime residents. By the time the Czech Republic's citizenship law was assessed by international organizations—just a few years after the Baltic laws had come under critical scrutiny—this preference was cast as a rule of international law. The emerging doctrinal trend evident in these various assessments builds squarely on the foundation of postwar human rights principles.

#### IV. THE TRANSITION TO A HUMAN-RIGHTS PARADIGM: REDUCING STATELESSNESS

International efforts to reduce statelessness provide a conceptual bridge between the state-sovereignty paradigm of older law and the human rights paradigm that prevails in contemporary legal discourse. The first significant international effort to address the issue was undertaken at the 1930 Hague Codification Conference. Although the resulting conventions include provisions designed to avert statelessness—prefiguring subsequent assurances of a right to nationality—the 1930s-era treaties emphatically reaffirm the state-sovereignty paradigm of nationality.

For example, the 1930 Hague Convention affirms that “[i]t is for each State to determine under its own law who are its nationals.”<sup>83</sup> And while the 1930 Protocol Relating to a Certain Case of Statelessness establishes an affirmative duty for states parties to confer their nationality on certain persons born in their territory,<sup>84</sup> the protocol affirms that this obligation

<sup>82</sup> D. P. O'CONNELL, *THE LAW OF STATE SUCCESSION* 245–47 (1956); see also WEIS, *NATIONALITY*, *supra* note 74, at 150–51. In the absence of municipal law to the contrary, international law presumes that successor states provide for acquisition of their nationality by such habitual residents. See *id.* at 151. For the view that international law has long required successor states to confer their nationality on inhabitants, see John Quigley, *Wartime Mass Displacement and the Individual Right of Return* (forthcoming). Cf. Yasuaki Onuma, *Nationality and Territorial Change: In Search of the State of the Law*, 8 *YALE J. WORLD PUB. ORD.* 1, 1–2 (1991) (from the seventeenth through early twentieth centuries, states consistently observed the principle that, upon change in territorial sovereignty, nationals of the predecessor state who habitually resided in the successor state automatically became nationals of the latter).

<sup>83</sup> See *supra* note 75.

<sup>84</sup> Article 1 provides: “In a State whose nationality is not conferred by the mere fact of

"shall in no way be deemed to prejudice the question whether [the principles it embodies] do or do not already form part of international law."<sup>85</sup>

But the postwar emergence of human rights principles wrought a significant change in the discourse of international efforts to address statelessness, reframing the issue in terms of individual rights rather than states' prerogatives. A significant benchmark of the conceptual transition can be found in Article 15(1) of the 1948 Universal Declaration of Human Rights,<sup>86</sup> which provides: "Everyone has the right to a nationality."

At least initially, however, the right to a nationality presented only a minimal encroachment on sovereign discretion. Notably, while the Universal Declaration proclaims nationality as a fundamental right, no particular state is required to guarantee that right, making the assurance essentially aspirational.<sup>87</sup> The entitlement recognized in Article 15(1) has, moreover, found its way into only one of the major human rights treaties adopted in the postwar years, the American Convention on Human Rights.<sup>88</sup> When the United Nations drafted treaties to give binding effect to the Universal Declaration, the assurance set forth in Article 15(1) was omitted. Although states were prepared to accept the sweeping incursions on domestic jurisdiction entailed in the International Covenant on Civil and Political Rights (ICCPR)<sup>89</sup> as a whole, they were unwilling to relinquish their sovereign right to determine conditions of nationality by their own lights. In the end, only children were given the right to acquire a nationality.<sup>90</sup>

Still, meaningful efforts to assure nationality can be found in both human rights instruments and treaties concerned specifically with nationality. Early efforts to reduce statelessness did so by prescribing circumstances in which states should not denationalize individuals if it would

birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State." (1937-38) 179 L.N.T.S. 115 (No. 4138), art. 1.

<sup>85</sup> *Id.*, art. 2.

<sup>86</sup> G.A. Res. 217 (III) A, U.N. Doc. A/810, at 75 (1948) [hereinafter UDHR or Universal Declaration].

<sup>87</sup> See Paul Weis, *The United Nations Convention on the Reduction of Statelessness*, 1961, 11 INT'L & COMP. L.Q. 1073, 1075 (1962).

<sup>88</sup> Opened for signature November 22, 1969, 36 OAS T.S. 1, OAE/ser.L/V/II.23, doc. 21, rev. 6, 9 I.L.M. 673 (1970). Article 20(1) provides: "Every person has the right to a nationality."

<sup>89</sup> Opened for signature December 19, 1966, 999 U.N.T.S. 171.

<sup>90</sup> Article 24(3) provides: "Every child has the right to acquire a nationality." Interpreting this provision, the Human Rights Committee established to monitor states parties' compliance with the ICCPR has said that "it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born." Human Rights Committee, *General Comment 17*, para. 8, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1 at 24 (1992).

result in statelessness.<sup>91</sup> Over time, efforts to reduce statelessness also defined circumstances in which states should affirmatively confer nationality on individuals while at the same time further constraining states' freedom to withdraw nationality from those who already possessed it. Notably, both of these doctrinal trends have increasingly been shaped by the discourse of human rights.

Exemplifying this trend, Article 15(2) of the Universal Declaration provides: "No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."<sup>92</sup> Significantly, this provision protects individuals from loss of nationality even when they would not thereby become stateless. The 1961 Convention on the Reduction of Statelessness<sup>93</sup> similarly seeks to prevent arbitrary withdrawal of nationality and clarifies circumstances that constitute arbitrary deprivation of nationality. These include, *inter alia*, deprivation of citizenship without due process of law (even when withdrawal of citizenship is otherwise permitted).<sup>94</sup> The convention provides without qualification that states parties "may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds"<sup>95</sup>—a provision whose grim debt to Nazi history needs no elaboration.

While these provisions impose significant restraints on states' ability to withdraw nationality, they have little direct bearing on the citizenship policies of Latvia, Estonia, and the Czech Republic. None of the long-term residents who were denied automatic citizenship in these countries already possessed it; they were, of course, citizens of the now extinct USSR or Czechoslovakia. More relevant to their plight are international standards that seek to reduce statelessness by establishing affirmative obligations on states to confer their nationality on certain persons. Although few of these are legally binding on Latvia, Estonia, or the Czech Republic, the basic approach they incorporate pervades the critiques of those states' citizenship laws summarized in Part II.

Prefigured by earlier conventions, the 1961 Convention on the Reduction of Statelessness exemplifies contemporary treaty approaches to reduction of statelessness. The heart of the convention is a provision

<sup>91</sup> For example, the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws contains various provisions designed to prevent loss of nationality through the operation of personal status laws that would render a person stateless. See (1937-38) 179 L.N.T.S. 89 (No. 4137), arts. 8-9. The 1930 convention did not address the problem of loss of nationality upon changes in territorial sovereignty, although that was the chief cause of loss of nationality at the time of the Hague Codification Conference, which produced the convention. See Johannes M. M. Chan, *The Right to a Nationality As a Human Right: The Current Trend towards Recognition*, 12 HUM. RTS. L.J. 1, 2 (1991).

<sup>92</sup> UDHR, *supra* note 86.

<sup>93</sup> (1975) 989 U.N.T.S. 175 (No. 14458).

<sup>94</sup> *Id.* art. 8(2).

<sup>95</sup> *Id.* art. 9.

generally requiring states parties to confer citizenship on persons born in their territories if they would otherwise be stateless.<sup>96</sup> The general duty is qualified by a provision enabling states parties to limit the grant of nationality based on birth in their territories to persons habitually resident there before the age of maturity.<sup>97</sup>

Most important for purposes of this analysis, Article 10 seeks to assure that changes in territorial sovereignty do not result in statelessness. While the first provision recognizes that questions of nationality arising by virtue of transfers of territory are often dealt with by treaty, the second paragraph seeks to prevent statelessness in the absence of treaty arrangements.<sup>98</sup> In the case of a new state formed on territory previously belonging to another, the new state "shall confer its nationality upon the inhabitants of such territory unless they retain their former nationality by option or otherwise or have or acquire another nationality."<sup>99</sup>

The 1961 convention can scarcely be seen to embody customary standards. It took fourteen years after its adoption for the convention to come into effect, and it has not been widely ratified.<sup>100</sup> But its core principle—the assurance that every person possess a nationality—had already gained widespread adherence through its incorporation in the 1948 Universal Declaration of Human Rights. Further, the obligations that the convention imposes to this end echo a persistent theme, evident in international legal responses to issues of nationality, which implicitly endorses a territorial/civic vision of nationality. It is that vision above all, I will argue in the following section, that has informed international responses to the Baltic and Czech citizenship policies.

## V. TERRITORIAL/CIVIC NATIONALITY

Central to a territorial/civic model of nationality is the concept of a political community, defined in significant part by a particular bounded territorial space within which people obey the same political and legal authorities and that also demarcates the boundaries of their shared political loyalty. Its antonym is a predominantly ethnic model of citizenship, in which the political community is defined above all by common descent and culture.

<sup>96</sup> (1975) 989 U.N.T.S. 175 (No. 14458), art. 1.

<sup>97</sup> *Id.* art. 1(2)(b). Similar provisions are included in Article 6(2) of the Draft European Convention on Nationality, Council of Europe Doc. DIR/JUR (97) 2 (1997) [hereinafter Draft European Convention].

<sup>98</sup> Article 10(1) provides: "Every treaty providing for the transfer of a territory shall include provisions for ensuring that, subject to the exercise of the right of option, the inhabitants of that territory shall not become stateless."

<sup>99</sup> *Id.* art. 10(2).

<sup>100</sup> See Chan, *supra* note 91, at 4.

Neither of these models corresponds precisely to the *jus soli* and *jus sanguinis* bases for determining citizenship, though extreme forms of the *jus sanguinis* approach to citizenship may affirm an ethnic model.<sup>101</sup> For the most part, both the *jus soli* and *jus sanguinis* principles are ascriptive—that is, they ascribe citizenship based upon what might be viewed as an arbitrary circumstance rather than on affirmative consent to citizenship by either the individual on whom citizenship is conferred or by his or her political community.<sup>102</sup> When, however, either principle is combined with the further requirement of habitual residence in a territory as a condition of acquiring citizenship, the resulting criteria tend to support a territorial/civic model.

While international law has long been formally neutral on which criteria states may use to determine citizenship (within, of course, permissible limits), it has long subtly favored a territorial/civic model. For example, in the *Nottebohm* case the International Court of Justice found the links of the applicant state, Liechtenstein, and the individual on whose behalf it sought to espouse a claim, Friedrich Nottebohm, insufficient to entitle Liechtenstein to assert a judicial claim of protection against Guatemala that the latter was required to recognize. German by birth, Nottebohm had moved to Guatemala in 1905. Although Guatemala remained his home thereafter, Nottebohm possessed German nationality until 1939, when, shortly after Germany invaded Poland, he successfully applied for naturalization in Liechtenstein. Upon acquiring a Liechtenstein passport, Nottebohm returned to Guatemala. Based on these facts, the court found the link between Liechtenstein and Nottebohm inadequate to entitle the former to espouse the claim of the latter. The court reasoned:

[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred,

<sup>101</sup> Examples include Germany and Israel, which extend citizenship to all Germans and Jews, respectively, regardless of whether a prospective citizen's parents possessed the states' nationality. More commonly, countries that utilize the *jus sanguinis* principle confer citizenship on persons whose parents possess their nationality.

<sup>102</sup> See generally PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* 9–41 (1985) [hereinafter *CITIZENSHIP*]. As these authors note, both the *jus soli* and *jus sanguinis* principles may seem antithetical to an Enlightenment view that a government's legitimacy rests upon the consent of its citizens. For John Locke, the *jus soli* principle was even harder to reconcile with the principle of consent than the *jus sanguinis* approach. The latter could be reconciled with the principle of consent on the basis that parents, in Locke's view, possessed a right of tutelage over their children until the latter reached maturity, at which time they would freely chose their political allegiance. As a practical matter, persons reaching majority would generally elect the citizenship of their family. See *id.* at 23–26. Still, only citizenship through naturalization would be fully consistent with the principle of consent.

either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him its national.<sup>103</sup>

Although the "genuine link" test thus articulated was explicitly limited to the context of states' espousal of claims on the international plane, the territorial/civic conception of nationality on which it is based has shaped more recent responses to issues of statelessness, responses that focus more on the rights of people than on the prerogatives of states. This is notably true of the 1961 Convention on the Reduction of Statelessness. As I have noted, the convention generally requires states parties to confer citizenship on persons born in their territories if they would otherwise be stateless. But states parties applying the *jus soli* principle may condition the acquisition of nationality on habitual residence before the age of maturity, in effect limiting the *jus soli* principle to persons who have established a meaningful membership in a state party's political community through habitual residence in its territory. This same approach governs the convention's treatment of changes in territorial sovereignty. As noted earlier, new states are required to confer their nationality on those inhabiting their territory unless they have or acquire another nationality.

Scarcely an innovation, this provision reflects a longstanding state practice in respect of transfers of territorial sovereignty. Treaties of cession have often provided for acquisition of the new state's nationality by citizens of the transferred territory, but these provisions have frequently sought to exclude people whose presence at the time of transfer was merely transitory. The most commonly used criterion for automatic citizenship in the new state has been habitual residence in the transferred territory,<sup>104</sup> and influential proposals for legal reform have endorsed this as the preferred approach.<sup>105</sup> Signifying the trend of international legal doctrine in this regard, a United Nations rapporteur has suggested that successor states may now

<sup>103</sup> *Nottebohm Case*, *supra* note 73, at 23.

<sup>104</sup> See International Law Commission, *First Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons*, by Vaclav Mikulka, Special Rapporteur, U.N. Doc. A/CN.4/467, at 27, para. 74 (1995) [hereinafter *ILC Report*].

<sup>105</sup> For example, the Harvard Research Draft on Nationality proposed that, in cases of partial succession, habitual residence should be the test for conferring the new state's nationality on persons in the transferred territory. 23 AM. J. INT'L L. 26 (1929). See also O'CONNELL, *supra* note 82, at 258 (expressing view that habitual residence is "the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons"). Many proponents of this approach add the qualification that habitual residents should possess a right of option with respect to another nationality.



have some duty under international law to confer their nationality on inhabitants who would otherwise become stateless.<sup>106</sup>

Notably, the UNHCR's assessment of the Czech citizenship law treated the genuine link test, applied by the ICJ as a rule governing states' relationships *inter se*, as though it were equally relevant in assessing internal laws on citizenship. Although the *Nottebohm* opinion had expressly confined the genuine link test to the court's assessment of a state's right to assert diplomatic protection on the international plane, the UNHCR invoked *Nottebohm* to condemn as incompatible with international law the Czech Republic's new law.<sup>107</sup> Similarly, the Council of Europe invoked the concept of a "genuine, effective link between the State and its citizens"<sup>108</sup> as a principle limiting the Czech and Slovak governments' discretion in determining criteria for citizenship.<sup>109</sup>

By applying the genuine link test in this fashion, the UNHCR and the Council of Europe transported a test that had been firmly rooted in the sovereign prerogative paradigm to a context that radically encroaches on states' prerogatives. In *Nottebohm*, the ICJ invoked the genuine link test to determine whether the manner in which Liechtenstein had naturalized Mr. Nottebohm gave it "a sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala."<sup>110</sup> What was at stake was not Mr. Nottebohm's rights—which would have been better served had the court judged Liechtenstein entitled to espouse his claim—but those of Liechtenstein *vis-à-vis* Guatemala. The ICJ again affirmed the sovereign

<sup>106</sup> *ILC Report, supra* note 104, at 30–31, para. 87. More recently, a working group established by the ILC to identify issues relating to the impact of state succession on nationality has proposed that a future instrument should include a principle recognizing the "obligation of States concerned to avoid that persons who, on the date of the succession of States, had the nationality of the predecessor State and had their habitual residence on the respective territories of the States concerned, become stateless as a result of such succession." Report of the International Law Commission on the work of its forty-eighth session, U.N. GAOR, 51st sess., Supp. No. 10, para. 87, U.N. Doc. A/51/10 (1996). *Cf.* Draft European Convention, *supra* note 97, art. 4(d) and (g) (each state party to draft treaty "shall facilitate in its internal law the acquisition of its nationality for . . . persons who were born on its territory and reside there lawfully and habitually; . . . [and] stateless persons . . . lawfully and habitually resident on its territory"); *id.*, art. 19(1) (in matters of nationality in cases of state succession, principles contained in article 4 shall be respected); and *id.*, art. 2(b) (in that same context, each state party, in deciding on the granting or retention of nationality, should take particular account of, *inter alia*, "the habitual residence of the person concerned at the time of State succession").

<sup>107</sup> See *UNHCR Report, supra* note 56, at 6, para. 13; 18, para. 53.

<sup>108</sup> *Council of Europe Report on Czech/Slovak Laws, supra* note 27, at 19, para. 45.

<sup>109</sup> A Draft European Convention on Nationality similarly invokes the genuine link standard as a limitation on the nationality rules that states parties may adopt and enforce. *See, e.g.*, Draft European Convention, *supra* note 97, arts. 7(e) and 18(2)(b). The Czech government responded to the UNHCR and Council of Europe reports by asserting, *inter alia*, that nonapplication of the criterion of habitual residence is permitted by international law, which also does not normally link issues of citizenship to the context of state succession. *Position of the Czech Republic on the UNHCR Regional Bureau for Europe Document: The Czech and Slovak Citizenship Laws and the Problem of Statelessness* 4–5, 13 (April 1996); *Reply of the Government of the Czech Republic, in Council of Europe Report on Czech/Slovak Laws, supra* note 27, at 98–99, 106.

<sup>110</sup> *Nottebohm Case, supra* note 73, at 17.

prerogative paradigm by making clear that its ruling did not call into question Liechtenstein's sovereign right to confer its nationality on Mr. Nottebohm for purposes of its internal law.<sup>111</sup> Rather, the genuine link test was relevant only in respect of Liechtenstein's right to extend its protection to Mr. Nottebohm vis-à-vis Guatemala. This distinction, critical to the court's analysis in *Nottebohm*, was swept aside by the UNCHR and the Council of Europe.

## VI. HUMAN RIGHTS RESTRAINTS ON NATIONALITY CRITERIA

The analyses summarized in Part II highlight the extraordinary degree to which international assurances of personal rights now circumscribe states' discretion with respect to citizenship determinations.<sup>112</sup> This is notably true, for example, of international legal guarantees of non-discrimination on such grounds as race, national origin, and gender.

For example, although the Convention on the Elimination of All Forms of Race Discrimination<sup>113</sup> permits some distinctions between citizens and noncitizens, it makes clear that states parties may not discriminate among noncitizens on the basis of race or nationality. Article 1(3) asserts that nothing in the convention "may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality." Article 5, the key provision prohibiting discrimination, reinforces this by requiring states parties "to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . . (d)(iii) The right to nationality." Because this convention requires states parties to "nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination,"<sup>114</sup> parties to the convention presumably could be in breach if their nationality laws had the effect of discriminating against persons of a particular national origin.

<sup>111</sup> *Id.* at 20.

<sup>112</sup> *Cf. Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion, Inter-Am. Ct. Hum. Rts., No. OC-4/84, January 29, 1984, reprinted in 5 HUMAN RIGHTS PROCEEDINGS 161, 167, para. 32 (1984), in which the Inter-American Court of Human Rights proclaimed: "[D]espite 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 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." See also *id.* at 168, para. 38; ILC Report, *supra* note 104, at 30, para. 85 (1995).

<sup>113</sup> Opened for signature March 7, 1966, entered into force January 4, 1969, 660 U.N.T.S. 195 [hereinafter *Race Convention*].

<sup>114</sup> *Id.* art. 2(c).

Similarly, citizenship laws that discriminate on the basis of gender have been found incompatible with the prohibition against gender-based discrimination found in all major human rights conventions.<sup>115</sup> Further, several of the analyses discussed in Part II suggested that the Baltic states' new/proposed citizenship laws could run afoul of international standards if they were applied in a manner that interfered with international legal assurances of family unity and freedom of movement. One of the grounds on which the Czech Republic's law has been faulted is the claim that it violates international prohibitions of retroactive punishment.<sup>116</sup>

But if restrictive citizenship laws can founder on the basis of these and other human rights, it is not the sheer aggregation of internationally protected rights that has so substantially circumscribed states' discretion in respect of citizenship. Rather, human rights doctrine provides a deeper justification for international law's emerging affirmation of a territorial/civic model of citizenship.

The central idea is elegant in its simplicity: it is those states to whose (abuse of) power individuals are vulnerable that owe individuals an obligation to respect and ensure fundamental rights. This idea informs the entire body of postwar law protecting individuals against the abuse of state power; the scope of states' human rights obligations is, in the main, defined in territorial terms.<sup>117</sup> States are thereby held to account for their treatment of persons who are subject to their sovereign power—a power generally, but not exclusively, exercised on a territorial basis.<sup>118</sup>

<sup>115</sup> See *Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, *supra* note 112. Both the Estonian and Latvian citizenship laws have been amended to eliminate distinctions based upon gender.

<sup>116</sup> As I have noted, persons who were citizens of Czechoslovakia but who did not possess what was formerly the equivalent of a federal-state nationality can be denied citizenship in the successor state of the Czech Republic based on a crime for which they have already been convicted. This, it has been urged, constitutes imposition of a further penal sanction in violation of the international proscription of retroactive punishment. See COMMISSION ON SECURITY AND COOPERATION IN EUROPE, *EX POST FACTO PROBLEMS OF THE CZECH CITIZENSHIP LAW* (September 1996).

<sup>117</sup> The predominantly territorial approach of human rights law is captured in Article 2(1) of the ICCPR, which provides: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant." The extension of states parties' obligations to persons subject to their jurisdiction even if outside their territory reinforces the principle underlying the basic approach of territorial responsibility: states owe human rights obligations to individuals who are vulnerable to their exercise of sovereign power.

<sup>118</sup> To be sure, treaties generally apply on a territorial basis. See Vienna Convention on the Law of Treaties, art. 29, May 23, 1969, U.N. Doc. A/CONF. 39/27 (entered into force January 27, 1990). Yet as I have noted, in the case of human rights treaties the scope of application is often more broadly defined to cover all persons subject to the jurisdiction of states parties. Notably, the International Court of Justice has found that states parties' duties under the Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, G.A. Res. 260 A (III) (entered into force January 12, 1951), to prevent and punish genocide are not territorially limited. Decision on Preliminary Objections, Case Concerning Application of

This idea, then, begins to explain why international law has moved in the direction of establishing a presumptive right to citizenship in the state of habitual residence. It is that state on whom individuals must depend for the effective assurance of fundamental rights. As the various assessments of the citizenship laws summarized in Part II reiterated, the effective realization of many internationally protected rights turns on full citizenship.

In larger perspective, citizenship in the state where one habitually resides is the only meaningful way to realize other values associated with self-government, an entitlement that received special attention in the assessments of European organizations not merely because of its instrumental value in securing other rights but because of its independent and singularly important value in the lexicon of international human rights assurances. To exclude longtime residents from citizenship, the European delegations' reports concluded, would vitiate the democratic nature of these countries.

This conclusion was surely the most legally innovative aspect of the assessments summarized in Part II; human rights instruments recognizing a right of political participation typically limit that right to persons already possessing citizenship.<sup>119</sup> If not clearly established by legal precedent, how, then, are the European delegations' conclusions to be explained? To put the question more precisely, in what way would a country's democratic nature be fundamentally subverted by denying full citizenship to longtime residents?

The answer lies at "the very heart of the democratic idea: that governmental legitimacy depends upon the affirmative consent of those who are governed."<sup>120</sup> Michael Walzer captures the point this way: "Men and women are either subject to the state's authority, or they are not; and if they

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the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia), July 11, 1996.

<sup>119</sup> For example, while most of the rights recognized in the ICCPR apply to all persons in a state party's territory, rights relating to political participation are explicitly assured only in respect of citizens. Further, the International Convention on the Elimination of All Forms of Racial Discrimination, whose principal thrust is to prohibit racial discrimination, explicitly excepts "distinctions, exclusions, restrictions or preferences made by a State Party . . . between citizens and non-citizens." Race Convention, *supra* note 113, art. 1(2).

<sup>120</sup> Jamin Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PENN. L. REV. 1391, 1444 (1993). In the 1809 Pennsylvania case of *Stewart v. Foster*, 2 Binn. 110 (Pa. 1809), Justice Blackenridge explained in clarion terms how this idea would be vitiated by denying resident aliens the right to vote in local elections: "The being an inhabitant, and the paying tax, are circumstances which give an interest in the borough. The being an inhabitant, gives an interest in the police or regulations of the borough generally; the paying tax gives an interest in the appropriation of the money levied. A right, therefore, to a voice mediately or immediately in these matters, is founded in natural justice. To reject this voice, or even to restrain it unnecessarily, would be wrong. It would be as unjust as it would be impolitic. It is the wise policy of every community to collect support from all on whom it may be reasonable to impose it; and it is but reasonable that all on whom it is imposed should have a voice to some extent in the mode and object of the application." *Id.* at 122.

are subject, they must be given a say, and ultimately an equal say, in what the authority does."<sup>121</sup> If taken seriously, this basic principle would sharply curtail states' discretion respecting criteria for naturalization with respect to long-term residents. Habitual residents of a state would enjoy a presumptive claim to full citizenship, a theme that pervades the European organizations' assessments of restrictive citizenship laws adopted by newly independent states.

More complex issues are raised by the question whether, or in what ways, democratic values constrain states' naturalization policies with respect to other categories of noncitizens—in particular, whether democratic values might be offended by naturalization policies that favor particular national groups. At least one important judgment has suggested that bonds of ethnic affinity may appropriately shape a state's naturalization laws. In a 1984 advisory opinion assessing the compatibility of a proposed Costa Rican citizenship law with the American Convention on Human Rights, the Inter-American Court of Human Rights concluded that proposed rules for naturalization that imposed less stringent residency requirements for Central Americans, Ibero-Americans, and Spaniards than for other foreigners were not impermissibly discriminatory. The court reasoned that such differentiation was reasonable because those who would benefit from the expedited procedures "objectively . . . share much closer historical, cultural and spiritual bonds with the people of Costa Rica. The existence of these bonds," the court continued, "permits the assumption that these individuals will be more easily and more rapidly assimilated within the national community and identify more readily with the traditional beliefs, values and institutions of Costa Rica, which the state has the right and duty to preserve."<sup>122</sup> Those same factors arguably facilitate the collective process of deliberation that is the warp and woof of self-government. On the other hand, though, concerned regard for co-citizens who belong to an "other" category is the hallmark of mature democratic deliberation.<sup>123</sup> But however

<sup>121</sup> MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 61 (1983). Pressing the cause further, Walzer argues that a place in which citizens govern over noncitizens is nothing less than tyrannical. *Id.* at 62.

<sup>122</sup> *Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, *supra* note 112, at 173, para. 60. The Council of Europe's report on the Czech/Slovak citizenship laws sounded a similar note, but—inexplicably and regrettably—implied that the principle is equally valid in the context of state succession: "It is legitimate to make distinctions on the basis of language and, in so far as this denotes a better ability for integration into a country, on the basis of ethnic origin in giving citizenship to new citizens of a State, also in case of dissolution of a previous State. Such distinctions are not considered as discrimination and accepted under general principles of nationality law." *Council of Europe Report on Czech/Slovak Laws*, *supra* note 27, at 48, para. 184.

<sup>123</sup> I explore these issues in *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 *YALE J. INT'L L.* 1 (1997). For a sophisticated analysis of the complex issues raised by political arrangements in democratic states that take account of national identity, see David Wippman's chapter in this volume.

perplexing these questions, their complexity should not obscure the principle recently affirmed in clarion terms: democratic values are deeply offended by the exclusion from citizenship of persons long resident in a political community.

Formerly subject to the sovereign discretion of states, questions of nationality are now extensively governed by human rights law. Ironically, at a time when human rights law has narrowed the gap between protections assured to citizens and noncitizens—and in that respect has diminished the importance of citizenship—that same law may be creating a new entitlement to citizenship. Above all, rights relating to participatory democracy establish a strong claim to citizenship on the part of persons long resident in a territory. The central importance of democratic values—values enshrined in all of the major human rights treaties—has thus wrought a radical reconception of the relationship between sovereign power and political community.

# International Law and Ethnic Conflict

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*Published under the Auspices of the  
American Society of International Law*

Cornell University Press · Ithaca and London