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Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law

Karen Knop
University of Toronto

Christine Chinkin
London School of Economics and Political Science

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REMEMBERING CHRYSYAL MACMILLAN: WOMEN'S EQUALITY AND NATIONALITY IN INTERNATIONAL LAW

*Karen Knop**
*Christine Chinkin***

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* Dr. Karen Knop, Associate Professor, University of Toronto Faculty of Law.

** Dr. Christine Chinkin, Professor, London School of Economics and Political Science. The authors were respectively Rapporteur and Chair, International Law Association, Committee on Feminism and International Law until 2000. This article is based upon the Final Report of that Committee on Women's Equality and Nationality in International Law, which reflects contributions by Committee members, and is in that sense a joint enterprise. Committee members were: Junko Akiba-Torii (Japan), Andrew C. Byrnes (Hong Kong), Hilary Charlesworth (Australia), Mai Chen (New Zealand), Patricia Conlan (Ireland, alternate), Alpha Connelly (Ireland), M. Kirilova Eriksson (Sweden), Anne Gallagher (Australia, alternate), Alda Gant (Brazil), Savitri W.E. Gooneskere (Sri Lanka), Anja-Riitta Ketokoski (Finland), Annette Lansink Kirk-Cohen (South Africa), Ludmila V. Korbut (Russia), Virginia Leary (United States), Maria Lacticia P. Loenen (The Netherlands), Ms. Justice Sujata V. Manohar (India), Karin Oellers-Frahm (Germany), Catherine Redgwell (United Kingdom), Zenaida P. Reyes (Philippines), Jenny Huei-Yi Shyu (Taiwan, Republic of China), Lilly Sucharipa (Austria), Giuseppe Vedovato (Italy), Tania Wasserstein (Brazil), and Chih-yu Wu (Taiwan, Republic of China, alternate). David Berry (West Indies) contributed to the Committee's work, although he only subsequently became a member of the Committee.

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In 1923, Chrystal Macmillan appeared before the International Law Association (ILA) and urged the Association to endorse the legal principle that women should have the same right as men to choose their nationality.¹

*Macmillan was perhaps the closest thing to a prominent feminist international lawyer of the time. Although not called to the English Bar until 1924,² shortly after admission was granted to women, she had already used her legal knowledge for many years to argue the causes of women's suffrage and pacifism.³ In 1908, Macmillan pleaded in person before the House of Lords in *Nairn v. University of St. Andrews*.⁴ Women did not then have the vote, but "persons" who were graduates of a Scottish university had the right to vote for the representative of their university in Parliament. A graduate of the University of Edinburgh (M.A. and B.Sc. with first class honors in mathematics and natural philosophy),⁵ Macmillan argued—unsuccessfully—in *Nairn* that "persons" should be interpreted to include women.⁶*

Along with a small number of women pacifists, including the American peace activists and later Nobel Peace Prize recipients Jane Addams and Emily Balch, Macmillan was central to the International Congress of Women held at The Hague in the midst of World War I. Not only did the Congress formulate a series of resolutions for a just peace, but two delegations of women appointed by the Congress, Macmillan on one, traveled from one country to the next with the purpose of conveying its resolutions to belligerent and neutral governments alike. In particular, they sought to build support for the Congress's plan to end the war through mediation by a conference of neutral states. Between them, the delegations succeeded in visiting fourteen countries and meeting with

1. INTERNATIONAL LAW ASSOCIATION, 32D CONFERENCE REPORT 40–44 (1923) [hereinafter 32D CONFERENCE REPORT] (transcript of presentation by Chrystal Macmillan).

2. *Obituary: Miss Chrystal Macmillan*, TIMES (London), Sept. 22, 1937, at 14d.

3. Cicely Hamilton, *Miss Chrystal Macmillan: Appreciations*, TIMES (London), Sept. 23, 1937, at 14c.

4. *Nairn v. University of St. Andrews*, [1909] A.C. 147 (H.L.).

5. *Obituary*, *supra* note 2.

6. On this and other "persons" cases, see ALBIE SACHS & JOAN HOFF WILSON, ch. 1, *Britain: Are Women "Persons"?*, in *SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES* 3 (1978).

twenty-two prime ministers and foreign ministers, the presidents of two republics, a king, and the Pope.⁷

Macmillan also became a leader in the campaign for the right of married women to choose their nationality independent of their husband's nationality, which became a priority for feminists after World War I.⁸ In addition to her involvement in efforts to reform British nationality law,⁹ she was a spokeswoman for equality in international fora, as her appearance before the ILA indicates. Macmillan chaired a women's international demonstration on the subject of married women's nationality at The Hague and led deputations from the demonstration to the Codification Conference held there in 1930.¹⁰ Feminist dissatisfaction with the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws (Hague Convention on Conflict of Nationality Laws),¹¹ which emerged from the Codification Conference, caused the League of Nations to create a Women's Consultative Committee on Nationality.¹² Macmillan convened the international action committee that lobbied the League¹³ and served as a member of the resulting Committee in the early 1930s.¹⁴

When Chrystal Macmillan addressed the International Law Association in 1923, the issue of women's nationality was already before the Association. At its conference the previous year, the ILA had resolved that "it would be desirable to fix uniformly by treaty the nationality of married women, reserving to a married woman, as far as possible, the right to choose her own nationality."¹⁵ Macmillan's priority was equality for women. But the ILA was primarily concerned with the loss of uniformity and potential for conflicts among nationality laws that arose as some states moved away from the principle of dependent nationality, whereby a woman's marriage to a man of another nationality automatically caused her to lose her own nationality and acquire his.

7. JANE ADDAMS ET AL., *WOMEN AT THE HAGUE: THE INTERNATIONAL CONGRESS OF WOMEN AND ITS RESULTS* (Garland Publ'g 1972) (1915).

8. 32D CONFERENCE REPORT, *supra* note 1, at 40–41. In the U.S. context, see CANDICE LEWIS BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND THE LAW OF CITIZENSHIP* (1998).

9. *Obituary*, *supra* note 2.

10. *Id.*

11. Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Apr. 12, 1930, 179 L.N.T.S. 89 [hereinafter Hague Convention on Conflict of Nationality Laws].

12. See Carol Ann Miller, *Lobbying the League: Women's International Organizations and the League of Nations 193–209* (1992) (unpublished Ph.D. thesis, University of Oxford) (on file with authors).

13. LEILA J. RUPP, *WORLDS OF WOMEN: THE MAKING OF AN INTERNATIONAL WOMEN'S MOVEMENT* 147 (1997).

14. *Obituary*, *supra* note 2.

15. 1 INTERNATIONAL LAW ASSOCIATION, 31ST CONFERENCE REPORT 257 (1922).

Founded in Brussels in 1873 as the Association for the Reform and Codification of the Law of Nations, the ILA had emerged from the American pacifist movement that saw the task of reform and codification as the prelude to the peaceful settlement of disputes.¹⁶ Even at its founding, however, the idea of an association committed to the general codification of international law and compulsory arbitration of disputes was contested as over-ambitious and impractical.¹⁷ And the ILA's increasingly practice-minded membership led it to concentrate instead on the unification of civil and commercial law.¹⁸ Indeed, maritime law is the area where the Association's contribution is most widely recognized.¹⁹ Over time, the ILA nevertheless returned to public international law, in part through its treatment of various subjects relating to the individual, such as nationality and naturalization.²⁰

At the 1923 International Law Association conference, Ernest Schuster, who delivered the paper on married women's nationality,²¹ limited the ILA's interest in the question to its objectives of promoting "uniformity of legislation in matters affecting international intercourse" and determining "means for the avoidance of conflicts between the laws of different countries."²² Schuster argued, however, that these objectives supported a married woman's right to choose her nationality because this was the trend rapidly emerging in domestic legislation, and encouragement of the trend would serve to promote uniformity and minimize conflicts between the nationality laws of different states.²³ Moreover, he personally endorsed this view on the grounds that no individual should be required to change her nationality without her consent and that an individual should truly bear allegiance to the state of which she is a national.²⁴ Following the discussion of Schuster's paper, Chrystal Macmillan presented the convention on the nationality of women proposed by the International Woman Suffrage Alliance (IWSA).²⁵ a

16. Irwin Abrams, *The Emergence of the International Law Societies*, 19 REV. OF POL. 361 (1957); F. Münch, *L'influence de l'International Law Association sur la doctrine et la pratique du droit international*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS WRITTEN IN HONOUR OF THE CENTENARY CELEBRATION OF THE INTERNATIONAL LAW ASSOCIATION 1873-1973* 23, 23-25 (Maarten Bos ed., 1973).

17. Abrams, *supra* note 16, at 376-78.

18. Münch, *supra* note 16, at 25. See also Abrams, *supra* note 16, at 378-79.

19. Münch, *supra* note 16, at 26.

20. *Id.* at 25.

21. Ernest J. Schuster, *The Effect of Marriage on Nationality in 32D CONFERENCE REPORT*, *supra* note 1, at 9.

22. *Id.*

23. *Id.* at 10.

24. *Id.* at 23-24.

25. The IWSA proposal is reprinted in *32D CONFERENCE REPORT*, *supra* note 1, app. at 45-47.

convention based squarely on the principle that women should have the same right as men to keep or change their nationality.

Macmillan did not carry the day. The ILA adopted a model domestic statute and set of international treaty provisions that furthered women's interests insofar as they addressed the problem of women's statelessness resulting from conflicts among the nationality laws of different states.²⁶ But the ILA accepted the position that "the old rule, which has come down from early Christian times,²⁷ should be the dominant rule still; that is to say, that the wife should, as a rule, follow the nationality of her husband."²⁸ In the view of its drafters, this solution was most likely to be consistent with "the happiness of family life, remembering that a wife joins a new family with her eyes open."²⁹

This article both continues and returns to the story of Chrystal Macmillan and the International Law Association. Some seventy-five years later, gender discrimination still exists in nationality law. For an American audience, Thailand's offer of nationality to U.S. golfer Tiger Woods, whose mother is Thai, highlighted the inequality of Thailand's laws on nationality.³⁰ Although Thai women, as well as Thai men, can now pass their nationality to their children, the law continues to discriminate against women in other matters of nationality. Whereas the foreign wives of Thai men are specially entitled to apply for Thai nationality, the foreign husbands of Thai women are not. In practice, Thai women married to foreigners are also subject to discrimination in the ownership of land. All Thais married to foreigners are prohibited from owning property in Thailand, but this prohibition is more easily enforced against Thai women because their identity card reveals their marital status and their husband's non-Thai surname. Thai men, whose marital status is not recorded on their identity card, can readily evade enforcement.³¹

26. See INTERNATIONAL LAW ASSOCIATION, 33D CONFERENCE REPORT 25-32 (1924) [hereinafter 33D CONFERENCE REPORT].

27. There was some debate as to whether this nationality rule was long implicit in the patriarchal ethos of the common and civil law or a more recent addition. Compare Schuster, *supra* note 21, at 10-15, with 32D CONFERENCE REPORT, *supra* note 1, at 26-38 (discussion of Schuster's paper at the conference).

28. 33D CONFERENCE REPORT, *supra* note 26, at 24. For Macmillan's response, see *id.* at 40.

29. *Id.* at 24.

30. *Woods' Victory, Overall Performance a Hit in Thailand*, U.S.A TODAY, Feb. 10, 1997, at 7c (final ed.); Stephen Vines, *The Man People Say Will be the Black Jack Nicklaus*, INDEPENDENT (London), Feb. 4, 1997, at 2. We are grateful to Antony Anghie for this example.

31. *Second and Third Periodic Reports of States Parties: Thailand*, U.N. Committee on the Elimination of Discrimination Against Women, at 38-39, U.N. Doc. CEDAW/C/THA/2-3 (1997). See also *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Thailand*, U.N. Committee on the Elimination of Discrimination Against Women, ¶¶ 226, 247-48, U.N. Doc. A/54/38, ¶¶ 213-50 (1999). According to the Consular Section of the Thai

Recent U.S. cases such as *Miller v. Albright*³² and *Nguyen v. Immigration and Naturalization Service*³³ demonstrate that gender discrimination persists not only “elsewhere,” but in U.S. nationality law as well. The United States Supreme Court in *Nguyen* upheld a provision of the Immigration and Nationality Act that makes it harder for American fathers than American mothers to pass citizenship to their children born abroad where the other parent is not a citizen and the parents are not married to one another. In the Court’s view, the requirement that the U.S. father’s paternity be established by legitimation, acknowledgment under oath, or adjudication before the child reaches 18 (on top of the requirement of “clear and convincing evidence” of paternity) furthers the government’s interest in ensuring a demonstrated opportunity for the U.S. parent and the child to develop a meaningful relationship with one another.³⁴ Even if the government’s interest is defined more strongly as ensuring the actual existence of such a parent-child relationship, the Court was still satisfied that the requirement sufficiently furthers the interest.³⁵ When the U.S. parent is the mother, the fact of giving birth is assumed to foster real, everyday ties between the child and the parent, and thus between the child and the United States.³⁶ In finding the different treatment of mothers and fathers to be inconsistent with the constitutional guarantee of equal protection, the four dissenting Justices concluded that the differentiation relies impermissibly on sexual stereotypes.³⁷ The mother’s presence at birth does not guarantee the opportunity for a real, practical relationship with the child. The child may be removed from the mother on account of alleged abuse or neglect, or may be separated from the mother by tragedy such as disaster or war. Nor, apart from stereotype, is

Embassy in Washington, D.C., the law has not changed since Thailand reported to the Committee on the Elimination of Discrimination Against Women. E-mail from Consular Section, Thai Embassy, Washington, D.C., to Karen Knop (Aug. 15, 2001) (on file with authors).

32. *Miller v. Albright*, 523 U.S. 420 (1998). For commentary, see Cornelia T.L. Pillard & T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power: Judicial and Executive Branch Decision Making in Miller v. Albright*, 1998 SUP. CT. REV. 1; Debra L. Satinoff, *Sex-Based Discrimination in U.S. Immigration Law: The High Court’s Lost Opportunity to Bridge the Gap Between What We Say and What We Do*, 47 AM. U. L. REV. 1353 (1998); Kristin Collins, Note, *When Fathers’ Rights are Mothers’ Duties: The Failure of Equal Protection in Miller v. Albright*, 109 YALE L.J. 1669 (2000); Ranjana Natarajan, Note, *Amerasians and Gender-Based Equal Protection Under U.S. Citizenship Law*, 30 COLUM. HUM. RTS. L. REV. 123 (1998).

33. Tuan Anh Nguyen v. INS, 121 S. Ct. 2053 (2001). See also *Ashcroft v. Lake*, 121 S. Ct. 2518 (2001) (vacating a Second Circuit finding that 8 U.S.C. § 1409(a) denied a U.S. citizen father equal protection and remanding for reconsideration in light of *Nguyen*); *United States v. Ahumada-Aguilar*, 121 S. Ct. 2518 (2001) (vacating a similar Ninth Circuit finding and remanding for reconsideration in light of *Nguyen*).

34. *Nguyen*, 121 S. Ct. at 2061–64.

35. *Id.* at 2064.

36. *Id.* at 2061.

37. *Id.* at 2071–76 (O’Connor, J., dissenting).

there reason to say that fathers who are present at the birth lack the opportunity for a relationship with the child.³⁸ Less permissible still is to assume that mothers actually will develop a close relationship with their children, but insist that fathers be shown to do so. The stereotype at work here is that women are much more likely than men to develop caring relationships with their children.³⁹ Moreover, the dissent in *Nguyen* traced the different treatment of unmarried mothers and fathers in the Immigration and Nationality Act to the old legal regime that made women responsible for nonmarital children and allowed men to choose whether to assume any of the responsibility.⁴⁰

38. *Id.* at 2073.

39. *Id.* at 2074. In fact, Nguyen's unmarried Vietnamese mother abandoned him at birth, and his U.S. father raised him from the age of five in Texas. *Tuan Anh Nguyen v. INS*, 208 F.3d 528, 530 (5th Cir. 2000).

40. *Nguyen*, 121 S. Ct. at 2075–76 (O'Connor, J., dissenting).

While this article situates the issues of gender equality in nationality law in a variety of contexts, it does not attempt a general analysis of how discrimination based on gender interacts with discrimination on other bases such as race, ethnicity, and religion. In this connection, Tiger Woods's portrayal by the media as the "black Jack Nicklaus"—a Cablinasian prodigy in the white, country-club sport of golf—points to the relevance of race to the law and practice of citizenship. NICHOLAS EDWARDS, *TIGER WOODS: AN AMERICAN MASTER* 4 (2d ed. 2001) ("Cablinasian" is Woods's term for himself as a Caucasian-black-Native American-Asian.). For example, Hope Lewis describes the prejudices that black women entering the United States may experience, arguing that U.S. nationality may make little or no difference. Hope Lewis, *Reflections on "BlackCrit Theory": Human Rights*, 45 VILL. L. REV. 1075, 1085–87 (2000). Indeed, historically, the American women's campaign for the independent nationality of married women was not free of anti-immigrant sentiment. BREDBENNER, *supra* note 8, at 46–57. Regarding the impact of class, religion, age, and ethnicity on the composition of the early international women's movement, including the IWSA, see RUPP, ch. 3, "Who's In, Who's Out," in *supra* note 13, at 51.

Also beyond the scope of this article is an analysis of how gender and nationality play into inequalities of power, symbolism, and resources across countries. Here again, the story of Tiger Woods is thought-provoking. Woods's father and mother met when Woods's father was stationed in Thailand with the U.S. Army. EDWARDS, *supra* note 40, at 6. On the one hand, African-American men have historically been victims of race and gender stereotypes when serving with the U.S. Armed Forces abroad. See, e.g., CYNTHIA ENLOE, *BANANAS, BEACHES AND BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS* 67–71 (updated ed. 2000) (controversy over relations between black American male soldiers and white British women in Britain during World War II). On the other, the number of U.S. military posted abroad reflects the global status of the United States. In 1999, the United States had 252,763 military personnel stationed in foreign countries. *Nguyen*, 121 S. Ct. at 2062. As citizens of a superpower, these personnel all enjoy some degree of privilege relative to the local population, especially in the Third World. Moreover, in terms of equality between nation-states, the U.S. citizenship rules that make citizenship harder to come by for the children born to a U.S. father and a local mother result in allocating responsibility for the nonmarital children of U.S. military personnel largely to the country where they are stationed. Because the U.S. military is overwhelmingly male, *id.*, the U.S. parent is most often the father, and U.S. citizenship is therefore more difficult for the child to acquire. *Cf. id.* at 2077 (O'Connor, J., dissenting) (As per the dissent in *Nguyen*, the Court's discussion of numbers of U.S. military personnel overseas and the proportion of women and men serving in the military may "simply reflect the stereotype of male irresponsibility"—which equates to U.S. irresponsibility.). See also Collins, *supra* note 32, at 1706; Clay M. West, *Case Note*, *Nguyen v. INS: Is Sex Really More Important Now?*, 19 YALE L. & POL'Y REV. 525, 525 (2001).

In light of such discrimination, the International Law Association took up the study of women's nationality again. When the ILA chose the topic of women's nationality this time, however, the choice was made by the Association's Committee on Feminism and International Law. Established in 1992, with Savitri Goonesekere of Sri Lanka as its first Chair, the Committee comprises international lawyers from around the world, most of whom are women. Whereas Macmillan's were outsider proposals, prepared by the International Woman Suffrage Alliance and presented by her to the ILA, the ILA's new recommendations on women's equality and nationality in international law were developed inside the Association by this Committee. And unlike the ILA's earlier preoccupation with the needs of the public and private international law order, to say nothing of patriarchy, the Committee's aim was gender equality. In particular, the Committee sought to enhance the understanding of how international law and international human rights law might further equality in domestic nationality law. In another contrast to Macmillan's experience, the Committee's recommendations, including non-discrimination on the grounds of sex, sexual orientation, culture, marital status, or any combination thereof, were adopted by the ILA at its millennium conference held in 2000.

The ongoing need to examine and promote equality in matters of nationality is apparent from the examples of Tiger Woods and the U.S. Supreme Court judgments in *Miller* and *Nguyen*. Parts I and II of the article expand on this contemporary relevance. Part I gives a sample of gender-related developments in nationality laws worldwide since 1990, and Part II surveys the current thinking on the nature and value of nationality.

The ILA's discussion of women's nationality in the 1920s, however, is not simply a point of departure. It also serves as a reminder that the idea of equality must contend with ideas of nationality in international law. This has been all but forgotten, perhaps because equality-based arguments are now most often situated in international human rights law where they compete mainly with ideas of community and culture. While nationality is linked to community and culture, and much else, in important and complicated ways, it is not synonymous with them.⁴¹ Accordingly, gender equality must also be analyzed in the historical, strategic, and conceptual contexts of nationality. Historically, equality has made demands on nationality, and nationality has resisted and con-

41. While there are similarities between a woman's equal right to the membership in the state that nationality in the traditional international law sense represents and a woman's equal right to membership in a community within the state, such as an indigenous people or ethnic minority, there are also important differences. See KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (forthcoming Mar. 2002). Accordingly, the latter is not discussed in this article.

tinues to resist in its own (gendered) terms. Strategically, nevertheless, the international rules on nationality offer certain practical protections to women—again, according to the prevailing logic of nationality in international law. Lastly, a conceptual understanding of the value of nationality aids in identifying what equality requires be preserved equally, whether via nationality or otherwise.

Parts III and IV of the article bring the historical, strategic, and conceptual contexts of nationality to the analysis of women's claims to equality and the various international legal regimes available to address these multi-layered claims. Part III thereby shows that gender discrimination in nationality law is not a single, uniform issue that continues unbroken from the 1920s, but rather three generations of issues, each generation created by the previous one. Besides providing a more precise measure of progress toward equality, the idea of generations demonstrates that many of the current law reform efforts may not actually achieve equality. Whereas the second generation of issues predominates in the caselaw, Part III points to an emerging third generation of equality issues related to nationality and identifies the alternative approaches and arguments needed to address this latest generation.

Part III thus furnishes a new conceptual understanding of what equality requires. With this in mind, Part IV examines and evaluates the historical development of international law as it concerns women's nationality. Whereas the usual tendency is to concentrate on the international human rights guarantees of nondiscrimination on the ground of sex, whether general or specific to nationality, Part IV also canvases the relevant developments in other international legal regimes with other bases. As well as the international human rights law regime derived from equality, Part IV discusses the public international law regime historically configured on one family-one nationality (the husband and father's) and subsequently reconfigured on one person-one nationality, and the child-centered regime of international children's rights. In attending to the different logic of the different regimes, the discussion takes seriously both the nature of the resistance to equality that they may continue to generate and their strategic usefulness. The conclusion presents and discusses the ILA's resulting recommendations.

A final word should perhaps be said about the International Law Association as the tradition within which this article works. Integral to the creation of the ILA was the belief that the Association should be open, alive to the international civil society of the time, and active in political and legal discussions about reform.⁴² It is in this early spirit of

42. Münch, *supra* note 16, at 23–24. This approach contrasted with that of the Institut de droit international, founded the same year as the ILA. *See id.*; Abrams, *supra* note 16. On the “men of

engagement that we contribute the article to what needs to be a broader dialogue about equality and nationality.⁴³

I. CONTEMPORARY RELEVANCE

With the 1991 judgment of the Botswana High Court⁴⁴ and 1992 judgment of the Court of Appeal⁴⁵ in *Unity Dow v. Attorney General of Botswana*, issues of nationality regained their historical prominence in the struggle for women's equality in international and domestic law. In *Unity Dow*, both the lower court and the appeal court used international standards and obligations to find that a law allowing only a father or an unmarried mother to pass Botswana citizenship to his or her children born in Botswana was unconstitutional on grounds of sex discrimination. The applicant, Unity Dow, was a citizen of Botswana married to a U.S. citizen. Although she was born in Botswana, the couple lived in Botswana, and their children were born and were growing up in Botswana, Unity Dow, as a married woman, was unable to pass Botswana citizenship to her children. Had the children instead been born in Botswana to a Botswana man married to a non-Botswana woman, they would have been Botswana citizens. Without citizenship, Unity Dow's children could remain in Botswana as legal aliens only if they formed part of their father's residency permit, which Botswana granted for no more than two years at a time. Since the children would have to travel on their father's passport, Unity Dow would not be entitled to return to Botswana with her children in the absence of their father. While she was jointly responsible with her husband for the education of their children, her children, as non-citizens, did not qualify for financial assistance for university education. In arguing that the citizenship law was unconstitutional, Unity Dow success-

1873," see MARTTI KOSKENNIEMI, ch. 1, "*The Legal Conscience of the Civilized World*", in *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* 11 (2001). The Institut de droit international also tackled the issue of married women's nationality. Pressed by James Brown Scott to adopt the equality of women and men as the guiding principle, the Institut recommended that while a spouse's nationality should not be changed without his or her consent, either spouse should be able to acquire the other's nationality as quickly as possible. A.N. Makarov, *La Nationalité de la femme mariée*, 60 RECUEIL DES COURS [REC. DES COURS] 115, 141-45 (1937).

43. For further contributions by the present authors, see CHRISTINE CHINKIN, NATIONALITY, CITIZENSHIP AND WOMEN (United Nations Division for the Advancement of Women, forthcoming); Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 89 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2001).

44. *Unity Dow v. Attorney General of Botswana*, [1991] Law Rep. Commonwealth (Const.) 574 (Bots. H. Ct.).

45. *Unity Dow v. Attorney General of Botswana*, [1992] Law Rep. Commonwealth (Const.) 623 (Bots. C.A.).

fully invoked the right of nondiscrimination on the basis of sex contained in the Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Convention),⁴⁶ the African Charter on Human and Peoples' Rights,⁴⁷ and other international instruments.

In the courts of other states, the outcome of cases challenging nationality laws on grounds of discrimination against women has varied over the past decade.⁴⁸ In 1994, the Zimbabwe Supreme Court used the *Unity Dow* case, along with the jurisprudence of the International Covenant on Civil and Political Rights⁴⁹ and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights),⁵⁰ to hold that the freedom of movement guaranteed by the Constitution of Zimbabwe entitles a female citizen of Zimbabwe married to a foreign citizen to reside permanently with her husband in Zimbabwe.⁵¹ In a later case, the Court expanded this ruling to the foreign husband's right to work in Zimbabwe.⁵² Although the Constitution of Zimbabwe was subsequently amended to provide that freedom of movement does not prevent the imposition of restrictions on the movement or residence in Zimbabwe of any person who is neither a citizen nor a permanent resident or the expulsion of any person who is not a citizen "whether or not he is married or related to another person who is a citizen of or permanently resident in Zimbabwe,"⁵³ the Court interpreted this amendment as leaving untouched the two earlier decisions.⁵⁴ In contrast, *Unity Dow* and the Women's Convention and European Court of Human Rights caselaw failed to persuade the High Court Division of the Bangladesh Supreme Court that tracing Bangladesh citizenship through

46. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter Women's Convention].

47. African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58.

48. See e.g. Savitri W.E. Goonesekere, *Nationality and Women's Human Rights: The Asia/Pacific Experience*, in *ADVANCING THE HUMAN RIGHTS OF WOMEN: USING INTERNATIONAL HUMAN RIGHTS STANDARDS IN DOMESTIC LITIGATION (PAPERS AND STATEMENTS FROM THE ASIA/SOUTH PACIFIC REGIONAL JUDICIAL COLLOQUIUM, HONG KONG, MAY 20-22, 1996)* 86, 94-96 (Andrew Byrnes et al. eds., 1997); *ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, HUMAN RIGHTS AND LEGAL STATUS OF WOMEN IN THE ASIAN AND PACIFIC REGION*, 31-32 (1997).

49. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

50. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

51. *Rattigan v. Chief Immigration Officer*, Zimbabwe 1995 (2) SA 182 (Zimb.).

52. *Salem v. Chief Immigration Officer*, Zimbabwe 1995 (4) SA 280 (Zimb.).

53. ZIMB. CONST. § 22(3)(d).

54. *Kohlhaas v. Chief Immigration Officer*, Zimbabwe 1998 (6) BCLR 757 (Zimb.). See also *Hambly v. Chief Immigration Officer* 1999 (9) BCLR 966 (Zimb.).

the male line violated fundamental human rights.⁵⁵ Whereas the Supreme Court of Sri Lanka in 1999 found that the Sri Lankan government policy that routinely granted residence visas to foreign wives of Sri Lankan citizens, but only exceptionally to foreign husbands, was unconstitutional,⁵⁶ a Pakistani court in 1997 upheld the provisions of the Pakistan Citizenship Act⁵⁷ that entitled a foreign woman married to a Pakistani man to the citizenship of Pakistan, but not a foreign man married to a Pakistani woman.⁵⁸ The Pakistan Citizenship Act was subsequently amended.⁵⁹ The Supreme Court of Canada in 1997 rejected the stricter treatment under the Canadian Citizenship Act⁶⁰ of persons seeking Canadian citizenship who had Canadian mothers, as compared to those who had Canadian fathers,⁶¹ yet the United States Supreme Court in *Miller*⁶² and *Nguyen*⁶³ accepted the additional requirements imposed by the U.S. Immigration and Nationality Act⁶⁴ on persons seeking U.S. citizenship where their U.S. parent was the father.

The uncertain progress toward equal rights for women with respect to nationality is confirmed by states' positions on article 9 of the Women's Convention. A significant number of states have made reservations to article 9, which gives women equal rights with men to acquire, change, or retain their nationality, and equal rights with respect to the nationality of their children. Although Cyprus, Fiji, Jamaica, Liechtenstein, Republic of Korea, and Thailand have withdrawn their reservations

55. *Malkani v. Secretary of the Ministry of Home Affairs of Bangladesh* (Bangl. Sup. Ct., High Ct. Div., Dhaka 1997) (Writ Petition No. 3192 of 1992) (uncertified copy on file with authors). See also Lubna Mariam, *Whither Equal Rights?*, DAILY STAR (Dhaka, Bangladesh), Jan. 26, 1998, available at <http://www.dailystarnews.com/199801/26/n8012609.htm>; Fostina Paraira, *Woman's Right to Transmit Citizenship to Her Children is Denied*, DAILY STAR (Dhaka, Bangladesh), Jan. 18, 1998, available at <http://www.dailystarnews.com/199801/18/n8011809.htm>.

56. *Fischer v. Controller of Immigration and Emigration* (Sri Lanka Sup. Ct. 1999), as summarized in 2 COMMONWEALTH HUM. RTS. L. DIG. 346 (2000), available at <http://www.interights.org/ccl>. See also Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIG. L.J. 233, 256-57 (1999) (pointing to the serious bureaucratic obstacles before alien men who wish to establish permanent residency in Israel based on their marriage to Israeli women, especially Palestinian men from the West Bank or Gaza who are married to Arab Israeli women).

57. Citizenship Act, No. 2 of 1951 (Pak.).

58. *Sharifan v. Federation of Pakistan*, 50 All Pak. Legal Decisions (Lahore) 59 (High Ct. 1997).

59. Press Release, Pakistan Ministry of Foreign Affairs, Feb. 28, 2001, available at <http://www.forisb.org/PR01-49.htm>.

60. Citizenship Act, R.S.C., ch. C-29 (1985) (Can.); Citizenship Act, R.S.C., ch. C-19 (1970) (Can.).

61. *Benner v. Canada* (Secretary of State), [1997] 1 S.C.R. 358.

62. *Miller v. Albright*, 523 U.S. 420 (1998).

63. *Tuan Anh Nguyen v. INS*, 121 S. Ct. 2053 (2001).

64. Immigration and Nationality Act, 8 U.S.C. § 1409(a) (1999).

since 1990,⁶⁵ nine states that ratified or acceded to the Women's Convention during the same period entered reservations to article 9.⁶⁶ Algeria, Bahamas,⁶⁷ Democratic People's Republic of Korea, Egypt, France,⁶⁸ Iraq, Jordan, Kuwait, Lebanon, Malaysia,⁶⁹ Morocco, Saudi Arabia, Singapore (without explicit reference to article 9), Tunisia, Turkey, and the United Kingdom, also on behalf of its dependent territories, currently maintain reservations or interpretive declarations with respect to all or part of article 9. Moreover, this list includes neither those states party to the Women's Convention that have made other reservations which potentially affect the nationality rights of women, nor those with discriminatory nationality laws that have not reserved.⁷⁰ Nor, of course, does it include states that are not party to the Women's Convention.⁷¹

65. United Nations Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty9.asp>. In 1996, the United Kingdom withdrew part of its reservation to article 9. *Id.*

66. *Id.* Algeria, Bahamas, Democratic People's Republic of Korea, Jordan, Kuwait, Lebanon, Malaysia, Morocco, Saudi Arabia.

67. See David S. Berry, International Law and the Violation of Women's Rights to Nationality: A Caribbean Perspective (2000) (unpublished manuscript, on file with authors).

68. Declaration not confirmed in substance upon ratification. United Nations Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty9.asp>.

69. In 1998, Malaysia withdrew its reservation to article 9(1) and indicated that it would review its remaining reservation to article 9(2) if the relevant law was amended. *Id.*

70. Venezuela is a clear example of the latter. Although its new constitution provides for the foreign spouse of a Venezuelan national to acquire Venezuelan nationality by naturalization, *Nationality*, THE WOMEN'S WATCH (Int'l Women's Rts. Action Watch Project, Humphrey Inst. Pub. Aff., Minneapolis, MN), Apr. 2000, at 4, the previous constitution limited this option to foreign wives. *Words and Deeds: Holding Governments Accountable in the Beijing + 5 Review Process*, WOMEN'S ACTION (Equality Now, New York, NY), July 1999, at 13. Since Venezuela had never reserved, this earlier discrimination would not have been identifiable through reservations to the Women's Convention.

Nepal is another such example. The Nepal Supreme Court found that a regulation discriminating against foreign spouses of Nepalese women in the issue of visas was inconsistent with the constitutional guarantee of gender equality. Goonesekere, *supra* note 48, at 95. However, the Constitution of Nepal itself discriminates against women in its article on the acquisition of citizenship (§ 9), which is contained in a different part of the Constitution from the right to equality (§ 11) and has therefore been argued to be beyond a constitutional equality challenge. NEPAL CONST., available at http://www.uni-wuerzburg.de/law/np00000_.html. The Forum for Women, Law and Development (Nepal) is working to change the discriminatory aspects of Nepalese nationality law. E-mails from the Forum for Women, Law and Development (Nepal) to Karen Knop (Apr. 20 and 23, 2000) (on file with authors).

71. Monaco has been identified as an example of a state with discriminatory nationality laws and is not a party to the Women's Convention. *Words and Deeds*, *supra* note 70, at 11-12.

II. NATIONALITY UNDER INTERNATIONAL AND DOMESTIC LAW

If issues of nationality have become a priority again in international and domestic campaigns for gender equality, this reflects the perception that nationality continues to be important. The article looks next at the nature and value of nationality in general. Part II.A defines the concept of nationality used in the article and describes its inter- and intra-state functions. This Part also discusses the limitations of the functions performed by nationality and the forecasts for these functions or for nationality as their principal basis. Part II.B outlines the ways that nationality may be obtained. The examples throughout focus on women, thereby highlighting the potential for even seemingly neutral laws on nationality to serve men better than women. The main work of Part II, though, is to set the stage for the next Part of the article, which analyzes overt gender discrimination and its legacy in nationality law.

A. *The Concept of Nationality*

The concept of nationality may be understood in a number of ways.⁷² Legally, it designates the formal status of membership in a state. This legal status is usually intended to correspond to a psychological or cultural experience of identity and solidarity. Nationality is also, as Hersch Lauterpacht wrote, “an instrument for securing the rights of the individual in the national and international spheres.”⁷³ In the republican as opposed to the liberal tradition, nationality—or, more properly, citizenship⁷⁴—refers to active engagement in the political life of the state. The analysis of gender equality in this article concentrates on the understandings of nationality as a formal legal status and as “the right to have

72. See Linda Bosniak, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447, 453–89 (2000).

73. Hersch Lauterpacht, *Foreword to the First Edition*, in PAUL WEIS, *NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW*, at xi (Sijthoff & Noordhoff 1979) (1956).

74. The term “nationality” is often used interchangeably with the term “citizenship.” In international law, as well as in many domestic jurisdictions, however, nationality and citizenship technically relate to different aspects of membership in a state. Nationality corresponds to membership in a state vis-à-vis other states; that is, it stresses the international protections afforded by membership. Citizenship is associated with full membership within the state. It follows from the distinction between nationality and citizenship that, as Paul Weis puts it, “[e]very citizen is a national, but not every national is necessarily a citizen” WEIS, *supra* note 73, at 5–6. While the laws of a state may distinguish between different classes of nationals, these distinctions are not relevant in international law. *Id.* at 3–7.

It should be stressed that this usage of “nationality” and “citizenship” is not universal. Where international law and most Western European states use the term “nationality,” most Eastern European states use the term “citizenship.” COUNCIL OF EUROPE, *EUROPEAN CONVENTION ON NATIONALITY AND EXPLANATORY REPORT* 3 (1997).

rights.”⁷⁵ In the other modes of identity and political activity, important gender-related work on nationality has been done by postcolonial and feminist authors in particular.⁷⁶

Each state determines under its own law who are its nationals. In the *Nottebohm* case, the International Court of Justice stated that “international law leaves it to each State to lay down the rules governing the grant of its own nationality.”⁷⁷ A state’s discretion is limited by customary international law and *jus cogens*, and is also limited where the state has entered into human rights treaties, whereby it binds itself under international law to provide particular safeguards under its domestic law.⁷⁸

In international law, nationality secures rights for the individual by associating her with a state. Traditionally the subjects of international law are states; individuals are not subjects of international law. By associating individual with state, nationality makes one state’s interference with the national of another a violation of the other state’s sovereignty. Nationality thereby provides the state of nationality with the standing to make a diplomatic claim with respect to the harms constituting violations of international law caused to that individual. When a state attempts to raise such a claim, however, its grant of nationality and hence its standing may be challenged on the ground that the individual has no genuine link to the state.⁷⁹

It is important not to overestimate the effectiveness of the diplomatic protection function of nationality. As with any discussion of nationality, there is the risk of implying that every individual is either the national of

75. *Perez v. Brownell*, 356 U.S. 44, 64 (1958) (Warren, C.J., dissenting) (“Citizenship is man’s basic right for it is nothing less than the right to have rights.”).

76. See, e.g., BETWEEN WOMAN AND NATION. NATIONALISMS, TRANSNATIONAL FEMINISMS AND THE STATE (Caren Kaplan et al. eds., 1999); FEMINIST NATIONALISM (Lois A. West ed., 1997); KUMARI JAYAWARDENA, FEMINISM AND NATIONALISM IN THE THIRD WORLD (1986); NATIONALISMS AND SEXUALITIES (Andrew Parker et al. eds., 1992); ANNE PHILLIPS, ENGENDERING DEMOCRACY (1991); REMAKING WOMEN. FEMINISM AND MODERNITY IN THE MIDDLE EAST (Lila Abu-Lughod ed., 1998); MELISSA S. WILLIAMS, VOICE, TRUST, AND MEMORY: MARGINALIZED GROUPS AND THE FAILINGS OF LIBERAL REPRESENTATION (1998); WOMAN-NATION-STATE (Nira Yuval-Davis & Floya Anthias eds., 1989).

77. *Nottebohm (Liech. v. Guat.)*, 1955 I.C.J. 4, 23 (Apr. 6). See also European Convention on Nationality, Nov. 6, 1997, art. 3(1), Europ. T.S. No.166; Hague Convention on Conflict of Nationality Laws, *supra* note 11, art. 1.

78. It has been argued, for example, that the deprivation by the South African government of the nationality of Africans in the so-called independent Bantustans (Transkei, Bophuthatswana, Venda and Ciskei) during the apartheid era violated the prohibition on denationalization on the grounds of race. See JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 451 (2d ed. 2000).

79. The concept of “effective nationality” has been stated in a number of decisions and can be seen to be accepted as international law. Some of the most important decisions where the concept has been discussed include: *Nottebohm*, 1955 I.C.J. 4; Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251 (1984); *Canevaro Case (Italy v. Peru)*, 11 R.I.A.A. 397 (Perm. Ct. Arb. 1912); *Salem Case (Egypt v. U.S.)*, 2 R.I.A.A. 1161 (1932).

some state (and therefore enjoys the rights and benefits of nationality) or stateless (and therefore does not). But there are individuals who are simply without status altogether. An example is the hill-tribe women who belong to one of the cultural groups that live in northern Thailand or along western border uplands and that have distinct cultural identities and languages. Many of these groups have moved into Thailand at different times over the twentieth century, and the nationality of some continues to be unclear.⁸⁰

Even if an individual has a nationality, she is not always able to document it. This has been a problem for, among others, Polish women who are part of the recent wave of women trafficked from Central and Eastern Europe into Western Europe to work in the sex trade.⁸¹ For these women, nationality is not a means to diplomatic protection because often their passports have been taken away by a pimp or brothel owner, and they cannot prove their nationality.⁸² Similar problems are encountered by women in the "maid trade": the temporary legal migration of unaccompanied women from less developed Asian states to Western Asia (the Middle East) or to prosperous East Asian states (for example, Singapore) to take positions as live-in domestic servants. Where their passports are seized by their employers, they may have difficulty getting help should they be exploited or abused, or returning home should they decide to do so.⁸³ With respect to trafficking, article 8 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the new United Nations Convention Against Transnational Organized Crime,⁸⁴ anticipates that victims may not have proper documentation and provides for the issuing of travel documents or whatever other authorization may be necessary to enable the person to return to her state of nationality or permanent residence.

80. *Second and Third Periodic Reports of States Parties: Thailand*, *supra* note 31, at 21–22. On *de facto* statelessness, see generally Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE L. 156 (1998).

81. United Nations, Economic and Social Council, Commission on Human Rights, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Addendum: Report on the Mission of the Special Rapporteur to Poland on the Issue of Trafficking and Forced Prostitution of Women (May 24–June 1, 1996), U.N. Doc. E/CN.4/1997/47/Add.1, ¶¶ 6, 44–45 (1996).

82. *Id.* ¶¶ 23, 66, 105. See also Gillian Caldwell et al., *Crime & Servitude: An Exposé of the Traffic in Women for Prostitution from the Newly Independent States*, Address Before the International Conference on the Trafficking of NIS Women Abroad, (Moscow, Russia, Nov. 3–5, 1997), available at <http://www.globalsurvival.net/femaletrade/9711russia.html>.

83. Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47, 79–80 (1998).

84. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 40 I.L.M. 335 (2001).

In any event, a state is not obliged to provide diplomatic protection to its nationals.⁸⁵ Saskia Sassen's analysis of the feminization of survival in the global economy indicates why a state is not necessarily disposed to help its female nationals abroad:

The last decade has seen a growing presence of women in a variety of cross-border circuits that have become a source for livelihood, profit-making, and the accrual of foreign currency. . . . They include the illegal trafficking in people for the sex industry and for various types of formal and informal labor markets. They also include cross-border migrations, both documented and not, which have provided an important source of convertible currency for governments in home countries. The formation and strengthening of these circuits is largely a consequence of broader structural conditions. Among the key actors emerging in these particular circuits are the women themselves in search of work, but also, and increasingly so, illegal traffickers and contractors as well as the governments of home countries.⁸⁶

In a Bangladesh case, however, the father of a girl abducted by child traffickers argued successfully that the government's failure to assist in repatriating her violated the constitutional provisions on equal protection and protection of law generally.⁸⁷

Finally, a state traditionally could not make a diplomatic claim on behalf of its national against another state if its national was also a national of that other state,⁸⁸ although there have been cases more recently where the state of effective nationality was allowed to bring a claim.⁸⁹ Until recently, the United Kingdom took the traditional position in the case of British-Asian women who alleged that they were forced into marriage⁹⁰ while visiting the Asian country of their ancestry. The United Kingdom assisted these women in various ways, but refused to intervene officially in any dispute because the women were dual nationals who

85. See *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 44 (Feb. 5).

86. Saskia Sassen, *Women's Burden: Counter-geographies of Globalization and the Feminization of Survival* 53 J. INT'L AFF. 503, 503 (2000).

87. *Abdul Gafur v. Minister of Foreign Affairs*, 2 COMMONWEALTH HUM. RTS. L. DIG. 168 (Bangl. Sup. Ct., High Ct. Div. 1997), available at <http://www.interights.org/ccl>.

88. See, e.g., *Reparations for Injuries Suffered in the Service of the United Nations*, 1949 I.C.J. 174, 186 (Apr. 11).

89. E.g. Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251 (1984).

90. Forced marriages should be distinguished from arranged marriages. Forced marriages involve coercion, whereas arranged marriages may be consented to by both parties. See *infra* text accompanying note 160.

were in the state of their second nationality.⁹¹ In response to a report on forced marriage by a government working group, however, the British Foreign and Commonwealth Office and Home Office have outlined a new position on diplomatic assistance in such cases. Their joint Action Plan, produced in 2000, states that the United Kingdom will assume a right of consular protection for its dual nationals until proven otherwise, will explore and test the right of consular protection for dual nationals not habitually resident in-country, and, where dual nationality is an impediment, will treat the problem as a human rights issue.⁹²

Besides the diplomatic protection function, the other key function of nationality in international law is the duty of the state to admit its nationals and allow them to reside within its territory.⁹³ While this is primarily a question for domestic law, it becomes an international legal obligation insofar as relations between states are affected. Under international law, states have the sovereign discretion to admit aliens and, subject to certain safeguards, to expel them. But, by not admitting its national expelled from another state, the state of nationality infringes the expelling state's sovereign right to choose which aliens reside in its territory. A state therefore has the duty, as between states, to admit its nationals into its territory. This duty of admission and non-expulsion of nationals is recognized in a number of international human rights instruments.⁹⁴

In the long term, however, both of the functions of nationality in inter-state relations may decrease in importance. The standing of a sovereign may become less needed as the individual herself is increasingly recognized as a subject of international law.⁹⁵ Alternatively, such standing may gradually cease to be based, or based exclusively, on nationality. With regard to the obligation to admit, as well as with regard to this diplomatic nexus, it is noteworthy that the repatriation article of the new Protocol to Prevent, Suppress and Punish Trafficking in Persons,

91. Alison Symington, *Dual Citizenship and Forced Marriages*, 10 DALHOUSIE J. LEGAL STUD. (forthcoming, 2001) (manuscript on file with authors).

92. Foreign and Commonwealth Office, Joint FCO/Home Office Action Plan (2000), available at <http://www.fco.gov.uk/news/newstext.asp?4048>.

93. See generally WEIS, *supra* note 73, at 45–61.

94. African Charter on Human and Peoples' Rights, *supra* note 47, art. 12(2); American Convention on Human Rights, Nov. 22, 1969, art. 22(5), 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights, *supra* note 49, art. 12(4); International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 5(d)(ii), 660 U.N.T.S. 195; Protocol No.4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, art. 3, Europ. T.S. No.46; Universal Declaration of Human Rights, GA Res. 217A(III), U.N. GAOR, 3d Sess., pt.1, art. 13(2), U.N. Doc. A/810 (1948).

95. See RUTH DONNER, *THE REGULATION OF NATIONALITY IN INTERNATIONAL LAW* 13–15 (2d ed. 1994).

Especially Women and Children⁹⁶ refers to the state of nationality or permanent residence. Under the International Covenant on Civil and Political Rights⁹⁷ and the European Convention on Human Rights,⁹⁸ for example, non-nationals may have certain rights to enter and to remain in the territory of a state party. The international human rights jurisprudence thus supplements nationality as the ground for admission and non-expulsion.⁹⁹

Within the state, the citizenship rights that flow from nationality are a passport to a series of other rights and duties which may range from the right to vote to the requirement of military service. In a General Recommendation interpreting the Women's Convention, the UN Committee on the Elimination of Discrimination against Women (CEDAW) considered that: "Nationality is critical to full participation in society . . . Without status as nationals or citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and a choice of residence."¹⁰⁰

While nationals within the state potentially enjoy full citizenship rights, non-nationals are traditionally regarded as aliens. The treatment of aliens depends, among other things, on whether the state in question accepts that there is an "international minimum standard" of treatment which must be accorded to all aliens by the state, irrespective of how it treats its own nationals, or takes the position that aliens may only insist on those rights which the state grants to its own nationals.¹⁰¹ Apart from

96. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *supra* note 84, art. 8.

97. *See, e.g.*, *Canepa v. Canada*, Communication No. 558/1993, U.N. Human Rights Committee, U.N. Doc. CCPR/C/59/D/558/1993, in 5 INT'L HUM. RTS. REP. 69 (1998); *Stewart v. Canada*, Communication No. 538/1993, U.N. Human Rights Committee, U.N. Doc. CCPR/C/58/D/538/1993, in 4 INT'L HUM. RTS. REP. 418 (1997); *Winata v. Australia*, Communication No. 930/2000, U.N. Human Rights Committee, U.N. Doc. CCPR/C/72/D/930/2000 (2001).

98. For a recent case, see *Boultif v. Switzerland*, App. No. 54273/00, Eur. Ct. H.R., Aug. 2, 2001, available at <http://hudoc.echr.coe.int/hudoc/default.asp?Language=en&Advanced=1>. *See also infra* notes 249–50 and accompanying text.

99. *See* Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519, 538–43 (2000).

100. U.N. Committee on the Elimination of Discrimination against Women, General Recommendation 21 on Equality in Marriage and Family Relations, in *Report of the Committee on the Elimination of Discrimination Against Women* (13th Sess.), U.N. GAOR, 49th Sess., Supp. No. 38, at 1, 2, U.N. Doc. A/49/38 (1994) [hereinafter General Recommendation 21 on Equality in Marriage and Family Relations].

101. *See* Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, G.A. Res. 144, U.N. GAOR, 40th Sess., Supp. No. 53, at 252, U.N. Doc. A/40/53 (1985).

whatever treatment they are guaranteed as aliens,¹⁰² non-nationals may also be entitled to certain international human rights within the state based on their residence or even their presence within the jurisdiction.

This impact of international human rights¹⁰³ has led to the mooted of new forms of citizenship, from “denationalized” to “transnational” to “postnational.”¹⁰⁴ Predictions of the demise of nationality as the basis for intra-state rights, however, rely mainly on the Western experience, particularly that of Western Europe. Worldwide, the impact of international human rights on the rights of non-nationals and the more general willingness to accord such rights have been uneven. In addition, the rights of non-nationals, whether under international human rights law or the national constitution, often depend on access to the courts, which may be impractical or impossible in many situations. Lastly, even in the Western European context, nationality has grown in importance because European Union (EU) nationals enjoy a range of benefits in EU states that other non-nationals do not. Inside the state as well as outside, therefore, nationality is still the broadest and most secure foundation for rights.

B. Bases for Nationality

Nationality can be obtained by a number of means. The two principles on which nationality is awarded at birth are *jus sanguinis* and *jus soli*. Where the state in question follows the principle of *jus sanguinis*, an individual’s nationality is determined by descent from a national. Historically, this principle took the patrilineal form of tracing the individual’s nationality only through the father’s line.¹⁰⁵ Where the principle is *jus soli*, the individual is a national of the state simply by being born within the state’s territory, irrespective of the parents’ nationalities. While this principle is superficially neutral, it favors the father’s nationality insofar as women have traditionally tended to reside in their

102. State responsibility for the treatment of aliens is considered an antecedent of the international law of human rights, although it continues to exist alongside it. Louis Henkin, *International Law: Politics, Values and Functions*, 216 REC. DES COURS 13, 209 (1989).

103. *But compare* YASEMIN NUHOGLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994) (seeing the positive impact of international human rights on the rights of aliens nationally) with Christian Joppke, *The Evolution of Alien Rights in the United States, Germany, and the European Union*, in CITIZENSHIP TODAY, *supra* note 43, at 36, 36–37 (arguing that the trend toward greater rights for aliens is not well explained by the impact of international human rights on national law).

104. *See, e.g.*, Symposium, *The State of Citizenship*, 7 IND. J. GLOBAL LEGAL STUD. 447 (2000).

105. The Israeli Law of Return, 1950, 4 L.S.I. 114, as amended by the Law of Return (Amendment No. 2), 1970, 24 L.S.I. 28, § 4B, is a notable exception in this regard. *See* Shachar, *supra* note 56, at 244–46.

husband's state. The vast majority of states have adopted an approach which is a combination of these principles.

Other than at birth, nationality may be acquired by naturalization. It is for the state to stipulate the requirements that must be satisfied before a non-national can apply to be naturalized. The philosophy behind the requirements, which generally include the passage of time and the establishment of residence within the state, is expressed by the Inter-American Court of Human Rights in its 1984 Advisory Opinion on amendments to the naturalization provisions of the Constitution of Costa Rica. "In these cases," the Inter-American Court of Human Rights stated, "nationality no longer depends on the fortuity of birth in a given territory or on parents having that nationality; it is based rather on a voluntary act aimed at establishing a relationship with a given political society, its culture, its way of life and its values."¹⁰⁶ Traditionally, this notion of naturalization as the voluntary establishment of a relationship with the state had to be reconciled, however, with the fact that marriage to a national was a basis for automatically granting nationality to a non-national woman. One way that the two were reconciled was through the idea that women consented to membership in the polity not directly, but indirectly as part and parcel of their consent to marriage.¹⁰⁷ As Anne McClintock observed: "For women, citizenship in the nation was mediated by the marriage relation within the family."¹⁰⁸

Where nationality is acquired by naturalization, it is clear that the rules for entry to a state control who will in future be eligible to be a national. The immigration law of each state lays down the requirements for admission. In many states, nationality law is therefore entangled with, and even based upon, the law of immigration. There is no uniformity in the principles upon which states have based their criteria for admission. The factors which may be taken into account include a person's language, religion, political beliefs, place of birth, connections to the state, the closeness of family relatives who already reside there, financial position, ethnicity, color, existing nationality, and sex. Since each state has wide discretion in its choice of such factors, its history, economic situation, culture, and political climate will determine which individuals will be granted immigration clearance and possibly nationality in the future. Individuals may be perceived as undesirable, for

106. Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R. (Ser. A) No. 4, ¶ 35 (1984), reprinted in 5 HUM. RTS. L.J. 161, 168 (1984), available at http://www1.umn.edu/humanrts/iachr/b_11_4d.htm [hereinafter Costa Rica Advisory Opinion].

107. See Mackenzie v. Hare, 239 U.S. 299, 311–12 (1915).

108. ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER AND SEXUALITY IN THE COLONIAL CONTEXT* 358 (1995).

example, if they are considered likely to be a burden upon the resources of the state. In fact, the vast majority of states grant “primary immigration” clearance only to those who can sustain themselves and bring some benefit to the state. Women have until recently almost always been viewed either as a burden, and therefore unworthy of citizenship on their own merits, or as the appendages of men.

III. ANALYZING WOMEN’S EQUALITY IN NATIONALITY LAW

The previous Part of the article provided a general introduction to the current concept of nationality and bases for its attribution, with an emphasis on the potential disadvantages for women. When Chrystal Macmillan addressed the ILA in 1923, however, she was concerned with those nationality laws that discriminated explicitly against women. The article accordingly turns next to the issues of women’s equality raised by the discriminatory nationality laws of Macmillan’s time and their reform.

This Part divides the issues into three generations. The first-generation issue is defined as the issue of a married woman’s right to an independent nationality. The second generation of issues involves those inequalities that come to the fore once a married woman has a nationality independent of, and hence potentially different from, her husband’s nationality. Although a third generation of equality issues has not yet taken shape, this Part suggests some remaining areas of concern for women.

Since women’s nationality is governed by both domestic and international law, the issues will differ from state to state and region to region. Although independent nationality for married women is now widely accepted, there are still states that maintain reservations or interpretive declarations to article 9(1) of the Women’s Convention, which provides that women have equal rights with men to acquire, change, or retain their nationality and, in particular, that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless, or force upon her the nationality of the husband. While the second generation of issues is most prominent in the contemporary caselaw, these successes may be compromised in ways that raise a third generation of issues.

A. First-Generation Issue of Equality: Nationality of Married Women

Until the First World War, the nationality laws of virtually all countries made a married woman’s nationality dependent on her husband’s

nationality.¹⁰⁹ The first of Virginia Woolf's three clarion phrases in her 1938 political work *Three Guineas*—"as a woman, I have no country. As a woman I want no country. As a woman my country is the whole world"—is a bitter allusion to British nationality laws of the day which deprived a woman of British nationality on her marriage to a foreigner.¹¹⁰ The principle of dependent nationality, also called the principle of the unity of nationality of spouses, rested on the conviction that a family should have the same nationality and on the patriarchal notion that the husband should determine that nationality.¹¹¹

On this principle, a woman who married a foreign national lost her own nationality and acquired that of her husband simply by virtue of marriage. If her husband's nationality changed or was lost during the marriage, her nationality altered accordingly. Moreover, divorce could render a woman stateless. In many cases, women became stateless without even being aware of it.

The principle of dependent nationality affected women of all classes, although the impact on women differed with their social class. Having lost their own nationality upon marriage, women did not have the right to return to or remain in their home country, since those rights are a function of nationality. If they did live there, it was without the civil, political, economic, and social rights attached to nationality. The lack of economic and social benefits was especially serious for poor and working-class women. Despite the fact that she lived in her own country, a widow who had lost her U.S. citizenship on marriage was denied public assistance for herself and her children, and faced with deportation as a public charge.¹¹² Similarly, where a woman who had become a U.S. citizen by marriage later divorced and returned to her home country, public responsibility for her medical care became a diplomatic issue.¹¹³ For middle- and upper-class women, the citizenship rights at stake were more often the hard-won right to vote or protections for property.¹¹⁴

In the history of U.S. citizenship law, for instance, the principle of dependent nationality did not, however, apply to women of all races. Marriage to a U.S. citizen did not naturalize a woman who was racially ineligible for naturalization; originally, any non-white woman and later

109. MAKAROV, *supra* note 42, at 119.

110. VIRGINIA WOOLF, *A ROOM OF ONE'S OWN AND THREE GUINEAS* 234 (Michèle Barrett ed., Penguin Books 1993) (1938).

111. See Costa Rica Advisory Opinion, Inter-Am. Ct. H.R. (Ser. A) No. 4, ¶ 64; U.N. DEP'T OF ECONOMICS & SOCIAL AFFAIRS, CONVENTION ON THE NATIONALITY OF MARRIED WOMEN: HISTORICAL BACKGROUND AND COMMENTARY at 3, U.N. Doc. E/CN.6/389, U.N. Sales No. 62.IV.3 (1962) [hereinafter HISTORICAL BACKGROUND].

112. BREDBENNER, *supra* note 8, at 1.

113. *Id.* at 27–28.

114. *Id.* at 1–2, 65, 68.

any woman who was not white, of African descent or nativity, or Native American (with the exception of certain tribes).¹¹⁵

Given that the principle of dependent nationality created problems of both practicality and principle, it was open to reformers to address the practical problem of women's statelessness and leave aside the problem of women's inequality. Indeed, the ILA at its 1924 Conference chose to deal with the nationality of married women as a problem of conflicts among the nationality laws of different states and not, as Chrystal Macmillan had hoped, as a problem of inequality. In comparison, the IWSA draft convention that she proposed to the ILA provided not only for the prospective application of the principle of independent nationality, but for the restoration of women's nationality lost through the principle of dependent nationality.¹¹⁶

B. *Second-Generation Issues of Equality*

1. Ability to Pass Nationality to Children

In arguing for the independent nationality of women at the 1923 ILA Conference, Ernest Schuster could assure the Conference that no claim had been made that "the wife, being allowed independence as regards her own nationality, might as a result claim that the children's nationality should also depend on hers."¹¹⁷ As the *Unity Dow* case indicates, this claim is precisely the sort of equality issue that followed from the recognition of independent nationality for women.

Traditionally, the husband's nationality determined the nationality of the children of the marriage, as well as the nationality of the wife. And similar to the structure of justification for the wife's dependent nationality, some of the reasons for not enabling a mother to give her nationality to her children rested on ideas of nationality, ideas of womanhood, and the relationship between these ideas. In opposing a mother's right to pass her nationality on to her children, a right finally recognized in Britain in the 1981 Nationality Act, Conservative Member of Parliament Enoch Powell relied on the notion that a man's duty to fight for his nation in time of war is the ultimate test of nationality.¹¹⁸ The stereotype of women as devoted to "the preservation and care of life" meant that women were

115. *Id.* at 16–17, n.3. As Leti Volpp argues, the intersection of race and gender in the structuring of U.S. citizenship law over time is a history that needs to be explored more fully. Leti Volpp, *Dependent Citizens and Marital Expatriates* (working title), Presentation at the Columbia Law School International Law Workshop (Apr. 3, 2001).

116. 32D CONFERENCE REPORT, *supra* note 1, app. at 46.

117. *Id.* at 20–21.

118. 997 PARL. DEB., H.C. (5th ser.) (1981) 966. *See also* Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358, 403.

incapable of demonstrating the love of country that would entitle them to pass its nationality on to their children. Even now, Ayelet Shachar argues, this idea of civic virtue as military virtue excludes Israeli women from recognition as full citizens of Israel. The Israeli paradigm of the citizen as soldier means that women are, to some degree, lesser citizens of Israel because although both men and women are obliged to perform military service, women can be exempted if they are wives or mothers.¹¹⁹

In states where nationality is determined wholly or partly by descent from a man of that nationality, a woman's legal inability to convey her nationality to her child is one of the main issues of women's equality and nationality. In a comment on the *Malkani* case, Lubna Mariam describes the dissonance between a mother's teaching her national identity to her children and her powerlessness to convey it legally to them:

Mothers may croon Bangla *ghoom pardani* lullabies at their child's cradle, guide them through their first Bangla rhymes, enjoin them to love Sonar Bangla; mothers may even send their sons and daughters to lay their lives for Bangladesh, if need be; but mothers, in Bangladesh, cannot give their children the right to call themselves Bangladeshis.¹²⁰

A mother's inability to pass on her nationality to the children may also cause problems of residency, mobility, and access to state benefits such as those presented in *Unity Dow*. In the *Malkani* case, a court-appointed *amicus curiae* argued that another consequence of denying Bangladesh citizenship to the child of a Bangladesh mother and foreign father was the effective denial, in the event of separation or divorce, of the mother's preferential rights of custody of children of tender years because the children would not be assured of the visas and visa renewals necessary for them, as non-citizens, to reside with her in Bangladesh.¹²¹ Ruth Donner points to the possibility for "legal kidnapping" in the situation where divorced parents have different nationalities and the mother has custody of the child in her state of nationality. If the child has only the father's nationality, then the mother's state of nationality has no standing to intervene diplomatically where the child is concerned. Thus, if the father abuses his visitation rights by taking the child back to his state of nationality, the mother's state cannot exercise its right of

119. Shachar, *supra* note 56, at 259–63.

120. Mariam, *supra* note 55.

121. Brief of Amicus Curiae Dr. Kamal Hossain at 2, ¶ 3(c), *Malkani v. Secretary of the Ministry of Home Affairs of Bangladesh* (Bangl. Sup. Ct., High Ct. Div., Dhaka 1997) (Writ Petition No. 3192 of 1992) (uncertified copy on file with authors).

diplomatic protection to recover the child.¹²² Lastly, if children can only receive their father's nationality, they will be stateless if the father is himself stateless or unknown.

Some states may make a distinction between children born inside and outside marriage. If it is the case that mothers can never convey their nationality to their children and also that fathers can only convey their nationality to their children born within marriage, then children of unmarried parents, lesbian couples, and single mothers¹²³ are left stateless. As *Nguyen* demonstrates, however, some states give the mother's and not the father's nationality to nonmarital children. The dissenting Justices in *Nguyen* traced this policy in U.S. nationality law historically to the assumption that fathers are the natural guardians of legitimate children and mothers are the natural guardians of illegitimate ones.¹²⁴ If the concern with gender discrimination in the case of married mothers is a lack of the parental rights and resources associated with nationality,¹²⁵ the concern here is the unmarried mother's surfeit of duties. In arguing that women and men should have the same ability to transmit their citizenship to their children, American feminists of the 1930s recognized that the practice of allowing unmarried mothers to transmit their citizenship to their children was predicated on and reinforced the law's allocation of full responsibility for nonmarital children to women. Equalizing unmarried men's and women's abilities to pass citizenship, they claimed, would help to remedy the unequal allocation of parental duties.¹²⁶

2. Naturalization Procedures

Since it was traditionally assumed that a wife would live in her husband's state,¹²⁷ some states replaced the regime of dependent nationality

122. DONNER, *supra* note 95, at 200. For one such narrative, see Assia Djebar, *A Sentence of Love*, 59 GRANTA 49 (1997). It should be noted that dual nationality for the child does not solve this problem (unless, perhaps, an argument can be made based on the child's effective nationality). Resort must instead be had to other international conventions.

123. Even if the children of a single mother have her nationality, there may still be nationality-related problems stemming from the role of the father as head of the family in some legal systems. See, e.g., *Nawakwi v. Attorney General of Zambia*, [1993] 3 Law Rep. Commonwealth 231 (Zambia H. Ct.) (single mother successfully challenged the requirement that she obtain the father's consent before she could include her children in her passport or they could obtain their own passport).

124. Tuan Anh Nguyen v. INS, 121 S. Ct. 2053, 2075–76 (2001) (O'Connor, J., dissenting).

125. See, e.g., Corte cost., 28 gen. 1983, n.30, 62 Racc. uff. corte cost. 1983, LXII, 157 (Italy) (unofficial translation provided by Alessandra Prioreschi).

126. Collins, *supra* note 32, at 1694–98.

127. See Macmillan's comments in 33D CONFERENCE REPORT, *supra* note 26, at 39. For an indication of U.S. statistics that support this assumption factually, see Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J. L. & FEMINISM 23, 24 (1997).

for married women with a special procedure for a foreign wife to acquire her husband's nationality by naturalization or to acquire residency status¹²⁸ in her husband's state.¹²⁹ The 1957 Convention on the Nationality of Married Women, in fact, envisages "specially privileged naturalization procedures" for foreign wives.¹³⁰ In several international¹³¹ and domestic cases over the last two decades, however, these rules have been found to violate the right of nondiscrimination. It is this discrimination against foreign husbands seeking nationality or residency that has become the other second-generation equality issue.

At the same time, it is important to bear in mind that even identical naturalization procedures for women and men may discriminate against women. In practice, many states require, among other things, personal interviews to test a person's competence in the language of the state before nationality is granted. This may be especially burdensome for women who have not had the opportunity to learn a language because they have remained within the home while the men have gained employment and pursued outside interests, thereby affording them greater opportunity to learn the language.¹³² Discussing why elderly immigrants to the United States have much lower rates of naturalization than younger immigrants, Joan Fitzpatrick points to such obstacles to citizenship as "a lack of knowledge of U.S. civics and English, a reluctance to adjust to a new culture, emotional problems stemming from redefined

128. Although the case law has involved both naturalization and residency status, the focus here will be on naturalization.

129. U.N. DEP'T OF ECONOMICS & SOCIAL AFFAIRS, NATIONALITY OF MARRIED WOMEN at 15-18, U.N. Doc. E/CN.6/254/Rev.1, U.N. Sales No. 64.IV.1 (1963) [hereinafter NATIONALITY OF MARRIED WOMEN].

130. Convention on the Nationality of Married Women, Feb. 20, 1957, art. 3, 309 U.N.T.S. 65.

131. See *infra* Part IV.C.

132. See, e.g., Council of Europe Parliamentary Assembly, Recommendation 1261 on the Situation of Immigrant Women in Europe ¶ 3 (1995):

The Assembly is concerned by the situation of immigrant women, a large number of whom live on the margins of society and are confronted by more serious difficulties than those facing immigrant men. When they are married, they are often confined to the home doing housework and isolated from the local community, without real opportunities to learn the language of the host country, thus further aggravating their isolation. When they are employed, they are often doing menial jobs uncondusive to greater autonomy or to their integration into the host society.

Available at <http://stars.coe.fr/ta95/erec1261.htm>.

According to the Dutch Working Group on Feminism and International Law, the Dutch citizenship requirements regarding proficiency in Dutch and sufficient integration into Dutch society make it generally harder for foreign women, especially those from Islamic countries who are often more isolated, to become Dutch citizens than it is for foreign men. Letter from Maria Laeticia P. Loenen, Dutch Working Group on Feminism and Int'l Law, to Christine Chinkin, Chair, Comm. on Feminism and Int'l Law, Int'l Law Ass'n 2 (Oct. 11, 1999) (on file with authors).

roles within the family, increased difficulty in acquiring a second language at an advanced age, and age-related impediments to access to language or civics classes."¹³³ She notes that these obstacles may be even greater for those elderly female immigrants who are illiterate in their first language and have little or no formal education.¹³⁴

C. Third-Generation Issues of Equality

In addition to a patriarchal idea of the family, the principle of dependent nationality of married women rested on the conviction that the family should have the same nationality. However quaint or outmoded this conviction, it served the practical purpose of securing the unity of the family legally through a common nationality. And thus far, ridding nationality law of its patriarchal foundation has come at some cost to the unity of the family. In particular, where one spouse is a national of the state where the family lives and the other is not, the foreign spouse will always lack the security, entitlements, and benefits which that state attaches to nationality.

Furthermore, the adjustments made by families in these situations may turn out to reproduce the old patriarchal outcome. Depending on the rights extended to non-nationals by that state, the only viable option for the foreign spouse may be to become a national by naturalization. If the two states involved do not both permit dual nationality, however, naturalization amounts to the forced renunciation of that spouse's own nationality. It also prevents that spouse from passing his or her own nationality to the children. And since it is more often the woman who is thus confronted with the need to give up her nationality and take her spouse's nationality, the effect is similar to the old principle of dependent nationality.

This scenario suggests that the achievement of equality in nationality law may involve either rights for non-national family members (the functional alternative); or the right of one spouse to acquire the nationality of the other or to the facilitation of the acquisition of that nationality, together with the right to dual nationality for the family (the dual nationality alternative).

While the functional alternative of rights for non-national family members will be raised in the course of Part IV, the rights of non-nationals generally is a fast-growing topic in the citizenship literature,¹³⁵ and we do not attempt a summary here.

133. FITZPATRICK, *supra* note 127, at 41.

134. *Id.*

135. See sources cited *supra* notes 103-04.

As regards the first step of the dual nationality alternative, the International Woman Suffrage Alliance draft convention presented to the ILA in 1923 remarkably contains a provision that special facilities should be given to one spouse to acquire the nationality of the other.¹³⁶ Although a number of states do facilitate a spouse's acquisition of nationality,¹³⁷ current international law does not recognize either the right of one spouse to acquire the nationality of the other or the right to the facilitation of its acquisition.¹³⁸ The United Nations Human Rights Committee, Inter-American Court, and European Court of Human Rights have all found discriminatory the special treatment for foreign wives that often replaced the prior legal regime of dependent nationality for married women. But while a state must provide such treatment to foreign wives and foreign husbands equally if it provides it to either, the state is under no obligation to provide special treatment in the first place. Legal challenges may therefore result not in the extension of special treatment to foreign husbands, but in its withdrawal altogether. In response to a case challenging British immigration rules as discriminatory under the European Convention on Human Rights, the British government changed the immigration rules so that it became as hard for foreign wives to join their husbands settled in Britain as it already was for foreign husbands to join their wives.¹³⁹

Moreover, anything short of an automatic right to acquire the other spouse's nationality involves some waiting period, during which the spouse seeking nationality is excluded from the protection and benefits of that nationality,¹⁴⁰ and may be vulnerable to, for example, deportation and separation from his or her children. As the U.S. example shows with respect to immigration status, any facilitation of the acquisition of nationality that depends on marriage to a national gives the national spouse control over the non-national spouse and thus also creates the risk that

136. 32D CONFERENCE REPORT, *supra* note 25, app. at 46.

137. Examples of countries that have specific provisions on marriage include Austria, Belgium, Finland, France, Germany, Ireland, Israel, Italy, Luxembourg, Mexico, The Netherlands, Portugal, Russia, Spain, South Africa, Sweden, the United Kingdom, and the United States. Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in CITIZENSHIP TODAY, *supra* note 43, at 17, 24.

138. DONNER, *supra* note 95, at 239. Cf. Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R. (Ser. A) No. 4, ¶ 59 (1984), reprinted in 5 HUM. RTS. L.J. 161, 173 (1984), available at http://www1.umn.edu/humanrts/iachr/b_11_4d.htm.

139. See *infra* notes 251–255 and accompanying text. This is not to say that there are no international law standards on family reunification. See, e.g., Ian Brownlie, *The Application of Contemporary Standards of International Law to Cases Involving Separation of Husband and Wife as a Consequences of Administrative Action by the Israeli Authorities in the Occupied Territories*, 6 PALESTINE Y.B. INT'L L. 113 (1990/91).

140. Cf. Costa Rica Advisory Opinion, Inter-Am. Ct. H.R. Ser. A No. 4, ¶ 46.

the non-national spouse, most often the wife, may endure domestic abuse in order to acquire nationality. The following cases were documented at the time when U.S. immigration law required the citizen or permanent resident spouse to bring a petition for the foreign spouse to become a resident and did not yet allow exceptions for domestic abuse:

A woman from the Philippines was abused by her U.S. citizen spouse. He threatened to have immigration authorities deport her to the Philippines if she tried to leave him. She stayed. He later cut her all over her back, head, and hands with a meat cleaver.

A U.S. citizen never filed a petition for his Ecuadorian wife even though he had been married to her for three years and she was pregnant. She therefore could not gain legal status.

A Dominican woman fled from her U.S. citizen husband's violent assaults only after being hospitalized for the fifth time as a result of his beatings. Her husband bashed her head against the wall and threatened to kill her if she told her doctor what happened. She had been afraid to leave him because he controlled her immigration status.¹⁴¹

The second step in the dual nationality alternative for realizing equality in nationality law is the right to dual nationality, at least for families of mixed nationality. States have traditionally been opposed to dual nationality and have taken various international legal measures to reduce or eliminate cases of dual nationality. Insofar as this aversion relates to such practical problems as which of two states is entitled to represent an individual in an international claim, it may be lessened by the development of rules for dealing with such situations.¹⁴² Insofar as the state's concern with dual nationality is divided loyalty—on the dubious assumption that reducing dual nationality, in fact, reduces torn loyalties—it will not necessarily be persuasive to point to a trend primarily among Western states or between friendly states toward the acceptance of multiple nationality.¹⁴³ At the same time, it is important to

141. Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacy of Coverture*, in *CRITICAL RACE FEMINISM: A READER* 380, 380 (Adrien Katherine Wing ed., 1997). Regarding changes to U.S. immigration law intended to eliminate the potential for domestic abuse, see *id.* at 383–84; Violence Against Women Act, 114 Stat. 1464, §§ 1504–1507 (2000). See also NATIONAL ASSOCIATION OF WOMEN AND THE LAW, GENDER ANALYSIS OF IMMIGRATION AND REFUGEE PROTECTION LEGISLATION AND POLICY 5–6 (1999) (submission to Citizenship and Immigration Canada Ad Hoc Committee on Gender Analysis of the Immigration Act discussing negative impact of sponsorship).

142. On such rules, see *supra* notes 79, 89, and 92 and accompanying text.

143. See, e.g., Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359, 378–82 (1996); Peter J. Spiro, *Dual Nationality and the Meaning of Citizenship*, 46 EMORY L.J. 1411, 1457–58 (1997).

attend to the issues of who tends to raise concerns of divided loyalties—women or men—and whether these concerns are raised wherever applicable or primarily where they work to the disadvantage of women.

Although the dual nationality approach to third-generation issues of women's equality in nationality law finds little obvious support in current international law, there are several possible grounds of argument. One is the 1997 European Convention on Nationality, which is unusual in promoting the acquisition of one spouse's nationality by the other spouse and further in accepting dual nationality. The history of the Convention suggests that this solution is seen as reconciling gender equality with the traditional European notion of the legal unity of the family previously encoded in nationality law.¹⁴⁴

Rather than operating on a neutralized version of the patriarchal family in nationality, equality might operate on a relational conception of the individual and her rights. An argument for either the functional or the dual nationality approach to third-generation equality issues would be that a woman's right to equality in nationality law must be interpreted relationally, that is, incorporating her interdependency with others.¹⁴⁵ Recent African case law on nationality and immigration suggests such a conception. In *Dawood v. Minister of Home Affairs*,¹⁴⁶ the Constitutional Court of South Africa found that the general discretion to deny a temporary residence permit to an individual who is married to a South African citizen or permanent resident and seeks permanent residence in South Africa violated that individual's constitutional right of dignity¹⁴⁷ because it impaired her ability to achieve personal fulfillment through her relationship with another, specifically her ability to give effect to her marriage through cohabitation.¹⁴⁸ In light of South Africa's past, the Court was acutely aware that the possibilities for spouses to live together are shaped by factors including poverty¹⁴⁹ and, historically, race.¹⁵⁰ Accordingly, it refused to assume that where a temporary residence permit is denied, the spouses would both be able to move abroad. In recognizing the importance of marriage to the right of dignity, the Court valued the relationship "at least in part because human beings are social beings

144. COUNCIL OF EUROPE, NATIONALITY OF SPOUSES OF DIFFERENT NATIONALITIES AND NATIONALITY OF CHILDREN BORN IN WEDLOCK: RESOLUTIONS (77)12 AND (77)13 AND EXPLANATORY MEMORANDUM 8 (1977).

145. See Knop, *supra* note 43.

146. *Dawood v. Minister of Home Affairs*, 2000 (8) BCLR 837 (SA CC). See also *Booyesen v. Minister of Home Affairs*, 2001 (7) BCLR 645 (SA CC) (with respect to work permits for the foreign spouses of South Africans).

147. *Dawood*, 2000 (8) BCLR 837, ¶ 58.

148. *Id.* ¶ 37.

149. *Id.* ¶¶ 39, 51.

150. *Id.* ¶ 37 n.61.

whose humanity is expressed through their relationships with others.”¹⁵¹ “Umuntu ngumuntu ngabantu,” the Court noted, “a person is a person because of other people.”¹⁵²

Along relational lines, the Supreme Court of Zimbabwe found that a woman’s freedom of movement was impaired if her foreign husband was not legally able to reside permanently with her in Zimbabwe or to work there.¹⁵³ The Botswana Court of Appeal in *Unity Dow* similarly accepted that Unity Dow’s mobility rights were limited if she could not travel with her children absent their father because the children had his nationality and not hers. Judge President Amissah wrote, “the courts are not entitled to look at life in a compartmentalised form, with the misfortunes and disabilities of one always kept separate and sanitised from the misfortunes and disabilities of others.”¹⁵⁴ The Zambian High Court also relied on the mother’s constitutionally guaranteed freedom of movement in finding it unconstitutional to require the consent of the father before a mother can include her children in her passport or before they can obtain their own passport.¹⁵⁵

Another line of argument for facilitating dual nationality or some equivalent for spouses of different nationalities might be possible within an equality framework such as the Women’s Convention. The focus here would be more on the inequality of what otherwise amounts in effect to the dependent nationality of women, rather than on the legal vulnerability of the family unit or relationships. The Women’s Convention supports this line of argument insofar as the Convention defines discrimination against women to include discriminatory effect.

To the extent that third-generation equality issues involve some idea of the family or some idea of the relationships significant to the individual, discrimination in the idea of the family or relationships becomes an issue. “In recognizing the importance of the family,” the South African Constitutional Court cautioned in *Dawood*, “we must take care not to entrench particular forms of family at the expense of other forms.”¹⁵⁶ Some authors argue that what constitutes a family is taken for granted

151. *Id.* ¶ 30.

152. *Id.* ¶ 30 n.42.

153. *Kohlhaas v. Chief Immigration Officer, Zimbabwe* 1998 (6) BCLR 757 (Zimb.); *Rattigan v. Chief Immigration Officer, Zimbabwe* 1995 (2) SA 182 (Zimb.); *Salem v. Chief Immigration Officer, Zimbabwe* 1995 (4) SA 280 (Zimb.).

154. *Unity Dow v. Attorney General of Botswana*, [1992] Law Rep. Commonwealth (Const.) 623, 659 (Bots. C.A.).

155. *Nawakwi v. Attorney General of Zambia*, [1993] 3 Law Rep. Commonwealth 231 (Zambia H. Ct.).

156. *Dawood*, 2000 (8) BCLR 837, ¶ 31.

and tends, in fact, to be the traditional Western idea of a nuclear family.¹⁵⁷ This may create problems for same-sex relationships, unmarried couples, and marriages according to non-Western cultures (for example, “arranged marriages”). In another case, for example, the South African Constitutional Court found that legislation facilitating the issuance of an immigration permit to foreign spouses of South Africans, where “spouse” referred to a marriage under civil or customary law, was unconstitutional because it discriminated against same-sex couples.¹⁵⁸ In this connection, however, it is important to note that not all lesbian women would favor legal changes that require them to identify their relationships as family. In the North American debate over family status for lesbian and gay relationships, some lesbians and gays take the position that their relationships should be recognized as family and accorded the same rights and benefits. But others argue that lesbian and gay relationships should not be legally defined as family, for reasons ranging from the obscuring of important differences between these and heterosexual relationships to the rejection of the family as an institution oppressive for women.¹⁵⁹

“Arranged marriages” and other forms of family found in non-Western cultures raise similarly complex issues. In the context of lobbying to change British immigration policy, for instance, women of color criticized the mainstream women’s movement for its implicit condemnation of “arranged marriages.” Hazel Carby wrote:

We would not wish to deny that the family can be a source of oppression for us but we also wish to examine how . . . the black family has been a site of political and cultural resistance to racism.

. . .

The media’s “horror stories” about Asian girls and arranged marriages bear little relation to their experience. The “feminist” version of the ideology presents Asian women as being in need of liberation, not in terms of their own herstory and needs, but

157. Tom Mullen, *Nationality and Immigration*, in *THE LEGAL RELEVANCE OF GENDER: SOME ASPECTS OF SEX-BASED DISCRIMINATION* 146, 162 (Sheila McLean & Noreen Burrows eds., 1988).

158. *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (1) BCLR 39 (SA CC), *aff’g* 1999 (3) BCLR 280 (SA Cape of Good Hope Provincial High Court). As the Cape High Court pointed out, common-law marriages and Muslim and Hindu marriages would also be excluded from preferential immigration treatment, although this exclusion was not challenged.

159. See e.g. Brenda Cossman, *Family Inside/Out*, 44 U. TORONTO L.J. 1 (1994); Jody Freeman, *Defining Family in Mossop V. DSS: The Challenge of Anti-Essentialism and Interactive Discrimination for Human Rights Litigation*, 44 U. TORONTO L.J. 41 (1994).

into the "progressive" social mores and customs of the metropolitan West.¹⁶⁰

To summarize, as we saw in Part I of the article, most of the current gender equality challenges to nationality law are challenges to laws that differentiate between women and men in the attribution of nationality to children or in the naturalization of spouses. Part III distinguished these issues as a second generation of equality issues, aimed at securing the same legal treatment for women as for men in matters of nationality. Furthermore, Part III showed that while such reforms are important, they may not be enough. In particular, they may leave families of mixed nationality without the safeguards previously provided by imposing the husband and father's nationality on the wife and children, and the resulting efforts to compensate may in fact compromise women's equality. This situation raises a third generation of equality issues. To address them, states need to allow all members of mixed nationality families to choose dual nationality or otherwise to guarantee sufficient rights and benefits to the non-national family members, including most especially security of residency. Part III ended by proposing various justifications for this result.

IV. INTERNATIONAL LAW REGIMES

Having determined what gender equality requires, the article next describes and assesses the historical development of international law as it relates to women's nationality. Historically, the principle that the nationality of the wife follows that of the husband was not a principle of international law. It was a principle that governed the nationality of married women in the vast majority of domestic legal systems at the turn of the century and had already slowly and in piecemeal fashion begun to change by the time that international law began to regulate the issue in the 1930s.

International law did not readily approach the issue of women's nationality on the basis of gender equality. It first approached women's nationality as a problem of statelessness and dual nationality caused by conflicts among the nationality laws of different states, an approach that is still found, for example, in states' reservations to the Women's Con-

160. Hazel Carby, *White Women Listen! Black Feminism and the Boundaries of Sisterhood*, in *THE EMPIRE STRIKES BACK: RACE AND RACISM IN 70s BRITAIN* 212, 214, 216 (1982). Regarding immigrant cultures, see also *NATIONAL ASSOCIATION OF WOMEN AND THE LAW*, *supra* note 141, at 7-8 (noting that for immigrant women, the skills and resources of extended family members are particularly important as essential support in terms of child care, social and emotional support, and financial income).

vention article on nationality. Gradually, international law, and particularly international human rights law, came to deal with women's nationality as an issue of equality. Most recently, the conclusion of the Convention on the Rights of the Child (the Children's Convention)¹⁶¹ and of two regional conventions on children's rights suggests the need to pursue the intersection of women's and children's rights of nationality.

Using the three generations of discrimination as a yardstick, this Part of the article traces the history of the international legal regimes most relevant to women's equality in nationality law. Parts IV.A and IV.B treat the development of the public international law rules on nationality, Part IV.C deals with international women's rights, and Part IV.D involves international children's rights. While all of these international legal regimes are relevant to the campaign for equality, not all are premised on equality or equality alone. By distinguishing the different regimes and their different dynamics, Part IV shows the debate and the strategies generated by each.

A. *Inequality*

According to a United Nations study, the nationality of the wife followed the nationality of the husband in all domestic legal systems in the world at the end of the first decade of the twentieth century, with the exception of a few Latin American states.¹⁶²

If strictly applied, this principle operates so that:

The alien woman marrying a national automatically acquires her husband's nationality; the woman national marrying an alien automatically loses her original nationality.

The alien woman whose alien husband acquires the nationality of the country during marriage acquires automatically his new nationality; the woman national whose husband, a national, loses his nationality during marriage, automatically loses her nationality.

The alien woman, married to a national, loses her nationality acquired through marriage, upon dissolution of the marriage; the woman national married to an alien reacquires automatically her original nationality (lost through marriage), upon dissolution of the marriage.¹⁶³

161. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter Children's Convention].

162. HISTORICAL BACKGROUND, *supra* note 111, at 3.

163. NATIONALITY OF MARRIED WOMEN, *supra* note 129, at 8.

This legal regime for the nationality of married women rests on two premises. The first premise is that all members of a family should have the same nationality, and the second is that the husband determines what that nationality is.¹⁶⁴ Strictly speaking, the first premise does not depend on gender. At the 1924 ILA Conference, G.M. Palliccia of Italy remarked jocularly, “let us have one nationality, and, if you like, let us choose the nationality of the wife, instead of that of the man. There will be perhaps a certain return to the period of matriarchy, but, after all, the world was not so bad under matriarchy.”¹⁶⁵ The second premise relies on a patriarchal notion of the family, entrenched in the law of the period, which gave the husband a privileged status and the power to make decisions affecting the family.

The first premise, that a family should have the same nationality, was deeply bound up with a vision of the international order as a power struggle between states. Husband and wife should not have different nationalities because through the powerful attachment of nationality, the rivalries, tensions, and hostilities that existed between states would be projected onto the marriage. In his 1929 book on the nationality of married women, Trinh Dinh Thao quotes a description of the household with two nationalities:

a rivalry of nation to nation, interests opposed between persons united, different affections, diverse fatherlands, enemy wishes for countries perhaps at war, and this between persons who have sworn to love one another, between whom everything is common and who must never leave one another.¹⁶⁶

Not only would a marriage between people of different nationalities tend to reproduce the antagonism between states, it would, in turn, give rise to conflicts between states as the protectors of the respective spouses.¹⁶⁷

From the premise that a family should have the same nationality, it followed, to the male mind of the day, that the husband should determine that nationality. In his manual on private international law, published in 1923, René Foignet writes: “[I]t is in conformity with the spirit of mar-

164. See Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R. (Ser. A) No. 4, ¶ 64 (1984), reprinted in 5 HUM. RTS. L.J. 161, 174 (1984), available at http://www1.umn.edu/humanrts/iachr/b_11_4d.htm; HISTORICAL BACKGROUND, *supra* note 111, at 3.

165. 33D CONFERENCE REPORT, *supra* note 26, at 43.

166. TRINH DINH THAO, DE L'INFLUENCE DU MARIAGE SUR LA NATIONALITÉ DE LA FEMME 15 (Paul Roubard ed., 1929), quoting Varambon, *Nationalité de la Femme Mariée*, 8 REVUE PRATIQUE DE DROIT FRANÇAIS 50, 56 (1859) (authors' translation).

167. See *Mackenzie v. Hare*, 239 U.S. 229, 311–12 (1915).

riage that spouses have the same nationality. From that moment, it is natural that the nationality of the husband spread to the wife."¹⁶⁸

Conversely, the premise that the family should have the same nationality can be derived from the idea of the *paterfamilias* reflected in the premise that the husband decides the family's nationality. If the wife has a different nationality, then she will feel a duty of obedience to her country that rivals her duty of obedience to her husband. She must acquire his nationality so that he will have no rival for her obedience.¹⁶⁹

If the intertwined concerns of divided loyalty and the preservation of patriarchy were used to oppose the first-generation equality issue of a woman's right to choose her nationality independent of her husband, these concerns, somewhat transmuted, continue to figure in the second and third generations of equality issues in nationality law. Once the members of a family can have different nationalities, the concern with divided loyalty becomes a concern with the prospect that some or all of them will be dual nationals and therefore subject to conflicting allegiances. As will be seen,¹⁷⁰ this concern is used as a justification for the law that only a father can pass nationality to a child. Since the other second-generation equality issue, equal naturalization procedures for foreign husbands and foreign wives, does not in and of itself necessitate allowing the foreign spouse to retain his or her original nationality, it does not raise the concern of divided loyalty. However, a third-generation equality analysis points to the possibility that absent the right to become a dual national, a spouse of one nationality living in the state of the other spouse's nationality, still most often the wife living in the husband's state, may effectively have no choice but to become a national of that state and to renounce her own nationality. Her nationality thereby follows his and reproduces the very situation that the campaign for the independent nationality of married women was intended to redress.

The patrilineal justification used historically to justify the unequal regime of dependent nationality for married women reappears in later generations of equality issues as a cultural defense, primarily in the second-generation context of nationality laws that entitle only a father to pass nationality to a child. In *Unity Dow*, the Attorney General of

168. RENÉ FOIGNET, *MANUEL ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ* 80 (6th ed. 1921) (authors' translation). While Foignet's conclusion may have reflected a wife's legal duty under the Civil Code to obey the husband and follow him in all his changes of residence, other French international lawyers maintained that the Code did not apply this duty of obedience to the wife's nationality because the Code accepted that the husband's nationality could change over the course of the marriage without the wife's also changing.

169. Makarov, *supra* note 42, at 166, citing E. Audinet, *La nationalité française*, *REVUE*, 1928, at 30, and François Pelletier, *La nationalité de la femme mariée* 9 (1925) (thesis, Université de Dijon).

170. *See infra* Part IV.B.

Botswana conceded that the Citizenship Act discriminated against Botswana women because it allowed only Botswana men to transmit citizenship to their children, but argued that this discrimination was not unconstitutional when the constitution was properly interpreted as a reflection of a patrilineal society. Both customary law and the Roman Dutch common law in Botswana, the Attorney General argued, were based upon the *paterfamilias* as the head of the family.¹⁷¹

Judge Amissah, President of the Court, rejected the premise that citizenship must follow the customary or traditional systems of a people, finding that it was not supported by the development of citizenship law. In particular, no claim had been made that the British *jus soli* principle that prevailed in Botswana prior to independence had interfered with the male orientation of Botswana customary society. Judge President Amissah reasoned that Botswana nationality in the civic sense need not be the same as Botswana nationality in the sense of the Botswana people, which would be a matter of descent through the father. Although Botswana could base its citizenship law on descent, there was no strong historical reason for it to do so. On the contrary, the constitutional and international guarantee of equality was a compelling reason for the citizenship law not to follow custom.¹⁷² Along similar lines, Lubna Mariam, in a comment on the *Malkani* case, argues that citizenship is a secular concept and should be determined separately from personal laws based on religious predicates.¹⁷³

Accepting a linkage of citizenship and culture, a different criticism of the cultural justification for tracing nationality through the father was given by a Brussels-based Pakistani woman journalist married to a Spanish man and unable, as a woman, to pass her Pakistani nationality to her

171. The Attorney General's Heads of Argument in the High Court and Court of Appeal cases are reprinted in *THE CITIZENSHIP CASE: THE ATTORNEY GENERAL OF THE REPUBLIC OF BOTSWANA V. UNITY DOW*, 20–21, 63–65 (Unity Dow ed., 1995).

172. *Unity Dow v. Attorney General of Botswana*, [1992] Law Rep. Commonwealth (Const.) 623, 641–43 (Bots. C.A.).

173. Mariam, *supra* note 55. See also Salma Sobhan's criticism of the *Malkani* decision, discussed in *id.*

Even if citizenship is not a secular concept, there is an ongoing discussion in the literature and within CEDAW on the reinterpretation of Islamic law in ways supportive of women's equality. For a sense of the literature, see Abdullahi Ahmed An-Na'im, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 167 (Rebecca J. Cook ed., 1994); Asma Mohamed Abdel Halim, *Challenges to the Application of International Women's Human Rights in the Sudan*, in *HUMAN RIGHTS OF WOMEN*, *supra* note 173, at 397; Sara Hossain, *Equality in the Home: Women's Rights and Personal Laws in South Asia*, in *HUMAN RIGHTS OF WOMEN*, *supra* note 173, at 465. An example of CEDAW's engagement with the issue is found in its questioning of the Libyan Arab Jamahiriya. *Report of the Committee on the Elimination of Discrimination Against Women* (13th Sess.), U.N. GAOR, 49th Sess., Supp. No. 38, at 39, U.N. Doc. A/49/38 (1994).

children. She argued that if anything, Pakistani women raising their children by a foreign husband outside Pakistan are more likely than Pakistani men bringing up their children by a foreign wife abroad to ensure that the children speak Urdu, know about Islam, and visit Pakistan as often as possible. If the logic is preservation of culture, then, on this logic, women are more deserving than men of the right to pass their nationality to their children.¹⁷⁴

Also within the framework of respect for culture, the Botswana High Court in *Unity Dow* concluded that the country's Citizenship Act actually introduced a tension between respect for culture and respect for marriage because the Act made an exception to the patrilineal rule for children born outside wedlock. By permitting a single mother to give citizenship to her child, the Act created an incentive for women to live and bear children outside wedlock.¹⁷⁵

B. Statelessness and Dual Nationality

By the time that Alexandre Nikolaevitch Makarov lectured on the nationality of the married woman at the Hague Academy of International Law in 1937,¹⁷⁶ the nationality laws of states ranged from those that were still based on the principle of dependent nationality for married women to those that had adopted the principle of independent nationality, and covered a variety of intermediate options. As a result of conflicts between these different nationality laws, women at the time of marriage or divorce were increasingly likely to become either stateless¹⁷⁷ or dual nationals. If a woman from a state that automatically deprived her of her nationality on marriage (based on some form of dependent nationality) married a man from a state that did not automatically grant her nationality on marriage (based on some form of independent nationality), then she became stateless. Conversely, if marriage, under the nationality laws of her state, had no effect on her nationality (independent nationality) and marriage, under the laws of her husband's state, gave her his nationality (dependent nationality), then she became a dual national. Similarly, if the state traced the child's nationality only through the husband (the

174. *Why Can't a Woman be Treated Like a Man?*, WOMEN LIVING UNDER MUSLIM LAWS NEWSHEET (Women Living Under Muslim Laws, London, United Kingdom; Lahore, Pakistan; Lagos, Nigeria), Mar. & June 1997, at 1. *But see* note 59 and accompanying text.

175. *Unity Dow v. Attorney General of Botswana*, [1991] Law Rep. Commonwealth (Const.) 574, 588 (Bots. H. Ct.).

176. Makarov, *supra* note 42.

177. Statelessness was also caused by other types of conflicts between nationality laws. For a series of examples, see 33D CONFERENCE REPORT, *supra* note 26, at 26–28. For an overview of the contemporary causes of statelessness, see Carol A. Batchelor, *UNHCR and Issues Related to Nationality*, 14 REFUGEE SURV. Q. 91 (1995).

patrilineal form of *jus sanguinis*), then the child of a stateless, unknown, or unmarried father would be stateless. It was these "evils of statelessness and double allegiance," rather than women's equality, with which the ILA's Committee on Nationality and Naturalisation was concerned in 1924.¹⁷⁸

While some solution to the problem of stateless women and children was clearly needed, the solution of the 1930 Hague Codification Conference was capable of reproducing the effect of dependent nationality.

The Hague Convention on Conflict of Nationality Laws,¹⁷⁹ which emerged from the 1930 Hague Codification Conference held under League of Nations auspices, is significant as the first international attempt to give every person a nationality.¹⁸⁰ The right to a nationality is also recognized by the Universal Declaration on Human Rights,¹⁸¹ the Convention on the Reduction of Statelessness,¹⁸² the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁸³ the American Convention on Human Rights,¹⁸⁴ and the European Convention on Nationality,¹⁸⁵ although the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the European Convention on Human Rights make no mention of the right. The International Covenant on Civil and Political Rights does, however, include a child's right to a nationality,¹⁸⁶ as do the Children's Convention¹⁸⁷ and the African Charter on the Rights and Welfare of the Child.¹⁸⁸ While the right to a nationality is probably not part of international customary law, there does seem to be a customary trend toward the elimination of statelessness. The only other right of nationality where some sort of customary consensus seems to exist is the right to change one's nationality, but different states attach different conditions to its exercise.¹⁸⁹

As concerns the nationality of married women, only one of the four articles on the subject in the Hague Convention appears to reflect the

178. 33D CONFERENCE REPORT, *supra* note 26, at 26.

179. Hague Convention on Conflict of Nationality Laws, *supra* note 11.

180. Johannes M.M. Chan, *The Right to Nationality as a Human Right*, 12 HUM. RTS. L.J. 1, 2 (1991).

181. Universal Declaration on Human Rights, *supra* note 94, art. 15.

182. Convention on the Reduction of Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175.

183. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 94, art. 5(d)(iii).

184. American Convention On Human Rights, *supra* note 94, art. 20.

185. European Convention on Nationality, *supra* note 77, art. 4(a).

186. International Covenant on Civil and Political Rights, *supra* note 49, art. 24(3).

187. Children's Convention, *supra* note 161, art. 7(1). *See also infra* Part IV.D.

188. African Charter on the Rights and Welfare of the Child, July 1990, art. 6(3), 1 AFR. Y.B. INT'L L. 295 (1993).

189. *See* Chan, *supra* note 180, at 8, 10-11.

principle of women's equality, as opposed to the aim of reducing statelessness and dual nationality. Namely, article 10 provides that "naturalisation of the husband during marriage shall not involve a change in the nationality of the wife except with her consent."¹⁹⁰

In contrast, article 8 of the Hague Convention reads: "if the national law of the wife causes her to lose her nationality on marriage with a foreigner, this consequence shall be conditional on her acquiring the nationality of the husband."¹⁹¹ The effect of article 8 is that so long as the husband's state subscribes to the principle of dependent nationality, the wife's state is also free to apply it. If states increasingly abandon the principle of dependent nationality, then article 8 would operate so as to require those states that still accept the principle to increasingly make exceptions to its application. In and of itself, however, article 8 is neutral as between the principles of dependent and independent nationality.¹⁹²

In a similar vein, a protocol to the Hague Convention gives a mother the right to pass on her nationality to her child where the child would otherwise be stateless:

In a State whose nationality is not conferred by the mere fact of 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.¹⁹³

Although gender-neutral, the relevant provisions of the Convention on the Reduction of Statelessness, concluded some three decades later, do not differ significantly in effect.¹⁹⁴

Thus, developments in international law aimed at solving problems of statelessness, including those created by the state-by-state reform of laws on the nationality of married women, did not necessarily promote the equality of men and women in matters of nationality. Indeed, from the perspective of women's statelessness, the principle of dependent nationality was basically as satisfactory as the principle of independent nationality. Problems arose only when the nationality laws of states were not uniformly based on one principle or the other.

190. On the one hand, a United Nations study states that the purpose of article 10 is actually to avoid statelessness and dual nationality. HISTORICAL BACKGROUND, *supra* note 111, at 10. On the other, Weis maintains that the principle of equality motivates not only article 10, but also, to some extent, article 11. WEIS, *supra* note 73, at 97.

191. See also Hague Convention on Conflict of Nationality Laws, *supra* note 11, art. 9.

192. See HISTORICAL BACKGROUND, *supra* note 111, at 10.

193. Protocol Relating to a Certain Case of Statelessness, Apr. 12, 1930, art. 1, 179 L.N.T.S. 115.

194. See Convention on the Reduction of Statelessness, *supra* note 182, arts. 4-6, 8.

Even now, some states give statelessness as the reason for their reservations or declarations to article 9 of the Women's Convention. Turkey's declaration states that article 9(1) does not conflict with the Turkish Law on Nationality "since the intent of the law's provisions regulating acquisition of citizenship through marriage is to prevent statelessness."¹⁹⁵ Morocco's reservation to article 9(2), which gives women equal rights with respect to the nationality of their children, is necessitated by its nationality law, which, similar to the Protocol to the Hague Convention, "permits a child to bear the nationality of its mother only in the cases where it is born to an unknown father, regardless of place of birth, or to a stateless father, when born in Morocco, and it does so in order to guarantee to each child its right to a nationality."¹⁹⁶

While statelessness is clearly an important problem for both states and women themselves, dual nationality is more complicated. Moreover, while the problem of statelessness admits of nondiscriminatory solutions, the problem of dual nationality does not insofar as states seek a rule that chooses or forces a choice between the mother's or the father's nationality, in the case of a child; or between the husband's or the wife's nationality, in the case of spouses. This makes dual nationality an obstacle to both second- and third-generation equality issues.

States' ingrained opposition to dual nationality generally continues their concern with divided loyalty, which was used to support the principle of dependent nationality. This antipathy to dual nationality is clearly articulated in the preamble to the Hague Convention, which reads in part:

Being convinced that it is in the general interest of the international community to secure that all its members should recognize that every person should have a nationality and should have one nationality only;

Recognizing accordingly that the ideal towards which the efforts of humanity should be directed in this domain is the abolition of all cases both of statelessness and of double nationality¹⁹⁷

Although there are some indications that states are becoming more tolerant of dual nationality,¹⁹⁸ this is not a universal trend.

On the assumption that the international order is perpetually on the verge of war, dual nationality might ill serve the individual as well as the

195. United Nations Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty9.asp>.

196. *Id.*

197. Hague Convention on Conflict of Nationality Laws, *supra* note 11, pmb1.

198. See Franck, *supra* note 143; Spiro, *supra* note 143.

state. Wyndham Bewes introduced the 1924 report of the ILA Committee on Nationality and Naturalisation with the observation that:

double nationality is . . . a serious inconvenience, for, if one of the competing States is at war with the other competing State, the unfortunate victim would be shot in the chest by one of them and in the back by the other, and he doubtless would not survive.¹⁹⁹

Indeed, the international regulation of dual nationality deals with, among other things, the military obligations owed by dual nationals.²⁰⁰ Commentators have argued, however, that the assumption of antagonistic states is outdated and should no longer prevent the recognition of dual nationality.²⁰¹

For women, moreover, dual nationality is used as a reason why only men can convey their nationality to their children. Egypt explains its reservation to article 9(2) of the Women's Convention in these terms:

This is in order to prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be prejudicial to his future. It is clear that the child's acquisition of his father's nationality is the procedure most suitable for the child and that this does not infringe upon the principle of equality between men and women, since it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality.²⁰²

In this connection, Judge President Amissah in *Unity Dow* disposes of the dual nationality justification as follows:

the fact that different states follow different criteria in conferring citizenship means that whatever Botswana provides in its citizenship laws may not achieve the objective of eliminating dual citizenship, if that indeed is what is desired . . . In this very case, the respondent's eldest child, Cheshe, who acquired Botswana citizenship at birth because her parents were not married at the time, also became, and presumably still is, an American citizen by descent. Such a child may continue with this dual citizenship for the rest of his or her life. But those states which want to

199. 33D CONFERENCE REPORT, *supra* note 26, at 23.

200. *E.g.*, Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, May 6, 1963, Europ. T.S. No. 43.

201. *See, e.g.*, Spiro, *supra* note 143.

202. United Nations Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty9.asp>.

avoid dual nationality would then require the child to opt for the citizenship which he or she wishes to continue with upon attaining majority. The device for eliminating dual citizenship does not, therefore, appear to me to lie in legislation which discriminates between the sexes of the parents.²⁰³

In a 1983 judgment, the Italian Constitutional Court considered whether the avoidance of dual nationality justified a 1912 law that did not give Italian citizenship to the children of Italian women who were married to non-Italians, but had retained their Italian citizenship. The Court, which found the law unconstitutional, concluded that the need to avoid dual nationality was not a valid reason to ignore the articles of the Constitution on equality before the law without distinction as to sex and on the moral and legal equality of spouses. According to the Court, the need to realize the constitutional principle of equality as regards the acquisition of citizenship by birth must take precedence, despite the serious inconveniences caused by dual nationality. Difficulties arising from children's dual citizenship could be minimized by legislation.²⁰⁴

If the opposition of states to dual nationality is an obstacle to women's equal right with men to convey their nationality to their children, a second-generation issue of equality, it also relates to the third-generation issue of the relationship between women's equality and the protection of the family. Where a woman retains her original nationality on marriage and chooses to acquire her husband's nationality as well, the state interest, as evidenced by the 1963 European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality,²⁰⁵ has traditionally been to require her to renounce one of the two nationalities. If the wife chooses her original nationality, however, the family may be divided by discrimination, in particular as regards residence permits, work permits, foreign travel, and, in case of separation, the right to see the children regularly.²⁰⁶ But if these concerns cause the wife instead to acquire her husband's nationality and,

203. *Unity Dow v. Attorney General of Botswana*, [1992] Law Rep. Commonwealth (Const.) 623, 643-44 (Bots. C.A.).

204. Corte cost., 28 gen. 1983, n.30, 62 Racc. uff. corte cost. 1983, LXII, 157 (Italy). For subsequent developments in Italian nationality law, see *Third Periodic Reports of States Parties: Italy*, U.N. Committee on the Elimination of Discrimination Against Women, at 20, U.N. Doc. CEDAW/C/ITA/3 (1998).

205. Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, *supra* note 200.

206. For an example where the different nationalities of divorced spouses limited the father's ability to see his children, see *Zouhair Ben Said v. Norway*, Communication No. 767/1997, U.N. Human Rights Committee, U.N. Doc. CCPR/C/68/D/767/1997 (2000) (Norway denied entry to a Tunisian national whose ex-wife and children were Norwegian nationals resident in Norway.).

as a condition, to renounce her own, then the effect is no different than that of the old principle of the dependent nationality of married women.²⁰⁷

For these reasons, the Parliamentary Assembly of the Council of Europe in 1988 adopted Recommendation 1081, which encourages a right to dual nationality in the case of mixed marriages. Recommendation 1081 reads in part:

4. Reaffirming the principle of equality of the spouses before the law;
5. Considering that, in view of the gravity of the economic and social problems affecting spouses in mixed marriages, that is to say marriages where the spouses have a different European nationality, it is desirable that each of such spouses may have the right to acquire the nationality of the other without losing his or her own nationality of origin;
6. Considering that the children born from mixed marriages should also be entitled to acquire and keep the nationality of both of their parents;
- ...
8. Considering that it is only in exceptional cases that the fact that a person has several nationalities may render difficult the application of other Council of Europe conventions and that this can hardly be considered an argument against the multiple nationality principle²⁰⁸

Several years later, a protocol was concluded amending the 1963 European Convention on the Reduction of Multiple Nationality to the same effect (the Second Protocol).²⁰⁹

Whereas the 1963 Convention, like the earlier Hague Convention, treats dual nationality as the twin evil of statelessness, Recommendation 1081 and the Second Protocol thus carve out mixed marriages as an exception. The 1997 European Convention on Nationality goes even

207. Although both foreign husbands and foreign wives may find themselves faced with this choice, it still seems to be more often the case that a wife will come to live in her husband's state.

208. Council of Europe Parliamentary Assembly, Recommendation 1081 on Problems of Nationality in Mixed Marriages (1988), *reprinted in* COUNCIL OF EUROPE, COUNCIL OF EUROPE ACHIEVEMENTS IN THE FIELD OF LAW: NATIONALITY 76, Doc. DIR/JUR(98)1 (1998).

209. Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, Feb. 2, 1993, Europ. T.S. No.149.

further in that it eliminates the principle of avoiding dual nationality altogether. The European Convention on Nationality reduces dual nationality to a problem of co-ordination and bases nationality law instead on the principles of the avoidance of statelessness and equality. Articles 4 and 5 of the Convention read:

ARTICLE 4—PRINCIPLES

The rules on nationality of each State Party shall be based on the following principles:

- a everyone has the right to a nationality;
- b statelessness shall be avoided;
- c no one shall be arbitrarily deprived of his or her nationality;
- d neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse.

ARTICLE 5—NON-DISCRIMINATION

1. The rules of a State Party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, colour, or national or ethnic origin.
2. Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently.

Under the European Convention on Nationality, it is possible to achieve equality other than at the expense of family life. Because a state may permit a family to choose dual nationality, the family can have unity of nationality, with the security that provides, without sacrificing the nationality of one spouse or the other. In the first place, article 6(1)(a) provides that a state party shall grant its nationality at birth to children born to a national within the state, and article 6(4) that a state party shall “facilitate in its internal law the acquisition of its nationality” for spouses of its nationals and those children of its nationals who are not already nationals by birth. In the second, article 14(1) requires states to allow dual nationality in the case of spouses and children who have automatically acquired more than one nationality by operation of law, and article 15 permits states to allow dual nationality generally.

If the European Convention on Nationality seeks to reconcile equality with the safeguarding and support of the family as a social and legal unit—previously reflected in its single nationality—the European Union had been concerned with the family as an economic unit and what that requires by way of rights for the non-national family members of an EU national. The EU guarantees to the non-EU spouse and family members of an EU national the right of free movement, the right of residence and to remain, as well as economic and social rights.²¹⁰ Although less than the rights secured by nationality, this package of rights makes it possible for the non-EU spouse to retain his or her own nationality without jeopardizing the security and well-being of the family.

But the rights of the non-EU spouse are not traditionally understood to be that spouse's as such. They are traditionally understood as the right of the EU national to be joined by (as it was assumed) his wife and family, a right seen as necessary to ensure the free movement of EU workers. Accordingly, these rights depend on the existence of the marriage.²¹¹ As in the case of spousal sponsorship for immigration status,²¹² this is problematic because it gives the EU spouse leverage over the life of his or her spouse through divorce or even the threat of divorce.²¹³ Moreover, as Joseph Weiler has argued, it reifies the non-EU spouse: she or he is a thing that serves the purpose of ensuring the free movement of labor within the European Union, as opposed to an individual with human dignity who has established a new life in a new place.²¹⁴ In this regard, there is now a proposal in the EU to grant in the event of the dissolution of the marriage an independent right of residence and right of work for the non-EU family members after a residence period of three and five years, respectively. That is, provided that the non-EU family members satisfy the residency requirement, the rights they enjoyed by virtue of their relationship to an EU national are not immediately lost on the break-up of the marriage. The proposal extends beyond spouses to include persons corresponding to spouses under the law of the host member state.²¹⁵

210. See Tamara Hervey, *A Gendered Perspective on the Right to Family Life in European Community Law*, in *THE EUROPEAN UNION AND HUMAN RIGHTS* 221, 230–32 (Nanette A. Neuwahl & Allan Rosas eds., 1995).

211. Joseph H.H. Weiler, *Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals—A Critique*, 3 *EUR. J. INT'L L.* 65, 90 (1992).

212. See *supra* notes 140–141 and accompanying text.

213. Weiler, *supra* note 211, at 87.

214. For gender-related criticisms regarding the EU conception of family and work, see Hervey, *supra* note 210.

215. Commission Proposal for a European Parliament and Council Regulation Amending Council Regulation 1612/68 EEC on Freedom of Movement for Workers Within the Community, 1998 O.J. (C 344) 9, amended 1999 O.J. (C 279) 58; Commission Proposal for a European Parliament and Council Directive Amending Directive 68/360 EEC on the Abolition of Restrictions on Movement and Residence Within the Community for Workers and their

C. Equality

Women in the Americas were the first to succeed internationally in having women's nationality treated as an issue of equal rights. Created by resolution of the Sixth Pan American Conference in 1928, the Inter-American Commission of Women was charged with "the preparation of juridical information and data of any other kind which may be deemed advisable to enable the Seventh International Conference of American States to take up the consideration of the civil and political equality of women in the continent."²¹⁶ At the Seventh Pan American Conference, the Commission presented a draft convention that became the 1933 Montevideo Convention on the Nationality of Women. Its single substantive provision was contained in article 1, in which the parties declare that "[t]here shall be no distinction based on sex as regards nationality, in their legislation or in their practice."²¹⁷

Subsequent international instruments that pertain to women's equality in nationality law may be divided into those dealing with women's equality in the context of nationality (discussed in Part IV.C.1) and those guaranteeing women's equality generally and in the context of other rights relevant to nationality (discussed in Part IV.C.2).

1. Equality Rights in Nationality Law

The 1948 Universal Declaration of Human Rights proclaims both the right of non-discrimination on the grounds of sex²¹⁸ and the right to a nationality.²¹⁹ By reading the two together, it can be argued that the Universal Declaration prohibits sexual discrimination in the laws awarding nationality. The 1969 American Convention on Human Rights also includes both the right to equality²²⁰ and the right to a nationality.²²¹ In a 1984 Advisory Opinion, the Inter-American Court of Human Rights held

Families, 1998 O.J. (C 344) 12, amended 1999 O.J. (C 279) 61. *But see id.*, proposed article 4(a)(2) (concerning non-economically active family members).

216. Quoted in James Brown Scott, *The Seventh International Conference of American States*, 28 AM. J. INT'L L. 219, 219 (1934).

217. Pan-American Convention on the Nationality of Women (Montevideo Convention on the Nationality of Women), Dec. 26, 1933, art. 1, 49 Stat. 2957, 2960 (1936). *See also* American Declaration on the Rights and Duties of Man, Mar. 30–May 2, 1948, arts. II, XIX, OASOR OEA/Ser.L.V/II.4 Rev. (1965), *reprinted in* BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 17, OEA/Ser.L.V/II.82 doc.6 rev.1 (1992); Montevideo Convention on Nationality, Dec. 26, 1933, art. 6, *reprinted in* INTERNATIONAL CONFERENCES OF AMERICAN STATES—SUPPLEMENT 1933–1940 108 (James Brown Scott, Carnegie Endowment for Int'l Peace ed., 1940).

218. Universal Declaration, *supra* note 94, art. 2.

219. *Id.* art. 15.

220. American Convention On Human Rights, *supra* note 94, arts. 1(1), 17(4), 24.

221. *Id.* art. 20.

that Costa Rica's proposal to amend the naturalization provisions of its constitution such that a foreign woman who marries a Costa Rican would be accorded special consideration for obtaining Costa Rican nationality constituted discrimination contrary to article 24 of the American Convention on equality before the law and article 17(4) on the equality of spouses.²²²

Although not directly violating the right to a nationality guaranteed by article 20 of the American Convention,²²³ the proposed constitutional amendment also raised issues bearing on that right.²²⁴ In particular, the amendment was drafted so that

foreigners who lose their nationality upon marrying a Costa Rican would have to remain stateless for at least two years because they cannot comply with one of the obligatory requirements for naturalization unless they have been married for that period of time. It should also be noted that it is by no means certain that statelessness would be limited to a period of two years only. This uncertainty results from the fact that the other concurrent requirement mandates a two-year period of residence in the country. Foreigners forced to leave the country temporarily due to unforeseen circumstances would continue to be stateless for an indefinite length of time until they will have completed all the concurrent requirements established under this proposed amendment.²²⁵

Despite this result, however, the proposed constitutional amendment did not violate the woman's right to a nationality because her statelessness was technically brought about by the nationality laws of her own state and not the Costa Rican Constitution.²²⁶

In this connection, the Inter-American Court refers to the Convention on the Nationality of Married Women and the Women's Convention as reflecting "current trends in international law."²²⁷ The Convention on the Nationality of Married Women,²²⁸ which came into force in 1958, establishes the independent nationality of a married woman,²²⁹ but

222. Advisory Opinion OC-4/84, Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), reprinted in 5 HUM. RTS. L.J. 161 (1984), available at http://www1.umn.edu/humanrts/iachr/b_11_4d.htm.

223. *Id.* ¶ 48.

224. *Id.* ¶ 43.

225. *Id.* ¶ 46.

226. *Id.* ¶ 48.

227. *Id.* ¶ 49. In the view of DONNER, *supra* note 95, at 209–210, the Convention on the Nationality of Married Women is not declaratory of customary international law.

228. Convention on the Nationality of Married Women, *supra* note 130.

229. *Id.* arts. 1–2.

neither a woman's equal right to pass on her nationality to her child nor that of a foreign husband to special naturalization procedures where such procedures have been established for foreign wives. On the contrary, by providing that the foreign wife of a national may, at her request, "acquire the nationality of her husband through specially privileged naturalization procedures,"²³⁰ the Convention reinforces the assumption that a wife will follow her husband. "I think probably a very great number of international marriages are the other way about," Chrystal Macmillan remarked at the 1924 ILA Conference, proposing that a foreign husband and a foreign wife be given the same special treatment.²³¹

The 1979 Women's Convention goes further than the Convention on the Nationality of Married Women in several respects. Article 9 of the Women's Convention reads:

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Like the Convention on the Nationality of Married Women, the Women's Convention entrenches the first-generation equality principle of independent nationality for married women. Article 9(1) also protects women against statelessness and ensures that they are not forced to take the nationality of their husband.

Unlike the Convention on the Nationality of Married Women, the Women's Convention also addresses the second generation of equality issues associated with nationality. Whereas the Convention on the Nationality of Married Women is silent on the nationality of children, article 9(2) grants women and men equal rights in this regard.

While the Convention on the Nationality of Married Women envisages specialized naturalization procedures for foreign wives, it is generally assumed that the Women's Convention requires the same procedures for both wives and husbands. Moreover, it may be argued, given the attention to *de facto* unions in CEDAW's General Recommendation dealing with articles 9, 15, and 16 of the Women's Convention, that whatever procedures apply to wives and husbands should apply to *de*

230. *Id.* art. 3. For the drafting history of article 3, see HISTORICAL BACKGROUND, *supra* note 111, at 40-44.

231. 33D CONFERENCE REPORT, *supra* note 26, at 39-40.

facto partners as well. The interpretation of equality in article 9 of the Women's Convention as requiring identical naturalization procedures for wives and husbands, and arguably also *de facto* partners, is consistent with the Inter-American Court's advisory opinion on the Costa Rican constitution and also with the jurisprudence of the UN Human Rights Committee and European Court of Human Rights on gender equality in immigration procedures.²³² This interpretation is also consistent with CEDAW's commentary on article 15(4) of the Women's Convention, which gives women and men "the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile."²³³ In CEDAW's view, article 15(4) requires that migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners, and children join them.²³⁴ It should be noted, however, that article 15 refers to the "same" rights, while article 9 involves the more complex notion of "equal" rights.

While article 9 of the Women's Convention requires states to equalize the procedures for the acquisition of nationality by the spouse of a national, it does not go so far as to oblige states to facilitate a spouse's acquisition of nationality.

The progress represented by article 9 of the Women's Convention is hampered by the large number of reservations, made by a range of states, to all or part of that article.²³⁵ Although a number of states have entered objections,²³⁶ these objecting states maintain that the Women's Convention remains in force as between them and the reserving states.²³⁷

232. See *infra* Part IV.C.2.

233. Women's Convention, *supra* note 46, art. 15(4).

234. General Recommendation 21 on Equality in Marriage and Family Relations, *supra* note 100, at 3.

235. For a list, see *supra* text accompanying notes 66–71.

236. Denmark, Finland, France, Germany, Mexico, the Netherlands, Norway, Portugal, Spain, and Sweden. There have also been objections to other reservations which might affect article 9. United Nations Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty9.asp>.

237. Christine Chinkin has therefore characterized these reservations as "little more than an official record of displeasure." Christine Chinkin, Nationality in International and Regional Human Rights Law, Keynote Address at a Judicial Colloquium organized by the U.N. Div. for the Advancement of Women 15 (Oct. 1999) (on file with authors). Alpha Connelly has stressed, however, that the reservations have some effect since in its relations with the reserving state, the objecting state may argue that the Women's Convention is fully in force; that is, as though the reservation to article 9 had never been made. Should the objecting state seek to take some action against the reserving state in respect of the reserving state's obligations under article 9, for instance, the objecting state may argue that the reservation is invalid, is not opposable to it since it objected or both. Letter from Alpha Connelly, Member, Comm. on Feminism and Int'l Law, Int'l Law Ass'n, to Karen Knop (May 4, 2000) (on file with authors).

Similarly, while CEDAW has questioned states on their application of article 9 in the state reporting process and has referred to states' non-implementation of article 9 in its concluding comments,²³⁸ relatively few states are party to the Optional Protocol that allows CEDAW to hear individual complaints under the Women's Convention.²³⁹

Although not necessarily in article 9, the Women's Convention may address the third generation of equality issues in nationality law. The root of these third-generation issues is the possibility that the independent nationality of women has left the unity of the family less legally secure because the family is no longer protected by a common nationality. In the more likely scenario where the husband is a national of the state where the family lives and the wife is not, the family lacks the security and the wife herself lacks the entitlements and benefits which that state bases on nationality. Depending on the rights extended to non-nationals by that state, the only viable option may be for the wife to become a national by naturalization. If the state does not permit dual nationality, however, then her naturalization amounts to the forced renunciation of her own nationality. As a result, the unity of the family and the wife's capacity to function in the state where the family lives come at the expense of her nationality and therefore her ability to convey her nationality to her children. Given that the discrimination against women prohibited by the Women's Convention extends to laws that discriminate in their effect, the Convention would likely require this scenario of the *de facto* dependent nationality of women to be remedied, whether by greater rights for non-national family members or by dual nationality for families of mixed nationality.

2. Equality and Other Rights Related to Nationality

In international human rights instruments that include a right of equality or non-discrimination, but not specifically in the context of nationality,²⁴⁰ the right of equality or non-discrimination may be used, much as in the Women's Convention, to challenge a state's nationality law on the ground that it discriminates against women. This is only possible, though, where the instrument provides for an autonomous equality

238. For a recent example, see *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Jordan*, U.N. Committee on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/2000/I/CRP.3/Add.1/Rev.1 (2000).

239. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 39 I.L.M. 281 (entered into force Dec. 22, 2000).

240. African Charter on Human and Peoples' Rights, *supra* note 47; International Covenant on Civil and Political Rights, *supra* note 49; European Convention on Human Rights, *supra* note 50. With respect to the European Convention on Human Rights, Protocol No.4 to the Convention, *supra* note 94, does, however, stipulate some nationality-related rights.

right, which applies independent of whether another right in the instrument is involved.²⁴¹ Article 26 of the International Covenant on Civil and Political Rights is an example of an autonomous equality right. In fact, in its recent General Comment on Equality of Rights Between Men and Women, the UN Human Rights Committee cites citizenship or the rights of non-citizens in a country as an example of an area where article 26 protects the right to equality before the law and freedom from discrimination.²⁴²

In contrast to the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the African Charter on Human and Peoples' Rights have only a subordinate equality right, which limits their application to discrimination with respect to another right in the instrument. However, Protocol No. 12,²⁴³ not yet in force, adds an autonomous equality right to the European Convention on Human Rights. And article 18(3) of the African Charter on Human and Peoples' Rights arguably incorporates the Women's Convention by requiring states to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions,"²⁴⁴ thereby removing the limitations of the subordinate equality right.

Where the equality right is subordinate, it can be argued in conjunction with whatever other right may be affected by the discriminatory nationality law. In *Unity Dow*,²⁴⁵ for example, the Botswana Court of Appeal found that the law that allowed a Botswana father, but not a Botswana mother, to convey Botswana nationality to the children of the marriage infringed a mother's right to freedom of movement. Because children of a Botswana mother and a non-Botswana father are aliens in Botswana, they could be denied re-entry into or residence in Botswana. Given the nature of the relationship between mother and child, the state's discretion to exclude such children from Botswana amounts to interference with the mother's right to freedom of movement.

241. On autonomous versus subordinate equality rights, see generally Anne F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, 11 HUM. RTS. L.J. 1, 3-4 (1990).

242. U.N. Human Rights Committee, General Comment No. 28 on Equality of Rights Between Men and Women (Art.3), U.N. Doc. CCPR/C/21/Rev.1/Add.10, ¶ 31 (2000).

243. Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. No. 177.

244. A protocol to the African Charter on Human and Peoples' Rights on the rights of women in Africa is being drafted. See United Nations Office of the High Commissioner for Human Rights, *Le Projet de Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits de la Femme en Afrique*, at http://www.unhchr.ch/french/html/menu2/womenpub2000_fr.htm.

245. *Unity Dow v. Attorney General of Botswana*, [1992] Law Rep. Commonwealth (Const.) 623 (Bots. C.A.).

In its General Comment on Equality, the Human Rights Committee applies the subordinate equality rights in articles 2 and 3 of the International Covenant on Civil and Political Rights to article 23(4) on the equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution. It thus glosses the Covenant as requiring states to ensure that “no sex-based discrimination occurs in respect of the acquisition or loss of nationality by reason of marriage [and in respect] of residence rights.”²⁴⁶ The Committee also specifies that “[i]n giving effect to recognition of the family in the context of article 23, it is important to accept the concept of the various forms of family, including unmarried couples and their children and single parents and their children and to ensure the equal treatment of women in these contexts.”²⁴⁷

The most relevant case decided by the Human Rights Committee is *Aumeeruddy-Cziffra v. Mauritius* (the *Mauritian Women's Case*),²⁴⁸ which dealt with the second-generation issue of equal treatment for foreign husbands and wives in immigration law. In the *Mauritian Women's Case*, a number of Mauritian women submitted a communication to the Human Rights Committee, in which they argued that amendments to the Mauritian immigration and deportation laws violated their right to equality and right to family life under the International Covenant on Civil and Political Rights. Up to 1977, spouses, that is, both husbands and wives, of Mauritian citizens had the right of free access to Mauritius and enjoyed immunity from deportation. Spouses had the right to be considered *de facto* as residents of Mauritius. The amendments limited these rights to the foreign wives of Mauritian citizens. As a result, foreign husbands had to apply to the Minister of the Interior for a residence permit and had no right to appeal to the courts should the permit be refused.

The application of article 17(1) of the Covenant gave Mauritian citizens the right not to be subjected to arbitrary or unlawful interference with their family. The Committee found that there had been interference with the family of those of the Mauritian women who were actually, as opposed to hypothetically, affected by the changes to the law. They and their husbands clearly constituted a “family,” a common residence was normal for husband and wife, and the precariousness of the husband's residence in Mauritius amounted to interference with the family. These families were unsure of whether and how long they could continue their life together in Mauritius. Moreover, the delay in processing the applica-

246. General Comment No. 28, *supra* note 242, ¶ 25. *See also id.* ¶ 17 (applying the subordinate equality rights in the Covenant to article 13 on the expulsion of aliens).

247. *Id.* ¶ 27.

248. *Aumeeruddy-Cziffra v. Mauritius*, Communication No.35/1978, U.N. Human Rights Committee, Selected Decisions Under the Optional Protocol 67, U.N. Doc. CCPR/C/OP1 (1985).

tion for a residence permit, a delay of several years in the case of Shirin Aumeeruddy-Cziffra, prevented the husband from receiving a work permit and therefore from contributing to the family income. Regardless of whether these restrictions would otherwise have been permissible under article 17(1), they were not permissible because they discriminated on the grounds of sex. The Committee therefore found a violation of Covenant articles 2(1) and (3), on non-discrimination and the equal rights of men and women respectively, in conjunction with article 17(1).

The Committee similarly found a violation of these equality provisions, as well as the provision in article 26 on equality before the law, in conjunction with the provision in article 23(1) on the protection of the family. While the legal protection of the family may vary from country to country and may depend on different social, economic, political and cultural conditions and traditions, it cannot vary with the sex of the spouse.

Of the different rights to family life in the European Convention, the right of men and women of marriageable age to marry and found a family, contained in article 12, has proved unlikely to provide a basis for any type of immigration case.²⁴⁹ According to Hugo Storey, "its interpretation has been dominated by an 'elsewhere' approach which assumes no Article 12 infringement can occur so long as an applicant is not prevented from marrying (or adopting, etc.) abroad."²⁵⁰ The right to respect for family life in article 8 of the European Convention in conjunction with the right of non-discrimination on grounds of sex in article 14 was successfully argued in the case of *Abdulaziz, Cabales and Balkandali v. United Kingdom*.²⁵¹ In that case, three women—one either stateless or a Malawi citizen, one a Filipino citizen, and one a citizen of the United Kingdom and Colonies—challenged the 1980 United Kingdom's Immigration Rules on the grounds of sex discrimination²⁵² and interference with family life. These Rules, which restricted who could join a spouse or intended spouse already settled in the United Kingdom, made it more difficult for a husband or fiancé to come to the United Kingdom than for a wife or fiancée. The United Kingdom conceded that the Immigration Rules discriminated on the ground of sex, but justified the decision as

249. See, e.g., A.M. Connelly, *Problems of Interpretation in Article 8 of the European Convention on Human Rights*, 35 INT'L & COMP. L. Q. 567 (1986); Jane Liddy, *Current Topic: The Concept of Family Life Under the ECHR*, 1998 EUR. HUM. RTS L. REV. 15; Hugo Storey, *The Right To Family Life and Immigration Case Law at Strasbourg*, 39 INT'L & COMP. L.Q. 328 (1990); Colin Warbrick, *The Structure of Article 8*, 1998 EUR. HUM. RTS L. REV. 32.

250. Storey, *supra* note 249, at 342.

251. *Abdulaziz, Cabales & Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (Ser. A) (1985).

252. Other grounds, including racial discrimination and inhuman or degrading treatment, were also argued.

necessary to protect the domestic labor market in a time of high unemployment.²⁵³ The Court rejected this justification, finding that the difference in impact on the labor market as between male and female immigrants was insufficiently important to justify discriminatory treatment on the basis of sex.²⁵⁴ The response of the British government is instructive. In 1985, after the European Commission had found that there was a case for the British government to answer, the government equalized the immigration rules downward.²⁵⁵ That is, rather than making it

253. *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (Ser. A) at 36. Cf. Singapore's general reservation to the Women's Convention:

Singapore is geographically one of the smallest independent countries in the world and one of the most densely populated. The Republic of Singapore accordingly reserves the right to apply such laws and conditions governing the entry into, stay in, employment of and departure from its territory of those who do not have the right under the laws of Singapore to enter and remain indefinitely in Singapore and to the conferment, acquisitions and loss of citizenship of women who have acquired such citizenship by marriage and of children born outside Singapore.

United Nations Treaty Collection, Convention on the Elimination of All Forms of Discrimination against Women, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty9.asp>.

In upholding the constitutionality of a provision of the Irish Nationality and Citizenship Act, No. 26 (1956) that entitled the foreign wife of an Irish citizen to obtain citizenship if she lodged a declaration accepting Irish citizenship as her post-nuptial citizenship, but allowed the foreign husband of an Irish citizen to obtain Irish citizenship only by naturalization, which is at the discretion of the Minister of Justice, the High Court of Ireland held that the provision had

regard to the social, economic and political conditions which might prevail in the various jurisdictions from which alien aspirants for citizenship might come. It was open to the Legislature to take the view that, in some at least of these jurisdictions, the likelihood of females being engaged on any of the activities which might be relevant in considering an application for citizenship was sufficiently remote to justify the automatic granting of citizenship to female aliens upon their marriage to Irish citizens.

Somjee v. Minister for Justice and Attorney General, [1981] I.L.R.M. 324, 326 (Ir. High Ct.).

Although the High Court did not specify what activities it had in mind, it sought, like the United Kingdom and Singapore, to justify the preferential treatment of foreign wives on the basis of assumptions about the different activities of men and women. Several years after this decision, however, the law was changed to make the conditions for the naturalization of foreign spouses the same, irrespective of the sex of the spouse. See Alpha Connelly, *The Constitution, in GENDER AND THE LAW IN IRELAND* 7–8 (Alpha Connelly ed., 1993).

Another justification used by states for discrimination in citizenship laws regarding foreign husbands of nationals is the prevention of "marriages of convenience." See CEDAW Report (13th Sess.), *supra* note 173, ¶ 331 (Zambia) and ¶ 695 (Senegal). However, even assuming that marriages of convenience always involve women marrying foreign men—an assumption that is highly questionable—it would be overbroad to target all women marrying foreign men rather than to take measures aimed specifically at marriage fraud.

254. *Abdulaziz, Cabales & Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (Ser. A) at 38.

255. Mullen, *supra* note 157, at 159–60.

equally easy for husbands and fiancés to come to the United Kingdom, these changes made it equally hard for wives and fiancées to come.

Just as the Human Rights Committee in the *Mauritian Women's Case* was not willing to find the immigration restrictions impermissible absent their discrimination on the ground of sex, the European Court of Human Rights in *Abdulaziz, Cabales and Balkandali* found no violation of the right to family life in article 8 taken alone. This suggests that while the right of equality or non-discrimination in conjunction with rights such as the right to freedom of movement or the right to family life have the potential to address the gender-based differentiation in nationality law characteristic of the second generation of equality issues, they do not necessarily ensure the greater rights for non-national family members or dual nationality for mixed nationality families identified as alternative approaches to the third generation of equality issues. However, the relational interpretation of the right to freedom of movement in the *Kohlhaas* line of cases in Zimbabwe²⁵⁶ and of the right to dignity in the *Dawood* line of cases in South Africa²⁵⁷ show that such rights by themselves offer growing protections for non-national family members.

D. Children's Rights

The current momentum behind children's rights in international law suggests that they may be an effective way to approach the second-generation equality issue of a woman's right to pass her nationality to her child and possibly also certain third-generation equality issues. As with any strategy not centered on the advancement of women's equality, however, the risk is that effectiveness will come at the cost of subordinating women's interests to children's interests.

As early as the 1930 Protocol Relating to a Certain Case of Statelessness,²⁵⁸ the prevention of statelessness among children served as a reason to give the mother's nationality to the child where the child would otherwise be stateless. Since then, a number of international human rights instruments have recognized the child's right to acquire a nationality. The right is found in the International Covenant on Civil and Political Rights,²⁵⁹ as well as in the newer, specialized conventions such

256. See *Kohlhaas v. Chief Immigration Officer, Zimbabwe* 1998 (6) BCLR 757 (Zimb.); *Rattigan v. Chief Immigration Officer, Zimbabwe* 1995 (2) SA 182 (Zimb.); *Salem v. Chief Immigration Officer, Zimbabwe* 1995 (4) SA 280 (Zimb.).

257. *Booyesen v. Minister of Home Affairs*, 2001 (7) BCLR 645 (SA CC); *Dawood v. Minister of Home Affairs*, 2000 (8) BCLR 837 (SA CC).

258. Protocol Relating to a Certain Case of Statelessness, *supra* note 193.

259. International Covenant on Civil and Political Rights, *supra* note 49, art. 24(3).

as the Children's Convention²⁶⁰ and the African Charter on the Rights and Welfare of the Child.²⁶¹

This growing recognition of the child's right to acquire a nationality does not, by itself, amount to the recognition of the equal right of both parents to pass their nationalities to the child. The UN Human Rights Committee has identified the purpose of the child's right to acquire a nationality contained in the International Covenant on Civil and Political Rights as "to prevent a child from being afforded less protection by society and the State because he is stateless."²⁶² As such, the child's right to acquire a nationality would be satisfied by any nationality. Savitri Goonesekere argues, however, that, at least as far as the Children's Convention is concerned, the Convention's general articles on gender equality (art. 2), family and parental rights and responsibilities (arts. 5, 8-10, and 18), and its norm of the best interests of the child (art. 3) require that if the child's nationality is traced through the parents (*jus sanguinis*), then it must be traced equally through both parents.²⁶³

Similarly, the Supreme Court of Canada in *Benner*²⁶⁴ ruled unanimously that provisions of the Canadian Citizenship Act which treated individuals claiming citizenship on the basis of their mother's Canadian citizenship differently from individuals whose claim was based on their father's Canadian citizenship violated their equality rights as guaranteed by the Canadian constitution. The first Citizenship Act, passed in 1946, enabled Canadian fathers to pass Canadian citizenship to their children born abroad. Except in the case of a child born out of wedlock,²⁶⁵ Canadian mothers did not have the same ability. A new Citizenship Act, which came into effect in 1977, removed this distinction for children

260. Children's Convention, *supra* note 161, art. 7(1).

261. African Charter on the Rights and Welfare of the Child, *supra* note 188, art. 6(3). There is also a European Convention on the Exercise of Children's Rights, Jan. 25, 1996, Europ. T.S. No. 160, the object of which is

in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority.

Id. art. 1(2).

262. U.N. Human Rights Committee, General Comment No. 17 on the Rights of the Child (Article 24) (35th session, 1989), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 23, ¶ 8 (1994).

263. Goonesekere, *supra* note 48, at 89-90. The child's right to a nationality may also be read in light of the Women's Convention.

264. *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358; Citizenship Act, R.S.C., ch. C-29, §§ 3(1)(e), 5(2)(b), 22 (1985) (Can.).

265. For the sake of brevity, the following account of *Benner* will refer simply to Canadian fathers and Canadian mothers, as opposed to Canadian fathers and unmarried Canadian mothers, on the one hand, and married Canadian mothers, on the other.

born outside Canada after the Act came into effect, making them Canadian citizens if either parent was Canadian. For children born abroad earlier, however, the new Act lessened, but did not entirely remove, the distinction made by the earlier Act. Children born to a Canadian father retained their automatic entitlement to citizenship upon registration, while children born to a Canadian mother could now apply to become citizens. But whereas children of a Canadian father could claim citizenship simply by registering within a certain time, children of a Canadian mother were required to apply and, as part of the application process, to undergo security and criminal record checks and to swear an oath.²⁶⁶ If the checks showed that they had been charged with an offence, then the Act prevented them from taking the oath, and therefore from becoming Canadian citizens, until the charges were resolved. If convicted of an indictable offence, they could not become Canadian citizens for three years after the conviction. Certain convictions might bar them from ever becoming Canadian citizens.²⁶⁷

The particular relevance of *Benner* is the Supreme Court's recognition that a child may have standing to bring an equality challenge to nationality laws. *Benner* was born in 1962 in the United States to a Canadian mother and U.S. father. The Canadian government argued that he lacked standing because any discrimination imposed by the Citizenship Act was not imposed on him, but on his mother. The Act did not discriminate against him based on his sex—the Act does not refer to the sex of the applicant for citizenship—but against his mother based on her sex. The Supreme Court rejected this argument, finding that there was a connection between *Benner's* rights and the Act's distinction between men and women. Under the Act, *Benner's* right to citizenship depended on whether his Canadian parent was male or female. Therefore, he was the real target of the provisions and the one with the greatest interest in challenging their constitutionality. In addition, given the unique link between parent and child, it was appropriate to thus extend the standing to raise discrimination on grounds of sex. Where "something so intimately connected to and so completely beyond the control of an applicant as the gender of his or her Canadian parent" can restrict access to benefits such as citizenship, the applicant may invoke the constitutional guarantee of equality.²⁶⁸

In addition to the second-generation equality issue of the right of both parents to pass their nationalities to their children, children's rights are another functional approach to emerging third-generation equality

266. *Benner*, [1997] 1 S.C.R. at 377–380.

267. *Id.* at 394.

268. *Id.* at 397–401.

issues. As opposed to protecting the relationship between parent and child through dual nationality, the Children's Convention does so through extensive family-related rights for non-nationals. These rights include the right of the child to know and be cared for by his or her parents (article 7(1)), the right of the child to preserve his or her identity, including family relations (article 8(1)), the right of the child whose parents reside in different states to maintain personal relations and direct contacts with both parents on a regular basis, and, towards that end, the right of the child and his or her parents to leave any country, including their own, and to enter their own country (article 10(2)), and the right of the child to protection from arbitrary or unlawful interference with his or her family (article 16(1)).

CONCLUSION

In picking up where Chrystal Macmillan left off, this article has not so much argued for equality as argued from equality. Where equality in matters of nationality continues to be contentious, the article's contribution is therefore primarily to highlight the debate, to expand its terms, and to canvass the practical options that may already be available to women through international law regimes based on premises other than equality, such as the avoidance of statelessness or the best interests of the child.

Where equality is accepted in principle, the article, and in particular the International Law Association's recommendations, contribute further by spelling out what equality would require in terms of reform to a state's nationality law, the rights it guarantees to residents, or both. The recommendations on women's equality and nationality in international law that were adopted by the ILA at its 2000 Conference are:

1. The rules of states on nationality should be based on the following principles of international law:
 - a. the right of everyone to a nationality;
 - b. the avoidance of statelessness; and
 - c. nondiscrimination on the basis of sex.

These principles are incorporated in the *European Convention on Nationality*.

2. The principle of nondiscrimination on the basis of sex should require, as in article 1 of the *Convention on the Elimination of All Forms of Discrimination Against Women*, the elimination of any distinction, exclusion or restriction made on the basis

of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, on a basis of equality of men and women, of their nationality and the rights associated with that nationality.

3. In designating the personal relationships that form the basis for preferential treatment under immigration and nationality rules, states should not discriminate on the grounds of sex, sexual orientation, culture, marital status or any combination thereof.
4. As provided for in article 9(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women* and other international human rights treaties, states should grant women equal rights with men to acquire, change or retain their nationality. In particular,
 - a. states should ensure that neither marriage to a foreign national nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband; and
 - b. the recommended prohibition in (a) on forcing upon a woman the nationality of her husband should extend to requiring states to ensure that any incentives for a woman to acquire the nationality of her husband or partner do not effectively deny her right to choose her nationality.
5. In the case of a family of mixed nationality living in a state of which one or more, but not all, of its members is a national,
 - a. the state in which the family is living should recognize the right of the non-national family members to enjoy equal treatment with nationals in relation to certain civil rights and social, economic and cultural rights, including the right of residence and right to work; or
 - b. the states involved should recognize
 - i. the right of each spouse or partner to acquire, after a short waiting period, the nationality of the other spouse or partner without losing his or her own nationality; and

- ii. the right of the children to acquire and keep the nationality of both parents.
6. Where a state facilitates the acquisition of nationality by the spouse or partner of a national, the state should ensure that the method of facilitation does not subject the foreign spouse or partner to the risk of abuse by the national spouse or partner.
7. As provided for in article 9(2) of the *Convention on the Elimination of All Forms of Discrimination Against Women* and other international human rights treaties, states should grant women equal rights with men with respect to the nationality of their children. In a case where a child's parents are of different nationalities, each parent should have the right to transmit her or his nationality to the child, even if this would result in the child's holding dual nationality.
8. States should provide effective remedies for individuals who have lost or been denied that state's nationality due to discrimination on the basis of sex, whether that discrimination is on the basis of the individual's sex or as a result of the individual's relationship to a spouse, partner or parent.
9. States should develop and implement mechanisms for studying the effect of the administration of their rules of nationality on women and ensuring that nondiscrimination in the rules of nationality is not compromised by the administration of these rules. This might involve, for example, the provision of gender-sensitivity training for those involved in the administration of the state's rules on nationality.
10. Women should have effective representation in all reforms to nationality law, whether at the domestic or international level.²⁶⁹

In conclusion, we emphasize that the argument from equality in this article does not prefer the solution in recommendation 5(a) to that in 5(b), greater rights for the non-national members of families where the spouses have different nationalities over dual nationality for such families, or *vice versa*. For conceptual or pragmatic reasons, one solution may well be superior, whether globally or in a given state. Indeed, equality may be a reason to find one superior to the other. But our analysis in

269. *Feminism and International Law*, International Law Association Resolution 5/2000, INTERNATIONAL LAW ASSOCIATION, 69TH CONFERENCE REPORT 27-29 (2000), available at <http://www.ila-hq.org/pdf/RESfeminism.pdf>.

the article does not go this far. Just as we have sought to show the variety of contexts in which gender equality is at issue in nationality law, it cannot be assumed that all women who seek equality in this regard hold the same idea of nationality as it relates to their identity, their culture, their part in society, their vision of the world, and so on. It is striking that however alike the early women campaigners for equality in nationality may seem to us now, they too differed in some or all of these ways. Women's quest may reflect not a general cosmopolitan ethos, but a deeply specific commitment to the transmission of their nation's culture or their role in its politics.²⁷⁰ It may also reflect the realities of the private and public environments in which they make and actualize choices about their lives. In this light, our aim has been to expand the understanding of the equality issues that remain in the law of nationality three-quarters of a century after Chrystal Macmillan spoke about the subject to the ILA one October day in 1923.

270. See, e.g., BREDBENNER, *supra* note 8, at 11–13; RUPP, *supra* note 13, at 146–50.