The Criterion of Citizenship for Minorities: The Example of Estonia

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The Criterion of Citizenship for Minorities
The Example of Estonia[1]

Carmen Thiele[2]

ABSTRACT

Using the example of Estonia, the criterion of citizenship as a prerequisite for membership in a national minority and its legal consequences for persons belonging to these groups is discussed. While at the universal level minority protection is considered as a basic human right, at the European level it is still viewed as a right of citizens. The author pleads for a simplification of the naturalisation process and the renouncing of the citizenship criterion as a requirement for membership of a national minority.

INTRODUCTION

There is no universal definition of the term "minority" in public international law and therefore no definite criteria for determining one's affiliation to a minority. Citizenship is one of the disputed criteria. The questions arises whether the protection of minorities is exclusively reserved for citizens whose ethnic affiliation is different from that of the majority, or whether foreigners also fall within the scope of this protection. The criterion of citizenship in connection with minorities is dealt with differently at the European and universal levels. The example of the Republic of Estonia provides an opportunity to consider the effects of applying the criterion of citizenship to minorities.

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[1] An earlier version of this paper was presented at the ECMI Seminar "Minorities and Majorities in Estonia: Problems of Integration on the Threshold of the EU," Aabenraa, Denmark, and Flensburg, Germany, 22 to 25 May 1998.

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I. THE PROTECTION OF MINORITIES AS A HUMAN RIGHT OR CITIZENS' RIGHT

1. The Protection of Minorities as a Human Right at the Universal Level of International Law

Minority protection under the League of Nations developed as a citizens' right (Gerber 1927: 27). Treaties after World War I connected minority protection to citizenship.[3] It initially seemed that the United Nations would follow the same path, observable in various attempts at developing a notion of minorities. The broadest consensus in theory and in practice was reached in the definition of a minority by Capotorti (1991), developed in response to a request of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1977 to report on the international state of discussions on the scope of Art. 27 of the International Covenant on Civil and Political Rights (ICCPR) of 16 December 1966,[4] which is still the only universally-binding instrument in public international law regarding minorities. Capotorti defined a "minority" as:

> "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language." (Capotorti 1991: 96, para. 568).

Capotorti emphasises here that citizenship of the state of residence is a prerequisite for membership of a minority protected under international law. In his opinion, foreigners,

[3] Art. 8 sentence 1 of the Minority Treaty with Poland of 28 June 1919 states: "Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals." In: *Consolidated Treaty Series (CTS),* vol. 225, p. 412.

[4] *United Nations Treaty Series (UNTS),* vol. 999, p. 171. The principal mandate of Sub-Commission, which was established in 1947 by the Commission on Human Rights, is to undertake studies and to make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities. At present, the Sub-Commission has four working groups which meet before each session: the Working Group on Communications, the Working Group on Contemporary Forms of Slavery, the Working Group on Indigenous Populations, and the Working Group on Minorities.

i.e. non-citizens, are already protected under customary international law (Capotorti 1991: 12, para. 57).

Deschênes (1985) also includes the criterion of citizenship for minorities, which he defines as:

> "A group of citizens of a state, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law." (Deschênes 1985: 30, para. 181).

On the other hand, Tomuschat (1983: 960) asserts as incorrect the statement in the 1977 report whereby it is "commonly accepted" that members of a minority must be citizens of the state. Nowak (1993) also doubts that the substantial meaning of the traditional concept of minorities in connection with the requirement of citizenship has found its way into Art. 27 of the ICCPR which uses the term "persons" and not the term "citizen" found in Art. 25 (Nowak 1993: 499 f., Art. 27, para. 16). The Human Rights Committee, established by Art. 28 and which is responsible for monitoring state obligations deriving from the ICCPR, stated explicitly that Art. 27 refers to foreigners as well. It also notes that all members of an ethnic, religious or linguistic minority are granted minority rights, no matter whether they possess the citizenship of the state or not.[5] Nowak comes quite logically to the conclusion that minority protection developed in the inter-war period from a citizens' right to a human right by way of Art. 27 (Nowak 1993: 489, para. 17).

Eide (1993) also includes non-nationals in the concept of minorities in his final report to the UN Sub-Commission. He stated that:

> "For the purpose of this study, a minority is any group of persons resident within a sovereign State which constitutes less than half the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguish them from the rest of the population." (Eide 1993: 7, para. 29).

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[5] Human Rights Committee, para. 5.1 of the "General Comment No. 23 (50) on Article 27/Minority rights," in: *UN Doc. CCPR/C/21/Rev. 1/Add. 5*, 6 April 1994; reprinted in: *Human Rights Law Journal (HRLJ),* 15 (1994) 4-6, p. 234 ff. (235).

He thereby effectively replaces the citizenship criterion with the simple standard of place of residence. According to his definition, even immigrants who have not resided for a very long time in the state would be considered a minority (Eide 1993: 9, paras. 41-42).

The internationally non-binding UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 18 December 1992[6] does not restrict minority rights to citizens but rather relates these to the principle of territoriality. Art. 1.1 requires that: "States shall protect the existence and the national or ethnic, cultural, religious and linguistic identity of minorities within their respective territories […]." Under certain circumstances, foreigners also come within the scope of the Declaration (Thornberry 1993: 28 ff.). There would thus seem to be a clear tendency at the universal level to understand minority rights as basic human rights and not merely as a citizens' right.

2. Protection of Minorities as a Citizens' Right at the European Level

The tendency at the universal level is, however, not followed in Europe. In the framework of documents on minority rights developed by the Council of Europe, a "national minority" is defined in such a manner that only citizens of the state fall within the scope of this protection. The Proposal for a European Convention for the Protection of Minorities adopted by the European Commission for Democracy through Law ("Venice Commission") of the Council of Europe on 8 February 1991[7] declares in Art. 2.1:

> "For the purposes of this Convention, the term 'minority' shall mean a group which is smaller in number than the rest of the population of a State, whose members, who are nationals of that state, have ethnical, religious or linguistic features different from those of the rest of the population, and are guided by the will to safeguard their culture, traditions, religion or language."

[6] UN Doc. A/RES/47/135, 18 December 1992; reprinted in: *HRLJ*, 14 (1993) 1-2, p. 54 ff. See the representations and assessments by Alfredsson and Zayas (1993: 1 ff.);Thornberry (1993: 11 ff.).

[7] European Commission for Democracy through Law - Venice Commission, CDL/MIN (93) 6 and 7.

The Proposal for an Additional Protocol to the European Convention on Human Rights concerning Persons belonging to National Minorities of 1 February 1993[8] defines a national minority in Art. 1 as follows:

> "For the purposes of this Convention, the expression "national minority" refers to a group of persons in a state who:
> a. reside on the territory of that state and are citizens thereof; [...]."

The European Charter for Regional or Minority Languages, adopted by the Council of Europe on 5 November 1992,[9] also uses the criterion of citizenship as demonstrated in Art. 1:

> For the purposes of this Charter:
> "a. regional or minority languages" means languages that are:
> i. traditionally used within a given territory of a State by nationals of that State [...]"

Due to disagreement between the participating states, the Council of Europe was unable to define the term "minority" in the Framework Convention for the Protection of National Minorities of 1 February 1995.[10] It was also unable to establish citizenship as a precondition for the protection of national minorities. Nevertheless, some states (e.g. Germany, Luxembourg) have made unilateral declarations concerning their understanding of whom the term "national minority" applies to, restricting it to nationals of the state. One will have to wait and see whether a new tendency towards abolishing citizenship as a criterion for defining national minorities will develop in Europe or whether this criterion will prevail.

Similarly, there is no definition of minorities in the documents of the Organisation for Security and Co-operation in Europe (OSCE, formerly CSCE). The Document of the Copenhagen Meeting of the Conference on the Human Dimension of 1990,[11] widely accepted as the most eminent and far-reaching document on the international protection of national minorities, distinguishes between regulations for the protection of migrant

[8] Rec. 1201 (1993) of the Parliamentary Assembly of the Council of Europe.

[9] European Treaty Series (ETS), 148, 1992. Entry into force on 1 March 1998; reprinted in: *HRLJ,* 14 (1993) 3-4, p. 148 ff. See the representations and assessments by Hofmann (1995), p. 55 ff.

[10] ETS, 157, 1995. Entry into force on 1 February 1998; reprinted in: *HRLJ,* 16 (1995) 1-3, p. 92 ff.

[11] 29 *International Legal Materials (ILM)* 1305 (1990).

workers and of national minorities.[12] The participating states acknowledged in the Document of the Geneva Meeting of Experts on National Minorities of 1991 that "members of a national minority have the same rights and the same duties [...] as the other citizens."[13] The conclusion may be drawn from both documents that, within the OSCE, the members of a national minority must possess the citizenship of their state of residence in order to obtain protection as a minority. The opposite conclusion might, however, be drawn from the practice of the OSCE and especially the practice of the High Commissioner on National Minorities (HCNM),[14] established by the Helsinki Summit in 1992.[15] The OSCE Missions and the HCNM have, for example, dealt with the problems of the Russian-speaking population of the Baltic states who do not possess the citizenship of these states.[16]

Finally, the national law of most European states, including the Federal Republic of Germany and the Baltic states, restricts minority rights to citizens and excludes foreigners, irrespective of the duration of their legal residence.

II. LAW ON CITIZENSHIP IN INTERNATIONAL LAW

1. Internal Competence of States to Regulate the Law on Citizenship

The right of the state to set the standards for citizenship derives from the *ius cogens* rule in public international law regulating the sovereignty of states. The doctrine of the exclusive domestic jurisdiction of states in international law was embodied in the Covenant of the League of Nations in Art. 15.8. An enumeration of what belonged to this jurisdiction was not included (Juss 1994: 226 f.). The doctrine of the "*domaine*

[12] Part II , pt. 22 and Part IV of the *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, 29 June 1990.

[13] Part IV of the *Report of the CSCE Meeting of Experts on National Minorities*, Geneva, 19 July 1991, in: 30 *ILM* 1692 (1697) (1991).

[14] For the mandate of the HCNM see: The Foundation on Inter-Ethnic Relations, *The Role of the High Commissioner on National Minorities in the OSCE Conflict Prevention. An Introduction*, The Hague: FIER, June 1997, p. 18 ff.

[15] Part II of the "CSCE Helsinki Document 1992: The Challenges of Change" adopted in Helsinki on 10 July 1992, hereafter referred to as "OSCE Helsinki II Document", in: 31 *ILM* 1385 (1396) (1992).

[16] OSCE Missions are present in Estonia and in Latvia, amongst others. They deal with the question of the acquisition of citizenship of the Russian-speaking population.

réservé" in questions of citizenship was proclaimed by the Permanent Court of International Justice (PCIJ) in its Advisory Opinion of 1923 on the Nationality Decrees in Tunis and Morocco.[17] This rule was codified in the Convention on Certain Questions relating to the Conflict of Nationality Laws of 12 April 1930.[18] Art. 1 of the Convention declares: "It is for each State to determine under its own law who are its nationals." Art. 2 states further: "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State." Reflecting state practice, this principle has been accepted as customary international law (Randelzhofer 1997: 502).

2. Public International Law Limits on National Citizenship Legislation

International law, nevertheless, still imposes some restrictions on the sovereign rights of states to regulate nationality laws.[19] The Hague Convention of 1930 states in Art. 1 sentence 2: "This law shall be recognised by other states in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."

There is, however, disagreement on the scope of the restrictions in international law (Dubois 1955: 34). The prevailing opinion is that international law has a rather limited role in nationality laws (Mikulka 1995: 23, para. 61). A generally-accepted criterion is the notion of the *genuine link* or *genuine connection* between the state and its nationals,[20] as set forth by the International Court of Justice in the Nottebohm case.[21] There is, however, no universally-accepted definition of the concept of *genuine link,* although a factual relation can be determined by the universally-accepted connection criteria of international law. A concrete ascertaining of the criterion lies with the state, so that it can vary state by state (Donner 1994: 112 ff.). There is no international binding rule which would restrict the criteria of naturalisation. Place of residence over a

[17] Permanent Court of International Justice (PCIJ), Series B, 1923, No. 4, p. 24.

[18] *League of Nations Treaty Series (LNTS),* vol. 179 (1937-38), No. 4137, p. 89 ff. See Hudson (1952: 7).

[19] "Advisory Opinion of 1923 on the Nationality Decrees in Tunis and Morocco," in: *PCIJ*, Series B, 1923, No. 4, p. 24.

[20] The Nottebohm case made a great contribution in that this rule was recognised as a rule of public international law. See Donner (1994: 89).

[21] Reports of Judgements, Advisory Opinions and Orders of the International Court of Justice (ICJ Rep.) 1955, p. 4 ff. (23).

longer period of time, knowledge of the language and self-sufficiency are commonly-required criteria (Weis 1979: 100). The obligations arising in regard to human rights are also acknowledged as criteria restricting the competence of states to regulate the law on nationality (Mikulka 1995: 24, para. 64).

3. Citizenship as a Human Right

a. At the Universal Level

The right to a citizenship or the protection against statelessness was first set forth in the Universal Declaration of Human Rights of 10 December 1948.[22] Art. 15.1 states that: "Everyone has the right to a nationality." From this rule, every human being can derive a right to a citizenship but not to that of a specific state. Since there is no duty for a state to grant any individual its nationality, this is in fact an empty rule (Chan 1991: 3). De Groot (1989) coins this right a "dubious human right" (de Groot 1989: 15). The right of a stateless person to a nationality can be deduced from this general principle, but not the duty of the state of residence to unconditionally grant its nationality to this person.[23] Due to the lack of a substantive common right to a nationality, there is also no absolute right to a nationality for people residing in a newly independent state, merely on the basis of residence at the time independence is regained (Donner 1994: 311).

Due to the complexity of the issue, the right of every human being to a nationality was not incorporated into the ICCPR.[24] Art. 24.3 grants every child the right to a nationality but the rule does not determine which state's citizenship the child is entitled to. Under the rule of interpretation in the 1969 Vienna Convention on the Law of Treaties[25] (Art. 31.1, which declares that a treaty has to be interpreted in the light of its intention and object) as well as in the ICCPR (Art. 2.1, which binds all contracting states to grant all the rights included in the Covenant to all human beings present on its territory or subject to its rule), every child residing on the territory of a given state has

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[22] UN Doc. A/RES/217 A (III).

[23] Report of the Secretary General "Situation of Human Rights in Estonia and Latvia," in: *UN Doc. A/48/511*, p. 7, para. 29.

[24] Nowak (1993: 433, Art. 24, para. 23).

[25] *UNTS,* vol. 1155, p. 331.

the right to obtain the nationality of this state, unless he or she has a claim to another nationality (Nowak 1993: 434, Art. 24, para. 26).

Even though there is no duty arising from Art. 24.3 of the ICCPR to grant citizenship to all children born on the territory of a state, there is at least the duty of the state to take measures, in co-operation with other states, in order to ensure that every child obtains a nationality. If all measures fail, then the state where the child is born must grant its nationality to the child.[26] The United Nations Convention on the Rights of the Child of 20 November 1989[27] (Art. 7.1) also proclaims the right of each child to a citizenship. The right of a stateless child to obtain the nationality of the state where he/she is born (*ius soli* principle) is already, in the opinion of Chan (1991: 11), a rule of customary international law.

The International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965[28] (Art. 5), whose prohibition of discrimination belongs to the rules of general public international law,[29] states that every kind of racial discrimination is prohibited and that each person has the right, regardless of race, colour, national or ethnic origin, to equality before the law. This is also valid for the right to a nationality listed under (d) (iii). Therefore, the right to a nationality has to be granted independently of one's national or ethnic affiliation.

b. At the Regional Level

The European Convention on Human Rights (ECHR) of 4 November 1950[30] makes no reference to the right to a nationality, but this should not be taken to mean that the Council of Europe is indifferent to this problem for it has dealt with the question of nationality in numerous documents.[31] It has also considered the integration of the right to a nationality into the ECHR as a human right.[32] The European Convention on

[26] "Human Rights Committee, General Comment No. 17, 5 April 1989," reprinted in: Nowak (1993: 865 ff.); Chan (1991: 5, Fn. 37).

[27] *UN Doc. A/RES/44/25*.

[28] *UN Doc. A/RES/2106 A (XX).*

[29] "Barcelona Traction, Light and Power Company, Limited, Judgement," in: *ICJ* Rep. 1970, para. 34, p. 3.

[30] *UNTS,* vol. 213, p. 221; ETS, 5, 1950.

[31] An enumeration at Chan (1991: 6 f.).

[32] Council of Europe, *Information Sheet No. 22*, 1988, p. 54.

Nationality of 6 November 1997[33] also testifies to efforts at achieving a rule for the question of citizenship. Art. 4 contains two important principles: (a) "everyone has the right to a nationality"; and (b) "statelessness shall be avoided".

In addition, under Art. 6.2, every contracting state has the duty to provide in its national law the possibility to grant its nationality to a child born within its territory, if the child does not obtain another nationality through birth. Every child has, therefore, a right to a nationality similar to that guaranteed by the Convention on the Rights of the Child. Pursuant to Art. 6.4, each state has the duty to simplify access to nationality, especially for persons who were born and live lawfully within its territory or who already have had their place of residence there for a certain period of time, to be determined by the national legal order, before their 18th birthday. In addition to these provisions, the OSCE Helsinki II Document of 1992 acknowledged that: "everybody [has] the right to a nationality."[34]

The American Convention on Human Rights of 1969[35] goes beyond these models by including a general right to a nationality (Art. 20). The Inter-American Court of Human Rights (IACourtHR) stated in its advisory opinion of 1984 regarding the proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica[36]: "[I]t is generally accepted today that nationality is an inherent right of all human beings." The Court continued

> " [...] it will be necessary to reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the state, [...] with the further principle that International Law imposes certain limits on the state's power, which limits are linked to the demands imposed by the international system for the protection of human rights."

There is thus a clear tendency to substitute the classical view, that the granting of nationality lies solely within the domestic jurisdiction of a state, with the modern, more human rights-oriented view.

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[33] ETS, 166, 1997; not yet in force.

[34] Point 55 of Part VI "Human Dimension" of the OSCE Helsinki II Document, in: 31 *ILM* 1385 (1396) (1992).

[35] 9 *ILM* 99 (1970).

[36] IACourtHR, Advisory Opinion of January 19, 1984, No. OC-4/84; reprinted in: *HRLJ*, 5 (1984) 2-4, para. 32, p. 161 ff.

III. MINORITY STATUS IN ESTONIA

1. Ethnic Composition of the Population of Estonia (See Appendix 1)

The last official population census took place in Estonia in 1989, during Soviet times. Based on estimations of the Estonian statistical authorities, Estonia currently has a population of 1,462,130 persons, comprising approximately 65% Estonians and 28% Russians (regardless of citizenship). All other national groups such as Ukrainians, Belorussians, etc., generally make up less than 3% of the population. Russians form therefore the largest ethnic group after Estonians.

2. Definition of a National Minority

Following the re-establishment of independence, Estonia attempted to continue the often-praised policy with respect to minority rights of the inter-war period. The minorities living in Estonia are divided officially into two groups: the "historical minorities" who lived in Estonia after World War I, and those who immigrated after the annexation by the Soviet Union. There are about 38,200 estimated members of the so-called "historical minorities". The Law on Cultural Autonomy for National Minorities of 11 November 1993[37] lists citizenship as a requirement for recognition as a member of a minority, as did the law in force between the wars—the Law on Cultural Self-Administration of National Minorities of 12 February 1925.[38] Pursuant to Art. 1 of the present minority law, members of a minority are citizens of Estonia who reside on the territory of Estonia; maintain long-standing, firm and lasting ties with Estonia; possess ethnic, cultural, religious or linguistic characteristics differing from those of Estonians; and demonstrate a sense of solidarity directed towards preserving their culture, traditions, religion or language. The potential groups targeted by Law are listed in Art. 2.2. These are the German, Russian, Swedish and Jewish national minorities, as well as persons belonging to a national minority which has more than 3,000 members. Some experts criticise the specifying of groups such as the Germans and Swedes which are very small (ca. 1,300 and practically no members respectively), especially since larger

[37] Riigi Teataja (RT) I, 1993, No. 71, pos. 1001.
[38] RT, 1925, No. 31/32, pos. 9.

groups, such as the Ukrainians (ca. 37,000), Finns (ca. 14,000) or Belorussians (ca. 22,000), are not explicitly mentioned (Hasselblatt 1993: 369). Historical minorities are thus given special recognition.

IV. CITIZENSHIP IN ESTONIA

1. Models for the Regulation of Estonian Citizenship

In accordance with the different opinions as to whether the Estonian state ceased or continued to exist, there are also differences of opinion regarding the regulation of Estonian citizenship (Brubaker 1992: 279). If one takes the view that the original state disintegrated or disappeared and that a new state was founded, the newly-founded state then determines the citizens on the basis of its territory. This model is similar to the "zero option"[39] which means that all those natural persons living on the territory at the moment of the foundation of the state are accepted as its citizens. All persons living at the time of the declaration of independence on the territory of the Estonian state would thus acquire Estonian nationality. The "zero option" would, in addition to people of Estonian ethnicity, also grant Estonian citizenship to non-Estonians, e.g. the Russian population.[40] The alternative view, emanating from the continuity of the state, would use the model of restored states, which implies the restoration of the citizenship of the original state.

A compromise between both views is offered by the so-called *mixed model*. This begins with the new conditions existing at the time of re-establishment of the state. On the basis of the former citizenship, new elements are introduced as preconditions for the granting of nationality—for example a certain, usually lengthier, period of residence on

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[39] The "zero option" was for instance used in some colonial countries. See Donner (1994: 279).

[40] Out of the former Socialist Soviet Republics, only Estonia and Latvia refused to apply the "zero option". Lithuania opted for the zero option in its Law on Citizenship of 3 November 1989. In accordance with Art. 1.3 of this Law, all persons who at the time and after the entry into force of this Law are residents of Lithuania and have a legal income are automatically citizens of Lithuania. For a period of two years after entry into force of this Law they have the option to choose their nationality freely; 85 % did so. See Öst (1993), pp. 59-60. The new Law on Citizenship of 5 December 1991 restricted the automatic granting of citizenship. See "CIS, Baltic States and Georgia: Nationality Legislation (April 1992)", in: *International Journal of Refugee Law*, 4 (1992) 2, p. 235 f.

the territory. Nationality is then restored for those who possessed it in the first place as well as for their offspring, and will also be newly granted to persons who can prove a long territorial relationship. This model, compared with the first one, is distinguished by the individual basis of a person's claim.

Following its understanding of its continuity as a state and the rejection of state succession as well as of the "zero option", Estonia adopted the model of restored nationality, so that only persons who possessed Estonian nationality in the inter-war period—when Estonia was independent—and their offspring were granted Estonian nationality.

The choice of the model of re-established nationality is in conformity with the view of a restored Estonian state and the resumption of its continuity, but ignores the subsequently produced long-standing situation. In the course of many decades and generations, the structure of the population changed dramatically. If the changed long-standing situation is not taken into account, old injustices would be replaced by newer, no less grave injustices (Zimmer 1971: 205). Eide sees in the option of automatic or *initial citizenship* greater conformity with modern human rights.[41] The length of interruption in the identity of the state should be used as the decisive criterion for the choice of either the model of restored nationality or the mixed model, which also follows the idea of a restoration of citizenship but under new conditions. Public international law does not recognise fixed temporal standards. In the case of a relatively short period of interruption, the model of restored nationality might well be appropriate, but in the case of an interruption of half a century, as in the Estonian case, the mixed model would have been more appropriate. As Estonia did not adopt the extreme position that all legal acts during the period of Soviet annexation are void (Driessen 1994: 120), it does not need to adopt the restoration model for the citizenship regulations. The acceptance of the mixed model would have been a rational answer to the actual situation in the state, and would furthermore have been in conformity with the human rights concept.

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[41] Asbjørn Eide, "Human Rights Aspects of the Citizenship Issues in Estonia and Latvia based on available material and visit 3-7 February 1992, at the request of the European Bank for Reconstruction and Development, Progress Report 11 March 1992," in: Birckenbach (1997), Doc. 1, para. 16 ff., p. 111 f.

2. Restoration of Estonian Citizenship

During the struggle for independence of the Estonian Socialist Soviet Republic (ESSR), every person residing on its territory was promised Estonian citizenship (*initial citizenship*). Already in January 1989, the population was requested to register for Estonian citizenship. Only those persons who themselves or whose parents possessed Estonian nationality before 16 June 1940—the day of the Soviet ultimatum which was followed by the Soviet annexation of Estonia—had a legal claim to Estonian nationality. Citizens without such a claim could earmark themselves as aspiring to Estonian citizenship, thus making later naturalisation easier and faster.

By decree of the Supreme Soviet of the Republic of Estonia, the Law on Citizenship of 1938 in the version of 16 June 1940[42] was put into force on 26 February 1992.[43] The main features of the citizenship regulation are the *ius sanguinis* principle[44] and the avoidance of dual citizenship.[45] Pursuant to Art. 3 of this Law, every person who possessed or whose parents possessed Estonian citizenship before the Soviet occupation is regarded as an Estonian citizen. About 80,000 non-Estonians thereby acquired the Estonian nationality.

Since there was no regulation on citizenship on the basis of the place of birth (*ius soli*) or residence (*ius domicilii*), Russians and other non-Estonians who came to Estonia after 1940 were automatically excluded from Estonian citizenship. They were called immigrant workers, even colonisers, with no right to automatic acquisition of the Estonian nationality.[46] The only way of acquiring the Estonian nationality was through naturalisation. As a precondition for naturalisation, the applicant had to have his or her permanent place of residence in the Estonian territory for at least two years before and one year after the day of application (residence census "two plus one") and had to provide proof of knowledge of the Estonian language (Art. 6 of the Law on Citizenship). The earliest date for establishing the permanent place of residence was set

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[42] RT, 1938, No. 39, pos. 357.

[43] Russian text in: *Vedomosti Estonskoi Respubliki (VER),* 1992, No. 7, pos. 109.

[44] Art. 1 sentence 1 of the Estonian Law on Citizenship of 1938 in the version of 1940 and Art. 8 of the Estonian Constitution of 1992.

[45] Art. 1 sentence 2 of the Estonian Law on Citizenship of 1938 in the version of 1940.

[46] Bratinka, "Report on the Application of the Republic of Estonia for Membership of the Council of Europe, 14 April 1993," in: Birckenbach (1997: 174 f., Doc. 4, para. 36). According to Eide, the citizens of the Soviet Union took advantage of their right of free movement within the Soviet Union of which the

at 30 March 1990. The required time period was counted only from that day onwards, so that 30 March 1993 was the earliest date at which one could acquire Estonian citizenship through naturalisation. A large part of the population, especially Russians, did not have the right to vote or the right to be elected in the parliamentary election of 20 September 1992, and were thus excluded from political participation,[47] giving rise to further tensions in a situation that was already tense.

3. The Law on Citizenship of 31 January 1995

After some intervening changes in the Law on Citizenship, a new Law was enacted on 19 January 1995[48] and entered into force on 1 April 1995. The new Law integrated the complete regulations on citizenship with some modifications. The detailed conditions for granting citizenship worthy of note are especially the conditions for naturalisation pursuant to Art. 6:

a) Minimum age of 15 years.
b) Place of residence in Estonia on the basis of a residence permit issued at least 5 years prior to the date of written application for Estonian citizenship and at least one year after the registration of the written application (residence census "five plus one").
c) Knowledge of the official language. The test consists of four parts: written (two questions), listening (twelve exercises, at least 7 to be answered correctly), reading (sixteen exercises, at least nine to be answered correctly) and conversation. These requirements correspond to category E of the Introductory Regulation of the Law on Citizenship of 14 July 1989 where, depending on the degree of difficulty, language knowledge is subdivided into six categories (A - F) (Uibopuu 1994: 37).[49]

Baltic States were a part. They therefore did not enter the country as foreigners and cannot be held as immigrant workers. See Eide, in: Birckenbach (1997: 99, Doc. 1, para 9).

[47] This is difficult to reconcile with a western understanding of democracy. See Hanneman (1995: 519).

[48] RT I, 1995, No. 12, pos. 122.

[49] Category A: oral and written understanding (800 words); category B: restricted oral and written knowledge (800 words); category C: restricted oral and written knowledge (800 words, official expressions); category D: oral and restricted written knowledge (1,500 words); category E: oral and written knowledge (2,500 words); category F: oral and written command. Categories A - C correspond

d) Knowledge of the Constitution and the Law on Citizenship. During the test, the applicant has to answer twenty questions on the Constitution and the Law, sixteen of which have to be answered correctly.
e) Economic preconditions, including a regular income.
f) Requirement of loyalty.
g) Oath of loyalty to the Estonian constitutional order.

4. Russian-Estonian Regulation of Citizenship

Pursuant to the bilateral Treaty on the Principles of the Interstate Relations between the Russian Soviet Federal Socialist Republic (RSFSR) and the Republic of Estonia of 12 January 1991[50] (Art. 3.1), the contracting parties are under the obligation to grant citizens of the former Soviet Union a choice between the nationality of the RSFSR or of the Republic of Estonia. The affected persons therefore had an option. According to the wording of the article, implementation of the "zero-option" could have been expected, but this did not happen in practice. In the legislation, however, a reference is made to the national legislation of the state of residence. The Treaty (Art. 3.3) calls for a more detailed regulation of this question in a special Treaty on Nationality. Such a regulation, which entails obligations for the parties, is called *"pactum de contrahendo"* in international law (Beyerlin 1976: 407 ff.).

The Treaty on the Principles of the Interstate Relations between of 1991 has therefore rather the character of a declaration of principle. Although the Russian Federation has issued a warning,[51] no bilateral regulation on the question of nationality has been enacted so far.

An Additional Protocol[52] to Art. 3, 4 and 5 of the Treaty was appended. Art. 1 requires the installation of a joint committee to which the affected person can appeal if a

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with a basic, category D to a medium, categories E and F to a higher degree of education. RT I, 1996, No. 8, pos. 168.

[50] Ratified by the Supreme Soviet of the Republic of Estonia on 15 January 1991, Russian text in: *VER*, 1991, No. 2, pos. 19. Ratified by the Highest Soviet of the RSFSR on the 26 December 1991, Russian text in: *Vedomosti RSFSR*, 1992, No. 3, pos. 87. For the Treaty and the Protocol of 12 January 1991 see Hecker (1997: 85 ff.).

[51] Letter dated 31 July 1992 from the Permanent Representative of the Russian Federation to the United Nations Office at Geneva addressed to the Under-Secretary-General for Human Rights, in: *UN Doc. E/CN.4/Sub.2/1992/45*, p. 3.

[52] Russian text in: *Jurist Estonii*, 1991, No. 2, p. 169 ff.

breach of Art. 3, 4 or 5 has occurred in the state in which the person is residing (Art. 6.1). Due to the absence of a Treaty on Nationality, the committee has no special importance.

The Russian Law on Citizenship of 28 November 1991,[53] amended before the USSR was dissolved, enabled Russians living within the territory of Estonia to acquire the Russian nationality through simple registration (Dmitrieva and Lukashuk 1993: 277 ff.). Pursuant to Art. 18 (d) of the amended Law of 6 February 1995,[54] every person who possessed the Soviet nationality and lived within the territory of a former Soviet Republic has the right to acquire the Russian nationality by registration.

Until mid-1997, about 120,000 Russians living in Estonia acquired the Russian nationality. The decision to become a Russian national results mainly from the necessity of avoiding statelessness and acquiring a valid passport.

V. Conformity of the Estonian Citizenship Law with Public International Law

Estonia derives its competence to legislate its citizenship qualifications from the generally-accepted principle of the domestic sovereignty of each state to regulate its own citizenship. Limits to this right are the obligatory *genuine link* between the natural person and the state as well as obligations arising from bilateral and multilateral international agreements.

1. Conformity with International Law as contained in Bilateral and Multilateral Treaties

In the Treaty of 1991 (Art. 3.3), Russia and Estonia agreed on the conclusion of a Treaty on Nationality. Until now, Estonia has failed to adhere to this binding international legal obligation. However, the obligation undertaken by Estonia pursuant to the Treaty (Art. 3.1 and Art. 4.3) to enable the acquisition of Estonian citizenship by

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[53] *Vedomosti RSFSR*, 1992, No. 6, pos. 243; English Translation in: *Review of Central and East European Law (RCEEL)*, 19 (1993) 3, pp. 293-309.

[54] Amendments in: *Vedomosti Rossijskoj Federacii (V RF),* 1993, No. 29, pos. 1112; V RF, 1995, No. 5, pos. 185.

former citizens of the Soviet Union and stateless persons with permanent residence on Estonian territory has generally been observed by Estonia. Citizenship applicants must fulfil detailed qualifications required by Estonian legislation, before they can acquire the citizenship.

The acquisition of Estonian citizenship through paternal descent, in accordance with the Law on Citizenship of 1938 in the version of 16 June 1940, was re-enacted on 26 February 1992. This regulation constituted a violation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women of 18 December 1979[55] (Art. 9.2) to which Estonia had already acceded in 1991. In the case of a conflict between domestic law and a ratified international treaty, the Estonian Constitution of 1992 (Art. 123.2) states that: "If Estonian laws or other acts contradict foreign treaties ratified by the Riigikogu, the provisions of the foreign treaty shall be applied." Furthermore, Estonia could not rely on its domestic law, the Law on Citizenship, under the Vienna Convention on the Law of Treaties of 1969 (Art. 27) in order to justify the failure to fulfil an international treaty. The obligation to reconcile domestic law with international norms was fulfilled by Estonia with the Amendment to the Law on Citizenship of 23 March 1993, whereby Estonian citizenship may be acquired through both maternal and paternal descent.

In accordance with the Law on Citizenship in the version of 1995, children of stateless parents born in Estonia could not acquire the Estonian nationality.[56] This was in violation of ICCPR (Art. 24.3) and the Convention on the Rights of the Child (Art. 7.1), both of which have been ratified by Estonia. These provisions proclaim the right of the child to acquire a nationality. Pursuant to the Amendment to the Estonian Law on Citizenship of 8 December 1998,[57] which entered into force on 12 July 1999, children under the age of 15 born on Estonian territory after 26 February 1992 can acquire the Estonian nationality on the basis of a declaration if their parents are stateless and have been legal residents of Estonia during the previous five years. The new regulation does not include children between the ages of 15 and 18 who are under the

[55] *UNTS,* vol.1249, p. 13.

[56] The UN Secretary-General and the HCNM recommend that children born in Estonia should acquire the Estonian nationality if they otherwise would become stateless. See Report of the Secretary-General "Situation of Human Rights in Estonia and Latvia", in: *UN Doc. A/48/511*, para. 89, p. 17; van der Stoel, Recommendations, in: *HRLJ,* 14(1993), 5-6, para. 3, p. 218.

[57] RT I, 1998, No. 111, pos. 1827.

protection of Art. 1 of the Convention on the Rights of the Child and children born before 26 February 1992. This domestic regulation is not fully in line with the international obligations of Estonia.

The Estonian Constitution (Art. 8.2) and the Law on Citizenship (Art. 5.3) contain a prohibition of the deprivation of citizenship for persons who acquired Estonian nationality by birth. This constitutes a legal position different from that of Estonian nationals who acquired citizenship through naturalisation. Indeed, an Estonian national who has acquired the nationality through naturalisation can be deprived of citizenship under Art. 28.1 (5) of the Law on Citizenship if he or she possesses another nationality as well. It is therefore possible for Estonians who have acquired nationality by birth to possess dual nationality whilst this is impossible for naturalised Estonians. This differentiation produces a division of Estonian citizens into two classes. Whereas citizenship may provide a basis for differential treatment in international law, discrimination on the ground of birth, descent or national origin is prohibited pursuant to the ICCPR (Art. 2.1) (Nowak 1993: 44, Art.2, para. 33), the International Convention on the Elimination of all Forms of Racial Discrimination (Art. 1.1) and ECHR (Art. 14). The principle of non-discrimination between nationals by birth or through naturalisation is included in the European Convention on Citizenship of 1997 (Art. 5.2) (not yet in force) where it is stated: "Each State party shall be guided by the principle of non-discrimination, whether they are nationals by birth or have acquired its nationality subsequently." As already mentioned, Estonia has not signed this Convention presumably because of the differences between the Estonian regulation on citizenship and the provisions of the Convention. Besides Art. 5.2 of this Convention, Art. 6, especially para. 3 and 4 (e), 4 (f) and 4 (g), is also affected. The Convention provides for the naturalisation of persons who were born on the territory of the state parties and reside there lawfully and habitually. Persons who are lawfully and habitually resident on its territory for a period of time beginning before the age of 18 (that period is to be determined by the internal law of the state party concerned) and stateless persons are granted an easier procedure for their naturalisation under the Convention. Contrary to the Estonian Law on Citizenship, the Convention provides for, and in fact permits, multiple citizenship (Chapter 5).

2. Conformity of Qualifications for Naturalisation with Customary International Law

Qualifications for naturalisation are determined by domestic law (Weis 1979: 241), but public international law sets certain limitations which must be observed by states. Long-term residence on the territory of the state is a generally-accepted criterion in international law for the granting of nationality. The place of residence establishes a *genuine link* between the state and the natural person. Public international law does not, however, lay down a fixed period of residence. The length or brevity of residence often depends on the number and extent of additional preconditions: the greater the number and extent of the additional preconditions, the shorter the period of residence and vice versa (de Groot 1989: 245). The Estonian demand of an additional one-year period of residence after registration of the application is unusual but not inadmissible from the standpoint of international law.

Knowledge of the language of the state belongs to the generally-accepted criteria of public international law for naturalisation. The future citizens of the state should be able to communicate in the local language so that they can, as the state requires, integrate into the society. Through its knowledge of the Estonian language, the Russian-speaking population would show its capacity and willingness to integrate into Estonian society. Language can thus establish the *genuine link* between the Estonian State and the natural person. The requirement of the knowledge of language falls within the qualifications for naturalisation set by the state, as a result of the internal competence of the state to regulate its own criteria for naturalisation. The IACourtHR acknowledges this in its Opinion on the Proposed Amendments to the Naturalisation Provisions of the Constitution of Costa Rica.[58] A specification of the admissible extent and degree of difficulty cannot, however, be found in international law. The extent and degree of difficulty of language knowledge required in Estonia corresponds to a higher level of education, which goes beyond general knowledge. The requirement of language proficiency is thus in accordance with international law, but the extent and degree of difficulty are highly disputable.

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[58] IACourtHR, Advisory Opinion of 19 January 1984, No. OC-4/84; reprinted in: *HRLJ*, 5 (1984) 2-4, para 63, p. 174.

Citizenship establishes certain rights and duties for the natural person in relation to public law. From this point of view, the necessity of some basic legal knowledge might be derived in respect of establishing the *genuine link* between the state and the natural person. In order to pass the examination on the Constitution and the Law on Citizenship, the applicant must, however, have a very good level of knowledge going beyond general knowledge. If knowledge of the language is presumed for Estonian nationals by birth, one may nevertheless doubt whether they possess the level of knowledge about the Constitution and the Law on Citizenship required from applicants for Estonian nationality. On the basis of the internal competence of a state in setting the preconditions for the establishment of a *genuine link* to applicants for citizenship, the requirement of knowledge of the Constitution and the Law on Citizenship is not inadmissible in international law and also justifies the differential treatment of citizens by birth and of naturalised citizens. In the same way as for language knowledge, the IACourtHR held that requirements regarding *knowledge of the history and values of the state* as a precondition for naturalisation also lie within the discretion of the state,[59] but that, here again, the degree and extent of such knowledge remain highly disputed.

The other conditions for naturalisation in Estonia, such as *economic preconditions,* requirement of *loyalty and oath of allegiance* are generally-accepted and admissible in international law. Nevertheless, the outcome of the high level of knowledge required for the language and legal test, as laid down by the Estonian Law on Citizenship, is that a substantial part of the non-Estonian population cannot meet the conditions and therefore cannot acquire Estonian nationality through naturalisation.

CONCLUDING REMARKS

The lack of a universally-accepted definition of the term "minority" generates numerous definitions, each with different criteria. Although the criterion of citizenship is no longer a precondition for the membership of a minority at the universal international level, the European regional system considers citizenship as a necessary

[59] Ibid.

requirement for membership of a legally protected minority. At the European level, therefore, minority protection is generally a citizens' right—a view also adopted by Estonia. Since citizenship regulation is solely a matter for the domestic legislation of the state, a state is free, apart from some limited international rules, to define the circle of persons who are to be granted the nationality of the state.

After regaining independence, Estonia decided to re-establish the principles of Estonian citizenship as applied in the inter-war period. All persons who have settled in Estonia after 1940 must go through the process of naturalisation in order to acquire citizenship, but this possibility is denied to many persons because of the language and legal knowledge requirements.

Because of the Estonian legislation, persons who have a different ethnic identity from Estonians and who are not citizens of Estonia do not receive the benefits of common minority rights. Under Estonian law, as at the European level, minority rights are rights granted to citizens. Therefore, persons within a population sharing the same ethnic characteristics, language, culture, tradition and history may have a different legal status which threatens the preservation of their identity. Some, as Estonian citizens, come under the protection of minority rights; others, as foreigners or as stateless persons, come under the law concerning aliens or foreigners. This case shows the serious consequences of relying on the citizenship criterion for specifying national minorities. On this basis, a considerable part of the Russian-speaking population with a long-standing territorial relationship is excluded from the Estonian nationality and thus also from minority rights. A simplification of the naturalisation process and/or the renouncing of the citizenship criterion as a requirement for membership of a national minority would positively influence the process of integration of these persons into the Estonian society.

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APPENDIX 1

ETHNIC COMPOSITION OF THE POPULATION OF ESTONIA

Ethnic Origin	**1989**	**1997**
Estonians	963,281	950,124
Russians	474,834	412,628
Ukrainians	48,271	37,306
Belarussians	27,711	21,883
Finns	16,622	13,629
Jews	4,613	2,553
Tatars	4,058	3,315
Germans	3,466	1,349
Latvians	3,135	2,723
Poles	3,008	2,374
Lithuanians	2,568	2,245
Swedes	297	-
Others	13,798	12,001
Total	1,565,662	1,462,130

Source: Statistical Office of Estonia, *Statistical Yearbook of Estonia,* Tallinn: 1997, p. 55.

APPENDIX 2

INTERNATIONAL TREATIES RELATED TO MINORITIES

No.	Treaty	Date Adopted	Organi-sation	Source	Entry into force	Entry into Force in Estonia
1	Convention on the Prevention and Punishment of the Crime of Genocide (Art. 2)	09.12.1948	UNO	UNTS, Vol. 78, p. 277	12.01.1951	21.10.1991
2	International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5)	21.12.1965	UNO	UNTS, vol. 660, p. 195	04.01.1969	21.10.1991
3	Convention against Discrimination in Education (Art. 5 para. 1 lit. c)	14.12.1960	UNESCO	UNTS, Vol. 429, p. 93	22.05.1962	–
4	International Covenant on Civil and Political Rights (Art. 27)	16.12.1966	UNO	UNTS, vol. 999, p. 171	23.03.1976	21.10.1991
5	Convention on the Rights of the Child (Art. 30)	20.11.1989	UNO	UN Doc. A/RES/44/25	02.09.1990	21.10.1991
6	European Charter for Regional or Minority Languages	05.11.1992	Council of Europe	ETS No. 148	01.03.1998	–
7	Framework Convention for the Protection of National Minorities	01.02.1995	Council of Europe	ETS No. 157	01.02.1998	01.02.1998 (ratified by Estonia on 06.01.1997)

APPENDIX 3

INTERNATIONAL TREATIES RELATED TO CITIZENSHIP AND STATELESSNESS

No.	Treaty	Date	Organi-sation	Source	Entry into force	Entry into force in Estonia
1	Convention on Certain Questions relating to the Conflict of Nationality Laws	12.04.1930	League of Nations	LNTS, Vol. 179, p. 89	01.07.1937	–
2	Protocol relating to Military Obligations in Certain Cases of Double Nationality	12.04.1930	League of Nations	LNTS, vol. 178, p. 227	25.05.1937	–
3	Protocol relating to a Certain Case of Statelessness	12.04.1930	League of Nations	LNTS, vol. 179, p. 115	01.07.1937	–
4	Convention relating to the Status of Stateless Persons	28.09.1954	UNO	UNTS, vol. 360, p. 117	06.06.1960	–
5	Convention on the Nationality of Married Women	20.02.1957	UNO	UNTS, vol. 309, p. 65	11.08.1958	–
6	Convention on the Reduction of Statelessness	30.08.1961	UNO	UNTS, vol. 989, p. 175	13.12.1975	–
7	Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality	06.05.1963	Council of Europe	ETS No. 43	28.03.1968	–
8	International Convention on the Elimination of All Forms of Racial Discrimination (Art. 5 d) iii)	21.12.1965	UNO	UNTS, vol. 660, p. 195	04.01.1969	21.10.1991
9	International Covenant on Civil and Political Rights	16.12.1966	UNO	UNTS, vol. 999, p. 171	23.03.1976	21.10.1991

	(Art. 24 para. 3)					
10	European Convention on the Adoption of Children	24.04.1967	Council of Europe	ETS No. 58	26.04.1968	–
11	Convention on the Reduction of the Number of Cases of Statelessness	13.09.1973	CIEC	UNTS, vol. 1081, p. 283	31.07.1977	–
12	Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in cases of Multiple Nationality	24.11.1977	Council of Europe	ETS No. 95	08.09.1978	–
13	Additional Protocol to the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality	24.11.1977	Council of Europe	ETS No. 96	17.10.1983	–
14	Convention on the Elimination of All Forms of Discrimination against Women (Art. 9)	18.12.1979	UNO	UNTS, vol. 1249, p. 13	03.09.1981	21.10.1991
15	Convention on the Rights of the Child (Art. 7)	20.11.1989	UNO	UN Doc. A/RES/ 44/25	02.09.1990	21.10.1991
16	Second Protocol Amending the Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality	02.02.1993	Council of Europe	ETS No. 149	24.03.1995	–
17	European Convention on Nationality	06.11.1997	Council of Europe	ETS No. 166	–	–