Advisory Committee
on Public International Law

Advisory report on the implications under international law of the inability to renounce a second nationality

Advisory report no. 39

Members of the Advisory Committee on Issues of Public International Law (CAVV)

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Contents

— Chapter I

Introduction

On 2 March 2021, the government requested an advisory report from the CAVV on the implications under international law of the prohibition on renouncing nationality in some national legal systems, even if it is a second nationality.[1] The request for advice arose in response to the private member's policy proposal of 27 May 2020 by Jan Paternotte MP (D66) on the protection of Dutch nationals who have an unwanted second nationality.[2] A motion introduced by Salima Belhaj MP (D66) on 4 February 2021 included the request that the advisory report should also address the question of whether, and to what extent, the automatic conferral of nationality to a third and subsequent generations of emigrants is compatible with international law, which remedies are available under international law for citizens who are adversely affected by it, and which intergovernmental organisations (IGOs) are equipped to facilitate multilateral dialogue on this issue.[3]

The request for the advisory report arose, then, from a wider concern regarding nationalities obtained against a person's wishes, unwanted associations with a second nationality or with the country concerned, and the impossibility of renouncing that nationality. According to the private member's policy proposal, this unwanted association with a country causes problems 'of many hues', [4] 'both in practice and symbolically'.[5] According to the private member's policy proposal, primacy should be accorded to individual freedom of choice. An example is the *Manifesto for Freedom of Choice in Nationality* – a direct appeal from a group of Dutch Moroccans to the Dutch government and to society. The Manifesto expresses the desire to be 'free from the interference, control and laws of Morocco', whereby the 'ever stronger grip' on Moroccans living in other countries is referred to as a problem. [6]

The issue of an unwanted nationality therefore touches on the broader question of undesirable foreign interference through the medium of nationals in the diaspora. Nationality may play a role in undesirable foreign interference – for example where the state of the other nationality lays claim to far-reaching extraterritorial jurisdiction. [7]

The request for advice focused specifically on the situation of Dutch nationals with a second nationality that has been acquired automatically as a result of descent from a parent who possesses a non-Dutch nationality. In practice, the automatic acquisition of dual or multiple nationalities at birth may also arise in the following situations:

- a person who has one Dutch and one non-Dutch parent; [8]
- a person one or both of whose parents themselves possess Dutch and a second nationality; [9]
- a person with non-Dutch parents, at least one of whom, at the time of his or her birth, had their principal place of residence in the Netherlands, and was himself or herself born as the child of a father or mother who, at the time of his or her birth, had their principal place of residence in the Netherlands. [10]

A situation of dual nationality may also arise after birth without the person's explicit consent. If one or both parents become a Dutch national by naturalisation, the minor non-Dutch child may also acquire Dutch nationality, for instance, without having any say in the matter. [11]

The following advisory report will confine itself to the questions as formulated in the request for advice. First, Chapter II will briefly discuss the place of nationality in international law. Chapter III will examine the question of the automatic conferral of nationality by the state (i.e. without any intervention on the part of the individual). This chapter will also look at the question of whether

individuals possess the right to renounce a nationality under international law. This section will also explore the existence of any available legal remedies and discuss the potential risks of such a right of renunciation. Chapter IV deals with the implications under international law of the possession of dual nationality (whether wanted or unwanted), with the emphasis on criminal jurisdiction, diplomatic protection and consular assistance. Finally, Chapter V concludes with the recommendations, including reflections on the question of how and where steps could be taken to address the problems discussed through multilateral dialogue.

A drafting committee was formed for this advisory report within the CAVV, consisting of Prof. L.J. van den Herik, who acted as coordinator, Dr Laura van Waas, Co-Director of the Institute on Statelessness and Inclusion as an external expert, and Dr C.M. Brölmann, Dr A.J.J. de Hoogh, A.E. Rosenboom LLM and Prof. C.M.J. Ryngaert as Members of the CAVV. The advisory report was formally adopted by the CAVV on 2 November 2021.

— Chapter II

Nationality: definition, status, legislative trends and framework under international law

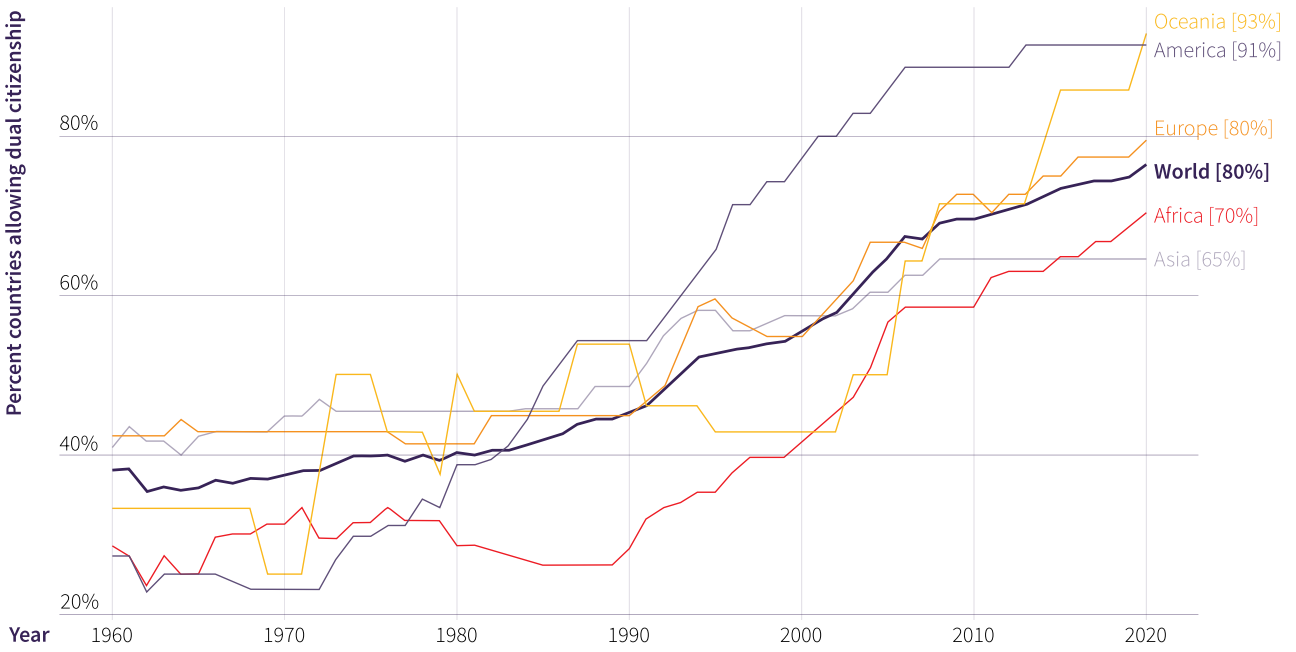
— II.I
The definition and status of nationality and legislative trends

Nationality (also known as citizenship) is the legal bond between a person and a state. It is the expression of an existing social connection,[12] to which rights and obligations are attached for both the individual and the state. This means that nationality is of significance for the person's legal status both within and outside the national society, and also forms part of someone's 'social identity'. [13]

States regulate the conditions for the acquisition and loss of nationality in their national legislation. [14] Nationality is acquired at birth on the basis of *jus sanguinis* (descent) or *jus soli* (place of birth), or a combination of the two. Nationality is usually granted automatically, by law, at birth – that is, without the intervention or consent of the person or their parent(s).

It is also possible to acquire a (new) nationality after birth, the most common route being naturalisation. Unlike the granting of nationality at birth, naturalisation usually takes place on the initiative of the individual, where he or she fulfils the conditions laid down in national legislation. In addition, states may also include rules in their national legislation on the loss of nationality – occurring automatically and/or at the initiative of the state – and on the renunciation of nationality at the individual's own request.

Worldwide, there is a growing number of individuals who have a link with more than one state – through descent from parents of different nationalities, for instance. Accordingly, it is increasingly common for an individual to acquire more than one nationality either automatically at birth or by requesting a new nationality in later life. Research into legislative trends shows that more and more states are also prepared to accept dual/multiple nationality, [15] as shown in the graph below issued by the *MACIMIDE Global Expatriate Dual Citizenship Dataset*. [16]



Expatriate dual citizenchip acceptance, global trend and by world region, 1960-2020 [%in 2020]

Source: MACIMIDE Global Expatriate Dual Citizenship Dataset, v5.00 [2020]

Figure 1 - MACIMIDE Global Expatriate Dual Citizenship Dataset

Although multiple nationality was for a long time viewed by states as undesirable, its acceptance is now clearly increasing. [17] Nonetheless, the possession of more than one nationality is sometimes perceived to be problematic, not only by states that have reservations about the multiple loyalties that are associated with multiple nationalities, but also by individuals who encounter negative consequences as a result of an automatically acquired second nationality. In this latter case, it is also possible to speak of an 'unwanted' nationality. While 'unwanted' is not a legally relevant characterisation, however, the individual's wish to renounce the nationality in question, which may result from this situation, *is* legally relevant.

— II.II
Nationality and international law

The conferral of nationality is the prerogative of states and is in principle not regulated by international law: it comes under the heading of the state's internal affairs *(domaine réservé)*, and therefore falls within the domestic jurisdiction. [18] However, international law does play a role in issues of nationality by imposing some preconditions, such as the obligation to avoid statelessness. [19] In addition, there are a number of treaties that further regulate the granting and loss of nationality, such as the Convention on the Reduction of Statelessness (1961) and the European Convention on Nationality (ECN; 1997).[20]

One of the most important developments since the Second World War has been the emergence of human rights as part of international law. States have an obligation to ensure human rights to individuals within their jurisdiction and these obligations apply independently of the nationality of the legal subjects concerned, with some exceptions. Some human rights explicitly pertain to nationality, such as the right of every child to a nationality (Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) and the right to leave and enter into one's own country (Article 12 of the ICCPR).[21] But also more generally formulated human rights can set limits to the freedom of states with regard to nationality issues. For example,

the European Court of Human Rights (ECtHR) has recognised that nationality is part of an individual's social identity and that nationality legislation and policy therefore fall within the scope of protection of Article 8 of the European Convention on Human Rights (ECHR), the right to private life. [22]

Chapter III of this advisory report examines the international standards that are relevant to the phenomenon of 'unwanted' nationality. It will first examine whether international law places limits on the automatic conferral of nationality by the state through descent (III.I), and then whether international law recognises an individual's right to renounce a nationality (III.II).

Nationality is a crucial connecting factor in determining the possible extraterritorial (criminal) jurisdiction of states (the 'active' nationality and 'passive' personality principles) and in imposing certain obligations such as conscription or taxation. [23] In addition, nationality is important in areas such as international investment law, humanitarian law and criminal law in general, including extradition law, as well as in the provision by states of diplomatic protection and consular assistance.

Chapter IV of the advisory report discusses the implications of a second (whether wanted or unwanted) nationality for some of the above doctrines of international law, looking in particular at issues of far-reaching criminal jurisdiction, diplomatic protection and consular assistance.

— Chapter III

Automatic conferral of nationality on a third and subsequent generations of descendants and the right to renounce a nationality

This chapter addresses two questions. First, whether international law places limits on the right of states to continue to confer nationality on the basis of descent at birth abroad (III.I). Second, whether international law provides for a right of individuals to renounce a second nationality, in particular in the case of automatic acquisition of nationality (III.II).

— III.I
International law and conferral of nationality on the basis of descent

Nationality is usually conferred at birth automatically on the basis of descent *(jus sanguinis)* or place of birth *(jus soli)*.[24] Both principles are considered a legitimate basis for conferring nationality at birth, even without an individual's consent. This means that it is possible for nationality to be conferred automatically and a situation of 'unwanted' nationality can potentially arise. In the case of parents of different nationalities, or in combination with jus soli, conferral of nationality on the basis of descent can also lead to dual or multiple nationality.

Some countries limit the conferral of nationality by restricting *jus sanguinis* in the case of emigrants to the first or, at most, second generation of descendants. This recognises the gradual fading of ties with the state as a result of long-term residence outside the territory. [25] Nonetheless, *jus sanguinis* in its unconditional form – perpetual allegiance – is still common. For example, at least twenty European countries, including the Netherlands, impose no limits on passing on nationality to (infinite) generations of descendants of emigrants.[26]

International law does not restrict the automatic or unconditional application of the *jus sanguinis* principle. [27] Although the unlimited imposition of nationality on the basis of descent is frequently criticised, [28] a nationality obtained in this way is in principle lawful under international law, even if the individual experiences it in the long term as 'unwanted'. Restricting the conferral of nationality on this ground is a right – not an obligation – accruing to states, as the ECN illustrates. This Convention – which has 21 States Parties, including the Netherlands – on the one hand obliges states to confer nationality automatically on the basis of descent, while on the other hand permitting states to impose restrictions on this conferral. States are permitted to impose a loss of nationality by operation of law, for instance, where there is a "lack of a genuine link between the State Party and a national habitually residing abroad". [29] The Convention thus leaves states free whether or not to apply the *jus sanguinis* principle unconditionally.

— III.II
International law and renouncing a nationality

The automatic acquisition of nationality on the basis of descent is accepted without limitation under international law, as set out above. However, the emergence and evolution of the international human rights system has gradually had an impact on nationality as a *domaine reservé* of states and on their national law. [30] International law now imposes limits on the loss of nationality: statelessness must be prevented [31] and the arbitrary deprivation of nationality is prohibited. [32] In response to the devastating consequences of statelessness and deprivation of nationality in the period surrounding the Second World War, rules were developed to protect the individual from the loss of status and rights through the deprivation of nationality by the state. The prohibition of the arbitrary deprivation of nationality therefore applies to the loss or deprivation of nationality whatever form these may take, with the exception of the voluntary renouncing of a nationality at the individual's own initiative. [33]

The question to be answered here is whether international law also requires states to offer individuals the opportunity to renounce a nationality. Do individuals have the right under international law to renounce a second nationality, for example because they view it as 'unwanted'? As yet, the right to renounce one's nationality has not been explicitly confirmed in any international treaty with universal scope, so that this question cannot easily be answered.

In the literature, several authors argue that the possibility of cancelling the nationality of the country in which a person does not reside, or no longer resides, should be considered a human right, provided that the cancellation does not lead to statelessness.[34] In support of this argument, reference is made to the widespread state practice of incorporating rules on renunciation of nationality in national legislation.[35] Several developments in international law can be cited in support of the *opinio juris*. For example, the Universal Declaration of Human Rights (UDHR) enshrines the right to change one's nationality (Article 15) and the right to leave one's own country (Article 13). [36] Both these rights have subsequently also been enshrined in several binding human rights treaties. [37] Although the right to renounce one's nationality is not explicitly mentioned in international law, the right to leave one's own country presupposes a right to permanent emigration, according to the Human Rights Committee.[38] Based on a study of the *Travaux Préparatoires* of various legal instruments, it is also argued that the right to change nationality presupposes the possibility of cancelling the original nationality. [39] Together, these two closely associated rights – to change nationality and to leave one's own country – therefore provide an important point of departure for development of the law in this area.[40]

However, an explicit right to renounce nationality has so far only been expressed in treaties of limited scope. The Convention on Certain Questions Relating to the Conflict of Nationality Laws of 1930 ('1930 Convention') was an early initiative by states to resolve issues relating to the conflict of nationality legislation. It focused in particular on how to deal with situations of statelessness and dual nationality, but it also addressed the issue of renunciation of nationality:

> 'A person possessing two nationalities acquired without any voluntary act on his part may renounce one of them with the authorisation of the state whose nationality he desires to surrender.
>
> This authorisation may not be refused in the case of a person who has his habitual and principal residence abroad, if the conditions laid down in the law of the state whose nationality he desires to surrender are satisfied'. [41]

This provision relates to individuals who have automatically acquired two nationalities and consider one of them to be 'unwanted'. The provision imposes a heavier obligation on states to respect the individual's right to renounce a nationality in the event that the person lives abroad. However, it is clear from the last sentence of this provision that the 1930 Convention allows the national law of the state to impose further

conditions that must be met before renouncing a nationality. [42] The 1930 Convention thus leaves states considerable discretion to limit the renunciation of nationality. However, the Convention has only 12 States Parties.

The 1997 ECN (21 States Parties) seeks to harmonise certain areas of nationality law within the Council of Europe and also 'to promote the progressive development of legal principles concerning nationality'. [43] The voluntary renunciation of nationality is addressed in Article 8 of the ECN:

> '1. Each State Party shall permit the renunciation of its nationality provided the persons concerned do not thereby become stateless.
>
> However, a State Party may provide in its internal law that renunciation may be effected only by nationals who are habitually resident abroad'.

This provision clearly recognises the right to renounce a second nationality. The ECN does allow states to impose the condition, however, that a national may only renounce his or her nationality if he or she is habitually resident abroad. This confirms the link between the right to leave one's own country, including for emigration purposes, and the right to renounce one's nationality – which together also give substance to the right to change nationality.

Only one other regional instrument addresses the renunciation of a nationality. Article 15 of the *Draft Protocol to the African Charter on Human and Peoples Rights on the Specific Aspects on the Right to a Nationality and the Eradication of Statelessness in Africa* [44] – which is currently being prepared by the African Union – states the following about this issue:

> '1. A State Party shall allow the voluntary renunciation of a person's nationality subject to the condition that such renunciation would not render the person stateless.
>
> 2. A State Party shall not authorize a child to renounce his or her nationality if either of his or her parents retains it, unless the child is capable of communicating his or her own views as provided in Article 10(2) of this Protocol and confirms that he or she desires to renounce nationality and it is confirmed that the child has in fact another nationality and that renunciation is not against the best interests of the child'.

This provision explicitly recognises the right to renounce a second nationality. The second paragraph includes a special rule to safeguard the best interests of the child, but does not give any further grounds for limiting the right to renunciation. However, this Convention is still under negotiation and the text is therefore not yet final.

There is as yet little international case law clarifying the state of development of any right to renounce a nationality. Only the ECtHR has ruled thus far in a case in which this question was explicitly at issue. Neither the right to a nationality nor the right to renounce a nationality is explicitly guaranteed by the ECHR and its accompanying Protocols. However, in *Riener v. Bulgaria*, the ECtHR did relate the refusal of a request for renunciation of nationality to the right to private life as enshrined in Article 8 of the ECHR, in line with the case law that recognises nationality as a part of a person's social identity: [45]

> 'While no right to renounce citizenship is guaranteed by the Convention or its Protocols, the Court cannot rule out the possibility that an arbitrary refusal of a request to renounce citizenship might in certain circumstances also raise an issue under Article 8 of the Convention if such a refusal has an impact on the individual's private life'.[46]

According to the ECtHR, the question of renouncing a nationality can therefore be brought within the scope of the Convention. The question of whether the rejection of such a request constitutes a violation of the Convention depends on a further assessment of the possible 'legal or practical consequences adversely affecting the applicant's rights or her private life'.[47] In the case at hand, it was ultimately held, on the basis of the facts, that the refusal to consent to the renunciation of nationality did not amount to a violation of Article 8 of the ECHR.[48] The question in which specific cases the balancing of interests should be decided in favour of the individual remains unanswered in this limited case law, in which no violation was found. Moreover, the ECHR does not recognise a general right to renounce one's nationality.

The above-mentioned development of the law towards a human right to renounce one's nationality shows that an important basis has been laid for the recognition of this right, but that the right has not yet crystallised completely. However, the Netherlands itself does recognise this right as a party to the ECN, in which the right to renounce nationality is explicitly laid down. It is recommended that the Netherlands support and promote the further development of the law, for example by intervening in international legal proceedings that contribute to this development of the law when the opportunity arises.

In principle, an international organisation with global membership and a general mandate, such as the United Nations, would be best equipped to facilitate multilateral dialogue on issues of nationality – including its renunciation. There are several forums that would lend themselves to an impetus towards further normative development. The CAVV advises the government to promote the adoption of a resolution by the United Nations Human Rights Council instructing the Office of the High Commissioner for Human Rights to prepare a report on the right to renounce nationality, including the scope of the right to nationality and the right to leave one's own country. The Netherlands could also take the initiative to ask one of the relevant Special Procedures (Special Rapporteurs and Independent Experts) to devote attention to this issue within their mandate. The International Law Commission (ILC), which has dealt with nationality issues in the past, [49] could also play a role. Finally, in the context of Europe, another possible forum is the European Migration Network (EMN), which facilitates exchanges of knowledge between European states through research and ad hoc queries. The EMN has also previously paid attention to policy and problems relating to nationality.

However, widening the scope for the individual's self-determination in relation to nationality calls for real freedom of choice. [50] This also applies to the above-mentioned Manifesto, which calls for support to be given to Dutch nationals with an 'unwanted' second nationality. It too focuses on the desire to be *'free to choose'* whether or not to have dual nationality. [51] After all, recognition of the right to renounce nationality by countries that currently impede this may create the expectation – for example in the context of the Netherlands, where mono-nationality is a policy preference – that those with dual nationality will and should make (more) use of this possibility. [52] This impinges on the situation of Dutch citizens with a second nationality that is desired and which they do not want to renounce. If the self-determination and autonomy of the individual are the point of departure, greater freedom of choice for some – those with an 'unwanted' nationality – should not lead to less freedom for others. The recognition that nationality is part of an individual's social identity also means that mandating the renunciation of a second nationality impinges on the right to private life protected under Article 8 of the ECHR. [53]

Individuals seeking a remedy for an 'unwanted' second nationality will have to follow conventional avenues. The first step must be to pursue the appropriate legal process to the administrative and/or judicial authorities of the state that has conferred the nationality. The Netherlands could play an advisory role here – by supplying information, for instance. If an individual is unsuccessful in the state whose nationality he or she wishes to renounce, and domestic remedies have been exhausted in the process of renunciation, the individual could then have recourse to an international or regional court, or a monitoring body of a human rights treaty, in so far as the state concerned has

accepted this possibility. Individual complaint procedures are available, for example, under the ECHR and the Optional Protocol to the ICCPR. In such cases, the ECtHR or the Human Rights Committee could issue an opinion on whether the impossibility of renouncing a nationality – or the refusal to allow it – under domestic legislation constitutes an arbitrary violation of the individual's human rights in a specific case.

— Chapter IV

Implications of a second nationality under international law

This chapter deals with the part of the request for advice concerning implications in public international law of a second nationality, for instance because renouncing a second nationality is impossible under that state's domestic legislation.[54] Specific attention will be paid to the exercise of extraterritorial jurisdiction based on the nationality principle in criminal law, and the doctrines of diplomatic protection and consular assistance. In some of these (national) laws and areas of law, a cautious development can be observed, with in certain cases a possible shift towards the regular place of residence as a connecting factor instead of nationality counting as the exclusive connecting factor. [55]

— IV.I
The consequences of dual nationality for the application of the criminal law

A person who has the nationality of a particular country can be subjected to that country's criminal jurisdiction. This means that the country of nationality can prosecute its nationals for acts that it deems to be crimes, even if these acts were committed elsewhere. [56] The nationality (or 'active personality') principle is therefore a principle of extraterritorial jurisdiction. In a sense, this principle is the counterpart of the right to diplomatic protection: while a person has the advantages of being protected by his or her country of nationality in the case of internationally unlawful acts, the person must also accept the disadvantages of that nationality – namely, subjection to the criminal law of the country of nationality. The existence of the nationality principle with regard to extraterritorial subjection to criminal law is not disputed, but the vast majority of states subject their nationals abroad to their own criminal law only in the case of (extremely) serious crimes. This often requires 'double criminality', which means that the acts in question must also be criminal offences under the law of the country where they were committed. However, double criminality is not a requirement under international law. The Netherlands is among those countries that establish extraterritorial jurisdiction for certain crimes on the basis of the nationality principle, even if the act is not a criminal offence in the country where it was committed. [57]

If a person has multiple nationalities, it is possible that all the countries of which the person is a national can prosecute.[58] Under some circumstances, then, it is possible for a Dutch national who also possesses another nationality to be prosecuted by both the Netherlands and the other country. In terms of the nationality principle, the most problematic category of crimes consists of the category of acts that are crimes in the country of nationality but not in the country where they were committed. These are frequently 'political offences', in which a person has expressed an opinion that is seen as a threat to national security in the country of nationality. This problem also comes into play in relation to people with dual nationality. For instance, take the example of a Dutch national with a second nationality who engages in criticism while in the Netherlands, for instance on social media, about the policy of the country of her or his other nationality, or who describes a certain situation in that other country as genocide. The latter country can classify such criticism as a criminal offence and exercise jurisdiction over the person concerned. [59] However, as long as this person does not voluntarily travel to the country of second nationality, it is difficult for this country to exercise its jurisdiction effectively. After all, the Netherlands can refuse to extradite such a person because he has Dutch nationality. [60] Indeed, the Netherlands is obliged to refuse to extradite the person if the country of the person's second

nationality provides insufficient protection for the person's fundamental rights, [61] and if the act is not a criminal offence in Dutch law or is a political offence. [62]

— IV.II
Diplomatic protection

The doctrine of diplomatic protection has a long and not uncontroversial history in international law. [63] Diplomatic protection involves one state invoking the responsibility of another state for a violation of international law in respect of one of its nationals (a natural or legal person). This doctrine of diplomatic protection was originally closely linked to the subject of the treatment of aliens, developed to help states ensure that their nationals were treated properly abroad in accordance with minimum international standards.[64] Nowadays, the rights of individuals are also ensured by the doctrine of human rights. However, diplomatic protection remains a powerful parallel protection mechanism, especially since it involves one state invoking the responsibility of another. Consequently, the individual is not alone. Furthermore, human rights are often not accompanied by any claim mechanism. The ILC's Draft Articles on diplomatic protection provide important guidelines for the international law framework governing diplomatic protection. [65] They aim to codify the current customary international law on diplomatic protection. [66]

The exercise of diplomatic protection is linked to nationality. [67] Article 5 of the Draft Articles on Diplomatic Protection requires that the individual possess the nationality of the state exercising diplomatic protection both at the time of the violation and at the time of invoking responsibility. With regard to the concept of the 'state of nationality', the Draft Articles on Diplomatic Protection are in line with the principles set out above – that is, it is for the state to determine its nationality law, but this freedom may be restricted by international law. There is emphatically no requirement for a 'genuine link' between the individual and the state in the case of naturalisation. [68] However, an individual must not have acquired the nationality in a way that is incompatible with international law.

A point of particular relevance to this advisory report is the rule under customary law that is set out in Article 7 of the Draft Articles on Diplomatic Protection,[69] which specifically addresses situations in which an individual has multiple nationalities and where the state of one nationality wishes to exercise diplomatic protection against the state of another nationality. [70] The main rule laid down by Article 7 is that this is not allowed unless the nationality of the protecting state is 'predominant' [71] in relation to the nationality of the state against which protection is exercised, both at the date of injury and at the date of the official presentation of the claim. Article 7 of the Draft Articles on Diplomatic Protection departs from the previous rule laid down in Article 4 of the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws, which does not allow the exercise of diplomatic protection between two states of nationality. The Netherlands is party to this convention, but on the basis of the *lex posterior* principle, the later rule under customary law as laid down in Article 7 of the Draft Articles on Diplomatic Protection is applicable – and the 1930 Convention rule has therefore been superseded.

To determine whether a nationality is predominant in relation to the other nationality in accordance with Article 7 of the Draft Articles on Diplomatic Protection, the following factors may be considered:

- habitual residence, the amount of time spent in each country of nationality, and – if applicable – the date of naturalisation (i.e. the length of the period spent as a national in the protective country before a claim was presented by that country);
- place, curricula and language of education;
- employment and financial interests;
- place of family life;
- family ties in each country;
- participation in social and public life;
- use of language;
- taxation, bank account, social security;
- visits to the other country of nationality;
- possession and use of the passport of the other country;
- military service.

In the Explanatory Memorandum accompanying Article 7 of the Draft Articles on Diplomatic Protection, the ILC indicated that none of these factors is decisive in itself and that the weight to be attached to each depends on the circumstances of the case. Article 7 provides for an exception, which is also clear from the formulation, which asserts that diplomatic protection cannot be exercised between two countries of nationality unless the nationality of one of the two states is predominant. It also follows from this construction that the state wishing to present a claim against the state of the other nationality must prove that its nationality is dominant. This means that, in principle, diplomatic protection by a state of the second nationality against the Netherlands on behalf of Dutch nationals living in the Netherlands is not possible. On the other hand, the Netherlands *can* exercise diplomatic protection on behalf of Dutch citizens abroad who have a predominant Dutch nationality, for example because they live in the Netherlands, against the state of another nationality.

A question raised by the request for advice is whether, and how, a statement that one nationality is unwanted affects the determination of which nationality is predominant, and whether a mere assertion is, or should be, sufficient to classify the other – wanted – nationality as predominant. [72] With regard to this question, it may be noted that if, on the basis of the above factors, the state of the 'unwanted' nationality is also the state of the predominant nationality, the state of the other nationality, or the national concerned, cannot unilaterally determine that this is not the case because it is 'unwanted', as the predominant state has an independent right to exercise diplomatic protection, as is evident from the wording of Article 2 of the Draft Articles on Diplomatic Protection. [73]

In the situation in which a person has multiple nationalities, all the states of nationality may offer diplomatic protection against a third state. The principle of dominance does not play a role in this case. The states of nationality can agree among themselves which state will exercise protection, when, and how, but one state cannot prohibit another from exercising protection, even if the first state is the state of predominant nationality. It is true, however, that Article 19 of the Draft Articles on Diplomatic Protection recommends states to take into account the views of the person for whom protection is exercised, which could include a national urging the state of the unwanted nationality not to take any action on her or his behalf.

In order to better embed international law on diplomatic protection, the CAVV recommends that the government – pursuant to the UN General Assembly's Resolution 74/188 of 18 December 2019 – seek to further the elaboration of a convention on the basis of the Draft Articles on Diplomatic Protection. [74] In this process, Article 19 on recommended practice can also be further consolidated.

— IV.III
Consular assistance

Consular assistance to citizens abroad is a separate doctrine. It is provided to citizens who find themselves in difficult situations and takes the form of assistance with repatriation or assistance to prisoners, as well as the provision of documents such as passports and visas. Consular assistance is governed by the 1963 Vienna Convention on Consular Relations, especially Article 36 on 'contact with nationals of the sending state'. [75] The Netherlands, along with 180 other states, is party to this convention, which, in so far as relevant here, should be seen as the codification of customary law.

The difference between diplomatic protection and consular assistance is that the former is a legal remedy that can be invoked in the event of a violation of the law, whereas the latter has a more general aim of protecting citizens abroad and assisting them where necessary; consular assistance is therefore predominantly preventive in nature. In practice, the distinction between the two is not always clear-cut. However, states are cautious about exercising diplomatic protection, whereas consular assistance to citizens abroad is regularly provided. As noted above, under international law the decision to exercise diplomatic protection lies with the state, although Article 19 of the Draft Articles on Diplomatic Protection makes certain recommendations to states regarding the exercise of protection in cases

of significant infringements. Consular assistance is only exercised at the citizen's request and with his or her consent. Certain forms of consular assistance are classified under international law as an individual right. That means a right that an individual has, for instance, in relation to the receiving state – that is, the state where she or he is present, [76] or the individual's right in relation to her or his state of nationality. [77]

The question of whether states may offer consular assistance to people with dual nationality in relation to, or in the state of, the other nationality, and the role of the principle of dominance in this regard, is not clearly answered by the Vienna Convention on Consular Relations.[78] In order to be able to provide consular assistance nonetheless in such cases to a resident of one nationality who travels to the country of the other nationality for a short stay, states have in the past made provision for it in bilateral consular agreements. [79] The Vienna Convention on Consular Relations provides the basis for this, and it has been agreed, in the case of people with multiple nationalities, that they could travel on the passport of the country of residence with a visa for the country of temporary stay. This means that, for the duration of the validity of the visa, the traveller is considered to be enjoying consular assistance and protection from the country of the passport on which he or she is travelling. Such an agreement also provides for a smooth return to the country of permanent residence.

Unlike some other states, the Netherlands does not provide for an individual (constitutional) right to protection for citizens abroad. [80] In the Letter to Parliament of 7 October 2020, the Minister of Foreign Affairs, Stef Blok, stated that formal consular legislation would not be opportune, because it would lead to unnecessary juridification while not necessarily yielding more legal certainty. He also emphasised that consular assistance often requires tailor-made solutions.[81] Nevertheless, the CAVV is of the opinion that the government could consider providing further clarification regarding the exercise of consular assistance in very specific situations for the benefit of all Dutch citizens and also for those who have ties with other states, whether wanted or unwanted, as a result of a migration background or otherwise. This may send an important signal – particularly with regard to people with multiple nationalities and with regard to countries of the other nationality.

The CAVV recommends that the government in any case explicitly indicate that in the case of multiple nationalities, the dominance principle will apply in relation to the state of the other nationality. By doing so, the Netherlands would be emphasising its right to stand up for Dutch nationals who live in the Netherlands and/or have their professional and social lives here, but who also have another nationality, and asserting that the Netherlands can and will also exercise protection vis-à-vis that other country. The question of whether or not this other nationality is 'wanted', and when it may have become 'unwanted', is not important in this context.

In view of the questions that have arisen in situations of repatriation during the COVID crisis and in the situation in Afghanistan – in relation to Afghan-Dutch dual nationals – since the Taliban takeover in 2021, a general clarification of the law on consular assistance, and more specifically of the mutual rights and obligations of states in cases of dual nationality, would be welcome.

— Chapter V

Concluding remarks and recommendations

1. International law does not explicitly restrict states in the automatic or unconditional application of the principle of *jus sanguinis*. Only the European Convention on Nationality contains provisions that do so – it states *inter alia* that contracting parties must confer nationality by operation of law on the basis of descent, but may impose restrictions in the event of birth outside the territory of the state.

2. The right of individuals to renounce a nationality is explicitly mentioned in Article 8 of the European Convention on Nationality, but it has not been enshrined explicitly in universal international human rights instruments. However, there is a noticeable trend towards greater recognition of this right, as a derivative of other human rights. The CAVV endorses this recognition. The CAVV therefore recommends that the Netherlands support and promote this development of the law.

3. In principle, an international organisation with global membership and a general mandate, such as the United Nations, is best equipped to facilitate a multilateral dialogue on issues of nationality – including renouncing a nationality. There are various forums within which a start could be made on further normative development. The CAVV recommends that the government promote, for example, the adoption of a resolution by the UN Human Rights Council instructing the Office of the High Commissioner for Human Rights to devote a report to the right to renounce nationality, including the scope of the right to nationality and the right to leave one's own country.

4. Individuals seeking a remedy for an 'unwanted' second nationality should first pursue the appropriate legal process to the administrative and/or judicial authorities of the state concerned, in which the Dutch government could offer advice and support. If an individual's application is rejected and domestic remedies have been exhausted, recourse to a regional court or the monitoring body of a human rights treaty is an option, provided the state in question is party to the relevant treaty and has accepted this possibility. For example, individual complaint procedures are available under the European Convention on Human Rights (ECHR) and the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).

5. If the self-determination and social identity of the individual within the meaning of Article 8 of the ECHR are taken as a point of departure in relation to issues involving an individual's renunciation of a nationality, greater freedom of choice for some – those with an 'unwanted' nationality – should not entail less freedom for others, namely people with a desired second nationality that they would like to keep.

6. If persons have Dutch nationality and a second – possibly unwanted – nationality, both countries of nationality can potentially exercise criminal jurisdiction on the basis of the nationality principle. With regard to persons who are in the Netherlands and are wanted by the country of second nationality, the CAVV endorses the importance of the guarantees as currently laid down in Dutch law. On the basis of these guarantees, the Netherlands must refrain from extradition to the country of the other nationality if the latter does not sufficiently protect the fundamental rights of the individual, or if these persons' acts do not constitute a criminal offence under Dutch law or constitute a political offence.

7. Diplomatic protection is a doctrine in international law on the basis of which the Netherlands can hold another state, including a state of a second nationality, whether wanted or unwanted, responsible for violations of international law with regard to a national. Given the importance of this doctrine, particularly for the situations underlying this request for advice, the CAVV recommends, pursuant to Resolution 74/188 of the UN General Assembly of 18 December 2019, that the Netherlands seek to further the elaboration of a convention on the basis of the Draft Articles on Diplomatic Protection.

8. With regard to consular assistance, the CAVV recommends that the government explicitly indicate that the principle of dominance applies in the case of multiple nationalities in relation to the state of the other nationality. By doing so, the Netherlands would be emphasising its right to stand up for Dutch nationals who live in the Netherlands and/or have their professional and social lives in the Netherlands, but who also have another nationality, and emphasising its right to provide protection in relation to the country of the other nationality. The question of whether this other nationality is wanted or unwanted, and when it may have become unwanted, is not important in this context.

9. In view of the questions that have arisen in situations of repatriation during the COVID crisis and in the situation in Afghanistan – in relation to Afghan-Dutch dual nationals – since the Taliban takeover in 2021, some clarification of the law on consular assistance in cases of dual nationality would be welcome, especially in relation to the mutual rights and obligations of states.

Endnotes

1 The request for the advisory report is found in Annex I.

2 The private member's policy proposal is found in Annex II.

3 The motion proposed by Salima Belhaj is found in Annex III.

4 See Jan Paternotte's private member's policy proposal 'Bescherm Nederlanders met een ongewenste tweede nationaliteit' ('Protect Dutch nationals with an unwanted second nationality'), Kamerstuk (Dutch Parliamentary Papers) 35475, no. 2, 2019/20, p. 2.

5 Ibid, p. 5.

6 'Manifest voor Keuzevrijheid in Nationaliteit' ('Manifesto for Freedom of Choice in Nationality'), September 2019, https://debalie.nl/Article/manifest-voor-keuzevrijheid-in-nationaliteit/.

7 NB: 'international law recognizes […] the general primacy of territorial jurisdiction and limits the actions that states of origin may take on behalf of their nationals abroad": Rainer Bauböck (2005) 'Citizenship policies: international, state, migrant and democratic perspectives', *Global Migration Perspectives No. 19*, p. 8.

8 The statutory basis for the acquisition of Dutch nationality in this case is Rijkswet op het Nederlanderschap (the Netherlands Nationality Act), section 3(1).

9 Ibid.

10 The statutory basis for the acquisition of Dutch nationality in this case is Rijkswet op het Nederlanderschap (the Netherlands Nationality Act), section 3(3).

11 The statutory basis for the acquisition of Dutch nationality in this case is Rijkswet op het Nederlanderschap (the Netherlands Nationality Act), section 11(1).

12 Also known as the 'social fact of attachment'. International Court of Justice, *Nottebohm Case (second phase)*, ICJ Reports 1955, pp. 23-24.

13 European Court of Human Rights (2011) *Genovese v Malta*, App. No 53124/09, para. 33.

14 For the Netherlands these laws are laid down in Rijkswet op het Nederlanderschap (the Netherlands Nationality Act) of 19 December 1984 adopting new general provisions governing Dutch citizenship to replace the Act of 12 December 1892, Bulletin of Acts and Decrees 268, governing Dutch citizenship and residence, most recently amended on 1 January 2011.

15 The simultaneous possession of two or more nationalities.

16 Can be consulted at https://macimide.maastrichtuniversity.nl/dual-cit-database/.

17 See e.g. Peter J. Spiro (2008, 2012), 'Multiple Nationality', in *Max Planck Encyclopedia of Public International Law*. Spiro explains that multiple nationality can arise: (i) through the interaction of rules governing nationality based on j*us sanguinis* and *jus soli*, (ii) in the case of a child with parents of different nationalities, and (iii) through naturalisation without renunciation of the previous nationality. A brief explanation of multiple nationality in the Netherlands can be found at https://www.rijksoverheid.nl/onderwerpen/nederlandse-nationaliteit/dubbele-nationaliteit. In fact, it is accepted in diverse contexts but in the case of naturalisation to Dutch citizenship, renunciation of the original nationality is required (unless an exception applies) and there are also rules governing the loss of Dutch nationality in the case of naturalisation in another country.

18 PCIJ, Advisory Opinion, *Nationality Decrees in Tunis and Morocco*, Series B, No. 4, pp. 23-24; and Article 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930, League of Nations, *Treaty Series* vol. 179, p. 89, no. 4137, and Tractatenblad (Dutch Treaty Series) 1967, no. 73. The Netherlands is party to this Convention.

[19] See e.g. the Convention Relating to the Status of Stateless Persons (1954), Tractatenblad (Dutch Treaty Series) 1955, no. 42 and the Convention on the Reduction of Statelessness (1961), Tractatenblad (Dutch Treaty Series) 1967, no. 124. The Netherlands is party to both conventions.

[20] Tractatenblad (Dutch Treaty Series) 1998, no.10.

[21] Tractatenblad (Dutch Treaty Series) 1969, no. 99.

[22] European Court of Human Rights (2011) *Genovese v Malta*, Application No 53124/09, para. 33.

[23] See e.g. the Dutch 'Accidental Americans', Cedric Ryngaert, 'De impact van Amerikaanse extraterritoriale regelgeving op Nederlandse belangen', *Nederlands Juristenblad* 24 (2021).

[24] See the survey of the nationality legislation in 175 countries in the Global Database on Modes of Acquisition of Citizenship of GLOBALCIT, Mode A01b – Descent (born abroad) at https://globalcit.eu/acquisition-citizenship/.

[25] Rainer Bauböck (1994), *Transnational citizenship. Membership and rights in international migration*, Edward Elgar, p. 41.

[26] Costica Dumbrava (2015), 'Super-Foreigners and Sub-citizens: Mapping ethno-national hierarchies of foreignness and citizenship in Europe', *Ethnopolitics* 14(3), pp. 296-310.

[27] International law does recognise that the automatic conferral of a new nationality *after birth*, against the will of the person concerned or without sufficient connection with the state, could be problematic because it may lead to 'over-claiming'. Spiro (2017), 'Citizenship Overreach', 38 *Michigan Journal of International Law* 167.

[28] For a discussion of this criticism, and of the failed attempts in the early 20th century to restrict conferral of nationality on the basis of *jus sanguinis* through an international convention, see Peter Spiro (2017) 'Citizenship Overreach'. 38 *Michigan Journal of International Law* 167, p. 177. See also Peter Spiro (2011) 'A New International Law of Citizenship', *American Journal of International Law*, 694, pp. 701-703.

[29] Article 7(1)e, European Convention on Nationality. Loss of nationality can only occur if it does not result in statelessness, see Article 7(3), European Convention on Nationality.

[30] For a discussion of this development, see Peter Spiro (2011) 'A new international law of citizenship', *The American Journal of International Law*, 105(4).

[31] See e.g. Articles 7 and 8 of the Convention on the Reduction of Statelessness (1961) and Articles 4(2) and 7 of the European Convention on Nationality.

[32] Article 15(2) of the Universal Declaration of Human Rights.

[33] UN Human Rights Council (2009) 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General', A/HRC/13/34, para. 23.

[34] See e.g. Paul Weis (1979) *Nationality and statelessness in international law*, Brill, p. 133; Rainer Bauböck (2005) 'Citizenship policies: international, state, migrant and democratic perspectives', *Global Migration Perspectives No. 19*, p. 20; Ernst Hirsch Ballin (2004) *Citizens' rights and the right to be a citizen*, Brill Nijhoff, p. 100; William Worster (2017) 'Human rights law and the taxation consequences for renouncing citizenship', *Saint Louis University Law Journal*, 62(85), p. 95.

[35] This issue is discussed at length in William Worster (2017) 'Human rights law and the taxation consequences for renouncing citizenship', *Saint Louis University Law Journal*, 62(85); and Savannah Price (2019) 'The right to renounce citizenship', *Fordham International Law Journal*, 42(5). Of the 175 countries that are included in the GLOBALCIT Database of nationality legislation, 89% recognise explicitly the possibility to renounce one's nationality. Of the twenty countries without such provisions in nationality legislation, thirteen nonetheless recognise the possibility of changing nationality by way of rules governing loss of nationality on the basis of acquiring a new nationality and/or after a prolonged period of residence abroad. The GLOBALCIT Database can be consulted at https://globalcit.eu/loss-of-citizenship/.

36 The (allegedly) customary law nature of Article 15 of the Universal Declaration of Human Rights also plays a role here – as explicitly recognised in African Court on Human and Peoples' Rights (2018) *Anudo Ochieng Anudo v. Tanzania*, Application No. 012/2015, para. 76.

37 The right to change one's nationality can be found in the Convention on the Rights of Persons with Disabilities, 2006 (Article 18) Tractatenblad (Dutch Treaty Series) 2007, no. 169; American Convention on Human Rights, 1969 (Article 20), 1144 UNTS 123; see also ASEAN Human Rights Declaration, 2012 (Article 18) https://asean.org/asean-human-rights-declaration/. The right to leave one's own country can be found *inter alia* in: International Covenant on Civil and Political Rights, 1966 (Article 12); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (Article 8), 2220 UNTS 3, Tractatenblad (Dutch Treaty Series) 1978, no.70; International Convention on the Elimination of All Forms of Racial Discrimination, 1966 (Article 5) 660 UNTS 195, Tractatenblad (Dutch Treaty Series) 1966, no. 237; Convention on the Rights of the Child, 1989 (Article 10) 1577 UNTS 3, Tractatenblad (Dutch Treaty Series) 1997, no. 3.

38 'Freedom to leave the territory of a state may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country. Thus travelling abroad is covered, as well as departure for permanent emigration.' Human Rights Committee (1999), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, CCPR/C/21/Rev.1/Add.9, para. 8.

39 http://undocs.org/A/C.3/SR.123, as referred to by Frederick Whelan (1981) 'The right to citizenship and the right to leave', *The American Political Science Review*, 75(3), p. 638 and William Worster (2017) 'Human rights law and the taxation consequences for renouncing citizenship', *Saint Louis University Law Journal*, 62(85), p. 101.

40 'The instruments do not specifically address a right to renounce citizenship, but they supply an instructive legal context'. Savannah Price (2019) 'The right to renounce citizenship', Fordham International Law Journal, 42(5), p. 1551.

41 Article 6, Convention on Certain Questions Relating to the Conflict of Nationality Laws .

42 In addition, Article 7 of the 1930 Convention provides that what is known as an 'expatriation permit' for renouncing nationality cannot have any effect if the citizen does not yet have another nationality. This Article addresses the prevention of statelessness and a similar provision can be found in the Convention on the Reduction of Statelessness (1961). However, the request for an advisory report relates to the renunciation of an 'unwanted' *second* nationality, in which limiting the right to renounce a nationality to prevent statelessness is not relevant.

43 Preamble, European Convention on Nationality.

44 https://www.achpr.org/public/Document/file/English/draft_citizenship_protocol_en_sept2015_achpr.pdf

45 See e.g. European Court of Human Rights (2011) *Genovese v Malta*, Application No 53124/09.

46 European Court of Human Rights (2020) *Ukraine v. Russia*, Application Nos. 20958/14 and 38334/18, para. 437. See also European Court of Human Rights (2006) *Riener v. Bulgaria*, Application no. 46343/99, para. 154.

47 European Court of Human Rights (2006) *Riener v. Bulgaria*, Application no. 46343/99, para. 155.

48 'The Court cannot accept that the alleged emotional distress resulting from the applicant's being "forced" to remain Bulgarian citizen amounted to an interference with her right to respect for her private life as protected by Article 8 of the Convention [...] The Court finds that the refusal of the applicant's request to renounce her citizenship did not interfere with her right to respect for her private life, within the meaning of Article 8 of the Convention.' European Court of Human Rights (2006) *Riener v. Bulgaria*, Application no. 46343/99, paras. 158-159.

49 The Netherlands could press for the UN General Assembly to adopt a resolution asking the ILC (under Article 16 of the ILC Statute) to place this issue on its agenda.

50 Self-determination is the fundamental principle at the heart of both the private member's policy proposal and the 'Manifest voor Keuzevrijheid in Nationaliteit' ('Manifesto for Freedom of Choice in Nationality'), see note 6 above.

51 'Manifest voor Keuzevrijheid in Nationaliteit' ('Manifesto for Freedom of Choice in Nationality'), see note 6 above.

52 Compare e.g. the experience gained with Germany and the Moroccan and Turkish policies on the renunciation of nationality. In situations where the renunciation of Moroccan nationality was possible – for children born to a Moroccan mother – this had the effect that Germany made it obligatory to renounce Moroccan nationality to obtain German nationality. It has also emerged that Turkey's relaxation of its rules on renouncing nationality has had the secondary effect of lowering the number of applications for naturalisation by Turkish nationals in Germany, since they were faced with a more peremptory choice of nationality. See also Delphine Perrin (2011) 'Country Report: Morocco', *EUDO Citizenship Observatory*, pp. 13 and 21.

53 As an aside, reference may also be made to the provision of Article 14(1) of the European Convention on Nationality: 'A state party shall allow children having different nationalities acquired automatically at birth to retain these nationalities'.

54 Private international law falls outside the mandate of the CAVV and will therefore be left out of consideration here.

55 See e.g. the provisions on jurisdiction in Wetboek van Strafrecht (the Dutch Criminal Code), articles 5(2) and 7(3), which refer to the individual's permanent place of residence in the context of the application of the active and passive personality principles.

56 See A. de Hoogh and G. Molier, 'Jurisdictie', in N. Horbach, R. Lefeber and O. Ribbelink (eds.) (2007) *Handboek Internationaal Recht*, Asser Press, pp. 210-215. For a general discussion of the establishment of jurisdiction, see C. Ryngaert (2015), *Jurisdiction in International Law*, OUP.

57 Art. 7(2), Wetboek van Strafrecht (Dutch Criminal Code).

58 F.A. Mann, 'The Doctrine of Jurisdiction in International Law,' 111 *Recueil des Cours* (1964- I) 9, 97ff; F.A. Mann, 'The Doctrine of Jurisdiction Revisited After Twenty Years,' 186 *Recueil des Cours* (1984- III) 9, 60– 63.

59 See e.g. article 38 of the Chinese Hong Kong National Security Law (2020): https://www.elegislation.gov.hk/fwddoc/hk/a406/eng_translation_(a406)_en.pdf ('This Law shall apply to offences under this Law committed against the Hong Kong Special Administrative Region from outside the Region by a person who is not a permanent resident of the Region.'). This provision may be primarily intended to enable the prosecution of members of the Chinese diaspora abroad, if they express unwelcome criticism of China's policy in Hong Kong. The Law does not make it entirely clear what expressions of opinion would pose a threat to national security.

60 In accordance with section 4(1) of the Uitleveringswet 1967 (Dutch Extradition Act), Dutch nationals will not be extradited, but section 4(2) provides for an exception if safeguards are provided that the person extradited would eventually be able to serve his or her custodial sentence in the Netherlands. As far as intra-EU extraditions are concerned, in accordance with Article 4(6) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *OJ EU* L 190/1 (2002), an EU Member State can refuse to surrender a person if 'the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that state undertakes to execute the sentence or detention order in accordance with its domestic law'. In other cases, an EU Member State cannot refuse purely on the grounds that the person wanted possesses its nationality.

61 The Netherlands cannot extradite a person to the country of second nationality if the latter cannot guarantee the person's fundamental rights, Art. 10 Uitleveringswet (Dutch Extradition Act) (for example the right to a fair trial, Art. 6 ECHR).

62 In the Netherlands, freedom of expression, while not unlimited, is more extensive than in autocratic countries. Opinions that are criminalised by the latter may not be so in the Netherlands – which is an obstacle to extradition.

63 In this context, the Special Rapporteur of the ILC also pointed to the misuse of this doctrine by Western states, most notably in the period leading up to the Second World War, in particular with regard to the

practice of military intervention: First Report on Diplomatic Protection by John Dugard, UN Document A/CN.4/506, 7 March and 20 April 2000, paras. 10-14.

64 L.F.H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, 15 October 1926, in UN, Reports of International Arbitration Awards, vol. IV, pp. 61-62, para. 4: 'Without attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

65 United Nations, *Draft Articles on Diplomatic Protection with commentaries*, 2006, Report of the International Law Commission on the work of its fifty-eighth session, YBILC 2006, Vol. II, Part Two, pp. 24-55.

66 It should be noted that the Explanatory Memorandum to the Draft Articles also indicates that some provisions, such as Article 8 (on diplomatic protection for stateless persons and refugees) and Article 19 (with recommendations on the choice of exercising diplomatic protection and the manner in which it should be exercised) go beyond customary international law as it existed at the time and were proposals to develop the law in a progressive manner.

67 In its earlier advisory report on diplomatic protection, the CAVV recommended that the Dutch government promote a development of the law that would give the state of regular residence, as well as the state of nationality, the right to exercise diplomatic protection: CAVV, *Advisory report on the questions put by the International Law Commission in relation to diplomatic protection*, 19 January 2001. In his response, the Minister of Foreign Affairs stated that he would not adopt this recommendation since he found it too far-reaching. In the context of the present advisory report, the CAVV would add that a development of the law along these lines would give the Netherlands the possibility to provide protection to individuals whose regular place of residence and social and professional life is in the Netherlands where the state of (unwanted) nationality fails to do so. For instance, Germany provided assistance to a Turkish prisoner in Guantánamo Bay who was born in Germany and had his regular place of residence there, while Turkey failed to provide such support. It had been called upon to do so by the Parliamentary Assembly of the Council of Europe in Resolution 1433 (2005), para. 10. And although British courts stated explicitly that the exercise of diplomatic protection is linked to nationality in the Al-Rawi case [2006] EWCA Civ 1279, 12 October 2006, para. 78, the UK government did eventually make efforts to have the Guantánamo Bay detainees returned to the UK, both those who had British nationality and those whose regular place of residence had been in in the UK. This development, in which some countries also exercise diplomatic protection for residents, is in line with the legal development mentioned above, in which habitual residence often serves as an additional connecting factor alongside nationality in rules and fields of law in which nationality remains important.

68 The ILC explicitly distanced itself from the Nottebohm judgment of the International Court of Justice, see para. 5 of the Explanatory Memorandum to Draft Article 4.

69 The ILC presents Article 7 as the 'present customary rule' in para. 4 in its Explanatory Memorandum to Draft Article 7.

70 Article 7 *Multiple nationality and claim against a state of nationality*: 'A state of nationality may not exercise diplomatic protection in respect of a person against a state of which that person is also a national unless the nationality of the former state is predominant, both at the date of injury and at the date of the official presentation of the claim.'

71 This doctrine plays a role in the horizontal tension between two states which both have the right to exercise diplomatic protection in respect of a particular individual; it plays no role in the vertical tension between the individual and the state in the choice of a particular nationality which the individual wishes to renounce.

72 In a Legal Opinion for the case of Nazanin Zaghari-Ratcliffe, who is being held in detention in Iran and holds dual nationality of the United Kingdom and Iran, and which addressed the question of whether the United Kingdom could exercise diplomatic protection against Iran, it was maintained that little

weight could be attached to Ms Zaghari-Ratcliffe's use of her Iranian passport to travel in and out of the country because this is mandatory and having two nationalities is illegal under Iranian law. However, in this case, the dominant nationality of the United Kingdom could be determined on the basis of the other factors, including place of residence, personal and family history, employment, and financial and other ties. (Professor John Dugard SC and Alison Macdonald QC, Re Nazanin Zaghari-Ratcliffe, Legal Opinion II Availability of Diplomatic Protection, 16 October 2017, para. 28, https://redress.org/wp-content/uploads/2017/11/Zaghari-Ratcliffe-Opinion-Diplomatic-Protection-for-web.pdf).

73 Draft Article 2 states: "A state has the right to exercise diplomatic protection in accordance with the present draft articles."

74 UN Doc. A/RES/74/188, 18 December 2019.

75 Article 36 of the Vienna Convention on Consular Relations states:
'1.With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner.
Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2) The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.'
(596 UNTS 261; Tractatenblad (Dutch Treaty Series) 1981 no. 143).

76 IGH, *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998*, ICJ Reports (1998), 426; *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment of 31 March 2004*, ICJ Reports (2004), 12; *Diallo (Republic of Guinea v. Democratic Republic of the Congo), Provisional Measures, the Judgment of the ICJ of 24 May 2007*, ICJ Reports (2007), 582; *Merits, Judgment of 30 November 2010*, ICJ Reports (2010), 639; *Compensation Judgment of 19 June 2012*, ICJ Reports (2012), 324.

77 For example, the right to a passport is inherent to the right to return to one's own country. Human Rights Committee (1999) General Comment No. 27: Article 12 (Freedom of Movement), para. 9.

78 For an analysis, see A. Vermeer-Künzli, Diplomatic protection and consular assistance of migrants, in Vincent Chetail and Céline Bauloz (eds.) (2019), *Research Handbook on International Law and Migration*, Edward Elgar, 2014, chapter 10. See also Stijn Hoorens et al., *'Die Nederlanders kom je ook overal tegen'; Inzichten uit een internationale vergelijking van consulaire dienstverlening aan staatsburgers in het buitenland*, RAND 2019 (RAND report), which states that the practice of states as regards offering consular assistance in another country to nationals with dual nationality is variable.

79 See e.g. the agreement between China and the United States: Consular convention, with exchange of notes. Signed in Washington on 17 September 1980; entered into effect on 19 February 1982. 33 UST 2973; TIAS 10209; 1529 UNTS 199. And between Canada and Hungary: Exchange of letters constituting an agreement concerning certain consular matters and passports, Ottawa, 11 June 1964, entered into effect on 25 May 1965, 862 UNTS 257.

80 For states that do provide for such a right, see e.g. Madalina Bianca Moraru, *Protecting (unrepresented) EU citizens in third countries – The intertwining roles of the EU and its Member States*, EUI, Thesis defended on 22 June 2015.

81 Letter to the House of Representatives from Stef Blok, Minister of Foreign Affairs, responding to the proposal of the parties Democrats '66 ('D66') and Green Left ('GroenLinks'): 'Naar een consulaire wet voor Nederland', 7 October 2020.