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# Nationality, expulsion, statelessness and the right to return

## 1. INTRODUCTION

This document outlines the application of international human rights standards to questions of nationality, statelessness and repatriation and examines various country situations and repatriation programs. The prime aim of this document is to assist in bringing about a solution to the situation of nearly 100,000 people, most of whom claim to be from southern Bhutan, who have been living for nearly ten years in refugee camps in eastern Nepal but it is hoped that it may also be of use to other governments trying to find solutions to other protracted refugee crises around the world.

This paper was first submitted in the form of a memorandum, prepared for Amnesty International by an independent consultant, to the Governments of Nepal and Bhutan in September 1999. It followed calls from the United Nations (UN) Sub-Commission on the Promotion and Protection of Human Rights (hereafter the UN Sub-Commission) in 1998 and 1999 for an early solution to the situation of the people claiming to be from Bhutan who have been residing in refugee camps in eastern Nepal for nearly ten years. While the two governments have stressed the bilateral nature of negotiations between them, both have invited Amnesty International to provide technical input which may be helpful to this process. To date, neither government has formally responded to the memorandum, although some oral comments were received.

Since this paper was submitted to both governments there have been further developments in the field of international standards setting in relation to these issues. Most significantly, the Human Rights Committee on 18 October 1999 adopted a General Comment (27) on the freedom of movement as enshrined in Article 12 of the International Covenant on Civil and Political Rights.<sup>1</sup> In August 2000, a resolution on the freedom of movement, the right to leave any country, including one's own, and to return to one's country, and the right to seek asylum from persecution was adopted by the UN Sub-Commission.

The scope of this paper does not permit an authoritative examination of many of the questions it raises. The aim primarily is to identify some questions which are worth further consideration by governments who are dealing with these complex issues rather than to reach any firm conclusions or make substantive recommendations. It should be treated more like a working paper, setting out material which may help to open up further discussions, as well as trying to focus attention on the human rights issues which must be an essential part of any negotiations.

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<sup>1</sup> The Human Rights Committee is the body of independent experts elected by states parties to the ICCPR to monitor states' compliance with that treaty. *General Comments of the Human Rights Committee represent the most authoritative interpretation of the Covenant on the scope of state obligations under the ICCPR available to State Parties.*

The specific issues examined here include:

- what makes a person belong to a state, the criteria used to determine whether a person has an “effective link” with a country
- the process used to ascertain who is a citizen or otherwise of a country to which they wish to return, even in cases where they hold no documentary evidence or the documentation is contested
- the limitations on denationalization, either for the purposes of or as a consequence of expulsion
- how the right to return has been dealt with, including in relation to the right to property
- the role played by international and regional agencies and mechanisms in helping to progress negotiations of this kind

The study draws on a range of sources on nationality, statelessness, repatriation programs, right to return and specific country situations. These include UN special rapporteurs’ reports, journal articles, reports of the Organization of American States (OAS) and Organization of African Unity (OAU), reports by non-government organizations (NGOs), including Amnesty International, Human Rights Watch and the Lawyers Committee for Human Rights, in addition to relevant national legislation and international instruments.<sup>2</sup>

The international standards cited are included for illustrative purposes and do not imply any specific legal obligation unless otherwise stated. Equally, country situations referred to have been put forward as comparative examples, not as an endorsement of any particular approaches or solutions adopted.

Following are some of the main observations contained in the paper:

- Denationalization for the purpose of expulsion is not permissible; it is a violation of fundamental human rights standards and breaches international law.
- There is an increasing presumption in international standards that denationalization is not permissible if it results in statelessness. While there are few signatories to the relevant international treaties, the principles are clear and incorporated as appropriate into many other international instruments such as the Convention on the Rights of the Child (CRC).
- Where denationalization does take place, at the initiative of the state or of the individual, it should be surrounded by the strictest procedural and other safeguards and take full account of the relevant human rights standards.
- The individual’s link with a state, which finds its legal expression in the acquisition of nationality, depends on a variety of factors including his or her birth, parentage, residence, and the focus of his or her social and other activities and his or her own sense of identity with that state. There are no clear cut detailed guidelines on this in international standards, but the principles are outlined in, for example, the European

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<sup>2</sup> See select bibliography in the appendix.

Convention on Nationality, and evidence of their application is found in the law and practice of many states.

- The right to enter one's own country set out in international standards does not necessarily depend on formally possessing that country's nationality.

## 2. NATIONALITY

At its 51<sup>st</sup> session in August 1999, the UN Sub-Commission called for “a fair and lasting resolution which takes into account . . . the principles of international law relating to non-discrimination; the right to return; **the right not to be arbitrarily deprived of one's nationality and the reduction of statelessness.**”

This section of the paper considers international standards on nationality and statelessness and shows how there has been a developing recognition that international human rights law has a significant bearing on state sovereignty in this matter.<sup>3</sup> It then considers some of the elements of citizenship, obstacles to acquiring citizenship for individuals who have a genuine and effective link with a country, some questions relating to deprivation or renunciation of nationality, and the creation of statelessness.

### 2.1 *Nationality and international human rights*

Questions relating to nationality and entry to a territory touch on the most sensitive areas of state sovereignty, but there has been a growing recognition that states' discretion in these matters is circumscribed by principles of international law and human rights standards, in particular with regard to the prevention of statelessness and the protection of the right to enter one's own country.

While international human rights standards with regard to nationality are less concrete than in some other areas of human rights, the past fifty years has seen the development of some important principles derived from and reflected in the practice of states, and set out in instruments such as the 1961 Convention on the Reduction of Statelessness and, most recently, the 1997 European Convention on Nationality. These principles are also found in a number of other human rights instruments of broader application, such as the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC), and have been reiterated continually in declarations by UN, regional and other bodies. Among the most concrete of these principles are those relating to the avoidance of statelessness and the right not to be arbitrarily deprived of nationality.

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<sup>3</sup> In this paper, the terms “citizenship” and “nationality” are used interchangeably.



**The Bhutanese refugees: their current position**

Since late 1990, almost 100,000 Nepali-speaking people have fled or were evicted from southern Bhutan to refugee camps in Nepal, or were born in exile to refugee parents. The causes of exile remain deeply contested. The refugees claim they are victims of human rights violations and discrimination by the Bhutan government's "one nation, one people" policy based on the traditions of the northern Bhutanese. The Bhutanese government maintains that the people in the refugee camps are illegal immigrants from Nepal who had overstayed their contracts in Bhutan or Bhutanese who left the country voluntarily and thus are deemed to have renounced their nationality under Bhutan's citizenship law.

Bhutan and Nepal commenced negotiations to solve the problem of the people in the refugee camps in November 1992. Since then, nine ministerial-level meetings between both countries have taken place. At the last meeting in May 2000, both countries reported "substantial progress" towards a solution. Disagreement on the precise unit of verification remains the main stumble block before a joint team comprising ten members, five nominated by each government, can start verifying the documents of the people in the refugee camps. Nepal maintains that verification should be done by heads of family; whereas Bhutan is insisting that individuals above 18 should be verified individually. The UN High Commissioner for Refugees (UNHCR) has put forward a formula aimed at bridging both positions. Nepal has accepted this formula. The Bhutan government to date has not made a decision.

In any event, even if verification starts tomorrow, there is a long way to go before refugees can return. So far both governments have not harmonized their position on what will happen to the refugees after verification. Both sides agreed four categories in October 1993 into which the people in the refugee camps would be classified. These categories were: 1) Bonafide Bhutanese if they have been forcefully evicted; 2) Bhutanese who emigrated; 3) Non-Bhutanese and 4) Bhutanese who have committed criminal acts. As pointed out in the report Bhutan: Forcible exile of August 1994 (AI Index: ASA 14/04/94), Amnesty International is concerned that this four-fold classification suggests that the question whether a person is deemed a national of Bhutan will be treated as the determining factor in establishing people's right to return. If this were the case, many of the guarantees provided under international law as set out in detail in this document may not be fulfilled.

*Amnesty International is urging that the refugees wishing to return to their places of origin will be permitted to do so at the earliest opportunity under a coordinated repatriation programme and that the sustainability of a repatriation in safety and with dignity is linked to the returnees' access to a wide range of human rights on a non-discriminatory basis, such as the rights to housing, health care,*

The concept of nationality has been developing in international law for some time. In 1923, the Permanent Court of International Justice in the *Tunisia and Morocco Nationality Decrees Case* (PCIJ (1923)) recognized that, while questions of nationality remained a matter for a state's jurisdiction, the competence of states in this area could be affected by international law and relations between states. The 1930 Hague Convention was the first attempt to solve problems arising from the conflict of nationality laws by establishing common standards. In relation to dual nationality, Article 5 of the Hague Convention provides that:

“... a third state shall ... recognize ... either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.”

The 1930 Hague Convention thus defined nationality on the international plane -- that is, its recognition by other states -- in terms of habitual residence or other close connection. However, given the contemporary state of international law, this was not going so far as to say that individuals with such a connection had any right to a particular nationality, simply that other states were obliged to recognize that nationality only if such a link existed.

This notion of an “effective link” was developed further in the 1954 *Nottebohm case (Liechtenstein v. Guatemala)*.<sup>4</sup> In that case, the International Court of Justice (ICJ) reaffirmed the principle that “the best way of making ... rules [relating to nationality] accord with the varying demographic conditions in different countries is to leave the fixing of such rules to the competence of each State.” But it reiterated also that “a State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with [the] general aim of making the legal bond of nationality accord with the individual's genuine connection with the State”. (*Liechtenstein v. Guatemala*, ICJ reports (1955) p.4ff)

So the notion of a genuine and effective link as a determining factor in nationality first arose in respect of the recognition by other states of a particular state's grant of nationality. It has developed further in the context of broader human rights law, particularly relating to statelessness and nationality.

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2. Nottebohm was a German national by birth who had resided in Guatemala since 1905; he maintained his German citizenship, as well as business and other connections with Germany till 1939 when while still residing in Guatemala he naturalized as a citizen of Liechtenstein. In 1943 he was removed from Guatemala as a result of war measures. Liechtenstein took the case to the ICJ, which ruled that Guatemala was not bound to recognize his acquisition of Liechtenstein nationality because of the absence of any genuine and effective link with that country, and for that reason the Court ruled that Liechtenstein was not entitled to extend its protection to Nottebohm vis-à-vis Guatemala, and the claim was inadmissible.

Fundamental rights in this area were enshrined in the Universal Declaration of Human Rights (UDHR) of 1948. Article 15 of the UDHR states:

“(1) Everyone has the right to a nationality.

“(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

The right of individuals to have or obtain a nationality is somewhat vaguely formulated in the UDHR, in so far as it is a collective obligation on states, with no single state being obliged to give effect to it. But the right articulated in Article 15(2) not to be arbitrarily deprived of nationality implies a clear obligation on a particular state.

One obvious question which arises is what amounts to “arbitrary” deprivation of nationality. Procedural due process and non-discrimination would normally be necessary, although not sufficient, elements in any decision if it is not to be regarded as arbitrary. More fundamentally, it has been persuasively argued that, while removal of nationality may be permissible in certain circumstances (for instance, to avoid dual nationality), any deprivation of nationality resulting in statelessness would destroy the right to nationality itself which is articulated in Article 15(1); it would therefore not be compatible with the aims and objectives of the UDHR, and so could be considered “arbitrary” in the sense of Article 15(2).

Since the adoption of the UDHR, this right not to be arbitrarily deprived of nationality has been further elaborated in a number of legally binding treaties and other instruments. Moreover, with the developing international standards on the avoidance of statelessness, even the more vaguely formulated element of the right to nationality in Article 15(1) of the UDHR has been developed into more binding form, particularly with regard to children and those who would otherwise be stateless.

At international level the main instrument for developing in treaty form the principles set out in Article 15 of the UDHR was the 1961 Convention on the Reduction of Statelessness which, as well as elaborating the limits on states’ discretion to remove nationality, contains a number of provisions requiring that children who would otherwise be stateless should be granted a nationality.

The 1961 Convention prohibits, with very few specific exceptions, any loss of nationality which results in statelessness. Articles 5 and 6 provide that any loss of nationality as a consequence of change in personal status (such as marriage, divorce, legitimation, adoption) or on the grounds of a change in the nationality of a person’s parent or spouse, shall be conditional on the possession or acquisition of another nationality. Article 7(1)(a) provides that a state may not permit a person to renounce their nationality if that would render them stateless. Article 7(3) provides that a national of a contracting state shall not lose his nationality so as to become stateless on the grounds of departure or residence abroad, except in the case of naturalized citizens who reside abroad for a period of seven consecutive years or

more and who fail to indicate their wish to retain that nationality, or, possibly, in some circumstances, in the case of nationals born and residing abroad after attaining majority. Other than those limited circumstances, Article 7(6) provides that a person shall not lose his nationality if that would render him stateless.

Article 8(1) provides that, generally, a contracting state shall not deprive a person of his nationality if that would render him stateless. However, other provisions of Article 8 set out exceptions to this general rule. The exceptions are: if the same circumstances apply as to Article 7 (above); if the nationality has been obtained by misrepresentation or fraud; or if at the time of becoming party to the treaty the state concerned specifies that it retains the right, as set out in its national law, to remove nationality in certain other circumstances related to entering the service of a foreign state, or if the person concerned has acted in a manner seriously prejudicial to the vital interests of the state. In such cases there must also be provision for the person concerned to have a fair hearing by a court or other independent body.

Although only few states (21 states as of May 2000) have ratified the 1961 Convention, it elaborates on the general obligation set out in Article 15 of the UDHR, and the principles embodied in it are reflected in the European Convention on Nationality and the basic provisions of citizenship legislation and practice in the majority of states. Some authors have argued that its provisions therefore reflect reference points for determining customary international law and reflect an international consensus on minimum legal standards to be applied to nationality. Others have taken a more cautious position that, while with such a low level of ratifications it could hardly represent customary international law, it nevertheless does provide the right to nationality with some substantive content and “is indicative of the extent of obligations of, or the international expectation on, States in the elimination and reduction of statelessness”. The UN Special Rapporteur on Zaire has gone as far as stating, despite the small number of ratifications, that the principles contained in the 1961 Convention are principles of international customary law that are impossible for states, even those which are not party to it, to disregard (UN Doc. E/CN.4/1996/66, para. 85). In 1988 the UN Sub-Commission’s Special Rapporteur on the right of everyone to leave any country, including his own, and to return to his own country, stated:

“In view of Human Rights Law, denationalization should be abolished. It constitutes a breach of international obligations, ... There is also a growing tendency to require the acquisition of another nationality as a precondition for the validity of denationalization. The recognition of the right to nationality as a basic human right, in effect, limits the power and freedom of a State arbitrarily to deprive its citizens of nationality” (UN Doc. E/CN.4/Sub.2/1988/35, para.107)

The principle of the avoidance of statelessness was reiterated by the UN General Assembly at its 50th session (1995) when it called on states

“16. ... to adopt nationality legislation with a view to reducing statelessness, consistent with the fundamental principles of international law, in particular by

preventing arbitrary deprivation of nationality and by eliminating the provisions that permit the renunciation of a nationality without the prior possession or acquisition of another nationality ...” (UN General Assembly Resolution 50/152)

The provisions of Bhutan’s nationality law, which provide for the removal of nationality or which deem that people leaving the country have renounced their nationality without making such loss of nationality contingent on acquisition of another nationality, run counter to these principles. Neither Nepal nor India normally permit dual citizenship, so Bhutanese of Nepali ethnic origin originating from either of those countries who acquired Bhutanese citizenship would have had to relinquish their former citizenship. It follows that if they are now deprived of their Bhutanese citizenship, or deemed to have voluntarily relinquished it by leaving, they thereby become stateless. The fact that Nepal law provides for reacquisition of its citizenship by former citizens is not relevant to this point, unless an individual genuinely makes that choice.

The right of children to acquire a nationality is reinforced by Article 7 of the Convention on the Rights of the Child (CRC). Article 7(2) places a special obligation on states in this matter in the case of children who would otherwise be stateless. This is a particularly important provision in view of the near-universal ratification of this Convention.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides, in Article 9:

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

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.”

These two treaties are of particular relevance, as to date they are among the few international instruments which both Bhutan and Nepal have ratified.<sup>5</sup>

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which Bhutan has signed but has not as yet ratified, provides that:

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<sup>5</sup> *The discriminatory provisions of Bhutan legislation, and their effect on children, are in probable breach of CRC and CEDAW. They are discussed in Tang Lay Lee, “Refugees from Bhutan” (see select bibliography in appendix).*

“States Parties undertake to ... guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (d) Other civil rights, in particular ... (iii) The right to nationality”.

## **2.2 Regional human rights instruments**

At the regional level, the 1948 American Declaration on Human Rights goes much further than the UDHR in providing for every person to have the right to the nationality of the territory of birth if he or she does not have the right to any other nationality.

In 1997 the Council of Europe adopted the European Convention on Nationality which reaffirms the right to nationality and the right not to be arbitrarily deprived of it. While recognizing that “in matters concerning nationality, account should be taken both of the legitimate interests of States and those of individuals” (Preamble), and reaffirming the principle that “each State shall determine under its own law who are its nationals” (Article 3), the Convention “establishes principles and rules relating to the nationality of natural persons ... to which the internal law of States Parties shall conform” (Article 1). These principles, set out in Article 4 of the Convention, include:

- a) everyone has the right to a nationality;
- b) statelessness shall be avoided;
- c) no one shall be arbitrarily deprived of his or her nationality.

The Convention requires states parties to provide for the possibility of naturalization of persons lawfully and habitually resident on their territory, and in particular to facilitate the naturalization of spouses and children of nationals and those born on their territory. It stipulates that “in establishing the conditions for naturalization, [a state] shall not provide for a period of residence exceeding ten years before the lodging of an application” (Article 6).

Article 7 sets out the limitations on deprivation of nationality, which is permissible only on voluntary acquisition of another nationality, voluntary service in a foreign military force, conduct seriously prejudicial to the vital interests of the State Party, for nationals habitually residing abroad who have no genuine link with the state party, or if in the case of a minor child the reasons for acquiring nationality are no longer fulfilled, such as if the child acquires or possesses the foreign nationality of its adoptive parents. In none of these cases is it permitted to withdraw nationality if it would lead to the person becoming stateless; the only circumstances in which a state can withdraw nationality if the person would become thereby stateless is if the nationality has been obtained by fraud. Loss of nationality at the initiative of the individual is permissible under Article 8, but not if the person concerned would thereby become stateless.

Articles 11 and 12 require that “decisions relating to the acquisition, retention, loss, recovery or certification of [a state’s] nationality contain reasons in writing” and “be open to an administrative or judicial review in conformity with [a state’s] internal law”.

The provision on non-discrimination (Article 5) prohibits rules on nationality containing distinctions or practices which amount to discrimination on the grounds of sex, religion, race, colour, or national or ethnic origin. But it also includes a provision which is

particularly important in the field of nationality, requiring states parties to be guided by the principle of non-discrimination between citizens by birth and naturalized citizens.

### **2.3 *Declarations of UN bodies***

As stated above (see 2.1), the UN General Assembly reiterated the importance of the prevention and reduction of statelessness in its 50th session (1995) when it called on states

“16. ... to adopt nationality legislation with a view to reducing statelessness, consistent with the fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality and by eliminating the provisions that permit the renunciation of a nationality without the prior possession or acquisition of another nationality ...” (UN General Assembly Resolution 50/152)

In recent years, the UN Commission on Human Rights in resolutions on Human Rights and Arbitrary Deprivation of Nationality has repeatedly reaffirmed “the importance of the right to nationality of every human person as an inalienable human right”, and noted that “full social integration of an individual might be impeded as a result of arbitrary deprivation of nationality” (Resolution 1999/28).

The Sub-Commission, reiterating the right to nationality in Resolution 1997/31, called on Governments

“to revise their citizenship laws, with the technical assistance of the [UN] Centre for Human Rights and with the advice of the [UNHCR] so that these laws are brought into accord with international human rights law and the Convention on the Reduction of Statelessness”.

### **2.4 *What ties a person to a country?***

#### **2.4.1 *Principles***

Traditionally there are two basic principles which govern the acquisition of nationality by birth: some countries confer nationality on children born on their territory (the principle of *jus soli*, prevalent in the Americas), others confer their nationality on children born of parents who are nationals (the *jus sanguinis* principle). Most states apply some combination of these principles, taking into account other factors such as residency. Over the past fifty years or so, increasing emphasis has been placed on the concept of the effective link or connection with a state as the determining factor in acquiring citizenship.

Long-term residency is one of the fundamental means of assessing the significance of the link between an individual and a state, but is not the only factor. The various elements it comprises are described by the ICJ in the *Nottebohm* case (see 2.1 above). In that case, the Court elaborated on what is the basis for the legal bond of nationality:

“... a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom [nationality] is conferred ... is in fact more closely connected with the population of the State conferring nationality than with that of any other state.”

The Court also recalled that in deciding cases of dual nationality,

“International arbitrators have ... given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved ... [T]he habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.”. (*Liechtenstein v. Guatemala*, ICJ Reports 1955, pp.4ff)

The 1961 Convention on Statelessness gives particular attention to factors relating to birth, either through the *jus soli* or the *jus sanguinis* principle, whichever in the particular case would be necessary to provide nationality to a person who would otherwise be stateless. For example, Article 1 of the Convention requires a state party to provide its nationality to a person born on its territory who would otherwise be stateless (*jus soli* principle). Article 4 requires a State Party to grant nationality to a person not born in its territory but who would otherwise be stateless, if the nationality of one of his or her parents at the time of birth was that of the contracting state (*jus sanguinis* principle).

At regional level, a number of these principles are included in the European Convention on Nationality (see 2.2 above). Chapter VI of that Convention requires states, in dealing with the grant or retention of nationality in matters of state succession, to weigh several factors including the person’s genuine and effective link with the state, the habitual residence, and the will of the person concerned. (It also mentions as a fourth factor the person’s territorial origin, since it is clear that this should be given more or less equal weight with the other factors when attributing the nationality of successor states to people who, for work or other reasons, might be residing at the time of succession outside the territory of origin which they consider to be their home.)

#### **2.4.2 Some examples of state practice**

The nationality laws of the states of the former USSR and of former Yugoslavia have come under international scrutiny in recent years because of the new nationality laws that were enacted by the successor states. This paper does not aim to address the specific question of nationality laws in the context of state succession, but simply considers some aspects of the laws of some of those countries in so far as they illustrate state practice with regard to what constitutes the effective link, either at the time of the establishment of the new state and its initial body of citizens, or at a later date by naturalization.

Most states of the former USSR granted citizenship to all who were lawful residents, irrespective of their ethnic origin, at the time their new nationality laws entered into force (the so-called “zero option”). By basing their citizenship laws firmly on the principle of residence at that time, no one who had been a citizen of the USSR was left stateless after its dissolution, at least in principle. (Moreover, Russia, as the successor state to the USSR, also offered citizenship on application to anyone who could prove residency in any of the 15 former Soviet republics at the time of dissolution.)

However, because these states have different rules and policies with regard to acquisition of their citizenship by people who were not permanently resident at the time, questions did arise relating to statelessness in the case of some of the formerly deported people who had not been able to return to their place of origin before the disintegration of the USSR, and who, like others of the formerly deported people, should be considered to have retained their effective link to their country of origin throughout the period of their enforced deportation (see 3.1 and 3.4 below). For example, some of the Crimean Tatars and Meshketian Turks did not return from Central Asia to Crimea and Georgia respectively until after 1991, and so did not automatically acquire citizenship in those states.

Citizens of the former Yugoslavia, in addition to their Federal citizenship of the Socialist Federal Republic of Yugoslavia (SFRY), held the citizenship of one of the constituent republics, and in principle automatically acquired the citizenship of the state which was a successor to the republic whose citizenship they formerly held. This principle was based on legal continuity and did not necessarily depend on residence at the time the successor state came into being. However, because republican citizenship in the SFRY had little legal or practical relevance, and indeed many people did not even know, until it became relevant for the purpose of state succession, which republican citizenship they held, this principle of legal continuity did not ensure that people acquired the citizenship of the republic with which they had the closest links.

Moreover, in Croatia and Bosnia-Herzegovina, the republics which had been most affected by the war, some people were unable automatically to acquire citizenship, despite having held the former republican citizenship, if they were unable to prove their former nationality because official records had been destroyed. Accordingly, because of the more or less exclusive application of the principle of legal continuity in Croatia, with no automatic right of citizenship given to legal residents who could not prove their former republican citizenship, UNHCR recommended that all those from those war-affected regions should be given the possibility to prove their Croatian republican citizenship through extraordinary means, including the use of testimonies. (see also 2.4.3 below)

In addition to the straightforward principle of legal continuity, some states adopted different approaches to granting nationality to residents not possessing the relevant republican citizenship. Bosnia provided citizenship automatically to all who were resident on 6 April 1992, and FRY (Serbia-Montenegro) offered it to all who were resident at the date of the adoption of the new Constitution (27 April 1992) on application within a one-year time limit

from the entry into force of the Citizenship Act. Other states, however, have adopted less generous provisions for offering citizenship.

Of the Baltic States, Lithuania, where the demographic effects of Sovietization were less pronounced than in Latvia and Estonia, and where Lithuanians constituted about 80 per cent of the population, adopted a modified version of the zero option approach. This in effect gave automatic citizenship to all who were resident in 1991 (those who had arrived in the country after 1940 simply had to undergo a special registration procedure). But in Estonia and Latvia, where in many regions of each country, particularly in urban areas, the titular (that is, Estonian or Latvian, respectively) population was in the minority, and in the population as a whole only a bare majority, the citizenship laws granted automatic citizenship only to those and their descendants who were citizens at the time of the Soviet occupation in 1940.

Complex naturalization procedures were established for other residents, who included people who had lived in Estonia and Latvia all their lives, and indeed many of whom had been politically active in the democratization movement at the end of the Soviet era. Important elements of the naturalization requirements were, in addition to a residence qualification, proficiency in the titular language and knowledge of the history and constitution. The language requirement in particular acted as a severe deterrent to many long-term residents naturalizing as citizens, particularly because during the Soviet era, and even after independence in many of the areas where the Russian-speaking population was predominant, the titular languages were not used in daily life (although nowadays the younger generation has the possibility to learn these languages in school).

Various mechanisms of the Conference on Security and Co-operation in Europe (CSCE<sup>6</sup>), the UN, and the Council of Europe at various times engaged in dialogue on these issues with the governments of Estonia and Latvia. While recognizing those states' wish to preserve their identity, of which in each case their unique language was an important element, and the special situation arising from those states having undergone an extended period of Soviet occupation, concerns were raised about the exclusionary effects of the citizenship laws. For example, the CSCE High Commissioner for National Minorities (HCNM) recognized the uniqueness of the language and its special place in Estonian culture, and that encouragement to learn the language as part of a policy of promoting access to citizenship could enhance the prospect that the population would develop a sense of loyalty towards Estonia, and that learning the language could be seen as evidence of a willingness to integrate into Estonian society. But among the points made by the High Commissioner and other international bodies was that, if some kind of language proficiency was to be required, the authorities must make proper provision for language classes at reasonable cost to enable residents to acquire the necessary proficiency, and also that the language test should be waived for older people and invalids or those with disabilities which would impede them from learning the language.

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<sup>6</sup> On 1 January 1995, the CSCE became the Organization for Security and Co-operation in Europe (OSCE).

Concerns were also raised that the language and civic knowledge tests were unreasonably difficult and required more than the basic proficiency which was reasonable in such circumstances.

### **2.4.3 *Establishing evidence of nationality or effective link***

In the case of the Nepali-speaking people from southern Bhutan currently in the refugee camps in eastern Nepal, the question arises of how to establish evidence of an effective link with Bhutan in cases where documentary evidence is absent or disputed. As shown in section 4 of this paper on repatriation programs, this is very common in situations where refugees have fled as a result of war or violence and records have been lost or destroyed (see, for example, the repatriation programs to Guatemala, Cambodia, and Namibia described in 4.4). In such instances the governments in the countries of origin have usually recognized that it is impracticable or impossible to insist on verifying the identity of each individual, and have instead accepted as reliable evidence UNHCR or other records taken in the country of asylum.

In other instances such as Viet Nam, where the government in the country of origin has insisted on verifying each individual before return, use was made of local records in the returnees' areas of former residence, so that even where people may have lost or no longer have their identity documents issued by their country of origin/return, their citizenship or effective link in that country could be established by other means. The lack of identity documents therefore does not need to be an obstacle if there is cooperation and good faith among the parties involved and a proper willingness to identify those people who have an effective link.

In some cases it may be necessary or possible to confirm former residence by means of documents other than official citizenship records, such as title deeds to property, or to rely on testimony from neighbours or others who can confirm the former residence of the individuals concerned.

The question of verifying citizenship has arisen in the former Yugoslavia, where in many cases local records have been lost or destroyed. The Principles on Citizenship Legislation concerning the Parties to the Peace Agreements on Bosnia and Herzegovina, adopted following a series of regional expert meetings organized under the auspices of the Council of Europe and UNHCR comprising representatives from the successor states of the Former Yugoslavia and from the OSCE, state in Principle 6:

“1. Where documentary information relating to citizenship is not accessible or cannot be obtained within a reasonable time by citizens of the former SFRY, each state shall allow such persons to provide this information by other means including statements made by or for such persons.

“2. Where the information given by the persons concerned shows that they are citizens of the state or qualified to obtain its citizenship, the state shall grant or confirm its citizenship in respect of such persons without delay.

“3. Where the citizenship status of refugees and displaced persons remains unresolved, additional measures shall be taken to facilitate the establishment of their citizenship.”

In Cambodia, following intervention by the Special Representative of the UN Secretary-General, the authorities agreed to use such methods to confirm the former residence of a group of around 4,000 Cambodians of Vietnamese origin whom initially they had not permitted to return. During the 1970s, Cambodians of Vietnamese origin, many of whose families had been settled in the country since the nineteenth century or earlier, were subjected to pogroms and expulsion. Many who fled at that time had returned to Cambodia, along with new settlers, after the 1979 invasion by Viet Nam. A prevailing anti-Vietnamese sentiment continued, encouraged or condoned by the authorities, and in the early 1990s ethnic Vietnamese were victim of many attacks attributed to the Khmer Rouge (PDK), where the authorities took little or no effective action to protect them.

Following one such massacre in Siem Reap in 1993, over 30,000 ethnic Vietnamese fled their home villages. Some of these people did not travel far, and chose to return home after a short period as internally displaced persons. Others reached the Vietnamese border, crossed and stayed in Viet Nam. But around 4,000 who fled as far as the border, but then wished to return to their homes were not permitted to do so. The Cambodian authorities claimed that they were Vietnamese with no history of residence or right to return. Their identity documents, issued under Cambodia's progressively more restrictive and ethnically discriminatory certification regulations, and which had effectively denationalized ethnic Vietnamese whose identity documents had for years previously designated them as Cambodian, stated that they were Vietnamese citizens.

In November 1994 an Amnesty International delegation interviewed a number of these people and found that they had a long-term history of residence in Cambodia; they spoke Khmer and some of them had identity documents -- by then regarded as invalid by the Cambodian authorities -- dating back to the time of the French protectorate. Amnesty International's delegation also visited the home areas of some of these people and inspected the local official records held there, which provided additional evidence of their long-term residence. Moreover their neighbours in their home areas could have confirmed that they had lived there for generations, but up to that time the authorities had not sought such confirmation.

The Special Representative of the UN Secretary-General recommended that the Cambodian authorities work in cooperation with UNHCR and the UN Centre for Human

Rights<sup>7</sup> and with the assistance of Cambodian NGOs in making a register of the families of Vietnamese origin, obtaining and giving proper consideration to the relevant documents establishing their long-term residence in Cambodia, and, in the absence of such documents, obtaining evidence from neighbours, friends or witnesses to substantiate their claims of long-term residence (E/CN/4/1995/87/Add.1, para 38).

In early 1995 the Cambodian authorities agreed to accept the assistance of UNHCR and the UN Centre for Human Rights in taking practical steps to resolve the issue. They established a screening program to check the documents offered as evidence of long-term residence, and to allow the people to return. In the case of those whose documents had been lost or destroyed, they agreed to accept as evidence of their history of residence statements made on their behalf by guarantors from their home villages. By early 1996, all the families had been able to return.

## **2.5 *Deprivation and renunciation of nationality***

This section considers the question of the deprivation of nationality by the state, and of the renunciation of nationality at the initiative of the citizen, and relates this to international standards. While in many states legislation on these matters provides for differential treatment between citizens by birth and naturalized citizens (with more restrictions on removing nationality from citizens by birth), there is growing consensus that principles of non-discrimination should be applied. For instance, the European Convention on Nationality provides that each state

“shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently” (Article 5).

### **2.5.1 *Deprivation of nationality***

The international standards relevant to deprivation of nationality are outlined above in section 2.1. There is a strengthening principle in international standards that prevents a state depriving someone of their nationality if it will result in statelessness.

Many states' nationality laws do provide for the state to deprive a person of citizenship in some circumstances, for example, for acts undermining the sovereignty of the state, such as dealing with the enemy in time of war, or on conviction for treason (as in the United States), but such provisions are quite limited in their application, and normally subject to legal challenge.

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<sup>7</sup> *The UN Centre for Human Rights was consolidated into the office of the UN High Commissioner for Human Rights in September 1997.*

With regard to deprivation of nationality for general criminal acts, one example is provided in the report on Human Rights and Arbitrary Deprivation of Nationality submitted by the UN Secretary-General to the 1999 session of the UN Commission on Human Rights. According to the United Kingdom (UK) Government's information contained in that report, UK legislation permits recently naturalized citizens to be deprived of citizenship if sentenced by the courts for a serious criminal offence; but this applies only to those who have naturalized within the past five years and not if the person thereby would become stateless. Moreover, the decision is subject to challenge, and the authorities have to demonstrate that it is in the public interest. The UK Government also comments that the power to withdraw nationality is regarded as one of last resort; it has not been used since 1983 and there were only ten instances under the preceding legislation from 1948 to 1983. (UN Doc. E/CN.4/1999/56, 28 December 1998, paras.31, 33)

With regard to deprivation of nationality on grounds of treason, undermining the security of the state, or similar acts, the Inter-American Commission on Human Rights examined this question in 1977 in relation to Chile, where a number of prominent opposition figures had been deprived of their nationality during the state of siege, on the grounds of allegedly "seriously damaging from abroad the essential interests of the state during .. states of emergency" (Chilean Government Decree No.175, 3 December 1973).<sup>8</sup> The Commission argued that a state of emergency, being by its nature transitory, could not justify a permanent measure such as deprivation of nationality (and, conversely, that any temporary deprivation of nationality commensurate with the timescale of a state of emergency would not make sense). The Commission considered both the human rights aspects of the measure and its effect on relations between states:

"... this right [to nationality] is properly considered to be one of the most important rights of man, after the right to life itself, because all the prerogatives, guarantees and benefits man derives from his membership in a political and social community -- the State -- stem from or are supported by this right. Because of its unique nature, there is almost no country in the world where the law uses or applies loss of nationality as a penalty or sanction for any kind of crime, much less for activities of a political nature. It is generally considered that since nationality of origin is an inherent attribute of man, his natural right, and is not a gift or favor bestowed through the generosity or

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<sup>8</sup> *The 1980 Constitution of Chile revoked this provision. The nationality of Orlando Letelier, former Minister of Foreign Affairs who was killed by a bomb placed in his car in Washington in 1976, was posthumously restored very shortly after the restoration of the civilian government in 1990. Subsequently the nationality of others whose nationality had been withdrawn around the same time was also restored.*

benevolence of the State, the State may neither impose it on anyone by force, nor withdraw it as punishment or reprisal.

“The deprivation of nationality ... always has the effect of leaving a citizen without a land or home of his own, forcing him to take refuge in an alien country. That is, it inevitably impinges on another jurisdiction, and no state may take upon itself the power to adopt measures of this sort. ... [T]he Commission believes that this penalty -- anachronistic, outlandish and legally unjustifiable in any part of the world -- is a thousand times more odious and reprehensible when applied in our own Americas, and should forever be banned from being applied by governments everywhere.” (Third Report on the Situation of Human Rights in Chile, IACHR OEA/Ser/L/V/II.40 Doc 10, 11 February 1977, pp. 80-1)

### **2.5.2 Renunciation of citizenship**

The Bhutan legislation contains a number of provisions whereby a person is deemed to have voluntarily surrendered their nationality if they leave their agricultural land or leave their country. A large number of the Nepali-speaking people from southern Bhutan currently living in refugee camps in eastern Nepal who now wish to return are alleged to have signed voluntary migration forms stating that they were leaving the country voluntarily, with the implication that they were willingly renouncing their nationality.

A number of the states whose nationality laws were considered in this study do contain some provision for assuming the renunciation of nationality if, for example, a person stays abroad for a number of years and takes no steps to indicate his or her wish to retain that nationality. This can be consistent with the notion of the effective link, if a person voluntarily absents himself or herself abroad over a long period, and takes no steps to maintain contact with the consulate of his or her country of nationality, for example in order to renew a passport. This is provided for in the European Convention on Nationality, which permits such loss of nationality if there is a “lack of a genuine link between the state ... and a national habitually residing abroad” (Article 7(1)(e)). But even in the case of a prolonged absence, a number of states, such as the United States, require an affirmative statement by the individual of his or her wish to renounce nationality. And even in cases where a person is presumed to have voluntarily renounced nationality, either by a prolonged absence, or by an affirmative statement, many states, in line with the principle in Article 8 of the European Convention on Nationality and Article 7(1)(a) of the 1961 Convention on the Reduction of Statelessness, do not permit such renunciation if it would result in statelessness.

With regard to the point that many of the Nepali-speaking people from southern Bhutan currently residing in the refugee camps in eastern Nepal allegedly signed voluntary migration forms and were provided compensation for selling their property at the time they left the country, there are numerous reports that make clear that in many cases, this was done

under severe duress.<sup>9</sup> In this regard, a provision in Annex 7 to the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement) explicitly states that no recognition should be given to any property transfers made under duress in the context of such people's expulsion and is currently proving a key factor for the refugees from the former Yugoslavia who are now seeking to return and regain their property. (see 3.5 below)

### **3. EXPULSION AND THE RIGHT TO RETURN**

The question of expulsion and the right to return are key to the situation of the people in the refugee camps in eastern Nepal and intimately linked to the issues of nationality dealt with in the previous chapter. In the case of the Nepali-speaking population of southern Bhutan currently residing in the refugee camps in Nepal, deprivation of nationality has been used as a justification for their expulsion - or it has been held to be a consequence of their having left the country and therefore a possible justification for denying their right to return.

This section describes the prohibitions of expulsion in international human rights standards and international law. Most fundamental of these is the right not to be expelled from one's own country, but human rights standards also provide protection to non-nationals or those who may not be habitual residents. This may be relevant in the case of the Nepali-speaking population of southern Bhutan whom the authorities have alleged were not Bhutanese nationals or lawful residents. This section also considers the other side of that equation -- the right to return to one's own country, which applies independently of the reasons for having left.

#### **3.1 *Prohibition on expulsion from one's own country, right to return***

It is a firmly established rule of international law that no state may expel its own nationals. Quite apart from violating the international human rights standards described below, it infringes the sovereignty of other states if a state expels or refuses to admit its own nationals.

Article 13(2) of the UDHR states that "Everyone has the right to leave any country, including his own, and to return to his country". Article 9 prohibits arbitrary exile.

While the International Covenant on Civil and Political Rights (ICCPR) does not expressly prohibit expulsion of nationals, this follows indirectly from the right to entry set out in Article 12(4), which states that: "No one shall be arbitrarily deprived of the right to enter his own country".

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<sup>9</sup> See AI report *Bhutan: Forcible Exile of August 1994* (AI Index: ASA 14/04/94)

It is significant that the right of entry to one's own country is not subject to the restrictions which can be applied to the right to liberty of movement within the state under Article 12(1) or to the right to leave set out in Article 12(2).<sup>10</sup>

The use of the term "right to enter" (rather than right to return) was to cover nationals of a country who have been born abroad and who may have never before set foot in the country whose nationality they hold (UN Doc. E/CN.4/Sub.2/1988/35, para.98).

The Human Rights Committee, in its General Comment 27 on Article 12 of the ICCPR, issued in October 1999, states:

"The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one's own country. It includes not only the right to return after having left one's own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person's State of nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries."

Article 12(4) of the ICCPR prohibits only "arbitrary" denial of the right to enter, which raises the question of what might amount to a "non-arbitrary" denial of this right. The drafting history shows that this wording was intended solely to cover lawful individual exile for those few states which still retained it as a criminal penalty. However, the drafters did not wish to go so far as to concede explicitly that exile might be permissible, so this form of words was used in order to cover it implicitly. In view of the drafting history, there is no doubt that the limitation on the right of entry expressed by the word "arbitrarily" relates solely to cases of lawful exile as a punishment for a crime, permitting no other form of denial of entry to those who fall within the scope of this provision.

The Human Rights Committee's General Comment 27 provides a detailed explanation of what constitutes arbitrariness in this context. Paragraph 21 reads:

"In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are

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<sup>10</sup> However, Article 12 as a whole can, in principle, be derogated from under the extreme circumstances provided for in Article 4 of the ICCPR, namely "in time of public emergency which threatens the life of the nation and the existence of which officially proclaimed.

few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."

The Committee also makes a point which is particularly relevant in the context of Bhutan:

"A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country."

The international treaties to which Bhutan is a party (CEDAW and the CRC) and the CERD to which Bhutan is a signatory reiterate the right to return in the particular contexts of those treaties.

At the regional level, protection against expulsion and the right to return are dealt with in Articles 2 and 3 of Protocol 4 of the European Convention on Human Rights, and in Article 22(5) of the American Convention on Human Rights. These provisions go further than the ICCPR in providing explicit protection against expulsion from one's own country (rather than simply leaving it to be inferred from the right to return). But they are narrower than the ICCPR in so far as these rights are explicitly limited to nationals. Article 12(2) of the African Charter does not restrict the right to return to nationals (although, unlike in the other treaties, this right appears to be subject to the same limitations as the right to leave).

The African Commission on Human and Peoples' Rights in May 2000 decided that Mauritania had violated, among others, Article 12 of the African Charter in a communication filed on behalf of thousands of black Mauritians expelled in 1989. The expulsion was triggered by a border dispute between Senegal and Mauritania in 1989 when, for a brief period of a few weeks, each expelled the other's nationals. The expulsions from Mauritania continued thereafter and were not limited to Senegalese but focused on Mauritians living in the south of the country. Estimates of the numbers expelled are as high as 100,000, around 10 per cent of the total population. The expulsions were associated with extreme human rights violations, including torture and extrajudicial executions, and most of those expelled had their Mauritanian identity papers destroyed at the time of their arrest and expulsion. Many were farmers in the fertile and relatively prosperous lands of the Senegal river valley, and many of the villages in that part of the country were subsequently resettled by members of the Moorish (Arab and Berber) ethnic groups originating from the north.

The government has stated that in principle those who wish to can return and have their citizenship restored. But while many have accordingly returned to Mauritania on an individual basis, numerous administrative obstacles have prevented all but a very few from being able to regain their nationality, with the rest remaining as stateless persons in their own country. Estimates of those remaining in Senegal are upwards of 15,000; they continue to press for a collective recognition of their citizenship and an organized return under the auspices of UNHCR, but the Mauritanian Government has continued to refuse to agree to this. The Senegalese Government has not been willing to grant them citizenship.

In its May 2000 decision, the African Commission on Human and Peoples' Rights urged Mauritania to "take diligent measures to replace the national identity documents of those Mauritanian citizens, which were taken from them at the time of their expulsion and ensure their return without delay to Mauritania as well as the restitution of the belongings looted from them at the time" of the expulsion.

In the case of the formerly deported peoples of the USSR who, at the time of their deportation in the 1940s, were displaced within their own country in the sense of the USSR, but far from their home republics, the right to return was later recognized by the USSR itself and, after dissolution, by the CIS states in, for example, the 1992 Bishkek Agreement on the situation of formerly deported populations, and reaffirmed in the Declaration of the 1996 CIS regional conference on refugees, displaced persons and other forms of involuntary displacement and returnees.

### **3.2 *One's "own country"***

Both the UDHR and the ICCPR refer to the right to enter one's "own country" (rather than the country of nationality). Because of the disputed nationality status of at least some of the Nepali-speaking people from southern Bhutan who are currently living in refugee camps in eastern Nepal (and in any other case where expulsion has been associated with denial or deprivation of nationality) the question of what is a person's "own country" is crucial to establishing their right to return. This applies not only to those who are alleged to have voluntarily surrendered their nationality by leaving the country or whose nationality status is otherwise disputed, but is important also because the successive nationality laws in Bhutan, and the way they have been applied, have made it difficult or impossible for many long-term residents of Bhutan who might have wished to become nationals to do so.

The notion of nationality is obviously the starting point for the interpretation of one's "own country". The draft of Article 12(4) of the ICCPR referred originally to the right of entry into "the country of which he is a national". But this was objected to by several states for whom the right to return was governed, not by rules of nationality or citizenship, but by the idea of a permanent home. So a compromise was reached based on UDHR Article 13(2) replacing the words "country of which he is a national" with "his own country". In the Third Committee of the UN General Assembly, however, in response to requests for clarification by some state delegates, it was explained that this was meant to denote the country of which one was a citizen. In support of the expansive interpretation of "own country" it has been suggested that the delegates in the Third Committee were unaware of the earlier debate on this matter in the UN Commission on Human Rights, and, further, that in the Third Committee debates some states (for example Saudi Arabia) expressed disagreement with this interpretation. Another view on this is that the drafters were not willing to make a firm decision either way, but left it to future practice and interpretation (UN Doc. E/CN.4/Sub.2/1988/35, para. 93).

For some years there has been a prevailing view in the writings of jurists that the wording which was finally adopted in the ICCPR guarantees the right of entry for those

persons who have established a “home” in a country other than that of their nationality, whether by birth or by long-term residence. Such include the children of immigrants and alien workers who were born in the host country and no longer have a home in their country of nationality, and immigrants who have lived many years, but who have not -- for whatever reason -- acquired the nationality of, the host country.

This interpretation is confirmed by the Committee of Experts of the Council of Europe who concluded that the scope of Article 12(4) is wider than that of Protocol 4 of the European Convention, such that it may include stateless persons and nationals of another state who have very close ties with the country in question. Crucially for the case of the Nepali-speaking people from southern Bhutan, this formulation also bars the practice of a state depriving a person of nationality for the purpose of expulsion as stated by the Human Rights Committee in paragraph 21 of General Comment 27, referred to above (see 3.1 above).

The Human Rights Committee, in its General Comment 27, issued in October 1999, provides authoritative clarification of the scope of the concept of “own country” in this regard. The Committee in paragraph 20 stated:

*“The wording of article 12, paragraph 4, does not distinguish between nationals and aliens (“no one”). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase “his own country”. The scope of “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien..... The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence...”*

The criteria to determine the effective link set out by the ICJ in the *Nottebohm* case (see 2.1 above) can serve as a basis for a determination of what is one's "own country". The most important of these is habitual residence, but they also include property, family, ties, centre of interests and intentions for the future. The longer an alien resides in a country the more difficult it becomes to expel him -- and in any event any such expulsion has to comply with the international standards on expulsion of non-nationals (see 3.6 below). After a number of years' residence an initially weak claim to residency matures into an immunity to expulsion identical to that of nationals, whether one has become a national or not, so the prohibition on expulsion of nationals extends to permanent resident aliens who have established such close links with their country of residence that they can consider it as their own country.

### **3.3 *The right to return after mass expulsion***

Authors differ as to whether the protection of Article 12(4) of the ICCPR applies to those who have been the subject of mass expulsion. The more restrictive view is that the right to enter one's own country was intended to apply to individuals, not to massive flows of those such as Palestinians or ethnic Germans displaced in the years after the Second World War as a result of war or political transfers of territory or population, and whose situations require large-scale political solutions. But this needs to be considered not just in terms of numbers but the nature and cause of displacement as well. In any case, other authors hold that the right of return applies even in cases of massive displacement. Moreover, the argument that large-scale displacements are excluded from the right to return is contradicted by international practice, as evidenced in consistent calls by UN bodies for the return of large numbers of refugees and displaced, such as Palestinians, Afghans and Greek Cypriots and, in the case of the former Yugoslavia, by the enforcement of the right to return in the Dayton Agreement (see 3.5 below).

### **3.4 *The right to return for refugees***

In cases where people have voluntarily absented themselves over a period of many years from their country of nationality or habitual residence, this may contribute to a weakening of the effective link. But the situation of refugees and those who have been expelled from their country, whose absence arises from factors beyond their own control, is quite different. Such persons retain the right to return to the country of nationality or former habitual residence, and the fact they may have been forced by circumstances to establish a second home country in the country of refuge should not be invoked for the purpose of preventing them returning to their "original home country", even if masses of people are claiming this right.

UNHCR ExCom Conclusions dealing with voluntary repatriation have reiterated the right to return:

“The basic rights of persons to return voluntarily to the country of origin is reaffirmed and it is urged that international co-operation be aimed at achieving this solution and should be further developed.” (UNHCR ExCom Conclusion No.40, para.(a)).<sup>11</sup>

The right of refugees to return has also been reiterated by the UN General Assembly, which, for example,

“Reaffirms that voluntary repatriation, when it is feasible, is the ideal solution to refugee problems and calls upon countries of origin, countries of asylum, the [UNHCR] and the international community as a whole to do everything possible to enable refugees to exercise their right to return home in safety and dignity” (UN General Assembly Resolution 50/152, para.17)

Even in situations extending over some generations, while the passage of time may alter the practical feasibility and political realities that determine how the right of return can be realized -- Palestinians being an obvious example -- it does not diminish the right itself. This is borne out in the repeated calls by UN bodies for the right to return of Palestinians, as well as the recognition of the right to return of the deported peoples of the USSR (see 3.1).

The right to return applies also to refugees who may have lost their nationality, who have not lost the bond with the country of origin and so have the right to return; UNHCR ExCom Conclusion 18 on voluntary repatriation adopted in 1980, moreover, calls on governments to arrange for nationality to be restored in such cases (see 4.1).

This was recognized in the November 1990 tripartite Chile-IOM-UNHCR repatriation agreement which provided for the return of refugees including “those persons who lost their Chilean nationality because they have acquired the nationality of their country of asylum or refuge” (Article II). That agreement thus provided for the return of refugees who, in many cases, had been absent from Chile for 17 years or more, and recognized the reality that, while in many cases such people would have forged links with their country of asylum, even to the extent of naturalizing as citizens, they had not thereby lost their links with Chile and their right to return. Moreover, a number of non-national former residents of Chile who had been expelled were permitted to return. (see also 2.5.1 and footnote 8).

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<sup>11</sup> *The Executive Committee of the High Commissioner’s programme (UNHCR ExCom) is an intergovernmental body, currently comprising around 50 states, which makes decisions (Conclusions) on specific aspects of refugee protection which are intended to guide UNHCR and states in protecting refugees. While the Conclusions are not binding on states in the same way as treaties, they represent the view of the international community and carry persuasive authority.*

### **3.5 *Return to one's home, compensation***

The right to return is considered as one of the “general principles of law recognized by civilized nations”, and the admission of nationals is recognized in the constitutions, laws and jurisprudence of most states (UN Doc. E/CN.4/Sub.2/1988/35, para.89). It is also recognized in international humanitarian law instruments, numerous UN General Assembly Resolutions, UNHCR Excom Conclusions, declarations and other instruments. All these lend support to the argument that the right exists in international law, even if its precise content is difficult to define.

More recently, and of more general application, the UN Sub-Commission, in its Resolution 1997/29,

“[a]ffirms the fundamental right of refugees ... to return voluntarily, in safety and dignity, to their countries of origin and, within them, to their place of origin or choice, and urges Governments to assist in and facilitate such return”.

The plain wording of the international and regional treaties provides simply for the return to a person's home country, but General Assembly or other UN resolutions adopted in specific instances clearly spell out the right of return to one's home.

With respect to Palestinians, in 1948 the UN General Assembly resolved that

“the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible” (Resolution 194, Article 11);

and in 1974 the General Assembly reaffirmed

“the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and call[ed] for their return” (Resolution 3236).

UN Sub-Commission Resolution 1998/26 on housing and property restitution in the context of the return of refugees and internally displaced persons,

“... Recognizing that the right of refugees and internally displaced persons to return freely to their homes and places of habitual residence in safety and security forms an indispensable element of national reconciliation and reconstruction ...

“Recognizing also the right of all returnees to the free exercise of their right to freedom of movement and to choose one’s residence, including the right to be officially registered in their homes and places of habitual residence ....

“3. Confirms that the adoption or application of laws by States which are designed to or result in the loss or removal of tenancy, use, ownership, or other rights connected with housing or property, the active retraction of the right to reside within a particular place, or laws of abandonment employed against refugees or internally displaced persons pose serious impediments to the return and reintegration of refugees and internally displaced persons and to reconstruction and reconciliation.”

This is a key element in respect of refugees returning to the former Yugoslavia, where Security Council Resolution 947 affirms the right of “all displaced persons to return voluntarily to their homes of origin in safety and dignity”. The UN Special Rapporteur on the former Yugoslavia has reiterated his support for “the right to return to one’s home of origin as a fundamental human right” (UN Doc. E/CN.4/1999/42 para.13).

Annex 7 of the Dayton Agreement, like a number of UN resolutions on the return of Palestinians, reiterates this and provides also for compensation in cases where people’s homes cannot be restored to them:

“All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.” (Article I(1), Dayton Agreement, Annex 7)

The Dayton Agreement (Article VII) established an independent Commission for Displaced Persons and Refugees with the mandate to

“resolve and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return”. (Article XI)

One provision whose underlying principle could be of relevance to the many Nepali-speaking people from southern Bhutan currently living in refugee camps in eastern Nepal who state they were coerced into signing statements of voluntary departure, states:

“In determining the lawful owner of any property, the ... Commission shall not recognize as valid any illegal property transaction, including any transfer that was made under duress ...”. (Article XII(3))

### **3.6 *Limitations on expulsion of non-nationals***

### **3.6.1 Arbitrary expulsion**

Article 13 of the ICCPR states that

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority”.

These procedural guarantees expressly apply to an “alien lawfully in the territory”, but in practice it is not possible to make a clear-cut distinction in this respect between the treatment to be accorded to lawful aliens and to others. The Human Rights Committee, in its General Comment 15/27 on the position of Aliens under the Covenant, has stated that

“if the legality of an alien’s entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with Article 13” (para.9).

Even for those states which are not party to the Covenant, a procedure to question the legality is a logical corollary of the prohibition on arbitrary expulsion; to that extent Article 13 is a reflection of customary international law. It has also been argued that the wide acceptance of the ICCPR, and the small number and nature of the reservations to Article 13, indicates that the procedural guarantees it enshrines are at the very minimum emerging norms of customary international law. One author has stated the view that there is no doubt that the core of Article 13, prohibiting arbitrary expulsions, has acquired the status of customary international law, while the second part, setting out procedural guarantees, is an emerging norm (Henckaerts, 1995).

The African Charter, in Article 12(4), states that

“A non-national legally admitted in a territory of a State Party to the present Charter may only be expelled from it by virtue of a decision taken in accordance with the law.”

Article 22(6) of the American Convention contains a very similar provision. Protocol 7 of the European Convention on Human Rights contains, in Article 1, protection against arbitrary expulsion of legal aliens which closely reflects the provisions in Article 13 of the ICCPR.

The procedural standard set out in the ICCPR is also now laid down in Article 22 of the UN Convention on Migrant Workers and Members of their Families, which is a clear statement of the current position of international law with respect to the expulsion of legal and illegal aliens, migrant workers or others. In some countries it is evident that the authorities

have tolerated irregular migration for a period -- for example, when labour is needed for economic development -- but then have cracked down on those migrants at a later date. In such instances, the requirement of the interpretation of treaties in good faith means that states cannot knowingly condone or fail to prevent illegal migration or tolerate the illegal status of migrants at an early stage, then later invoke their illegal status in order to justify expulsion.

### **3.6.2 Mass expulsion**

In any case of mass expulsion there is a presumption that the expulsion is tainted with discrimination, arbitrariness, and therefore inherently unlawful. It is inherently arbitrary because, among other things, it is impossible to tell whether among those so expelled are some who are legal residents; moreover its collective nature makes it virtually impossible for the state to provide the necessary procedural guarantees. Practice shows that, even in instances where a mass expulsion is purportedly aimed at irregular aliens, legal residents or nationals, or both, are often caught up in such expulsions.

The ICCPR contains no express prohibition on the collective expulsion of aliens. But the Human Rights Committee has stated that, while Article 13 directly regulates only the procedure and not the substantive grounds for expulsion, it entitles each individual to a decision in his or her own case and so does not permit laws or decisions providing for collective or mass expulsions (General Comment 15(27), para.10, adopted in 1986). So, while the ICCPR does not expressly prohibit mass expulsion, the procedural guarantees it requires prohibit that which characterizes it.

Mass expulsion is expressly prohibited under the regional instruments. Article 22(9) of the American Convention and Article 4 of Protocol 4 to the European Convention both state that “collective expulsion of aliens is prohibited”. Article 12(5) of the African Charter prohibits, and defines, mass expulsion of aliens:

“The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”

The expulsion of Haitians from the Dominican Republic in 1991 (which has resumed from time to time since), and the comments on it by the Inter-American Commission on Human Rights, illustrates some of the other human rights violations likely to arise in cases of mass expulsion. Over the years, large number of Haitians have migrated to the Dominican Republic to work on the sugar plantations, and some have been recruited specifically for the purpose. Many have lived there for generations. The population of Haitian origin was a mix of migrant workers, many of whom had lived in the country since childhood, and Dominican citizens, some of whom had citizenship papers, while others, even though lacking such papers, had been born in the Dominican Republic and so had a right to citizenship under the Constitution. In June 1991 the Dominican authorities issued Decree No.233/91, ordering the deportation of any undocumented Haitian aged under 16 and over 60. This led to collective expulsions of people of Haitian origin of all ages.

In August that year a delegation of the Inter-American Commission on Human Rights undertook an on-site mission to look into the situation. In reference to the Dominican Government’s arguments that the expulsions were conducted under the Dominican state’s sovereign law, the delegation stated:

“This is not something that can be viewed solely from the angle of sovereignty. We understand, of course, that every State has the authority to take decisions regarding aliens within its territory, but when doing so consideration must be given to the length of time those aliens have been in the country; the activity they have engaged in; whether or not they were born there; ... when they have had to leave the country so abruptly, something that after living there so many years had never even occurred to them ...”. (Inter-American Commission on Human Rights Annual Report 1991, OEA/Ser.L/V/II.81.rev.1 Doc.6, 14 February 1992, p.263)

The Commission found a violation of Article 22(9) of the American Convention, prohibiting the collective expulsion of aliens. Their other findings, expressed in terms of breaches of particular provisions of the American Convention, illustrate the closely-interlinked violations which are likely to occur in situations of mass expulsion.

“... the facts .. violate Article 22(5) [prohibiting expulsion of nationals] to the extent that the indiscriminate roundups and deportations in many instances cause the expulsion of individuals born in the Dominican republic [who] have the rights and attributes of citizenship, even if they are not able to prove it. They also violate Article 22(6) [expulsion of aliens only pursuant to a decision reached in accordance with law] to the extent that Haitians who could prove their status as residents are also deported without due legal process that would enable them to prove that they are not in violation of [the immigration law]. ...

“The way in which the expulsions were being carried out violates Article 8(1), which establishes the right to due process of law in determining the individual’s rights. ... This provision obliges the Government ... to consider the individual situation of persons accused of violating the Immigration Law and to grant them the right to present their defence in the framework of a formal hearing.

“Article 25 of the Convention [right to judicial protection] is also violated due to the hasty way in which the repatriations were carried out, which completely deprived those involved from any access to a judicial recourse to determine whether they had the right to remain in the country.”

The Commission also found that the expulsions had brought about the forced separation of families, in violation of Article 17(1). (OEA/Ser.L/V/II.81.rev.1 Doc.6, pp.277-8)

#### **4. REPATRIATION PROGRAMS**

Verification of refugees prior to their repatriation has not usually been undertaken as part of repatriation programs, either because neither party contested the status of the refugees or any disagreements were sorted out during the process of negotiations on the return.

The main exception where the authorities in the country of return undertook their own verification were the return programs to Viet Nam and Laos under the 1989 Comprehensive Plan of Action. The issue also arose, up to a point, in the return program to Namibia in 1989. However, in these repatriations the refugees had not been subject to measures of formal or informal expulsion from the country they had fled, so it is doubtful to what extent they can be compared with the situation of the Nepali-speaking people from southern Bhutan currently living in refugee camps in eastern Nepal.

This section first describes the provisions made in a number of repatriation agreements for establishing the identity of those who return. It then describes provisions which have been made for the return of non-national spouses, or where children born in the country of asylum may not automatically acquire the parent's citizenship.

That is followed by a section on the principle of return to the former place of residence or other place of the returnees' choice, which may shed some light on possible practical approaches that might be applied in the case of the people currently living in refugee camps in eastern Nepal.

Following the general discussion of these three questions is a description of relevant features of the repatriation programs to Viet Nam and to Laos under the Comprehensive Plan of Action, to Namibia from Angola, to Cambodia from Thailand, and to Guatemala from Mexico.

#### ***4.1 Verification of nationality or other status and right to return***

UNHCR's 1996 Repatriation Handbook does not deal with verification of nationality or other status in the country of origin; it appears to be assumed. The Handbook indicates that the UNHCR Voluntary Repatriation Form (VRF) is usually regarded as sufficient documentary evidence by the country of return. The model repatriation agreement set out in the UNHCR Repatriation Handbook states:

“Duly completed Voluntary Repatriation Forms (VRFs), the format of which shall be mutually agreed upon by the Parties and UNHCR, shall be recognized by the Parties as valid identity documents [in the country of asylum and in the country of origin] and as travel documents for the purpose of the refugees' return to their final destinations in [the country of origin]” (Article 17.2).

This is reflected in a number of the repatriation agreements considered here (Cambodia, Mozambique, Namibia) which state explicitly that a UNHCR voluntary repatriation form will be accepted by the country of origin/return as an identity/travel document for the returnees. Even in cases where this might not have been stated so explicitly in a repatriation agreement, in practice the link to the country is usually assumed in the case of people who have registered as refugees with UNHCR or other appropriate body in the country of refuge, with those

records accepted as sufficient evidence of the person's identity and right to return to the country of origin in the context of a repatriation program.

In the event that the authorities in the country of origin/return do not agree to accept the UNHCR repatriation form as sufficient evidence of identity for the purpose of return, UNHCR simply reiterates the provision set out in ExCom Conclusion No.18 that "the country of origin should provide repatriating refugees with the necessary travel documents, entry permits, and any other documentation required for return" (Repatriation Handbook Chapter 2.6). In this connection it should be noted that the Repatriation Handbook also states that in negotiating repatriation agreements "core protection elements" to be included are "[a]ssurances of ... access to official documentation and citizenship including for children born abroad" (Chapter 3.6), and that "[w]here refugees have lost their nationality, the country of origin should arrange for its restoration" (Chapter 2.6).

The March 1993 Memorandum of Understanding (MoU) between UNHCR and the Government of Mozambique contains no provision for Mozambique to undertake identity checks or verification of the nationality of those who return under the repatriation program. In line with the principles set out in UNHCR's 1996 Repatriation Handbook it waives the normal immigration and customs formalities for returnees (Article 4). The associated tripartite agreement with Zimbabwe states that "the parties will waive, simplify or reduce to a minimum their respective immigration, customs and health formalities to enable ... the use by refugees of duly completed and certified voluntary repatriation forms or other simplified procedures as travel documents in lieu of passports" (Article 12). The associated tripartite agreement with Malawi contains substantially similar provisions (Article 7).

The 1991 Letter of Understanding between UNHCR and Guatemala likewise contains no provisions for the Government of Guatemala to verify the identity, nationality or other status of the returnees, nor does it contain any provision for documenting the returnees prior to return. It does contain a provision in Article 7 for the documentation of returnees, although it is clear that this applies to after, not before, return (see 4.4.4 below)

The 1991 tripartite agreement for the return of Cambodians from Thailand stipulates that UNHCR in consultation with the Thai Government was responsible for registering the camp population and providing them with documents reflecting their civil status and any changes to it (such as births, marriages, divorce) which took place in Thailand. These documents were to be recognized by the contracting parties as valid identity documents, and as travel documents for the purpose of travel to Cambodia (Article 11).

The 1988 UNHCR MoU with Viet Nam was exceptional among those considered in that it contains an annex which explicitly sets out procedures by which the Government of Viet Nam would verify each returnee before giving clearance for return.

Relevant features of the Cambodia, Guatemala and Viet Nam repatriation programs are described in more detail below (see section 4.4 below).

#### **4.2 *Children born abroad and family members who are non-nationals***

Most of the repatriation agreements considered contain provisions for non-national family members to have the right of entry or return, and, where appropriate, for facilitating their acquisition of citizenship. The UNHCR Repatriation Handbook states that “the country of origin should arrange for ... granting [nationality] to children born outside the territory and, as appropriate, to non-national spouses” (Chapter 2.6).

Article 10 of the 1993 MoU between UNHCR and Mozambique states that

“1. In order to preserve the unity of the family, the spouses of returnees and/or children who may not themselves be citizens of Mozambique shall be allowed to enter and reside in Mozambique as part of such returnees’ families. Accordingly the Government shall regularize their residence in Mozambique in accordance with the provisions of its immigration or other relevant laws.

“2. [This] shall also apply to non-Mozambican spouses and/or children of deceased Mozambican refugees who may wish to enter and reside in Mozambique in order to preserve their family links”.

In Central America, the Concerted Plan of Action adopted by the 1989 Conference on Central American Refugees (CIREFCA) stated that voluntary repatriation programs would aim at regularizing the situation of returnees with regard to the delivery of identity documents and registering changes in civil status which had taken place in the country of asylum. The programs would also provide access to citizenship for children of returnees born abroad, as well as for foreign spouses when they so desire (CIREFCA Plan of Action, Article 22). The November 1991 Letter of Understanding between Guatemala and UNHCR includes an undertaking by the Government of Guatemala to provide support for the speedy and complete documentation of returnees as well as all children born abroad. Partners or spouses of a different nationality would be provided with full facilities to reside legally in the country preserving the family unit (Article 7).

The tripartite agreement covering returns from Thailand to Cambodia contains no precisely parallel provision. Article 10 stipulates that “All juridical status of Cambodian refugees and displaced persons, for example, births, deaths, adoptions, marriage, divorce, which occurs in Thailand shall be recognized in Cambodia”, and Article 12 provides for the repatriation to take place as far as possible in family units or, where that is not possible, for family reunification to take place once in Cambodia.

#### **4.3 *Choice of residence, restoration of property, access to land***

UNHCR ExCom Conclusion 40 states that repatriation should be “preferably to the place of residence of the refugee in his country of origin” (paragraph b).

UNHCR’s Repatriation Handbook states that the core protection elements which must be negotiated in repatriation agreements include “[a]ssurances of no unjustifiable interference in refugees’ free choice of destination and place of residence in their home country” and “[f]reedom of movement in accordance with national laws” (Chapter 3.6). It also states that consideration must be given to the issue of returnees’ access to residential and, where appropriate, agricultural land as a “key resource for returning refugees”. It recognizes that “the question of land use and land rights is a contentious and difficult one in the aftermath of conflict, [where] land previously occupied by returning refugees may have been sold or ‘repopulated’. ... UNHCR must attempt to protect the interest and legitimate rights of returnees with regard to access to land ...” (Chapter 6.2)

Most of the repatriation agreements considered provide for repatriates to return to their former homes or appropriate alternative, or to another place of their choice, although there is some variation in the formulations used.

The 1993 UNHCR MoU with Mozambique confirms the right of returnees to “return to their former places of residence or to any other places of their choice within Mozambique” and states that “the government shall ensure that returnees have access to land for settlement and use, in accordance with Mozambique laws” and “the government shall ... provide appropriate assistance to returnees who attempt to recover their lost property” (Article 5).

The Cartagena Declaration on Refugees, adopted by governments of Central American countries in 1984, asserts the principle that repatriation should be “preferably to the place of residence of the refugee in his country of origin” (Conclusion 12). The Concerted Plan of Action adopted by the 1989 CIREFCA Conference on Central American Refugees reiterates that voluntary repatriation programs would reflect respect for the principle that refugees should be able to choose their destination in their countries of origin, as well as freedom of movement and free choice of the place of residence, and access to means of subsistence and to land, under the same conditions as nationals of their countries (CIREFCA Plan of Action, Article 21(d) and (f)). The November 1991 Letter of Understanding between Guatemala and UNHCR contained a guarantee by the Government of Guatemala that the returnees could freely and without pressure elect the location where they decide to reside, whether individually and/or as family units, or collectively. The government also undertook to provide those returnees who were without land when they left the country with access to land on the same basis as other nationals. For those who formerly had rights to land, the government undertook to do all in its power to guarantee that they could recover and register it, or, by agreement with the current occupiers, be compensated with land similar in quality and location to that previously occupied (Articles 3 and 6).

In the 1991 MoU governing the return of Cambodians from Thailand, the contracting parties undertook to prevent any attempt by any side to interfere with the free choice of

destination in Cambodia (Article 3). (In fact, so many people opted for a UNHCR repatriation package of land in Battambang province that it was not possible to fulfil all the requests, and they had to be given the cash alternative. But the principle of free choice of destination was maintained.)

The 1988 UNHCR MoU with Viet Nam states, in Article 3b) that “The [Viet Nam government] will ensure that such persons will be allowed to return to their place of origin. If [this] is not feasible, they will be allowed to return to a comparable place of their choice subject to the approval of the authorities”. (Consistent with the agreement as a whole, this is couched in terms of the authorities permitting return, rather than in terms of any inherent right of the returnees to return.)

The right to return to one’s former home is also a key element in Annex 7 of the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement). It relates to a situation where there was systematic dispossession and resettlement of the areas which the refugees had fled. This, and a more general discussion of the right to return, particularly following expulsion, is covered in section 3.3 above.

#### ***4.4 Some points from specific repatriation programs***

##### ***4.4.1 Comprehensive Plan of Action (CPA): returns to Viet Nam and Laos***

The authorities in Viet Nam from the outset stressed that they would examine each case of those refugees who wished to return. As far back as 1975, when it requested UNHCR to promote voluntary repatriation, the government emphasized that authorization for return fell within the government’s sovereign rights, and that each case would need to be examined (statement to UNHCR ExCom, A/AC.96/521, para.105). The December 1988 UNHCR-Viet Nam Memorandum of Understanding, which was confirmed in the June 1989 Comprehensive Plan of Action, is couched in terms of the Viet Nam authorities authorizing return, rather than in terms of any right of the refugees to return.

The annex to the 1988 MoU sets out the procedures for verification before return would be authorized. These procedures include that UNHCR will send each applicant’s dossier to the authorities in Hanoi for verification (Article 3), and, if cleared for return, travel documents would be issued by the consular authorities in the country of asylum (Article 4). Moreover, the MoU, unlike a number of other repatriation agreements and the model agreement in UNHCR’s Repatriation Handbook, contains no reference to the waiver of customs and immigration formalities and regulations. All returnees had to abide by these formalities in the same way as any other Vietnamese nationals returning to the country.

Although not stated explicitly in these documents, in practice the verification related to those of mainly Chinese origin who had not accepted Vietnamese citizenship. Those ethnic Chinese who settled in Viet Nam during the last few centuries, had, while maintaining their customs, culture and language, become Vietnamese citizens. Many sought asylum in the 1970s and 1980s in first asylum countries in South-East Asia. Those who were screened out

under the CPA and returned to Viet Nam have not, to the knowledge of UNHCR, faced any problems in reintegration, and have been able to obtain their family registration (*Ho Khau*) in the same way as any other returnees.

Some ethnic Chinese, however, arrived in Viet Nam more recently, having fled China during the 1949 Revolution. In the 1950s Taiwan offered them Republic of China (RoC) citizenship. Those who accepted this offer were issued aliens' cards by the local Vietnamese authorities in the expectation that they would eventually move to Taiwan (although to date they have not been accepted for resettlement to Taiwan and it is unlikely that they will ever be so accepted). The concept of the "Taiwanese Chinese" was maintained by the Viet Nam Government after 1975, who issued those concerned with temporary residence permits subject to renewal every six months by the local police. Their children too are registered as aliens, and at the age of 16 are issued their own alien's card. In terms of the citizenship law of the RoC, these children inherit citizenship according to the principle of *jus sanguinis*. The unofficial Taiwanese consulate in Viet Nam has continued to renew their passports on request, although these passports do not confer the right to settle in Taiwan.

Others among the ethnic Chinese of 1949 origin did not take up the offer of RoC citizenship and applied for, and were granted, Vietnamese citizenship. Others who applied for Vietnamese citizenship were, for some reason, refused, and others did not apply for either Taiwanese or Vietnamese citizenship; these two groups remain without any documentation of either citizenship.

All of these four groups of Chinese of 1949 origin were included among the people who fled Viet Nam and some of them eventually came to apply for return under the CPA. The Vietnamese authorities cleared for return all those who had been granted Vietnamese citizenship. In addition, they cleared around 200 people from the other three categories, on an exceptional basis (though it is not clear what criteria they applied when clearing some and not others in these groups). But most individuals falling within these three categories were considered as "non-nationals" by the Vietnamese authorities and refused clearance for return.

The matter was complicated by instances where some people in first asylum countries initially claimed to be RoC nationals, apparently in the hope of being refused clearance for return and so improving their chances of third country resettlement. The Viet Nam authorities stated that if such individuals reapplied as Vietnamese nationals, they would be accepted for return. When such individuals did provide information which enabled the authorities to confirm that they were Vietnamese citizens, they were cleared for return.

At the time the refugee camps were closed in June 2000, there remained about 300 of these "non-nationals" in Hong Kong, and a number in other first asylum countries in the region, who had not been cleared for return by the Viet Nam authorities. The Hong Kong authorities at the same time granted all the remaining "non-nationals" permanent residency.

In the case of returns to Laos from China, a China-Laos-UNHCR memorandum of July 1991 states the principles for repatriation but makes no mention of approval by the Laos Government. There is no formal agreement for returns to Laos from Thailand, which are governed by procedures agreed in various tripartite meetings from 1989 to date; the meeting notes do not specifically state that the government reserves the right to screen returnees, but this is simply implied in the procedures agreed. In the early years of the repatriation (1990-1), there were some delays in the approval of applications; in some cases this was due to lack of logistical support for transporting returnees, as well as strict requirements by some provinces in accepting people for return. However, since 1994 the process has moved more quickly. To date around 28,000 people have returned to Laos from Thailand (the vast majority), China and third countries, with only very few cases questioned by the authorities on grounds of nationality. Many or most that have been questioned have been subsequently resolved and so cleared for return.

#### **4.4.2 Namibia**

At the time of the repatriation to Namibia from Angola, the country was still administered by South Africa, which had, however, accepted the principle that it should become independent according to the terms of UN Resolution 435. The repatriation took place ahead of elections scheduled for November 1989. Given the particular nature of Namibia's transition, it is not a directly comparable example for the situation of the people from southern Bhutan currently living in refugee camps in eastern Nepal. Nevertheless, it is worth examining because it is one of the return programs where the possibility of disputed nationality claims is mentioned in the repatriation agreement, even though it does not appear to have become an issue in practice.

A Protocol was concluded in March 1989 between SWAPO (as representatives of the refugees), UNHCR and the Government of Angola, where the refugees had been in exile. In addition UNHCR undertook bilateral consultations with the Government of Angola regarding the repatriation of those refugees who were not SWAPO affiliates. UNHCR also entered into separate agreements with South Africa on procedures for the entry and reception of Namibian exiles and on UNHCR's role in promoting the voluntary repatriation.

In the negotiation of the repatriation program, the South African authorities had initially attempted to insist that the Namibian citizenship of returnees was certified by their respective tribal chiefs. However, the South Africa-UNHCR agreement itself states that the (South African) Administrator General accepted the UNHCR Voluntary Repatriation Registration Form (VRRF) as a valid travel document for the purpose of returning to Namibia (Article 6). It also states (Article 7) that no returnee will be required to fill out any arrival or any other form. The UNHCR-South Africa agreement on the role of UNHCR states that the government undertakes to accept the validity of unexpired travel documents issued under the auspices of the UN or the ICRC, and that an authenticated UNHCR voluntary repatriation form shall serve as a one-way travel and identity document (Article 17).

The agreement also states (Article 26) that persons crossing the border claiming to be Namibian exiles but without the VRRF would not be turned back, but arrangements would be made for them to be interviewed by UNHCR who, if satisfied that they are genuine Namibian exiles, would ask them to complete the VRRF and then refer them to Namibian immigration officials for processing. Unusually among the repatriation agreements studied, this agreement does mention the possibility of disputed nationality claims, but says that they “will not serve as a basis to bar repatriation or deny admission into Namibia if the applicant can establish to the satisfaction of UNHCR that he was a former habitual resident of Namibia prior to his exile” (Article 18). Thus, it seems clear that the authorities in the country of origin/return were willing to recognize UNHCR’s registration as evidence of the returnees’ link to Namibia and their right to return.

#### **4.4.3 Cambodia**

Article 11 of the Thailand-Cambodia-UNHCR MoU stated that the documents issued to the returnees in the course of the registration exercise carried out by UNHCR in consultation with the Thai Government would be recognized as identity and travel documents. Children born and registered in the camps were recognized as having the right to return, pursuant to Article 10.

There was no citizenship verification for the returnees to Cambodia from the Thai camps -- indeed, it would have been virtually impossible to conduct such a verification since most records had been destroyed by the Khmer Rouge. Once the returnees reached the reception centres (transit centres) in Cambodia, however, their papers were checked and this enabled the authorities also to carry out some kind of security screening of those who had been in camps under effective Khmer Rouge control or who were suspected of having former Khmer Rouge links, some of whom returned to Khmer Rouge-held areas out of the control of the Cambodian authorities. Moreover, the Thai and Cambodian authorities, as well as the other parties to the Paris Peace agreement, saw the advantage of ensuring that as many people as possible returned from Thailand, rather than remaining in the border camps where they might have posed a security risk. Few of the returnees had any personal documentation except the UNHCR registration forms which required simply the following information: name, sex, age, place of birth, UNHCR or UN Border Relief Operation ration/registration number, reception (transit) centre and intended destination. There may have been some cases where the Cambodian authorities in the reception centres raised some questions in certain cases, but this would probably have been for security reasons (see above), or arising from anti-Vietnamese sentiment (see below); in any event no cases were known to have been refused for return. In fact, with the massive rate of return (40,000 people per month at one stage) a systematic verification would not have been feasible, even had the Cambodian records not been destroyed.

However, while there was no systematic verification of those returning to Cambodia en masse from Thailand, the situation was complicated because a very small number of those in the camps in Thailand who, out of fear or for other reasons, did not wish to return to

Cambodia, were able to transfer to other camps for Vietnamese, where they entered the CPA screening program. Many such people were of Chinese or Vietnamese ethnic origin who had lived at different times in Viet Nam and in Cambodia. There may have been some among this group who had lived for a longer time in Cambodia, and for whom Cambodia could have been regarded as their own country, but it is not known if any clear data are available on this.<sup>12</sup> Some such people were resettled as refugees under the CPA, and some who were screened out apparently eventually returned to Viet Nam.

In other first asylum countries in the region there were Cambodians of Vietnamese or Chinese ethnic origin, who had fled from Cambodia to Viet Nam during the Khmer Rouge period and then fled Viet Nam and ended up in the camps for Vietnamese in the region. Some were resettled as Vietnamese refugees under the CPA. Others, after assessment by Cambodian officials, were accepted for return to Cambodia. Others, who were not accepted for return by the Vietnamese or the Cambodian governments, were eventually recognized as effectively stateless and resettled elsewhere. However, a number of Cambodians of ethnic Chinese origin who had remained in refugee camps in Viet Nam, and who were not formally cleared for return by the Cambodian authorities, nevertheless returned across the open border of their own accord, and apparently faced no particular problems with the authorities after return.

#### **4.4.4 Guatemala**

The repatriations from Mexico to Guatemala took place in several stages over a period from 1984 onwards, while the conflict in Guatemala still continued. Before 1987 those repatriating did so spontaneously; UNHCR had no presence in Guatemala at that time and once past the border there was no international monitoring or assistance. In 1987 Permanent Commissions representing the refugees were established to negotiate on their behalf and on the government side a government repatriation agency was established, with UNHCR involvement.

In the early years those repatriating did so spontaneously and in small groups, but at the end of 1991 a Letter of Understanding was signed between UNHCR and the Guatemalan Government, recognizing the right of the refugees to return in a collective and organized manner. In 1993 the first mass repatriations took place.

There is no indication that verification of nationality, former residence or other status in Guatemala was an issue, and in any case, the population of Guatemala as a whole was not documented. Most of the refugees were indigenous with a weak sense of national identity as Guatemalans -- their closest identity was with the area where they lived and in particular with

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<sup>12</sup> This should be seen against the context of the fluidity of the population in southeast Asian countries, arising from traditional migration patterns and, particularly, the displacement caused by the war and other upheavals of the 1960s to 1980s. Many people in the region had been on the move for many years and may have resided in two or three countries at different times in their lives.

their land. From the point of view of the authorities, the main concern regarding the returnees was security and their perceived support for the guerrillas. The Guatemalan Government never contested that those who were registered as refugees in Mexico had indeed come from Guatemala, and accepted the registration undertaken by the Mexican Government or by UNHCR as sufficient evidence of their identity and right to return.

In view of the lack of documentation of most of the refugees at the time they fled -- which was common to the Guatemalan population as a whole -- it was recognized that documenting the returnees was an important part of the repatriation and reintegration strategy. Article 7 of the 1991 UNHCR-Guatemala Letter of Understanding stated "The Government of Guatemala ... will provide all its support for the speedy and complete documentation of returnees as well as all children born abroad. ... UNHCR ... [will] provide needed support to the pertinent state entities and instrumentalities to ensure that the latter [possesses] such infrastructure as may be necessary to carry out the terms of this commitment". Pursuant to this, UNHCR, in agreement with the Guatemalan Government, established a project to document all those who had returned over the years. This project was being actively implemented by 1997 (UN Doc. EC/47/SC/CRP.43). Although this provision in the Letter of Understanding and the UNHCR documentation project focussed only on the documentation of the returnees, it may have had a catalytic effect in encouraging the new law on personal documentation, applicable to the population as a whole, approved by the Guatemalan Congress in October 1997.

The question of the Guatemalan citizenship of the children born in the camps and of foreign spouses was already addressed in general terms in Article 22 of the CIREFCA plan of action (see 4.2 above); Article 7 of the 1991 UNHCR-Guatemala Letter of Understanding provides for the return and lawful residence of non-Guatemalan partners and spouses. The Letter of Understanding does not explicitly provide for the citizenship of children born in the camps, but this would have been unnecessary, since Article 144 of the 1985 Guatemala Constitution provides that children born abroad of Guatemalan parents are Guatemalan nationals.

Some of the Guatemalan refugees in Mexico, however, having been there for almost a generation and in some cases having married and established families with Mexicans and become integrated into local communities, did not wish to return to Guatemala. The children who had been in Mexico were in any case entitled to Mexican citizenship by birth under the principle of *jus soli*. The Mexican Government's migratory stabilization plan for Guatemalan refugees, announced in August 1996, granted legal immigrant status in Mexico to those who did not opt for voluntary repatriation and afforded accelerated naturalization procedures to those with Mexican spouses or children (UN Doc. EC/47/SC/CRP.43). However, it is important to distinguish this situation from that applying to the people in the camps in Nepal, since the Guatemalan refugees had not been subject to formal or informal measures of expulsion or deprivation of their Guatemalan citizenship, and they had the opportunity of returning to Guatemala had they wished to do so. The Mexican offer of settlement and citizenship applied only to those who had expressed a wish not to return to Guatemala.

The main issue from the point of view of the returnees to Guatemala, especially in the early stages, was access to land, as is evident from the prominence given to this question in the 1991 Guatemala-UNHCR Letter of Understanding. During the 1980s, the Guatemalan Government's policy was that all returnees had to apply for amnesty and were then settled by the army in "development poles" or model villages. While in some cases refugees were able to recover their land if it had remained idle because of the conflict, more often the land had been occupied by displaced peasants (who were moved to these areas by the army for security reasons) or by larger landholders. This applied in particular to the lands which had been formed into cooperatives and had been the centre of conflict in the 1960s. Problems in recovering land were often exacerbated by the difficulty of proving legal ownership even though the land may have been in the family for generations -- many people had lost title deeds and municipal records of land holdings had been destroyed during the conflict.

The 1991 Guatemala-UNHCR Letter of Understanding contained a government guarantee that returnees who had no land when they left the country would have access to land on the same basis as other nationals, and that those who formerly had rights to land would receive government assistance in recovering it or obtaining land similar in quality and location by way of compensation (Article 6). In 1992 an agreement was signed between the Permanent Commissions of the refugees and the Guatemalan Government whereby the government undertook to enable the refugees either to recover their former lands or to purchase new land. But even after this the pace of return was slow, largely because of the government's failure to implement this aspect of the agreement effectively.

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Amnesty International hopes that this summary of international law, standards and practice in relation to issues of nationality, statelessness and repatriation will be given full consideration by Nepal and Bhutan in their negotiations to find a clear and fair solution within a reasonable time to the situation of the people claiming to be from Bhutan who have been residing in refugee camps in eastern Nepal for nearly ten years. The organization also hopes that this report may assist other governments and agencies seeking to find solutions to similar situations of displacement in other parts of the world.

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