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Citizenship Regimes in the New States of South Eastern Europe

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# The constitutional mosaic across the boundaries of the European Union: citizenship regimes in the new states of South Eastern Europe

Jo Shaw

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University of Edinburgh, School of Law  
The Europeanisation of Citizenship in the Successor States of the Former Yugoslavia  
(CITSEE)

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## **The constitutional mosaic across the boundaries of the European Union: citizenship regimes in the new states of South Eastern Europe**

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### **Abstract**

This paper begins by examining the relationship between citizenship of the European Union and national citizenship, and in particular the significance of EU law for the regulation of the acquisition and loss of citizenship in EU Member States, as part of a wider enquiry into how the citizenship regimes of the seven 'successor states' of the former Yugoslavia can be located within a 'constitutional mosaic' of overlapping and sometimes competing legal norms. It identifies six primary instruments whereby non-state sources of law impact upon the citizenship regimes of these states: compliance with international human rights norms; EU conditionality; direct intervention by international organisations; direct supervision by international organisations; other forms of international pressure; and overlapping citizenship regimes between the successor states. As part of a wider task of shifting attention onto the citizenship regimes of these states in the context of processes of Europeanisation as well as polity-building at the state and regional level, the paper concludes that polity-building and the processes of constructing citizenship regimes will remain closely intertwined for the foreseeable future.

### **Keywords:**

Yugoslavia, citizenship, Western Balkans, constitutionalism, European Union, law

### **1. Introduction**

In any constitutional settlement, citizenship claims a central place. This observation is as valid for that dimension of citizenship – often termed nationality under international law – which constitutes and formalises the link between a particular individual and a particular state, as it is for the other dimension which is concerned with the institutions, rights and practices through which a person attains and exercises full membership of a community. Citizenship continues to determine,

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<sup>1</sup> Salvesen Chair of European Institutions, University of Edinburgh. This paper draws on work ongoing in the context of the European Research Council-funded CITSEE project: *The Europeanisation of Citizenship in the Successor States of the Former Yugoslavia* (ERC Advanced Grant 230239); I am very grateful to members of the project team (Igor Štiks, Jelena Džankić, Gëzim Krasniqi, Eldar Sarajlić and Ljubica Spaskovska for discussion and input; I would also acknowledge the input of Felicita Medved). See <http://www.law.ed.ac.uk/citsee> for more details of CITSEE, including material such as Country Profiles which have been used in the preparation of this paper. CITSEE works closely with the EUCITAC/EUDO-Citizenship Observatory Project funded by EC Commission DG JLS (<http://eudo-citizenship.eu>), based on a project funded by the British Academy (<http://www.law.ed.ac.uk/citmodes>). The financial support of all of these funding bodies is acknowledged with thanks.

above all, who belongs within a given constitutional settlement and thus who has the right to determine – and to share in – the future. It concerns, in Hannah Arendt's famous phrase, the 'right to have rights', the most basic of rights.<sup>2</sup> It is central, therefore, to state-building and to polity-building more generally.

Even so, citizenship is rarely *just* national. For example, international law has taken a position on what constitutes 'nationality' for the purposes of what should be recognised by states, namely a 'genuine link' between the citizen and the state.<sup>3</sup> In addition, states frequently sign up voluntarily to a range of international legal instruments which impose conditions and restrictions (e.g. in the name of human rights) upon the answers to the question which is ostensibly one for states alone, namely the definition of 'who is a citizen?'. Sometimes the imposition of international norms results from actions of the international community rather than from the voluntary choices of states. One example would be where it is for the purpose of humanitarian intervention or in order to foster security and stability within a region. Even within states, there may be variation in relation to citizenship rights and practices between different subnational units, especially in federal or quasi-federal states, and – even more frequently – substantial contestation between subnational units and the federal 'centre' around, for example, the question of who should vote in subnational elections.<sup>4</sup>

In the light of such challenges to national 'hegemony' over the concept and practices of citizenship, the central task of this paper is to illuminate the network of normative sources which shape the legal status of citizenship in Europe today. For these purposes it looks not only at the paradigm case of multi-level citizenship in Europe today, namely citizenship of the Union under the EU Treaties, but it also uses the case study of the citizenship regimes of the new states of South Eastern Europe (i.e. those states now existing on the territory of the former Yugoslavia<sup>5</sup>). This is a region which has been profoundly affected not only by the operation of EU law, as each of

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<sup>2</sup> H Arendt, *Origins of Totalitarianism*. new edn (New York, Harcourt Brace Jovanovich, 1973) 293.

<sup>3</sup> *Liechtenstein v Guatemala (Nottebohm)* 1955 ICJ 4.

<sup>4</sup> J Shaw, 'Political Rights and Multilevel Citizenship in Europe', in E Guild, K Groenendijk and S Carrera (eds), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU* (Farnham, Ashgate, 2009) 29-49.

<sup>5</sup> 'Yugoslavia' has taken a number of different legal forms: the (first) interwar Yugoslavia (originally the Kingdom of Serbs, Croats and Slovenes until 1929) until the Axis powers invaded in 1941; the (second) postwar Yugoslavia which was the Democratic Federal Yugoslavia until late 1945, Federal People's Republic of Yugoslavia until 1963 and the Socialist Federal Republic of Yugoslavia ('SFRY') thereafter until dissolution in 1991-1992; and finally the (third) Yugoslavia or Federal Republic of Yugoslavia ('FRY') comprising the two non-secessionist republics remaining after dissolution. This state was established in 1992 and existed until 2003 when it was replaced by the State Union of Serbia and Montenegro, which existed until Montenegro declared independence in 2006.

the states prepares (or has prepared, in the case of Slovenia) for the challenges of accession to the EU, but also by multiple sources of 'beyond-the-state' law. The former Yugoslavia represents a classic scenario of fragmentation, disintegration and partial reintegration under the shadow of international and European (Union) law, with the result that we can see clearly – as the metaphor underpinning this collection would have it – the mosaic-like character of the broader constitutional framework which is evolving for these seven states.<sup>6</sup> There are also areas of profound tension *between* the states in relation to questions of citizenship, where it is possible to see spillover from one (national) legal order to another. Somewhat surprisingly, however, in such a scenario of intense state-building where questions of sovereignty have often been debated and contested, little attention has thus far been paid to the issues raised by the complex and overlapping citizenship regimes of these states.<sup>7</sup> This paper aims to begin the process of filling this gap, at least from a legal point of view, building in particular on the earlier work of Štiks, who observed in 2006 how these states had – almost without exception – used citizenship as a tool of 'ethnic engineering' in the context of the process of state- building.<sup>8</sup>

This paper shares the basic pluralistic assumptions of this collection as a whole that national constitutional frameworks are nested within broader transnational and supranational structures in which multiple sources of normative authority often compete for centrality, or come into conflict with each other. Institutional means to adjudicate conflict are needed from time to time, as well as day-to-day mechanisms for avoiding conflict and friction between the systems. The relationship is, moreover, iterative and two way, with much of the structure of the supranational constitution

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<sup>6</sup> In the order in which they became independent and recognised by the international community: Slovenia, Croatia, Macedonia, Bosnia, Serbia, Montenegro and Kosovo. When dealing with Kosovo, the EU still routinely refers to Kosovo 'under UN Resolution 1244', as it has not been recognised by all Member States of the EU, nor is it yet a member of the United Nations. However, it has a separate legal and constitutional system, incorporating its own citizenship regime, and for these purposes it is treated unconditionally as a 'state'.

<sup>7</sup> The limited work includes M Dika, A Helton and J Omejec (eds) 'The Citizenship Status of Citizens of the Former SFR Yugoslavia After its Dissolution,' (1998) 3 *Croatian Critical Law Review*, nos 1-2 (now rather outdated) and S Imeri (ed.), *Rule of Law in the Countries of the Former SFR Yugoslavia and Albania: Between Theory and practice*, (Gostivar, Association for Democratic Initiatives, 2006). There are also some single country case studies: F Medved, 'From civic to ethnic community? The evolution of Slovenian citizenship' and F Ragazzi and I Štiks, 'Croatian citizenship: from ethnic engineering to inclusiveness', in R Bauböck, B Perchinig and W Sievers (eds), *Citizenship Policies in the New Europe*, 2nd edn (Amsterdam, Amsterdam University Press, 2009), 305 and 339.

<sup>8</sup> I Štiks, 'Nationality and Citizenship in the Former Yugoslavia: From Disintegration to European Integration', (2006) 6 *Southeast European and Black Sea Studies* 483; other work by Štiks includes: I Štiks, *A Laboratory of Citizenship: Nations and Citizenship in the Former Yugoslavia and its Successor States*, PhD Dissertation, Northwestern University (June 2009)/Sciences Po, Paris (March 2009); I Štiks, *A Laboratory of Citizenship: Shifting Conceptions of Citizenship in Yugoslavia and its Successor States*, CITSEE Working Paper 2010/2 (<http://www.law.ed.ac.uk/citsee>).

of the EU itself, and indeed of the wider legal framework provided by the Council of Europe and other international organisations and legal regimes, being underpinned by national constitutional sources as well as national mechanisms for implementation. The various sources are, on that argument, as much mutually reinforcing as they are in competition with each other. The legitimacy of the whole does not depend upon one source or another, but upon the composite constitutional structure providing the fundamental human goods which we demand in order to sustain the good life. However, this paper is primarily descriptive and interpretative in its approach, and approaches the question of the constitutional mosaic as a useful metaphor for illuminating cases of plural normative authority, rather than as an invitation to engage in further theory-building.

As the case study of citizenship regimes in the former Yugoslavia will show, this region remains unstable in citizenship (and indeed many other constitutional) terms. It is often argued that the costs of non-integration of the new states now to be found on the territory of the former Yugoslavia within all aspects of Europe's constitutional mosaic are greater than those of integration, not least because of the wider effects of these instabilities. However, integration within the EU does not necessarily and automatically imply a simplification of the sources of constitutional authority or the resolution of the fragmented pattern of the mosaic into a discernible picture with settled constitutional structures in a unified framework. On the contrary, while the former Yugoslavia offers a fascinating laboratory within which to study the interaction of multiple sources of constitutional authority as these operate upon the case of citizenship, it is not necessarily so different in its fundamental character to other cases within the European Union, such as the UK, Spain and Belgium, where state constitutional authority is contested from below. The difference in the former Yugoslavia is that in some contexts sovereignty remains contested by other neighbouring states as well as from below, not least because of the single constitutional root of all the citizenship regimes in that of the former SFRY which itself had a multilevel system with both federal and republican-level citizenship. Furthermore, many of the actions undertaken by external authorities have been and continue to be contested by domestic political actors.<sup>9</sup> While there may be multiple sources of normative authority enveloping the region and its new states, the levels of compliance at the national and local level are often in practice very low and friction both with international legal regimes and also as between the neighbouring states is high. Legal change, therefore, will rarely be sufficient on its own.

In this paper, the term 'citizenship regime' is given a specific meaning. It denotes certain key legal statuses which are central to the exercise of civil rights, political membership and – in many cases – full socio-economic membership in a particular

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<sup>9</sup> See T Freyburg and S Richter, 'National identity matters: the limited impact of EU Political conditionality in the Western Balkans', (2010) 17 *Journal of European Public Policy* 263.



territory. Specifically, this includes 'nationality' in the sense of the internally and externally recognised link between the citizen and the state,<sup>10</sup> and thus the body of law which sustains this link such as rules and processes governing acquisition and loss, as well as key themes such as toleration or rejection of dual or multiple nationality, the treatment of *de jure* and *de facto* statelessness, and the rules which govern effective access to a given citizenship status, such as requirements of civic registration. The latter are often important issues in regions which have seen violent conflict, war and forced population movements, especially in the case of socially, politically and legally marginal groups such as the Roma who are the most vulnerable to the long term exclusionary effects of forced population movements. However, other groups of internally displaced persons also find it difficult to resolve their citizenship status after conflicts.

Where applicable, the concept of citizenship regime must also include the status and rights attaching to citizenship of the European Union (and the connection between EU citizenship and national citizenship), as well as the effects of EU law, such as rules on visa liberalisation or facilitated entry mechanisms (e.g. for students or those seeking family reunification), although – as we shall see – Union citizenship is different in character to national citizenship. It also includes certain statuses of internal 'quasi-citizenship' for non-national residents where these extend to electoral rights and related political rights which are normally restricted to national citizens alone, and of external 'quasi-citizenship' for non-nationals residing outside the territory of the state, who receive special benefits as former nationals (or their descendants) or ethnic kin groups related to the protector state.

More generally, a citizenship regime could be said to encompass certain key individual and collective rights protected by national and international human rights law, such as minority rights and non-discrimination rights which profoundly impact upon the exercise of full civic membership within a society and a polity, in particular the right to non-discrimination on grounds of race or ethnic origin, gender and religious affiliation. This is the case even where the exercise of these rights is not strictly limited by reference to citizenship status or where the source of the norm being invoked for protection is not to be found in the national constitution or legislation, but in international law. However, the latter points fall largely outside the scope of this paper.

The discussion starts with a presentation of the significance and character of citizenship of the European Union. Membership of the European Union and thus the achievement for their citizens of the status of citizens of the Union is a central foreign

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<sup>10</sup> This is, of course, a technical use of the term 'nationality', which is quite different to the way that 'nationality' is often used in Slavic languages (e.g. *nacionalnost* or *narodnost* in Croatian) to denote an ethnic conception of 'national' identity.

policy goal of all of the South Eastern European states whose citizenship regimes will be under discussion in the latter part of the paper. It is also a stated goal of the EU and its Member States, albeit with one with a rather long time horizon in some cases. It is thus logical to present at the outset the curious multilevel character of the EU's own citizenship regime before moving to a closer examination of those of the seven new states of South Eastern Europe and the dense networks of norms stemming from sources beyond the state which impact upon these regimes.

## 2. The place of (Union) citizenship in Europe's constitutional mosaic

### a) The relationship between Union citizenship and national citizenship

Although scholarly opinion is divided as to the precise significance of national citizenship in an increasingly globalised world,<sup>11</sup> the European Union's complex scenario of multilevel citizenship has paradoxically contributed to strengthening the significance of holding the citizenship of one of the Member States, when compared to holding the citizenship of a third country (or indeed of a candidate state). It has not, in that sense, contributed to the erosion of national citizenship as an institution despite the activist nature of much of the Court of Justice's recent case law in this area. The Court's case law has thus far had little to say directly about (national) citizenship; indirectly, however, it has strengthened the alternative reference point of residence rather than national belonging at least for those EU citizens who are resident in other Member States, by extending residence-based access to certain benefits and educational entitlements<sup>12</sup> and by imposing restrictions on the exercise of national competences *vis-à-vis* mobile EU citizens in some surprising areas, such as the national rules which regulate surnames.<sup>13</sup> It has also permitted the portability outside the national jurisdiction of some benefits and entitlements, in order not to penalise EU citizens for exercising free movement rights.<sup>14</sup> Even so, Member States still remain substantially unconstrained to regulate access to and loss of national citizenship as they wish.

Thus in the EU, the root of citizenship lies at the national level. 'Citizenship of the Union', introduced by the Treaty of Maastricht in 1993, is limited in its personal scope by reference to the national citizenship laws of the Member States. EU citizens

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<sup>11</sup> For a somewhat partial review of the debates see R Hansen, 'The poverty of postnationalism: citizenship, immigration, and the new Europe', (2009) 38 *Theory and Society* 1; see also C Joppke, 'The vulnerability of non-citizens', (2009) 39 *Perspectives on Europe* 18; C Joppke, 'Transformation of Citizenship: Status, Rights, Identity', (2007) 11 *Citizenship Studies* 37.

<sup>12</sup> Case C-85/96 *Martínez Sala v Freistadt Berlin* [1998] ECR I-2691; Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-La-Neuve* [2001] ECR-I 6193.

<sup>13</sup> Case C-148/02 *Garcia Avello v Belgian State* [2003] ECR I-11613; Case C353/08 *Grunkin and Paul v Grunkin-Paul and Standesamt Stadt Niebüll* [2008] ECR I- 7639.

<sup>14</sup> E.g. Case C-11/06 *Morgan v Bezirksregierung Köln* [2007] ECR I-9161; Case C-224/98 *D'Hoop v Office National de l'Emploi* [2002] ECR I-6191.

are the nationals of the Member States, according to Article 9 TEU,<sup>15</sup> and Union citizenship is intended to have a secondary function in comparison to national citizenship:

‘Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.’

The same point is repeated in Article 20 TFEU.

The Court of Justice is now beginning to take up the task of elaborating further upon the significance of the connection between national citizenship and Union citizenship, and thus upon the effects of national regulation of access to and loss of national citizenship, in ways that might in the future prove significant for the states of the former Yugoslavia. In *Micheletti*,<sup>16</sup> even before the introduction of Union citizenship, the Court confirmed that while Member States remain competent alone to define the scope of their citizenship laws in order to determine who are their citizens, they must act with due regard to EU law. Thus when the host state is faced with a person who has the nationality of a Member State and also the nationality of a third state, it is obliged to recognise that part of a person’s dual (or multiple) nationality which gives them access to free movement and non-discrimination rights. Post-Maastricht this means that Member States must recognise the Union citizenship of nationals of other Member States also holding the nationality of a third state, or – as in the case of *Chen* – benefiting from broad *ius soli* rules governing acquisition by birth.<sup>17</sup>

The Court confirmed the autonomy of the Member States in *Kaur*,<sup>18</sup> holding that in order to determine who was a national of the UK for the purposes of determining the scope of the Treaty *ratione personae*, it was essential to refer to the 1972 and 1982 declarations made by the UK and appended to the treaties stating which persons it regarded as its citizens for the purposes of the application of EU law (even though declarations are not normally regarded as having the same value as the EU Treaties themselves).

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<sup>15</sup> References are to the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) with their post-Lisbon formulation and numbering unless otherwise indicated.

<sup>16</sup> Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239.

<sup>17</sup> Case C-200/02 *Chen v Secretary of State for the Home Department* [2004] ECR I-9924.

<sup>18</sup> Case C-192/99 *R v Secretary of State for the Home Department, ex parte Kaur* [2001] ECR I-1237.

In the 2010 case of *Rottmann*,<sup>19</sup> despite a rather cautious opinion from Advocate General Maduro, the Court of Justice has adopted a formula for articulating the relationship between national citizenship, EU citizenship and the requirements of EU law which Member States might in the future find quite intrusive into an arena which they have hitherto guarded as largely one for the unfettered exercise of national sovereignty – i.e. the choice of who should be their citizens. The case concerned the issue of a decision by Germany to withdraw naturalisation from the applicant Rottmann, where the decision granting naturalisation had been obtained by fraud. That is, the applicant had failed to disclose that he was subject to criminal proceedings in Austria. On naturalisation in Germany, Rottmann had, by operation of law, lost his Austrian citizenship. As he would not automatically reacquire Austrian citizenship in event of loss of German citizenship obtained by fraud, he would be stateless. He would also, at least temporarily, lose his EU citizenship and all the rights such as free movement rights associated with it.

The Court noted the well-established principle that while it is for each Member State to lay down the conditions for the acquisition and loss of nationality, they must none the less do so ‘having due regard to Community law’<sup>20</sup> in ‘situations covered by European Union law’.<sup>21</sup> The essence of the AG Maduro’s Opinion was that the loss of citizenship here was not related to the exercise of free movement rights in such a way as to render it subject to scrutiny under EU law. He contrasted Rottmann’s situation with one where a person is deprived of the citizenship acquired after an exercise of free movement because of political or trade union activities, and drew attention also to the scenario where Member States would be concerned about mass naturalisations of third country nationals in circumstances that could amount to a breach of the duty of sincere cooperation under Article 4 TEU. The Court, in contrast, made a very strong and broad statement about the ‘reach’ of Union citizenship and consequently the capacity of Member States to withdraw national citizenship where that results in the loss of Union citizenship:

‘It is clear that the situation of a citizen of the Union who, like the applicant in the main proceedings, is faced with a decision withdrawing his naturalisation, adopted by the authorities of one Member State, and placing him, after he has lost the nationality of another Member State that he originally possessed, in a position capable of causing him to lose the status conferred by Article 17 EC [i.e. Union citizenship] and the rights attaching thereto falls, by reason of its nature and its consequences, within the ambit of European Union law’.<sup>22</sup>

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<sup>19</sup> Case C-135/08 *Rottmann v Freistaat Bayern*, judgment of 2 March 2010; Opinion of Advocate General Maduro of 30 September 2009.

<sup>20</sup> *Rottmann*, para 39.

<sup>21</sup> *Rottmann*, para 41.

<sup>22</sup> Emphasis added; para 42.

In *Rottmann* the connection which the Court draws between EU law and national law is the simple fact that by losing national citizenship a person will also lose EU citizenship rights. This seems to be a step beyond the approach in *Micheletti* where the Court formulated the issue thus:

‘it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State by imposing an additional condition for recognition of that nationality with a view to the exercise of the fundamental freedoms provided for in the Treaty.’<sup>23</sup>

This matches more closely the approach taken by AG Maduro, but it is arguable that the Court’s approach represents a logical continuation of other aspects of its citizenship case law where it has gradually attenuated the link between citizenship and free movement.<sup>24</sup> The *Rottmann* formulation is justified by reference to the oft-repeated statement that ‘citizenship of the Union is intended to be the fundamental status of nationals of the Member States’,<sup>25</sup> but significantly the Court omitted the second part of the original quotation which went on to refer to the equal treatment principle and the transnational element of Union citizenship.<sup>26</sup> Later on, the Court emphasised once again ‘the importance which primary law attaches to the status of citizen of the Union’.<sup>27</sup> Accordingly, having decided that EU law applies in principle in a situation such as this, the Court concluded that it is for the national court to determine whether the national laws, regulations and measures taken are proportionate in all the circumstances, having regard to the implication of the loss of Union citizenship for the person affected. It did not give any further guidance to the national court on this matter or attempt to decide the issue itself, as it has done in other cases.

The longer term implications of *Rottmann* are yet to be discerned, and while the case does not change the fundamental character of Union citizenship, which remains derivative from national citizenship, it does seem to change some aspects of the legal connection between the two statuses, and open up an avenue which could be exploited to challenge a variety of aspects of national citizenship laws. Such challenges could come from aggrieved individuals, or indeed *Rottmann* could be used by the European Commission in the context of accession conditionality in order

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<sup>23</sup> *Micheletti* above n16, para 10.

<sup>24</sup> Case C-148/02 *Garcia Avello v Belgian State* [2003] ECR I-11613; see also Case C-353/08 *Grunkin and Paul v. Grunkin-Paul and Standesamt Stadt Niebüll* [2008] I-07639.

<sup>25</sup> *Rottmann*, para 43. This quotation was originally to be found in Case C-184/99 *Grzelczyk v. Centre public d’aide sociale d’Ottignies-Louvain-La-Neuve* [2001] ECR-I 6193 para 31. Note the small (but significant ?) change in wording from ‘destined’ to ‘intended’.

<sup>26</sup> The original quotation in *Grzelczyk* went on to state that Union citizenship enables ‘those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for’.

<sup>27</sup> *Rottmann*, para 56.

to pressurise candidate states to alter certain problematic aspects of their citizenship laws. This point will be discussed in more detail in Section 4b below. One implication in terms of cases brought before the national courts and indeed the Court of Justice could be that since national decisions which result in a person losing their Union citizenship (or perhaps also, not gaining EU citizenship) are now subject to judicial review in this manner, they must – by definition – need to be reasoned, in order to allow a Court to scrutinize the basis on which they are taken. This will have an impact upon what are often discretionary powers relating to naturalisation residing with national executives.

### **b) The character of Union citizenship**

As a legal status, citizenship of the Union gathers together a set of rights largely associated with the exercise of free movement rights, including political rights giving a Union citizen the rights to stand and vote under the same conditions as nationals when resident in a Member State other than the one of which she is a national, in both local elections and European Parliamentary elections. Under the reforms introduced by the Treaty of Lisbon, the language of citizenship is linked increasingly to the language of democracy and representation, in order to insist, for example, that the European Parliament is the Parliament of Union citizens.<sup>28</sup> Thus in future we may see the concept of citizenship in the EU context filled out to a greater extent and made more meaningful for ‘static’ citizens. However, so far as concerns the current legally enforceable rights, it is essentially in relation to the mobile European citizen that the specific impact of EU law can be felt and has indeed been felt in a series of cases which have gradually eroded various aspects of the welfare and immigration ‘sovereignty’ of the Member States.<sup>29</sup> According to the Court of Justice, ‘Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.’<sup>30</sup> It has repeated this point in numerous judgments since 2001. Clearly, at the present time, this statement must be read in the light of the limited scope of Union citizenship, which is constrained by reference to the limited competences of the Union itself as determined by the founding Treaties, but so far as concerns mobility *within* the EU and across the borders of the Member States for Union citizens it is increasingly the reference point of residence that matters most,

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<sup>28</sup> J Shaw, ‘The constitutional development of citizenship in the EU context: with or without the Treaty of Lisbon’, in I Pernice and E Tanchev (eds), *Ceci n’est pas une Constitution – Constitutionalisation without a Constitution?*, (Baden-Baden, Nomos, 2009) 104.

<sup>29</sup> See *Martinez Sala* and other cases cited above in relation to welfare sovereignty; as regards immigration sovereignty, see Case C-413/99 *Baumbast and R* [2002] ECR I-7091; C-127/08 *Metock and others v Minister for Justice, Equality and Law Reform* [2008] ECR I-6241.

<sup>30</sup> *Grzelczyk*, above n12 para. 31.

rather than national citizenship.<sup>31</sup> In that sense, Union citizenship could be called a species of *transnational* citizenship.<sup>32</sup>

Meanwhile, for those who find themselves at or beyond the margins of the territory of the Union, national citizenship as a status remains decisive because it gives access to the full benefits of Union citizenship. For the 'new' Member State citizens, the situation is precarious. Much has been made of the limited free movement rights granted to citizens of the Member States which joined the Union in 2004 and 2007. Most Member States have applied transitional periods in order to restrict labour market access for Union citizens, whose status has widely been characterized as that of second class citizens.<sup>33</sup> Thus national citizenship matters here, as it does for third country nationals. In that sense, Union citizenship is definitely neither a form of *postnational* membership itself,<sup>34</sup> nor a mechanism which in and of itself will lead to the withering away of the significance of national citizenship – even – as *Rottmann* shows, for citizens of the 'old' Member States.

In states which are (still) outside the external borders of the European Union, individuals can become Union citizens in two ways: either by gaining the nationality of an existing Member State (with all the attendant difficulties associated with naturalization, such as contending with possible requirements of renunciation or release,<sup>35</sup> passing citizenship /language tests, and demonstrating possible 'virtue' requirements), or because the state of which they are a national itself becomes a Member State. It is important to note that many of the states at or just beyond the boundaries of the present EU (including all of those in the former Yugoslavia) are new, or renewed states, with citizenship regimes and rules on acquisition and loss of national citizenship which have been devised or substantially amended during the twenty years or so which have elapsed since the fall of the Berlin Wall, the collapse of the Soviet Union and the end of the Cold War.<sup>36</sup> Some of these are (sometimes fragile and weak) states with unstable and changing citizenship regimes (often overlapping in important ways the regimes of other neighbouring states which may have

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<sup>31</sup> G Davies, "Any Place I Hang My Hat?" or: Residence is the New Nationality', (2005) 11 *European Law Journal* 43.

<sup>32</sup> J Fox, 'Unpacking "Transnational Citizenship"', (2005) 8 *Annual Review of Political Science* 171.

<sup>33</sup> N Rollason, 'Citizenship and the Expanding European Union: The Rights of New EU Nationals', in A Baldaccini, E Guild and H Toner (eds), *Whose Freedom, Security and Justice. EU Immigration and Asylum Law and Policy*, (Oxford, Hart Publishing, 2007).

<sup>34</sup> This term is particularly associated with the work of Yasemin Soysal: Y Soysal, *Limits of Citizenship. Migrants and Postnational Membership in Europe*, (Chicago/London, University of Chicago Press, 1994)

<sup>35</sup> For a reflection on the implications of this in an intra-EU context see D. Kochenov, 'A Glance at Member State Nationality – EU Citizenship Interaction', forthcoming 2010, draft version available at [http://www.unc.edu/euce/eusa2009/papers/kochenov\\_05E.pdf](http://www.unc.edu/euce/eusa2009/papers/kochenov_05E.pdf).

<sup>36</sup> On the character of citizenship politics in new states, see O Shevel, 'The Politics of Citizenship Policy in New States', (2009) 41 *Comparative Politics* 273.

originated in a single state of origin), and in some cases they are states where there are contested sovereignty claims on the part of different national groups or continuing protectorate statuses pursuant to situations of war and violent conflict. In the region studied here, Kosovo and Bosnia-Herzegovina are two cases in point.

In the post-1989 'transition' states, there are frequently groups of national minorities, whose status has been formed by a combination of historical population flows combined with boundary changes which have occurred throughout the twentieth century and into the twenty-first. 'Immigration' in its twentieth and twenty-first century guises has not constituted these groups of minorities, but rather other historical forces, generally outwith the agency of individuals, who find their formal status as citizens changing without them changing their location. In such circumstances, concepts such as citizenship and nationality have quite different meanings, even though it may be overly simplistic to talk of an East-West divide in the context of citizenship.<sup>37</sup>

Reflections upon more general questions about citizenship and enlargement were the subject of an earlier paper, which called for the specifics of national constitutional, legal and political conditions to be given close attention in the context of assessing the process of national accommodation of new (post-2004) Member States with the requirements of EU law.<sup>38</sup> This paper meanwhile adopts a different angle of approach to some of the same material as it seeks to figure out in more detail the place of citizenship in Europe's constitutional mosaic by taking into account not only the national constitutional specifics, but also the multiple sources of normative authority from beyond the state which contribute to determining the patterns of the mosaic. Specifically, it does so by looking at one highly contested region rather than at the question of enlargement more generally. This is the territory of the former Yugoslavia, which dissolved from 1991 onwards, partly as a result of the end of the Cold War and changes in the priorities of the US and other great powers, but also because of the rise of nationalist and ethnic politics and the dominance of political elites who used nationalist politics for their own ends, with the disastrous end result, in several cases, of war and crimes against humanity such as ethnic cleansing. These in turn caused widespread population displacement and statelessness, which in some cases have persisted until the present day.

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<sup>37</sup> See A Liebich and R Bauböck (eds), *Is there (still) an East-West divide in the conception of citizenship in Europe?*, RSCAS Working Paper 2010/19, [http://eudo-citizenship.eu/docs/RSCAS\\_2010\\_19.pdf](http://eudo-citizenship.eu/docs/RSCAS_2010_19.pdf).

<sup>38</sup> J Shaw, 'Citizenship and Enlargement: The Outer Limits of EU Political Citizenship', in C Barnard and O Odudu (eds), *The Outer Limits of EU Law*, (Oxford, Hart Publishing, 2009).



### 3. Situating the evolving citizenship regimes in the new states of South Eastern Europe

The case of the seven states which are now to be found on the territory of the former Socialist Federal Republic of Yugoslavia shows clearly the effects of transition, disintegration and partial re-integration processes in relation to the evolution and operation of citizenship regimes in new states. We can term these seven states, for the purposes of this paper, either the new states of South Eastern Europe, or the new Balkan states.<sup>39</sup> For lack of space, this paper cannot provide even an outline description of the regimes of all seven states;<sup>40</sup> rather, it proceeds by picking out the dimensions which help to illustrate the complexity of the constitutional mosaic and its specific character as regards the regulation of membership questions.

The choice of this case study is justified by the fact that the region which the European Commission now terms the Western Balkans<sup>41</sup> is an enclave within the European Union, and is an arena of enduring political and constitutional instability encompassing some 'weak states',<sup>42</sup> which is uniquely proximate to the EU itself. For

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<sup>39</sup> All of these terms could be contested. Strictly speaking, Slovenia has never been viewed as a 'Balkan' state, but obviously its inclusion in Yugoslavia from its inception as the Kingdom of the Serbs, Croats and Slovenes in 1918 until Slovenia's declaration of independence in 1991 continues to tie its citizenship regime to those of the other states of the region which were, like Slovenia, Republics in the former Yugoslavia (Croatia, Bosnia-Herzegovina, Serbia, Montenegro and Macedonia), as well as to that of Kosovo, which was never a Republic, but was an autonomous province within the Republic of Serbia with republic-like competences and representation within Federal institutions, after the last 1974 SFRY Constitution was adopted. It should also be pointed out that the term 'successor states' of the former Yugoslavia is a problematic term, since it is clear that only former SFRY Republics can strictly be successor states. In 1992, there were five successor states: Slovenia, Bosnia-Herzegovina, Croatia, Macedonia and the FRY (or – as it became after 2003 – the State Union of Serbia and Montenegro). In 2006, Montenegro seceded, but formally Serbia was declared the successor of their Union. Kosovo seceded unilaterally from Serbia in 2008 but, as it was never a Republic, it cannot in that narrow sense be a 'successor state'; the Badinter Commission of 1991 specifically restricted recognition processes to entities which had been SFRY Republics, on the basis of the continued subsistence of Republican boundaries. Finally, some of the states, such as Serbia or Croatia, might balk at being termed 'new'.

<sup>40</sup> For more details, see Štiks, 'Shifting Conceptions', above n8. See also the material and especially the country reports provided via the Country Profile section of the CITSEE project website: <http://www.law.ed.ac.uk/citsee/countryprofiles/>. One prominent issue which this paper does not address is the question of 'entity' citizenship, adding a multi-level element to citizenship in Bosnia: see E Sarajlić, *The Bosnian Triangle: Ethnicity, Politics and Citizenship*, CITSEE Working Paper 2010/06, 15-16.

<sup>41</sup> Once again this term excludes Slovenia, although it was a Republic of the former SFRY and it also includes Albania, which, due to ethnic ties with neighbouring Kosovo and the ethnic Albanian minorities in Macedonia and Montenegro, is definitely part of the post-Yugoslav future although it was not part of Yugoslavia itself.

<sup>42</sup> See generally D Kostovicova and V Bojicic-Dzelilovic (eds), *Persistent State Weakness in the Global Age*, (Aldershot, Ashgate, 2009); D Jano, 'How Legacies of the Past and Weakness of the State Brought Violent Dissolution and Disorder to the Western Balkan States', *Journal of Peace*,

much of the 1990s, the dissolution of Yugoslavia represented one of the most difficult foreign policy challenges for the EU and its Member States – a challenge which, in the view of many, both the EU and its leading Member States failed rather comprehensively.<sup>43</sup> Even now, while officially all of the states are at least potential EU Member States, it is hard to discern precisely whether this region is an arena of EU enlargement policy or foreign policy.<sup>44</sup>

One of the seven post-Yugoslav states, Slovenia, has been a member of the EU since 2004 and thus its citizens are EU citizens. It is also within the Schengen zone, requiring it to apply the same visa rules and border controls as the other Schengen members (subject to local border traffic agreements), including towards states which were originally part of the same country. And – as an indicator of the degree of its integration within the EU – it has adopted the euro as its currency.<sup>45</sup> Three out of the other six states share land borders with two or more Member States if one includes Slovenia in this tally (Croatia, Serbia and the Former Yugoslav Republic of Macedonia<sup>46</sup>). Two of the three which do not have land borders with EU Member States are located just across the Adriatic from Italy (Bosnia-Herzegovina<sup>47</sup> and Montenegro). Only landlocked Kosovo has neither sea nor land borders with EU Member States. Conversely, five Member States (Hungary, Romania, Bulgaria, Greece and Italy), not including Slovenia, have land or sea borders with the states in the region and additionally Austria, Italy and Hungary have land borders with Slovenia.

All the Western Balkan states have been offered a ‘European’ perspective by the EU and its Member States, with Croatia nearing the end of its protracted negotiations for an accession treaty, and likely to be a Member State by 2011 or 2012, despite ongoing bilateral difficulties with Slovenia and some questions over its compliance with the requirements imposed by the International Criminal Tribunal for the Former Yugoslavia established in the Hague. Its citizens have generally benefited throughout the period since the dissolution of Yugoslavia and Croatia’s declaration of independence in 1991 from visa free travel in the EU Member States, although the UK imposed visa requirements for six years until 2006. Macedonia is recognised as a candidate state, although it has not begun negotiations for accession and the EU has been postponing making a decision on this question, not least because of the dispute

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*Conflict and Development*, Issue 14, July 2009, available [www.peacestudiesjournal.org.uk](http://www.peacestudiesjournal.org.uk) and [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1438662](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1438662).

<sup>43</sup> L Silber and A Little, *The Death of Yugoslavia*, rev edn, (London, Penguin Books/BBC Books, 1996).

<sup>44</sup> G Noutcheva, ‘Fake, partial and imposed compliance: the limits of the EU’s normative power in the Western Balkans’, (2009) 16 *Journal of European Public Policy* 1065, 1066.

<sup>45</sup> It is interesting to note that both Kosovo and Montenegro have unilaterally adopted the euro as their currency.

<sup>46</sup> Hereinafter referred to as ‘Macedonia’.

<sup>47</sup> Hereinafter referred to as ‘Bosnia’.

over its name with Greece. However, its citizens have benefited from visa liberalisation and greater freedom of movement for the purposes of business and leisure travel to the Schengen area since 19 December 2009,<sup>48</sup> along with the citizens of Montenegro and Serbia. Both of these states have applied for membership of the EU, but are not recognised as candidate states. Serbia did so most recently, on 22 December 2009, having taken its inclusion in visa liberalisation along with the unblocking of an interim trade agreement which is part of the Stabilisation and Association Agreement process as the green light from the EU institutions and Member States to submit an application. At the beginning of 2010, Montenegro was awaiting a decision of Council of Ministers as to whether to seek an Opinion from the Commission on its application.

Meanwhile the citizens of Bosnia and Kosovo (along with those of Albania, which has – like Montenegro and Serbia – submitted an EU membership application but has not been recognised as a candidate state) were not given visa liberalisation in the first phase, but Bosnia and Albania, at least, although not Kosovo, are likely to fulfil the relevant conditions imposed in relation to the Schengen area by the middle of 2010. For Kosovo, the prospect of visa liberalisation and the reduction in its significant level of physical isolation seems a more distant prospect, not least because it has not been recognised as a state by five of the 27 Member States<sup>49</sup> and thus does not have formal contractual relations with the EU in the absence of a consensus of the Member States necessary under the Common Foreign and Security Policy, even though it hosts the largest EU civilian mission aimed at bringing stability and promoting the rule of law internally: EULEX. It has also not been recognised by its neighbours Serbia and Bosnia, or by significant international players such as Russia and China, which can veto its membership of the United Nations.

The region thus offers an example of a complex tapestry of legal relationships with the EU and its Member States, not just in the area of passport control and visas but also in other matters which lie outwith the scope of this paper such as trade relations and other conditions of economic transition and integration with the EU which form part of a route map to accession. But in truth little illustrates the point better than what happened to the different groups of persons who – before 1991 – would all have enjoyed comprehensive visa free travel throughout Europe and many other parts of the world on the basis of what was, in the heyday of Tito's Yugoslavia, the

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<sup>48</sup> Council Regulation 1244/2009 amending Regulation (EC) No 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2009 L336/1, based on a Commission proposal of 15 July 2009: CON(2009) 366. The UK seems likely to remove the visa requirement one year later than the Schengen zone states.

<sup>49</sup> Cyprus, Greece, Romania, Slovakia and Spain have not recognised Kosovo.

valuable red passport.<sup>50</sup> While some are now EU citizens, others have since faced substantial physical isolation as citizens of new states. We shall return in due course to the issue of visa liberalisation.

While the EU has been and remains an important 'player' in the Western Balkans, there are numerous other international and regional organizations which have been engaged in this region in the process of trying directly or indirectly to sow the seeds which would lead to enhanced recognition and implementation of key norms associated with liberal and democratic constitutionalism under the rule of law. These include norms stemming from international and European human rights treaties, as well as more inchoate norms of good governance, democracy and neighbourly relations. The 'interplay' between these institutions, if not necessarily the norms which they have been seeking to bring into play, has not always been comfortable.<sup>51</sup> A non-exhaustive list of such organisations must include NATO, the Council of Europe (especially the Venice Commission but also other relevant treaty frameworks adopted under its aegis such as the European Convention on Nationality and the Framework Convention on the Protection of National Minorities, and the latter's institutional enforcement mechanisms), the OSCE, the Stability Pact for South Eastern Europe and its successor, the Regional Cooperation Council, the UN Security Council, the UNHCR, the UNDP and other UN agencies, not to mention numerous special-purpose instruments and institutions of the international community and of the EU and its Member States, specifically designed to bring conflict to an end and to deal with post-conflict situations in the protectorate or quasi-protectorate states of Bosnia and Kosovo or to deal with war crimes and crimes against humanity (e.g. International Criminal Tribunal for the Former Yugoslavia). The region and its states have been the subject of numerous international plans, some of which have been given the legal force of treaties or UN Security Council Resolutions, but by no means all. All these plans none the less have been the means through which norms have been identified for more or less explicit transplantation into the internal legal sphere, or into transborder relations between states. Many of these have impacted directly or indirectly upon citizenship questions, even though the states are ostensibly largely free under international and European law to set their own norms in this domain, as we have seen. It is important to note that in this paper our concern is not with the broader ideational dimensions of norm transfer which often accompany the discussion of the EU as a foreign policy actor in the Western Balkans or elsewhere,<sup>52</sup>

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<sup>50</sup> See <http://www.followstamps.com/other/dok-yupassport1.JPG>. Images of the new passports can be found on the CITSEE website.

<sup>51</sup> See U. Caruso, *Interplay between the Council of Europe, OSCE, EU and NATO*, 2007, Report compiled for the MIRICO FP6 project available at <http://www.eurac.edu/NR/rdonlyres/4EA381B7-95DD-4750-A2D4-528E463863C3/0/ReportoninterplayWEB.pdf>.

<sup>52</sup> Noutcheva, above n44.

but specifically with the impact of legal norms. It is an exercise in understanding the operation of law in its wider political and societal context.

Section 4 outlines out the main mechanisms which structure the interface between the international or European normative orders and the state-level legal orders by identifying the main sources and forms of 'norm' which are being 'exported' via those mechanisms into the state-level legal and constitutional orders. Of course, the use of the term 'export' here conveys the sense that the process is exclusively unidirectional. That is not by any means the full story as we shall see evidence of how *national* rules on citizenship acquisition and loss have transnational effects upon neighbouring states, and also of cases where EU level policies, for example visa liberalisation, have been influenced by the scope and nature of national citizenship. The typological outline in Section 4 is limited to brief statements about the various forms of intervention or interposition of international norms with examples of how this impacts upon citizenship laws, institutions and practices. It is not comprehensive in nature. Indeed, an institutionally-focused survey of the significance of each of the international organisations cited above, along with their respective 'legal' systems, for the seven new states under discussion here, using a broad framework of disintegration and re-integration, would be too vast an enterprise for a single paper. While the main focus is upon 'vertical' relationships between state level legal orders and those in the international or regional sphere, some attention is also paid to the horizontal challenges stemming from the way in which the citizenship regimes of the new states substantially overlap and impact upon each other. Woven into the discussion is a focus on two key dimensions of citizenship: first, the conditions under which citizenship is defined and thus the main mechanisms which allow individuals to become citizens (and conversely which restrict access to citizenship), and secondly the implications of this for mobility both within the region and – crucially – to and across the Member States of the European Union.

Descriptively, what emerges from this survey of mechanisms is some evidence of a greater degree of openness towards the outside in relation to issues of citizenship definition, even in cases where such openness has not been directly mandated as a result of international action, but also many examples of as yet unresolved tensions and frictions stemming from the fact that each of the seven citizenship regimes have sprung, directly or indirectly, from the same source (the SFRY regime). This has the result that many of the regimes are effectively overlapping rather than exclusive in character. All of this suggests that a multi-perspectival approach to assessing these citizenship regimes alongside each other will be a complex endeavour, requiring a detailed study going well beyond the rather elliptical survey of rules and practices given here.

#### **4. The constitutional mosaic in practice: instruments and norms**

Without claiming to provide a comprehensive overview, this section identifies six principal mechanisms whereby instruments and norms of a constitutional character having their source outwith the state gain an impact upon domestic law, and specifically upon the national citizenship regimes of the new states of South Eastern Europe. Five of these categories are directly concerned with the impact of international norms, and they are closely intertwined. For example, compliance with international human rights norms represents a key element of conditionality for the purposes of preparation for accession to the EU under the Copenhagen Criteria. The precise distinction between direct intervention and direct supervision by international organisations may often be hard to discern, although the former is associated more with military interventions and their direct consequences, and the latter with civilian missions; equally the distinction between formal and more informal interventions by the EU, other organisations and indeed by third states is rather fine. Furthermore, external actors do not only engage with governmental organisations within the region, but also with organisations within civil society, both those which are of local origin and also those which are international organisations such as the Open Society Institute or Helsinki Committee, with a local base. The sixth category focuses on overlaps between the systems, and how these impact upon the respective domestic systems.

##### **a) Adoption of and compliance with international norms**

With the exception of Kosovo, all the new states – as they emerged – have become members of the United Nations and the Council of Europe. This has implied – under the aegis of the latter organisation – signing and ratifying key treaties such as the European Convention on Human Rights and Fundamental Freedoms and permitting the right of individual petition to the judicial institutions of Strasbourg.

ECHR norms have a limited impact upon citizenship rules and regulations as such. The Court of Human Rights has consistently held that ‘no right to acquire or retain a particular nationality is as such included among the rights and freedoms guaranteed by the Convention or its Protocols.’<sup>53</sup> The ECHR does, however, impact upon the exercise of citizenship rights consequent upon citizenship, especially political rights. This point is well illustrated by a case brought against Moldova,<sup>54</sup> in which the applicants challenged Moldovan rules which banned dual nationals from holding public posts, including posts as Members of Parliament. The citizenship rules themselves remain unaffected. This would mean that Moldova would be at liberty, like other states, to correct the human rights violation by abolishing dual nationality. Whether or not to allow dual nationality is a free choice of states; having chosen to

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<sup>53</sup> See, for example, a case concerning a former Yugoslav Republic: *Makuc and others v Slovenia*, Application no. 26828/06, partial decision on admissibility of 31 May 2007, [2007] ECHR 523, para. 160.

<sup>54</sup> *Tănase and Chirtoacă v Moldova*, Application no. 7/08, 18 November 2008.

allow it, Moldova is under an obligation to treat all citizens equally. A set of related questions emerged in *Sejdić and Finci*,<sup>55</sup> concerning an application brought against Bosnia by members of the Roma and Jewish communities. They successfully argued that they have experienced discrimination on grounds of race and ethnic origin because of the effects of the Bosnian post-Dayton constitution, which limits certain political rights, such as the right to stand for the collective Bosnian Presidency, to self-declared members of the three 'constituent peoples' of Bosnia (the Bosniacs, Croats and Serbs). Again, all citizens must be treated equally, and *Sejdić and Finci* represents an important first case on the application of the freestanding non-discrimination principle in Article 1 of Protocol No. 12 of the ECHR.

One of the most infamous citizenship 'incidents' to result from the dissolution of Yugoslavia has been brought before the Court of Human Rights, and awaits a final judgment.<sup>56</sup> The *Makuc* case concerns the fate of citizens of former Yugoslav republics other than Slovenia who were resident there on the date of independence, and who – for whatever reason – either could not or would not apply for Slovenian citizenship under the conditions prescribed by Section 40 of the 1991 Slovenian Citizenship Act. There were three requirements which they needed to meet: they must have acquired permanent resident status in Slovenia by 23 December 1990, be actually residing in Slovenia and have applied for citizenship within six months after the Citizenship Act entered into force (i.e. 28 February 1992). Those who did not apply, or who did apply and whose applications were rejected, were – on the orders of the Ministry of Interior – erased from all registers from that date and effectively rendered non-persons. Having repeated, as noted above, its well-known mantra concerning the limited effects of the ECHR in relation to the 'right' to a nationality, the Court none the less noted that an arbitrary denial of citizenship – such as that alleged by the applicants who were all erased – could raise issues under Article 8 of the Convention because of the possible impact upon the private life of the applicant.<sup>57</sup> In this case, because the actual 'erasure' took place before Slovenia acceded to the Convention in 1994, the Court declared that part of the application inadmissible from a temporal perspective. However, it did decide to adjourn for further examination and argument issues related to the denial of a retrospective right of permanent residence for those of the erased who did eventually succeed in establishing the legality of their residence in Slovenia and the continued denial of an effective remedy (notwithstanding two Slovenian Constitutional Court judgments condemning the actions of the Government<sup>58</sup>). It remains to be seen what position the Court will take on these

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<sup>55</sup> *Sejdić and Finci v Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06, judgment of the Grand Chamber of 22 December 2009.

<sup>56</sup> See *Makuc* above n53.

<sup>57</sup> See *Makuc* above n53 para. 160.

<sup>58</sup> For more details see V Jalušič and J Dedić, '(The) Erasure – Mass Human Rights Violation and Denial of Responsibility: The Case of Independent Slovenia', (2008) 9 *Human Rights Review* 9; Medved, above n8.

matters. Medved<sup>59</sup> interprets the case of the Erased as part of a more general drift in Slovenia away from a civic conception of citizenship, visible in the initial determination of the citizenry and influenced by international 'best practice' towards a more ethnic-nation approach. This latter has more in common with the approaches taken by most of the other new states of South Eastern Europe. Moreover, in 2010, it seemed that the region was heading towards a related incidence of erasure, almost twenty years after the initial dissolution of Yugoslavia. Human rights advocates in Montenegro have highlighted the profound difficulties which members of the Roma community are having in obtaining citizenship papers in Montenegro, after the dissolution of the State Union with Serbia, and consequent upon the adoption of the new Montenegrin citizenship law and also the law on foreigners, mandated by the European Commission as part of the 'tidying up' process leading towards visa liberalisation and accession candidature.<sup>60</sup> Existing papers, such as those obtained during the period of the Federal Republic of Yugoslavia, or under the State Union, are being rendered nugatory in the new Republic.<sup>61</sup>

By comparison with the ECHR, acceptance of other conventions specifically concerned with questions of nationality and citizenship is patchier. Bosnia and Croatia have signed but not ratified the core European norms on nationality, the 1997 European Convention on Nationality.<sup>62</sup> Only Macedonia has actually ratified the Convention, and the decision to do so in 2003 was a central element in Macedonia's 'civic' and 'non-ethnic' redefinition of its constitution and its citizenship law in the aftermath of the Ohrid Framework Agreement of 2001 which brought to an end an armed rebellion by Macedonia's substantial Albanian community which threatened the very survival of the state.<sup>63</sup> Only Montenegro has signed the more recent 2006 Council of Europe Convention on the avoidance of statelessness in relation to State succession.<sup>64</sup> On the other hand, reflecting concerns on the status of minorities which express themselves in particular in the context of EU conditionality (see category b) below), all of the states except Kosovo have signed and ratified the 1995 Framework Convention on the Protection of National Minorities,<sup>65</sup> a convention which it is safe to say was specifically drafted with post-1989 Central and Eastern Europe in mind. Like

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<sup>59</sup> Medved, above n8.

<sup>60</sup> For details on Montenegrin citizenship law, see J Džankić, *Transformations of Citizenship in Montenegro: a context-generated evolution of citizenship policies*, CITSEE Working Paper 2010/03.

<sup>61</sup> Interview with Aleksandar Sasa Zekovic, Podgorica, 29 March 2010.

<sup>62</sup> ETS No. 166.

<sup>63</sup> See generally L Spaskovska, *Macedonia's Nationals, Minorities and Refugees in the Post-Communist Labyrinths of Citizenship*, CITSEE Working Paper 2010/05. The issue of the Ohrid Agreement is discussed at n93 below.

<sup>64</sup> ETS No. 200.

<sup>65</sup> ETS No. 157.



the ECHR, this is not a text which directly addresses itself to issues of citizenship (or statelessness), but it obviously has some effects.<sup>66</sup>

Thus far, in its condition of internationally supervised independence, Kosovo has not been able to join any key international organisations concerned with human rights and fundamental freedoms, including the United Nations and the Council of Europe. As it requires a two thirds majority of members of the Council of Europe for accession, and it has been recognised by more than two thirds of the CoE's 47 member countries, accession to the latter became a prospect in 2010. In terms of fundamental rights norms, however, the scenario in relation to Kosovo is more a case of category c) discussed below, as Kosovo's explicit adhesion of international human rights standards was written in to the Ahtisaari Plan or 'Comprehensive proposal for the Kosovo Status Settlement' of 2007, which in turn largely determined the contours of Kosovo's post independence Constitution as the basis for a multi-ethnic state based on civic rather than ethnic principles.<sup>67</sup> However, the United Nations Interim Administration in Kosovo (UNMIK) adopted a number of technical agreements relating to key Conventions, especially the Framework Convention on National Minorities.<sup>68</sup> This enables the enforcement bodies which supervise these international instruments to scrutinize Kosovo's performance under key headings. However, it does not engage Kosovo's full international responsibility under these Conventions.

#### **b) Conditionality in relation to prospects of accession to the EU**

It would be wrong to view conditionality too simplistically, as either coercive or voluntary in character. Conditionality engages a complex set of pressures and motivations on the part of the actors on both sides of the bargain.

The status of the seven states in relation to the EU has already been set out above and need not be repeated here. Potential accession to the EU implies not just direct pre-accession compliance with the rules of EU law (as well as all the necessary economic and political adjustments), but also other forms of legal and political compliance at earlier stages of looser integration as the potential candidate state is guided along a Commission-devised 'roadmap' towards integration, e.g. through the Stabilisation and Association Process. One of the aims of such 'roadmaps', such as those in

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<sup>66</sup> See, for example, the comments on access to citizenship for minorities in the Committee of Minister's recommendation of 14 January 2009 following the first cycle of reports, opinions, comments and recommendations following Montenegro's 2006 accession to the Convention: [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/Table\\_en.asp#Montenegro](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/Table_en.asp#Montenegro)

<sup>67</sup> For details of the Ahtisaari Plan see the website of the United Nations Special Envoy for Kosovo: <http://www.unosek.org/unosek/en/statusproposal.html>. See further below at n84. However, it is interesting to note that visits to Kosovo by the Advisory Committee on the Framework Convention on National Minorities, and recommendations

<sup>68</sup> See Agreement between the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Council of Europe on technical arrangements related to the Framework Convention for the Protection of National Minorities, 4 June 2006.

relation to visa liberalisation, is to render the process ostensibly more technical and less political, although one of the by-products of such an approach is that it reveals the inconsistency of EU policies. Western Balkan states have been required to issue biometric passports to achieve visa liberalisation, and only those citizens of the three states which achieved Schengen visa liberalisation in December 2009 who actually possess biometric passports can benefit from the new regime. However, Croatia has been extremely slow to start issuing biometric passports, yet its citizens have visa free travel and – in relation to the Schengen states – have always benefited from this status.

As we have seen in Section 2a) the relationship between EU law and national citizenship laws and policies is a rather difficult one, especially since the judgment of the Court of Justice in the *Rottmann* case.<sup>69</sup> It would be incorrect to state that these national rules fall strictly outwith the scope of EU law. Even so, hitherto, Member States have thought themselves relatively unconstrained in their implementation of policies on acquisition and loss of citizenship, subject to compliance with obligations otherwise arising under EU law such as the duty to recognise dual citizenship established in *Micheletti*.<sup>70</sup> However, for candidate states, broader human rights compliance is supposed to be a heavier burden, where a substantial impact on, for example, problematic citizenship policies might expect to be seen. Furthermore, there is an as yet undiscovered potential for the Commission in the *Rottmann* case, which it may choose to use proactively in relation to candidatures. Hitherto, there has been a signal failure to apply conditionality consistently, as evidenced by the singular failure of the EU institutions to use Slovenia's pre-accession process in order to force progress in relation to a situation (the Erasure) which has not only been characterised as a serious human rights violation by organisations such as Amnesty International<sup>71</sup> and the Justice Initiative of the Open Society Institute,<sup>72</sup> but which has also drawn negative comment because of its effects in relation to statelessness from actors such as the Council of Europe Commissioner for Human Rights. But the rather hidden fate of the Erased failed to make a substantial dent in the overall success rate of Slovenia, which has been widely seen in international spheres as the only success story of the dissolution of Yugoslavia and a deserving member of the '2004 team' – i.e. the first post-1989 enlargement of the EU towards Central and Eastern Europe.<sup>73</sup> On the other hand, Bosnia will undoubtedly be expected to implement constitutional reforms to

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<sup>69</sup> See n19 above and the accompanying discussion.

<sup>70</sup> See n16.

<sup>71</sup> See, most recently, Amnesty International Briefing, Slovenia: Submission to the UN Universal Periodic Review: Seventh session of the UPR Working Group of the Human Rights Council, February 2010, AI Index EUR 68/004/2009, 8 September 2009.

<sup>72</sup> See U Boljka, *The Unfinished Business of the Fifth Enlargement Countries. Country Report: Slovenia*, Open Society Institute – Sofia, European Policies Initiative, 2009, 16-17.

<sup>73</sup> A similar failure in relation to the situation of the Russian minorities and stateless persons in Estonia and Latvia before 2004 can also be observed; see Shaw, above n38, 70-83.

correct the human rights violation identified in the *Sejdić and Finci* judgment<sup>74</sup> on the political rights of non-members of its 'constituent peoples' before it can expect to make further progress towards accession. It will be interesting to see how Montenegro's putative 'erasure' scenario is treated in the future.

Visa liberalisation policies also have effects upon the citizenship policies of the former Yugoslav states. Since the liberalisation policy still excludes two of the six states which remain outside the EU (Bosnia and Kosovo), it will clearly affect the motivations of citizens of those states to seek other passports – especially since Bosnia and Kosovo are two of the states which are relatively tolerant, in different ways, of dual and indeed multiple nationality.<sup>75</sup> For example, it is estimated that there are more than 500,000 Croatian passport holders resident in Bosnia – a relic of the willingness of the Croatian authorities to give passports to non-resident citizens whose acquisition of Croatian citizenship after independence was specifically facilitated in earlier versions of its citizenship law.<sup>76</sup> This policy sees Bosnian Croats as full members of the Croatian nation and is consistent with a general Croatian policy of using ethnic preferences in order to determine the limits of its citizenship laws. Likewise, Bosnian Serbs will be able to acquire Serbian passports, either by establishing a 'residence' in Serbia or by taking advantage of a citizenship law which has become more open towards granting passports to non-resident co-ethnics since Serbia constitutionally redefined itself as 'the state of the Serbian people and of all citizens living in Serbia'.<sup>77</sup> It seems that only the third 'constituent people', Bosnia's Muslim citizens or 'Bosniacs', will be likely to continue to require visas in the future in order to access the Schengen area, especially those who suffered both the consequences of war and of post-war reconstruction and were unable to obtain the passports of Western states as did many Bosnian refugees who left the country. This reinforces, unfortunately, a perception that the EU does not recognise – in its dealings with Bosnia – the fact that it was this group who suffered the most during the 1992-1995 wars in Bosnia.

In the context of Kosovo and Serbia, the EU has adopted a set of measures differentiating between different 'classes' of citizenship which seems difficult to justify in view of fundamental principles of non-discrimination. Paragraph 4 of the preamble to Regulation 1244/2009<sup>78</sup> states:

For persons residing in Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 (referred to as Kosovo (UNSCR 1244))

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<sup>74</sup> See above n55.

<sup>75</sup> Sarajlić, above n40, 19-21; G Krasniqi, *The challenge of building an independent citizenship regime in a partially recognised state: the case of Kosovo*, CITSEE Working Paper 2010/04, 17-18.

<sup>76</sup> See Ragazzi and Štiks, above n7.

<sup>77</sup> See Štiks, *Laboratory of Citizenship*, above n8, 318-210.

<sup>78</sup> See above n48. See also Article 1(2) of the Regulation.

and persons whose citizenship certificate has been issued for the territory of Kosovo (UNSCR 1244), a specific Coordination Directorate in Belgrade will be in charge of collecting their passport applications and the issuance of passports. However, in view of security concerns regarding in particular the potential for illegal migration, the holders of Serbian passports issued by that specific Coordination Directorate should be excluded from the visa-free regime for Serbia.

The casual reference to 'illegal migration' as the justification for drawing this distinction has the effect of continuing the stigmatization of that part of the Balkans, for visa liberalisation only affects short term travel and not long term residence or work regimes. Those determined to travel illegally to the EU and to work there will continue to do so, regardless of the existence of the visa regime. The statement also has implications for both Serbians and Kosovans, and indicates that EU policies can themselves be affected by domestic contingencies such as the capacity to distinguish between different categories of Serbian documents. As Serbia does not recognise the independence of Kosovo, and on the contrary sees that territory as still being subject to its sovereign jurisdiction, citizens of Kosovo are – simultaneously – citizens of Serbia.<sup>79</sup> Indeed, for pragmatic reasons, many Kosovans have retained Serbian documents hitherto, and this measure appears to be a step intended to reduce the benefits for them of so doing. Equally, of course, this measure has the effect of removing ethnic Serbian Kosovans – some of whom have also taken up Kosovan documents as well as Serbian ones, also for pragmatic reasons – from the ambit of the visa liberalisation regime. To that extent, Serbia appears to have agreed to a regime which may benefit the majority of its population, but which discriminates between different groups of citizens, both on the basis of residence and on the basis of ethnicity, and it will be interesting to see whether it is challenged internally. Of course, either group can seek to establish a 'residence' in Serbia, spurious or otherwise, and seek to obtain documents through that means. Indeed, as is often commented, those who seek ways around the law, or who are prepared to act illegally, are rarely those who are inconvenienced or stigmatized by visa regimes.<sup>80</sup> On the contrary, it is 'ordinary' citizens who bear the brunt.

Equally, one of the factors pointing in favour of early implementation of visa liberalisation for Macedonia was the fact that such a policy would relieve some of the pressure which has arisen because of the willingness of Bulgaria to give passports to Macedonians – whom some in Bulgaria see in any event as belonging to the Bulgarian nation – on the basis of rather spurious residence qualifications in Bulgaria, because they have studied at a University in Bulgaria, or on the basis of

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<sup>79</sup> See Krasniqi, above n75.

<sup>80</sup> E. Neumayer, 'Unequal Access to Foreign Spaces: How States use Visa Restrictions to Regulate Mobility in a Globalized World', (2006) *Transactions of the Institute of British Geographers* 72.

special measures benefiting non-resident citizens.<sup>81</sup> Again, this may be evidence of domestic policies spilling over into the EU arena. However, since Bulgaria is already a Member State – albeit one subject to transitional restrictions on freedom of movement for labour purposes – and Macedonia has not even begun its accession negotiations, the likelihood is that this route will continue to be seen as an attractive one for some Macedonians in order to acquire a passport more highly valued within the EU context.

### c) Direct intervention by international organisations

In the context of violent conflict in the region, there have been numerous occasions when international organisations have intervened directly, both to prevent conflict and also for humanitarian reasons, including to provide aid and to protect the interests of refugees and internally displaced persons (IDPs). NATO and the UN and its various agencies have been most directly engaged in these processes, along with the Council of Europe and the EU itself. As regards refugees and IDPs, questions of access to citizenship in particular via civic registration processes have often been raised with the successor states by international organisations, and they continue to be raised in the context of EU accession conditionality, especially with regard to groups such as the Roma.<sup>82</sup> However, in terms of direct impact upon citizenship questions, it is the role of the United Nations Interim Administration Mission in Kosovo (UNMIK), and also of the UN Special Envoy in Kosovo, Martti Ahtisaari, which requires more detailed discussion.<sup>83</sup>

During the period of international administration (1999-2008), up to the date of Kosovo's unilateral declaration of independence, UNMIK decided to create a separate Civil Registry for Kosovo residents to deal with the fact that persons born after 1999 were undoubtedly stateless as they had no opportunity to be entered into the registers of the Federal Republic of Yugoslavia ('FRY'),<sup>84</sup> which continued to claim sovereignty over the territory even after the UN Security Council adopted Resolution 1244 obliging the FRY military and police forces and administration to withdraw completely from the territory. Indeed, as most civil registers were destroyed or confiscated after 1999 by the FRY administration, as a result of which even those born before 1999 had difficulties in presenting official papers especially as many were lost or destroyed during the conflicts at the end of the 1990s.

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<sup>81</sup> See D Smilov and E Jileva, *Report on Bulgaria*, EUDO-Citizenship Observatory, available at <http://eudo-citizenship.eu/docs/CountryReports/EUDO-2009-Bulgaria-linked.pdf>, 17; Spaskovska, above n63, 23.

<sup>82</sup> For an example, see the Commission 2009 Progress Report on Macedonia, SEC(2009) 1335, 21, which refers to 3,000 to 5,000 Roma, ethnic Albanians and ethnic Turks still lacking personal documents.

<sup>83</sup> See generally Krasniqi, above n75.

<sup>84</sup> This refers to the 'rump' state comprising Serbia and Montenegro and in existence until 2003 when it was replaced by the State Union of Serbia and Montenegro.

Consequently, UNMIK began to issue ID cards and also travel documents for those who could prove that they were 'habitual residents' of Kosovo. Krasniqi has obtained figures showing that UNMIK issued around 1,600,000 ID cards and 600,000 travel documents between 2000 and 2008, effectively beginning the process of reconstituting the citizenry of what became – in 2008 – the Republic of Kosovo.<sup>85</sup>

The transition to supervised independence for Kosovo came under the conditions of compliance with externally imposed principles of statehood. However, in practice, the UN Security Council was unable to endorse the plan for independence developed under the leadership of the UN Special Envoy, Martti Ahtisaari, leading in February 2008 to a unilateral declaration of independence and the adoption of the documents and symbols of statehood based on the democratic, secular and multi-ethnic principles which Kosovo signed up to in the context of the Ahtisaari plan. This affects also the terms of citizenship under the Kosovan constitution and Law on Citizenship adopted shortly after independence. The Citizenship Law enables not only habitual residents during the UNMIK period but also pre-war residents of Kosovo and their descendants to acquire Kosovan citizenship – and is even-handed as to whether these persons are of Albanian or Serbian ethnicity. It is, as Krasniqi argues, an open and inclusive solution to the task of defining a citizenry, which is close to the so-called 'new state' solution identified by Rogers Brubaker when discussing the post-Soviet successor states.<sup>86</sup> This is because – unlike the other six states – Kosovo was not a republic of the former Yugoslavia and thus there was no republican level citizenship upon which the initial determination of the citizenry could be based. As a law drafted and adopted by the Kosovan Parliament under a fast track procedure supervised by the officials of the International Civilian Office (ICO), the Kosovan citizenship law owes less than some of the other laws drawn up during that phase of development to examples drawn from other post-Yugoslav states such as Slovenia, as was often the practice of the ICO officials.<sup>87</sup> Whether – given the relatively mono-ethnic character of Kosovo – which has an Albanian majority group amounting to 90% of the population, it is possible in practice to give effect to a civic conception of citizenship remains to be seen.

#### **d) Direct supervision by international organisations**

While it might be appropriate to describe the period of UNMIK administration of Kosovo as a direct *intervention* by an international organisation, it would be best to describe the current situation as an incidence of direct *supervision*. This involves the final stages of the UNMIK phase taking the form of the ICO and the EU Special Representative for Kosovo (EUSR) (whose functions are expected to be wound down over a period of time), combined with an anticipated long term presence for the

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<sup>85</sup> Krasniqi, above n75, 7-11.

<sup>86</sup> Krasniqi, above n75, 2; see R Brubaker, 'Citizenship Struggles in Soviet Successor States', (1992) 26 *International Migration Review* 269. See also more recently Shevel, above n36.

<sup>87</sup> Interview in ICO office October 2009.

largest EU civilian mission ever established (EULEX: the EU Rule of Law Mission). In that context, continued impacts upon citizenship and related matters can be seen, as Kosovo finishes the task of reconstituting its citizenry through measures relating to civic and electoral registers, as well as the detailed implementation through administrative instructions of the Citizenship Law. Here, direct evidence of the importation of best practices can be seen, for example, in the procedures established to deal with requests for citizenship through the Citizenship Office and the Appeal Committee of Citizenship which has tight deadlines for making its decisions and which will – for the foreseeable future – be subject to scrutiny in its work by EULEX.<sup>88</sup>

In Bosnia, a similar quasi-protectorate scenario is in place, with the office of the High Representative retaining substantial powers since the Dayton Agreements, similar to those of the ICO, EUSR and EULEX in Kosovo. The High Representative imposed the citizenship law in Bosnia after Dayton, two years before it was enacted by the state parliament.<sup>89</sup> In practice, also, the peculiarities of Bosnia's post-Dayton constitutional settlement have given considerable veto powers to the representatives of the two sub-state 'entities', and progress has thus been blocked in relation to important aspects of the constitution which it is widely recognised as not in conformity with international human rights norms. It is interesting to speculate whether – in the citizenship-related field of electoral rights – the case of *Sejdić and Finci* brought before the European Court of Human Rights<sup>90</sup> might achieve outcomes which the High Representative in Bosnia cannot.<sup>91</sup> For it is anticipated that the Bosnian Constitution will be amended to make it possible for persons not self-declaring as members of the three 'constituent peoples' of Bosnia to be elected to the collective Presidency and the House of the Peoples.

#### e) Other forms of international pressure

Throughout the region, more traditional forms of international pressure can be discerned, exercised both by other international organisations with a presence in the region which do not have the powers of the ICO/EUSR or EULEX in Kosovo or the High Representative in Bosnia, or by neighbouring states with particular interests to promote and by states with particular regional interests or responsibilities such as the USA, Russia and many Member States of the EU. In all of these cases, states and international organisations make use of the normal channels of diplomatic influence and pressure, many of which are not visible in public. Such pressures will cover, of course, not only citizenship issues but also other norms of good governance such as democracy, transparency, and good administration. It is thus harder to state, for example, the extent to which Bulgaria experiences pressure from its EU partners not

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<sup>88</sup> On procedures, see in particular Krasniqi, above n75, 19-20.

<sup>89</sup> See Sarajlić, above n40, 11.

<sup>90</sup> See above at n55.

<sup>91</sup> See Sarajlić, above n40, 23-24, 25-26.

to grant citizenship to Macedonians, or whether some attempts have been made to persuade Slovenia finally and fully to regularise the situation of the Erased.<sup>92</sup> It is certainly clear that at a certain point in the late 1990s and early 2000s Croatia did come under pressure, as part of an international policy to force it to allow the return of Serb refugees, to permit Croatian Serbs to access, if they so wished, Croatian citizenship. Croatia never pursued the Slovenian option of 'erasing' the residents who were citizens of other former Yugoslav Republics, but the military successes of the Croatian army in the Krajina, Slavonia and elsewhere in 1995 led to large numbers of refugees amongst the Serb community who subsequently found it hard to return to Croatia from what was then the FRY, and to reassert the citizenship which they retained at least in theory.

Macedonia, however, does provide one very good example of a 'citizenship effect' of external pressure which it would be appropriate to include under this fifth rather *ad hoc* category. This concerns the Ohrid Framework Agreement, which was negotiated under the guidance of mediators from the United States and the EU, as well as with more informal and private advice from the French politician and jurist Robert Badinter, well known for having headed Arbitration Commission of the Peace Conference on the former Yugoslavia appointed by the Council of Ministers in 1991 to attempt to devise some reliable criteria for determining when – and which – states seceding from Yugoslavia should receive international recognition by the EU and its Member States. The agreement was signed by both the international mediators and the representatives of the various ethnic Macedonian and Albanian parties, and it successfully brought to an end an armed rebellion by Albanian radicals which was threatening the stability of the state. The agreement itself recognised the importance of Macedonia being a multi-ethnic state governed on the basis of republican secular principles, and it led to the introduction of a form of consociationalism through constitutional amendments giving vetoes to both communities in the process, at all levels of government. Macedonia was constitutionally redesignated as a 'civic and democratic state', replacing the previous definition of Macedonia as primarily the state of the Macedonian people, 'as well as citizens living within its borders who are part' of the minorities. This exclusionary definition had been supported by a Citizenship Law of 1992 which established a lengthy 15 year continuous residence period, which effectively excluded many Albanian and Roma minority residents from citizenship of the new republic. This was reduced in a new law of 2004 to an

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<sup>92</sup> In March 2010, the Slovenian Parliament again amended its law to bring a final closure on the issue of the Erased, enabling a further tranche of those erased to recover their permanent resident status; see Balkan Insight, 'Slovenia Parliament amends law on erased', <http://www.balkaninsight.com/en/main/news/26402/>, 9 March 2010. However, the opposition parties have attempted to call a further referendum on this question, reckoning on the existence of a continuing tension between resolving the situation of the erased and perceptions of national identity in what remains a new state.



eight year residence period.<sup>93</sup> Moreover, in its most recent amendment of 2008, it is possible to see further external influence upon Macedonian citizenship laws. Responding to international pressure which consistently highlighted the continued problems with refugees and IDPs, the amendment established that refugees can apply for Macedonian citizenship if they have been legally resident in Macedonia for six years prior to the application. It was also specifically aimed at settling the position of refugees from Kosovo as it abolished the requirement that a person seeking naturalisation must have been released from their previous citizenship (in this case Serbian citizenship) and also removed the requirement that such persons must not have been subject to criminal prosecution in their country of citizenship.<sup>94</sup> In practice, many Kosovan Albanians had been subject to criminal prosecutions in Serbia.

**f) Overlapping citizenship regimes between neighbouring states**

As we have noted at several points in this paper, one of the features of the citizenship regimes under consideration is that they all stem from a single root, namely the citizenship regime of the former Yugoslavia, with its dual system of republican/federal citizenship. This factor, along with cross-republic mobility, transnational family ties and more historical links which developed over centuries in the Balkans, explains why there are often points of overlap and friction between the citizenship regimes of these states, of an extent and an intensity which goes beyond other neighbouring pairs or sets of states (e.g. Belgium/France; Benelux states; Nordic states).

These factors account, for example, for the importance and high prevalence of dual nationality as between pairs of states (e.g. Croatia/Bosnia; Croatia/Serbia; Serbia/Bosnia; Serbia/Kosovo; Macedonia/Bulgaria, etc.) as well as with those third countries permitting dual nationality which have been the most common destinations for emigrant Yugoslavs and citizens of post-Yugoslav states. In that context, the position in Montenegro – which acquired its independence in 2006 – is of considerable interest. Montenegro discourages dual citizenship, most particularly because of the relationship with Serbia (up to 30% of the Montenegrin population identify themselves as Serbian and thus dual citizenship could have a profound impact upon voting arithmetic).<sup>95</sup> Dual citizenship is only permitted in the context of reciprocity, once agreements have been concluded with other states; so far, an agreement has only been concluded with Macedonia. Montenegro's policy choice, which is significant for the purposes of state-building and community cohesion, therefore, impacts upon the citizenship regimes of the *other* neighbouring states, because it seeks exclusivity for Montenegrin citizenship in a manner which the other regimes, with the exception of Bosnia which also has a reciprocity clause, do not.

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<sup>93</sup> See Spaskovska, above n63, 12.

<sup>94</sup> See Spaskovska, above n63, 14.

<sup>95</sup> See Džankić, above n60, especially 1-2, 16-17.

The overlapping character of the citizenship regimes of the seven states also accounts for the sensitivities which attached in particular to the initial definition of the citizenry in each of the states at the point of independence/secession/state redefinition. As we saw in the case of the Erased in Slovenia, this was seen to pose a particular challenge in relation to the question of 'who are the citizens?', as no single state could be in any substantial respect isolated or insulated from the others. Indeed, as Oxana Shevel argues, 'the politics of national identity (defined as contestation between citizenship policymaking elites over the question of the nation's boundaries) is a particularly important source of citizenship policies in new states'.<sup>96</sup> But difficulties arose more generally because there had been a number of changes to the definitions of citizenship at both the federal and the republican levels whilst socialist Yugoslavia exists, and there were subtle differences between each of the states. Many citizens were not aware of the significance of republican citizenship and the registers of citizens were often incomplete or incorrect. As a result, there were many cases in the immediate aftermath of independence of persons finding themselves involuntarily stateless because it turned out they were not registered where they expected to be, or their registration did not have the effect of giving them the citizenship of the state where they might have resided for many years, or even were born. The impact of these rules also caused profound difficulties in relation to access to property, since – as Verdery has shown – during the postsocialist transition citizenship and property rights intersected in important ways during phases of privatization as well as periods of conflict, violence and forced population mobility.<sup>97</sup> In the EU – i.e. where European norms of non-discrimination on grounds of nationality apply – it is, of course, unlawful to link property ownership to nationality in that way.

## 5. Conclusions

This paper has covered a wide range of issues, having started with an analysis of the place of Union citizenship in the EU context, before shifting focus to look at the impact of the mosaic of constitutional and constitutional-like norms which impinge upon the citizenship regimes of a complex region – the former Yugoslavia – which remains unstable and in transition even 20 years or more after the fall of the Berlin Wall.<sup>98</sup> Moreover, it is a region which has not, for the most part, conformed to the patterns of post-socialist transition, which are visible in the states of central and eastern Europe which acceded to the EU in 2004 and 2007. Despite the lack of attention that citizenship has generally received in the context of the dissolution of Yugoslavia, it is not surprising that questions of membership definition have been of

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<sup>96</sup> Shevel, above n36, 274.

<sup>97</sup> K Verdery, 'Transnationalism, Nationalism, Citizenship and Property: Eastern Europe since 1989', (1998) 25 *American Ethnologist* 291.

<sup>98</sup> See I Štikš, "'The Berlin Wall Crumbled Down upon Our Heads!': 1989 and Violence in the Former Socialist Multinational Federations', (2010) 24 *Global Society* 91.

acute relevance in the context of a painful transition from a single multinational and multi-ethnic state, comprised of republics most of which were themselves (increasingly) multi-ethnic in character, into seven often ethnically defined states. This is all the more so because there were increasingly large numbers of transnational families in Yugoslavia as a result of labour migration after the second world war and the impact of the policies of the Yugoslav National Army. Such families, along with ethnic groups that have suffered specific policies of ethnic cleansing in a number of different contexts (e.g. Serbs in Croatia; Croats and Bosniacs in Bosnia), have often been internally or indeed externally displaced throughout the 1990s and into the 2000s.

The intention in this paper was not, of course, to make the argument that the relations between Union citizenship and the citizenship of the Member States are completely straightforward, as cases such as *Micheletti*, *Kaur* and especially *Rottmann* have clearly shown, or to try to argue that integration in the EU or the role of EU citizenship represents some sort of panacea for the citizenship troubles of the new states of South Eastern Europe. The paradoxical effects of the EU on borders are, as is well known, as much to redefine them as it is to remove them altogether.<sup>99</sup> However, it is worth noting that even where EU citizenship is at its most challenging for the national citizenships of the Member States, it is still a less fraught scenario than that which faces the citizenship regimes of the new states of South Eastern Europe, engaging with multiple sources of normative authority making connections to the EU and its Member States, to each other and to other third countries. Even so, it should not be thought that external pressures, whether vertical or horizontal in character, are the only forces in the shaping of the national citizenship laws of the seven states now established in the territory of the former Yugoslavia. Endogenous factors, such as the ethnic mix of the states or internal historical and institutional factors and questions of national identity, also play a role.

By the same token it should not be concluded that the international dimension of the constitutional mosaic, so far as it affects citizenship, somehow undermines the legitimacy of the existing constitutional settlements. It would be wrong to suggest that these seven states will only reach a state of stability once they kick (almost all) the international norms out and start, as mature national systems, to deal with their own problems through predominantly national solutions. On the contrary, the experience of the EU in relation to citizenship surely suggests otherwise, as we saw in Section 2, which charted the complex and still evolving relationship between EU citizenship and national citizenship for the Member States. For with stability and mature constitutional systems, along with greater economic prosperity, will – most

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<sup>99</sup> N Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', (2008) 6 *International Journal of Constitutional Law* 375; T Diez, 'The Paradoxes of Europe's Borders', (2006) 4 *Comparative European Politics* 235.

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likely – come also EU membership for these states and thus the complexities of a multi-level citizenship settlement that this involves, albeit with only limited constraints directly upon the capacity of states to determine the contours of their own citizenry. But if the EU continues to develop along its present (political) lines, as the Treaty of Lisbon has shown, a greater political substance is likely to be invested in EU citizenship, with consequential effects upon national *political* citizenship, if not the rules on acquisition and loss.

In that context, the patterns of the constitutional mosaic will change for the new states of South Eastern Europe, as a result of changes *within* the EU of an institutional and a legal character, as well as changes *to* the EU (i.e. the expansion of membership). Some of the arrangements discussed in this paper will wither away, but others – such as the ECHR – may remain and develop, as civil and political rights become increasingly intertwined in the case law of the European Court of Justice. However, even when the last of the seven states in the region becomes a member, the heritage of its complex and often tortured history is likely to be evident in the continued intertwining of state-building and citizenship as presented here.



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