Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding *Ius Sanguinis* and *Ius Soli*

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Abstract
This contribution maps recent global trends regarding the grounds for acquisition of citizenship by descent and by birth on a particular territory. Questions of nationality law have traditionally been part of the State’s reserved domain. However, it will be seen that some of the trends regarding citizenship acquisition by *ius sanguinis* and *ius soli* can be attributed to the inroads made by international law into the rule that each State has absolute autonomy in deciding who its citizens are. Others are the result of the still considerable leeway available to States in nationality matters. Against the backdrop of the current international standards and drawing on data collected by the GLOBALCIT Observatory for 174 countries on five continents, the article analyses national practices in respect of the acquisition by *ius sanguinis* and *ius soli*, remedial *ius soli* for otherwise stateless children, and the nationality effects of the recognition of paternity.

Keywords  Nationality · Citizenship · Acquisition · Loss · Statelessness · GLOBALCIT Observatory

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1 Introductory Remarks

Traditionally it is written that acquisition of nationality by *ius sanguinis* (acquisition by descent) is typical of civil law countries, whereas *ius soli* (acquisition by birth on the territory) is to be found in common law countries.\(^1\) However, on closer examination the picture is more complicated.

The English use of *ius soli*, having a long tradition and going back to the 1608 *Calvin* case,\(^2\) was subsequently exported to British possessions all over the world. The *ius sanguinis* practice of civil law countries is of more recent origin. In France, the 1804 *Code Civil* for the first time laid down rules for obtaining the ‘*qualité de français*’ by *ius sanguinis*. Although nationality would only be regulated in special nationality laws several decades later, French law was particularly influential because it would be exported throughout Europe in the nineteenth century.\(^3\)

Yet it should be noted that *ius soli* was applied in e.g. Prussia until 1842\(^4\) and in Spain until 1889,\(^5\) and that until 1893 the Netherlands used *ius sanguinis* alongside *ius soli*.\(^6\) The approach of Spain would have a lasting influence on the former Spanish colonies in Latin America.\(^7\)

In this contribution we will elaborate on the development of rules on acquisition of nationality by *ius sanguinis* and on the different variations of the application of *ius soli*. We will be able to observe a global trend of most of the classic *ius soli* countries modifying their approach in the direction of a more conditional *ius soli* and additionally establishing *ius sanguinis* elements in their legislation. On the other hand, we will describe that some classic *ius sanguinis* countries have created the possibility to acquire their nationality by *ius soli* constructions and have modified the rules on acquisition *iure sanguinis* in light of the equal treatment of men and women. However, before paying attention to these developments in Sects. 3 and 4 some terminological remarks should be made. It is also noted at the outset that we will discuss a number of international instruments. Of course, the treaties dealing with nationality matters are strictly spoken only binding for States that acceded to these conventions. The soft law documents that we will touch on are even less binding. But all these documents have at least a persuasive character. Together they constitute the framework of international standards within which States should draw the picture of their nationality rules.\(^8\)

Our observations will be based on the data of 174 countries on five continents (including Australia and New Zealand but with the exception of Oceania) collected

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1. Compare the remarks of Solodoch and Sommer (2018), in particular pp. 5 and 6.
2. De Groot and Vonk (2016), p. 10 and De Groot et al. (2018), p. 10.
3. Hecker (1980); Grawert (1973), pp. 156–163.
4. See on the development of the grounds for acquisition and loss of nationality in the German-speaking territories and in France: Grawert (1973). See on the developments in Prussia, pp. 124–134.
5. De Groot (1989), pp. 178–179.
6. De Groot (1989), p. 125.
7. Acosta (2018).
8. De Groot (2016), p. 8.
in the GLOBALCIT Database on Acquisition of Citizenship, to which we have contributed since 2012. Below we analyse the information for four modes of acquisition:

1. *Ius sanguinis*
2. *Ius soli*
3. Remedial *ius soli*
4. Recognition paternity.

### 2 About the Terms *Ius Sanguinis*, *Ius Filiationis* and (Unconditional/Conditional/Remedial/Double) *Ius Soli*

Acquisition *iure sanguinis* implies that the nationality of a certain country is acquired by a child due to the fact that (s)he has a parent who is a national of that country. The parent is a person who acquired this status either under the law of the State involved or under foreign law, but is recognised as the parent in the State involved. It does not matter whether the legal status of parent is based on the genetic truth; a State shall not make the acquisition of nationality by parentage conditional on proof of the biological truth if this evidence was not yet a condition for the establishment of the parentage. Furthermore, if the parentage established abroad between a child born to a surrogate mother with an intending parent is recognised by the State of nationality of this parent, the child must have access to the nationality of the intending parent under the same conditions as a child born to this parent. In other words, it is not the ‘blood’ (*sanguis*) of a child that matters for the acquisition of nationality, but the legal tie of parentage (*filiationis*). It would for that reason be considerably better to use the term *ius filiationis* instead of the old-fashioned *ius sanguinis*. Nevertheless, we will use the term *ius sanguinis* in this contribution in order to avoid any confusion.

Originally, all States which provided for an acquisition of nationality *iure sanguinis* almost exclusively applied *ius sanguinis a patre* (by the paternal line); only in exceptional circumstances was *ius sanguinis a matre* (by the maternal line) relevant, for example in the case of a child born out of wedlock and not recognised by a man. In practice, however, most children had the same nationality as the father and

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9 Available at http://globalcit.eu/acquisition-citizenship/.
10 The categories used by the GLOBALCIT database in respect of these modes of acquisition are A01a and A01b (*ius sanguinis*), A02a and A02b (*ius soli*), A03b (remedial *ius soli*) and A04 (recognition paternity).
11 Recommendation of the Committee of Ministers of the Council of Europe 13/2009 (hereafter: Recommendation 2009/13), Principle 10, available at https://rm.coe.int/16807096bf. However, as we will see below a number of countries do not follow this rule.
12 Recommendation 2009/13, Principle 11 as well as para. 32 of the explanatory memorandum to this recommendation. Compare also the decision of the ECtHR of 26 June 2014 in *Labassee* and in *Menneson*, Application nos. 65192/11 and 65941/11. See on the nationality status of children arising from intercountry surrogacy arrangements Wells-Greco (2015) and De Groot (2014).
13 See Bauböck et al. (2015).
mother, because women lost their own nationality at the moment of marriage and at that moment acquired the nationality of their husband. During the twentieth century this ‘unitary’ system was gradually replaced by the ‘dualist’ system which allowed women to possess their own independent nationality.14

The traditional ius soli implied the conferral of the nationality of the country of birth to all children born on the territory of the State, without any other condition to be fulfilled. Such unconditional ius soli included therefore inter alia the children born on the territory of the State to parents staying unlawfully in the country.

However, ius soli countries have increasingly amended their rules and limited the application of the ius soli principle to children born on their territory who also fulfil one or more additional conditions, most commonly the condition that a parent is in possession of a specific residence right. This type of ius soli rules will be labelled as conditional ius soli provisions.

A very specific category of a conditional ius soli regulation is a provision providing for the acquisition of the nationality of the country of birth in order to avoid statelessness of a child: a country may provide that the nationality of the State is acquired by a child born on its territory who otherwise would be stateless. This type of provisions will be labelled as remedial ius soli.

Ius soli provisions are sometimes also divided in ius soli at birth and ius soli after birth.15 We would like to underpin that a real ius soli provision operates immediately at birth. To use the concept of ius soli after birth is insofar useful that it highlights that birth on the territory of a State may matter for the facilitated access to the nationality of the country of birth. But it does not confer as such a birthright nationality. The access to nationality is often conditional on the fulfilment of one or more additional conditions, like a certain period of residence in possession of a residence permit.16

Another special form of a conditional ius soli is the so called double ius soli. This form of ius soli was originally developed and introduced in France in 1889 and was copied by many other countries: a child born on the territory of the State acquires the nationality of the country of birth if a parent was also born on the territory of that State. In the past such a double ius soli was generally applied in the paternal line and only under exceptional conditions in the maternal line. However, nowadays States which take equal treatment of men and women seriously have to apply this double ius soli equally for the maternal and the paternal line: therefore a child will acquire the nationality of the country of birth if either the father or the mother was also born on the territory of the State involved.

A ‘residence’ variation of double ius soli exists in the Netherlands: Article 3(3) Netherlands Nationality Act provides that

A child shall be a Netherlands national if he or she is born to a father or mother who has his or her principal place of residence in the Netherlands, Aruba,

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14 Dutoit (1973–1998); De Groot (2012).
15 E.g. Vonk (2018), pp. 14–15.
16 See below Sect. 4.1 for more details.
Curaçao or Sint Maarten at the time of his or her birth and who was born to a father or mother who himself or herself had his or her principal place of residence in one of those countries at the time of his or her birth, provided that the child has his or her principal place of residence in the Netherlands, Aruba, Curaçao or Sint Maarten at the time of his or her birth.\textsuperscript{17}

The background to this domicile variation is the wish to avoid that also a mere accidental birth of the child and the parent on the territory of the State may cause the acquisition of Netherlands nationality.

3 Variations in \textit{Ius Sanguinis/Filiationis}

3.1 International Standards and Choices to be Made by States\textsuperscript{18}

While questions of nationality law have traditionally been part of the State’s reserved domain,\textsuperscript{19} recent decades have witnessed a growing body of international standards and guidelines in this area. According to the international standards a child has the right to acquire the nationality of a parent, but States may make exceptions for children born abroad and may provide for a special procedure for children born out of wedlock.\textsuperscript{20} However, if the child would otherwise be stateless the child must always automatically acquire the nationality of the parent, also in case of birth abroad.\textsuperscript{21} What is more, a State may never make a distinction based on the maternal or paternal parentage.\textsuperscript{22} In other words, the acquisition of nationality through the father (\textit{ius sanguinis a patre}) needs to happen under the same conditions as the acquisition of nationality through the mother (\textit{ius sanguinis a matre}). Moreover, a State may never regulate any ground for acquisition of nationality in a way which would result in ethnic, racial or religious discrimination.\textsuperscript{23}
However, a State may provide that a child of a national born abroad only acquires the nationality of this parent if a) both parents are nationals; b) both parents lodge a joint declaration; or c) one parent lodges a declaration.\(^\text{24}\) A State may also differentiate between the first, second and subsequent generations born abroad.

Therefore, States have to decide whether they want to restrict the acquisition of the nationality by parentage in cases of birth abroad. A reason to do so will be the assumption that a child born abroad will not build sufficiently close ties with the State of nationality of the parent to justify the attribution of nationality.\(^\text{25}\) However, an alternative for limiting the acquisition of nationality in the case of birth abroad is to provide for loss of nationality because of residence abroad by a person born abroad and living permanently abroad during a certain number of years after having attained the age of majority.\(^\text{26}\) An obvious advantage of this alternative is the fact that the child can decide to build up ties with the country of nationality in order to avoid the loss of nationality.

A disadvantage of limiting the acquisition of nationality by parentage in case of birth abroad or to make this conditional on the consent of both parents is that it creates problems in respect of diplomatic and consular protection of the child in case of (parental) child abduction. If the child does not acquire the nationality of a parent because of a general limitation of the transfer of nationality at birth in case of birth abroad or because the non-national parent refuses to give the required consent for the acquisition of nationality and the parents split up, the parent whose nationality the child does not possess may be legally prejudiced in requesting diplomatic or consular assistance of her or his own State if the child is abducted to another country.

To make the acquisition of nationality of a parent by the child in case of birth abroad conditional on the registration as a national on the request of a parent is also not unproblematic. The first problem is whether a State is entitled to provide that only the national-parent can request such registration. A negative answer seems to be appropriate.\(^\text{27}\) If the parentage is established against the will of the parent involved (s)he may be tempted not to register the child in order to avoid the child developing nationality ties with the State involved.

Making the acquisition of nationality conditional on the registration by either parent is less problematic but one should realise that later in life the child will perhaps not share the ‘reasons’ of the parent(s) for non-registration. The reason for non-registration may be indifference, lack of information on the necessity to register, or may be of a more serious nature. Be this as it may, it is not difficult to imagine that children may be of a different opinion and may develop a huge interest in acquiring the nationality of the parent. In that light, it is attractive to offer the child a window to register as a national also during a certain period after having attained the age of

\(^{24}\) Art. 6 ECN.

\(^{25}\) De Groot and Vink (2010/2014); De Groot (2016), pp. 13–17.

\(^{26}\) De Groot and Vink (2010/2014), para. 6 and Table 3.5.

\(^{27}\) We conclude this from the ruling of the ECtHR 11 October 2011, Genovese v. Malta, Application no. 53124/09. See De Groot and Vonk (2012), pp. 317–325.
majority.\textsuperscript{28} In favour of this solution is the fact that the child as a young adult is no longer subject to the parental authority of the parent(s). A disadvantage of this solution is evidently that the child would also be able to register as a national if until that moment no ties were developed with the country involved.

A huge disadvantage of allowing registration of the child as national by only one parent can also appear if the child already acquired \textit{ex lege} the nationality of the country of the other parent. If this other State classifies the acquisition of nationality by registration as voluntary acquisition of a foreign nationality, this may trigger the loss of the first acquired nationality.\textsuperscript{29}

A related issue is the following. \textit{Quid iuris} if the parentage tie was only established after having attained the age of majority? Most legal systems provide only for acquisition of nationality by parentage, if this parentage was established during the minority of the child.\textsuperscript{30} However, some States provide for a different age limit\textsuperscript{31} or an alternative access to nationality instead of an automatic acquisition (for example registration within a certain period) after the establishment of the parentage.\textsuperscript{32} These alternatives are in particular welcome in cases where e.g. a mother made an arrangement (often against payment) with the biological father not to establish the paternity. If the child is not able to start as a minor the procedure for a judicial establishment of paternity, the child would be deprived of the possibility to acquire the nationality of his father by parentage in case (s)he has to wait until having attained the age of majority. Giving the young adult an own window to acquire the nationality of the father seems to be appropriate.

Again another issue arises if the State provides for acquisition of nationality \textit{iure filiationis} but documentary evidence on the parentage is lacking. It is certainly a best practice that Austria allows in such cases proof of parentage by DNA-evidence.\textsuperscript{33} It is questionable, however, whether the rule that the person involved has to pay the costs of the DNA-test can be recommended with respect to less wealthy States.

A related ground for acquisition of nationality is adoption.\textsuperscript{34} It was already mentioned that parentage as a ground for acquisition of nationality should not depend on how this parentage is established and it should be irrelevant whether or not the parentage reflects the biological truth. In this sense there seems to be a justification to

\begin{itemize}
  \item \textsuperscript{28} Compare Art. 1(2)(a) 1961 CRS.
  \item \textsuperscript{29} See for an example on the loss of Norwegian nationality by the child of a Norwegian mother and an Australian father due to the registration of the child as an Australian national: \url{http://statsborger.no/en/how-nina-cannot-live-together-with-her-kids-in-norway/}. A similar problem can arise under Japanese nationality law (information received during a workshop on nationality and statelessness organised in Tokyo on 3 August 2018). For the issue of dual nationality, see Wautelet (2018) in this special issue.
  \item \textsuperscript{30} GLOBALCIT database mode A04.
  \item \textsuperscript{31} E.g. Germany, para. 4(1) \textit{Staatsangehörigkeitsgesetz}: the parentage must be established by recognition or the procedure requesting judicial establishment of paternity must be initiated before the young adult reached the age of 23 years.
  \item \textsuperscript{32} E.g. Spain, Art. 17(2) of the \textit{Código Civil}: the young adult has an option right to Spanish nationality during a period of two years after the establishment of paternity.
  \item \textsuperscript{33} E.g. Austria, para. 5(2) \textit{Staatsbürgerschaftsgesetz}.
  \item \textsuperscript{34} GLOBALCIT database mode A10.
\end{itemize}
present adoption as a subcategory of parentage and for that reason as a case of acquisition of nationality by *ius sanguinis*. However, three reasons lead to the conclusion that a separate discussion of adoption is to be preferred. First, not all adoptions replace the original parentage tie completely by a parentage tie with the adoptive parents. Second, some attention has to be given to defective adoption procedures, i.e. those cases where a child was residing in a particular State with a view of being adopted but the adoption was not finalised. Third, in case of intercountry adoption most adopted children are born abroad.\(^{35}\) For these reasons, we will not pay further attention to the acquisition of nationality by adoption in this contribution.

### 3.2 Comparative Observations Based on the GLOBALCIT Database

#### 3.2.1 *Ius Sanguinis a Patre et a Matre* (Children Born in the Country)

Given the dominance of *ius sanguinis* over *ius soli* in contemporary nationality law, the overwhelming majority of countries automatically grant nationality to a child born on their territory to a citizen parent. However, as will be explained below, there are still countries that discriminate against women and only grant citizenship to children born to a male parent.

In the Americas, where *ius soli* prevails over *ius sanguinis*, a provision granting citizenship to children born on the territory to a citizen parent is often lacking. A rare example of a country that does provide for such a rule is Nicaragua, where one might thus say that the acquisition of citizenship rests on a combination of *ius soli*-*ius sanguinis*.

#### 3.2.2 *Ius Sanguinis a Patre et a Matre* (Children Born Abroad)

The GLOBALCIT database lists fifty-five countries which simply provide that acquisition is automatic if a child is born abroad to a citizen. In many other countries, acquisition may happen but is conditional on meeting other or additional conditions. There are many variations as well as different procedures (i.e. automatic acquisition, by declaration or by registration), such as:

- Person is born abroad to two citizens: Bhutan, Haiti and Georgia;
- Person is born abroad to a parent who was born in the country of nationality: Belgium and Dominica;
- Person is born abroad to a citizen otherwise than by descent (i.e. by *ius soli* or by naturalisation): Gambia and Guyana;
- Person is born abroad to a citizen by birth: Honduras and Panama;
- Person is born to a parent in the diplomatic service of the country of nationality: Barbados and Brazil;

\(^{35}\) De Groot (2016), pp. 18–23. See also De Groot (2014), pp. 163–165. Compare Art. 5(2)(c) Draft African Nationality Protocol.
• Person is born abroad to a citizen and is registered with an embassy and/or establishes residence in the country of the parent’s nationality: Bolivia, Colombia and East Timor;
• Person is born abroad in wedlock to a citizen: Cambodia and Finland;
• Person is born abroad to a parent who is a citizen and another parent who is stateless or of unknown citizenship: Croatia and Kazakhstan;
• Person is born abroad to a citizen and has not acquired the citizenship of the country of birth: China and India.

3.2.3 *Ius Sanguinis a Patre* (Gender Discrimination of Women)

While gender discrimination in nationality law has been removed in most countries since the 1970s,36 it is still prevalent in the Middle East and North Africa (MENA) region. According to Albarazi, ‘more than half of the 25 countries worldwide where women cannot pass their nationality to their children on an equal basis to men are found in the MENA region’.37 The United Nations High Commissioner for Refugees (UNHCR) makes the following subdivision,38 which is confirmed by the country-specific analyses in the GLOBALCIT database:

• Nationality laws which do not allow mothers to confer their nationality on their children with no, or very limited, exceptions: Brunei Darussalam, Iran, Kuwait, Lebanon, Qatar, Somalia and Swaziland;
• Nationality laws that have some safeguards against the creation of statelessness (for example making exceptions for mothers to confer nationality if the father is unknown or stateless): Bahamas, Bahrain, Barbados, Burundi, Iraq, Jordan, Kiribati, Liberia, Libya, Malaysia, Nepal, Oman, Saudi Arabia, Sudan, Syria, Togo and United Arab Emirates;
• Nationality laws that limit the conferral of nationality by women but provide for additional guarantees to ensure that statelessness will only arise in very few circumstances: Mauritania.

Differences can also be found within these categories. In Nepal, for example, acquisition is through naturalisation if the child is born to a citizen mother and a non-citizen father, while in most of the other countries the acquisition would be automatic upon meeting additional requirements if the nationality of the father is not acquired. The rules are also frequently unclear. Thus, in Libya acquisition is automatic if the child is born to a male citizen; by contrast, it is not clear what are the governing rules for female citizens transferring their citizenship, as there is a

36 Recent studies of nationality law on the Asian continent show that the Asian countries followed this trend. Gender equality was introduced in the following years: Bangladesh (2008), China (1980), India (1992), Japan (1985), Pakistan (2000), South Korea (1998), Sri Lanka (2003) and Taiwan (2000 but with retroactive effect to 1980). See Vonk (2018), pp. 12–16.
37 Albarazi (2017), p. 3.
38 See http://www.refworld.org/pdfid/5aa10fd94.pdf.
contradiction in the law and governing rules are yet to be issued. In Lebanon children born to only a Lebanese mother and out of wedlock face difficulties having their birth registered, which may result in problems with not being considered a citizen. Although this can be solved in court, it is a difficult and opaque process.

3.2.4 *Ius Sanguinis a Matre* and *Ius Sanguinis a Patre* (But for the Paternal Line Only under Certain Conditions; Discrimination of Men)

Some countries do not discriminate against women but discriminate against men in respect of the possibility to transmit their nationality to their children, more specifically to their children born out of wedlock. Of course, a child will in all countries only be able to acquire the nationality of the father by *ius sanguinis* if the parentage of the father is legally established. However, some countries particularly fear that a paternal parentage created by acknowledgement could be abused if the biological truth of the acknowledgement of a child born out of wedlock by the father is not a condition for the validity of the acknowledgement. In order to avoid the risk of abuse, these countries provide that the nationality of the father is only acquired after evidence of the biological truth is submitted. This is e.g. the case in Iceland and in the Netherlands.  

4 Variations in *Ius Soli*

4.1 International Standards and Choices to Be Made by States

No international instrument obliges to apply *unconditional ius soli*. However, *remedial ius soli* is addressed in several conventions and other international instruments. The 1961 CRS gives a child who would otherwise be stateless the right to acquire the nationality of its country of birth through one of two means. First, a State may grant its nationality to otherwise stateless children born in its territory automatically by operation of law. This implies a *remedial ius soli* application. The second alternative is that a State may grant nationality to otherwise stateless persons born in their territory later upon application. The grant of nationality on application may, according to Article 1(2), be subject to one or more of the four conditions mentioned in that provision. This second option is an example of a *conditional ius soli after birth*.

The Convention further includes provisions in favour of foundlings (Article 2), on acquisition of the nationality of the mother by descent if the child was born in

39 Art. 2(2) Icelandic Nationality Act; Art. 4(4) Netherlands Nationality Act (for children acknowledged between the age of 7 and 18 years).
40 De Groot (2014), pp. 148–154.
41 Note that the obligations of the 1961 CRS try to remedy the statelessness of children. Contracting States may not require that the children involved have stateless parents. The obligations of the Convention also apply in cases where a parent possesses a nationality but cannot transmit this status to a child.
her country’s territory and would otherwise be stateless (Article 1(3)), acquisition of the nationality of a parent by descent via an application procedure for individuals who do not acquire the nationality of the country of their birth (Article 1(4)) and on acquisition of the nationality of a parent by descent for individuals born abroad who would otherwise be stateless (Article 4). Article 1(4) and Article 4(2) allow exceptions to their rules under some circumstances.

The 1969 American Convention on Human Rights opts clearly for the first option of the 1961 CRS and proclaims that every person has the right to the nationality of the State in whose territory (s)he was born if (s)he does not have the right to any other nationality.42

Under the heading ‘Reducing statelessness of children’ Recommendation 2009/13 of the Council of Europe43 states:

1. [...]  
2. provide that children born on their territory who otherwise would be stateless acquire their nationality subject to no other condition than the lawful and habitual residence of a parent;  
3. provide that children on their territory who are stateless despite the provisions contained in principles 1 and 2 above, and who have the right to acquire the nationality of another state, be provided with any necessary assistance to exercise that right;  
4. provide that children who, at birth, have the right to acquire the nationality of another state, but who could not reasonably be expected to acquire that nationality, are not excluded from the scope of principles 1 and 2 above;  
5. provide that stateless children have the right to apply for their nationality after lawful and habitual residence on their territory for a period not exceeding 5 years immediately preceding the lodging of the application.

Principle 2 obviously advocates a conditional ius soli, whereas principle 5 addresses the desirability of a facilitated access to the nationality of the country of birth which also could be described as an approach of ius soli after birth.

Relevant is also principle 17 which advocates that States should ‘facilitate the acquisition of nationality, before the age of majority, by children born on their territory to a foreign parent lawfully and habitually residing there. Enhanced facilitation should be offered in cases where that parent is also born on their territory’.

The explanatory memorandum (para. 41) clarifies a number of potentially ambiguous points, stating for example that ‘if a parent has been residing lawfully and habitually in a state, the child born on the territory of that state should have facilitated access to its nationality. In that case it is extremely likely that the child will be integrated into that state and this fact alone justifies facilitation’, although ‘States are free to determine how they want to facilitate the access to their nationality for

42 So does Art. 5(1)(b) Draft African Nationality Protocol.  
43 De Groot (2014), pp. 154–158.
the children concerned’. Nevertheless, the principle is evidently in favour of *ius soli after birth*.

Additionally, the explanatory memorandum (para. 42)—being the only international instrument to do so—addresses the possibility of *double ius soli*, stipulating that based on the presumed integration of the child

an enhanced facilitation of the acquisition of the nationality of the country of birth and residence should be provided in the case that a child is born in a country to foreign parents, one of whom was also born in that country. If a child is born to a second generation immigrant on the territory while her or his parents and grandparents have spent a considerable part of their lives residing in this country, the child will usually be integrated. Consequently, an enhanced facilitation of the acquisition of the nationality of the state of birth is justified. A state could decide to attribute under these circumstances its nationality *ex lege* at birth. However, another possibility is to grant the right to register the child as a national on application by the parents, or to reduce the conditions for the acquisition of the nationality of the state of birth in other ways. States enjoy a wide margin of appreciation concerning means to provide this enhanced facilitation, and may, for instance, where facilitating the acquisition of their nationality, require the renunciation of the other nationality or nationalities acquired by birth.

### 4.2 Comparative Observations Based on the GLOBALCIT Database

#### 4.2.1 Unconditional *Ius Soli*

Unconditional *ius soli* is still the rule in the Americas, with a standard exception for children born to foreign diplomats or other State representatives. The United States has applied this principle since the adoption of the 14th Amendment to the US Constitution, the 150th anniversary of which was celebrated this year, and its conclusive interpretation by the Supreme Court in *Wong Kim Ark* (1898). In the Americas as a whole, thirty out of thirty-five countries provide for automatic and unconditional *ius soli*. Acosta, who has pointed at the influence of the Spanish 1812 (‘Cádiz’) Constitution in drafting the rules on nationals and foreigners in South America, explains that discussions regarding both indigenous peoples and African descendants related primarily to representational concerns rather than to ethical questions of inclusion or exclusion in the polity. An ongoing process of collective homogenisation was at stake, by which these groups were valued to the extent that they

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44 Interesting is that Art. 5(1)(b) Draft African Nationality Protocol includes *double ius soli* as a general rule.
45 See on attempts to abolish the *unconditional ius soli* Solodoch and Sommer (2018), pp. 1 and 2.
46 *United States v. Wong Kim Ark*, 169 US 649 (1898).
47 Vonk (2015), p. 10.
could serve the interests of both a new society and the reconfigured colonial system. *The preference for *ius soli* and the distinction between nationals and citizens is best understood by considering this background.* Civil rights and obligations were granted to all male nationals, to the full body of the nation comprising Spaniards from both hemispheres. On the other hand, the status of citizen, understood as a holder of political rights, remained confined to a smaller category of nationals, thus allowing for a gradual transformation of society rather than a radical rupture with the established order.\(^{48}\)

Four of the five countries in the western hemisphere which do not provide for an unconditional *ius soli* (Colombia, the Dominican Republic, Haiti and Surinam) have introduced a conditional *ius soli*. Only the Bahamas do not have such a provision.\(^{49}\)

Outside the western hemisphere, only four countries have unconditional *ius soli*: Chad, Lesotho, Moldova and Pakistan. A complication is raised in some other countries by the fact that they provide for *ius soli* in their legislation, but do not actually apply it in practice. In Bangladesh, where *ius soli* is arguably automatic under Article 4 of the Citizenship Act, no practice has been reported in this respect and Bangladesh therefore exclusively applies *ius sanguinis*.\(^{50}\) Something similar can be said of Tanzania, where the national *ius soli* provision is not applied and has been overruled by the State’s legal office. The Tanzanian authorities thus interpret the *ius soli* provision to require one parent to be a citizen.\(^{51}\)

Over the past decades most countries have gradually abolished automatic (unconditional) *ius soli* or replaced it by more conditional forms of *ius soli*. In Africa, this trend can be particularly witnessed in the Commonwealth States, where fourteen Commonwealth countries either removed or seriously restricted unconditional *ius soli* between the 1960s and 1990s.\(^{52}\) At first sight, also Liberia and Uganda seem to provide for unconditional *ius soli* at birth, but they impose important racial or ethnic restrictions in order to be eligible.\(^{53}\)

A shift from *ius soli* to *ius sanguinis* can also be witnessed in Asia. While many of the constitutions enacted after gaining independence applied *ius soli*, this was increasingly replaced in the course of the twentieth century by *ius sanguinis*, including in Bangladesh, India, Indonesia, Malaysia and the Philippines.\(^{54}\)

With the exception of Moldova, which provides for *ius soli* under Article 11(1) c of its citizenship law, unconditional *ius soli* can no longer be found in Europe ever since it was abolished in the UK in 1983 and Ireland in 2006. However, many countries have conditional forms of *ius soli*. Remarkable is Germany, traditionally a *ius sanguinis* country, where since 2000 a child born in Germany to foreign parents

\(^{48}\) Emphasis added. Acosta (2017), p. 5.

\(^{49}\) Vonk (2015), p. 93.

\(^{50}\) Vonk (2018), p. 69.

\(^{51}\) Manby (2016), p. 47.

\(^{52}\) Manby (2015), p. 2 and Table 1 on p. 94.

\(^{53}\) Manby (2015), p. 124; Manby (2016), p. 47.

\(^{54}\) Vonk (2018), pp. 12–13.
becomes eligible for German nationality if a parent has already been a resident in the country for at least 8 years.

Also in Australia, *ius soli* is only applied to children born to parents with permanent residence status. In New Zealand, where unconditional *ius soli* was applied from 1949 to 2006, the parent needs to be entitled to be in New Zealand indefinitely.

4.2.2 Conditional *Ius Soli*

While not following the general practice in the Americas of granting citizenship automatically by birth on the territory, four countries do provide for *ius soli* under the following conditions:

- Colombia: person is born in Colombia to non-citizens who are domiciled in the country at the time of the person’s birth;
- Dominican Republic: person is born in the Dominican Republic, unless born to foreign diplomats, foreigners ‘in transit’, and those residing illegally in the country;
- Haiti: person is born in Haiti to a father who is an alien and of the African race, or, in case of non-recognition, to a mother who is an alien and of the African race;
- Suriname: person is born in Suriname and does not have citizenship of another country. Prior to 2014, this provision only applied to children born in Suriname, without the citizenship of another country, and without a father (either by law or by recognition/legitimation).

Worldwide, twenty other countries apply conditional *ius soli*, often focusing on the residence status of the parent as for example in

- Australia: person is born in Australia to parents with permanent residence status;
- Cape Verde: person is born in Cape Verde to parents who have been habitually resident for at least 5 years and are not in the service of another State;
- Portugal: person is born in Portugal to a person who has been resident there for 5 years;
- Sao Tome and Principe: person is born in STP to foreign parents who reside there and are not in the service of another State;
- UK: person is born in the UK to a parent who is resident there without immigration restrictions;
- Germany: person is born in Germany to a parent who has been resident in Germany for 8 years;
- Ireland: person is born in Ireland to a parent with permanent residence in Ireland or the UK, or to a parent who was resident in Ireland for 3 out of the last 4 years.

In some countries the ground for acquisition is conditioned to the extent that one cannot speak of a *ius soli* rule proper. Thus, according to Liberian law the person

55 See also Manby (2016), p. 47.
must be born in Liberia and be a negro or of negro descent. In Israel, the acquisition of citizenship *jure soli* is made dependent on the parent’s registration in the Population Register at the time of the person’s birth, which is reserved for Jews only.

### 4.2.3 Double *ius Soli*

29 countries have double *ius soli*. It is automatic if one of the parents was also born there in the following countries: Benin, Burkina Faso, Cameroon, East-Timor, France, Gabon (with additional requirement of birth in wedlock), Luxembourg, Mozambique, Niger, Senegal and Spain.

The most common variations are as follows:\(^56\):

- Gender discrimination in that it must be the child’s father who was born in the country: Bahrein, Guinea, Iran, Iraq, Morocco (with additional requirement that father must come from a country of Arab and Muslim majority and also belongs to this group) and Yemen;
- Mother and father must have been born in the country: Brunei and Cambodia;
- Parent must have been born in the country and must either be resident there at the time of the child’s birth or must have had residence prior to the child’s birth: Belgium, Greece and Portugal. In the Netherlands birth in the territory is not required; what matters is the (double) legal residence in the Netherlands at the child’s birth;
- Mali: the parent must be a citizen of another African State;
- Sierra Leone: parent or grandparent was born in Sierra Leone but this person must be of negro African descent;
- Togo: person is born in Togo to parents who were both born there and has habitual residence in Togo and apparent status (‘*possession d’état*’) as Togolese.

### 4.2.4 Remedial *ius Soli* for Otherwise Stateless Children

A protection mechanism granting or facilitating the acquisition of nationality in respect of otherwise stateless children born on the State’s territory is found in 88 countries, though State practice is little consistent. As seen above in Sect. 4.1, international law stipulates that it is the potential statelessness of the child that should be assessed, not the parent’s lack of nationality, their residence status or the length of time spent in the country of the child’s birth. In previous publications on State practice in Europe we showed that not all countries that provide for remedial *ius soli* act in line with international law.\(^57\) For example, in some countries the safeguard against statelessness is limited to persons lawfully in the country (Germany), to persons born to parents of whom at least one holds a residence permit (Czech Republic) or who are unknown or stateless (Poland). Similar limitations can be found outside Europe, with few of the legal provisions actually focusing on the nationality position

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\(^56\) Compare also Manby (2016), p. 48.

\(^57\) Vonk et al. (2013); De Groot et al. (2015).
of the child. Overall, sixty-five countries provide for (automatic) remedial *ius soli* at birth. Others grant facilitated access to nationality by naturalisation (eleven countries), by declaration (six countries) or by registration (six countries). In five countries out of these eighty-eight countries acquisition is either automatic or by naturalisation, depending on the circumstances.

5 Conclusions

We have seen throughout this contribution that a growing number of treaties, recommendations and guidelines have made inroads into the general rule under international law that each State has absolute autonomy in deciding who its citizens are. While some of the following trends can be attributed to this process, others are the result of the still considerable leeway available to States in nationality matters.

(a) Increasingly, countries have implemented the principle of equal treatment of men and women in respect of the possibility to transmit their nationality to their children. However, in respect of children born outside the State of nationality of a parent States have a wide margin of appreciation whether or not to provide for the acquisition of nationality, but they should do so on a non-discriminatory basis. Furthermore, in light of the increasing support for avoiding statelessness, more and more States provide that exceptions to the acquisition of nationality by *ius sanguinis* should not cause statelessness.

(b) A clear global trend is the abolition of automatic (unconditional) *ius soli* or its replacement by more conditional forms of *ius soli*. Only in the Americas unconditional *ius soli* is still the rule. This is remarkable because most of the American legal systems belong to the civil law tradition. However, these systems were influenced by the *ius soli* approach of the Spanish Cádiz Constitution of 1812. Outside of the Americas only four countries have a real unconditional *ius soli*.

(c) A considerable number of countries provide for remedial *ius soli* for otherwise stateless children born in their country. Countries that are party to the 1961 Convention do so to comply with Article 1 of the Convention.

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