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Foreword

The International Commission on Civil Status (ICCS) is an intergovernmental organisation of which 16[1] *States –Austria, Belgium, Croatia, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Spain, Switzerland, Turkey and the United Kingdom- are at present members. Its headquarters and Secretariat are located at 3 place Arnold, Strasbourg (France).*

Each ICCS member State organises a National Section, which is usually composed of law professors, judges, representatives of ministries or administrative departments responsible for the supervision of civil status, and local registration officers. The Bureau of the ICCS comprises the Presidents of the various National Sections assisted by a few experts and meets each year in Strasbourg, usually at the end of March. The Commission holds a General Assembly every September in one of its member States.

The objectives of the Commission as laid down in its founding instruments and Rules of Procedure are as follows :

- *"to compile and keep up to date a documentation on legislation and case-law setting out the law of the various member States in matters relating to the status of persons, to the family and to nationality";*
- *"to provide, on the basis of this documentation, information to the authorities referred to in Article 2 of the Protocol of 25 September 1950 (i.e. government departments, diplomatic missions, consuls general, consuls, vice-consuls or consular agents of each of the High Contracting Parties)";*
- *"to carry out any studies and work - in particular by drawing up recommendations or draft conventions - aimed at harmonizing the provisions in force in the member States on these matters";*
- *to seek legal and technical means for improving the operation of civil registration in the member States;*
- *to "co-ordinate its activities with those of other international bodies" which are also dealing with the law of persons and family law.*

It is within this general framework that the ICCS has, since the Berlin General Assembly of 1992, been giving serious thought to the problem of fraud in civil status documents. It was accordingly decided to set up a sub-committee with one representative from each ICCS member country. This sub-committee was chaired from 1992 to 1994 by Ms Van Iterson from the Netherlands Ministry of Justice and subsequently by Professor Moura-Ramos of the University of Coimbra (Portugal). Its work is currently being directed by Mr Lukács, adviser at the Netherlands Ministry of Justice and judge at the Amsterdam Court of Appeal. Mrs Guyon-Renard, magistrat and legal adviser at the central civil status department of the French Ministry of Foreign Affairs has served as general rapporteur since the sub-committee was established.

Among other things the sub-committee has prepared a number of questionnaires focused on the most common types of fraud, false acknowledgments of children and bogus marriages which were sent to the National Sections. The replies given by the Sections were then discussed and compared.

[1] *The study does not however cover the new member States : United Kingdom (September 1996), Poland (September 1998), Croatia (March 1999) and Hungary (September 1999).*

It is the information contained in those replies and the reports prepared by the sub-committee, backed up on a few points by information drawn from the "Guide pratique international de l'état civil" prepared by the ICCS and published by Editions Berger Levrault, 17 rue Rémy Dumoncel, 75014 Paris or from documentation collected by the Secretariat, that have served as the basis for this study, approved by the ICCS General Assembly, which adopted it and authorised its publication in legal journals.

The original version of the study **"Fraud with respect to Civil Status in the member States of the ICCS" (I. Guyon-Renard with the assistance of the ICCS Secretariat)** *was published, in French, in the* Revue critique de droit international privé *(Editions Dalloz – Sirey, Paris, 1996, pp. 541-571). It has also been published in Spain (*Boletin de Informacion, Ministerio de Justicia, *Madrid, 1 septiembre 1997, núms 1803-1804, pp. 1779-1813, in Spanish), in Italy* (I Servizi Demografici, *Maggioli Editore, Rimini, 1997, n° 4, pp. 461- 503, in Italian), in the Netherlands (Fraude inzake de Burgerlijke Stand, La Haye, 1997, in Dutch), in Poland* (Oszustwa w sprawach z zakresu stanu cywilnego w krajach członkowskich MKSC, *in Polish) and in Portugal (*Boletim do Ministerio da Justiça, *maio 1998, n° 476, pp. 5-53).*

The present version is no more than an up-dating of the study published in 1996, which has been prepared for the purposes of a new bilingual edition (English and French) and supplemented by a note, drafted by Jonathan Sharpe, Deputy Secretary General of the ICCS, on the compatibility with the European Convention on Human Rights of legislative and regulatory measures taken by States to combat fraud with respect to civil status.

The ICCS Secretariat General expresses its thanks to the Council of Europe for having undertaken the translation of the study into English.

FRAUD WITH RESPECT TO CIVIL STATUS

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FRAUD WITH RESPECT TO CIVIL STATUS
IN THE ICCS MEMBER STATES

Up-dated edition
of the study by Isabelle Guyon-Renard and the ICCS Secretariat General published in 1996

INTRODUCTION

The ICCS, anxious to safeguard the reliability of the information contained in civil status registers, was naturally led to examine the problem of fraud with respect to civil status. The studies conducted on this subject since 1992, especially the analysis of replies by ICCS member States to the questionnaires sent to them, confirmed the feeling, already expressed by numerous persons working in the field, that fraud in civil status matters is steadily increasing.

None of the States, however, possesses a reliable and centralised statistical instrument. Only a few of them are in a position to give selective indications of the scale of fraud by reference to judicial proceedings in that area.

Switzerland, for example, is able to indicate that, for the years 1990 and 1991, there were 25 cases of fraud concerning marriage, and more than 20 other cases during the procedure to authorise the registration of a foreign decision or instrument, to which should be added about ten cases involving registrations of birth and a similar number concerning acknowledgments of paternity. Similarly, the Netherlands stated that in 1987 about forty fraudulent instruments acknowledging the paternity of Filipino children were declared void and that in 1992 the honorary consul-general of the Netherlands in the Dominican Republic had estimated their number at approximately a thousand a year. Lastly, from May 1992 to April 1995, French diplomatic and consular agents forwarded to the central civil status registration office 597 files concerning marriages celebrated abroad and suspected of being void owing to lack of consent, 459 of which were passed on to the State Prosecution Service.

A second aspect that deserves to be emphasised is the fact that fraud is rarely committed by the registration officers of an ICCS country : only Greece mentioned the extreme case of a mayor who drew up his own death certificate in an attempt to escape criminal prosecution.

This study will be focused exclusively on deliberate or indirect fraud that leads registration officers to inscribe in their registers a false or non-existent event or to register foreign documents that are not authentic. After discussing in detail these types of fraud and the reasons for them (section I), the study then considers the methods of combating fraud adopted in each ICCS member State as described by the National Section (section II) before examining their respective advantages and limitations (section III)

I. TYPES OF FRAUD AND THE REASONS FOR THEM

The replies to the questionnaires quickly revealed two majors sources of fraud : false declarations by the persons concerned to the registration officer (I.1.) and the submission of falsified civil status documents from another country (I.2.). The comparative analysis of replies further brought out the singular nature of certain types of fraud (I.3.).

I.1. False declarations

False declarations concern, in decreasing order of importance, birth certificates, marriage certificates and instruments of acknowledgment of paternity.

I.1.1. Concerning birth certificates

Eight countries (France, Germany, Greece, Netherlands, Portugal, Spain, Switzerland and Turkey) stated that the main problem encountered concerned birth certificates, with the date of birth and the identity of the person being the details most frequently falsified.

Recourse to a declaratory judgment makes it possible to backdate the birth to a time which has implications for nationality. This happens in France, for example, regarding the application of legislation in countries formerly under French administration (former Articles 23 and 24 of the French Code of Nationality). The drawing up of the certificate at a later date also makes it possible to create fictitious relationships by descent, of particular importance in questions of nationality. Portugal refers to this type of fraud arising from the application of Articles 1 to 4 of Decree-Law N° 308 - A/75 of 24 June 1975 concerning the effects of decolonisation on nationality in the case of persons born in territories under Portuguese administration. Spain mentions that the Central Registration Office was obliged to issue several decisions to combat this type of fraud (23 March and 17 October 1991; 1 April, 24 October and 3 December 1992; 24 February, 16 April and 5 May 1993).

Mention should also be made of cases in which the birth is declared in the name of a woman who did not bear the child, in which substitution of a child or mother is suspected. Both Spain and France referred to this type of fraud. In France, Law N° 94-653 of 29 July 1994 on respect for the human body inserted into the Civil Code an Article 16-7 according to which "Any agreement concerning procreation or gestation on behalf of another person is void". Agreements of this nature are also prohibited by Article 10 of the Spanish Law N° 35 of 22 November 1988 on assisted procreation techniques.

I.1.2. Concerning marriage certificates

It emerges from all the replies received that this type of fraud, which is steadily increasing, can take various forms, including a false declaration of unmarried status or of the dissolution of a previous marriage, the falsification of marriage certificates, decrees of divorce, identity cards and passports and, lastly, the feigning of an intention to marry.

Fraudulent declarations of unmarried status may be facilitated when the internal legislation does not require proper verification of the marital situation (eg Greece and Turkey). Germany mentions difficulties encountered in the case of nationals of Third-World countries who resort to this type of fraud in order to marry German women. The Netherlands state that the possibility for spouses to give their identity under oath encourages fraud. Switzerland reports the submission of falsified decrees of divorce.

Another case, common in practice, is the absence of the intention to marry, which may be discerned in the behaviour of the future spouses and in their respective situations. In its circular of 16 July 1992, the French Ministry of Justice listed the criteria that cast doubt on the sincerity of a marriage in order to draw the attention of municipal and consular registration officers to the risks of fraud. The Belgian Minister of Justice did likewise in a circular of 1 July 1994, replaced by the circular of 17 December 1999 (see point II.2.2.).

The main purpose of such fraud is to facilitate residence on the territory of the country in which the foreign national wishes to settle, as the acquisition of nationality through marriage is generally subject to other more stringent conditions.

Table 1 appended hereto recapitulates the various conditions, described by States in their replies to the questionnaires, that have to be satisfied, in the case of marriage contracted between one of their nationals and an alien who is not a national of a European Union country, for the obtainment of a residence permit or the acquisition of nationality.

I.1.3. Concerning acknowledgments of paternity

This type of fraud usually involves a person declaring himself to be the father of a child who is not biologically his, for the purpose of facilitating the reuniting of the family or of evading the rules relating to adoption.

I.1.3.1. *The legislation in most of the States contains rules that are favourable to* ***foreign children whose paternity is acknowledged by an alien*** *already resident on their territory.*

Austria, for example, indicated that acknowledgment of paternity by an alien with a valid residence permit enables a minor to enter its territory more easily and to stay there [§ 3 of the Federal Law on residence - BGBl. (Bundesgesetzblatt-Official Journal of the Austrian Republic) Nr. 466/1992 (BGBl. Nr. 351/1995)]. Similarly, in accordance with the Belgian Law of 15 December 1980 and the Royal Decree of 8 October 1981 on admission to the territory, residence, settlement and deportation of aliens, the reuniting of families is encouraged in this case. Article 18-3-K of Law 7/1985 of 1 July 1985 on the rights and freedoms of aliens in Spain and Article 56 of the Portuguese Decree-Law N° 244/98 of 8 August 1998 concerning entry and residence offer the same advantages.

France, Greece, Italy (Article 2 §1 of the Law of 5 February 1992), Luxembourg and the Netherlands state that ***the acknowledgment of paternity of a foreign minor by one of their nationals*** *gives that child the country's nationality and thus removes all difficulties of admission and residence. This is also the case in Germany since 1 July 1993 for aliens under 23 years of age. Austria states that in such cases the admission of the minor child to its territory is facilitated. In Spain, the acknowledgment of paternity of a foreign minor confers on him or her Spanish nationality if the author's Spanish nationality is original or, if not, the right to opt for that nationality (Article 20 of the Civil Code). Such an option also exists if the subject of the acknowledgment is of age (Article 17 of the Civil Code). The option has sometimes been refused on the ground that filiation was not sufficiently established.*

In the case of ***acknowledgment of paternity by an alien of an under-age national,*** *the alien may, under French law, obtain a residence permit if he is residing lawfully on French territory (Article 15-3 amended of Order N° 45-2658 of 2 November 1945 relating to conditions of entry and residence of aliens in France). In Spain, such an acknowledgment makes it easier for the alien to obtain a work permit (Organic Law 7/85, of 1 July 1985, on the rights and freedoms of aliens in Spain, and Royal Decree of 26 May 1986).*

Switzerland experiences no difficulties in this area since, according to its legislation, acknowledgment of paternity has no effect on residence or nationality.

I.1.3.2. *Recourse to acknowledgment of paternity for purposes of* ***disguised adoption*** *may constitute another form of fraud.*

It is true that Germany, like Belgium, Italy, Luxembourg, Switzerland and Turkey, regards it as a straightforward option made possible by the absence of a requirement to prove biological descent. Greece indicates that this type of fraud is purely theoretical since the mother must consent to the acknowledgment of paternity (Article 1475 of the Civil Code).

Spain, like France and the Netherlands, reports this type of fraud, especially in regard to children born of a foreign mother abroad. The method used, described in detail by the Netherlands Section, consists in having the child recognised by the husband when the name of the mother is not indicated in the locally issued birth certificate. The child concerned will then be adopted by the spouse of the person acknowledging the child.

Portugal states that adoption was impossible prior to 1967 and, between 1967 and 1978, subject to very strict conditions. In such circumstances disguised adoptions were quite common. Today the number of such cases is insignificant.

I.2. Submission of forged foreign documents

Numerous States mentioned difficulties arising from the use of documents from countries with an unreliable organisation of civil status, which encourages a lucrative business of issuing forged documents, a point specifically raised by Switzerland. This very important type of fraud is essentially concerned with birth certificates.

Germany, for example, states that in 1994 its representative in Accra (Ghana) had to examine over 400 applications for certificates of unmarried status, 80 % of which were false. In the Congo, since 1997, it is estimated that 80 to 90% of the documents presented to the German Embassy are forged or falsified.

Belgium stresses that certain foreign consuls find it impossible to check the documents submitted by their nationals and issue "attestations of birth" on the basis of statements made by them.

French consuls working in countries formerly under French rule, such as those in Black Africa, the Comoros or Madagascar, often find it quite impossible to confirm that the documents produced by applicants are conserved by the local authorities. The extremely poor conditions of conservation of the registers lead the local authorities to agree to render non-mandatory judgments which add considerably to the amount of fraud.

Luxembourg also refers to difficulties in verifying civil status documents submitted by nationals of Arab countries.

The Netherlands have noted an increase in the number of material and intellectual forgeries from Ghana, India, Pakistan and Nigeria as well as problems in the Dominican Republic.

Portugal reports various cases concerning the use by persons of Indian origin of civil status certificates of deceased persons, whom they impersonate.

It should also be stressed that only France mentions the submission of actes de notoriété drawn up abroad (documents attesting that a given situation, such as marriage, was common knowledge) as a means of fraud aimed at officialising marriages that had not been celebrated in the proper way.

I.3. Special cases of fraud

Mention should be made here of special cases cited by Greece in which the ***falsification of birth certificates*** *performed by some of its nationals was intended either to advance the date of beginning school or to defer the moment of retirement. Spain listed cases of certificates forged with the purpose of locating the place of birth on Spanish territory (births claimed to have taken place in Ceuta and Melilla rejected by the Central Registration Office : between 3 and 9 such decisions per year in the period 1991-1998) in order to acquire Spanish nationality. The forgery of death certificates appears to be uncommon. It was cited by Switzerland as a means of providing fraudulent evidence of the dissolution of a previous marriage.*

In this connection Turkey stated that the purpose in certain ***cases of impersonation*** *was to avoid criminal prosecution or to establish false lines of descent in order to inherit property.*

It would appear that the legislation in certain States (France, Germany, Greece, Luxembourg, Netherlands, Portugal) making it possible to replace missing civil status documents by actes de notoriété is not usually a source of fraud. Only the Netherlands mentioned cases in which certain notaries had drawn up actes de notoriété based on the statements of aliens, thus facilitating impersonation.

The ***use of non-mandatory or declaratory judgments*** *with respect to birth, rendered in member States or in other countries, was hardly mentioned as a means of fraud. According to France, however, this method is very frequently employed in countries in which the civil registers are no longer trustworthy (Comoros, Cameroon, Guinea, for example). On the other hand, several countries report cases of fraud related to foreign judgments rectifying birth certificates (Austria, France, Netherlands).*

Lastly, it should be noted that the ***possibility of marriage by proxy*** *abroad is, at least where France is concerned, a not insignificant source of fraud. This is precisely what led the French legislature (Law N° 93-1027 of 24 August 1993 on the control of immigration and conditions of admission, reception and residence of aliens in France) to insert into the Civil Code Article 146-1, which makes the failure of the French spouse to be present at the celebration, even if it takes place abroad, a ground of absolute nullity of the marriage. Also with a view to preventing this type of fraud, the Netherlands require the future spouse of the person wishing to marry abroad to have obtained a temporary residence permit.*

II. METHODS OF COMBATING FRAUD

Member States described four main types of method employed to limit fraud. (1) Steps have been taken to enable registration officers to verify the declared event and the probative value of the civil status document or to check the binding status of certain amending judgments as well as the capacity to marry and the lawfulness of the residence of the foreign spouse. (2) In certain cases registration officers are even empowered to refuse to draw up a record. (3) In addition, preventive or a posteriori civil penalties as well as penal or administrative sanctions have been prescribed to punish fraudulent misconduct. (4) Lastly, certain States have amended their legislation to make fraud less attractive.

II.1. Verifications

II.1.1. Verification of events declared

Requiring production of a medical certificate attesting to the birth enables the registration officer to check the genuineness of birth. This applies in Austria, Belgium, France, Germany, Greece, Luxembourg, Portugal, Spain and Turkey. Such a document is required in the Netherlands only if the registration officer has doubts ; he may then make use of any means of investigation he deems necessary.

In Spain, a directive issued by the Central Registration Office on 7 October 1988 reminded registration officers that, in the case of births in Spain declared suspiciously late, they should make use of the means of investigation ex officio conferred on them by Articles 312 and 316 of the Regulation of 14 November 1958 on the Civil Register.

II.1.2. Verification of the authenticity and content of foreign documents

The replies of the various member States revealed a difference in degree in such verification procedures.

In Belgium, France and Luxembourg, verification is generally limited to the form of the documents submitted and the authenticity of signatures at the time of legalisation of the document. In case of doubt, the State prosecuting authorities may be consulted by the registration officer.

In Greece the verification, also purely formal, is carried out by the Greek consular authorities at the place where the document was drawn up before it is forwarded, together with its translation, to the registration officer in Athens.

In six other countries, registration officers are authorised to verify the existence and the content of the foreign certificate of civil status. Dutch registration officers (Directive of June 1992 recalled by circulars in November 1993, in May 1996 and again in January 2000 – entry into force on 1 February 2000), and their counterparts in Portugal, Switzerland and Turkey contact their diplomatic or consular representatives through the Ministry for Foreign Affairs. Such consultation has even been made compulsory by the Dutch Ministry for Foreign Affairs for documents established in Ghana, India, Pakistan, Nigeria and the Dominican Republic. Austrian registration officers get in touch directly with the foreign authorities. Their Spanish counterparts do likewise (Article 23 of the Law of 8 June 1957 concerning the Civil Register and Article 85 of the aforementioned Regulation on the Civil Register); they verify the reality and the legality of the events and sometimes refuse inscription on the ground that the foreign document lacks the requisite guarantees of authenticity (for example, documents from Equatorial Guinea or the Dominican Republic).

Certain States have adopted more significant methods; in Switzerland, for example, the documents may be examined in specialised laboratories.

It is not without interest to note that an administrative agreement was concluded on 1 June 1978 between France and Morocco on the civil status of Moroccan nationals working in France. For instance, it provides in Article 3 that their applications for social benefits and retirement pensions are

admissible subject to the two conditions that the civil status documents therein do not contain any contradictory or unlikely elements and that the difference between the declared age on entry into France and the age claimed is less than ten years. Otherwise the person concerned may be required to undergo a medical examination by the medical officer of the fund or a recognised doctor in Morocco.

Lastly, in 1993, Belgium decided to require a substantive investigation in certain countries (Indian peninsula, Central and West Africa) before the legalisation of foreign documents. This verification is carried out by agents appointed by the Belgian embassies and costs the person requiring legalisation about 10,000 Belgian francs.

II.1.3. Verification of foreign judgments amending birth certificates

In the Netherlands a circular of August 1988 concerning foreign decisions that modify the date of birth lays down criteria that must be satisfied for such decisions to be recognised in the Netherlands. The decisions must have been taken by a competent judicial authority after a properly conducted inquiry and must not be contrary to public policy. The same conditions are set in Austria.

The Dutch circular further states that the decision must be based on real evidence such as an expert opinion or a report established by a hospital service designated for the purpose. The decision must also show that the Attorney-General's Department and/or the registration officer have been heard and that the person concerned has appeared in person before the competent authority making the decision. The burden of proof lies with the applicant. Lastly, the administration is not required to recognise a decision that is in contradiction with other known elements, such as information regarding members of the applicant's family.

In the same spirit, it is worth mentioning a judgment of the French Court of Cassation which refused to recognise a decision amending a birth certificate that was given in another country and was wrong (Cassation, First Civil Chamber, 29 November 1994).

II.1.4. Verifications prior to marriage

II.1.4.1. *As a rule, the registration officer must check the* ***capacity to marry*** *of the two spouses when the marriage papers are prepared or the banns published.*

In Greece, as in Luxembourg, the alien must produce a certificate of capacity to marry, whereas in France such a document is required only if the person concerned wishes to benefit from legal provisions that are more favourable than those under French law.

In Germany, the foreign spouse-to-be must produce before the registration officer a certificate of capacity to marry (Article 1309, paragraph 1, of the BGB). In the absence of such a document, the capacity to marry is verified by the presiding judge of the higher regional court (Article 1309, paragraph 2, of the BGB). For this purpose the foreign spouse-to-be must produce a certificate or declaration of unmarried status. If the authenticity of the document is doubtful, it must be legalised by the German consular authorities in the country in which it was drawn up.

Aliens who marry in Austria must produce the same documents as are required in Germany [§43 of the Federal Law on civil status - BGBl. Nr. 60/1983 (BGBl. Nr. 25/1995), §21 of the implementing order of the Law on civil status - BGBl. Nr. 629/1983 (BGBl. Nr. 336/1995)].

In Belgium, a circular of 28 August 1997 concerning, inter alia, the procedure for the publication of marriage banns enabled a registration officer to effect various verifications regarding the real intentions of the future spouses. A Law of 4 May 1999 amending certain provisions relating to marriage, that entered into force on 1 January 2000, abolished the publication of banns and replaced it by a system of declaration of marriage made to the registration officer. Henceforth the officer is empowered to refuse to draw up the formal record of the declaration if he is not supplied with a certain number of documents or if there is manifest and unquestionable fraud (forged or falsified documents). This Law was the object of a circular of 17 December 1999 which partially replaced the above-mentioned circular of 28 August 1997 (see also point II.4.2.).

In Spain, the Instruction of 9 January 1995 of the Central Registration Office on the rules concerning the procedure prior to marriage when one party is domiciled abroad is applied in all cases of marriage between a Spaniard and an alien. Verification covers notably the sincerity of consent and the criteria underlying the Resolution of 4 December 1997 of the Council of the European Union, on the measures to be adopted to prevent fraudulent marriages, are followed.

In Portugal, the foreign future spouse must produce a certificate, issued less than six months previously by the competent authority of the country of which he or she is a national. When this document cannot be produced, the capacity to marry is verified in accordance with an administrative procedure by the registration officer (Article 166 of the Code of Civil Registration).

In Switzerland the obligation, under Articles 98 et seq. *of the Civil Code and 150-154 of the Order on civil status, to check the capacity to marry may be backed up by the forwarding of files concerning the preparations for mixed marriages to the supervisory cantonal authority. This power is used by almost all the cantons whenever the marriage is international in character.*

II.1.4.2. *Except in Italy (new provisions in regard to political asylum, entry and residence of non-Community nationals, regularisation of their situation and of the situation of stateless persons already present on the territory of the State - Decree-Law N° 416 of 30 December 1989) and in the Netherlands (Article 44 of the Civil Code in the case of an alien residing in the country), registration officers* ***are not responsible for inquiring into the lawfulness of residence*** *of foreign future spouses, this not being a condition for the validity of the marriage. It should be stressed that Dutch registration officers ask the immigration department for an attestation concerning the situation of the foreign spouse-to-be with respect to the law on immigration, which is such as to enable them to gauge the sincerity of the intention to marry. Again, possession of a valid residence permit is required if an alien wishes to have a partnership registered in the Netherlands (Article 80a, paragraph 2, book 1 of the Civil Code). Belgian registration officers exercise indirect control : if the applicant is under an order to leave the territory by a date which has passed, the registration officer must contact the immigration authorities, who are required to assess on a case-by-case basis the advisability of granting an extension of the time-limit for compliance with the measure so as to allow the marriage to take place, bearing in mind the reasons for the order and the advantages of the marriage.*

The Swiss Section states that although unlawful residence is not an obstacle to marriage, it may in practice trigger a thorough examination of the marriage papers and in particular a request for verification and authentification of the foreign documents by the Swiss representation in the country of origin in order to make sure that it is not a "bogus marriage". In this connection, the immigration authorities do not deport a person whose residence in Switzerland has become unlawful if the marriage preparations are at an advanced stage.

II.2. Grounds for refusal available to registration officers

II.2.1. Refusal to register civil status events

In certain countries the registration officer may ***refuse to register the civil status event*** *brought to his knowledge.*

Belgian civil registration officers, for example, may refuse to register an acknowledgment of paternity should such acknowledgment be contrary to the rules of private international law or to public policy. Similarly, in France, section 307 of the general instructions with respect to civil status issued by the Ministry of Justice provides that "if the instrument of acknowledgment of paternity reveals of itself the mendacious character of the acknowledgment, the registration officer may refuse to record it". This happens in practice, for instance, when the difference in age between the person acknowledging the child and the child is less than 12 years.

Spanish civil registration officers -who are usually judges- have general powers to decide for themselves whether it is appropriate to register a civil status document. They may refuse to do so in cases when the basic conditions are not satisfied or when the documents lack authenticity. Their Portuguese counterparts have the same powers in regard to the acknowledgment of paternity of a child. Abroad, the Spanish officer - generally the consul - will refuse to register a marriage between a Spaniard and an alien celebrated in accordance with local law if he is convinced that there has been fraud.

Article 18 b of the Dutch Civil Code, introduced by the Law of 14 October 1993 on the revision of civil status legislation and, for marriages celebrated abroad, Article 6 of the Law of 14 March 1978 implementing the Hague Convention with respect to marriage both oblige registration officers to refuse to draw up a record when this would be contrary to Dutch public policy. Article 37 of Law N° 494 of 9 June 1994 (most recently amended by the Law of 17 December 1997, Stb. 660) on the basic administration of data held by municipalities gives the official responsible for the population register the same powers. Swiss registration officers are bound by a similar constraint based on the combined application of the provisions of Articles 25-27 and 32 of the Federal Law of 18 December 1987 on private international law. It also covers marriages celebrated abroad with the manifest intention of evading the grounds for nullity laid down in Swiss law (Article 45 of that law).

II.2.2. Refusal to celebrate marriage

*The second power granted to a registration officer is that of **refusing to celebrate a marriage**. The registration officer here acts either on his own initiative or under the supervision of a judicial authority.*

In Germany, registration officers may refuse to celebrate a marriage only when it is manifestly a marriage of convenience, for example in order to obtain a residence permit (Article 1310, paragraph 1, of the BGB; Article 5, paragraph 4, of the Law on civil status).

In case of doubt regarding the capacity to marry of one of the spouses or the validity of the documents, Austrian or Spanish registration officers may refuse to celebrate the marriage. In Spain, such a refusal is also possible if the officer detects an absence of genuine consent. In these cases the applicant may then appeal to administrative authorities (Austria) or to the Central Registration Office (Spain - Article 247 of the aforementioned Regulation on the Civil Register).

In Belgium, Article 167 of the Civil Code, introduced by the Law of 4 May 1999, enables registration officers either to refuse to celebrate a marriage if the conditions prescribed for its conclusion are not met or if they consider that the celebration would be contrary to public policy, or to postpone the ceremony if there is a strong presumption that the said conditions are not satisfied. This is the case when, for example, the officer has the feeling, on the basis of certain items of evidence, that the intended marriage is a bogus marriage. The circular of 17 December 1999 cites as examples the following factors which, save in quite exceptional cases, need to be present in combination to justify a refusal to celebrate the marriage : a great difference in age betwen the man and the woman, the fact that the two persons concerned do not speak the same language, have never met, make mistakes regarding each other's names or nationality, the circumstances in which they got to know each other or their respective professional activities, the fact that one of the two is involved in prostitution or that the marriage has been arranged by a third party.

Under Article 99 of the Swiss Civil Code, registration officers are required to verify that the conditions for a marriage are satisfied and will refuse to celebrate it if they are not.

In the event of a violation of public policy, Dutch registration officers decide independently (Article 18-b of the Civil Code) but also have the power to ask the public prosecution service for information and advice. Appeals may be brought before a court of first instance. Article 18-b also applies to partnerships: thus, the Amsterdam regional court held that a registration officer had properly refused to register a partnership between a Dutch woman and a Moroccan woman who had been in the Netherlands for some months but had not been granted a residence permit.

Since the Law of 24 August 1993 already referred to, France has adopted a special procedure aimed at giving registration officers responsible for celebrating marriages and law officers in the State Counsel's Office powers to prevent marriages of convenience. Article 175-2 of the Civil Code gives registration

officers power to postpone the celebration of a marriage in cases where there exist several objective elements that suggest the absence of an intention to marry. The public prosecutor then has fifteen days, from the time the matter was brought to his attention by the registration officer, to take action. If the evidence is manifest, the public prosecutor objects to the marriage under the conditions laid down in Articles 172 et seq. *of the Civil Code and in Article 423 of the new Code of Civil Procedure. If an inquiry turns out to be necessary, the public prosecutor may postpone the celebration of the marriage for a period not exceeding one month. If there is no reply from the public prosecutor within the time fixed, the marriage must be celebrated. The decision to postpone the celebration of the marriage may be contested by either of the future spouses, even if under age, before the president of the regional court, who must give a ruling within ten days; the same period of ten days applies in the event of an appeal.*

In Luxembourg, the registration officer submits his opinion for consideration by the State prosecutor.

In the other countries, registration officers must, in case of doubt, seek the opinion of the judicial authority to which they are answerable. It should, however, be noted that in Greece such consultation does not have to be effected since the authority responsible for celebrating the marriage is not entitled to refuse to do so.

II.3. Sanctions prescribed by law

If fraud is detected, the States possess an arsenal of civil, penal or administrative sanctions which are generally similar in nature. These sanctions are indicated in Tables 2, 3 and 4, which are based on information provided by the National Sections. Two further details may be added : firstly, in all the countries, penal sanctions are more severe when the perpetrator of the fraud is a registration officer and, secondly, special offences have been defined to punish the non-observance by such officers of regulations concerning the drawing up of official documents.

II.3.1. *It is of particular interest to note that the majority of the States immediately draw the consequences of fraudulent marriages, without waiting for the annulment of such marriages by the courts.*

This principle is easy to explain in that the internal legislation in certain countries, such as the Netherlands, makes the validity of a residence permit depend on continuous cohabitation. In France, this has raised legal difficulties. In an opinion given on 9 October 1992 (Abihilali case), the Conseil d'Etat accepted that the normally automatic issue of a residence permit on a person's marriage did not bind the administration in the event of fraud. It also considered that it would be inadvisable to wait for the outcome of the necessarily lengthy court proceedings before withdrawing a residence permit from a person, as this would mean allowing that person to live for a significant period of time on French territory, thus creating a factual situation that would, in view of the provisions of Article 8 of the European Convention on Human Rights, make it more difficult to withdraw the residence permit. At bottom, the opinion of the Conseil d'Etat is founded on case-law which already recognises the power of the administrative authorities to draw the consequences of the evident unlawfulness of a private-law act before that act has been declared void by the courts, especially in cases relating to the deportation of aliens.

This principle is enshrined in Articles 15 bis and 16 of the aforementioned Order of 2 November 1945 (wording of the Law of 24 August 1993) which prohibit the issue or renewal of a residence permit to a polygamous alien and his spouse.

II.3.2. *One original feature merits attention. France is the only country with the following procedure : the new Article 170-1 of the Civil Code (wording of the Law of 24 August 1993) provided for a retrospective control mechanism of the validity of marriages celebrated abroad when at least one of the spouses is French. This control is exercised at the time of going through the formalities of entering the marriage in the French civil status registers.*

The new procedure is aimed not only at marriages liable to annulment for lack of matrimonial intention through the application of Article 146 of the Civil Code (marriage of convenience) but also at all

marriages that risk being declared void on the basis of Articles 144 (non-respect of conditions in respect of age), 146-1 (failure of the French spouse to appear in person), 147 (bigamy), 161, 162 and 163 (impediments owing to kinship or relationship by marriage), 190-1 (fraudulent evasion of the law) and 191 (clandestine marriage or marriage celebrated before an unauthorised registration officer).

Henceforth, the consular registration officer responsible for registering a marriage that he deems likely to be declared void under one of the above-mentioned provisions must postpone the registration and immediately inform the public prosecutor in Nantes. The latter informs the prosecuting authorities of the regional court for the defendant's place of residence, who must then decide whether it is appropriate to bring proceedings against the spouses to declare the marriage void. If the answer is positive, the certificate is registered for the sole purpose of the annulment. If it is negative, the consular agent will be authorised to register the marriage so that the certificate may be used in the normal way. If the Nantes prosecution service does not reply within a period of six months, the marriage certificate has to be registered and made use of in the normal way. The particularity of this procedure lies in the fact that registration is postponed pending the decision of the prosecution service.

It should be noted that although this type of procedure does not exist in Belgium, that country protects itself against presumed bogus marriages as follows: through the Ministry for Foreign Affairs, the Belgian embassy concerned gets in touch with the Crown Prosecutor in order to seek an opinion (on the basis of the circular of 17 December 1999 referred to in point II.2.2.). If, after investigation by the Crown Prosecutor, it turns out that the presumption of a bogus marriage is justified, no document certifying the absence of legal impediments to the marriage is issued and the local authorities usually refuse to celebrate it.

II.4. Legislative reforms

Certain countries have reformed their legislation with a view to discouraging the use of forged documents or bogus marriages for the purpose of benefiting from attractive legal provisions governing acquisition of nationality or entry and residence. In other countries a number of draft laws are under discussion.

II.4.1. Nationality

II.4.1.1. Recent laws

*The **law on nationality** was reformed in Spain in 1990, in Italy (Law N° 91 of 5 February 1992) and in Switzerland in 1992, in Belgium and France in 1993, in Portugal in 1994 and again in France in 1998 (Law N° 98-170 of 16 March 1998, J.O. of 17 March 1998, 3935).*

In Spain, Law N° 18/1990 of 17 December 1990 reforming the law on nationality amended the Civil Code. Spanish nationality cannot be acquired by an alien married to a Spanish national unless the person concerned is able to prove a duration of residence and marriage of one year in a normal state of cohabitation (Article 22-2 of the Civil Code and Directive of 20 March 1991 issued by the Central Registration Office).

In Switzerland so-called "nationality marriages" are no longer possible since the foreign woman who marries a Swiss national acquires Swiss nationality not, as previously, by the sole fact of the marriage (abrogation from 1 January 1992 of Article 3 of the Federal Law on the acquisition and loss of Swiss nationality) but by an easier naturalisation procedure to which recourse can be had only after at least three years of conjugal life at the time of the filing of the application (Article 27 of the above-mentioned Law). The Federal Court has on two occasions upheld the annulment of an acquisition of Swiss citizenship in cases where it transpired that a divorce petition had been filed before Swiss nationality was obtained (31 August and 10 September 1998, Revue de l'état civil, *1999, pp. 6 and 7). In order to avoid as far as possible fictitious acknowledgments of paternity, this Law does not provide for the acquisition of Swiss nationality by the sole acknowledgment of paternity by a Swiss national (not married to the foreign mother of the child) but offers an easier naturalisation procedure that allows the necessary checks to be made.*

The Law of 6 August 1993 amending the Belgian Code of Nationality and the laws on naturalisation have extended from six months to three years the period of cohabitation required in Belgium for the foreign spouse to be able to make a declaration of acquisition of Belgian nationality. The former period of six months' cohabitation remains valid, however, for a foreign spouse lawfully resident in Belgium for at least three years at the time of the declaration. A new Law of 22 December 1998 amending the Belgian Code of Nationality as regards the procedure for naturalisation, which entered into force on 1 September 1999, also makes some changes to the option, declaration of nationality and naturalisation procedures, without however altering the substantive conditions for acquiring Belgian nationality. An additional effect of this Law is to attribute to registration officers a more central role in these procedures.

The French Law N° 93-933 of 22 July 1993 reforming the law on nationality amended the former Article 37-1 of the Code of Nationality, which became Article 21-2 of the Civil Code, by extending the period of cohabitation required to acquire French nationality by marriage (two years –reduced to one year since 1 September 1998, the date of entry into force of the Law of 16 March 1998- instead of six months if there is no child born of the couple). The same 1993 Law raises a presumption of fraud if the spouses' cohabitation ceases in the twelve months following registration of the declaration that leads to acquisition of nationality, in which event the declaration can be contested in courts.

In Portugal, the government had a reform of the law on nationality adopted on 19 September 1994 and it came into force on 1 November 1994. One of its purposes was to combat bogus marriages. The spouse of a Portuguese national cannot acquire Portuguese nationality by declaration until after three years of marriage. Moreover, the foreign spouse must prove the existence of a genuine link with the national community, failing which the public prosecutor will lodge an objection. Such an objection was in principle possible before but it was purely theoretical owing to case-law requiring the public prosecutor to prove -a virtually impossible task in practice- the manifest non-existence of any genuine link with the national community on the part of a person who, as the spouse of a Portuguese national, claimed to acquire Portuguese nationality.

***II.4.1.2.** Draft laws under discussion*

Draft laws are under discussion in Belgium, the Netherlands and Turkey.

In Belgium, a draft law, which is on the point of being passed by Parliament, radically simplifies, and loosens the conditions for having recourse to, the procedures for acquiring Belgian nationality, in particular the declaration of nationality and the naturalisation procedures.

In the Netherlands, a draft law amending the law on Netherlands nationality has been adopted by the Second Chamber. It provides that a foreign minor whose paternity has been acknowledged by a Netherlands national will not be able to acquire Netherlands nationality until he has lived for three years in the family of the author of the acknowledgment. The draft also contains a provision whereby the acquisition of Netherlands nationality may be refused or Netherlands nationality obtained by fraudulent means may be withdrawn.

In Turkey, a draft law before Parliament provides that a foreign woman who marries a Turkish national must wait for three years to be able to acquire Turkish nationality.

II.4.2. <u>Marriage</u>

In Belgium, a Law of 4 May 1999, which entered into force on 1 January 2000, has replaced the publication of marriage banns by a procedure of declaration of marriage: this declaration is made by one or both of the future spouses to the registration officer, who will draw up a formal record thereof. The Law lists the documents to be handed, for each of the future spouses, to the registration officer when the declaration of marriage is made. If these documents are not handed to him at that time, he will refuse to draw up the formal record (his decision is open to appeal). The Law introduces into the Civil Code the express provision that there is no marriage if, although the formal consents to marriage have been given, a combination of circumstances reveals that the intention of at least one of the spouses is manifestly not to establish a lasting cohabitation, but solely to obtain an advantage in the matter of residence, linked to the status of spouse. Finally, the Law provides that the registration officer shall

refuse to celebrate the marriage if the conditions therefor are not satisfied or if he considers that the marriage is contrary to the principles of public policy. It also gives him the possibility of postponing the celebration in order to make further enquiries.

In the Netherlands, a draft law amending the law on bogus marriages has been submitted to Parliament. It envisages that the obligation to present an attestation from the immigration department (see point II.1.4.2) will be confined to foreigners not holding a separate residence prlmit and that the period of validity of that attestation will be increased from two to six months. The draft also provides for the application of these measures to be extended to registered partnerships.

In Switzerland, the procedure of publication of marriage banns has been abolished since 1 January 2000, the date of entry into force of the 26 June 1998 revision of the Civil Code. The registration officer celebrates the marriage after completion of a preparatory procedure during which he checks the identities of the future spouses and makes sure that the conditions of marriage are satisfied. If they are not or if there is still some doubt concerning the authenticity of the documents produced by the future spouses, the registration officer must refuse to celebrate the marriage (or to issue an authorisation to celebrate the marriage in another district), notifying the engaged couple in a formal decision that indicates the means of appeal.

II.4.3. Entry and residence

In Belgium, in the case of marriage to a foreigner who is a non-European Union national permitted to reside or already settled in Belgium, a residence permit for the purposes of family reunion will not be granted unless the two spouses are over eighteen years old (Article 10-4° of the Law of 15 December 1980 on admission to the territory, residence, settlement and deportation of aliens).

French law was reformed by Law N° 93-1027 of 24 August 1993 on control over immigration. The conditions governing the issue of a ten-year residence permit to the foreign spouse of a French national (Article 15, 1 of the aforementioned Order of 2 November 1945, as worded following Law N° 98-349 of 11 May 1998) are now as follows :

- *lawfulness of residence prior to the marriage,*
- *one year of marriage without cessation of cohabitation,*
- *conservation of French nationality by the spouse,*
- *prior registration in the civil registers of a marriage celebrated abroad (Article 170 of the Civil Code).*

In the Netherlands, it is by virtue of a circular dated 1 June 1993, updated by a circular that came into force on 1 February 2000, that the administration may refuse to grant a residence permit to an alien unable to produce duly legalised documents. Moreover, when legalised documents are lacking and the person concerned is unable to produce an acte de notoriété, a special entry is made in the population register: only data concerning the person's identity are recorded, without any reference to descent from parents, matrimonial relations or parenthood of children.

In Switzerland, the legislation to combat bogus marriage was reinforced with effect from 1 January 1992 in the Federal Law on the residence and settlement of aliens : an extension of the residence permit of the alien spouse of an alien settled in Switzerland will be refused if the spouses are no longer living together.

II.4.4. Forged documents

Certain countries (Belgium, Netherlands, Turkey) are attempting to establish effective procedures to combat the use of forged documents.

In Belgium, the Law of 4 May 1999 enables the registration officer to make certain enquiries in the context of a proposed marriage (see point II.4.2.).

In the Netherlands, the Law of 2 June 1994 on bogus marriages, which came into force on 1 November 1994, provides that the documents required for celebration of the marriage must be submitted at the

time of declaring the intent to marry. The registration officer may refuse to record the declaration of intent if he considers that the documents submitted are inadequate.

In this connection, several provisions of the Dutch law on bogus marriages are specifically aimed at preventing fraud. They concern :

- *the means of investigation available to the registration officer: before drawing up a certificate the registration officer may ask to be given the documents required by law. He may also demand any other document he deems necessary for the establishment of the certificate or for the details that must be inscribed thereon. For this purpose he may obtain free of charge the information contained in the civil status and other public registers.*
- *the grounds for refusing to draw up a record: the registration officer may refuse to draw up a record if he considers that the documents submitted to him are inadequate or that the certificate would be contrary to public policy.*

These provisions apply to all civil status certificates, including the registration of a partnership.

Lastly, since 1 January 1995, the date of entry into force of the Law of 14 October 1993 amending the legislation on civil status, Dutch registration officers may, in case of doubt when a birth is reported, ask for a statement by the doctor or midwife certifying that the child was born of the mother whose name appears on the certificate. Any doctor who makes out a false certificate is liable to a penal sanction.

In Turkey, a draft law aimed at cutting down the use of forged documents is under consideration.

III. THE LIMITATIONS OF SUCH METHODS

The limitations of the methods used to combat fraud are particularly evident in regard to foreign civil status documents whose probative value is very easily recognised in ICCS member countries. The legislation of these countries sins by the ineffectiveness of legalisation and often by the absence of provisions that make it possible to reject certain forged documents at once (1).

These drawbacks are usually compounded by the need to wait for a court decision before drawing the administrative consequences of forged civil status documents ; but such decisions are difficult to obtain owing to the complexity of the proof to be adduced (2). In short, it would appear that the domestic statutory provisions currently in force are still inadequate (3) and that there may be other limitations deriving from the requirements of Community law or from data-protection rules (4).

III.1. Limitations related to legalisation and to the obligation to register a priori *a foreign civil status document*

III.1.1. Legalisation

This procedure, which consists in checking the authenticity of the signatures appended to a civil status document, is tending to become inoperative for two reasons : firstly, administrations are faced with documents that are properly legalised but on the basis of erroneous information; secondly, it is increasingly common for them to dispense with the obligation to have the documents legalised.

Belgium has become conscious of the questionable value of certain legalisations carried out by foreign consuls on its territory. A circular of the Ministry for Justice dated 17 February 1993 reminds those concerned that the normal procedure is for legalisation to be perfomed by the Belgian consul abroad and that legalisation by the foreign consul in Belgium is accepted only in exceptional cases.

In France, legalisation by French representatives abroad is in actual practice gradually being preferred to legalisation through a foreign consul established on French territory. Not long ago the situation of civil status registers in Haiti brought out the importance of that approach. The same situation is valid for the Comoros and for Pondicherry.

To combat the administrative habit of accepting non-legalised documents, the Netherlands have had to issue circulars, most recently in January 2000, to remind registration officers and population department officials of instructions issued in June 1992 giving reasons for the requirement that foreign civil status documents be legalised. However, the circular of 12 January 2000, which entered into force on 1 February 2000, exempts from legalisation documents the contents of which correspond to those of other documents that have been legalised and already supplied to the registration officer.

Since in most cases the registration officer is obliged to register apparently valid certificates, other methods need to be found.

III.1.2. Refusals to register

Few States (Netherlands, Portugal, Spain, Switzerland) allow the authorities responsible for civil status to dispense with drawing up a certificate and the safeguarding of public policy is a criterion that is seldom employed in practice to enable a registration officer to refuse to register a civil status event. In Spain, this criterion has founded refusals to register marriages between a Spanish woman and a man already married in accordance with his personal law that permits polygamous marriages.

In the case of false acknowledgments of paternity, the refusal to draw up the record, though more easily accepted, is often based solely on the inconsistencies or blunders of the person acknowledging paternity or on the evident impossibility for that person to be father.

In this connection, the States that are generally the most powerless to deal with an erroneous or forged foreign civil status document are those which can do no more than make a straightforward formal inspection of the certificate (France, Belgium and Greece) and whose discretion is therefore limited at the time of registration.

III.2. Limitations related to contentious proceedings

These limitations are of several kinds :

III.2.1. *One limitation is the fact that, in certain countries, the fraudulent act will continue to produce effects, especially in administrative matters, as long as it has not been established by a court.*

III.2.2. *Another limitation derives from the absence or restriction of conditions for the institution of legal proceedings.*

For example, in ***questions of acknowledgment of paternity****, the law in Germany and Greece does not allow the public authorities to ask for the acknowledgment to be declared void. In France, as a consequence of the principle of respect for the private life of the family, Article 339, paragraph 2, of the Civil Code (modified by Law N° 72-3 of 3 January 1972) limits the powers of the public prosecutor to cases in which the intent to deceive is revealed by the civil status documents themselves. However, since Law N° 96-604 of 5 July 1996 on adoption, this provision has been supplemented, in that the public prosecutor may also institute an action to set aside an act of acknowledgment of paternity made in order to evade the rules governing adoption. Moreover, progress towards greater flexibility could perhaps already have been seen from a judgment (Paris Regional Court, 1 March 1994) which accepted that an acknowledgment of paternity, made in the interests of its author rather than the child, may be set aside at the request of the public prosecutor. In Luxembourg, where the public prosecutor's right of action used to be a matter of debate, the legislation currently in force is similar to that applicable in France under the Law of 3 January 1972.*

*It is, moreover, common for the possibility of instituting legal proceedings to challenge acknowledgments of paternity to be limited, in the interests of the child, on the ground of his enjoyment of a publicly recognised status (*possession d'état - *Belgium, France, Luxembourg, Spain) or of marriage (Switzerland).*

***In regard to marriage**, the feigning of consent is not a ground for nullity in Greek law, according to predominant legal opinion. In German law, the marriage is in such a case revocable ("*aufhebbar*"- Article 1314, paragraph 2, n° 5, of the BGB). In Switzerland there exists no special provision, on the grounds that it is not for the State to investigate the intentions of the engaged couple and that the administrative authorities of the immigration department have powers to limit the effects of fraudulent marriages.*

Two examples cited by the Netherlands before the entry into force of the Law of 2 June 1994 on bogus marriages illustrate the situation perfectly :

> *"The first case concerned a marriage contracted between a brother and sister (note that one was of Netherlands and the other of Surinam nationality). The other case concerned a woman of Cape Verde nationality who had declared her intention to marry a Dutch citizen. As the latter died before the celebration of the marriage he was replaced by another man at the wedding ceremony. The marriage certificate contained the name of the deceased. In the latter case two separate proceedings were conducted : in the first one, concerning the marriage between the woman and the deceased man, the judge decided that the marriage was non-existent because only persons who are alive can enter into a marriage ; in the second procedure, concerning the marriage between the woman and the substitute man, the judge decided that that marriage was also non-existent because the substitute had impersonated the deceased."*

***III.2.3.** The last limitation arises from the difficulty of proving the fraud.*

This was stressed by Spain in the case of acknowledgments of paternity, by France in the case of bogus marriages and by Portugal in the case of legal proceedings in regard to nationality. Due consideration needs to be given to the principle of freedom of marriage and the right of the person concerned to acknowledge paternity in the interests of the child. In practice, the courts often refuse to accept mere presumptions, even if they are corroborative, probably because they do not wish to interfere with those freedoms.

Respect for the freedom to marry, seen in the light of the European Convention on Human Rights, led the French Constitutional Court on 13 August 1993 to declare invalid the provisions of Article 175-2 of the Civil Code, as originally drafted, on the ground that they gave the public prosecutor power to suspend the celebration of a marriage for a period of three months without indicating the means by which the future spouses could challenge his decision. The principle of the freedom of marriage is also reiterated constantly in the instructions issued by the Spanish Central Registration Office on 9 January 1995, so as to ensure that the rights of the future spouses are scrupulously respected.

In member countries the paucity of case-law relating to the punishment of fraud attests to the problems of evidence that have to be overcome. Spain mentioned a few examples :

"The case referred to in the decision of 9 October 1993 concerns an intended marriage suspected of being a paper marriage between a Spanish man and a Moroccan woman but which, in view of the solemn declarations of the two future spouses, nevertheless took place because there existed no means of proving its bogus nature in court and because the fundamental right to marry must not be restricted. In the same spirit, the decision of 3 December 1993 authorised a marriage between a Spanish woman and an alien even though the latter did not have a residence permit and was threatened with expulsion from Spanish territory together with an order forbidding him to enter Spain for a period of three months. The decision stated that, having regard to the circumstances, there was no suspicion of fraud; the ius nubendi *must not be restricted and, in any case, an alien not permitted to enter Spain could give a power of attorney for the marriage, as is permitted by Article 55 of the Civil Code. On the other hand, the decision of 17 December 1993 refused to authorise marriage between a Spanish man and a foreign woman in a case in which fraud was probable: the Spanish man was a mentally disabled person with a mental age of under twelve whose legal incapacity had not yet been pronounced." More recently the Central Registration Office went so far as to refuse to register a marriage celebrated abroad in the following conditions: the spouses did not know each other, had no language in common, were residing separately in different hotels, etc. (decisions of 30 May 1995, 22 November 1995 and 8 January 1996).*

III.3. Limitations related to legislation in the area of civil status

III.3.1. *A lack of concordance in legislation on questions of civil law and on the subject of entry and residence may reduce the effectiveness of the means used to combat fraud. Certain countries (France, Netherlands) have therefore attempted to improve the consistency of their legislation.*

In the Netherlands the period of cohabitation after which a separate residence permit may be obtained is the same as for naturalisation. The law obliges the spouses to continue to cohabit effectively for a period of time that is relatively dissuasive. Conversely, the absence of a similar provision in Belgium and Portugal may undermine the procedure for the granting of residence permits.

In a different vein, France now requires the production of a duly registered marriage certificate for the granting of a residence permit as spouse. Since checks are made at the time of registration, attempted fraud may be exposed at the outset.

III.3.2. *It has also been noted that certain legislative provisions may provide opportunities for fraud.*

In Germany, for instance, paragraph 1 of Article 4 of the law on nationality (Law of 30 June 1993) concerning the acknowledgment of paternity of a child born out of wedlock confers German nationality on the child. The same can be said of all those States, for example Italy, where an acknowledgement of paternity by one of their nationals entails acquisition of their nationality by the child (see point I.1.3.1.). Similarly in France, since the entry into force of Article 21-2 of the Civil Code (Law N° 93-933 of 22 July 1993 reforming the law on nationality) a person must prove cohabitation for a period of two years (since 1 September 1998 the period has been reduced to one year) in order to obtain French nationality by declaration but total exemption is accorded when a child is born before or after the marriage of the persons concerned, thus potentially encouraging false acknowledgments. In this connection, mention should be made of the decision of the Netherlands Parliament to limit the power of the registration officer to demand a medical certificate solely to those cases in which the declaration of a birth is suspect (Law of 14 October 1993 on revision of the legislation relating to civil status, which came into force on 1 January 1995).

III.3.3. *At the same time it may be observed that only the Netherlands and Switzerland have carried out a general study on the problem of fraud and have introduced structured arangements to combat fraud effectively where it occurs. An enquiry conducted in the Netherlands tends to confirm that the Dutch law on bogus marriages, whilst being susceptible to certain improvements, has clearly had a preventive effect.*

Switzerland explains that the cantons consulted "would like above all to be given practical assistance in the form of better information, instruction and co-ordination by the Confederation. A serious and conscientious method of work is probably the best means of combating fraud. In principle, all international cases are handled by the cantonal authorities in charge of civil status, which carry out a preliminary examination (Articles 43a, 103, paragraph 2, and 168 of the Federal Order on civil status in conjunction with the cantonal implementing regulations). All doubtful documents may be submitted for authentification to the competent Swiss representation in the foreign country. Collaboration among civil status authorities, asylum authorities and the immigration department needs to be further strengthened to the extent permitted by the principles concerning the protection of data. The Federal Office for Refugees has set up effective forms of assistance (memorandum for checking the authenticity of documents; illustrative set of documents; apparatus for the visual control of documents; handbook on the examination of passports; collaboration with the document control laboratory of the Zurich cantonal police). It is ready to place its knowledge at the disposal of civil status authorities".

The Netherlands have adopted the following measures:

- *gradual establishment of computerised data banks in the administrations concerned which will in particular make it possible to avoid having the same person register in several municipalities and thus receive social benefits twice. There are also plans for the exchanging and comparison of the data of different administrations. In the new computerised system of the population department, a record is kept of the residence permits of all aliens. Lastly, the tax and social security number*

necessary to engage in paid employment is in principle now granted only to persons residing lawfully on the territory of the Netherlands;

- *use of fingerprints: this measure is at present in use for persons seeking asylum. The possibility of extending it to other categories of aliens is under consideration ;*
- *compilation of statistics on refusals of registration in order to evaluate the effects of the new statutory provisions after one year in operation.*

Two working groups responsible for evaluating the effectiveness of the measures already taken and for proposing any further measures that might be necessary were set up, one for bogus marriages and the other for fraud in civil status documents. The first group proposes to improve the attestation to be delivered by the immigration department. The work of the second group, on legalisation and verification of foreign civil status documents, led to the replacement of the circular of May 1996 by a new circular of 12 January 2000, that entered into force on 1 February 2000. Amongst other things, the new text introduces exemption from legalisation for documents the contents of which correspond to those of other documents that have been legalised and already supplied to the registration officer, and the possibility for persons unable to furnish documentary proof of a blood tie to prove it by a DNA test.

III.4. Other limitations

*Other limitations may derive from the requirements of Community law. Thus, the Court of Justice of the European Communities held on 2 December 1997 that: "*In proceedings for determining the entitlements to social security benefits of a migrant worker who is a Community national, the competent social security institutions and the courts of a member State must accept certificates and analogous documents relative to personal status issued by the competent authoritites of the other member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.*" (CJEC, 2 Decemeber 1997: D. 1998, 112.48).*

Detection of fraud may also be rendered more difficult by rules on the protection of personal data, requiring authorisation for the setting up and the interconnection of filing systems.

CONCLUSION

Comparison of the various replies by ICCS member States to the questionnaires on fraud has brought out certain major common trends, such as the large number of forged foreign civil status documents in circulation, the number of bogus marriages and the emergence of a form of fraud involving the false acknowledgment of paternity of a child.

In most cases, registration officers may have verifications made by the country's representative abroad and may in consequence refuse to register a record or may refer the matter to the competent authorities to have the defective document declared void. Their action, however, is circumscribed by the powerful safeguards surrounding the freedom of marriage, which have often forced the abandonment for lack of evidence of attempts to combat bogus marriages either before or after their celebration.

Another general trait worth stressing is the variable degree to which States are organised to cope with the problem of fraud: co-ordination when necessary among the various departments, joint discussions and organisation of international exchanges in this field. There have been some limited experiments only. This observation gives food for thought when a comparison is made with the considerable resources recently deployed in regard to visas .

For the future, it would be interesting to know whether knowledge of measures taken by certain States is likely to incite others to try out new approaches and devote resources to evaluating the effectiveness of the texts on marriage and immigration that have come into force recently. It would also be interesting to examine the possible repercussions of reforms implemented in one State on neighbouring countries. The ICCS would provide a particularly appropriate structure for such studies.

TABLE N° 1 : *Effects in each State of marriages between a national and an alien not a national of a European Union country in the matter of residence and nationality*

	Conditions for issue of a residence permit	***Conditions for acquisition of nationality***
Germany	*§ 23 of Law of 9 July 1990 on aliens.* - *Effective cohabitation at time of obtaining residence permit.* - *Separate residence permit after 4 years of cohabitation (sometimes 3 years in case of compelling need for the foreign spouse, § 29 of above -mentioned Law).*	*§ 9 of Law of 22 July 1913 on nationality.* *Naturalisation facilitated if:* - *4 years of residence including 2 of cohabitation,* - *no convictions,* - *means of subsistence and housing,* - *renunciation of nationality of origin,* - *ability of alien to integrate into Germany.*
Austria	*§ 3 of Federal Law on residence BGBl. Nr. 466/1992 (BGBl. Nr. 351/1995)* - *6 months of marriage (or less in case of effective cohabitation at time of marriage, for example).*	*§11a of Federal Law on nationality BGBl. Nr. 311/1985 (BGBl. Nr.521/1995).* *Naturalisation facilitated if :* - *married for at least 1 year and foreign spouse domiciled in Austria for at least 4 years,* - *or married for at least 2 years and foreign spouse domiciled in Austria for at least 3 years,* - *or married for at least 5 years and spouse an Austrian national for at least 10 years.*
Belgium	*Article 40* et seq. *of Law of 15 December 1980 on admission to the territory, residence, settlement and deportation of aliens.* - *Obtainment as of right of a permanent residence permit.* - *No condition of previous cohabitation, but the alien must come to take up residence in Belgium or take up residence with his Belgian spouse.*	*Article 16- §2 of Code of Belgian nationality.* *Acquisition by declaration if :* - *3 years of cohabitation in Belgium. The period may be reduced to 6 months if alien has resided lawfully for 3 years in Belgium.*
Spain	*Article 54 of Royal Decree N° 155/1996 of 2 February 1996 on execution of Organic Law N° 7/1985 on the rights and freedoms of aliens in Spain.* - *Spouse acquires right to residence.*	*Article 22-2-d of Civil Code.* *Granted if :* - *1 year of residence and* - *1 year of marriage without judicial or* de facto *separation.*

	Additional information regarding the issue of a residence permit
Belgium	*Article 10, para 1, 4°, of Law of 15 December 1980 on admission to the territory, residence, settlement and deportation of aliens : the foreign spouse of an alien admitted to or authorised to reside or settle in Belgium is allowed as of right to reside in Belgium for an indefinite period, without any condition of previous cohabitation but provided that the spouse comes to live with the alien.*
Spain	*Article 54 of Royal Decree 155/1996 of 2 February 1996 on execution of Organic Law N° 7/1985 on the rights and freedoms of aliens in Spain : the spouse of an alien lawfully resident in Spain acquires the right to reside in Spain "if not living apart or judicially separated, if another spouse is not living with the alien and if the marriage was not celebrated fraudulently".* *The spouse of a resident alien may obtain a separate residence permit notably if he or she has cohabited with his or her spouse for 2 years in Spain.* *A residence permit will not be granted to an alien on the basis of his or her being the spouse of a resident if another spouse of that resident has already resided in Spain.*

TABLE N° 1 : *Effects in each State of marriages between a national and an alien not a national of a European Union country in the matter of residence and nationality*

	Conditions for issue of a residence permit	***Conditions for acquisition of nationality***
France	*Article 15-1° of Order N° 45-2658 of 2 November 1945 concerning conditions of entry and residence of aliens in France, in the wording resulting from Law N° 98-349 of 11 May 1998.* *Issue of a residence permit if:* - *1 year of marriage,* - *cohabitation,* - *transcription of marriage certificate if marriage celebrated abroad,* - *lawfulness of residence on French territory.*	*Article 21-2 of Civil Code.* *Acquisition by declaration if :* - *1 year of cohabitation (2 years before 1 September 1998),* - *this condition dropped if birth of child to couple before or after marriage.*
Greece	*No applicable text.* *Administrative practice as follows :* - *Authorisation of residence for a period of 3 months to 1 year renewable, dependent on effective cohabitation of spouses.*	*Article 4 of Code of nationality : no effect.* *But naturalisation facilitated.*
Italy	*Article 4, paragraph 7, of Decree-Law N° 416 of 30 December 1989 (new provisions of the law on political asylum, entry and residence of non-Community nationals, regularisation of their situation and of the situation of stateless persons already present on the territory of the State).* - *Issue of an indefinite residence permit if 3 years of marriage.*	*Article 5 of Law N° 91 of 5 February 1992 (new provisions of Law on nationality).* - *Acquisition facilitated.* - *No condition of cohabitation or lawful residence.*
Luxembourg	*No applicable text.* *Obtainment of a one-year renewable residence permit.*	*Articles 19 and 21 of the Law on Luxembourg nationality of 22 February 1968 amended.* *Acquisition by declaration if:* - *3 years of residence,* - *cohabitation,* - de facto *and lawful residence.*

TABLE N° 1 : *Effects in each State of marriages between a national and an alien not a national of a European Union country in the matter of residence and nationality*

	Conditions for issue of a residence permit	***Conditions for acquisition of nationality***
Netherlands	*Article 9 of Law N° 40 of 13 January 1965 on aliens (Law N° 250 of 26 April 1995).* *- valid marriage,* *- cohabitation of spouses,* *- sufficient means of subsistence,* *- absence of impediment.* *Unconditional residence permit may be granted after 3 years of marriage.*	*Article 8 of Law N° 628 of 19 December 1984 on nationality.* *Naturalisation facilitated if:* *- 3 years of marriage,* *- person concerned is of age,* *- person concerned sufficiently integrated,* *- no impediment related to health, security and public policy, or morality.*
Portugal	*Articles 51 and 58 of Decree-Law N° 244/98 of 8 August 1998 and Article 6 of Decree-Law N° 60/93 of 3 March 1993 concerning entry and residence.* *- The spouse is allowed as of right to reside in Portugal, without condition of cohabitation.*	*Article 3, N° 1 and 9, of Law on nationality and Articles 11 and 22 of Regulations on nationality* *Acquisition by declaration if :* *- 3 years of marriage,* *- proof of genuine links with Portuguese community.*
Switzerland	*Article 7, paragraph 1, of Federal Law of 26 March 1931 (RS 142.20) on residence and settlement of aliens.* *- Renewable residence permit on condition of continued marriage but without requirement of continued cohabitation.*	*Articles 27 and 28 of Federal Law on nationality (in force since 1 January 1992).* *Naturalisation facilitated. Two cases :* *1)* marriage of an alien to a Swiss living in Switzerland: *the alien must have resided in Switzerland for 5 years altogether and since at least one year and must prove 3 years of conjugal life at time of application for naturalisation.* *2)* marriage of an alien to a Swiss living abroad: *requirement of close ties with Switzerland and 6 years of conjugal life.*
Turkey	*No specific provisions.*	*Article 42 of Law N° 1587-1974 on population.* *Acquisition by declaration :* *- alien women may acquire Turkish nationality following marriage with a Turk.*

	Additional information regarding the issue of a residence permit
Netherlands	*Article 9 of Law N° 40 of 13 January 1965 on aliens (Law N° 250 of 26 April 1995) : the foreign spouse of an alien admitted to or authorised to reside in the Netherlands is granted an ancillary residence permit (cohabitation necessary). After 3 years an individual residence permit may be granted.*
Portugal	*Article 56 of Decree-Law N° 244/98 of 8 August 1998 - The alien spouse of an alien authorised to reside in Portugal can obtain a residence permit if the latter has means of subsistence and accommodation.*
Switzerland	*Same conditions for all aliens, whether nationals of a country of the European Union (of which Switzerland is not a member) or of another country.* *Article 17, paragraph 2, of Federal Law of 26 March 1931 (RS 142.20.) on residence and settlement of aliens : the foreign spouse of an alien authorised to reside in Switzerland may obtain a residence permit so long as conjugal life continues. Case-law has required legal and* de facto *conjugal life. After 5 years of lawful uninterrupted residence the foreign spouse acquires a right of settlement.*

TABLE N° 2	***SANCTIONS FOR FORGERY OF CIVIL STATUS DOCUMENTS***	
	Civil sanctions	***Penal sanctions***
Germany	- *not declared void* - *rectification (§§ 47-50 of Law of 8 August 1957 on civil status) ordered by District Court (Amtsgericht) to which referred at request of any interested party, registration officer under Länder legislation or supervisory authority* - *marginal entry in document*	*Custodial sentence or fine :* - *falsification of civil status (§ 169 of Penal Code)* - *forgery of public documents (§ 271 of Penal Code)* - *forged affidavit (§ 156 of Penal Code)* - *forgery of documents (§ 267 of Penal Code)* - *misuse of an identity document (§ 281 of Penal Code)*
Austria	- *not declared void* - *rectification ordered by sub-prefecture [§ 15 of Federal Law on civil status - BGBl. Nr. 60/1983 (BGBl. Nr. 25/1995)]* - *marginal entry in document*	*§ 57 of Federal Law on civil status - BGBl. Nr. 60/1983 (BGBl. Nr. 25/1995) :* - *falsification of documents (§§ 223, 224, 225, 230, 293 of Penal Code) : custodial sentence and/or fine* - *false declarations before a registration officer : fine* - *submission of documents that are not falsified but show inaccurate or outdated personal status : fine*
Belgium	- *declared void by court of first instance to which matter referred by interested parties and, under Article 138, paragraph 2, of Judicial Code, by public prosecutor's office in case of violation of public policy* - *in absence of text, same procedure as for judicial rectification* - *marginal entry in document*	- *application of general provisions on forgery and use of forged documents with intent to defraud (Articles 193-195 of Penal Code): custodial sentence and fine*
Spain	- *declared void, if substantial breach, under ordinary procedure by civil judge at request of any interested party or of public prosecutor (Articles 92 and 95 LRC)* - *invalidated document made unusable by lines drawn across it (Article 164 of RRC)*	- *falsification of an official document: custodial sentence and fine (Articles 390 and 398 of Penal Code – Law of 23 November 1995)* - *fraudulent childbirth: custodial sentence (Articles 220 and 222 of Penal Code)*
France	- *declared void by Regional Court at request of any interested party or public prosecutor's office* - *in absence of text, same procedure as for judicial rectification* - *marginal entry in document*	*Custodial sentence and/or fine :* - *application of general provisions on forgery and use of forged documents with intent to defraud (Articles 441-1* et seq. *of new Penal Code)* - *deliberate substitution, simulation or dissimulation having entailed a violation of the civil status of a child (Article 227-13 of new Penal Code)* - *fraud (Article 313-1 of new Penal Code)* - *change of name in a public or authentic document (Article 433-19 of new Penal Code)*
Greece	- *declared void or rectified as case may be by Regional Court at request of any interested party, public prosecutor's office or registration officer (Article 782 of Code of Civil Procedure, Article 48 of Law N° 344-1976, Article 20 of Presidential Decree N° 850-1976)* - *marginal entry in document*	*Application of general provisions on forgery of documents (Articles 216, 217, 220, 221, 242, 259 of Penal Code) : custodial sentence and/or fine*

TABLE N° 2	SANCTIONS FOR FORGERY OF CIVIL STATUS DOCUMENTS	
	Civil sanctions	**Penal sanctions**
Italy	- declared void (Articles 1418-1424 of Civil Code) by civil judicial authorities to whom matter referred at request of any interested party or ex officio by judge - marginal entry in document	- application of provisions laid down for criminal offences of falsification (Articles 476 to 480, 483, 495 of Penal Code): custodial sentence - false declaration of birth (Articles 566 and 567 of Penal Code): custodial sentence
Luxembourg	- declared void by District Court to which matter referred at request of any interested party or public prosecutor's office - marginal entry in document	Application of general provisions on forgery and use of forged documents with intent to defraud (Articles 193 to 197 and 214 of Penal Code): custodial sentence and fine
Netherlands	- cancellation ordered by Regional Court to which matter referred at request of any interested party or public prosecutor (Article 24 of Civil Code) - marginal entry in document	Custodial sentence and fine : - forgery of documents (Articles 225 and 227 of Penal Code) - concealment of civil status (Article 236 of Penal Code) - fraud with respect to non-economic property (medical certificate and, apparently, civil status document) (Article 326 of Penal Code)
Portugal	- nullity (Article 88 of Code of Civil Status) or non-existence (Article 85 of Code of Civil Status - Decree-Law N° 131/95 of 6 June 1995) - sanctions pronounced by judicial authorities (Articles 90 and 239 of Code of Civil Status) to which matter referred at request of any interested party, the registration officer or the public prosecutor's office (Articles 86, 223 and 229 of Code of Civil Status) - nullity or non-existence inscribed in margin of document (Article 114 of Code of Civil Status)	- forgery and use of false authentic documents : custodial sentence or fine (Articles 256 N° 1 and 261 of Penal Code) - falsification or illegal use of civil status: custodial sentence or fine (Article 248 of Penal Code)
Switzerland	- declared absolutely void by judicial authorities to which matter referred either ex officio or at request of any interested party in regard to marriage (Articles 120 et seq. of Civil Code and Article 8, paragraph 4, final section of Civil Code), - declared partially void by judicial authorities at request of spouse who was misled or threatened (Article 107 of Civil Code), - rectification by judicial authorities (Article 42 of Civil Code) ordered ex officio or at request of any interested party, the authority designated by the canton or a registration officer acting with authorisation of his supervisory authority (Article 50, paragraph 3, OEC) - cancellation of entry in register (Article 51 OEC) - marginal entry in document (Articles 50, 51 and 53 OEC)	Fraud and use of false authentic documents: custodial sentence or fine (Articles 251 et seq. of Penal Code)
Turkey	- declared void by the judge to whom matter referred at request of any interested party (Article 294 of Civil Code) - cancellation of document	Forgery of documents: custodial sentence (Articles 339 and 342 of Penal Code)

TABLE N° 3	***SANCTIONS FOR FALSE ACKNOWLEDGMENTS OF PATERNITY***		
	Civil sanctions	***Penal sanctions***	***Administrative sanctions***
Germany	- *declared void by court of first instance (Familiengericht) at request of man who made the acknowledgment of paternity, the mother or the child (§1600 BGB [Bürgerliches Gesetz-buch - German Civil Code]* - *reduction of time-limit for legal proceedings (§ 1600b BGB)* - *marginal entry of rectification in document*	- *None* *(no sanction because no criminal offence)*	*Withdrawal of residence permit independently of judicial annulment of the acknowledgment of paternity.*
Austria	*§§ 163d, 164, 164-b, 164c ABGB [Allgemeines Bürgerliches Gesetz-buch – General Civil Code]:* - *declared void by guardianship court,* ex officio *after appli-cation to set aside by mother or child and establishment of another relationship of pater-nity, or at the request of the person who made the acknowledgment* - *reduction of time-limit for legal proceedings* - *marginal entry in document*	*§ 57 of Federal Law on civil status - BGBl. Nr. 60/1983 (BGBl. Nr. 25/1995) :* - *falsification of documents (§§ 223 to 225, 230, 293 of Penal Code): custodial sentence and/or fine* - *false declarations before registrar : fine* - *submission of documents not falsified but containing an incorrect or outdated personal status : fine*	
Belgium	- *declared void by court of first instance at request of any interested party (Article 330, §1, of Civil Code) or of prosecuting authorities if contrary to public policy (Article 138, paragraph 2, of Judicial Code)* - *inadmissibility of legal procee-dings against person making the acknowledgment if the child enjoys a publicly recog-nised status (Article 330, §2 of Civil Code)* - *marginal entry in document*	- *application of general provisions on forgery and making use of forged documents with intent to defraud (Articles 193, 196 and 214 of Penal Code): custodial sentence and fine*	*None.* *The administrative authority awaits the judicial decision of annulment before with-drawing the residence permit.*
Spain	- *declared void by civil judge under ordinary procedure (Article 484 of Law on civil procedure) at request of any interested party or of Attorney General* - *limitation of interested parties and reduction of time-limit for institution of proceedings if the child enjoys a publicly recognised status (Articles 137, 139 and 140 of Civil Code)* - *marginal entry in document (Article 164 RRC)*	- *falsification of an official document (Articles 390* et seq. *of Penal Code): custodial sentence and fine* - *illegal use of civil status (Article 401 of Penal Code): custodial sentence*	*None.*

TABLE N° 3	***SANCTIONS FOR FALSE ACKNOWLEDGMENTS OF PATERNITY***		
	Civil sanctions	***Penal sanctions***	***Administrative sanctions***
France	- *declared void by Regional Court to which matter referred at request of any interested party (Article 339, paragraph 1, of Civil Code) or of public prosecutor's office (Article 339, para. 2, of Civil Code)* - *limitation of interested parties and reduction of time-limit for institution of proceedings if the child enjoys a publicly recognised status (Article 339, paragraph 3, of Civil Code)* - *marginal entry in document*	- *None* *(forgery of public documents not applicable: Court of Cassation, Criminal Division, 11 March 1988)*	*Withdrawal of residence permit apparently possible without judicial annulment of the acknowledgment (argument : opinion of 9 October 1992 of Conseil d'Etat).*
Greece	- *declared void by judicial authority to which matter referred at request of any person with a family interest, of the person who made the acknowledgment and of the heirs (Articles 140* et seq. *of Civil Code)* - *action to set aside no longer possible if child has not instituted proceedings two years after attainment of full age at the latest (Article 1477 of Civil Code)* - *marginal entry in document*	- *application of provisions of Article 354 of Penal Code relating to disturbance of family peace : custodial sentence*	*Distinction necessary :* - child under age at time of acknowledgment : *None. But regularisation of residence made necessary by judicial annulment of the acknowledgment if it causes child to lose Greek nationality ;* - child of full age at time of acknowledgment*:* *residence permit may be withdrawn under rules of ordinary law.*
Italy	- *declared void by civil judicial authority to which matter referred at request of any interested party (Article 263 of Civil Code).* - *proceedings may be instituted without restriction (not subject to limitation and independently of enjoyment of a publicly recognised status)* - *transcription of decision in civil status registers (Article 66, para. 3, N° 7, RD [*Regio decreto*] N° 1238/39 of 9 July 1939), then marginal entry in document.*	*None (no offence committed). Application of penalties incurred in case of forged civil status documents:* - *application of provisions for criminal offences of forgery (Articles 476-480, 483, 495 of Penal Code) : custodial sentence*	*None. Withdrawal of residence permit is independent of legal validity of the acknowledgment.*
Luxembourg	- *declared void by District Court to which matter referred at request of any interested party (Article 339, para. 1, of Civil Code) or of public prosecutor's office (Article 339, para. 2, of Civil Code)* - *limitation of interested parties and reduction of time-limit for institution of proceedings if the child enjoys a publicly recognised status (Article 339, paragraphs 3 and 4, of Civil Code)* - *marginal entry in document*	- *application of general provisions on forgery and making use of forged documents with intent to defraud (Articles 193 - 197 and 214 of Penal Code): custodial sentence and fine*	*None, in principle.*

TABLE N° 3	***SANCTIONS FOR FALSE ACKNOWLEDGMENTS OF PATERNITY***		
	Civil sanctions	***Penal sanctions***	***Administrative sanctions***
Netherlands	- *declared void by judicial authority to which matter referred at request of the child, mother, author of the acknowledgement or public prosecutor's office only (Article 205 of Civil Code)* - *cancellation of the record*	*Application of penalties incurred for forged civil status certificates. Custodial sentence and fine :* - *forgery of documents (Articles 225 and 227 of Penal Code)* - *concealment of civil status (Article 236 of Penal Code)* - *fraud in respect of non-economic property (Article 326 of Penal Code): examples : medical certificate and, apparently, civil status document*	*None.* *Regularisation of residence made dependent on judicial annulment of the acknowledgment.*
Portugal	- *declared void by judicial authority to which matter referred at request of any interested party and public prosecutor's office (Articles 86, 90, 223 and 229 of Code of Civil Status)* - *marginal entry in document (Article 91-b of Code of Civil Registration)*	- *forgery and use of false authentic documents: custodial sentence or fine (Articles 256 N° 1 and 261 of Penal Code)* - *falsification or illegal use of civil status: custodial sentence or fine (Article 248 of Penal Code)*	*Possibility of refusal to register the acknowledgment.*
Switzerland	- *declared void by judicial authority to which matter referred at request of any interested party (Article 260 a of Civil Code)* - *limitation of interested parties and reduction of time-limit for institu-tion of proceedings (Articles 260, paragraph 2, and 260c of Civil Code)* - *marginal entry in document*	- *forgery and use of false authentic documents: custodial sentence (Articles 251* et seq. *of Penal Code)*	*Possibility of refusal available to cantonal immigration authorities at time of issuing a temporary or permanent residence permit to the foreign child who has been acknowledged or to the alien who made the acknowledgment, if the validity of the acknowledgment is questionable.*
Turkey	- *application to set aside made to judge by mother, child or, after death of child, its descendants ; if application allowed, acknowledgment declared void by the judge (Article 293 of Civil Code) and entry cancelled* - *application to set aside by Treasury or any interested party (Article 294 of Civil Code): entry declared void and cancelled.* *These two proceedings must be commenced within 3 months of discovery of the fraud.*	- *forgery of documents: custodial sentence (Articles 339 and 342 of Penal Code)*	*None.*

TABLE N° 4	***SANCTIONS FOR BOGUS MARRIAGES***		
	Civil sanctions	***Penal sanctions***	***Administrative sanctions***
Germany	- Preventive: *refusal to celebrate the marriage by registration officer if manifestly a marriage of convenience.* - After the event: *revocation (Aufhebung) of marriage.*	*Custodial sentence and fine if marriage feigned for the sole purpose of obtaining a residence permit (§ 92 of Law of 9 July 1990 on aliens).*	*Possible withdrawal of residence permit despite validity of marriage.*
Austria	- Preventive: *refusal to celebrate the marriage by registration officer if manifestly a bogus marriage.* - After the event: *marriage declared void by Regional Court at request of public prosecutor (§§ 23 and 28 of Federal Law on marriage)* - *Marginal entry in document.*	*§ 57 of Federal Law on civil status - BGBl. Nr. 60/1983 (BGBl. Nr. 25/1995) :* - *falsification of documents (§§ 223, 224, 225, 230, 293 of Penal Code): custodial sentence and/or fine* - *false declarations to registration officer: fine* - *submission of documents that are not falsified but indicate an incorrect or outdated personal status: fine*	*Possible withdrawal of residence permit.*
Belgium	- Preventive: *objection to marriage by prosecuting authorities (Article 138, para. 2, of Judicial Code); refusal to celebrate marriage if manifestly a bogus marriage (Law of 4 May 1999 and circular of 17 December 1999)* - After the event: *absolute nullity of marriage declared by court of first instance to which matter referred at request of any interested party or of Crown prosecutor (Article 138 of Judicial Code)* - *Marginal entry in document.*	*Application of penalties for forgery of authentic documents (Articles 193, 196 and 214 of Penal Code): custodial sentence and fine.*	*None.*
Spain	- Preventive: *refusal to celebrate the marriage by registration officer if manifestly a bogus marriage.* - After the event: *marriage declared void (Articles 45 and 73-1 of Civil Code) by ordinary court (Article 484 Lec [Ley de enjuiciamento civil-law of civil procedure] to which matter referred at request of principal State prosecutor, the spouses or any interested party (Article 74 of Civil Code).* - *Marginal entry in document (Article 306 RRC).*	*None (not an offence).*	*None.* *But immediate communication of judicial decision of annulment to Ministry of Interior (Articles 25 and 26 of Law of 1 July 1985).*

TABLE N° 4	***SANCTIONS FOR BOGUS MARRIAGES***		
	Civil sanctions	***Penal sanctions***	***Administrative sanctions***
France	- Preventive: *objection to marriage by State Counsel's Office (Article 175-2 of Civil Code)* - After the event: *absolute nullity of marriage (Article 146 of Civil Code) pronounced by Regional Court to which matter referred at request of State Counsel's Office (while two spouses alive) or any interested party (Article 190 of Civil Code).* - *Marginal entry in document.*	- *Article 441 of Penal Code: custodial sentence and fine* - *assistance or attempted assistance in regard to unlawful residence (Article 21 of Order of 2 November 1945).*	*Before judicial annulment of marriage, possibility for administration to refuse to issue residence permit or to withdraw it (cf. opinion of 9 October 1992 of Conseil d'Etat).*
Greece	- Preventive: *none.* - After the event: *no annulment of marriage (Article 1372 of Civil Code).*	*None (not an offence).*	*None.*
Italy	- Preventive: *none.* - After the event: *marriage declared void by civil court to which matter referred at request of either spouse or any interested party (Article 123 of Civil Code).* - *Trancription of decision (Article 125, paragraph 5, n° 6, R.D. N° 1238/39) and marginal entry in birth certificate of spouses (Article 88 R.D. N° 1238/39).*	*None (not an offence).*	*None.*
Luxembourg	- Preventive: *objection to marriage by State Prosecutor.* - After the event: *marriage declared void by District Court to which matter referred at request of any interested party or of State Prosecutor (Articles 180 to 202 of Civil Code).* - *Marginal entry in document.*	*Application of penalties for forgery of authentic documents (Articles 193 to 197 and 214 of Penal Code): custodial sentence and fine.*	*Possible withdrawal of residence permit.*

TABLE N° 4	***SANCTIONS FOR BOGUS MARRIAGES***		
	Civil sanctions	***Penal sanctions***	***Administrative sanctions***
Netherlands	- Preventive: *objection to marriage by State Counsel's Office (Article 53 of Civil Code); refusal to celebrate marriage if contrary to public policy (Article 18b of Civil Code). These sanctions also apply to registered partnerships.* - After the event: *marriage declared void by court of first instance to which matter referred at request of State Counsel's Office (Article 71-a of Civil Code). The extension of this sanction to registered partnerships is envisa-ged.* - *Cancellation of certificate.*	*Draft law laying down penalties incurred by :* - *any person having agreed to contract a bogus marriage with purpose of enabling spouse to obtain residence permit* - *any intermediary.*	*Possible withdrawal of residence permit.*
Portugal	- Preventive: *none.* - After the event: *marriage declared void (Article 1635-d of Civil Code) by judicial authority to which matter referred at request of one of the spouses or any interested party (Article 1640-1 of Civil Code).* - *Cancellation of certificate followed by marginal note.*	*None (not an offence).*	*Possible withdrawal of residence permit in case of admission by spouses of fictitious nature of marriage.*
Switzerland	- Preventive: *none.* - After the event: *not ground for nullity of marriage.*	*None (not an offence).*	*Refusal or withdrawal of residence permit (Article 7, par. 2, of Federal Law on tempo-rary and permanent residence of aliens).*
Turkey	- Preventive: *none.* - After the event: *not ground for nullity of marriage.*	*None (not an offence).*	*None.*

Note on the compatibility with the European Convention on Human Rights

of legislative and regulatory measures taken by States

to combat fraud with respect to civil status

With one possible exception (Nsona v. the Netherlands, 28.11.1996; see section I-A-2 below), the European Court of Human Rights[1] has not to date delivered any judgments in cases directly concerning measures taken to combat fraud with respect to civil status.

It nevertheless seems probable that if any such cases were to arise in the future, they could raise questions under, in particular, Articles 8, 12, 14 and 6 of the European Convention on Human Rights ("the Convention"). It thus appears useful firstly to set out a brief summary of certain principles that emerge from the existing case-law on these Articles and then to endeavour to draw up, in the light of those principles, a list of matters that might be relevant in this area.

I. The existing case-law

A. Article 8

Article 8 of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

1. Private and family life

The first question is obviously what is meant by "private and family life". With its customary prudence, the Court has never tried to give an exhaustive definition of these two concepts, but rather has preferred to indicate what they can include or what they do not exclude.

*Thus, "private life", in the Court's view, "*includes a person's physical and psychological integrity; the guarantee afforded by Article 8 … is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings*". (Botta v.Italy, 24.2.1998, para. 32).*

*The Court has held that, by guaranteeing the right to respect for "family life", the Convention "*presupposes the existence of a family*" but that "*this does not mean that all intended family life falls entirely outside the ambit" *of Article 8*. "Whatever else the word 'family' may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage …*" [emphasis added] (Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28.5.1985, para. 62).*

[1] *This note does not cover the decisions of the European Commission of Human Rights or of the Committee of Ministers of the Council of Europe.*

*Again, "*Article 8 applies to the 'family life' of the 'illegitimate' family as it does to that of the 'legitimate' family*" (Marckx v. Belgium, 13.6.1979, para. 31). "*The notion of the 'family' in [Article 8] is not confined solely to marriage-based relationships and may encompass other de facto 'family' ties where the parties are living together outside of marriage.*" (Keegan v. Ireland, 26.5.1994, para. 44). However, "*although, as a rule, living together may be a requirement for such a relationship, exceptionally other factors may also serve to demonstrate that a relationship has sufficient constancy to create de facto 'family ties' *" (Kroon and Others v. the Netherlands, 27.10.1994, para. 30). "*When deciding whether a relationship can be said to amount to 'family life', a number of factors may be relevant, including whether the couple … [have had] children together or by any other means*" (X, Y and Z v. the United Kingdom, 22.4.1997, para. 36).*

2. *Interference*

The Court has stated on several occasions that the object of Article 8 "is essentially that of protecting the individual against arbitrary interference by the public authorities*" (Marckx v. Belgium, 13.6.1979, para. 31).*

*On this point it should be noted that the alleged interference with the right to respect for family life must be imputable to the respondent State. That was not so, the Court decided, in a case where a passport had been falsified with a view to obtaining the entry of a nine-year-old child into the Netherlands. "*The Netherlands authorities cannot be blamed, once [the deceit] was discovered, for refusing to accept allegations unsupported by evidence*" (Nsona v. the Netherlands, 28.11.1996, para. 113 and 114[1]).*

An interference with the right to respect for family life entails a violation of Article 8 if it does not meet the conditions set out in paragraph 2 of that provision: it must therefore (a) be "in accordance with the law", (b) have an aim or aims that is or are legitimate under Article 8§2, and (c) be "necessary in a democratic society" for the aforesaid aim or aims (Olsson v. Sweden, 24.3.1988, para. 59).

From the abundant case-law on this issue, which cannot be briefly summarised, the following principles can be extracted:

- *(a) The phrase "in accordance with the law" also relates to the quality of the law and implies that there must be a measure of protection in domestic law against arbitrary interferences (Olsson v. Sweden, 24.3.1998, para. 61(b)).*
- *(b) The contested measure must not have been motivated by considerations extraneous to the legitimate aim pursued (Olsson v. Sweden (no.2), 27.11.1992, para. 79).*
- *(c) The notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; the Court will take into account in this context that a margin of appreciation is left to the Contracting States (Olsson v. Sweden, 24.3.1988, para. 67). Although Article 8 contains no explicit procedural requirements, the Court, in assessing the "necessity" of a measure, will not fail to examine as well whether the decision-making process was fair and provided the requisite protection of the interests protected by Article 8 (W v. the United Kingdom, 8.7.1987, paras. 62 and 64).*

3. *Positive obligations*

*In addition to the State's obligation to abstain from interferences, there may, according to the Court, be "*positive obligations inherent in an effective respect for private or family life*" (Marckx v. Belgium, 13.6.1979, para. 31, and X and Y v. the Netherlands, 26.3.1985, para. 23). These obligations may involve the adoption of measures designed to allow those concerned to lead a normal family life, to secure respect for private life even in the sphere of the relations of individuals between themselves (Marckx v. Belgium, 13.6.1979, para.*

[1] *The passport had been tampered with so as to identify one of the applicants as the daughter of the other; on being questioned by the police, the latter claimed, without proffering any evidence, that the child was her niece. The child was sent back to Zaïre.*

31, and X and Y v. the Netherlands, 26.3.1985, para. 23), or to allow complete legal family ties to be formed between those concerned (Kroon and Others v. the Netherlands, 27.10.1994, para. 36).

In determining whether or not a positive obligation exists, the Court will have regard to "the fair balance that has to be struck between the general interest of the community and the interests of the individual*"; in this respect the aims mentioned in paragraph 2 of Article 8 "*may be of a certain relevance*" (Rees v. the United Kingdom, 17.10.1986, para. 37). This again is an area in which the Contracting States enjoy a margin of appreciation, the width whereof varies according to the case (judgments too numerous to cite).*

In this context, the Court will also take into account the seriousness of the disadvantages and the degree of inconvenience caused to the applicant by the State's inaction. The absence of undue hardship or sufficient inconvenience will lead to the conclusion that there has not been a failure to respect private and family life (Guillot v. France, 24.10.1996, para. 23, and X, Y and Z v. the United Kingdom, 22.4.1997, para. 48).

4. The boundaries between negative and positive obligations

*As the Court itself has recognised, "*the boundaries between the positive and the negative obligations do not lend themselves to precise definition*" (Keegan v. Ireland, 26.5.1994, para. 49, and see the separate opinion of Judge Wildhaber in the case of Stjerna v. Finland, 25.11.1994). The point is perhaps academic, given that "*the applicable principles are similar*" and that "*in both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole*" (Keegan v. Ireland, 26.5.1994, para. 49).*

5. Cases concerning controls on immigration

Several cases involving controls on immigration (expulsions, exclusions from the territory of a State, etc.) have come before the Court. In this area, where questions related to the civil status of individuals can well arise, it has enunciated the following principles:

*"*It is for the Contracting States to maintain public order, in particular by exercising their right … to control the entry and residence of aliens. To that end, they have the power to deport aliens convicted of criminal offences.

However, their decisions… must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued…
[The Court must accordingly ascertain whether the contested measure] struck a fair balance between the relevant interests, namely the applicant's right to respect for her private and family life, on the one hand, and the prevention of disorder or crime, on the other*" (Dalia v. France, 19.2.1998, para. 52).*

*However, "*the duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in the country*" (Abdulaziz, Cabales and Balkandali v. the United Kingdom, 28.5.1985, para. 68).*

In the majority of these cases, it was hardly disputed that the measure in issue was "in accordance with the law" and pursued an aim that was legitimate under paragraph 2 of Article 8. The Court therefore had to determine whether the "fair balance" had been attained and whether the measure was proportionate. It is difficult to identify precise principles on this point, as the Court proceeded on a case-by-case basis and took into consideration factors such as the applicant's age, the extent of his family ties in the respondent State and in his country of origin, the possibility for him to lead a normal family life in that country, his knowledge of languages, the nature and gravity of the offence he had committed, etc.

B. Article 12

*Article 12 of the Convention is worded as follows: "*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*"*

*At first sight it could be thought that this provision leaves the Contracting States entirely free to determine the content of their national laws on marriage. That has not been the approach taken by the Court, for it has held that the limitations introduced by a national law "*must not restrict or reduce the right [to marry] in such a way or to such an extent that the very essence of the right is impaired*" (Rees v. the United Kingdom, 17.10.1986, para. 50). If it is not to infringe Article 12, the limitation must also be proportionate to the legitimate aim pursued (F. v. Switzerland, 18.12.1987, para. 40).*

It seems that a limitation affecting "the very essence" of the right to marry would not violate Article 12 if it were shown to be proportionate to the legitimate aim pursued[1]. There remains, however, the problem of knowing which aims the Court would regard as legitimate in this context, since Article 12 – unlike Article 8 – does not contain, in a paragraph 2, a list of aims capable of being taken into consideration.

C. Article 14

*Under Article 14 of the Convention, "*The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"*

*Article 14 safeguards "*individuals, placed in similar situations,*" from any discrimination in the enjoyment of the rights and freedoms guaranteed by the Convention (Marckx v. Belgium, 13.6.1979, para. 32). "*It has no independent existence since it has effect solely in relation to 'the enjoyment of the rights and freedoms' [safeguarded by the other substantive provisions of the Convention and the Protocols]. Although the application of Article 14 does not necessarily presuppose a breach of those provisions – and to this extent it has an autonomous meaning -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter*" (Rasmussen v. Denmark, 28.11.1984, para. 29).*

*According to the Court's established case-law, a distinction is discriminatory if it "*has no objective and reasonable justification*", that is, if it does not pursue a "*legitimate aim*" or if there is not a "*reasonable relationship of proportionality between the means employed and the aim sought to be realised*" (Marckx v. Belgium, 13.6.1979, para. 33).*

D. Article 6

*The relevant passages of Article 6 of the Convention read as follows: "*In the determination of his civil rights and obligations … , everyone is entitled to a … hearing within a reasonable time by [a] … tribunal…*".*

The case-law of the Court on this provision is so abundant that it cannot be briefly summarised. For the present purposes, the following principles can be recalled:

(a) Article 6 §1 secures not only the right to a fair trial but also a right of access to a tribunal meeting the requirements it lays down (Hornsby v. Greece, 19.3.1997, para. 40).

*(b) This right of access exists for "*disputes over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law; [Article 6 §1] does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States*" (O v. the United Kingdom, 8.7.1987, para. 54). The Court has abstained from giving an*

[1] *Compare, however, the judgment in F. v. Switzerland with the judgment in Stubbings and Others v. the United Kingdom (22.10.1996, para. 56): limitations on the right, which is implicit, of access to a court (Article 6 para. 1 of the Convention) must not impair the very essence of the right and must also pursue a legitimate aim and be proportionate.*

*exhaustive definition but the word "civil" covers questions that are matters of family law (Rasmussen v. Denmark, 28.11.1984, para. 32) or form an integral part of family life (O v. the United Kingdom, 8.7.1987, para. 59) and, more generally, at least "*rights which have a private nature*" (Le Compte, Van Leuven and De Meyere v. Belgium, 23.6.1981, para. 48).*

(c) *The tribunal in question must be "*competent to determine all the aspects of the matter*" and have jurisdiction over questions of fact and of law (Le Compte, Van Leuven and De Meyere v. Belgium, 23.6.1981, paras. 51 and 61; Albert and Le Compte v. Belgium, 10.2.1983, para. 29).*

II. Measures to combat fraud

A. In general

It is tempting, but would probably be wrong, to attach too much importance to isolated passages drawn from the Court's judgments. Thus, it would be going too far to state, on the basis of the judgment in Abdulaziz, Cabales and Balkandali v. the United Kingdom [28.5.1985], that measures concerning bogus marriages could never raise issues under the Convention or, on the basis of the judgment in Nsona v. the Netherlands [28.11.1996], that deceit on the part of the person concerned excludes ipso facto and in all cases the possibility of imputing to the State an interference with a guaranteed right.

*Again, one should keep in mind the settled case-law of the Court: "*in proceedings originating in an individual application, [the Court] has to confine its attention, as far as possible, to the issues raised by the concrete case before it. Its task is thus not to review in abstracto under the Convention the domestic law complained of, but to examine the manner in which that law has been applied to the applicant or has affected him*" (F. v. Switzerland, 18.12.1987, para. 31).*

That being so, it would be not only risky but also contrary to the Court's practice to express an opinion as to the compatibility in the abstract of a given measure with the Convention. Instead, one has to proceed on a case-by-case basis and examine the effects of the application of the measure in the instance concerned.

Nevertheless, it does seem possible to draw up a list of some matters or indications that are relevant in this area.

(a) *The wide meaning given by the Court to the words "private and family life" must always be borne in mind. Thus, for example, the existence of a child may, of itself, create family links that attract the protection of Article 8.*

(b) *Legislation on which an anti-fraud measure is based must satisfy the criteria derived by the Court from the phrase "in accordance with the law", notably as regards its precision and the protection it affords against arbitrariness.*

(c) *Any measure taken that amounts to an interference must pursue an aim that is legitimate under the Convention. Of the aims listed in paragraph 2 of Article 8, the most important would probably be "the prevention of disorder or crime". It remains to be seen which aims the Court would accept in the context of Article 12; the F. v. Switzerland judgment (18.12.1987, para. 36) mentions only "the stability of marriage", but some of the aims referred to in Article 8 could, here too, be relevant.*

(d) *As regards the "necessity" of a measure, the decision-making process must be fair and provide the applicant with the requisite protection of his interests.*

(e) *A measure amounting to an interference must not only correspond to a pressing social need (and this phrase is of itself pretty restrictive) but also be proportionate to the aim pursued. It is perhaps here that one runs up against the greatest difficulty in evaluating the compatibility of a measure with the Convention, given that its effects must be assessed in the light of the facts of the case.*

(f) If a measure to combat fraud were to impinge on a positive obligation on the part of the State, consideration would be given to the fair balance to be struck between the interests at stake and the degree of proportionality between the effects of the measure and the aim pursued.

(g) In order not to violate Article 14, measures must in principle be of general application and not involve distinctions based, for example, on race or national origin. The Court does, however, accept a grant of preferential treatment to nationals of the States of the European Union (C. v. Belgium, 7.8.1996, paras. 37 and 38[1]).

(h) In all cases, account must be taken of the requirements of Article 6 of the Convention, concerning appeals to a court.

B. Particular methods of combating fraud

The study "Fraud with respect to Civil Status", prepared by Mrs Guyon-Renard, describes the methods used by the member States of the ICCS to prevent fraud. These methods fall into two categories: verifications (of events, foreign documents, foreign judgments, etc.) and the possibilities of refusal (to register documents, to celebrate marriage) available to a registration officer.

At first sight, it does not seem that having recourse to verifications could, of itself, raise problems under the Convention. Care should, however, be taken to ensure that the verification process does not, on account of its duration or for other reasons, produce effects that could amount to an unjustified interference with a right guaranteed by the Convention or impede fulfilment of a positive obligation on the part of the State (for example, effects on residence permits, family reunion, etc.). It may be noted, in passing, that there is at present no case-law of the Court on the use of DNA tests to combat fraud.

The same observations apply, a fortiori, to a refusal to register civil status events. If such a refusal prevented the persons concerned from leading a normal family life, it would obviously infringe the Convention if it did not pursue a legitimate aim or if it was arbitrary, discriminatory or disproportionate.

As for refusal to celebrate a marriage, no firm opinion can be expressed on the basis of the case-law as it now stands. It can be noted that all laws include provisions which, at first sight, affect the very essence of the right to marry (conditions as to age, impediments related to ties of kinship) but which, it may be supposed, are acceptable under the Convention. It seems possible to take the view that the same would apply to fraudulent marriages, characterised as they are by an absence of genuine matrimonial intention. In any event, sight should not be lost of the requirements of Article 6 §1 of the Convention in this context.

It goes without saying that, in the absence of decisions of the Court bearing directly on the subject under consideration, the observations in this note are submitted with all due reservations. Nevertheless, they may perhaps be of use in subsequent discussions within the ICCS in this area.

[1] *Expulsion of a Moroccan – measure not applicable to citizens of the Union – this preferential treatment* "is based on an objective and reasonable justification, given that the member States of the European Union form a special legal order".