Address by Dr Tonio Borg at Seminar on *Statelessness* organized by Association of Former Parliamentarians

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Mr President

I thank you for inviting me to address this gathering on this subject, one which does not create great interest or excitement for the simple reason that as confirmed in the UNHCR Report on Statelessness in Malta, the number of such persons living in Malta is not high; which however does not mean that their human rights are less important than if there were many.

It is proper to start this intervention by stating what statelessness is not; since perceptions are erroneous as to what it actually means; for instance there is a familiar tendency to equate statelessness with irregular migration. The fact that a person enters a country irregularly does not necessarily mean that he or she is stateless. Now it is true that most migrants on reaching the shores of their country of transit or destination get rid of their travel documents to avoid repatriation making the process of identifying their nationality, a pre-requisite for repatriation- more difficult. But being without a travel document does not mean that one is stateless; in the same way as losing your passport does not mean that you have no nationality. Statelessness in international law is described as not being considered as a national by any state under the operation of its law (article 1 of the 1954 Convention relating to the Status of **Stateless** Persons).

The Maltese Citizenship Act defines stateless as *destitute of any nationality and "stateless person" shall be construed accordingly*. The reasons for finding oneself in such state ranges from the extinction of a state which existed, conflict of nationality laws, and discrimination based on ethnicity. Besides, people who are "citizens" of non-state territories are stateless. This includes, for instance, residents of occupied territories where statehood has ceased to exist or never emerged in the first place. The Palestinian territories were the most prominent example but now may no longer be an issue in view that a lot of States recognize the Paletestinian State. Others are Western Sahara and Northern Cyprus (depending on the interpretation of what constitutes statehood and sovereignty). Following the disintegration of the Soviet Union, the subsequent State secession has produced thousands of stateless persons in the Baltic States. The current plight of the Rohingyas is indeed the result of their statelessness situation.

The international community has sought to regulate and regularize this sorrowful state of affairs through two Conventions namely the UN Convention relating to the Status of Stateless Persons of 1954, and the UN Convention on the Reduction of Statelessness of 1961. These Conventions have not been signed and ratified by Malta although this does not mean that no protection is available to person with such status.

Two of the fundamental rules of the first Convention are that Contracting States shall accord to stateless persons the same treatment as is accorded to aliens generally; and that no "exceptional measures" are to be taken against stateless persons in a Contracting State because of their former nationality. Besides on request a travel document is to be issued to such persons.

The 1961 Convention provides additional rights namely:" Stateless birth" on their territory attracts the grant of their nationality (article 1). Otherwise stateless persons may take the

nationality of the place of their birth or of the place where they were found (in the case of a foundling), otherwise they may take the nationality of one of their parents (in each case possibly subject to a qualifying period of residence in that State).

Currently the Malta Citizenship Act 1965 (Chapter 188 of the Laws of Malta) recognizes only in part the rights to nationality of stateless persons in Malta. This was not the case following Malta's Independence until 1 August 1989 when a person acquired Maltese citizenship by mere birth in Malta. In this regard Malta followed suit in this regard the approach of other States – abandoning the *just solis* principle It grants the right to Maltese nationality to stateless persons but only if the following requirements are fulfilled namely:

(a) that the person was born in Malta; or

(b) if born outside Malta , that his father was a Maltese-born Maltese national , or his mother was a Maltese citizen (not necessarily born in Malta) at time of birth,

(c) that he is eighteen years of age

(d) that he has lived in Malta in the five years preceding his application;

From these requirements contained in article 10 of the Act, it is evident that even though the question of granting Maltese nationality in such circumstances is not subject to a discretion but is granted *by right*, the person concerned has to apply to the Minister, and fulfill all the requirements in question.

This means for instance that he is not entitled as of right to acquire Maltese citizenship except once he attains majority age.

As regards the provision whereby the stateless person was born outside Malta of a parent born in Malta, following the amendments in 2007 to the Maltese Citizenship Act, such persons have the right now to be registered (not naturalized) and do not have to satisfy any conditions (even if they are still minors) except provide evidence of their descent from a person born in Malta.

Now it is true that article 11 of the Act grants a discretion to the Minister responsible for citizenship to cause any minor to be granted a certificate of naturalization as a citizen of Malta if he feels that there are special circumstances justifying such granting. This power is very extensive since the minor need not have been born in Malta nor is there any requirement of residence for a period of time. However unlike article 10, it is a matter of *discretion* by the authorities and not a *right* to which such minor is entitled.

The main obstacles to rights to acquire nationality are that unless born in Malta, one of the parents (mother) has to be Maltese or the father has to be a Malta-born Maltese national , and secondly the requirement of being of majority age.

Considering the limited number of stateless persons present in Malta , I feel that the time has come to revisit these provisions. It is natural in a small country like ours to be vigilant and cautious in granting nationality; which is why on independence in 1964, dual nationality was not allowed after the age of nineteen. The fear has always been in matters of nationality that one of the smallest countries in the world will be inundated with arrivals of persons related to Malta who desire to acquire Maltese nationality. That impediment however has been removed since 2000 extending dual nationality to any Maltese citizen whether born in Malta or outside Malta

to retain his Maltese nationality even if he voluntarily acquires a foreign one. The feared invasion of Maltese citizens living abroad did not materialize.

In view of the limited number of stateless persons in Malta one may introduce certain changes in stages:

For instance is it necessary that nationality is granted only when one reaches the age of majority? As a first step a policy could be drafted and launched whereby the Minister would be favourable to the granting of Maltese nationality to minors on application or after a certain period of time, to prevent the state of statelessness of such persons who after all are living in Malta to remain for too long disadvantaged by such status with all the legal disadvantages attached to such status. AS a first step one could require the same requirements applicable to adult persons today under article 10 viz born in Malta. Certainly strict rules have to apply for one to prove that one's statelessness and the burden of proof lies with applicant or his legitimate representative.

After all the practice already existed for decades regarding the granting of Maltese nationality to persons born out of marriage from a Maltese father rather than a Maltese mother, since in such cases nationality was not acquired at birth, it was granted almost automatically as a matter of policy by applying for it. The *Genovese* case , mentioned in the UNHCR report, has removed this difference in treatment between persons born in and outside marriage. However as rightly pointed out in the Report the distinction in treatment in considering the acquisition of nationality at birth still exists. In fact the law in article 17 has remained unchanged namely that any reference to the father of a person shall, in relation to a person born out of wedlock and not legitimated be construed as a reference to the mother of that person; consequently while children born in wedlock acquire Maltese nationality at birth if either of their parents is a Maltese citizen,

in the cases of children born outside marriage , which today constitute almost 25% of all births, only if the mother is a Maltese citizen is such nationality acquired at birth. If only the father is a Maltese citizen, then there is no such acquisition and the father has to apply to the Minister who having ascertained that the father has acknowledged the child as his, then grants nationality in his discretion *but not as of right*. The time has come to align the law with the conclusions of the ECHR judgment delivered six years ago in 2011.

The UNHC Report on Statelessness in Malta apart from recommending Malta accession to the 1954 and 1961 Conventions recommends that Malta should put into place an effective statelessness determination procedure, the recognition of the rights of stateless persons including issuing residence permits, access to work and the issuing of travel documents; and above all that stateless person born in Malta should be granted Maltese nationality at birth and the facilitation of the naturalization of stateless persons and at the same time make naturalization decisions transparent and introduce the possibility of an administrative or judicial review of nationality decisions.

As to the latter point in a landmark judgment delivered in July 2016 [1]i.e. after the Report was published in 2014, the courts in Malta have affirmed their right to judicially review the procedure and decisions relating to nationality and in that case ruled that not only the procedural rules of natural justice such as *audi alteram partem* had been breached but that the decision not to grant nationality was unreasonable in the circumstances of the case

[1] Kevin Brincat v Principal Immigration Officer (FH)((5th July 2016) (684/05) (Mr Justice JR Micallef)

The granting at birth to stateless person born in Malta may be considered to be too controversial and premature at the present moment. According to Maltese law, a person acquires Maltese nationality at birth if born in Malta if any one of his parents is a Maltese citizen. If born outside Malta then any one of his parents must also be Maltese-born . In my view as a first step it would be better to grant it as a matter of policy after a few years from birth e.g. five years before amending the nationality legislation.

As regard travel documents, I see no reason why these should not be issued. I remember the same issue had arisen regarding refugees and persons enjoying humanitarian protection. The Geneva Conventions require contracting states to grant such documents to recognized refugees but leaves it to the discretion of the states to grant them in humanitarian cases. The Maltese authorities decided years ago to grant them to both. It should not be a real problem to grant the travel document to stateless persons as well

As regards *deprivation of citizenship* since there is no acquisition of nationality at birth for any stateless person born in Malta, such person who acquired through naturalisation either as of right when obtaining the age of eighteen years and has satisfied the legal requirements, or as a minor if the Minister in his discretion deemed that there were exceptional circumstances to grant such nationality, is subject to deprivation of nationality; if for instance, if citizenship was acquired on the basis of fraud and amongst other circumstances where within seven years from naturalisation, he commits a crime anywhere not necessarily in Malta punishable with at least one year imprisonment while persons who acquire Maltese nationality *at birth* are not so subjected . A person may be deprived of his citizenship notwithstanding that this would render him stateless except in the case where such deprivation was the result of a conviction.

As regards foundlings, a new born infant who is found abandoned in Malta is considered to be a citizen of Malta if no other nationality can be established for him, and shall be so considered until a nationality is established for him.

The objection to this may be raised that the provision applies only to new-born infant. There is no definition of this phrase in the law. The Report rightly points out that international standards require that "at the minimum the safeguard to grant nationality to foundlings is to apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth "(UNHCR guidelines on Statelessness.) I believe this is a just and correct criticism and no legal earthquake would be created if the law 's definition of foundling would be extended in such way

A common objection to any initiative of improving the right conditions and status of irregular migrants or stateless persons or refugees, or persons deserving protection is that such changes act as a pull factor drawing even more persons entering Malta illegally. I have always opposed and criticized such approach, and do so even more in the case of stateless persons. Migratory flows are conditioned mostly by the desperate situation in which refugees, but also economic migrants find themselves. Having spent their life savings in crossing frontiers and risking their lives on unseaworthy boats to cross over to Europe, the legal niceties of one's legal position in the country of transit or destination is the least thing on their mind; certainly they move towards countries which enjoy prosperity and economic opportunities.

In the case of stateless persons, though these may be refugees or persons seeking a better future, they are not necessarily so; they may be simply the result of events over which they had no control as we have seen. Consequently the gradual even if incomplete overhaul of our legislation moving our legal position slowly towards the two Conventions should not create any particular logistical problems for our country. Naturally there will be those who think that any concession to foreigners let alone foreigners outside the EU is a step in the wrong direction. But one needs to create consciousness about the problems of stateless persons, their predicament and legal limbo which they find themselves in; and that as this consciousness increases one can also improve their legal position.