Nationality and Statelessness under International Law

Edited by **Alice Edwards** and **Laura van Waas**

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ALICE EDWARDS AND LAURA VAN WAAS

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Key Challenges (Asser Press, 2007) and co-authored the *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (2006), a joint publication of the IOM, Organization for Security and Co-operation in Europe (OSCE) and ILO. He was also Co-Editor-in-Chief of IOM's *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy.* Ryszard holds a doctoral degree (LL.D.) from the University of Ottawa, a Master in Laws degree (LL.M.) from the University of Saskatchewan and a Bachelor of Laws degree (LL.B.) from the University of Leicester.

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ALICE EDWARDS is the Senior Legal Coordinator and Chief of the Protection Policy and Legal Advice Section at UNHCR in Geneva, where she is responsible *inter alia* for shaping UNHCR's doctrinal positions, as well as standard-setting, litigation, research, and human rights liaison. She was previously on the law faculties of the universities of Oxford and Nottingham (2006–10); was the expert adviser to the CEDAW Committee on questions of displacement and statelessness; and the lead amicus in a brief to the US Supreme Court on statelessness (*Flores-Villar* v. *United States of America*, 2010). She has taught statelessness courses at masters level and has delivered short courses on the subject for

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LAURA VAN WAAS is Senior Researcher and Manager of the Statelessness Programme, an initiative of Tilburg Law School in the Netherlands, which is dedicated to research, training and outreach on statelessness and related issues. Among the Statelessness Programme's current work is a detailed study of statelessness in the Middle East, in collaboration with the Open Society Justice Initiative and a research project aiming to map the link between statelessness and human trafficking, funded by the US Department of State Bureau for Population, Refugees and Migration. Laura's doctoral thesis, entitled *Nationality Matters – Statelessness under International Law* (Intersentia, 2008), is an in-depth analysis of the international normative framework relating to statelessness. After gaining her Ph.D., Laura was employed as an expert by UNHCR to work on several successive statelessness projects. She has drafted public information materials, developed training programmes and delivered training on statelessness. She has undertaken comparative research of statelessness situations in the Middle East and North Africa as well as South East Asia. While based in UNHCR's Beirut and Bangkok offices respectively for these projects, Laura helped the agency to build capacity to address statelessness by providing further training and directly advising on strategy development. In 2011, she developed a module on Statelessness for the University of Oxford's Refugee Studies Centre's International Summer

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A.E.

From first hearing of Alice's plans for this edited collection, I was impatient to see and use the finished product, since it would engage prominent international experts to jointly fill a significant gap in the literature on statelessness. My own contribution was initially to be limited to a chapter on the UN statelessness conventions, which I studied closely in the context of my doctoral research. To my delight, however, I had the opportunity to become more closely involved in the project and join Alice as co-editor. I have learned a great deal from her over the course of this collaboration and have also cherished the opportunity to delve into detailed

nitty-gritty and enthusiastic discussions with her on the state of statelessness law today. It has been a great pleasure to work together and I hope this will not be the last chance to do so. I would also like to thank Monica Neal for willingly giving up so much of her time alongside her studies to assist with editing the contributions in this volume. A big thank you is also due to my colleagues at the Statelessness Programme at Tilburg Law School, whose enthusiasm for exploring and understanding statelessness knows no bounds and whose sense of humour is unmatchable. And to Mark and Dylan – thank you for never letting a day pass without a good dose of grinning and giggles, and for being such great motivational coaches for the whole Statelessness Programme team.

Laura

ABBREVIATIONS AND ACRONYMS

1930 Hague Convention	League of Nations Convention on Certain Questions Relating to the Conflict of Nationality Laws 1930
1951 Convention or 1951 Refugee Convention	Convention relating to the Status of Refugees 1951
1954 Convention or 1954 Statelessness Convention	Convention relating to the Status of Stateless Persons 1954
1961 Convention or 1961 Statelessness Convention	Convention on the Reduction of Statelessness 1961
1967 Protocol	Protocol relating to the Status of Refugees 1967
ACHPR or African Charter	African Charter on Human and Peoples' Rights 1981
ACHR	American Convention on Human Rights
ACRWC or African Child Rights Charter	African Charter on the Rights and Welfare of the Child 1990
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women 1979
CEDAW Committee	Committee on the Elimination of Discrimination against Women
Children's Committee	Committee on the Rights of the Child
CHR	Commission on Human Rights
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child 1989
CRPD	Committee on the Rights of Persons with Disabilities
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms 1950

ECmHR	European Commission on Human Rights
ECN	European Convention on Nationality 1997
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
ExCom	Executive Committee of the High Commissioner for Refugees Program
HRC	Human Rights Committee
I-ACmHR	Inter-American Commission of Human Rights
I-ACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights 1966
ICCS	International Commission on Civil Status
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination 1965
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ICJ	International Court of Justice
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990
ICRPD	International Convention on the Rights of Persons with Disabilities 2006
ILC	International Law Commission
ILO	International Labour Organization
IOM	International Organization for Migration
MWC	Committee on the Rights of Migrant Workers and Members of their Families
NGO	Non-governmental organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
PRWA or Protocol on the Rights of Women in Africa	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2000
UDHR	Universal Declaration of Human Rights 1948
UNCAT	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UPR	Universal Periodic Review

Introduction

ALICE EDWARDS* AND LAURA VAN WAAS

'International statelessness law' is the clear runt of the international legal regime. So much so, in fact, that it has yet to truly assert itself as a field of study in its own right – unlike, for instance, international refugee law, international human rights law or even 'international migration law'. Yet international statelessness law deals with a plethora of fascinating and fundamental questions about the interactions between States, the relationship between people and their governments, and the aspirations versus the limitations of the contemporary human rights framework. As such, international statelessness law has much to contribute to our understanding of the functioning of the modern international legal system.

With at least 10 million stateless people around the world,[1] the sheer weight of numbers also demands that we pay closer attention to international law relating to statelessness and renew efforts to interpret and apply it. These 10 million people, lacking a legal identity, are largely invisible and forgotten, yet their suffering is real and, at times, acute. To be cast adrift by every country is a powerfully distressing state of being: 'I feel like nobody who belongs to nowhere. Like I don't exist.'[2] Moreover, statelessness interferes with the enjoyment of a wide range of civil, cultural, economic, political and social rights, which, despite the great aspiration of international human rights that they are to be enjoyed by all human beings equally and thus transcend citizenship categories, this is yet to become reality.

> In Burma we are forced to build roads. We are forced to build jetties and piers and we are forced to build military camps and move all of the military equipment. We are forced to work sentry duty at night. If we doze

* The views expressed in this Introduction are the personal views of the author and do not necessarily reflect those of the United Nations or the UNHCR.

[1] UNHCR, *Global Trends 2012: Displacement. The New 21st Century Challenge*, June 2013, available at www.unhcr.org/51bacb0f9.html, last accessed 9 May 2014.

[2] Stateless woman from Ukraine whose story was captured by Greg Constantine as part of the photography series *Nowhere People*, available at www.nowherepeople.org, last accessed 9 May 2014.

> off from exhaustion we are beaten. When we wake up we are beaten. And when we are beaten we are made to give away a chicken to pay for our punishment. My father was a farmer and had some land but it was confiscated by the military to build a military camp. I can remember working in the field with my father. When they confiscated our land we cried, but we had no way to say anything.[3]

While the stateless in Myanmar are one of the world's most oppressed groups, disenfranchisement and lost livelihoods are recurring themes for most of the world's stateless people from Kuwait's Bidoon, to Kenya's Nubians, to those rendered stateless due to state dissolution or individual deprivation of nationality. Promoting the study of international statelessness law is key to addressing their plight and preventing new groups and individuals from being exposed to the same problems in future.

The phenomenon of statelessness, or the lack of recognition as a national of any State, is intrinsically linked to broader questions surrounding the regulation and content of nationality. The study of statelessness law, therefore, necessarily goes hand-in-hand with an exploration of nationality law. This is reflected in the title and contributions to this volume, which set out and critique the main legal frameworks relevant to nationality and statelessness matters, with a particular focus on where these intersect. It is hoped that through this book, a modest contribution is made to examining and answering some of the most important legal questions around nationality and statelessness, and that it will encourage practitioners, scholars and students to take up the study of statelessness and lead to its reduction, or even eradication, once and for all.

Although the regulation of nationality remains largely within the exclusive domain of States, statelessness has been on the international agenda since the United Nations was founded. The Secretary-General's 1949 *Study of Statelessness* was a defining moment in the positioning of the UN in the aftermath of the Second World War, in which statelessness was recognized as being connected to genocide, armed conflict, persecution and racism.[4] Ultimately, however, statelessness took a back seat to what were considered the more pressing needs of the Second World War's refugees.[5]

[3] Account of the plight of the stateless Muslim minority, commonly known as the Rohingya, from Northern Rakhine State in Myanmar as told in Greg Constantine, *Exiled to Nowhere. Burma's Rohingya*, 2012, part of the *Nowhere People* book series.

[4] United Nations, *A Study of Statelessness*, UN Doc. E/1112 (August 1949).

[5] For more on the relationship between refugee law and statelessness law, see A. Edwards and L. van Waas, 'Statelessness' in G. Loescher, E. Fiddian-Qasimeyah, K. Long and N. Sigona (eds.), *Oxford Handbook on Refugee and Forced Migration Studies* (Oxford University Press, 2014).

Today, questions around nationality and statelessness are increasingly on international and national agendas and the dedication of an edited collection to the intersection of nationality and statelessness is therefore timely, if not long awaited. The break-up of the Soviet Union and the former Yugoslavia in the 1990s gave rise to renewed questions around nationality in the context of state succession[6] and saw the agreement of new legal instruments.[7] Resolving nationality questions and avoiding statelessness have also been fundamental to ending the conflicts between Ethiopia and Eritrea,[8] and have been central to the peace negotiations between South Sudan and Sudan and the transition of the south into independent statehood in 2011.[9] Clearly questions over statehood are central to the resolution of the Palestinian question, and in due course the framing of the State of Palestine's nationality legislation will be pivotal.

Armed conflict as a cause and consequence of statelessness is well documented. In many parts of the world, there are cases of the deliberate administrative removal of members of minority ethnic groups from the citizenship registers, or the official deprivation of nationality by legislative enactment. In some cases, these situations have given rise to human rights claims to restitution of nationality and compensation.[10]

[6] On the Soviet Union, see G. Ginsburgs, 'Soviet Citizenship Legislation and Statelessness as a Consequence of the Conflict of Nationality Laws' (1966) 15(1) *Int'l & Comp. L. Qty* 1–54; G. Ginsburgs, 'The "Right to a Nationality" and the Regime of Loss of Russian Citizenship' (2000) 26(1) *Rev. Central & East European L.* 1–33; I. Ziemele, *State Continuity and Nationality: The Baltic States and Russia. Past, Present and Future as Defined by International Law* (Leiden: Martinus Nijhoff Publishers, 2005). On the former Yugoslavia, see R. Mullerson, 'The Continuity and Succession of States, By Reference to the Former USSR and the Yugoslavia' (1993) 43 *Int'l & Comp. L. Qty* 473–93; Working papers of the Europeanisation of Citizenship in the Successor States of the Former Yugoslavia, CITSEE Project, based at the University of Edinburgh, available at www.citsee.ed.ac.uk/.

[7] See, e.g., European Convention on the Avoidance of Statelessness in Relation to State Succession 2006, ETS 200, 15 March 2006 (not yet entered into force).

[8] See, e.g., K. Southwick, 'Ethiopia–Eritrea: Statelessness and State Succession' 32 (2009) *Forced Migration Review* 15–17.

[9] See, e.g., 'Peace and Security Council Should Protect the Right to a Nationality in Sudan', International Refugee Rights Initiative and the Open Society Foundation, 28 January 2011, available at: www.refugee-rights.org/Publications/2011/CRAI_PSC_Sudan_PressRelease_Jan2011[1].pdf; UNHCR, 'Khartoum Symposium Discusses Citizenship Ahead of Referendum', *News Story*, 9 November 2010, available at: www.unhcr.org/4cd981529.html, last accessed 9 May 2014.

[10] See, e.g., *Kuric and Others* v. *Slovenia*, ECtHR, Applic. No. 26828/06, Grand Chamber Decision 26 June 2012; Human Rights Watch, *The Horn of Africa War: Mass Expulsions and the Nationality Issue* (2003); African Commission on Human and Peoples' Rights, *Malawi African Association and Others* v. *Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97–196/97 and 210/98, 11 May 2000.

As nationality is the principal gateway to political participation, the spread of multi-party democracy has put an increasing strain on access to nationality in some countries, while opening it up in others. In the former, disenfranchisement through statelessness can therefore be an attractive tool for those who seek to gain or hold onto power.[11] The Arab Spring has also demonstrated how the extreme politicization of nationality policy can contribute to generating new cases of statelessness through the deliberate deprivation of nationality,[12] as well as to opening new doors to the resolution of long-standing situations of statelessness.[13]

Ethnic, racial and gender discrimination are at the source of many governmental actions to deprive individuals of their nationality. Apart from discrimination against ethnic minorities in respect of nationality laws, women and children may be disproportionately affected by statelessness. Women continue to be discriminated against in the enjoyment of the equal right to a nationality, and in turn they may be unable to pass on their nationality to their children.[14] Lack of birth registration and other

[11] Consider the case of Kenneth Kaunda, former President of Zambia, who was effectively declared stateless in 1999 by the country's High Court after his political opponents called his nationality into question. 'Founder of Zambia is Declared Stateless in High Court Ruling', *New York Times*, 1 April 1999. See also C. Pouilly, 'Africa's Hidden Problem', *Refugees Magazine*, Number 147, Issue 3, 2007; J. Goldston, 'Holes in the Rights Framework: Racial Discrimination, Citizenship and the Rights of Noncitizens', *Ethics and International Affairs* 20 (2006) 321–47;

[12] 'Bahrain Revokes 31 Opposition Activists' Citizenship', BBC News Middle East, 7 November 2012, available at: www.bbc.co.uk/news/world-middle-east-20235542, last accessed 9 May 2014.

[13] Consider Decree No. 49 issued by President Assad of Syria in March 2011, in response to protests early in the Syrian crisis, paving the way for the naturalization – after fifty years of statelessness – of the country's stateless *Ajanib* Kurds. Z. Albarazi, 'The Stateless Syrians', SSRN, 2013, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2269700. Consider also the repeated promises by the Kuwaiti authorities, following ongoing protests by members of the country's stateless Bidoon population, to take measures to address their situation. C. Hilleary, 'In Kuwait's Arab Spring, Bidun Fight for Citizenship', Middle East Voices, 23 January 2012, available at: http://middleeastvoices.voanews.com/2012/01/in-kuwait%E2%80%99s-arab-spring-bidun-fight-for-citizenship/; Human Rights Watch, 'Kuwait: Promises, Mostly Unfulfilled, on Citizenship', 5 February 2012, available at: www.hrw.org/news/2012/02/05/kuwait-promises-mostly-unfulfilled-citizenship. All websites last accessed 9 May 2014.

[14] A. Edwards, Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women, UNHCR, Legal and Protection Policy Research Series, POLAS/2009/02, Geneva, August 2009, available at www.unhcr.org/4a8d0f1b9.html, last accessed 9 May 2014; International Law Association, Committee on Feminism and International Law, Rapporteurs C. Chinkin and K. Knop, Final Report on Women's Equality and Nationality in International Law (2000).

administrative obstacles to acquiring nationality,[15] as well as systems of nationality acquisition based on patrilineal descent further risk statelessness in children.[16] International adoption and surrogacy arrangements also pose an additional challenge to guaranteeing the right to a nationality for children.[17]

Statelessness has also been raised as an issue in the climate change debates around the status of persons who may no longer have a physical territory upon which to live should it submerge under rising tides.[18] Meanwhile, governments are increasingly interested in who is and who is not a national, especially in the post-9/11 security environment,[19] as well as in relation to questions around irregular migration. The latter has caused particular problems for persons with no 'effective nationality', or 'who cannot prove or verify their nationality.'[20] Attempted deportations of long-staying and permanent residents have also raised legal issues around the meaning of nationality in today's world.[21] Not all of these issues were

[15] See, e.g., Human Rights Watch, '"Illegal People": Haitians and Dominico-Haitians in the Dominican Republic' (2002), available at: www.hrw.org/reports/2002/domrep/ last accessed 9 May 2014; Inter-American Court of Human Rights, *Dilicea Yean and Violeta Bosico* v. *Dominican Republic*, I-ACtHR, Judgment of 8 September 2005, Series C No. 130; African Committee of Experts on the Rights and Welfare of the Child, *Nubian Minors* v. *Kenya*, Communication No. Com/002/2009, 22 March 2011.

[16] See, e.g., J. Bhabha (ed.), *Children without a State: A Global Human Rights Challenge* (Cambridge, MA: MIT Press, 2011); D. Hodgson, 'The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness' (1993) 7(2) *Int'l J. Law, Pol'y and Family* 255–70. On the practical effects of statelessness in children: J. Boyden and J. Hart, 'The Statelessness of the World's Children' (2007) 21(4) *Children and Society* 237–48.

[17] For a recent example of a case relating to surrogacy arrangements, see 'Stateless Twins Live in Limbo', *The Times of India*, 2 February 2011.

[18] See, e.g., J. McAdam, '"Disappearing States", Statelessness and the Boundaries of International Law' in J. McAdam, *Climate Change and Displacement: Multidisciplinary Perspectives* (Oxford: Hart Publishing, 2010), 105–29.

[19] See cases raising diplomatic protection questions in the terrorism context: *R (on the application of Abbasi and another)* v. *Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EQCA Civ 1598 (English Court of Appeal); *R (Al Rawi and others)* v. *SSFCA and another (UNHCR intervening)* [2006] EWCA Cov 127 (English Court of Appeal); *Canada (Prime Minister* v. *Khadr* (2010) S.C.C. 3 (Supreme Court of Canada); *Kaunda and Others* v. *The President of the Republic of South Africa and Others*, Case CCT 23/04 (Constitutional Court of South Africa).

[20] D. Weissbrodt, *The Human Rights of Non-citizens* (Oxford University Press, 2008), at 84. See, further, C. Batchelor, 'Stateless Persons: Some Gaps in International Protection', *Int'l J. Ref. L.*, 7 (1995), 232.

[21] See two Australian cases: *Minister for Immigration and Indigenous Affairs* v. *Stefan Nystrom* [2006], HCA 50, 8 Nov. 2006, which involved an unsuccessful challenge before the High Court of Australia concerning the deportation under 'character grounds'

able to be addressed in this book, but a good portion of them are reflected and discussed.

Nationality and Statelessness under International Law is primarily a legal text, focusing on the legal dimensions of nationality and statelessness, albeit situated within their political context, and introduces the reader to them. The authors hope the book will be a resource for scholars, researchers, legal practitioners and governmental and international policy-makers. It is also geared to students and university teachers, with each chapter being followed by a set of questions to guide self-study or classroom discussion. At the same time, the authors believe it provides an introduction to these issues for scholars and students of other disciplines: in order to successfully contribute to this field of study, a thorough understanding of statelessness as a legal concept is crucial. Contrary to several other works in this area, the book adopts a thematic approach, rather than, for instance, presenting population-specific dilemmas. In this way, the book hopes to offer possible solutions to such challenges through the law. The observations made should therefore be relevant across different countries, regions and contexts.

The book is composed of eleven chapters. The first two contributions comprise an extended introduction to the concepts of nationality and statelessness, from both legal and political-philosophical perspectives. Alice Edwards' chapter provides an overview of the meaning, content and purpose of nationality under international law, including an exploration of the procedural versus the substantive aspects of the right to a nationality. Her chapter asks us to consider whether the 'right to a nationality' is limited only to the right to acquire a nationality and to protections against the arbitrary deprivation of nationality (that is, procedural guarantees), or whether it has, with the growth in human rights, come to mean more than that. Can we, as nationals, expect a certain level of treatment based on that nationality? Within this dichotomy, she deals with the limits on state discretion in conferring or removing a person's nationality, as well

relating to criminality of the relevant legislation of Nystrom, an Australian permanent resident, born in Sweden, but having returned to Australia with his parents less than one month after his birth and who had otherwise never left Australia. He was convicted of 87 criminal offences and had served eight different periods in prison. Another case of Robert Jovicic, who was deported to Serbia in 2004, despite having lived in Australia as a permanent resident since he was two years old and with no ties to Serbia: see 'Court Backs Deportation to Serbia', *The Australian*, 16 December 2006, available at: www.theaustralian.com.au/news/nation/court-backs-deportation-to-serbia/story-e6frg6nf-1111112697067, last accessed 9 May 2014. See also *Jovicic* v. *Minister for Immigration and Multicultural Affairs* [2006] FCA 1758, 15 December 2006.

as what possessing a nationality really means in terms of benefits or privileges. As such, the chapter sets out the overall legal framework governing nationality rights and explores what international human rights law has added to this equation. This is complemented by the subsequent chapter, which gives 'an overview of the normative complexities and political dynamics of contemporary statelessness'. Matthew Gibney discusses the political and practical importance of the possession of citizenship in the modern state-based world for the enjoyment of rights and protections, while also challenging the idea that securing citizenship somewhere – anywhere – is the end-goal. He observes that obtaining citizenship represents the minimum right, but it does not always lead to the enjoyment of rights, nor of political participation. He also gives us insights into the interests states may have in maintaining or perpetuating statelessness, as well as what moral duty exists for states to nevertheless admit stateless people as citizens.

After these broad reflections on the function of nationality and the anomaly of statelessness, Chapters 3–5 delve into the global legal framework on statelessness in greater detail. Van Waas presents the two United Nations' statelessness conventions – the 1954 Convention relating to the Status of Stateless Persons[22] and the 1961 Convention on the Reduction of Statelessness[23] – which were developed specifically with a view to offering protection to stateless persons and prescribing safeguards for the avoidance of new cases of statelessness. Through a discussion of the drafting history of these two pivotal texts, she canvasses their relative strengths and weaknesses. Importantly, she explains the legal definition of a 'stateless person' set out in the 1954 Convention and the distinction between *de jure* statelessness and the emergence of the non-legal, yet popular, concept of *de facto* statelessness, the latter extending the concept of statelessness beyond mere possession of nationality to ideas around the 'effectiveness' of that nationality. She critiques the utility of '*de facto* statelessness' as a construct, arguing in particular that it is not grounded in an international legal framework and is highly ambiguous.

Following van Waas, Chapter 4 by Mark Manly, Head of the UNHCR's Statelessness Unit, turns to discuss one of the primary institutional elements of the UN framework for addressing statelessness, the UNHCR.

[22] Convention relating to the Status of Stateless Persons, New York, 28 September 1954, in force 6 June 1960, 360 UNTS 117.

[23] Convention on the Reduction of Statelessness, New York, 30 August 1961, in force 13 December 1975, 989 UNTS 175.

Tracing the history and development of the agency's role in statelessness, as laid down in General Assembly resolutions and conclusions of UNHCR's own Executive Committee, Manly explains how UNHCR has come to hold a global, comprehensive and multifaceted mandate, giving examples of both the operational successes achieved and the ongoing difficulties faced in implementing that mandate. In relation to the latter, the widely different interpretations of 'stateless person' that exist re-emerges in Manly's chapter as a factor that impacts on the accepted extent of UNHCR's mandate, which sits alongside the real problem of identifying and counting stateless persons, who are often not recorded in government censuses. Next, in Chapter 5, Gábor Gyulai explores a key question for the statelessness regime: what is the relationship between the international legal framework and statelessness-specific status determination and protection mechanisms at the municipal level? In particular, he examines the necessity of statelessness determination as a precursor to effective protection and looks at some of the ways in which this has taken shape in different countries. In canvassing some of the main challenges which states have to address in this context, he puts forward the basic building blocks for a functioning protection system, and in essence offers a model for states. His chapter will be particularly useful to government policymakers.

The next set of chapters (6–8) turns to look at three of the most pressing and pervasive problems in respect of the avoidance of statelessness: securing children's right to a nationality; abolishing gender discrimination in the enjoyment of nationality rights; and interpreting and applying the prohibition of arbitrary deprivation of nationality in the context of state decisions to withdraw nationality from an individual rendering him/her stateless. In Chapter 6, René de Groot discusses the development and content of the child's right to a nationality under international and regional human rights law, as well as within the specific parameters of the 1961 Statelessness Convention and numerous Council of Europe instruments where these norms have been elaborated in greater detail. He explains the challenges to childhood statelessness through three case studies, focusing on abandoned children, international adoption or surrogacy arrangements, and foundlings. In presenting a complex legal picture, in which European standards have advanced beyond and filled some of the gaps at the international level, he proposes a solid set of propositions to address childhood statelessness. Nonetheless, these are not yet widely accepted at the international level and may need further codification.

In Chapter 7, Radha Govil and Alice Edwards explore the historical 'gendering' of nationality laws and their impact, in particular in terms of creating and perpetuating statelessness. The chapter focuses on the equal right to nationality, evident in a growing number of international and regional human rights instruments, and its link with statelessness. They point out arguably one of the most stark shortcomings of the 1961 Statelessness Convention: it is not in fact concerned with providing for equal rights to nationality between women and men, or between mothers and fathers, and it does *not* prohibit discriminatory nationality laws. Rather, the 1961 Convention only requires states to permit the passage of nationality from mother to child in circumstances where the child would *otherwise* be stateless. It also says nothing about a right to nationality for women independent of their husbands. The role of the United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW) as the leading source of international norms on gender equality is thus central to the eradication and elimination of inequality in nationality matters, particularly where this gives rise to statelessness. Last in this set of chapters is Jorunn Brandvoll's contribution, which looks at the meaning of 'arbitrariness' in the context of a deprivation of nationality. Noting that the statelessness regime permits the deprivation of nationality even if it results in statelessness in certain circumstances, Bandvoll departs from a discussion of the relevant provisions of the 1961 Statelessness Convention, but takes a step beyond this framework by considering how developments in human rights law or within relevant regional instruments may now be shaping states' obligations in this area.

In the final three chapters (9–11), the discussion moves away from issues relating to the general functioning of statelessness law and into the realm of how questions of nationality and statelessness are – or should be – dealt with in particular contemporary contexts that pose corresponding challenges. Judge Ineta Ziemele looks at how states regulate nationality matters in the context of state succession, which by its very nature creates significant upheaval and prompts difficult questions about the reconciliation of municipal interests and international obligations. She explores the way in which the international community's interest in avoiding large-scale statelessness has influenced progressive standard-setting in this context. Judge Ziemele also considers the distinct difficulties posed by situations in which state succession entails the transition from an illegal regime, when international law may make conflicting demands in asking both for

the non-recognition of the illegal regime (and its effects) and the avoidance of statelessness.

In Chapter 10, Sophie Nonnenmacher and Ryszard Cholewinski delve into the pressures placed on nationality policy by modern patterns of international migration. They consider in particular the manner in which migration is contributing to new cases or a heightened risk of statelessness among different migrant groups. At the same time, they explore the other dimension of the nexus between nationality and migration: where statelessness is acting as a push-factor, triggering migration while also sometimes hampering states' ability to effectively implement their immigration laws. In the final chapter of the book, Kim Rubenstein and Niamh Lenagh-Maguire offer an exposé of the treatment of dual nationals – including case studies of the United Kingdom and Australia – arguing that some nationals (namely dual or multiple nationals) are more vulnerable to denationalization or deportation than others, precisely because they are not at risk of statelessness. This brings them to a broader reflection on the relationship between nationality and 'one's own country', in particular in light of contemporary human rights law, taking the reader full-circle back to the question of the meaning and content of nationality under international law today.

International statelessness law is undeniably receiving increasing attention from students, scholars, researchers, governments, civil society, legal practice and the international community, specifically UNHCR. Yet, as Manly points out in Chapter 4, 'there is nothing even closely resembling an international movement of the kind which currently exist to address child soldiers, landmines, or even refugee rights'. Given the rapid pace of developments on this issue over the past few years, as discussed in many of the contributions presented here, we may nevertheless be on the cusp of such an international movement on statelessness. With the sixtieth anniversary of the 1954 Convention coinciding with the release of this book, it is hoped that the book will inspire many more scholars, students and practitioners to take up the cause of statelessness so that in the coming years, statelessness will become a phenomenon of the past, studied only by historians.

1

The meaning of nationality in international law in an era of human rights

Procedural and substantive aspects

ALICE EDWARDS

1.1. Introduction

Nationality defines the legal relationship or 'legal bond'[1] between the citizen/national and her state, based on social facts of attachment, and which gives rise to rights and duties on the part of both sides of that relationship. This chapter is interested in what 'nationality' means as a matter of international law today, particularly with the growth in human rights, which apply, in theory at least, to all human beings, *irrespective of* their nationality. The chapter looks at two aspects of the right to a nationality – procedural and substantive – and explains what these aspects entail. On the procedural side, this chapter examines the regulation of nationality: how is nationality determined, who decides, and what are the limits on states' discretion in conferring or removing one's nationality? On the substantive side, it examines whether there is a 'minimum core substantive content' for nationality to exist. What rights are associated with nationality? It looks at this both from the perspective of the state, and from the perspective of the national. Reflecting on these primary legal questions, the chapter sets out the overall legal framework governing nationality rights and explores what international human

The views expressed in this chapter are those of the author and are not necessarily reflective of those of the United Nations or UNHCR.

[1] European Convention on Nationality 1997, 6 November 1997, in force 3 January 2000, ETS No. 166, Art. 2(a). See also *Dickson Car Wheel Company Case*, Special Claims Commission between the United States and Mexico, *UN Reports*, 1931 vol. IV, 669–91, at 688; *Annual Digest*, 1931–32, Case No. 115, in which it was stated that: 'This [bond of nationality] is the link existing between the law and individuals and through it alone are individuals enabled to invoke the protection of a State and the latter empowered to intervene on their behalf', as referred to in P. Weis, *Nationality and Statelessness in International Law*, 2nd edn (Dordrecht: Kluwer Academic Publishers Group, 1979), 162.

rights law has added to this equation. It is hoped that this chapter will be used as a reference on its own, as well as a guide to the other chapters in this volume.

1.2. The concept of nationality

The International Court of Justice (ICJ) in the *Nottebohm* case indicated that 'Nationality serves above all to determine the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals.'[2] In its most frequently cited passage as to the meaning of nationality, the ICJ held that: '[N]ationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.'[3] Nationality is thus *determined* by one's social ties to the country of one's nationality, and when established, gives rise to rights and duties on the part of the state, as well as on the part of the citizen/national. In turn 'citizenship' is a way to maintain common norms and values of the state as a social and political community.

The modern concept of nationality emerged following the Peace of Westphalia of 1648 and the rise of separate sovereign states.[4] It was essentially a method of classification between those who owed allegiance and those who did not to a particular sovereign, within the new state-based world order. As such, nationality is essentially a matter of domestic law, but it is one with international consequences.[5]

From the perspective of the citizen/national, possessing the nationality of a particular state grants entitlements to a range of goods, services and rights, such as rights to take up residence, participate in public life and to vote, and to consular assistance when abroad. It also includes entitlements to social benefits. Citizens may also be required to perform specific

[2] *Nottebohm Case (Liechtenstein* v. *Guatemala); Second Phase*, International Court of Justice (ICJ), 6 April 1955, ICJ Reports 1955, p. 4; General List, No. 18.

[3] *Ibid.* See also 1997 European Convention on Nationality, Council of Europe, 6 November 1997, ETS 166, which defines 'nationality' as 'the legal bond between a person and a State that does not indicate the person's ethnic origin' (Art. 2).

[4] For more on the historical evolution of the concept of nationality, see Ivan Shearer and Brian Opeskin, 'Nationality and Statelessness' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds.), *Foundations of International Migration Law* (Cambridge University Press, 2012), 93.

[5] This has been nicely put by Shearer and Opeskin as 'Nationality is essentially an institution of domestic law but it has consequences in international law', *Ibid.*

civic duties, including the obligation to defend the state against enemies (military service), to pay taxes, or even to vote.[6] Interestingly, some of these rights and duties are no longer applicable only to citizens, but are regularly extended to permanent residents or certain migrant categories. At the municipal level, it has been said that there are as many variations of citizenship as there are states.[7]

As a concept of international law, however, nationality goes beyond the individual rights of the national vis-à-vis her state of nationality. In fact, the bonds of nationality create *duties* upon states vis-à-vis other states, such as the duty to readmit one's own nationals from abroad. The bond of nationality also grants particular discretionary rights to the state of nationality, such as the right of that state to exercise 'diplomatic protection' on behalf of its own citizens/nationals. Other aspects of nationality include procedural safeguards against the arbitrary deprivation or loss of nationality, as well as to some extent shared practices on rules relating to nationality acquisition.

Before moving to explore these aspects more fully, it is important to say a word about terminology, in particular 'nationality' versus 'citizenship', and 'national' versus 'citizen'. For the purposes of this chapter, both terms will be used, although as a chapter centred on international law, the notion of 'nationality' is preferred. There are, however, two general approaches to understanding these terms in international law. The first, more traditional view, is that:

> Conceptually and linguistically, the terms 'nationality' and 'citizenship' emphasize two different aspects of the same notion: State membership. 'Nationality' stresses the international, 'citizenship' the national, municipal, aspect. Under the laws of most States citizenship connotes full membership, including the possession of political rights; some States distinguish between different classes of members (subjects and nationals).[8]

Nationality has been described as giving rise on the part of the state to 'personal jurisdiction over the individual, and standing *vis-à-vis* other States under international law.'[9] Citizenship, on the other hand, is 'the highest

[6] Australia, for example, imposes an obligation on citizens to vote in elections, with the penalty of a fine for failing or refusing to do so: Commonwealth Electoral Act 1918.

[7] *Towne* v. *Eisner*, 245 US 418, 423 (1918), per Justice Holmes.

[8] Weis, Nationality and Statelessness in International Law, 4–5.

[9] A. Boll, 'Nationality and Obligations of Loyalty in International and Municipal Law' *Australian Yearbook of International Law* 24 (2003) 37–63, 37, n. 3.

of political rights/duties in municipal law.'[10] A study by the International Law Association also accepts this distinction between the two terms.[11]

The second view, and the one adopted by many international human rights law scholars, including many of the contributors to this book, is that the terms can be used interchangeably. They argue that while the distinction between nationality (international law) and citizenship (municipal law) can be maintained in many contexts, it is also true that there is a close relationship between the two, such that making such a clear distinction is not always necessary or helpful. From a rights perspective, the label is less important than the ability to exercise rights. Such an approach has also been adopted because, as we will see in this chapter, 'Nationality has no positive, immutable meaning. On the contrary its meaning and import have changed with the changing character of States ... Nationality always connotes, however, membership of some kind in the society of a State or nation.'[12] Likewise, the substantive content of 'citizenship' will depend to a large extent on one's country of citizenship.

1.3. Procedural aspects of nationality

Article 15 of the 1948 Universal Declaration of Human Rights (UDHR) provides that everyone has 'the right to a nationality' and no one shall be arbitrarily deprived of that nationality nor denied the right to change one's nationality. No corresponding obligation on states to grant nationality was elaborated in the UDHR.[13] The transposition of Article 15 of the UDHR into Article 24(3) of the 1966 International Covenant on Civil and Political Rights (ICCPR) limited its application to children, while clarifying that they have a right 'to acquire' a nationality.[14] Again, no corresponding obligation *to grant* nationality to every child born in their

[10] *Ibid.*

[11] International Law Association Committee on Feminism and International Law, 'Final Report on Women's Equality and Nationality in International Law' (2000) Report of a conference held in London, International Law Association, London, available at: www.unhcr.org/3dc7cccf4.pdf, last accessed 1 June 2014.

[12] M. O. Hudson and R. W. Flournoy Jr., 'Nationality – Responsibility of States – Territorial Waters, Drafts of Conventions prepared in Anticipation of the First Conference on the Codification of International Law, The Hague 1930', *American Journal of International Law* 23 (1929), Supplement, 21.

[13] Art. 15, UDHR, provides: '1. Everyone has the right to a nationality; 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.'

[14] Art. 24(3) of the ICCPR provides: 'Every child has the right to acquire a nationality.' 1966 International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171.

territory was included, nor protection against the arbitrary deprivation of nationality. Nonetheless, the right to acquire a nationality in Article 24(3) of the ICCPR is not devoid of obligation.

The UN Human Rights Committee has stated, for example, that: 'States are required [by Article 24(3)] to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality.'[15] This obligation includes the requirement to register every child immediately after birth.[16] A child's right to acquire a nationality is repeated in the 1989 Convention on the Rights of the Child (CRC), which importantly contains a special safeguard against statelessness.[17] The right to a nationality is also affirmed in a wide range of soft law instruments.[18] It could be asserted that the obligation under the CRC is time-bound, since such measures must be undertaken by the state prior to the child reaching majority.[19] Delays in the recognition of a child's right to acquire a nationality by application are permitted in some circumstances,[20] yet, as they can have adverse consequences for the child, including leaving the child stateless for periods of time, it has been argued that Articles 7 and 3 (best interests of the child principle) of the CRC require nationality to be granted either (i) automatically at birth or (ii) upon application shortly after birth.[21]

[15] Human Rights Committee, *CCPR General Comment No. 17: Rights of the Child (Art. 24)*, Geneva, 7 April 1989, para. 8.

[16] Art. 24(2), ICCPR provides: 'Every child shall be registered immediately after birth and shall have a name.'

[17] Art. 7, CRC provides: '1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.'

[18] See latest resolutions and conclusions: General Assembly resolution 67/149 of 20 December 2012; Executive Committee (ExCom) Conclusion No. 106 (LVI) – 2010 on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons; ExCom Conclusion No. 107 (LVIII) – 2007 on Children at Risk, para. (h), lit. 19.

[19] According to Article 1 of the Convention on the Rights of the Child, a 'child' is defined as: 'a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.'

[20] See Art. 1(2), Convention on the Reduction of Statelessness, New York, 30 August 1961, in force 13 December 1975, 989 UNTS 175 (1961 Statelessness Convention).

[21] UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness', HRC/GS/12/04, 21 December 2012, in particular paras. 34–5.

According to the United Nations Secretary-General's report on human rights and the arbitrary deprivation of nationality, the right to a nationality implies (i) the right of each individual to acquire, change and retain a nationality; and (ii) that one's nationality cannot be arbitrarily removed.[22] Beyond these two components, the Secretary-General's report does not delve into the question of whether there are any substantive rights associated with the possession of nationality, to which all nationals, regardless of their state of nationality, are entitled to enjoy as a matter of international law. The right to a nationality under international law has thus been crafted and could be classified primarily as a *'procedural right'*, covering rights and rules relating to nationality acquisition and deprivation. This chapter now turns to look at some of these procedural aspects of the right to a nationality; the issue of any associated substantive content is considered in Section 1.4.

1.3.1 Modes of nationality acquisition

There are three main methods in which nationality is acquired or conferred by states, namely by descent/parentage (*jus sanguinis* – law of the blood), birth on the territory (*jus soli* – law of the soil) or by way of naturalization (including *jus domicili* or long residence). In each case, the idea is that nationality reflects a link with the state, either through a connection with the territory (*jus soli, jus domicili*) or through lineage such as through a family member who is already a national (*jus sanguinis* including legitimation,[23] adoption, or marriage). This relates to the fact that nationality, as already noted, is a bond of membership that is based on a 'social fact of attachment'.[24] Territorial or family links are commonly viewed as demonstrating such an attachment. There are also modes of nationality acquisition in the specific context of state succession and dissolution, although these are not discussed in this chapter.[25]

[22] Report of the Secretary-General to the General Assembly, 'Human rights and arbitrary deprivation of nationality', A/HRC/13/34 (14 December 2009), para. 21.

[23] 'Legitimation' refers to where the father's parentage is legally recognized having the effect of changing or confirming the nationality of the child in systems operating rules of *jus sanguinis* by paternity. For more on these other forms, see I. Brownlie, 'The Relations of Nationality in Public International Law', *British Yearbook of International Law*, 39 (1963), 284–364.

[24] *Nottebohm*, above n. 2.

[25] See ILC, 'Articles on Nationality of Natural Persons in relation to the Succession of States' (1999). See also Ziemele's Chapter 9 in this book.

While there is far more variation in the conferment of nationality via naturalization, there is widespread state practice of nationality conferral at birth using one or a combination of the *jus soli* or *jus sanguinis* approaches. In fact, Manley O. Hudson, the International Law Commission's (ILC) Rapporteur on nationality questions in the 1950s concluded that 'This uniformity of nationality laws seems to indicate a consensus of opinion of States that conferment of nationality at birth has to be based on' either or both of these modes.[26] By 1958, van Panhuys had suggested that the two modes are approved by customary law.[27] They remain the predominant practices.[28]

These two modes of nationality conferral are subject to a number of widely accepted exceptions. As far as the *jus soli* conferral system is concerned, a number of international treaties provide that children born to persons enjoying diplomatic immunity are not automatically entitled to nationality by operation of law.[29] Another exception is in respect of children of 'enemy alien fathers born in territory under enemy occupation'.[30] At the national level, an exception exists in some countries to deny children born to asylum-seekers and irregular migrants the automatic recognition of nationality on the basis of *jus soli*; or an exception requires that they are subject to a *jus sanguinis* link simultaneously.[31] In contrast, as to

[26] Report by Mr. Manley O. Hudson, Special Rapporteur, 'Nationality, including Statelessness', A/CN.4/50, *ILC Yearbook* (1952-II), p. 3, at p. 7; cited also in Brownlie, 'The Relations of Nationality in Public International Law', 302–3.

[27] H. F. Van Panhuys, *The Role of Nationality in International Law* (Leydon: A. W. Sythoff, 1959), 160–1.

[28] See, by way of comparison, the laws of states in 1940, 1952 as well as 2010, in which *jus soli* and *jus sanguinis* are used alone or in combination: see *Brief of Amicus Curiae, Scholars of Statelessness in Support of the Petitioner in the Supreme Court of the United States of America, Ruben Flores-Villar* v. *United States of America*, 24 June 2010, in which the author of this chapter was lead amicus.

[29] See Article 12, League of Nations, Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137 (1930 Hague Convention): 'Rules of law which confer nationality by reason of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunity, in the country where the birth occurs' and 1961 United Nations Conference on Diplomatic Intercourse and Immunities which adopted an Optional Protocol to the Vienna Convention on Consular Relations concerning the Acquisition of Nationality, 24 April 1963, UNTS 469, Article II provides: 'Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.'

[30] Brownlie, 'The Relations of Nationality in Public International Law', 305.

[31] See, for more, L. van Waas, 'The Children of Irregular Migrants: A Stateless Generation?', *Netherlands Quarterly of Human Rights*, 25 (2007), 437–58; D. A. Martin, 'Citizenship

persons born on ships or aircraft registered under the flag of the conferring state, the *jus soli* rules are generally extended to them.[32]

For countries operating *jus sanguinis* rules, a number of practices that in the past were considered to be legitimate exercises of discretion in nationality matters are no longer accepted. Some *jus sanguinis* countries, for example, trace a child's lineage through paternal lines only, which in turn deprives a citizen-mother of being able to independently pass her nationality to her children.[33] At times, such children will be rendered stateless.[34] A number of states also deprive a woman of her nationality automatically upon marriage.[35] UNHCR has calculated that there are some twenty-seven countries that continue to maintain gender discriminatory nationality laws, which are per se in violation of the international prohibition on discrimination on the basis of sex.[36]

Compared to *jus sanguinis* or *jus soli* rules of nationality conferral, the granting of nationality by naturalization remains more robustly within the discretion of states, and has largely remained untouched by international law. Historically, naturalization was based primarily on *jus domicili* principles; in other words, nationality was acquired via long residence

in Countries of Immigration – Introduction', in T. A. Aleinikoff and D. Kluysmeyer (eds.), *From Margins to Citizens: Membership in a Changing World* (Washington D.C.: Brookings Institution Press, 2000).

[32] See Art. 3, 1961 Statelessness Convention: 'For the purpose of determining the obligations of Contracting States under this Convention, birth on a ship or in an aircraft shall be deemed to have taken place in the territory of the State whose flag the ship flies or in the territory of the State in which the aircraft is registered, as the case may be.' See also Arts. 17–21 of the International Civil Aviation Organization (ICAO), International Convention on Civil Aviation ('Chicago Convention'), 7 December 1944 (1994) 15 UNTS. 295, which recognizes the nationality of the flag state over aircraft.

[33] For more on discrimination in the conferral of nationality, see Chapter 7 by Govil and Edwards in this volume. See also International Law Association Committee on Feminism and International Law, 'Final Report on Women's Equality and Nationality in International Law' (2000) Report of a conference held in London, International Law Association, London, available at: www.unhcr.org/3dc7cccf4.pdf; A. Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women', (2009) Legal and Protection Policy Research Series, UNHCR, Geneva, available at: www.unhcr.org/4a8d0f1b9.pdf. Both websites last accessed 1 June 2014.

[34] 1954 Convention relating to the Status of Stateless Persons, 28 September 1951, 360 UNTS 117, Art. 1.

[35] See Govil and Edwards in this volume.

[36] UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness 2014, 8 March 2014, available at: www.refworld.org/docid/532075964.html, last accessed 1 June 2014. See, in particular, Art. 9 of the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women.

in the territory. The length of this residency was determined by each individual state. Historically, too, as single nationality was preferred, individuals would usually be required to relinquish their other nationality, or it would cease automatically upon acquisition of their new nationality.

Jus domicili alone is not, however, the only basis of conferment of nationality by naturalization. States have in fact adopted a multitude of rules related to naturalization. An emerging trend in naturalization rules, especially in industrialized countries, is that persons must prove their allegiance to the state in new ways (also noting the demise of compulsory military service). Via knowledge testing, language proficiency and/or even financial position – usually still coupled with residency periods – potential citizens are asked to demonstrate that they share the values of the state.[37] 'Citizenship testing' has been introduced, for example, in many countries including Australia, Denmark, France, Greece, the Netherlands and the United Kingdom, as an attempt to ensure that only those loyal to the values of the state ('good citizens') are granted nationality. 'Citizenship ceremonies' have been made mandatory in some jurisdictions, in which new citizens are required to swear official allegiance to their new sovereign in a public forum. More restrictive policies in respect of acquiring citizenship based on marriage, including extending qualifying residence periods and/or raising the marriage age for foreign spouses and/or the duration of marriage periods and by removing exemptions from other naturalization requirements, are also observed.[38]

Some of these new, more onerous naturalization practices have emerged against a backdrop of political concern and tensions over the integration of migrants and new citizens, as well as fraud. Another factor is the loosening of the rules relating to dual nationality in many countries – both in the countries of old and new citizenship.[39] In both countries, the motivation of the state in allowing dual nationality is linked as much to economic as to social attachment arguments.[40] Allowing one's

[37] R. Bauböck, Eva Ersbøll, Kees Groenendijk and Harald Waldrauch (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* (Institute for European Integration Research, Austrian Academy of Sciences, Vienna, 2006), p. 1.

[38] *Ibid.*

[39] See Chapter 11 in this book by Rubenstein and Lenagh-Maguire.

[40] Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality*, p. 1. The authors of this report noted different responses to the phenomenon of migration. They note that '[s]ome States have reacted to problems with immigrant integration by promoting naturalisation and by granting second and third generations of immigrant descent a right to their nationality, while others have made access to nationality more difficult for immigrants and their descendants. Some States have seen an interest

citizens abroad to acquire a new nationality can safeguard remittances and investment in the country of original or first nationality over the long term, while for countries of new citizenship, governments ensure that migrants are rewarded for their economic contribution to society and that such contributions will not be lost to other countries where citizenship rules may be more relaxed.

Long gone are the days for many countries of the 'exclusivity of national identification'[41] of the early twentieth century. In the past, dual nationality was generally thought to create tensions among nation states as loyalty and allegiance would be split between different sovereigns. In particular, it could place competing demands on citizens in terms of military service.[42] Dual nationality was also considered to create challenges to the institution of diplomatic protection (discussed below).[43] In fact, international law relating to nationality was originally focused on questions of dual nationality and reconciling conflicts between nationality laws. While dual or multiple nationality is now more widely accepted,[44] including citizenship of supranational bodies such as the European Union,[45] there remain many countries that do not allow their nationals to hold

in maintaining ties with their emigrants by allowing them to naturalise abroad without losing their nationality of origin, while others have refused to do so.'

[41] P. J. Spiro, 'Dual Nationality: Unobjectionable and Unstoppable', Centre for Immigration Studies, available at: www.cis.org/node/2939, last accessed 1 June 2014.

[42] See the 1963 European Convention on the Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality, 6 May 1963, ETS 43, which attempted to set some rules in this regard. Spiro, in 'Dual Nationality: Unobjectionable and Unstoppable', gives the example of Europeans emigrating to the United States of America in the late nineteenth and early twentieth centuries, with their home countries refusing to recognise their new nationality. This in turn led to their prosecution for failing to complete military service by some countries if they returned to their country of origin to visit family.

[43] The classical case is also that of *Nottebohm*, above n. 2 (discussed below).

[44] Spiro, 'Dual Nationality: Unobjectionable and Unstoppable' refers explicitly to the Dominican Republic, Italy, Mexico and Thailand as recent additions to the group of states that recognize dual nationality. He also states that South Korea, India and the Philippines are poised to join the group. See also A. M. Boll, *Multiple Nationality and International Law* (Leiden: Martinus Nijhoff, 2007). See also B. Manby, *Struggles for Citizenship in Africa* (London: Zed Books, October 2009), 7, who lists thirteen countries in Africa that have changed their nationality laws to allow for dual nationality since 1999, with another three allowing it with official permission from the government. She notes, however, that still half of African countries do not permit dual nationality.

[45] Article 17 of the Treaty Establishing the European Community 1957 provides that: 'Citizenship of the Union is hereby established. Every citizen holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.' See, inter alia, Court of Justice of the European Union, Case C-200/02 – *Zhu and Chen* v. *Secretary of State for the Home Department*, ECR

simultaneously nationality elsewhere. For those that do, and as highlighted above, gaining membership to some countries is becoming more layered and complex.

Dual nationality also appears to come with some risks for the individual. Rubenstein and Lenagh-Maguire in this book argue, for example, that a dual national is more vulnerable to deportation or extradition compared with single-country nationals. It has also been seen, although more research is required in this area, that dual nationals are more likely to have their nationality removed than single nationals, in part because there is no risk of statelessness preventing a state from so doing.[46]

1.3.2 Loss and deprivation of nationality

Nationality may be lost or deprived in a number of ways, either through the operation of law (loss) or through administrative act (deprivation).

2004, I-3887, in which it was held that not only is every person holding the nationality of a Member State a citizen of the EU, but also that it is not permissible for a Member State to restrict the effects of the grant of the nationality of another Member State by imposing additional conditions for recognition of that nationality. Thus, Member States with harsher naturalization criteria are not entitled to withhold the benefits of fundamental freedoms under Community law from Union citizens who have naturalized on easier terms in other Member States. Cf. CJEU, Case C-135/08, *Rottmann* v. *Freistaat Bayern*, 2 March 2010, which considered whether Austria (state of original nationality granted at birth) might be bound, by virtue of the duty to cooperate with the Union in good faith and having regard to the values enshrined in the 1961 Statelessness Convention and in Article 7(1)(b) of the European Convention on Nationality, to interpret and apply its national law or to adapt it so as to prevent the person concerned from becoming stateless when, as in the case in the main proceedings, that person had not been given the right to keep his nationality of origin following the acquisition of a foreign nationality (in this case German nationality, which had been withdrawn owing to serious fraud on an occupational basis). In that case, the CJEU turned instead to the question of whether Germany had withdrawn his nationality in line with EU and international law, and did not pass judgment on whether Austria was required to grant him nationality [except in noting that that decision also must observe the principle of proportionality], finding that '[57] a Member State whose nationality has been acquired by deception cannot be considered bound, pursuant to Article 17 EC, to refrain from withdrawing naturalisation merely because the person concerned has not recovered the nationality of his Member State of origin. [58] It is, nevertheless, for the national court to determine whether, before such a decision withdrawing naturalisation takes effect, having regard to all the relevant circumstances, observance of *the principle of proportionality requires the person concerned to be afforded a reasonable period of time in order to try to recover the nationality of his Member State of origin*' (emphasis added).

[46] International law generally prohibits the making of persons stateless, which in turn limits the power of states to deprive single-country nationals of their nationality if it would render them stateless: see below in text.

According to the 1961 Convention on the Reduction of Statelessness (1961 Statelessness Convention), the only United Nations treaty where some rules on loss and deprivation of nationality are spelt out, there are various ways in which nationality may be lost or deprived. For example, one may lose one's nationality where the law entails loss of nationality as a consequence of a change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption.[47] The 1961 Statelessness Convention adds that any loss of nationality as a consequence of any change in personal status shall be conditional upon possession or acquisition of another nationality.[48]

Nationality may also be lost through acquisition of another nationality, or through renunciation of nationality.[49] Renunciation of nationality is the voluntary act of giving up one's nationality for the purposes of acquiring another nationality. It is also called 'expatriation'.[50] Some countries may not allow or do not recognize renunciation of nationality or they may establish administrative procedures that make it impossible or very difficult to complete. Again, the 1961 Statelessness Convention, concerned with reducing the incidence of statelessness, imposes a number of safeguards on states parties to ensure that such loss shall be accompanied by the acquisition of another nationality.[51]

Deprivation of nationality, too, takes many forms. The 1961 Statelessness Convention recognizes that a state may deprive an individual of nationality, for example, because that nationality was acquired by fraud or misrepresentation, even where statelessness may result.[52] Disloyalty to the state or deprivation in the national interest are further permissible deprivations of nationality.[53]

[47] Art. 5, 1961 Statelessness Convention.

[48] Art. 5, 1961 Statelessness Convention provides: '1. If the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality; 2. If, under the law of a Contracting State, a child born out of wedlock loses the nationality of that State in consequence of a recognition of affiliation, he shall be given an opportunity to recover that nationality by written application to the appropriate authority, and the conditions governing such application shall not be more rigorous than those laid down in paragraph 2 of Article 1 of this Convention.'

[49] Art. 7, 1961 Statelessness Convention.

[50] Weis, *Nationality and Statelessness in International Law*, pp. 115–17.

[51] Art. 7, 1961 Statelessness Convention.

[52] Art. 8, 1961 Statelessness Convention.

[53] Art. 8, 1961 Statelessness Convention. Note that for states parties to the Convention, they need to specify that they wish to retain the right to so deprive nationals of their nationality at the time of signature, ratification or accession (Art. 8(3)).

As already noted, a past trend of nationality being removed via acquisition of a new nationality has reduced in significance in many countries as dual and multiple nationality have become more accepted. It remains a form of deprivation in single nationality countries, although the administrative procedures around it will vary. Likewise, deprivation of nationality owing to criminal activities has reduced in at least Europe, although remains a practice in many other countries. Forms of deprivation that are not accepted under international law include the arbitrary or discriminatory deprivation of nationality, such as on grounds of race, ethnicity, religion or political views,[54] or, generally, deprivation resulting in statelessness (these are dealt with next in the section on limits on states' discretion). It remains widely accepted, however, that one's nationality can be removed in cases of fraud or other abuse of process, or if the person joins the military or diplomatic services of another state. These practices are permitted by the 1961 Statelessness Convention in certain circumstances, even where the person may be left stateless.[55]

Finally, nationality may be deprived via 'expiration'. This refers to circumstances where a citizen has taken up residence abroad and their nationality 'expires' after a specified number of years if their passport is either not renewed or the citizen does not return to reside in their country of nationality. This is still the practice in a few countries, but is not widely enforced.

1.3.3 The limits on state discretion in respect of nationality conferral and loss

It has long been held that decisions as to the conferral and loss of nationality are, in principle, a matter within the 'reserved domain' of municipal law, albeit one dependent on the development of international relations.[56] The 1930 Convention on Certain Questions Relating to the Conflict of

[54] See, e.g., Art. 9, 1961 Statelessness Convention. On gender discrimination as an arbitrary form of deprivation, see Chapter 7 by Govil and Edwards in this volume.

[55] Art. 8, 1961 Statelessness Convention. See, further, Chapter 8 by Brandvoll in this volume.

[56] *Nationality Decrees in Tunis and Morocco Opinion* (1923) Permanent Court of International Justice (PCIJ) Series B No. 4, 24: 'The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain.' See, further, C. F. Amerasinghe, *Diplomatic Protection* (Oxford Monographs in International Law, 2008), at 4. See also *Nottebohm* above n. 2, at 23.

Nationality Laws (1930 Hague Convention) provided, for example, that: 'It is for each State to determine under its own law who are its nationals'[57] and further that: 'Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.'[58]

While largely deferring to municipal law, the Permanent Court of International Justice (PCIJ) in *Nationality Decrees in Tunis and Morocco* did acknowledge limits, derived from international law, on the discretion of states in this area:

> For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.[59]

Similarly, the 1930 Hague Convention acknowledges the international law limits on the general rights of states in nationality matters:

> This law [of nationality] shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.[60]

One of the growth areas since the Second World War that has had an influence on nationality rights is that of human rights. There is an observable trend towards recognizing the right to nationality as a human right – and not only as a state's right – and it has been accepted that, in matters of nationality, states shall also take individual interests into account. Nationality not only links an individual to a state, it also links individuals to international law.[61]

For example, the Inter-American Court on Human Rights has advised that:

> Despite the fact that it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits

[57] Art. 1, 1930 Hague Convention. [58] *Ibid.*, Art. 2.

[59] *Advisory Opinion No. 4, Nationality Decrees in Tunis and Morocco Opinion* (1923) PCIJ Series B No. 4, at p. 24.

[60] Article 1, 1930 Hague Convention.

[61] Bauböck, Ersbøll, Groenendijk and Waldrauch (eds.), *Acquisition and Loss of Nationality.*

> on the broad powers enjoyed by the States in that area and that the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction: those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights.[62]

So what are the limits imposed by international law?

Examples of some general principles of international law that are particularly relevant to nationality matters include the obligation not to interfere in the domestic affairs of other states[63] and the right of every state 'to exist and ... to protect and preserve its existence.'[64] Spiro describes these limits on state practice as when municipal matters impinge on the interests of other states by, for example, 'drawing their membership circles too broadly – especially when they laid claim to individuals over whom other States might establish better claims.'[65] The classic example of such interference would be the wholesale and automatic attribution of nationality by one state over another state's nationals. According to Brownlie, such situations would prima facie be violations of general principles of international law.[66] This general principle has also been codified in the international and regional laws on state succession.[67]

Apart from these general principles, a number of other limits on a state's discretion in nationality matters derived either from general principles, custom or treaty obligations include: (i) the prohibition on the arbitrary deprivation of nationality; (ii) non-discrimination in nationality matters; and (iii) the duty to avoid statelessness. These are summarized below.

First, the prohibition on the arbitrary deprivation of nationality is considered a general principle of international law,[68] also reinforced in

[62] Inter-American Court of Human Rights, *Proposed Amendments to the Naturalization Provision of the Political Constitution of Costa Rica*, Advisory Opinion OC-4/84 of 19 January 1984, Series A No. 4, para 32.

[63] See, e.g., UN General Assembly resolution 2131 (XX), 'Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty', adopted on 21 December 1965, by a vote of 109 votes to none, with one abstention.

[64] Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States (Memo. Submitted by the Secretary-General), ILC, 1948, A/CN.4/2, cited in Brownlie, 'The Relations of Nationality in Public International Law', 295.

[65] P. J. Spiro, 'A New International Law of Citizenship', American Journal of International Law, 105 (2011), 694, 698.

[66] Brownlie, 'The Relations of Nationality in Public International Law', 295.

[67] See Chapter 9 by Ziemele in this volume.

[68] See GA Res A/RES/50/152, Office of the United Nations High Commissioner for Refugees, 9 February 1996, para. 15, referring to the prohibition of arbitrary deprivation as a fundamental principle of international law.

international human rights law.[69] The Secretary-General's report confirms that states must comply with their human rights obligations when granting nationality.[70] The arbitrary deprivation of nationality generally refers to the withdrawal by the state of a citizen's nationality where it does not serve a legitimate purpose, comply with the principle of proportionality and that is otherwise incompatible with international law.[71]

Second, nationality laws must not be discriminatory. Related to arbitrariness, non-discrimination in nationality laws is a general principle of international law underpinned by many international conventions. Article 9 of the 1961 Statelessness Convention, for example, prohibits the deprivation of nationality on racial, ethnic, religious or political grounds. Likewise, Article 5(d)(iii) of the 1965 Convention on the Elimination of Racial Discrimination provides that depriving someone of their nationality on the basis of race, colour, descent, or national or ethnic origin, is a breach of a state's obligations under the Convention. Moreover, the prohibition on racial discrimination is considered a *jus cogens* norm of international law.[72]

[69] Art. 15, UDHR. Relevant provisions in other international human rights instruments include Convention on the Rights of Persons with Disabilities, 13 December 2006, in force 3 May 2008, 2515 UNTS 3, Art. 18(1)(a). According to this treaty, states parties shall ensure that disabled persons are not deprived of their nationality arbitrarily or on the basis of their disability. American Convention on Human Rights (ACHR), 22 November 1969, in force 18 July 1978, OAS Treaty Series No. 36, Art. 20; Arab Charter on Human Rights (adopted 22 May 2004, entered into force 15 March 2008), Art. 29; Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, 26 May 1995, in force 11 August 1998, Art. 24. It is worth noting that neither the European Convention on Human Rights nor the African Charter on Human and Peoples' Rights includes the right to a nationality and not to be arbitrarily deprived of it.

[70] See Report of the Secretary-General to the General Assembly, 'Human rights and arbitrary deprivation of nationality', A/HRC/13/34 (14 December 2009), para. 20.

[71] On the meaning of 'arbitrary interference', see, e.g., HRC General Comment No. 16, 'Right to respect of privacy, home, correspondence, and protection of honour and reputation (Article 17)', para. 4: 'In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.' In its jurisprudence on the deprivation of liberty, the Human Rights Committee explains that the concept of 'arbitrariness' is 'not to be equated [only] with the law, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability'. See, inter alia, *Van Alphen* v. *The Netherlands* HRC, Comm. No. 305/1988, 23 July 1990, para. 5.8.

[72] See, e.g., *South West Africa Cases (Liberia* v. *South Africa; Ethiopia v. South Africa)* 1962 ICJ Rep. 319.

The 1957 United Nations Convention on the Nationality of Married Women and the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also provide that gender discrimination in nationality matters is prohibited. Article 9 of the CEDAW provides that: '[States] shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.' Gender-discriminatory nationality laws have been held in a range of jurisdictions to be unlawful under international law,[73] and this form of prohibited discrimination in nationality laws is increasingly acknowledged by international law.[74]

The third area imposing limits on states' discretion in the conferment or loss of nationality is the duty to prevent or reduce statelessness. Nationality and statelessness are intimately interlinked. In fact, the duty to prevent statelessness has been described as a negative right arising from the right to nationality.[75] Gaps in nationality laws or their incomplete or discriminatory application, for example, can lead to statelessness. Statelessness is the fact of having no nationality recognized by any state under the operation of its laws.[76] As a matter of international relations and international law regarding diplomatic protection, Spiro has aptly

[73] See, e.g., *The Attorney General of Botswana* v. *Unity Dow*, High Court of Botswana, 1995 (which highlighted how a range of women's human rights with regard to child custody, personal travel and freedom of movement, as well as the child's rights relating to health, education and child support in the country of the mother's nationality, can be undermined when a woman cannot transmit her nationality to her children because of the nationality of their father); *Genovese* v. *Malta*, Application no. 53124/09, Council of Europe: European Court of Human Rights, 11 October 2011 (which found that Maltese provisions discriminated on the basis of descent and being born out of wedlock and thus in violation of Article 14 in conjunction with Article 8 of the ECHR).

[74] Human Rights Council resolution 10/13, Human rights and arbitrary deprivation of nationality, 26 March 2009, paras 2 and 3. For more on gender discrimination in nationality matters, see Chapter 7 by Govil and Edwards in this volume.

[75] J. Blackman, 'State Succession and Statelessness: The Emerging Right to an Effective Nationality under International Law', *Michigan Journal of International Law*, 19 (1998), 1141–94, at 1176.

[76] 'Stateless person' is defined in the 1954 Convention relating to the Status of Stateless Persons as 'a person who is not considered as a national by any State under the operation of its laws', and this definition has been accepted as reflecting customary international law: see p. 49 of the ILC's Articles on Diplomatic Protection with commentaries, 2006, in which it is noted that the definition of 'stateless person' in Article 1 of the 1954 Convention is 'no doubt [to] be considered as having acquired a customary nature'.

described statelessness as 'challenging the international legal system by creating a class of individuals for whose conduct no State would stand responsible, thereby presenting, in theory at least, a gap in the enforceability of international law'.[77] The consequences of having no nationality for stateless persons themselves, as well as for states, are well-known and documented elsewhere in this book.[78]

Provisions on statelessness and its avoidance, prevention and reduction, as well as on the protection of stateless persons, permeate international agreements relating to nationality matters. The 1930 Hague Convention, for example, permits a woman to be deprived of her nationality upon marrying a foreigner *only* when she acquires the nationality of her husband.[79] Likewise the Hague Convention contains safeguards against statelessness in the case of children.[80] The key international and regional instruments governing state formation and succession likewise contain provisions that guard against statelessness.[81] The 1961 Statelessness Convention is dedicated entirely to the reduction of statelessness.

The low, albeit growing, membership of the 1961 Statelessness Convention may argue against an across-the-board acceptance of the proposition that the prevention of statelessness has emerged as a general principle of international law.[82] On the other hand, it has been argued that the underlying principles in the 1961 Statelessness Convention are generally reflected in state practice,[83] even in non-states parties. A global example of near-universal state practice is the Convention on the Rights of the Child, which specifically addresses statelessness in

[77] Spiro, 'A New International Law of Citizenship', 709.

[78] See also L. van Waas, *Nationality Matters: Statelessness under International Law* (Antwerp/Oxford/Portland, OR: Intersentia, 2008).

[79] Art. 8, 1930 Hague Convention.

[80] Art. 13, 1930 Hague Convention provided that if a child does not acquire the new nationality of his or her parents in the context of their naturalization, they were to retain their original nationality. See also Article 13 of the 1937 Convention on Certain Questions Relating to the Conflict of Nationality Law, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137.

[81] See Report of the Secretary-General to the General Assembly, 'Human rights and arbitrary deprivation of nationality', A/HRC/13/34 (14 December 2009), paras 47–55; International Law Commission, 'Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries)', Supplement No. 10 (A/54/10) (3 April 1999). See also Chapter 9 by Ziemele in this volume.

[82] At the time of writing, there were only fifty-five states parties to the 1961 Statelessness Convention.

[83] See, e.g., Chapter 3 by van Waas in this volume.

children. Likewise, a number of regional treaties reinforce the obligation on states to grant nationality if the person would otherwise be stateless.[84] These trends indicate that the duty to prevent statelessness, at least in respect of children, is emerging as a norm of customary international law.

In sum, nationality rules are domestic matters only in so far as international law (including general principles, custom or international agreements) does not regulate the practice to the contrary, and as long as domestic rules do not otherwise conflict with international law.

1.4. Substantive content of nationality

Having explained the basic rules relating to the acquisition and loss of nationality (or what this chapter has termed the 'procedural aspects' of nationality), this section will now explore whether there is a 'substantive' content of nationality – both from a state's perspective (and thus from the perspective of international law) and from the national's perspective (and from the perspective of individual human rights). Are there any shared substantive aspects of nationality across jurisdictions? Is the state obliged under international law to provide certain rights to its nationals if they hold its nationality? What happens if such rights are not provided? Does this mean that the individuals are not nationals, or only that they have

[84] See, e.g., Article 20 of the 1969 American Convention on Human Rights, which provides that every person has a right to a nationality, no one should be arbitrarily deprived of nationality, and a person has the right to the nationality of the state of birth if otherwise stateless. See, too, Inter-American Court of Human Rights, *Dilcia Yean and Violeta Bosico* v. *Dominican Republic*, Judgment of 8 September 2005, Series C No. 130, which held that although states have the sovereign right to regulate nationality, they are responsible for abiding by international human rights standards protecting individuals against arbitrary state action. States are particularly limited in their discretion to grant nationality, the Court held, by their obligations to guarantee equal protection before the law and to prevent, avoid and reduce statelessness. Article 6(3) and (4) of the 1990 African Charter on the Rights and Welfare of the Child contains a similar principle of acquisition of the nationality of the state of birth in cases where there would otherwise be statelessness. The 1997 European Convention on Nationality indicates as a general rule that statelessness shall be avoided, with steps outlined in specific articles on how to ensure statelessness does not occur. This instrument stipulates that after a maximum period of ten years of lawful residence, an individual who was neither born in the state nor descended from a national must be given the opportunity to apply for naturalization, thus potentially facilitating the reduction of statelessness for those who cannot acquire a nationality otherwise. The Convention on the Avoidance of Statelessness in relation to State Succession adopted by the Council of Europe in 2006 is devoted in its entirety to the problem of statelessness.

been deprived of certain rights? The question whether there is a minimum core 'substantive' content of nationality under international law is complex, and has been related to the definition of a 'stateless person'.[85] The answer is far from settled.

1.4.1 The state's perspective

When the concept of nationality was first conceived, it was intended to regulate relationships among and between sovereign states.[86] Only later with developments in international human rights law did its individual dimensions emerge, as discussed next. In the seminal work by Paul Weis of 1979 two functions of nationality under international law are identified: (i) the right of diplomatic protection and (ii) the duty of (re-)admission and residence.[87] Both are claimed as rights and duties of the state, albeit the former is seen as a discretionary right of the state, while the latter has been historically considered primarily a duty exercisable vis-à-vis other states, rather than towards a state's own nationals. The latter is no longer, however, viewed as only a question of states' rights, as it is matched by the international human right of individuals to return to their own country from abroad and to reside there (see below). In understanding the content (and thus whether there is a minimum core content) of the right to nationality under international law, it is important to understand these two components. While this chapter focuses only on these two main aspects of nationality, other authors have argued that there are additional components.[88]

[85] The question of whether the right to a nationality has a 'minimum core content' arose during UNHCR's consultations on the status of a stateless person and whether the concept of 'effective nationality' is helpful to that definition: UNHCR, 'Summary Conclusions – Expert Meeting – The Concept of Stateless Persons under International Law ("Prato Conclusions")' (May 2010).

[86] J. Chan, 'The Right to a Nationality as a Human Right: The Current Trend Towards Recognition', *Human Rights Law Journal*, 12 (1991), 1–14, at 1.

[87] Weis, *Nationality and Statelessness in International Law*.

[88] Shearer, for example, refers to seven aspects of nationality. In addition to those covered by this chapter, he includes: state responsibility for nationals; allegiance; right to refuse extradition; determination of enemy status in wartime; and exercise of jurisdiction: I. A. Shearer, *Starke's International Law*, 11th edn (London: Butterworths, 1994), 309. Some of these are challengeable as components of nationality. See Boll, 'Nationality and Obligations of Loyalty in International and Municipal Law', who argues that 'allegiance' or obligation of loyalty is not a concept and principle of international law, but one of municipal law. Others would be subsumed under procedural aspects of the right to nationality.

Protection – Article 2(3) read together with Article 8 – providing that a state may exercise diplomatic protection on behalf of lawfully and habitually resident refugees or stateless persons,[93] although in respect of refugees, a state cannot exercise diplomatic protection as against the refugee's state of nationality. This position is based on policy considerations such that 'Most refugees have serious complaints about their treatment at the hand of their State of nationality, from which they have fled to avoid persecution. To allow diplomatic protection in such cases would be to open the floodgates for international litigation. Moreover, the fear of demands for such action by refugees might deter States from accepting refugees.'[94]

While diplomatic protection, therefore, has an individual dimension in so far as it is an intervention on behalf of a national, the ICJ in *Nottebohm* clarified that ultimately 'Diplomatic protection and protection by means of judicial proceedings constitute measures for *the defence of the right of the State*.'[95] According to the ICJ, it is not, however, an unlimited discretion. It is worth outlining the facts of the case before moving to the Court's position on diplomatic protection.

Friedrich Nottebohm, a continuous resident of Guatemala since 1905 at aged 24, acquired Liechtenstein citizenship at the outbreak of the Second World War in 1939. By doing so, he lost his German citizenship automatically. Guatemala, treating him as a German citizen, extradited him to the United States during the war and confiscated his property. After the war, Liechtenstein sought to challenge these actions on Nottebohm's behalf. The issue before the Court was whether Liechtenstein, Nottebohm's state of nationality, could exercise diplomatic protection on his behalf vis-à-vis Guatemala, which objected to Liechtenstein's overtures. A majority of the ICJ did not accept that the nationality Liechtenstein had conferred on Nottebohm could validly be invoked against Guatemala for the purpose of diplomatic protection, and held instead that both Nottebohm and Liechtenstein had sought to circumvent the laws of war through the loose international rules relating to nationality.[96] In making its findings, the Court examined the basis of Nottebohm's nationality and held, in the oft-quoted passage, that nationality is 'a legal bond having as its basis a

[93] International Law Commission, Articles on Diplomatic Protection (2006).

[94] International Law Commission, 'Commentary on the Draft Articles on Diplomatic Protection' (2006), 51.

[95] *Nottebohm* above n. 2, 15–16 (my emphasis).

[96] *Nottebohm* above n. 2, 26. See also Robert D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality', *Harvard International Law Review* 50 (2009), 11.

social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[97] Finding that Nottebohm did not enjoy such attachments to Liechtenstein, Liechtenstein was denied the right to exercise diplomatic protection on his behalf. This judgment confirmed that diplomatic protection is a right of the state vis-à-vis another state, rather than an individual's right, but it also clarified that legal nationality is a necessary but not sufficient criterion for one's state of nationality to exercise diplomatic protection on one's behalf.

Whether a similar decision would be rendered today is not clear and certainly worth asking. In the background to this case were the exceptional post-war circumstances in which, as synthesized by Rubenstein and Lenagh-Maguire in their chapter in this book:

> In the Court's view neither Nottebohm nor Liechtenstein had acted unlawfully, but Liechtenstein had granted citizenship 'without regard to the concept of nationality adopted in international relations'. While Liechtenstein was entitled to do so, Guatemala did not need to recognise that citizenship as effective nationality for the purposes of providing Nottebohm with diplomatic protection.[98]

In one way the case says nothing more than the international/domestic rules relating to nationality are inferior to the laws of war and international relations. This decision thus permitted the alleged violating state (here Guatemala) from recognizing the right of claim to diplomatic protection from the aggrieved state (here Liechtenstein), even where there was no competing state of nationality (Nottebohm was no longer a German national). The ICJ held that the alleged violating state is immune from the overtures of diplomatic protection if a 'genuine and effective link' has not been established.[99] The ICJ held in essence that 'Guatemala is under no obligation to recognize a nationality granted in such circumstances'.[100] The 'circumstances' in question, according to Sloane, were those of an abuse of diplomatic relations between states.[101]

[97] *Nottebohm* above n. 2, 23. [98] Footnotes omitted.

[99] The final sentence in the judgment is instructive here: Nottebohm acquired Liechtenstein's nationality 'to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein.' *Nottebohm*, above n. 2, at 26.

[100] *Nottebohm* above n. 2, 26.

[101] Sloane, 'Breaking the Genuine Link', Sloane also refers to the case of *Flegenheimer (US* v. *Italy)*, 14 R.I.A.A. 327 (Italian-US Concil. Comm'n. 1958) to confirm that at the essence

The case also reveals a distinction between national laws on nationality and their consequences under international law. As a matter of international law, the case appears to establish that nationality in the form of diplomatic protection is only exercisable as a state's right if it is conferred based on 'social attachment'. As a matter of the national law of Liechtenstein, Nottebohm was considered a lawful citizen, irrespective of whether he had ever lived in Liechtenstein. For purposes other than diplomatic protection, such as if Guatemala sought to deport him to Liechtenstein, it would be interesting to see if his nationality stood the test. I suspect that the ICJ would find that Liechtenstein is obligated to readmit him, given that he held no other nationality.

The case has been widely criticized[102] and (in part) rejected by the ILC's Articles on Diplomatic Protection, which recognize nationality per se as subject to the laws of the conferring state without mention of the 'genuine and effective link' test established in *Nottebhohm*.[103] Critics of *Nottebohm* have stated that if followed, hundreds of thousands of foreign nationals living or doing business abroad could be deprived of diplomatic protection.[104]

Conversely, where a state has an inadequate interest in the grievance of one of its nationals, it is unlikely to exercise diplomatic protection. There is also a limited right of challenge by the national concerned. This has been confirmed in a number of recent terrorism-related cases. In the cases of *R (Abbasi)* and *Al Rawi and Others,* for example, the United Kingdom's Court of Appeal held that human rights imperatives do not open the executive's conduct of foreign affairs to review under ordinary administrative law principles.[105] The Supreme Court of Canada held similarly in *Omar Khadr* v. *The Prime Minister of Canada*. While holding that the constitutional rights of Khadr, a fifteen-year-old boy held in Guantanamo Bay, had been violated, it stopped short of ordering the government to seek Khadr's return to Canada from Guantanamo Bay (in other words, the government was not obliged to render diplomatic protection).[106] Each of these cases reaffirms Weis' description of diplomatic protection as 'not a legal right, but an extraordinary legal remedy'.[107]

of the judgment in *Nottebohm* is an equality of arms between states, rather than the focus on the 'effective and genuine link', which he claims was in fact mostly *dicta*.

[102] L. F. E. Goldie, 'The Critical Date', *Int'l and Comp. L. Qty*, 12 (1963), 1251; Sloane, 'Breaking the Genuine Link'.

[103] ILC, 'Articles on Diplomatic Protection with Commentaries' (2006), 32–3.

[104] Sloane, 'Breaking the Genuine Link'.

[105] *R (Abbasi)* [2003] UKHRR 76 and *Al Rawi and Others* [2006] HRLR 42.

[106] *Canada (Prime Minister)* v. *Khadr* [2010] 1 SCR 44.

[107] Weis, *Nationality and Statelessness in International Law*, 34.

An exception to the generally held view that diplomatic protection remains an unchallengeable discretion of the state is found in South Africa's Constitutional Court's judgment in *Kaunda*. While accepting the general principle that there is no individual right to diplomatic protection, the Constitutional Court held nonetheless that the decision not to intervene is an act subject to judicial review as an exercise of public power.[108]

As to new developments, Article 19 of the ILC's Articles on Diplomatic Protection declares that a state entitled to exercise diplomatic protection 'should ... give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred'.[109] While it is too early to suggest that there has been any change in the international legal position on diplomatic protection, South Africa's Constitutional Court's judgment subjecting such decisions to judicial review, plus the ILC's appeal to states to give due consideration to exercising diplomatic protection (even if not mandatory), hint that the future of diplomatic protection may look different to the strict parameters of *Nottebohm*. Only time will tell.

Finally, diplomatic protection needs to be contrasted with the right to consular assistance, which imposes certain obligations in the case of an arrest or detention of a foreign national, in order to guarantee the inalienable right to counsel and due process through consular notification and effective access to consular protection.[110] Individuals have the right to seek consular assistance from their country of nationality and governments are required to provide it. Likewise, access to one's own government officials cannot generally be denied by the host country.[111]

(ii) The duty of (re)admission and residence

The second function of nationality from a state's perspective is the right – or duty – to readmit its nationals to its territory. Based on the 'territorial supremacy of States', van Panhuys noted that 'The duty to admit nationals

[108] *Kaunda* v. *President of the Republic of South Africa* 2005 (4) South African Law Reports 235 (CC), ILM vol. 44 (2005), p. 173.

[109] International Law Commission, 'Commentary on the Draft Articles on Diplomatic Protection' (2006), 29–30.

[110] The distinction between 'diplomatic protection' and 'consular assistance' is an important one. The latter is regulated by Article 36 of the 1963 Vienna Convention on Consular Relations, 596 UNTS 261.

[111] See International Court of Justice, *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, 31 March 2004, ICJ Reports 2004, 12. The exception to the general rule is likely to be where the states have no diplomatic relations.

[and to allow their residence] is considered so important a consequence of nationality that it is almost equated with it.'[112] As explained by Weis:

> As between national and State of nationality the question of the right of sojourn is not a question of international law. It may, however, become a question bearing on the relations between States. The expulsion of nationals forces other States to admit aliens, but, according to the accepted principles of international law, the admission of aliens is in the discretion of each State – except where a State is bound by treaty to accord such admission.[113]

Weis also points out the exceptions to this general rule, such as expulsion of nationals in connection with conviction for a crime.[114] States can only expel their nationals in cooperation with and with the consent of the receiving state. Meanwhile, the state of nationality is under a duty towards other states to receive back its expelled nationals to its territory.[115] The duty of readmission of one's nationals is thus an obligation of states vis-à-vis other states under international law. It is also clearly one of the defining features of nationality as a matter of international law.

But what if (re)admission is denied? Whether denying a national readmission to his or her state of nationality would consequently lead to the position that the person is no longer considered as a national under international law (provided he or she has no other nationality) will depend on the facts of the case at hand. It could, for example, be indicative of the loss of nationality and that the person is *de jure* stateless (provided he or she has no other nationality). This is to be distinguished from the situation described later in this section (relating to the United Kingdom) whereby a person is recognized as being a national by a particular country but is 'merely' denied the right to reside in certain parts of the territory. Readmission could still take place to the territory of the state, but to certain parts of it, which are within the discretion of the state of nationality. Clearly, too, the ability to readmit one's nationals is an essential exercise of statehood. Likewise, the granting of nationality is linked to the Montevideo Convention criterion of a permanent population.[116]

[112] Van Panhuys, 56.

[113] Weis, *Nationality and Statelessness in International Law*, 45.

[114] *Ibid.*

[115] Van Panhuys 55, 56; Weis, *Nationality and Statelessness in International Law*, 46. See, for an early example, Havana Convention on the Status of Aliens, 20 February 1925, OAS Treaty Series No. 34, in force 29 August 1929, Art. 6: 'States are required to receive their nationals expelled from foreign soil who seek to enter their territory'.

[116] Article 1, Convention on the Rights and Duties of States: Montevideo, 26 December 1933, in force 26 December 1934, LoN-3802. See P. Weil, 'Access to Citizenship: A Comparison

Developments in international human rights law confirm the duty of readmission on the state as also being a right of the individual, not least Article 12 of the ICCPR, which prohibits the arbitrary deprivation of the right to re-enter one's country, and equivalent provisions in regional treaties.[117] At the same time, human rights law has arguably extended the obligation of readmission further than the public international legal duty to readmit one's *own nationals*. Human rights case law suggests that this duty is to be exercisable also in favour of habitual residents.[118] In *Stewart* v. *Canada*, for example, the UN Human Rights Committee held that Stewart, a habitual resident of Canada, had the right to re-enter Canada owing to his long residence there and that Canada was considered his 'own country' for the purposes of the right of return.[119] This case directly challenges the exclusivity of nationality and its link with readmission and residence, and, together with the Committee's General Comment No. 27, extends the right of (re)admission and residence to a specific category of long-staying non-nationals. Although this case does not undermine the duty of states to readmit their own nationals, it does appear to extend that duty to other country's nationals, as well as stateless and other persons in specific circumstances.[120] The 1951 Convention relating to the Status of Refugees and the 1954 Convention relating to

of Twenty-five Nationality Laws', in A. T. Aleinikoff and D. Kluysmeyer (eds.), *Citizenship Today: Global Perspectives and Practices* (Washington, D.C.: Carnegie Endowment for Peace, 2001), 17–35, at 17 (who argues that 'If territory determines the geographical limits of state sovereignty, nationality determines its population'). In contrast, Crawford states that: 'Nationality is ... dependent on statehood, not the reverse': J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), 40.

[117] See Art. 12: '2. Everyone shall be free to leave any country, including his own; 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant; 4. No one shall be arbitrarily deprived of the right to enter his own country.' See also Protocol 4 of the ECHR, for example, which provides: 'No one shall be deprived of the right to enter the territory of the State of which he is a national' (Art. 3(2)).

[118] See, for example, *Nystrom* v. *Australia*, Human Rights Committee, CCPR/C/102/D/1557/2007.

[119] *Stewart* v. *Canada*, Human Rights Committee, CCPR/C/58/D/538/1993 (1996) See Chapter 11 by Rubenstein and Lenagh-Maguire in this volume.

[120] UN Human Rights Committee, CCPR General Comment No. 27, Freedom of movement, CCPR/C/21/Rev.1/Add.9, 2 November 1999, which includes: nationals of a country who have been stripped of their nationality in violation of international law; individuals whose country of nationality has been incorporated in or transferred to another national entity whose nationality is being denied them; and other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of their right to acquire the nationality of the country of such residence.

the Status of Stateless persons arguably reiterate this position, implicitly requiring states parties to readmit refugees and stateless persons to whom they have issued Convention Travel Documents, pursuant to Article 28 of each instrument.[121]

1.4.2 Individual right to a nationality

As a citizen/national, an individual is recognized as a full member of the state, with all its attendant rights and obligations to be enjoyed in full equality and without discrimination. As noted in the introduction to this chapter, citizens also bear the burden of duties, including specifically those relating to military service, the payment of taxes and to participate in public life.

In contrast, non-nationals, including stateless persons, 'often have minimal, if any, access to the kind of basic political and social rights that most citizens take for granted'.[122] Their residency is dependent on municipal laws, including immigration rules and requirements, and they do not always have the right to leave and return at will.[123] Contrary to the aspiration of international human rights law that all rights apply to everyone by virtue of their shared humanity, and regardless of their nationality, there are multiple junctures in which distinctions between nationals and non-nationals are permitted.[124] Clearly, political rights, including the right to vote, to run for elections and to hold public office, which can be exclusively reserved for citizens, are important distinctions.[125] The range of economic, social and cultural rights provided by international human rights law can also be variously restricted under human rights law.[126] Distinctions between nationals and non-nationals are also at times legally permitted where, for example, they 'serve a legitimate State objective and

[121] Art. 28, 1951 Convention relating to the Status of Refugees, 189 UNTS 150; Art. 28, 1954 Convention relating to the Status of Stateless Persons.

[122] UNHCR, 'The World's Stateless – Questions and Answers' (2004), 4.

[123] Lawfully staying stateless persons are entitled to a Convention Travel Document, per Art. 28, 1954 Convention, for the purposes of travel abroad.

[124] See General Assembly Declaration on the Rights of Peoples who are not Nationals of the Country in which they Live, UN Doc. 40/144, 13 December 1985. For further discussion of the treatment of non-nationals under international law and in international relations, see: A. Edwards and C. Ferstman (eds.), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2009); van Waas, *Nationality Matters*.

[125] See, e.g., Article 25, ICCPR.

[126] See, e.g., Article 2(3), ICESCR. 1966 International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3.

are proportional to the achievement of that objective'.[127] It is also accepted that some rights can be limited depending on the category of the non-national.[128]

In practice, differential treatment between nationals and non-nationals occurs for many reasons, mostly around non-implementation of obligations. Many governments, for example, have not domesticated fully their international human rights obligations or they reserve rights only for nationals. Many national constitutions regulate the relationship between the sovereign and its citizens only. Some countries also continue to recognize different citizenship categories, or limit rights depending on how nationality was acquired. Some countries because of historical reasons have various categories of nationality with differing names and associated rights.[129] The United Kingdom, for example, distinguishes between a number of different categories of 'British national', based on its historical imperial power and its many overseas territories, not all of whom enjoy the right of abode in the United Kingdom.[130] The United States of America does not allow citizens to run for president unless they were born in the territory.[131] In parts of the Middle East and Africa, long waiting periods are imposed on those having naturalized before they can exercise political rights.[132] For the purposes of both municipal and international law, these persons are considered to be citizens of their countries of nationality, even though they do not enjoy equal rights. In an ideal world, such differences in citizenship categories would be removed entirely.

[127] D. Weissbrodt, *The Human Rights of Non-citizens* (Oxford University Press, 2008), at 45.

[128] Such limits can be imposed on the right to freedom of movement as it applies only to persons lawfully in the territory: Art. 12, ICCPR, provided that such restrictions do not amount to arbitrary deprivation of liberty: Art. 9, ICCPR.

[129] UNHCR, 'Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons' (Geneva, 2014), para. 52.

[130] For more, see L. Fransman Q.C., *British Nationality Law*, 3rd edn (West Sussex: Bloomsbury Publishing, 2011).

[131] Article II, Constitution of the United States of America: The President must be a natural-born citizen of the United States or a citizen at the time of the adoption of the Constitution, at least thirty-five years old and a resident of the United States for at least fourteen years.

[132] On Africa, see B. Manby, *Struggles for Citizenship in Africa* (London: Zed Books, 2009). In the Middle East, Kuwait's nationality law provides for a thirty-year waiting period after naturalization before a person has the right to vote in parliamentary elections, plus determines that naturalized persons cannot (ever) stand as a candidate or be appointed to membership of any parliamentary body (Article 6 of the law). In Jordan, a naturalized national has a five-year wait before being eligible for nomination to a municipal council

In practice, too, the circumstances of stateless persons are a clear example of the very real problems faced by persons who live with no nationality. Stateless persons are politically, socially and culturally marginalized. '[N]ationality is [thus still] critical to full participation in society',[133] both as a matter of law and as a pragmatic fact. The case of dual or multiple nationality also supports the view that: 'The link between the State and the individual that is defined by nationality is still a supreme one, if perhaps no longer an all-encompassing one.'[134] So while international human rights law articulates the basic rights all persons are entitled to enjoy, *regardless* of their nationality, there are still some key rights linked to nationality.

While there is no list of rights to which a national may appeal, it is possible to indicate that there are a number of rights generally associated with holding a nationality by drawing on international human rights norms, summarized as:

- the right to leave one's 'own country' and to re-enter and reside permanently in the territory of the state of one's nationality;[135]
- the right to consular assistance (as discussed earlier), at page 35;
- the right to vote and participate in public life,[136] although, as noted, even here there are some exceptions depending on the type of nationality held; and
- rights to economic, social and cultural advancement.[137]

But what does such a list mean for persons who do not have access to or enjoy these rights in full equality and without discrimination? UNHCR summarized its position on this question in its Handbook on Protection of Stateless Persons:

> Generally, at a minimum, [nationality] status **will be associated with** the right of entry, re-entry and residence in the State's territory but there may be situations where, for historical reasons, entry is only permitted to a non-metropolitan territory belonging to a State. The fact that different categories of nationality within a State have different rights associated with them does not prevent their holders from being treated as a 'national' for

or trade union office and a ten-year wait for eligibility to a political or diplomatic position or any public office prescribed by the Council of Ministers or a member of the state council (Article 14).

133 CEDAW, General Recommendation No. 21: Equality in Marriage and Family Relations (1994), at 2.

134 Boll, *Multiple Nationality*, 12.

135 See n. 117 above. 136 Art. 25, ICCPR.

137 See Weissbrodt, *The Human Rights of Non-citizens*, at Ch. 4. See, further, Edwards and Ferstman, *Human Security and Non-Citizens*.

> the purposes of Article 1(1) [of the 1954 Convention relating to the Status of Stateless Persons]. Nor does the fact that in some countries the rights associated with nationality are fewer than those enjoyed by nationals of other States or indeed fall short of those required in terms of international human rights obligations. Although the issue of diminished rights may raise issues regarding the effectiveness of the nationality and violations of international human rights obligations, this is not pertinent to the application of the stateless person definition in the 1954 Convention.[138]

While UNHCR's position was developed in relation to the phrase 'not being a national of any State' for the purposes of identifying who is stateless and who is not, a similar approach ought to be taken in relation to more general questions about nationality, not least to ensure consistency in international law. Even though the above-mentioned substantive rights are usually associated with the holding of nationality, the lack of access to or enjoyment of these rights does not change the nationality status of the individual under international law, nor ordinarily under municipal law. Such an approach would also appear consistent with the ICJ's position: the ICJ in *Nottebohm* did not question Mr. Nottebohm's Liechtenstein nationality, even as they decided Liechtenstein was not entitled to exercise diplomatic protection on the basis of that nationality.

The only possible exception may be the case where a state denies an individual of the right to enter, re-enter and reside in its territory (considered as the essence of nationality as a matter of public international law), which could be interpreted as that state effectively denying that the individual is its national. However, this could only be determined on the individual case at hand and considering all the relevant facts. Overall, while different national laws may recognize different categories of citizenship or provide different levels of rights to its various citizens compared to another country, for international law purposes, there are only two relevant categories: being a national or being (*de jure*) stateless.[139]

1.5. Conclusion

This chapter has sought to understand the meaning of nationality in an era of human rights. The right to a nationality was discussed from two aspects: as a *procedural right* – derived from the right to acquire a

[138] UNHCR, 'Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons' (Geneva, 2014), para. 53.

[139] UNHCR, 'Summary Conclusions – Expert Meeting – The Concept of Stateless Persons under International Law ("Prato Conclusions")' (May 2010) para. 11.

nationality and not to be arbitrarily deprived of that nationality, as well as the established international rules regarding the acquisition and loss of nationality; and in terms of *substantive content*, which looked at the range of rights ordinarily associated with the possession of nationality/citizenship. It was observed that there is no agreed substantive minimum content of nationality as a matter of international law, not least because it turns so heavily on conditions and rules in the state of nationality. It further found that the inability of nationals to enjoy human rights in their country of nationality does not as a rule have a bearing on the recognition of their nationality under either municipal law or international law. The right to nationality, as it is expressed as a human right, remains largely framed as a *procedural* right.

The chapter did note, however, that each state of nationality has: (i) a duty to admit and readmit its nationals from abroad and allow them to reside in its territory, and (ii) a discretionary right to provide diplomatic protection to its own nationals (and arguably also to refugees and stateless persons), the former drawing parallels with the human right of nationals to leave their country and to return to it from abroad. This chapter also saw that while the general idea that nationality falls within the 'reserved domain' of states is still largely correct, state sovereignty is subject to other rules of international law, not least those derived from international human rights law. In particular, states may not arbitrarily deprive an individual of nationality, which means that governmental decisions must be proportionate and pursue a legitimate objective, concepts which are drawn from international human rights law; may not discriminate against particular individuals or groups in decisions regarding nationality conferral or deprivation; and have a general duty to prevent statelessness in their decisions on nationality. States retain discretion, however, in the rules they apply regarding nationality acquisition especially by way of naturalization.

Questions to guide discussion

1. Is there a definition of nationality under international law? How would you explain the concept?
2. Does the right to a nationality contain only procedural aspects, or substantive content, or both? Is this analytical division between procedural and substantive aspects a useful one?
3. What are the three general modes of nationality acquisition? How can nationality be lost?

4. To what extent is the conferral or loss of nationality within the 'reserved domain' of the state? What are the three main limits imposed by international law? How established are these limits?
5. Discuss the ICJ's decision in *Nottebohm*. Do you think it would be differently decided today? Is so, why?
6. Do the developments in international human rights law suggest we are moving towards agreement by states on the minimum core substantive content of nationality? What is your view?

(i) Diplomatic protection

'Diplomatic protection' is generally described as a right of the state to intervene on behalf of its own nationals if their rights are violated by another state for the purpose of obtaining redress.[89] As the PCIJ stated in *Mavrommatis*:

> [Diplomatic protection] is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through ordinary channels.[90]

The power of the state is far-reaching, and 'involves the resort to all forms of diplomatic intervention for the settlement of disputes, both amicable and non-amicable, from diplomatic negotiations and good offices to the use of force'.[91] In the first instance, diplomatic protection is exercisable vis-à-vis one's own nationals. As the PCIJ noted in *Panevezys-Saldutiskis Railway*:

> This right [of diplomatic protection] is necessarily limited to intervention on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right to diplomatic protection ...[92]

The only arguable exception to this nationality link is in relation to refugees and stateless persons, where it is asserted that a state may exercise diplomatic protection on their behalf in the absence of any other state. This position is supported by the ILC's Articles on Diplomatic

[89] See Art. 2, 2006 Articles on Diplomatic Protection: 'A State has the right to exercise diplomatic protection in accordance with the present draft articles'. For a comprehensive review of diplomatic protection, see Amerasinghe, *Diplomatic Protection* (who identifies seven basic elements of diplomatic protection, pp. 25–7).

[90] *Mavrommatis Palestine Concessions (Greece* v. *U.K.)*, 1924 PCIJ (ser. B) No. 3 (August 30), at p. 12.

[91] *Barcelona Traction Case* (Judgment), ICJ Reports, 1970, p. 3, at p. 44, which concerned the question of the protection of a corporate entity: 'The Court would have to observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that a State is asserting ...'. In the literature on the use of force, this practice is sometimes referred to as 'humanitarian intervention', or a separate feature of that, including as part of the right of self-defence: see F. K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague: Kluwer Law International, 1990), 30–59; Boll, *Multiple Nationality and International* Law, 135–6.

[92] *Panevezys-Saldutiskis Railway (Estonia* v. *Lithuania)*, 1938 PCIJ (ser. A/B) No. 76 (February 28), 16.

2

Statelessness and citizenship in ethical and political perspective

MATTHEW J. GIBNEY

In a well-known article defending open immigration, the political theorist Joseph Carens once unflatteringly compared modern citizenship to a feudal status. National citizenship, he said, 'is assigned at birth, for the most part, not subject to change by an individual's will and efforts; and it has a major impact upon a person's life standards'.[1] Yet the plight of one group of people in the contemporary world – the stateless – suggests that there may be at least one thing worse than holding a feudal status, and that is holding no status at all. To lack any state in which one claims nationality or full membership (citizenship) is a recipe for exclusion, precariousness and dispossession.

Despite its profound impact upon the lives of the people affected, the issue of statelessness has, with some notable exceptions, been largely ignored by scholars, practitioners and government officials in the decades since World War II. This neglect, which stands in stark contrast to the international attention focused on refugees, asylum seekers and immigrants (in their various incarnations), is particularly notable because the current estimated number of stateless people in the world – over 10 million – is comparable to the total number of refugees at 15 million.[2] Arguably, the position of the stateless in the shadows of international society merely reflects their abject disempowerment. That said, there has been a flourishing of interest in statelessness in the last few years, buoyed by new scholarship,[3] commissioned reports,[4] and a commitment by

[1] J. Carens, 'Migration and Morality: A Liberal Egalitarian Perspective' in B. Barry and R. Goodin, (eds.), *Free Movement* (London: Harvester Wheatsheaf, 1992), 26.

[2] See UNHCR, *Global Trends 2013* and UNHCR *Global Appeal 2014*.

[3] C. Sawyer and B. K. Blitz (eds.), *Statelessness in the European Union: Displaced, Undocumented, Unwanted* (Cambridge University Press, 2011); K. Staples, *Retheorising Statelessness: A Background Theory of Membership in World Politics* (Edinburgh University Press, 2012).

[4] B. K. Blitz and M. Lynch (eds.), *Statelessness and the Benefits of Citizenship: A Comparative Study* (London: Geneva Academy of International Humanitarian Law and Human Rights

international bodies, organizations and states to engage with the issue. This new interest is important not only because it offers the possibility of encouraging collective action to reduce statelessness, but also because the issue of statelessness raises important normative and political questions about the international order of states itself.

As a *normative* issue, the existence of statelessness brings into question the very legitimacy of the international state system. Put simply, a key claim at the centre of statelessness as a moral issue is this: if there is going to be a world exhaustively divided between states – if people are to have no choice but to live under the coercive rule of one state or another – then everyone should be able to claim citizenship and its corresponding rights somewhere. This is a claim that unites political and moral scholars as diverse as civic republicans, natural law adherents, communitarians and liberals. As the legal scholar John Finnis has recently written: 'Whoever and wherever one may be, one is both entitled and bound to regard oneself as belonging to ... [a state]: statelessness is an anomaly, a disability, and presumptively an injustice.'[5] Nonetheless, if statelessness is indeed morally unacceptable, there is only limited agreement on how the duties of individual states to rectify it ought to be formulated.

As a *political* issue statelessness challenges one to understand the dynamics behind the exclusion from national membership of substantial numbers of people. Statelessness is not a new issue. Indeed, in 1951 Hannah Arendt described the stateless as the 'most symptomatic group in contemporary politics' because they symbolized the triumph of the exclusivity of the nation over the civic inclusion of the state.[6] Yet it is a problem that has hitherto survived the development of an international order of human rights in the post-World War II period. Why is it that states have not only tolerated the existence of statelessness but in some cases acted to create it?

In this chapter, I aim to provide an overview of the normative complexities and political dynamics of contemporary statelessness. Unlike the other chapters in this book, which discuss nationality and statelessness from the perspective of international law, I approach these subjects from a political theory perspective and hope to add a layer of analysis not reflected elsewhere in the book. More specifically, I have three major goals.

and International Observatory on Statelessness, 2009); Equal Rights Trust, *Unravelling Anomaly* (London: Equal Rights Trust, 2010).

[5] J. Finnis, 'Nationality, Alienage and Constitutional Principle', Oxford Legal Studies Research Paper No. 08/2008 (2008), at 30.

[6] H. Arendt, *The Origins of Totalitarianism* (London: Andre Deutsch, 1986), 77.

First, to illustrate why statelessness is commonly conceived of as 'bad' and thus something to be avoided and minimized; in so doing, I will show how statelessness is informed by an implicit normative conception of what states ought to provide to their citizens. Second, I will offer an account of the 'uses' of statelessness for governing elites in order to understand better why, despite its negative consequences, statelessness is produced and maintained over time. Third, I consider how we might conceptualize the duties of states to rectify statelessness. I will discuss two different accounts of the injustice inflicted by statelessness: one stresses responsibilities to the stateless qua stateless people; the other recognizes responsibilities to them by virtue of their role as unrecognized citizens. I argue that the most convincing account of state duties may be one that articulates a right to membership in a way conceptually unrelated to statelessness.

My examination here also aims to highlight a paradox. The possession of citizenship may (often) provide individuals with a particularly secure grounding for their rights and entitlements in the contemporary world, but it also enchains people, as Carens suggested above, to particular territories, reinforcing egregious patterns of global inequality and mocking consent-based governance. Statelessness brings to our attention not only the dangers of not possessing citizenship, but also the profound problems posed by the international order of states in which the status of citizenship is nested.

It should already be obvious that I am using the term 'stateless' as shorthand for both a lack of nationality and of citizenship (full membership in the state). Hence, while I acknowledge that the categories of nationality and citizenship are analytically separate, I combine them in the discussion that follows.

2.1. Statelessness in normative and descriptive context

Before I proceed, it is important to explore the concept of statelessness to bring out its implicit normativity. In purely *descriptive* terms, statelessness can be defined as a situation in which an individual (or a group of people) has no membership in any state whatsoever. This account of statelessness has the virtue of picking out a range of groups who have been stripped of their citizenship (e.g. Jews in Nazi Germany) or who are born without a nationality (e.g. the children of the Bidoon in the United Arab Emirates). However, understanding statelessness in this way tells nothing about why one should be concerned about the phenomenon.

Describing someone as stateless in descriptive terms provides no more reason for incorporating them into state membership than describing someone as a non-Christian does for converting them to the path of Jesus. Statelessness is merely one amongst a number of ways of categorizing certain individuals or groups. However, in its practical use statelessness is a concept that typically secretes an (implicit) *normative* agenda: to be stateless is perceived to be suffering a *loss* or a *deprivation*. In its broadest terms, this deprivation is of 'State protection'.[7] To be stateless is not to enjoy various rights and entitlements guaranteed by states to their nationals, including the right lawfully to reside somewhere on the earth's surface.

The descriptive term and the normative components of statelessness stand in an uncomfortable relationship to each other. While the descriptive term seems to pick out a relatively confined and clearly demarcated section of the world's population (those without legal citizenship anywhere), the normative component is far more expansive. The category of people who lack the goods associated with state protection certainly includes the formally stateless, but it is not exhausted by it. A person may possess state membership in name (hence they are not *descriptively* stateless) and yet their nationality and citizenship may not deliver to them the kinds of goods, rights and entitlements membership ought to provide (making them *normatively* stateless). These are what are sometimes called the *de facto* stateless.[8]

There are a variety of ways of becoming normatively (or *de facto*) stateless in the contemporary world. An individual might, like the undocumented migrant, be out of the territory of her state of membership and lack protection because she is unable for some reason to avail herself of the protection of the state in which she is residing (perhaps because she fears deportation). Alternatively, someone may never have left his national territory but, because of the unwillingness or incapacity of his state, experiences an existence that is tantamount to statelessness in its absence of basic protections and rights. This is the situation of many internally displaced people, oppressed minorities and marginalized social groups. The elasticity of the term stateless is evident in the sociologist Margaret Somers' controversial use of the term to describe

[7] J. Bhabha (ed.), *Children Without a State: A Global Human Rights Challenge* (Cambridge, MA: MIT Press, 2011).

[8] For a discussion of the notion of *de facto* statelessness from the perspective of international law, see also the contribution by van Waas in this volume at Chapter 3.

the experience of black Americans who were displaced by Hurricane Katrina. She argues that the 'social exclusion' and 'expendability' of this group, evidenced by the US government's failure to respond to their plight, showed that '[these Americans] were no longer in any meaningful sense citizens; they were now, in effect, stateless people'.[9] This is not a use of the word 'stateless' that would be likely to be endorsed from a legal perspective.

Refugees, individuals who are persecuted by their own state, are yet another group who might be conceptualized as normatively stateless. In international law such people have access to a distinctive regime built around the 1951 UN Convention relating to the Status of Refugees (1951 Convention), yet their practical separation from the stateless – and particularly what we may call the *de facto* stateless – is a matter of vicissitudes of history and institutional arrangements more than a matter of conceptual distinctiveness. Indeed, in her famous 1951 exposition on refugees in the *Origins of Totalitarianism*, Hannah Arendt treated the stateless and the refugee as synonyms: both were cast adrift from state protection.[10]

In what remains of this chapter, my concentration will be on the formally stateless, i.e. those people that have no membership in a state anywhere. This focus does not reflect a belief that there is any normative difference or significance between *de jure* and *de facto* statelessness, less still that international attention should focus on the former more than the latter. For, as I have shown above, the reason statelessness matters for individuals (if not necessarily for states) is because state membership is a valuable guarantor of certain goods, rights and entitlements. Once we acknowledge this, it seems difficult to justify distinguishing between those who do not have these goods guaranteed because they have no state whatsoever and those who do not enjoy them because their state is ineffective, absent or simply malign, even if the distinction is an evident one in international law. Indeed, I suggest below that the moral responsibilities of states to stateless people may best be conceptualized through an approach indifferent to whether one has no state at all or simply an absent or ineffective state.

[9] M. R. Somers, *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights* (Cambridge University Press, 2008), 114.

[10] Arendt, *The Origins of Totalitarianism*.

2.2. The undesirability of statelessness

I have suggested that there is an implicit assumption that statelessness is a normatively undesirable state of affairs, but why is it considered so? One answer is that it leaves individuals vulnerable to insecurity and rights violations. But this is only part of the reason why statelessness has traditionally been considered a problem or a 'bad'. To get a richer picture of the problem of statelessness it is important to consider the problems posed by statelessness across different levels of agency: in particular, the international state system, the individual state, and stateless persons themselves.

In terms of the *international state system*, statelessness is a bad to be avoided primarily because it risks exacerbating international tensions and disorder. Statelessness creates people who are, by definition, out of place, somewhere where they have no right to be. Adapting Zygmunt Bauman's pithy description, the stateless are 'gatecrashers' in the backyards of others,[11] and thus people whose presence is unlikely to be viewed with equanimity. International tension is particularly likely to result when their situation has come about because of the deliberate actions of a state attempting to rid itself of unwanted peoples (e.g. by stripping citizenship or not recognizing as members sections of their populations). A prime example of such international tensions were those set in train by the mass denationalization of their foreign resident citizens by Communist Russia and Nazi Germany in the 1920s and 1930s respectively. The actions created floating populations of unwanted foreigners that states were unwilling to integrate but could not expel. The stateless showed the truth of Arendt's observation of the 1940s that 'whether we like it or not we have really started to live in One World'.[12] In a world exhaustively divided between states, the membership decisions of states are radically interdependent. Statelessness is thus often a challenge of 'order management' in the international system.[13]

Statelessness also creates problems for *individual states*, potentially challenging their ability to control and order their subject populations. Statelessness undermines the ability of states to expel unwanted foreigners (who will take them?) and thus shape the boundaries of inclusion. It is therefore unsurprising that the United Kingdom, for example, has

[11] Z. Bauman, *In search of Politics* (Stanford University Press, 1999), 195.
[12] Arendt, *The Origins of Totalitarianism*, 296.
[13] P. J. Spiro, 'A New International Law of Citizenship' (2011) 105 *Am. J. Int'l L.*, 694.

recently criminalized the actions of asylum seekers who destroy their passports. This act of destruction aims to obscure asylum seekers' membership of a state – mimicking a situation of statelessness – to prevent Britain from deporting them.

The presence of statelessness also demonstrates a population who lack a reason (beyond the threat of force) for yielding to the state's authority, yet unlike other non-citizens cannot be deported. If the rights, entitlements and privileges that states grant to citizens are seen as ways that obedience to rule is achieved, the stateless – who live in the state but do not receive the benefits of citizenship – are easily interpreted as potentially dangerous and disloyal. More radically, the stateless may be perceived as offering a potentially subversive vision of a life beyond membership in the state. Agamben's view of the refugee as 'nothing less than a border concept that radically calls into question the principles of the nation State and, at the same time, helps clear the field for a no longer delayable renewal of categories'[14] seems equally applicable to the concept of statelessness. Governing elites, whose power is vested in national institutions, are unlikely to welcome such a 'renewal', or take kindly to its supposed harbingers.

Yet if statelessness is a problem for the state system and individual states it is most of all a problem for those *individuals* who lack membership. Statelessness not only tracks patterns of social and political exclusion, it creates circumstances of vulnerability and precariousness in its own right. In a famous 1958 United States' Supreme Court decision, *Trop* v. *Dulles*, which limited the ability of the US government to strip citizenship as a punishment, the court described the experience of statelessness:

> [Loss of all citizenship] strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights ..., no country need do so, because he is stateless ... In short, the expatriate has lost the right to have rights.[15]

Hannah Arendt, whose writings the court drew upon in its judgement, went further in her famous work of 1951, *Origins of Totalitarianism*. She argued that the stateless were victims of not one loss but of three: the loss of a home, the loss of government protection and the loss 'of a place in the world which makes opinions significant and actions effective', a

[14] G. Agamben, 'We Refugees', *Symposium*, 49(2) (1995), 114–19, at 117.
[15] United States Supreme Court, *Trop* v. *Dulles*, 356 US 86, 31 March 1958, at section II.

shared political community in which to act, initiate and form views of a common world.[16]

Arendt's account of the experience of statelessness is problematical as a description of the contemporary phenomenon. Unlike the focus of Arendt's attention – the victims of mass denationalization in inter-war Europe – most stateless people today have not been expelled from their homes; the problem they face is lack of recognition and citizenship in the country where they live, and sometimes have always lived. Moreover, the stateless often do not lack all government protection. The development of international human rights law over the last fifty years provides a range of protections (enforced to various degrees) available to individuals on the basis of their personhood.

Rather, to get an accurate picture of why statelessness may be a problem for individuals, it is necessary to understand the key benefits tied to citizenship, or formal membership in the state. In most countries, citizenship is a passport to some key social, economic and political goods that have a huge impact on the well-being of individuals and social groups. The key benefits of citizenship can generally be categorized in terms of access to three goods: privileges, security and voice.

The *privileges* associated with citizenship may involve favoured or exclusive access to public goods (such as housing, welfare, state-provided healthcare, education, etc.); government (public service) positions and membership of the military, and thus access to key elevators for social advancement; and the right to own land, other forms of property and businesses. The good of *security*, on the other hand, is evident primarily in the fact that the possession of citizenship offers a unique level of security of residence in the state. Citizens, unlike non-citizens, typically cannot be deported or expelled, making their access to other rights and privileges in the state uniquely robust. Moreover, they may leave or enter the state at will and claim diplomatic protection when abroad.

By contrast, being stateless deprives one of any equivalent unconditional right to reside in and to re-enter the state. In this respect, the stateless can be considered 'deportable', to use De Genova's term.[17] They are individuals whose daily lives are lived under the shadow of possible expulsion from the state. To be sure, any state wishing to expel a stateless person needs to find another state willing to accept them (as noted above).

[16] Arendt, *The Origins of Totalitarianism*, 296.

[17] N. De Genova, 'Migrant "Illegality" and Deportability in Everyday Life', *Annual Review of Anthropology*, 31 (2002) 419–47.

Yet even this constraint is not without a sting in the tail. As observers from Arendt to Agamben have noted, the lack of options for deportation have often provided the impetus for the development of new forms of exclusion within state territory. Some of these forms of exclusion – the detention centre, the off-shore island and even mass extermination camp – can make deportation look civilized.[18]

The final relevant good of citizenship is that of *voice*:[19] the right to air in public fora views about the use and abuse of government power and the direction of society, specifically by participating in (or being elected to) the political institutions that fashion law and policy. The *sine qua non* of citizenship is thus often seen as embodied in key rights associated with voice, namely 'rights to vote, hold elected and appointed government offices, to sit on various sorts of juries, and generally to participate in debates as equal community members'.[20]

This idea of voice, particularly the aspect of participating in debates as equal community members, comes close to what Arendt meant when she described the stateless as lacking a place in the world where their actions were effective and opinions significant.[21] A key consequence of statelessness is the loss of the very right to have rights because, Arendt argued, rights are created through shared political action. This lack of standing has made the stateless targets of racism and other forms of hostile objectification. For when people are deprived of 'a framework' within which they are judged by their 'actions and opinions',[22] they are more susceptible to being judged by ascriptive characteristics: *what* they are (their race, immigration status, ethnicity, etc.) rather than *who* they are (the product of their own words and deeds). A lack of voice thus makes the stateless particularly vulnerable to dehumanization.

2.3. The political uses of statelessness

From the account of the problem of statelessness I have outlined, it is unclear why statelessness exists for any length of time at all. After all, the

[18] See A. R. Zolberg, A. Suhrke and S. Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (USA: Oxford University Press, 1989), 16.

[19] A. Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press, 2009).

[20] R. M. Smith, 'Modern Citizenship' in Engin F. Isin and Bryan S. Turner (eds.), *Handbook of Citizenship Studies* (New York: Sage, 2002), 105.

[21] R. Bernstein, *Hannah Arendt and the Jewish Question* (Cambridge, MA: MIT Press, 1996), 83.

[22] *Ibid.*

existence of people without state membership creates difficulties for the state system in terms of maintaining international order, undermines the ability of individual states to rule effectively and denies individual stateless people many basic rights and protections. These difficulties alone would seem to give states sufficient motivation to act to eliminate the phenomenon.

Statelessness is often generated by the unintentional actions of states. Conflicts of citizenship laws, state dissolution, gendered nationality laws and bureaucratic incompetence can lead to people without membership. In fact, statelessness in some shape or form may be an inevitable part of the international system of states. But even if the creation of statelessness is unintentional or even inevitable, it is still important to ask: why did some groups of people, such as the Rohingya of Burma or the Estate Tamils of Sri Lanka,[23] remain stateless over long periods of time, excluded from societies in which they lived? This is the question to which I will now turn.

One answer may lie in the weakness and ineffectiveness of some states. Poor or fragile states – particularly those with weak infrastructures or in the throes of conflict or dissolution – may simply fail to register people born on their territory or otherwise eligible for citizenship, and have a cumbersome or inefficient process for rectifying this failure. Yet this is only part of the reason. Contemporary statelessness is as much a symptom of state *intention* as it is of state *incompetence*. If statelessness can cause problems, it can also have its uses. There are four major types of reason why it may be in the interests of particular states to keep people stateless.

The first is what I will call 'gain'. To be stateless is, as we have seen, typically to be disempowered. The stateless are vulnerable to state power in part because they lack the rights and institutional representation necessary to effect changes in state policy and in part because of their lack of political and social rights. This vulnerability may be useful to social and political elites because it facilitates the exploitation of the group in question. Groups that lack rights and institutional modes for the expression of grievances lack the ability to act back against economic and other forms of exploitation. For example, workers of Haitian ancestry and their

[23] Note that in 2003, Sri Lanka passed a law that allowed the majority of its stateless Estate Tamils to gain citizenship. P. Sivapragasam, 'From Statelessness to Citizenship: Up-Country Tamils in Sri Lanka' in B. Blitz and M. Lynch (eds.) *Statelessness and Citizenship. A Comparative Study of the Benefits of Nationality* (Cheltenham: Edward Elgar, 2011).

children in the Dominican Republic have provided a valuable source of 'live in' labour for economically central activities like harvesting sugar cane and work in building trades.[24] Citizenship laws that exclude them from membership capture such workers in precarious labour, preventing social mobility and facilitating a situation of low wages and poor living standards.

A second set of reasons can be categorized as those stemming from 'fear and distrust'. Statelessness may be reproduced because of a perception that it would be socially or politically dangerous to convert a particular group of people into citizens. The group concerned may be characterized (rightly or wrongly) as possessing foreign loyalties or allegiances that make them threatening to the state. Some countries strip citizenship from terrorists or others deemed grossly disloyal, even if statelessness is the result.[25] For example, in 2012 the United Arab Emirates withdrew the citizenship of five of its nationals (thus making them stateless) because they jeopardized 'the national security of the UAE through their connection with suspicious regional and international organisations and personalities'.[26] But exclusion based on concerns about disloyalty can involve far larger groups as well, crossing over ethnic or culture lines. The Bihari in Bangladesh were, until very recently, excluded from citizenship largely because they were seen as an ethnic group whose real loyalty lay with Pakistan rather than Bangladesh;[27] the situation of those of Russian descent who became stateless after the Baltic States adopted their own nationality laws in the early 1990s reflected similar concerns about distrust and lack of loyalty.[28]

The patterns of fear and distrust that justify exclusion often reflect and reinforce anxieties that some groups are intrinsically 'unworthy' of citizenship. Conceptions of unworthiness themselves tend to track invidious ethnic and racial judgments about groups considered incapable of fulfilling the demands of citizenship or integrating into the national community. While the obvious case here is the racial construction of Jews

[24] Amnesty International, 'A Life in Transit: The Plight of Haitian Migrants and Dominicans of Haitian Descent' (2007), available at: www.unhcr.org/refworld/country,,AMNESTY,,HTI,4562d94e2,461224362,0.html, last accessed 9 May 2014.

[25] M. J. Gibney, 'Should Citizenship Be Conditional?' *Journal of Politics* 75 (03 (2013) 646–58.

[26] 'UAE Detains Six Militants', *The Nation*, 11 April 2012.

[27] L. van Waas, *Nationality Matters: Statelessness under International Law* (Antwerp/Oxford/Portland, OR: Intersentia, 2008), 128.

[28] P. Järve and V. Poleshchuk, *Country Report: Estonia* (EUDO Citizenship Observatory, 2013), available at: http://eudo-citizenship.eu/docs/CountryReports/Estonia.pdf, last accessed 9 May 2014.

under the Nazi regime, other groups before them, such as blacks in the United States and aboriginal groups in Australia, were considered at best less than full citizens and offered diminished versions of its entitlements. A more recent example of the connection between racial and ethnic construction and statelessness can be found in the treatment of Roma in various European countries reforming their citizenship laws in the aftermath of the Soviet Union's demise in 1989. After the division of Czechoslovakia in the early 1990s, for instance, some in the Roma population – long victims of racial discrimination, harassment and negative stereotyping – were left stateless.[29]

A final reason for the persistence of statelessness is that exclusion from membership is often congruent with national processes of 'people building'. While I noted above that statelessness can create difficulties for effective governance, these difficulties may be outweighed by the benefits elites reap in reinforcing or creating national bonds amongst the dominant community. It is no coincidence that statelessness is often a result of state formation or war. Exclusion can be a way of affirming the boundaries of the nation when loyalty or unity is most needed by political elites. The creation of a collective identity is achieved by contrasting the included community with the excluded ones (the Roma, the Jews, the Ugandan Asians) and, in so doing, formulating the distinctive character of the national community (we are not lazy, Muslim, greedy, imperialistic, etc.). Exclusion based on people-building is a timeless feature of political rule. As Freud noted in *Civilization and its Discontents*, 'it is always possible to bind together a considerable number of people in love, so long as there are other people left over to receive the manifestations of their aggressiveness ... In this respect, the Jewish people, scattered everywhere, have rendered most useful services to the civilizations of the countries that have been their hosts.'[30] Statelessness, like refugee generation, may not be an inevitable product of people-building, but they often go hand in hand.

While I have separated out the various political uses of statelessness for analytical reasons here, they are usually intermingled in practice. Ethnic, social or racial groups viewed as unworthy of citizenship, like those of Haitian descent in the Dominican Republic, are obviously plausible candidates for exploitation, and may (justifiably given their maltreatment)

[29] S. Swimelar, 'The Making of Minority Rights Norms in the Context of EU Enlargement: The Czech Republic and the Roma' *The International Journal of Human Rights*, 12(4) (2008), 505–27.

[30] S. Freud, *Civilization and its Discontents* (New York: WW Norton & Company Incorporated, 2005), Chapter 5.

often be considered untrustworthy, too. Equally, groups considered untrustworthy, like Jews in Nazi Germany, are scapegoated in order to affirm a common national identity in times of war or social upheaval.

2.4. The moral responsibilities of states

I have now shown that while statelessness may be widely viewed as an undesirable feature of the modern international order of states, there are still reasons why a particular state might have an interest in keeping some groups of people stateless. States have been able to act upon these interests in exclusion, it is important to note, because of a long-held presumption in international law (and, to some extent, common morality) that states have the prerogative to determine the boundaries of their own membership, offering and withholding citizenship as they please. Hence, when Alexander Downer, Australia's Foreign Affairs Minister, was asked in the 1960s to defend his government's racially restrictive immigration policy, he stated, 'We seek to create a homogeneous nation... Can anyone reasonably object to that? Is this not the elementary right of every government to decide the composition of the nation?'[31] More recently, the German immigration law scholar, Kai Hailbronner, claimed that 'there are no moral and therefore generally applicable criteria in judging a nation's citizenship policy... Naturalisation policy cannot be determined by questions of what is good or bad, moral or immoral. It has to be determined by balancing divergent political interests'.[32] Of course, both of these proponents of state discretion would have accepted that the state's right to decide membership is constrained by the need to avoid conflicts with other states (the requirement of international order) and to respect international law. But should state discretion not also be constrained by a right of stateless people to citizenship?

In the remainder of this chapter, I want to consider the question of the responsibilities of states to admit stateless people into membership. My concern is not with the *legal* obligations of states (others in this volume will consider this question)[33] but rather with the question of states' *moral* duties. The advantage of this perspective is that it gives us a basis on which

[31] Quoted in M. Walzer, *Spheres of Justice* (New York: Basic Books, 1983), 46.

[32] K. Hailbronner, 'Citizenship and Nationhood in Germany', in R. Brubaker (ed.), *Immigration and the Politics of Citizenship in Europe and North America* (New York: University of America Press, 1989), 74–5.

[33] See also Spiro, 'A New International Law of Citizenship'.

to appraise critically the practices of states, regardless of whether they are lawful or not.

There are two main ways in which we might conceptualize the injustice experienced by stateless people, each of which has different implications for state responsibilities. One way is to see the stateless as victims of 'statelessness per se', where the duty-holder is the international society of states; the other way is to conceptualize the stateless as 'unrecognized members', where the duty-holder is the particular state in which the stateless person currently resides (or to which he or she has deep connections). I will now discuss each of these conceptualizations in turn.

Probably the most common way of conceptualizing the stateless is as victims of an injustice inflicted upon them by international society. This conceptualization is implicit in the Universal Declaration of Human Rights, which stipulates that every individual has the right to a nationality. It is present also in Arendt's description of the stateless as the 'scum of the earth', as people rendered superfluous by the fact that no state anywhere would accept them for membership.[34] In this view, statelessness is wrong because it represents the violation of the individual's right to live under the protection of a state, even while it forces them to live in a system of states. Statelessness challenges the state system's very legitimacy because if that system is to be defensible, it should accommodate all of the world's denizens.

Denial of the right to possess citizenship somewhere is a very plausible way of conceptualizing the problem of statelessness but it creates a problem. The entity with the responsibility to rectify the injustice of lack of citizenship (the international society of states) is not the same as the entity that controls the good that needs to be distributed (citizenship). Control over the distribution of membership is still, as we noted above, largely the prerogative of individual states. Therefore, to speak of a right to citizenship (or nationality) begs the question: where? Which *particular* state has a duty to provide citizenship to the stateless person? If an individual's right to a state is not to be empty, a principle for determining the responsibilities of individual states must be found.

There are a number of possible ways that duties might be distributed amongst states to reflect the fact that statelessness is a collective responsibility. One way is through a principle of numerical equality where each of the world's states takes a proportion of the world's stateless people (e.g. Australia must accept into citizenship 10,000; the United States, 10,000

[34] Arendt, *The Origins of Totalitarianism*.

and Tunisia, 10,000). The number of people allocated to each state could be adjusted to reflect the relative capabilities and costs to particular states, taking into account, for example, demographic density and GDP. A different way of allocating responsibilities would be to make states responsible for stateless people who are on (or who come to) their territory. This might be called distribution on the basis of proximity and is analogous to the principle of *non-refoulement* in refugee law, whereby persecuted individuals can (subject to some limitations) claim protection in any state at which they arrive. Another possible principle distributes responsibility on the basis of birth, making states responsible for any children born stateless on their territory. This would be a kind of *jus soli* principle for stateless people and, while it would not solve all problems of statelessness (e.g. it would not help those who have *lost* their citizenship, such as through state dissolution), it would significantly reduce them.

Each of these ways of conceiving of state responsibilities would, if enacted, go some way to giving all individuals the right to citizenship somewhere. Yet there is something disturbing about simply distributing stateless people amongst states on the basis of principles of global international justice. The stateless are not, in practice, simply deracinated, homeless people, wandering the globe in search of any state that will have them. They are typically, though not exclusively, people settled in particular societies, lacking legal recognition of and appropriate protection for their status as residents. The primary injustice they experience, then, is not that they cannot find *any* state to grant them citizenship but that the state that really should grant them citizenship will not, for various reasons, do so. As their claim is less to citizenship somewhere than to recognition of their moral claim to membership in the state where they are already making their lives, they are most accurately conceptualized as 'unrecognized citizens'.

Paradoxically, one gets a clearer picture of the injustice of unrecognized citizenship by considering an example of an individual who lost his 'membership' but did *not* become stateless. In 2004, the Australian government deported Robert Jovicic to Serbia, the country in which he held citizenship. Jovicic was a non-citizen permanent resident of Australia who had over many years been repeatedly convicted of crimes related to drug use. In many respects, he was an exemplar for the government's policy of deporting foreign citizens convicted of criminal offences. But his deportation caused a huge public outcry, ultimately forcing the government to facilitate his return. What lay behind this response? Jovicic had lived in Australia for some thirty-six years prior to his deportation.

He had arrived in Australia with his parents when he was two years old; he did not speak or understand Serbian or have any social network in Serbia. In the words of the opposition immigration spokesperson, 'Even though ... [Jovicic] has not been a good member of our community, he is undeniably Australia's responsibility.'[35] The Jovicic case shows that public conceptions of who is a member – and who is thus entitled to the protections of membership – are not exhausted by legal categories of citizenship. Jovicic was widely conceptualized as a member of Australian society (and thus eligible for protection from deportation) despite his lack of formal citizenship. His status grew out of his extended presence in Australian society.

The idea that a society might possess unrecognized citizens – individuals with a compelling moral case to be accepted as citizens – has been explored in recent political thought. Rainer Bauböck, for example, has argued that a morally defensible account of citizenship in a particular political community should include all individuals who have a 'stake' in the future of the society in question.[36] To have a 'stake', in his terms, is to be dependent on the political community for the protection of one's rights and to be reliant on how the state develops over time.[37] According to Bauböck, 'self-governing political communities should include as citizens those individuals who circumstances of life link their individual autonomy or well-being to the common good of the political community'.[38] The legal scholar Ayelet Shachar conceptualizes the moral boundaries of membership only slightly differently. She argues that they should include all those who have a genuine 'link' to the state in question. Her principle of *jus nexi* privileges an idea of membership based on 'social attachment' and 'community ties'. The moral community is, according to Shachar, defined not merely by domicile in the state, but by 'factual membership and affected interests'.[39]

Despite their differences, both of these accounts of who is morally a member of the state draw their power in part from their ability to speak

[35] B. Evans, 'Jovicic Awaits Residency Decision', Australian Broadcasting Corporation, 9 March 2006.

[36] R. Bauböck, *'Stakeholder Citizenship: An Idea Whose Time Has Come?'* (Washington, D.C.: Migration Policy Institute, 2008).

[37] R. Yusar, 'Exploring Normative Theories of Democratic Citizenship', MA Thesis, Central European University, Hungary (2012).

[38] R. Bauböck, 'Expansive Citizenship – Voting Beyond Territory and Membership', *PS: Political Science & Politics*, 38(04) (2005) 683–7, at 686.

[39] Shachar, The Birthright Lottery.

to both communitarian and liberal moral sentiments.[40] Consistent with communitarian ideals, each acknowledges the way people's identity is shaped by their social context and thus that extended residence in a society creates moral claims. Consistent with liberal principles, they recognize that if someone is to live under the coercive institutions of a particular society, they are entitled to the protections and rights necessary to act as a political agent in that society.

Both the 'stake' and the 'link' approaches seem highly congenial to the integration of stateless people into membership in the societies in which they are living. For it can hardly be denied that the stateless are dependent on the evolution of the society in which they live, or have interests 'affected' by that society and its political institutions. Indeed, their statelessness situation makes them particularly vulnerable to capricious state power. If Jovicic had a strong claim to be considered a member of Australian society based on extended residence (and he did), the claims to citizenship of those like the stateless Kurds who have lived in Syria for decades seem at least as strong.

Is it best to conceptualize the stateless as unrecognized citizens or as stateless people per se? My feeling is that the most compelling of these approaches is the former. This is partly because the idea of unrecognized membership enables one to bypass the difficulties of determining how responsibility should be divided amongst (in principle) similarly situated agents (states), but also because the claim of stateless people often seems to be to citizenship where they are living, not to citizenship *tout court*.

If this is right, then, paradoxically, the best account of the duties of states to stateless people (and the injustice they are subject to) may be one that does not emphasize their experience of statelessness as such, but simply recognizes their right to be included in a particular state. Indeed, herein lies another advantage of the unrecognized members conceptualization: it avoids the issue of *de jure* versus *de facto* statelessness. The question of a right to membership is not decided by the existence of some other state that may formally claim one as a member but is dependent primarily on one's relationship to the state in which one is actually making one's life.

[40] M. J. Gibney, 'The Rights of Non-citizens to Membership' in C. Sawyer and B. Blitz (eds.), *Statelessness in the European Union: Displaced, Undocumented, Unwanted* (Cambridge University Press, 2011), 41–68.

2.5. A duty to join a state?

If one accepts my argument, states have a duty to offer citizenship to stateless people either directly because they are stateless (subject to a principle of just distribution between states) or indirectly through the obligation states have to any stateless resident on their territory for an extended period. But these conceptualizations of state responsibilities give rise to a question: do stateless people have a corresponding duty to *accept* any offer of citizenship? Let me briefly discuss this question before concluding this piece.

One reason why states have a duty to the stateless is because states exist only to protect the security and welfare of the people over whom they rule, and citizenship is an important marker of the boundaries of a state's rule. By contrast, individual people – stateless or otherwise – do not exist *for* the state in the same way, and they thus have no analogous duty. However, one might argue that those already in receipt of the goods of citizenship (including security) have a duty to formalize their membership in the state (this is what some philosophers call 'a duty of gratitude'). But this position seems unlikely to apply to stateless people because their very need to join a state derives from the fact that they are *not* already receiving the protection of the state. The stateless can have no duty of gratitude for goods they have never received.

Of course, it is likely the case there are still good reasons (short of moral obligation) why stateless persons *should* for their own sake join any state that offers them membership, reasons spelt out earlier in this piece and by a panoply of writers on statelessness. That said, it is sobering to remember that citizenship does not only involve 'goods', it also involves burdens, in some cases onerous ones: citizens undertake certain roles, including national service, and may even have to make themselves available to risk their life for the state at a time of war. Moreover, the 'goods' of citizenship on offer in some states are rather slim indeed. It makes a world of difference whether one has a right to citizenship in Chad or Sweden.

Even if one believes that the duties one assumes represent a fair trade in return for the benefits of citizenship, it is surely a relevant consideration that many of the world's citizens are poorly placed to ensure that the citizen–state contract remains mutually advantageous over time. As Joseph Carens has noted, for most of the world's denizens, citizenship has no opt-out clause, it is like a 'feudal status that chains one

to a particular territory'.[41] Without proper avenues for exit – or even expressing discontent – citizenship cannot be the kind of morally valid association that the stateless (or any other individual) would be obliged to join.[42] The duty of states to offer citizenship to stateless people in their territory thus should create no correlative duty on the part of the stateless to accept the offer.

2.6. Conclusion

I began this chapter by establishing the case for taking statelessness seriously against Joseph Carens' description of citizenship in the modern world as a feudal status. Yet I have now returned to Carens' observation to question the case for a duty on the part of stateless people to join those states that offer them citizenship. Herein lies the key paradox at the heart of attempts to resolve the problem of statelessness in the contemporary world: at its best, the possession of citizenship provides individuals with a particularly secure grounding for rights and protections, yet it also ties people to particular territories and reinforces egregious patterns of global inequality. Indeed, in many countries citizenship does not even offer the security of basic rights or insulate people from humiliating and harmful forms of social exclusion.

Possession of citizenship is almost always a necessary condition for securely holding fundamental rights in the contemporary world, but it is nowhere near a sufficient one. This is no reason to tolerate statelessness or to ignore the legal and moral duties states have to offer citizenship to stateless people. But it *is* a powerful reason not to exaggerate the protections and virtues of modern citizenship for most of the world's denizens: *where* one is born into citizenship is almost as important as *whether* one is born into citizenship. For the time being, statelessness is likely to remain a devastating and precarious plight that we have good reason to strive to eliminate. But, ironically, it might be that the very same principles of equality and security that impel us to put an end to statelessness also require us to start imagining a world beyond states.

[41] Carens, 'Migration and Morality'.

[42] Cf. R. M. Smith, *Stories of Peoplehood: The Politics and Morals of Political Membership* (Cambridge University Press, 2003), 136–41.

Questions to guide discussion

1. From the political science – rather than the legal – perspective, is the distinction between *de facto* and *de jure* stateless helpful in normative or descriptive terms?[43]
2. Why is statelessness commonly conceived of as a 'bad'? What are the consequences of a lack of nationality in the contemporary world order of states?
3. How has statelessness been 'used' by governing elites to control and maintain power? What are some of the political motives for creating or maintaining stateless residents?
4. What are the moral – as opposed to legal – imperatives to eradicating statelessness and to granting citizenship to stateless persons?
5. What do you think of Gibney's moral imperative based on 'fair distribution of stateless persons' among states, versus obligations to those already within a state's territory?
6. If one accepts a moral duty on states to admit stateless persons into its circle of membership, is there a correlative duty to accept that membership by the stateless?

[43] For the legal distinction and discussion questions, see the contribution by van Waas in this volume at Chapter 3.

The UN statelessness conventions

LAURA VAN WAAS

During the early years of the United Nations, statelessness featured prominently on its agenda. In March 1948, the Economic and Social Council (ECOSOC) requested the Secretary-General to undertake a study of 'the existing situation in regard to the protection of stateless persons',[1] to explore the need for further standard setting at the international level to address their vulnerable position. Just a few months later, on 10 December 1948, the Universal Declaration of Human Rights (UDHR) proclaimed that 'everyone has the right to a nationality' and 'no one shall be arbitrarily deprived of his nationality' – an expression of the international community's parallel interest in preventing new cases of statelessness from arising.[2]

Over the course of the years that followed, the UN proceeded to determine how and where international law could play a part in addressing statelessness in accordance with two identified objectives: 1) protecting people who are in need of attention and assistance because they are currently stateless; and 2) avoiding the creation of statelessness (eventually rendering the measures for the protection of stateless people obsolete over time). Thus, two separate instruments came into being: the 1954 Convention relating to the Status of Stateless Persons[3] and the 1961 Convention on the Reduction of Statelessness.[4]

While operating independently of one another – and clearly distinct in their aims and approach – these conventions share a common root in the *Study of Statelessness*.[5] Together the instruments form the core of the

[1] Resolution 116 (VI) D, Resolutions adopted by the Economic and Social Council during its sixth session (2 February to 11 March 1948), p. 18.

[2] Universal Declaration of Human Rights, Paris, 10 December 1948, GA Res. 217A(III), UN Doc. A/810 at 71, Art. 15.

[3] Convention relating to the Status of Stateless Persons, New York, 28 September 1954, in force 6 June 1960, 360 UNTS 117.

[4] Convention on the Reduction of Statelessness, New York, 30 August 1961, in force 13 December 1975, 989 UNTS 175.

[5] United Nations, *A Study of Statelessness*, UN Doc. E/1112 (August 1949).

international community's response to statelessness, as the only universal conventions to have a specific, dedicated and comprehensive focus on the issue. This chapter introduces the two United Nations' statelessness conventions and analyses their origins and content in detail, before offering some reflections on their impact and enduring relevance in light of contemporary developments.

3.1. The birth of a dedicated statelessness regime

In its *Study of Statelessness*, the United Nations concluded that 'statelessness is a phenomenon as old as the concept of nationality'.[6] Its existence was perceived to be an inevitable by-product of the freedom of states to set the rules for acquisition and loss of nationality, which at times leads to a conflict of laws situation that leave a person stateless. Such isolated cases, the study suggested, 'did not greatly disturb international life'[7] but, in the post-war era, 'statelessness assumed unprecedented proportions'.[8] This prompted the inclusion of statelessness in the work of the newly formed United Nations, eventually leading to the adoption of the 1954 and 1961 statelessness conventions, as set out below.

3.1.1 Protecting stateless people: the history of the 1954 Convention

The large-scale displacement and denationalization that accompanied the Second World War left hundreds of thousands of people without the protection of any government. Even though the UDHR proclaimed that 'all human beings are born free and equal in dignity and rights' and elaborated a catalogue of rights and freedoms to which everyone is entitled, regardless of their status, these 'unprotected persons' were still considered to be in a highly precarious situation. Given their circumstances, how exactly were their fundamental rights to be guaranteed and who, indeed, was responsible for their protection now that they were cast adrift from their state of origin?

During the drafting of the UDHR, the representative of the International Refugee Organisation[9] suggested that where *national* protection was

[6] *Ibid.* [7] *Ibid.*, p. 4. [8] *Ibid.*

[9] This is the United Nations' specialized agency established in 1946 to provide assistance to and, where appropriate, facilitate the repatriation of displaced persons and refugees following the Second World War.

lacking, *international* protection must be offered and that this was a role for the United Nations itself.[10] In a similar vein, a concrete proposal submitted during the drafting of the UDHR was to include in Article 15 – after the affirmation that 'everyone has the right to a nationality' – the following text: 'All persons who do not enjoy the protection of any Government shall be placed under the protection of the United Nations.'[11] However, the idea of incorporating a direct reference to international or UN protection in the UDHR did not garner enough support and was dropped in favour of leaving this matter to be dealt with separately by ECOSOC – which had already called for a more detailed study of the question.[12]

The publication, in 1949, of the UN's *Study of Statelessness*, therefore, marked the first real step towards the creation of an international regime for protecting the 'unprotected'. The study concluded that the 'improvement of the position of stateless persons requires their integration in the framework of international law'.[13] In other words, guaranteeing protection for stateless people necessitates the adoption of a 'general convention [as] a lasting international structure' as well as the creation of 'an independent organ which would to some extent make up for the absence of national protection and render them certain services which the authorities of a country of origin render to their nationals resident abroad'.[14]

It should be noted that in these sections of the study, as in the study's title, the term 'stateless' is deemed to refer to all those lacking the protection of a national government.[15] However, the study also draws a distinction between those among the 'unprotected' who are *refugees* and those who are *stateless persons*.[16] Moreover, the study distinguishes between

[10] He pointed out that: 'The principle of international protection for stateless people was accepted by the United Nations when it created the International Refugee Organisation, and [that] therefore the Declaration on Human Rights should contain a statement recognising the fundamental need of protection of thousands of people who were stateless either in law or in fact.' Statement by Oliver Stone, as cited in J. Morsink, *The Universal Declaration of Human Rights. Origins, Drafting and Intent* (Philadelphia, PA: University of Pennsylvania Press, 1999), 81.

[11] This was to be followed by a proviso reading 'This protection shall not be accorded to criminals, nor to those whose acts are contrary to the principles and aims of the United Nations.' See the Draft International Declaration on Human Rights in Annex A, Part I of the Report of the Commission on Human Rights, 6th Session, E/600, 17 December 1947.

[12] Resolution 116 (VI) D.

[13] United Nations, *A Study of Statelessness*, 43.

[14] *Ibid.*, 51 and 56.

[15] See also the 'Report of the Commission on Human Rights, 6th Session', E/600 (December 1947) para. 46 ('Miscellaneous Resolutions – Stateless Persons').

[16] For more on this, see A. Edwards and L. van Waas, 'Statelessness' in *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press, in 2014).

two categories of *stateless person*, namely the *de jure* stateless 'who are not nationals of any state' and the *de facto* stateless 'who, having left the country of which they are nationals, no longer enjoy the protection and assistance of their national authorities'.[17] The latter scenario – that of *de facto* statelessness – was seen to be closely aligned with the situation of refugees since, elsewhere, 'the study identified two causes of *de facto* statelessness, both of them refugee-related: taking refuge abroad as a result of racial, religious or political persecution; or mass emigration caused by changes in a country's political or social system'.[18] Most *de facto* stateless people would therefore be considered refugees. Refugees could meanwhile also be stateless *de jure* 'if they have been deprived of their nationality by their country of origin'.[19]

Although pointing out their distinct circumstances, both refugees and stateless persons were seen by the *Study of Statelessness* as requiring international assistance and so they remained grouped together when the study recommended the drafting of a convention to improve their status. The subsequently convened Ad Hoc Committee on Statelessness and Related Problems quickly agreed that an international treaty should be prepared for the protection of these two categories of 'unprotected person'. The majority of the committee members felt, however, that the two groups should be distinguished within this process.[20] The committee thus compiled the text of a Draft Convention Relating to the Status of Refugees and a Draft Protocol thereto Relating to the Status of Stateless Persons. This set the refugee and the stateless person, who had until then been cast together in the eyes of the international community, on diverging paths – a move which has had far-reaching consequences for the protection of the stateless to this day.

In 1951, the Convention relating to the Status of Refugees (Refugee Convention) was adopted and with it the international legal definition of a refugee was established. In essence, a refugee came to be defined as someone who is 'unprotected' because they have fled their country

[17] 'Report of the Commission on Human Rights, 6th Session', p. 7. Note that with regard to the category of *de facto* stateless, the study proceeds to reference the Annex to the Constitution of the International Refugee Organisation, which 'uses this formula: "a person... who... is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality"'.

[18] UNHCR, 'UNHCR and de facto statelessness' LPPR/2010/01 (April 2010), p. 6.

[19] United Nations, *A Study of Statelessness*, 8.

[20] G. Goodwin-Gill, 'Introduction to the 1954 Convention relating to the Status of Stateless Persons, from the United Nations Audiovisual Library of International Law', available at: http://untreaty.un.org/cod/avl/ha/cssp/cssp.html, last accessed 2 January 2013.

and cannot invoke the protection of their government, on account of a well-founded fear of persecution.[21] The refugee may or may not hold a nationality, but this is not the crux of the matter – what is paramount is whether they have a fear of persecution. With the adoption of the Refugee Convention, those stateless people who also met the definition of a refugee could benefit from international protection,[22] while the non-refugee stateless were left unprotected by either a national government or by international law. This was to be remedied by the aforementioned Draft Protocol to the Refugee Convention on the Status of Stateless Persons, but discussion of this text was deferred to a later date because of time pressure to adopt the refugee instrument and a sense that refugees were in urgent need of attention.[23]

A second conference of plenipotentiaries was convened in 1954, which set about drafting a new instrument on stateless persons, taking the Refugee Convention and the Draft Protocol as its point of departure to consider what rights to extend to non-refugee stateless people. Indeed, it was 'the prevailing view of the conference [...] that for a practical consideration (time) they should not engage in rewording the text of the Refugee Convention, except when this was justified by the difference between the two groups (refugees vs. stateless persons)'.[24] In the end, it was decided that the instrument should become a convention in its own right and it was adopted as the 1954 United Nations Convention relating to the Status of Stateless Persons (1954 Convention). The purpose of a separate convention – rather than a protocol – was to allow states to become parties to this statelessness instrument without having to first ratify the Refugee Convention. In practice, this possibility has remained virtually unused, since the Refugee Convention quickly drew dozens of states parties, while the 1954 Convention attracted relatively few and continues to lag behind its sister convention in accessions. Regardless, the shared drafting history of the two instruments as set out here has left an indelible mark on the 1954 Convention: it is almost identical to the Refugee

[21] Convention relating to the Status of Refugees, Geneva, 28 July 1951, in force 22 April 1954, 189 UNTS 150, Art. 1A(2).

[22] As well as from the assistance of the Office of the United Nations High Commissioner for Refugees, which was established the year before the Refugee Convention was adopted and is directly mandated with a supervisory role under Article 35 of the Convention.

[23] C. Bachelor, 'Stateless Persons: Some Gaps in International Protection', *International Journal of Refugee Law* (1995), 7; Goodwin-Gill, 'Introduction to the 1954 Convention relating to the Status of Stateless Persons'.

[24] N. Robinson, *Convention relating to the Status of Stateless Persons – Its History and Interpretation* (New York: Institute of Jewish Affairs, 1955).

Convention. The significance of this will be explored when the content and impact of the 1954 Convention is discussed later in this chapter, but first I turn to the drafting process of the second dedicated UN instrument on statelessness.

3.1.2 Avoiding statelessness: the history of the 1961 Convention

The history of the international community's interest in statelessness actually predates the developments described above, which unfolded only after the Second World War. Two decades earlier, there were already attempts to agree international rules that would reduce the incidence of statelessness. Indeed, the ultimate goal of the international community's engagement with statelessness was to eliminate past and future cases. The challenge in doing so rests in the ever-present tension between a state's freedom to set the conditions for acquisition and loss of nationality and the need to address anomalies like statelessness that result precisely from that freedom.[25]

The League of Nations' Hague Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 (1930 Hague Convention) sought to navigate a course between these tensions.[26] For example, the 1930 Hague Convention details how states should deal with certain situations giving rise to statelessness within their respective nationality laws, including voluntary renunciation of nationality (Articles 7 and 12), potential change of nationality as a result of change in civil status or a change in the nationality of a family member (Articles 8, 9, 13, 16 and 17), acquisition of nationality by foundlings (Article 14) and acquisition of nationality by children born to parents who are themselves of unknown nationality or stateless (Article 15).[27] A Protocol relating to a Certain Case

[25] Note that historically, regulating access to nationality was seen as part of the *domaine réservé* of states and it was not initially subject to any rules of international law. *Tunis and Morocco Nationality Decrees case*, Permanent Court of International Justice, 1923, p. 24. A detailed exposition of the developing influence of international law on nationality is given in P. Spiro, 'A New International Law of Citizenship', *The American Journal of International Law*, 105 (2011).

[26] See, in this respect, Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Law, The Hague, 13 April 1930, in force 1 July 1937, 179 LNTS 89.

[27] It should be noted that this guidance is issued in varying degrees of obligation, using suggestive language in some provisions (such as Article 15 on granting nationality by place of birth to children whose parents are themselves of unknown nationality or stateless) and directive language in others (such as Article 14 on foundlings).

of Statelessness was also adopted, specifically 'with a view to preventing statelessness'.[28] This protocol's only substantive Article obliges state parties to confer nationality to 'a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality', even if the state does not usually adhere to the *jus soli* system.[29] Thus, without seeking to harmonize nationality regulations more broadly and with minimal interference in states' sovereignty in the area of nationality, the 1930 Hague Convention and Protocol codified the first significant international rules regarding the avoidance of statelessness.

Although successful in laying some early groundwork for the regulation of nationality matters by international agreement, these 1930s standards proved insufficient to secure the avoidance of statelessness. Then, the right to a nationality was included in the 1948 Universal Declaration of Human Rights, recognizing, for the first time, 'the individual's interest in nationality to be a matter of international law'.[30] Subsequently, in 1954, the International Law Commission (ILC) answered the General Assembly's call for the preparation of 'a draft international convention or conventions for the elimination of statelessness',[31] forwarding two proposals for its consideration: a Draft Convention on the Elimination of Future Statelessness and a Draft Convention on the Reduction of Future Statelessness.[32] While not markedly different in terms of their overall style and content, the two drafts differed significantly in their potential to deal with statelessness. The first of these alternatives contained unconditioned safeguards which, if implemented through each state's nationality laws, would guarantee that no new cases of statelessness would arise in the various conflicts of laws scenarios dealt with. The second draft convention addressed the same set of problems and in a broadly similar fashion. However, this version acknowledged that a state could prescribe certain preconditions for individuals who wish to benefit from some of the safeguards against statelessness to meet.

Both drafts prepared by the ILC focused exclusively on providing a solution in the specific circumstance of a threat of statelessness and did

[28] Protocol Relating to a Certain Case of Statelessness, The Hague, 12 April 1930, in force 1 July 1937, 179 LNTS 115, Preamble.

[29] *Ibid.*, Art. 1.

[30] Spiro, 'A New International Law of Citizenship', 710.

[31] Resolution 319 (IV): Provisions for the functioning of the High Commissioner's Office for Refugees, UN General Assembly, 11 August 1950.

[32] International Law Commission, 'Report of the International Law Commission covering the work of its Sixth Session' A/CN.4/88 (1954).

not seek to establish international rules on nationality more generally. Nevertheless, by phrasing the proposed safeguards in absolute terms, the Draft Convention on the Elimination of Future Statelessness was deemed a step too far when government representatives met in 1959 to discuss the texts. Therefore, it was quickly discarded in favour of a detailed consideration of the alternative draft, that on the *reduction* of future statelessness. This version was seen to strike a better balance between states' sovereign interests in the realm of nationality and the common interest of agreeing some restrictions on this discretion with a view to avoiding statelessness.[33] After some further painstaking negotiations, a text was finally agreed and adopted at a second meeting convened in 1961 as the United Nations Convention on the Reduction of Statelessness (1961 Convention).[34]

3.2. The content of the statelessness conventions

Twelve years after publishing its *Study of Statelessness*, the United Nations' international statelessness regime was finally in place. As the drafting history demonstrates, the first instrument adopted, the 1954 Convention, aims to guarantee the enjoyment by stateless people of a minimum set of rights. The second, the 1961 Convention, houses a set of safeguards for the avoidance of statelessness. Details of the approach taken by the conventions to meet these respective aims are set out in the following paragraphs.

3.2.1 Protecting stateless people: the approach of the 1954 Convention

A core provision of the 1954 Convention and one that was the subject of intense discussion both during the drafting process and again in recent years, is Article 1(1).[35] This sets out the definition of a stateless person as follows:

> The term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.

[33] C. Batchelor, 'Stateless Persons: Some Gaps in International Protection', *International Journal of Refugee Law*, 7 (1995), 250; UNHCR and IPU, 'Nationality and Statelessness. A Handbook for Parliamentarians' (2005), 12.

[34] See further L. E. van Waas, *Nationality Matters. Statelessness under International Law* (Antwerp/Oxford/Portland, OR: Intersentia, 2008), 45.

[35] See, for instance, Robinson, *Convention relating to the Status of Stateless Persons*; UNHCR, 'Expert Meeting – The Concept of Stateless Persons under International Law ("Prato Conclusions")' (May 2010).

What underlies the stateless person's 'unprotected' status and what renders him or her in need of international protection, is simply the absence of a nationality.[36] It is neither relevant how the individual came to be without nationality nor where the person subsequently finds him or herself.[37] Once stateless – and bar some limited exclusion clauses[38] – a person is entitled to the benefits of the 1954 Convention.

Before looking at what these benefits are, it is worthwhile pointing out that several other international instruments also refer to statelessness – including, of course, the 1961 Convention – and it is a term in common use within the UN framework, as well as at the level of both national and regional legal systems.[39] Yet, this opening provision of the 1954 Convention is the only place where international law defines the term. As such, the definition of statelessness provided by this instrument is widely recognized as the basis for interpreting any reference to statelessness found elsewhere in treaty, legislation or soft law texts. It has also been described by the ILC as having attained the status of customary international law, meaning that the definition housed in the 1954 Convention should be adhered to by all states when dealing with the question of statelessness, even if they have not acceded to the convention.[40]

[36] The corresponding article of the Refugee Convention defines a refugee as 'unprotected' and in need of international protection due to a well-founded fear of persecution on one of a number of particular grounds.

[37] As the UNHCR Handbook on Protection of Stateless Persons explains, 'the question of free choice is not relevant when determining eligibility for recognition as stateless under article 1(1)'. Moreover, 'article 1(1) applies in both migration and non-migration contexts'. UNHCR, 'Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons'(Geneva, 2014), paras. 51 and 15 respectively.

[38] These can be found in Article 1(2) of the 1954 Convention and are, in effect, also the same as those encountered in the 1951 refugee convention. They detail who is considered to either not need or not deserve this international protection, including: persons who are already receiving assistance from another United Nations agency (primarily excluding Palestinians assisted under UNRWA's mandate) and persons with respect of whom there is serious reason for considering that they have committed a crime against peace or a serious non-political crime. Note that someone who falls within one of these exclusion clauses is still 'stateless' and must be treated as such where international law provides other benefits on the basis of that status, but they fall beyond the specific scope of protection of the 1954 Convention.

[39] Other examples of international and regional instruments that refer explicitly to statelessness include Article 7 of the Convention on the Rights of the Child, Article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women and several Articles of the European Convention on Nationality.

[40] The International Law Commission states in its commentary to the Draft Articles on Diplomatic Protection, which also refers to statelessness without defining it, that the 1954 Convention definition 'can no doubt be considered as having acquired a customary

The benefits accruing to the status of 'stateless person' under the 1954 Convention come in the form of a set of civil, economic, social and cultural rights for which a minimum standard of treatment is guaranteed. The topics covered are the same as those dealt with in the Refugee Convention, upon which this instrument was modelled. They are: religious freedom, access to courts, (moveable, immoveable and intellectual) property, education, employment and labour rights, freedom of association, social security, housing, rationing, free movement and legal personhood. Significantly, although the 1954 Convention does not require states parties to grant their nationality to stateless persons, it does call on states to facilitate the naturalization of stateless people, with a view to helping them to resolve their situation by acquiring a nationality as quickly and easily as possible.[41]

The actual standard of treatment to be enjoyed by a stateless person differs from one right to another, again mimicking the Refugee Convention in this regard. The base level of rights enjoyment is that 'accorded to aliens generally in the same circumstances' and effectively amounts to a non-discrimination clause for stateless persons vis-à-vis other non-nationals.[42] However, most of the provisions ask contracting states to offer 'treatment as favourable as possible' and some demand the same treatment as nationals. There are also a number of absolute rights, to be accorded to stateless people regardless of whether these are available for the country's own nationals.[43] The 1954 Convention also copied another technique of the Refugee Convention: extending these benefits of the convention on a gradual scale, according to the degree of attachment between the person and the state. Thus, only a few of the rights housed in the 1954 Convention can immediately be invoked by anyone within a state's jurisdiction who satisfies the definition of a stateless person. Many of the entitlements are only offered to those who are lawfully present, lawfully staying or even habitually resident in the territory of the contracting state.[44]

nature'. However, no further reasoning is provided. ILC, 'Draft Articles on Diplomatic Protection with Commentaries', *Yearbook of the International Law Commission*, 2 (2006) 49.

[41] Art. 32, 1954 Convention. [42] *Ibid.*, Art. 7(1).

[43] The rights included are: access to courts (Art. 16(1)) and protection from expulsion (Art. 31).

[44] Examples of rights applicable for stateless persons lawfully staying include the right to wage-earning employment, artistic and intellectual property rights and the right to public relief.

The prescription of different standards of treatment, to be enjoyed in accordance with different levels of attachment to the state, creates a complex picture in terms of the exact benefits stateless people are entitled to enjoy under the 1954 Convention.[45] The operation of the convention has also been complicated by the lack of instruction on how the definition of a stateless person is to be applied in practice – the instrument itself is silent on this. The manner in which the 1954 Convention came into being and the core characteristics of the text as described here have conspired to cause problems in its implementation, as will be explored in Part 3.3.1 below. Moreover, the 1954 Convention failed to include any kind of oversight mechanism. Its sister instrument, the Refugee Convention, establishes in contrast a clear role for the Office of the United Nations High Commissioner for Refugees with regards to the interpretation and supervision of its implementation by states.[46] When the 1954 Convention became a stand-alone instrument, rather than a protocol to the Refugee Convention as originally envisaged, it also became divorced from this supervisory machinery.

3.2.2 Avoiding statelessness: the approach of the 1961 Convention

It is time to turn to the content of the 'other' statelessness convention: the 1961 Convention on the Reduction of Statelessness. At first sight, this instrument appears difficult to digest. The first Article alone takes up more than a full page in the official UN version available online, thanks to its various paragraphs and sub-paragraphs.[47] Despite this, the 1961 Convention is actually relatively straightforward. In its ten substantive Articles, it sets out safeguards for the avoidance of statelessness in three broad contexts: acquisition of an original nationality at birth, including by foundlings (Articles 1 to 4);[48] loss, deprivation or renunciation of

[45] See the 'Schematic Overview of Rights in the 1954 Statelessness Convention' in Annex 3 of L. van Waas, *Nationality Matters. Statelessness under International Law*, 455.

[46] According to Article 35 of the 1951 Refugee Convention, 'Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees ... in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.' As such, states have a duty to report to UNHCR on the implementation of the convention. Moreover, under its own Statute UNHCR is also mandated to promote ratification of relevant instruments and implementation of appropriate measures for the protection of refugees. See Article 8 of the Statute of the Office of the United Nations High Commissioner for Refugees, as adopted by the General Assembly on 14 December 1950 (Annex to Resolution 428 (V)).

[47] Available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/6_1_1961.pdf, last accessed 2 January 2013.

[48] See Chapter 6 by de Groot in this volume.

nationality in later life (Articles 5 to 9);[49] and in respect of succession of states (Article 10).[50] In each case, the provision indicates which state is responsible for allowing a person to acquire or retain nationality if they would otherwise be stateless.

The 1961 Convention offers a far more comprehensive framework in this respect than the earlier 1930 Hague Convention and Protocol.[51] At the same time, the 1961 Convention holds true to the approach adopted by its League of Nations' forerunners; it respects the overall freedom of states to legislate as they see fit in the area of nationality and does not attempt to create an international law on nationality. Instead, all bar one of its provisions only enter into effect when the outcome would 'otherwise' be statelessness. The only Article to proclaim a broader obligation for states to adhere to when rendering any decision on nationality is Article 9, which prohibits the deprivation of nationality on 'racial, ethnic, religious or political grounds'. This is a general standard that echoes and reinforces Article 15(2) of the UDHR, which prohibits the arbitrary deprivation of nationality.

Overall, the 1961 Convention thus offers a clear and concrete set of guarantees for the avoidance of statelessness in each of these potential conflict of laws situations that can be readily transposed into domestic law. Nevertheless, the early decision to proceed with a text that prescribes only the *reduction* and not the *elimination* of statelessness means that some cases may still slip through. The text displays the unfortunate hallmarks of an international compromise shaped by the previously discussed tension between states' sovereign interests in the field of nationality and the shared interest of avoiding statelessness – it stops short of prescribing obligations that will decisively eliminate statelessness in all circumstances. Herein lies the explanation for the length and complexity of the 1961 Convention Articles. Had the draft text on the *elimination* of statelessness been adopted, Article 1 would have simply read as follows:

> A person who would otherwise be stateless shall acquire at birth the nationality of the Party in whose territory he is born.[52]

[49] See Chapter 8 by Brandvoll in this volume.

[50] See Chapter 9 by Ziemele in this volume.

[51] For instance, the 1961 Convention provides for acquisition of nationality by any child born on a contracting state's territory who would otherwise be stateless (Article 1). This is a more effective guarantee than that offered in either the 1930 Hague Convention or the Protocol Relating to a Certain Case of Statelessness which both focus on securing a nationality for a child, one or both of whose parents are stateless. This latter approach does not address the situation in which the parents do hold a nationality, but are, for whatever reason, unable to transmit this nationality to their child.

[52] 'Draft Convention on the Elimination of Future Statelessness', *Yearbook of the International Law Commission* (1954), 2.

Article 1 in the 1961 Convention on the Reduction of Statelessness, as adopted, comprises five lengthy paragraphs with further sub-paragraphs. In fact, the ten substantive provisions of the Draft Convention on the Elimination of Future Statelessness amounted to just 477 words in total, while the word count for the same ten Articles in the 1961 Convention comes to four times that: 1,855 words.

Sticking with Article 1, the reluctance of states to surrender too much of their freedom to regulate access to nationality can be demonstrated through closer inspection of the various paragraphs and sub-paragraphs, which effectively operate as provisos to the main rule elaborated in the opening sentence: 'A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless.'[53] A state may choose the path of automatic conferral of nationality in these circumstances, which would meet the standard envisaged in the Draft Convention on the Elimination of Future Statelessness by ensuring the immediate and unconditional avoidance of childhood statelessness. However, in accordance with paragraph 1(b) of Article 1, a state may also elect to establish an application procedure for the grant of nationality at a later date to a child who is stateless from birth. The state may also make such an application subject to one or more of four conditions detailed in paragraph 2 of the same Article.[54] Recognizing that this system may leave some persons stateless, paragraph 4 offers a further safeguard to help those who fail to acquire a nationality because they missed the application deadline or did not fulfil the residence requirements set – in such circumstances by descent from a parent who is a national. However, there too, access to nationality may be offered through an application procedure and again subject to certain conditions. Thus, although the text asserts the general rule that nationality may not be lost or deprived where it would leave an individual stateless, it also accepts that states may nevertheless render a person stateless in this manner, in a limited set of exceptional circumstances.[55] In all, by giving states

[53] Art. 1(1), 1961 Convention.

[54] This exhaustive list of further conditions is as follows: 'a fixed period for lodging an application immediately following the age of majority (Article 1(2)(a)); habitual residence in the Contracting State for a fixed period, not exceeding five years immediately preceding an application nor ten years in all (Article 1(2)(b)); restrictions on criminal history (Article 1(2)(c)); and the condition that an individual has always been stateless (Article 1(2)(d))'. UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness' HRC/GS/12/04 (21 December 2012), para. 36.

[55] The exceptions concern the following situations: loss or deprivation of nationality where a naturalized person has spent an extended period of residence abroad (Article 7(4)); loss

some freedom with regard to the manner in which certain safeguards are effectuated, the 1961 Convention is realistic in its ambitions and offers flexibility, but it also undercuts its primary objective by admitting that some people will be rendered or left stateless without this amounting to a violation of the Convention's terms.

Given the aforementioned exceptions that states are permitted to maintain under the 1961 Convention to the general rule that statelessness is to be avoided, it is of great importance to ensure that states do not overreach this margin of discretion by interpreting the various exceptions too expansively or upholding conditions that are not prescribed by the 1961 Convention. In this regard, the question of a supervisory mechanism is central. Article 11 of the 1961 Convention aims to address this matter. A person who believes that they are entitled to invoke one of the instrument's safeguards can, if such assistance is required, receive help from an appointed international 'body' to present their claim to the requisite state authority. Since the entry into force of the 1961 Convention, UNHCR has held the mandate to carry out this role.[56] However, this advisory function lacks the power of a true supervisory mechanism and has, in practice, seldom been invoked.[57] This will necessarily have an impact on the level of implementation of the convention's safeguards.

3.3. Assessing the impact and relevance of the statelessness conventions today

For the first four decades after their adoption, the statelessness conventions drew very little interest. State parties were unforthcoming and the instruments were relatively slow to enter into force.[58] The international

or deprivation of nationality for a person who acquired nationality by descent (while born abroad) and failed to take the steps prescribed by law to retain this nationality upon attaining the age of majority (Article 7(5)); deprivation of nationality acquired by fraud (Article 8(2)(b)); and deprivation of nationality as a consequence of the person committing particular acts which are inconsistent with his or her duty of loyalty to the State (Article 8(3)).

[56] Resolution 3274 (XXIV), UN General Assembly, 10 December 1974.

[57] Note that both the 1954 and 1961 UN statelessness conventions grant jurisdiction to the International Court of Justice to settle any disputes arising over the interpretation and application of the instruments' terms, but no such referrals have been made under either convention to date. Moreover, it can be questioned whether it is appropriate to rely on a state to initiate proceedings before the ICJ on behalf of a stateless person, given that their lack of national protection is what underlies their situation. See also L. van Waas, *Nationality Matters. Statelessness under International Law*, 46.

[58] A chart mapping the rate of accessions to both statelessness conventions is available at: www.unhcr.org/4ff2e4b39.html, last accessed 9 May 2014.

community scarcely devoted any attention to promoting the conventions, with calls for ratification – for instance, from the UN General Assembly – only starting to pick up from the late 1990s.[59] UNHCR's involvement was initially also very limited. Although tasked by the General Assembly in the 1970s as the body to which an individual could turn to receive assistance in presenting a claim under the 1961 Convention to the relevant authority, the agency did not actively pursue this element of its mandate, as refugee work continued to monopolize its time and resources. The more expansive, global mandate that UNHCR holds today also only developed later.[60] Nor did the statelessness conventions attract much in the way of analysis or academic writing – only a handful of publications devoted more than a cursory reference to the issue during this period.[61] It was with no false modesty then, that the conventions' own 'Information and Accession Package' – released at the turn of the century to expound their merits to potential state parties – described them as 'orphan conventions'.[62] Yet the question as to the impact and enduring relevance of the UN statelessness conventions is complex and requires a deeper exploration of their value in light of contemporary developments.

3.3.1 *Protecting stateless people: challenges and opportunities under the 1954 Convention*

One of the most significant consequences of this period of neglect of the statelessness conventions is that certain questions relating to

[59] See the UNHCR compilation of 'Extracts of international documents encouraging states to accede to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness', available at: www.unhcr.org/refworld/pdfid/4c21c6822.pdf, last accessed 9 May 2014.

[60] See Chapter 4 by Manly in this volume.

[61] These include two works by Paul Weis: Paul Weis, 'The United Nations Convention on the Reduction of Statelessness, 1961', *International and Comparative Law Quarterly*, 2 (1962), 4; and Paul Weis, *Nationality and Statelessness in International Law* (Dordrecht: Kluwer Academic Publishers Group, 1979); as well as a number of articles written by Carol Batchelor from 1995 onwards, including: Carol Batchelor, 'Statelessness and the Problem of Resolving Nationality Status', *International Journal of Refugee Law*, 10 (1998) and Carol Batchelor, 'Developments in International law: The Avoidance of Statelessness Through Positive Application of the Right to a Nationality', Council of Europe's First Conference on Nationality, Strasbourg, 2001.

[62] UNHCR, 'Information and Accession Package: The 1954 Convention relating to the status of stateless persons and the 1961 Convention on the reduction of statelessness', Geneva (January 1999).

the interpretation and application of the 1954 Convention standards remained unaddressed. This is particularly evident with regard to the fundamental issue of what is understood by the term 'stateless'. Although the 1954 Convention sets out a definition of – and legal regime for – the 'stateless person', this did not entirely quell debate about who ought to benefit from international protection. In principal, with the adoption of the 1951 Convention on refugees and, three years later, the 1954 Convention, states had defined the circumstances in which they would be willing to extend such protection to otherwise 'unprotected persons'. This lack of protection warranting international protection must either manifest itself as a fear of persecution or as the absence of nationality. Yet there was a nagging sense among many that the *quality* not just the *possession* of nationality is crucial. Thus, some commentators argued that 'persons with no effective nationality are, for all practical purposes, stateless, and should be labelled and treated as such'.[63] The drafters of the 1954 Convention themselves acknowledged this conundrum in the instrument's Final Act, as previously mentioned, when they recommended that a state party also consider extending the benefits of the convention to others 'when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national'.[64] This recommendation was included as a nod towards the protection of the so-called '*de facto* stateless'.[65]

The notion of '*de facto* statelessness' has more recently attracted considerable attention and has been the subject of varying and at times extremely broad interpretations, usually centring on the basic idea of holding a nationality that is somehow ineffective.[66] What little debate there was on statelessness in international affairs was often distracted by a preoccupation with this broader group, for whom no dedicated international legal framework had been developed and with regard to whom states' obligations of *international* protection were therefore

[63] D. Weissbrodt and C. Collins, 'The Human Rights of Stateless Persons', *Human Rights Quarterly*, 28 (2006), 251.

[64] Art. 1, Final Act of the 1954 Convention.

[65] This, in contrast to the '*de jure* stateless' which is the term commonly used to describe those who meet the international legal definition of a stateless person, as contained in Article 1 of the 1954 Convention relating to the Status of Stateless Persons. See also the discussion of the distinction between *de jure* and *de facto* statelessness made within the original United Nations, *A Study of Statelessness*.

[66] A detailed discussion of the history of the concept of *de facto* statelessness and an overview of some of its different usages can be found in H. Massey 'UNHCR and de facto Statelessness' UNHCR Legal and Protection Policy Series, Geneva, April 2010.

highly ambiguous.[67] In contrast, there was scant investment in improving the understanding of the parameters and practical application of the definition of a 'stateless person' as prescribed in Article 1 of the 1954 Convention. For instance, dedicated Stateless Status Determination mechanisms – a logical equivalent to the common Refugee Status Determination procedures – are few and far between.[68] Similarly, while the definition of a refugee was debated and the concept of refugee protection underwent progressive interpretation through doctrinal guidance and jurisprudence, the international statelessness regime has not yet undergone the same kind of organic development, although this is slowly changing.

There has recently been a concerted effort by the international community to make up for lost time in terms of its commitment to the 1954 Convention. The relative enforcement gap pointed out earlier in this chapter has already been closed by the expansion of UNHCR's statelessness mandate to include the protection of stateless persons, in part by acting as a guardian of the 1954 Convention.[69] UNHCR has subsequently taken a leading role in helping to settle the ambiguity surrounding state parties' obligations towards stateless people and the manner in which the determination of statelessness should be conducted, by encouraging doctrinal debate and developing authoritative guidance on these issues, including on the definition.[70]

This is helping to finally put to rest some of the debate surrounding '*de facto* statelessness'. The criticism that the 1954 Convention's definition of a 'stateless person' is too narrow and will only offer a pathway to protection for a select few has been demonstrated as ungrounded. Many situations

[67] This is notwithstanding the obligations of states towards all persons within their jurisdiction on the basis of human rights law and the specific obligations relating to the protection of the rights of their citizens.

[68] See Chapter 5 by Gyulai in this volume.

[69] See, for instance, General Assembly Resolution No. 61/37, Office of the United Nations High Commissioner for Refugees, A/RES/61/137, 25 January 2007. See Chapter 4 by Manly in this volume.

[70] UNHCR, 'Guidelines on Statelessness No. 1: The Definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons' HCR/GS/12/01 (20 February 2012); UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person' HCR/GS/12/02 (5 April 2012); UNHCR, 'Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level' HRC/GS/12/03 (17 July 2012). These guidelines have been consolidated into UNHCR, "Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons' (Geneva, 2014).

that have long been described as '*de facto* statelessness' should properly be understood as falling within the scope of the 1954 Convention definition of a stateless person, because the individuals in question are 'not *considered as* a national *under the operation of* [any state's] law'.[71] The assessment of who is a 'stateless person' must take into account not only the letter of the law, but also the manner in which the state interprets and applies this law. As such, even if an objective third party would determine that a certain person enjoys nationality on the basis of their reasoned reading of the legislation in force, if the state reaches the opposite conclusion, this latter viewpoint is decisive. On the other hand, if the state evidently does deem the person to be a citizen but he or she is experiencing problems exercising particular rights in that state – such as voting or owning property – there is a clear violation of human rights norms, which needs to be tackled as such, but it is not a problem of statelessness. There is only a small grey area remaining, where the notion of '*de facto* statelessness' lingers, namely with respect to a person who is *outside* their country of nationality and cannot invoke its diplomatic or consular protection.[72] As shown earlier in this chapter, the original United Nations *Study of Statelessness* coined the term '*de facto* statelessness' in relation to such circumstances, but in most cases such individuals will fall within the scope of the international refugee protection framework. Now that the 1954 Convention's protection scope has been clarified and states are exploring how best to implement this in their national systems, the international community will be better placed to have a focused and informed discussion on the extent to which the UN framework needs to be supplemented. In the few remaining incidences where a person is neither stateless, nor a refugee, but is abroad and without *national* protection, it remains to be seen whether states are willing to go beyond their present obligations and nevertheless extend *international* protection.

The push to make up lost ground and settle the various outstanding questions is an acknowledgement that the protection of stateless people warrants more attention, and that the 1954 Convention – regardless of any intrinsic shortcomings – provides useful tools for this purpose that cannot readily be found elsewhere in international law. Indeed, although human rights law now offers a broader framework for the protection of individual rights, there is no other instrument that is specifically geared

[71] Emphasis added, Art. 1(1), 1954 Convention.

[72] On diplomatic protection and consular assistance, see Chapter 1 by Edwards in this volume.

towards the situation and particular needs of the stateless. In particular, the special measures prescribed by the 1954 Convention, such as travel and identity documents, administrative assistance and an appeal for facilitated naturalization, continue to form a vital complement to human rights standards.

3.3.2 Avoiding statelessness: challenges and opportunities under the 1961 Convention

It is interesting to note that, despite its cautious and flexible approach, the 1961 Convention on the Reduction of Statelessness was especially slow to attract support following its adoption – even compared to the 1954 Convention.[73] Nevertheless, upon closer inspection, the influence of the standards housed in the 1961 Convention may, in fact, belie its 'orphan' status. In reality, states continued to face the very same challenges that had paved the way for the negotiation of this international agreement to begin with. They were confronted with conflicts of nationality laws that had the potential to leave people stateless and this was still considered to be a fundamentally undesirable anomaly. The 1961 Convention provides practical solutions for the most common problems encountered by states, including for the avoidance of statelessness among children upon a change of civil status and resulting from renunciation, loss or deprivation of nationality. In elaborating these safeguards, the 1961 Convention takes its cue from the fundamental principles upon which all states' nationality policy is ultimately based: family ties (*jus sanguinis*) and a territorial connection (*jus soli* and *jus domicilli*).[74] By adopting a balanced and pragmatic approach, grounded in existing nationality doctrine, the 1961 Convention actually reflects how states have sought to address the aforementioned problems of statelessness even in the absence of formal ratification of the convention, and thus have wider relevance beyond the circle of states parties.

A comprehensive global review of nationality laws' compliance with the 1961 Convention has yet to be carried out.[75] However, various basic surveys and regional studies provide some sense of the extent to which the 1961 Convention standards have spread. In Africa, for example, a region-wide

[73] In the end, it took until December 1975 for the 1961 Convention to enter into force, having finally accrued the six state parties required two years previously.

[74] See Chapter 1 by Edwards in this volume.

[75] UNHCR, the EUDO Citizenship Observatory, the Statelessness Programme of Tilburg Law School and other partners are currently cooperating with a view to establishing a

audit of citizenship laws completed in 2009 indicated that at least nine countries provide some form of explicit protection against statelessness in the context of loss or deprivation of nationality, incorporating all or part of the safeguards set out in Articles 7 and 8 of the 1961 Convention, even though only two of those included in this list are state parties.[76] The same audit uncovered at least thirty-nine African countries with a provision in their nationality laws allowing a child of unknown parentage (i.e., a foundling) to acquire citizenship, concurring with Article 2 of the 1961 Convention – as well as Article 14 of the even more poorly ratified 1930 Hague Convention – despite a very low number of state parties to this instrument in Africa.[77] Similar trends are visible, for instance, in Europe and the ASEAN region.[78] This demonstrates that the lack of interest in formally acceding to the 1961 Convention is not matched by an equal disinterest in the overall avoidance of statelessness. On the contrary, many states have put in place one or more of the safeguards against statelessness which have been codified in this instrument. Moreover, even taking into account developments in the field of international law since the convention was adopted, this statelessness-specific instrument has retained its value and is being given renewed consideration since statelessness started to climb back up the international agenda as an issue of concern from the late 1990s onwards.[79] There is no other universal treaty with such detailed, comprehensive and readily implementable safeguards for the avoidance of statelessness, which helps to explain the recent

Global Nationality Law Analytical Database. The aim is to assess each country's nationality law and its compliance with major international standards, including key provisions of the 1961 Convention on the Reduction of Statelessness. Once this data becomes available, the exact reach of the 1961 Convention standards will become more visible.

[76] B. Manby, *Citizenship Law in Africa. A Comparative Study* (New York: Open Society Institute, 2009) at table 6. Status of accessions in all cases cited here as of 9 May 2014.

[77] Thirty-one of the countries in which a foundling provision was traced were not parties to the 1961 Convention at the time of the citizenship audit. Manby, *Citizenship Law in Africa*, at table 1.

[78] L. van Waas, 'Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in South East Asia', Human Rights in Southeast Asia, Series 1: Breaking the Silence, South East Asia Human Rights Network, (2011). Assessment tables compiled by the European Union Democracy Observatory on Citizenship, available at: http://eudo-citizenship.eu, last accessed 4 January 2013.

[79] The right to a nationality is now widely recognized as a fundamental human right. It has been included in almost every major human rights instrument since the 1948 Universal Declaration – both at the global and at the regional level. Consider, for instance, Article 24 of the International Covenant on Civil and Political Rights; Article 7 of the Convention on the Rights of the Child; Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Article 9 of the Convention on the Elimination of All Forms of Discrimination Against Women;

increase in accessions.[80] Moreover, it offers a concrete platform from which UNHCR – as the United Nations' agency mandated to assist states to implement the convention – can provide valuable technical advice on the reform and application of nationality laws to prevent and reduce statelessness.[81]

At the same time, certain challenges inherent in the approach of the 1961 Convention must be acknowledged. First, there are the limitations described earlier in this chapter with regard to the sub-clauses that may allow a person to become or remain stateless even when the safeguards are fully implemented. In particular where this has the effect of allowing someone to be stateless from birth into adulthood or even beyond, it can be questioned whether this benchmark is not inappropriately low given the widespread recognition of a *child's* right to a nationality.[82] Second, the 1961 Convention does not deal in any real depth with the problem of statelessness when arising from state succession. Article 10, which addresses this issue, offers neither the required depth nor detail to address the problem decisively. The ILC, which previously undertook the preparatory drafting of the 1961 Convention, has since identified this gap and elaborated the Articles on Nationality of Natural Persons in Relation to the Succession of States. This separate set of standards, however, has yet to attain the status of an international convention and remains a soft law instrument.[83] Third, the 1961 Convention shows its age where it fails to tackle some of the contemporary challenges with regard to the prevention of statelessness. In debating the draft text half a century ago, states could not have foreseen that modern reproductive technology, resulting, for

Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination; Article 18 of the Convention on the Rights of Persons with Disabilities; Article 6 of the African Charter on the Rights and Welfare of the Child; Article 20 of the American Convention on Human Rights; Article 7 of the Covenant on the Rights of the Child in Islam; Article 6 of the UN Declaration on the Rights of Indigenous Peoples. However, the formulation of this right tends to be in largely aspirational terms and it is not immediately clear which state would be responsible for attributing nationality in any given circumstances.

[80] Only in the European context has a similar effort to elaborate more concrete safeguards been pursued, resulting in the 1997 European Convention on Nationality – and later also the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession.

[81] See, for instance, UNHCR, 'Note on International Protection. Addendum – Note on Statelessness' A/AC/96/1098/Add.1 (28 June 2011).

[82] See Chapter 6 by de Groot in this volume.

[83] Articles on Nationality in relation to the succession of States, as contained in *Yearbook of the International Law Commission*, 1999, vol. II, Part Two. See Chapter 9 by Ziemele in this volume.

instance, in complex international surrogacy arrangements, would manifest itself down the line as a new source of potential conflicts of nationality laws and statelessness. The 1961 Convention is understandably, yet regrettably, silent on such questions. Finally, there are some areas in which the 1961 Convention appears to actually stand at odds with subsequent developments in international law. For example, it fails to prescribe gender equality in the enjoyment of nationality rights and even makes a distinction within its own safeguards between children born in and out of wedlock.[84] Furthermore, there is an emerging view among scholars that any deprivation of nationality resulting in statelessness is, by definition, arbitrary and thereby prohibited under international human rights law.[85] The 1961 Convention, however, allows for the loss or deprivation of nationality in several different circumstances, even if this would lead to statelessness.[86]

3.4. Conclusion

Since the turn of the century, statelessness has resurfaced onto the international agenda, after a period of relative neglect and with a fresh sense of urgency. There is evident concern about what is now understood to be the impact of statelessness on human security and communal stability.[87] Indeed, whether it be in the (online) media, in multilateral government meetings, in academic literature or in civil society programming, interest in statelessness is arguably keener today than ever before. What is of great interest is the position of the statelessness conventions within this renaissance. In October 2012, as UNHCR welcomed the newest state parties to the 1954 and 1961 conventions, High Commissioner Guterres pronounced:

> We are at a turning point. Fifteen states have become parties to the Conventions in the past 18 months and we know that many more are

[84] Gender is missing from the list of grounds elaborated in Article 9 of the 1961 Convention on which deprivation of nationality is prohibited. See Chapter 7 by Govil and Edwards in this volume.

[85] See Chapter 8 by Brandvoll in this volume.

[86] Compare, for instance, Articles 7 and 8 of the 1961 Convention to Article 7 of the European Convention on Nationality (adopted by the Council of Europe in 1997).

[87] See, for instance, L. van Waas and M. Manly, 'The Value of the Human Security Framework in Addressing Statelessness' in Edwards and Ferstman (eds.), *Human Security and Non-Citizens: Law, Policy and International Affairs*, (Cambridge University Press, 2010) 49–81.

> preparing to do so – in the Americas, Africa, Asia, Europe and the Middle East. This is unprecedented.[88]

In fact, by the end of 2012, a new record had been set for attracting the greatest number of new states parties to the two UN statelessness conventions in any year since their adoption. Thus, rather than being cast out as irrelevant in content, inadequate in approach or invalidated by time, the instruments are being widely embraced.

Today, the 1954 and 1961 Statelessness Conventions can best be seen as legitimate and key components of a broader international framework for tackling statelessness – and their provisions should also be interpreted, wherever relevant, in light of subsequent developments, in particular in the field of human rights.[89] Some of the shortcomings discussed in this chapter are likely to remedy themselves in time, with a concerted commitment to the implementation of the standards housed in the two instruments. In fact, the assessment of the 1954 and 1961 Statelessness Conventions provided in this chapter is perhaps premature. In some ways, in spite of the physical age of the instruments, there is a sense that the work starts now and a true evaluation of their effectiveness in offering solutions for statelessness can reasonably be conducted only once some of the most recent developments in terms of accessions, doctrinal debate and the issuance of guidance have had the chance to take hold and any remaining gaps can be properly identified.

Questions to guide discussion

1. Identify the two UN Statelessness Conventions. What were the aims of each convention?
2. What are the limitations of the 1961 Convention? What reasons are there for these limitations?

[88] UNHCR 'Ecuador, Honduras and Portugal accede to Statelessness Conventions', News Story (2 October 2011), available at www.unhcr.org/506adfc95.html, last accessed 11 November 2012.

[89] The 1961 Convention on the Reduction of Statelessness should, for instance, be interpreted in accordance with the principle of the best interests of the child, the recommendations of the Committee on the Rights of the Child, and emerging human rights jurisprudence including: Series C, Case 130, *Yean and Bosico* v. *Dominican Republic*, Inter-American Court of Human Rights, 8 September 2005; Case C-135/08 *Janko Rottmann* v. *Freistaat Bayern* [2 March 2010] CJEU; *Nubian Children in Kenya* v. *Kenya*, No. 002/Com/002/209, 22 March 2011; *Genovese* v. *Malta* (App. no. 53124/09), ECHR, 11 October 2011.

3. The 1961 Statelessness Convention has been described as having a 'cautious and flexible approach'. Yet it has still been slow to gather signatures. Would another approach have been better?
4. Describe the debate around the concept of *de facto* statelessness. How would you construct an argument that some cases that have been described as *de facto* statelessness actually fall within the definition of statelessness in the 1954 Convention? Do you agree?
5. Establish whether your country is a signatory to both the 1954 and 1961 Statelessness Conventions. What arguments would you make in favour of the conventions to a government that was considering whether or not to become a signatory?

UNHCR's mandate and activities to address statelessness

MARK MANLY

For most of the past sixty years, statelessness has been regarded as a problem for international governance. After a flurry of activity focused on the development of international legal standards from the end of World War II until the early 1960s, the issue essentially disappeared from the global agenda.[1] UNHCR has had some responsibility for stateless persons since its establishment in 1950, but it was only in the mid-1990s that its mandate significantly expanded as a result of resolutions of the United Nations General Assembly. The authority to act did not immediately lead to global action on statelessness by UNHCR, in large part because of significant gaps in the understanding of the scope and nature of statelessness problems around the world. Nevertheless, in recent years this has changed dramatically, as UNHCR's Executive Committee, or ExCom, has provided some flesh to the bare bones of the mandate entrusted to the office by the General Assembly.

This chapter explores the content and scope of that mandate. It begins with a general overview of the basis for the mandate and looks in turn at activities undertaken by the office to promote and clarify the content and scope of existing standards, develop complementary standards, generally raise awareness of the problem and build partnerships to improve responses to statelessness around the world. The chapter then looks at what have become the four key components of the mandate: identification, prevention and reduction of statelessness and the protection of

This chapter reflects the views of the author and not necessarily those of UNHCR or of the United Nations. The author gratefully acknowledges comments provided on earlier versions of this chapter by Janice L. Marshall and Laura van Waas.

[1] There were of course references in UN human rights treaties (discussed below) and some activity at the country and regional level such as the recommendations adopted by the Council of Europe and the International Commission on Civil Status (ICCS), Convention No. 13 to Reduce the Number of Cases of Statelessness, 13 September 1973, available at: www.unhcr.org/refworld/docid/3decd5ce4.html, last accessed 21 May 2014.

stateless persons. It does so by looking at some of the key activities undertaken with regard to each of these areas in turn, and ends with a brief analysis of where things stand today.

4.1. The mandate in a nutshell

UNHCR was originally mandated in its 1950 Statute to address the situation of stateless persons, but this was limited to stateless persons who were refugees pursuant to paragraph 6(A)(II) of the UNHCR Statute and Article 1(A)(2) of the 1951 Convention relating to the Status of Refugees. Following the emergence of mass statelessness linked to the dissolution of the USSR, Czechoslovakia and the Federal Socialist Republic of Yugoslavia, in 1995 UNHCR's Executive Committee adopted a conclusion on the Prevention and Reduction of Statelessness and the Protection of Stateless Persons.[2] The United Nations General Assembly then took up the issue in its 'omnibus' resolution on UNHCR of the same year.[3] This resolution established a truly global mandate for UNHCR on statelessness.

The General Assembly identified statelessness as a cause of forced displacement and then indicated that 'the prevention and reduction of statelessness and the protection of stateless persons are important also in the prevention of potential refugee situations'. The resolution then endorsed the activities already being undertaken and linked them to the office's protection and solutions mandate. The General Assembly '[e]ncourages the High Commissioner to continue her activities on behalf of stateless persons, as part of her statutory function of providing international protection and of seeking preventive action'.[4] The General Assembly specifically requested that UNHCR focus on promotion of accession to the two statelessness conventions and 'to provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation'.[5] The focus on accessions to the conventions and technical advice on nationality legislation became a central part of UNHCR's activities over the following decade. Much of

[2] Executive Committee of the UN High Commissioner for Refugee's Program, 'Prevention and Reduction of Statelessness and the Protection of Stateless Persons', Conclusion No. 78 (XLVI) 1995.

[3] UN General Assembly resolution A/RES/50/152, on 'Office of the High Commissioner for Refugees', 9 February 1996.

[4] *Ibid.*, para. 14. [5] *Ibid.*, para. 15.

this work was focused on Europe and related to efforts to mitigate the impact of state succession.

The year 2006 marked a turning point. The Executive Committee adopted a detailed conclusion on the identification, prevention and reduction of statelessness and the protection of stateless persons.[6] Comprising twenty-four operative paragraphs, it provided a great deal more guidance on how the office was to implement the mandate. Much of the conclusion is focused on operational responses to statelessness such as studies to identify statelessness in regions where there are information gaps,[7] support to states in undertaking citizenship campaigns[8], support for states to disseminate information on nationality procedures[9] and establishing programmes to protect and assist stateless persons including through legal aid.[10] As in 1995, the General Assembly's resolution on UNHCR adopted later the same year endorsed the conclusion and the work already being undertaken by the office and specifically referred to the four distinct areas of activity. The General Assembly:

> notes the work of the High Commissioner in regard to identifying stateless persons, preventing and reducing statelessness, and protecting stateless persons, and urges the Office of the High Commissioner to continue to work in this area in accordance with relevant General Assembly resolutions and Executive Committee conclusions.[11]

UNHCR's global mandate is supplemented by a specific role under the 1961 UN Convention on the Reduction of Statelessness ('1961 Convention'). When the sixth instrument of ratification/accession to the 1961 Convention was deposited in 1974, the General Assembly designated UNHCR as the body referred to in Article 11 of the Convention 'to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.'[12] This was initially on an interim basis but was confirmed by the General Assembly in 1976 and in more recent resolutions.[13] As set out

[6] ExCom, 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106 (LVII) – 2006'.
[7] *Ibid.*, para. (c). [8] *Ibid.*, para. (q).
[9] *Ibid.*, para. (r). [10] *Ibid.*, para. (v).
[11] UN General Assembly resolution 61/137, on 'Office of the High Commissioner for Refugees', 25 January 2006, para. 4.
[12] UN General Assembly resolution 3274 (XXIV) of 10 December 1974.
[13] See UNHCR, 'United Nations General Assembly Resolutions of particular relevance to statelessness and nationality', 25 March 2013, available at: www.unhcr.org/refworld/docid/4c49a02c2.html, last accessed 21 May 2014.

in UNHCR's 2010 global statelessness strategy,[14] relevant activities under Article 11 include:

- Publicizing UNHCR's role, including through contacts with relevant state authorities, NGOs and lawyers' networks;
- Reaching out to individuals who Field Offices believe may have valid claims under the terms of the 1961 Convention;
- Assessing the compatibility of the state's legislation with its obligations under the 1961 Convention with relevance to the case;
- Assessing whether the individual falls under the scope of a relevant provision, e.g. whether or not a child would otherwise be stateless if not granted the nationality of the state in question;
- Presenting findings to the individual concerned, the authorities or in court proceedings where necessary through *amicus curiae* briefs.

The 1954 UN Convention relating to the Status of Stateless Persons ('1954 Convention') has only a minimalist supervisory regime, setting out in Article 33 that '[t]he Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention'. In practice UNHCR has performed this function. This is complemented by the request of the Executive Committee that UNHCR 'provide technical advice to States Parties on the implementation of the 1954 Convention so as to ensure consistent implementation of its provisions'.[15]

For the most part, states have accepted, at least tacitly, that UNHCR has responsibility to address statelessness in their territory. In the limited number of situations in which UNHCR has been requested by governments not to act, they have tended to indicate that the issue was not one of statelessness, as opposed to denying that UNHCR has a mandate to address it. The following sections set out in greater detail how this mandate has been implemented in recent years.

The issue of mandate inevitably leads to questions of scope: where does UNHCR's responsibility end and that of another agency begin? The question of institutional responsibilities within the UN system was addressed

[14] UNHCR, 'UNHCR Action to Address Statelessness: A Strategy Note', March 2010, para. 69, available at: www.unhcr.org/refworld/docid/4b9e0c3d2.html, last accessed 21 May 2014.

[15] ExCom, 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106 (LVII) – 2006', para. (x).

in the UN Secretary-General's Guidance Note on The United Nations and Statelessness, which states:

> The UN General Assembly has entrusted the Office of the United Nations High Commissioner for Refugees (UNHCR) with a mandate relating to the identification, prevention and reduction of statelessness and protection of stateless persons. However, this Guidance Note affirms that all UN entities system-wide must increase their efforts to address statelessness. The UN should tackle both the causes and consequences of statelessness as a key priority within the Organization's broader efforts to strengthen the rule of law.[16]

Nonetheless, there may be overlap between mandates and competencies of different agencies, something that is a particular concern in the context of humanitarian action in conflict and internal displacement settings, where rapid responses, and hence clear delineation of responsibilities and good coordination, are essential. The Guidance Note therefore specifies that 'At the country level, the UN Country Teams provide the appropriate framework for coordination between UN entities dealing with statelessness with a lead responsibility exercised by UNHCR under its mandate.'[17]

4.2. Implementation – setting the agenda at the international level

There has been uneven and sometimes halting progress towards implementation of the mandate for most of the period since 1995. In a litter of two offspring, statelessness was the metaphorical runt. It was overlooked and unloved while the refugee mandate received all of the attention. Statelessness was dramatically overshadowed by UNHCR's work on internal displacement, an area where mandate responsibility is not as strongly rooted. Increasingly, though, UNHCR has been successful in improving implementation of the mandate in terms of both 'breadth' and 'depth'. As will be seen, it has achieved some success in putting statelessness on the international agenda.

As will be clear from the remainder of this chapter, 'breadth' has increased dramatically in terms of the range of issues addressed since 1995, moving beyond a focus principally on accessions to the conventions

[16] UN Secretary-General, 'Guidance Note of the Secretary-General: The United Nations and Statelessness', June 2011, p. 3, available at: www.unhcr.org/refworld/docid/4e11d5092.html, last accessed 21 May 2014.

[17] *Ibid.*, p. 15.

and reform of nationality laws to a range of technical, operational and awareness-raising responses. Breadth has also increased in geographic terms, measured both in terms of the number and location of states in which UNHCR operates. In the period 2009–13,[18] the number of UNHCR offices that set objectives on statelessness more than doubled. Whereas in the 1990s most activities were in Europe, in 2011–13 the largest country budgets were elsewhere, in particular in Africa[19], the Americas[20] and Asia.[21]

Implementation is now far 'deeper' than it was previously, in particular as a result of more detailed guidance on treaty standards and a growing body of expertise relating to operational responses. As a result, UNHCR has provided more effective technical advice to governments on appropriate operational responses, specific aspects of nationality legislation and determination procedures under the 1954 Convention. These trends are set to continue, not least as a result of the creation of dedicated country and regional statelessness posts in 2011–13 in Asia, the Middle East and North Africa, Europe, the Americas and West Africa.

4.3. Promotion of existing standards of international law

The 1954 Convention and the 1961 Convention are the only modern-day, global treaties designed specifically to address aspects of the problem of statelessness.[22] As at 20 July 2014, the 1954 Convention had eighty-two states parties, with the majority in Africa (17), the Americas (18) and Europe (37). There are only six states parties in Asia and four in the Middle East and North Africa (MENA). The 1961 Convention had fifty-nine states parties including twelve in Africa, twelve in the Americas, five in Asia and the Pacific, twenty-nine in Europe and two in MENA.

These two treaties cannot be applied in isolation and should be viewed as forming part of a much wider web of international standards relating to prevention and reduction of statelessness and protection of stateless persons, in particular in UN human rights conventions and regional treaties. Looked at in this way, the international legal framework addresses many, but not all, of the issues relating to statelessness.

[18] There is no data prior to this time because the budget structure did not separate statelessness activities from those oriented towards refugees, returnees and internally displaced persons.

[19] Sudan, South Sudan and Côte d'Ivoire.

[20] The Caribbean. [21] Myanmar, Central Asia.

[22] See also Chapter 3 by van Waas in this volume.

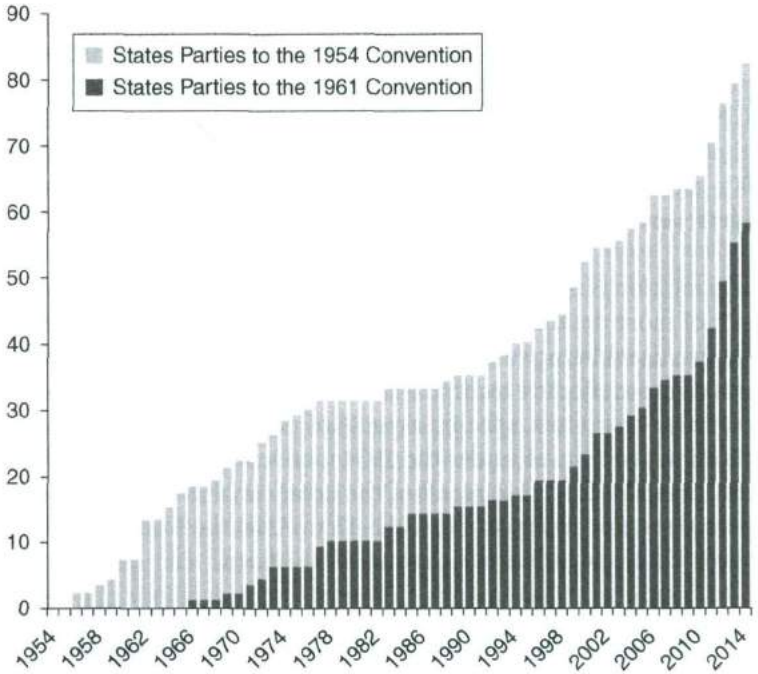

Figure 4.1 The number of states parties to the 1954 and 1961 Conventions since their adoption

UNHCR has undertaken a number of activities to promote existing standards. Since the mid-1990s, it has advocated for accession[23] to the 1954 and 1961 Conventions. Previously, no UN entity actively promoted accession. The impact of UNHCR's efforts in this area are evidenced by the upturn in the rate of accessions beginning in 1995 and in particular in 2011–14 as a result of the campaign linked to the fiftieth anniversary of the 1961 Convention,[24] which led to seventeen accessions to the 1954 Convention and twenty-two to the 1961 Convention between mid-2011 and July 2014.

[23] Note that because the 1954 Convention closed for signature on 31 December 1955, states that did not sign can only become parties by accession (see Art. 35). The same holds for the 1961 Convention, which closed for signature on 31 May 1962 (see Art. 16).

[24] See the range of tools developed for this campaign, available at: www.unhcr.org/refworld/statelessness.html, last accessed 21 May 2014, including 'Protecting the Rights of Stateless Persons: The 1954 Convention relating to the Status of Stateless Persons', September 2010 and 'Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness', September 2010.

Documents produced by UNHCR also systematically refer to standards of international human rights law, in particular those relating to the right to a nationality.[25] Faced with a series of instances of state succession, UNHCR has also referred on multiple occasions to the ILC Articles on the Nationality of Natural Persons in Relation to Succession of States. [26]

4.4. Clarification of the content and scope of existing standards

Statelessness has often been viewed as a highly specialized but obscure area of international law. This is no doubt explained in part by the complexities of and wide divergences in approach between nationality laws of different states. The sheer range of issues and standards involved also provides part of the explanation. For example, prevention and reduction of statelessness are rather different from protection of stateless persons.

Another challenge, though, is the manner in which key elements of the 1954 and 1961 Conventions are worded. For example, the definition of a stateless person in the 1954 Convention is more complex than it appears at first glance and has been interpreted in wildly diverging manners. The 1961 Convention has several provisions which are lengthy and highly technical. The Executive Committee therefore requested UNHCR to provide technical advice to states on the adoption and implementation of safeguards to prevent statelessness[27] and also on the implementation of the 1954 Convention.[28]

The Division of International Protection of UNHCR responded by developing authoritative guidance on key doctrinal issues through a process the starting point of which is consultation with external experts[29] and UNHCR field staff. The first of the issues addressed was the definition

[25] Just two of many examples are UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness', 21 December 2012, HCR/GS/12/04, available at: www.unhcr.org/refworld/docid/50d460c72.html and UNHCR, 'UNHCR Action to Address Statelessness: A Strategy Note', March 2010, available at: www.unhcr.org/refworld/docid/4b9e0c3d2.html, last accessed 21 May 2014.

[26] See, for example, UNHCR, 'Sudan Citizenship Symposium – Keynote Address by Ms. Erika Feller, Assistant High Commissioner – Protection, UNHCR', 6 November 2010, available at: www.unhcr.org/refworld/docid/4cf384662.html, last accessed 21 May 2014.

[27] ExCom, 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106 (LVII) – 2006', para. (s).

[28] *Ibid.*, para. (x).

[29] Meetings were attended by a mix of government officials, members of the judiciary, NGO representatives, legal practitioners, academics, members of human rights supervisory bodies and UNHCR staff.

of a stateless person in international law. UNHCR organized an expert meeting in Prato, Italy in 2010[30] and published guidelines[31] in February 2012. The conclusions of this meeting were groundbreaking. They analysed the definition in far more detail than had been done previously in any UNHCR document, making it clear that in many instances it had been interpreted too restrictively in the past.

The conclusions also helped clarify the limits of the notion of '*de facto*' statelessness, a term which had often been employed as a catch-all category for people who were deemed to have some nationality 'problem'.[32] The very idea of '*de facto*' statelessness has been questioned, not least because it is not defined, nor does it give rise to specific standards of treatment in an international treaty.[33] Yet there is also some consensus that the 'traditional' (read: 1940s and 1950s) usage of the term describes individuals who are 'unprotected' and who continue to fall into a protection gap. A perennial debate has therefore arisen: Should the notion of '*de facto*' statelessness be discarded altogether or is there any advantage in terms of promoting the protection of specific individuals in continuing to employ it? UNHCR has opted to note the limitations inherent in the concept while attempting to salvage what it can to address the situation of those people who possess a nationality but are denied the protection of their state.[34]

Expert consultations held subsequently went on to examine procedures to determine who is stateless and the status to be granted to stateless persons at the national level.[35] Guidelines on these two topics were also issued in 2012.[36] The final meeting in the series focused on the prevention

[30] UNHCR, 'Expert Meeting – The Concept of Stateless Persons under International Law (Summary Conclusions)', Prato, May 2010 ('Prato Conclusions').

[31] UNHCR, 'Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons', HCR/GS/12/01, 20 February 2012.

[32] This issue is explored in some detail in the background paper prepared for the meeting by Hugh Massey, 'UNHCR and De Facto Statelessness', April 2010, Legal and Protection Policy Research Series, LPPR/2010/01.

[33] Guy S. Goodwin-Gill, 'Definitions, Statelessness, and Stateless Persons. Some notes on some of the issues', prepared for UNHCR's 2010 Expert Meeting held in Prato, Italy; Alison Harvey, 'Statelessness: The "de facto" Statelessness Debate', *Immigration, Asylum and Nationality Law*, 24 (2010), 257, 258.

[34] UNHCR, 'Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons' (Geneva, 2014), paras. 123 and 124.

[35] UNHCR, 'Expert Meeting – Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)' Geneva, December 2010.

[36] UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', HCR/GS/12/02, 5 April 2012; and UNHCR, 'Guidelines

of statelessness under the 1961 Convention amongst children born in the territory of a state party or to a national abroad.[37] Guidelines on this issue were issued in December 2012.[38] In 2014, UNHCR consolidated the first two guidelines relating to the protection of stateless persons into a handbook.[39]

Given the importance of international human rights standards, UNHCR has provided significant input to human rights supervisory bodies. For example, in coordination with UN country teams, it has provided background information during the review of each UN member state in the context of the Human Rights Council's Universal Periodic Review. It has also advocated for and provided input to general comments on specific treaty standards.[40]

4.5. Standard setting

Development of complementary global and regional treaty and non-treaty standards has been a key priority given the relatively low number of states parties to the two statelessness conventions as well as gaps in the standards they contain.

UNHCR's role in the development of treaty standards has a long history and includes participation in the drafting of the 1961 Convention

on Statelessness No. 3: The Status of Stateless Persons at the National Level', HRC/GS/12/03, 17 July 2012.

[37] UNHCR, 'Expert Meeting – Interpreting the 1961 Statelessness Convention and *Preventing Statelessness among Children: Summary Conclusions*', Dakar, Senegal, September 2011 ('Dakar Conclusions').

[38] UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness', 21 December 2012, HCR/GS/12/04.

[39] UNHCR, 'Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons' (Geneva, 2014).

[40] See, for example, 'General Recommendation XXX of the Committee for the Elimination of Racial Discrimination (CERD)', 'CRC General Comment No. 6 (2005) on Treatment of Unaccompanied and Separated Children Outside their Country of Origin, of the Committee on the Rights of the Child (CRC)' and the 'General Comment on Undocumented Children of the Committee on the Rights of Migrant Workers and their Families'. For an example of advocacy aimed at adoption of a general comment, see Alice Edwards, 'Displacement, Statelessness and Questions of Gender Equality under the Convention on the Elimination of All Forms of Discrimination against Women', August 2009, PPLAS/2009/02, available at: www.unhcr.org/refworld/docid/4a8aa8bd2.html, last accessed 21 May 2014, produced for a joint CEDAW/UNHCR seminar in 2009.

itself.[41] At the regional level, UNHCR has worked with other actors to further develop international standards in the field of nationality, in particular to address emerging issues and gaps under the 1961 Convention. It has maintained a long and productive collaboration with the Council of Europe in this area. UNHCR participated actively in the drafting of the 1997 European Convention on Nationality.[42] Moreover, given that the 1961 Convention contains only a limited provision on state succession, UNHCR provided input to the drafting of the International Law Commission's Articles on the Nationality of Natural Persons in Relation to Succession of States, as well as to the 2006 Council of Europe Convention on the avoidance of statelessness in relation to state succession.

Thus far, UNHCR involvement in standard setting in other regions has been limited to declarations, resolutions and other non-binding documents, notably of the Organization of American States[43] and the Asian-African Legal Consultative Organization.[44] Going forward, UNHCR will support adoption of additional treaty standards, for example as recommended for Africa by an African Union symposium in 2012.[45]

UNHCR has played an active role in negotiation of a number of resolutions of the UN Human Rights Council and the former Commission of Human Rights,[46] notably the series of resolutions on arbitrary deprivation of nationality and the resolution on nationality of women and children, adopted for the first time in 2012.

[41] See the historical overview provided in the United Nations Audiovisual Library of International Law, 'Convention on the Reduction of Statelessness, 1961: Introductory note' by Guy S. Goodwin-Gill, available at: http://legal.un.org/avl/ha/crs/crs.html, last accessed 21 May 2014.

[42] UNHCR played a significant role also in the drafting of the 1999 'Recommendation on the Avoidance and Reduction of Statelessness' and the 2009 'Recommendation on the Nationality of Children'. See also Chapter 6 by de Groot in this volume.

[43] See Resolutions 2599 (XL-O/10) and 2665 (XLI-O/11) on 'Prevention and Reduction of Statelessness and Protection of Stateless Persons in the Americas'.

[44] See Asian-African Legal Consultative Organization (AALCO), Resolution on the Half-Day Special Meeting on 'Legal Identity and Statelessness', 8 April 2006, RES/45/SP.1, available at: www.unhcr.org/refworld/docid/44eaddc54.html, last accessed 21 May 2014.

[45] See African Union, Recommendations of the African Union Symposium on 'Citizenship in Africa: Preventing Statelessness, Preventing Conflicts', 24 October 2012, available at: www.unhcr.org/refworld/docid/510139472.html, last accessed 21 May 2014.

[46] Relevant resolutions of both the Council and the former Commission are available at: www.unhcr.org/refworld/statelessness.html, last accessed 21 May 2014.

4.6. Awareness raising

Much of the foregoing reflects one of the traditional weaknesses of the discourse surrounding statelessness: it focuses on the legal and technical aspects of the problem. Often, however, what is most needed is more general information, highlighting the terrible impact of statelessness in human terms, and straightforward explanations of what can be done to address it. Thus, UNHCR has published a range of documents,[47] media stories[48] as well as photo[49] and video resources[50] that target a wider audience, in particular policy and opinion makers.

Thus far, the high-water mark of these efforts was the fiftieth anniversary of the 1961 Convention on the Reduction of Statelessness. The year 2011 was marked by unprecedented activity. The broad range of activities undertaken succeeded in placing statelessness on the international agenda. Over the course of the year, UNHCR intensified bilateral contact with governments to raise a series of priority issues: accessions and withdrawal of reservations, establishment of determination procedures, reform of nationality laws, measures to reduce statelessness and resolving obstacles to civil registration and issuance of proof of nationality. Field offices organized a series of activities including workshops and round-tables with government authorities and civil society in a broad range of countries,[51] including states where there had never been discussion of statelessness between government authorities and the United Nations. Country-level meetings were complemented by regional meetings, including in South-East Asia, Southern Africa, West Africa, Central Asia and the European Union.[52] These discussions served to underline and to

[47] See, for example, Chapter 4 of UNHCR, 'State of the World's Refugees: In Search of Solidarity', 2012. Available in abridged form at: www.refworld.org/docid/5100fec32.html, last accessed 21 May 2014.

[48] See UNHCR news archive at: www.unhcr.org/statelessness, last accessed 21 May 2014.

[49] The photo exhibition 'Nowhere People' by Greg Constantine has been shown in a wide range of venues including UN Headquarters during the high-level segment of the General Assembly and during meetings of UNHCR's ExCom and the Human Rights Council at the Palais des Nations in Geneva as well a range of world capitals.

[50] See, for example, the 'storytelling' videos 'Zeinab and Manal' from Lebanon and 'I am stateless' from France at www.unhcr.org/pages/49c3646c161.html, last accessed 21 May 2014.

[51] Locations included Georgia, Lebanon, Mexico, Namibia, Spain, South Sudan and Turkmenistan.

[52] Preparatory and outcomes documents for a number of these meetings are available on the statelessness page of UNHCR's Refworld site at: www.unhcr.org/refworld/statelessness.html, last accessed 21 May 2014.

better understand the gravity of the problem but also to discuss possible solutions. The most effective advocates for action to address statelessness proved to be representatives of governments which had already taken steps themselves.

A media campaign on the occasion of the anniversary of the 1961 Convention led to hundreds of reports in television, radio, print and electronic media on all continents.[53] These activities helped set the stage for a ministerial-level conference organized by UNHCR in Geneva in December 2011, which proved to be a turning point for international efforts on statelessness.

The ministerial meeting was undoubtedly the highest-level discussion of statelessness ever. More than 150 states participated and over 70 did so at the ministerial level. Many states expressed concern at the magnitude and impact of statelessness around the world. A number referred to action they had already taken and it was clear that many states wished to be able to show they were taking the problem seriously and leading by example. Perhaps most important of all were the outcomes of the pledging process. Sixty-one states made pledges on statelessness. These included thirty-three pledges on accession (some of which refer to accession to both treaties), twelve to reform nationality laws to prevent statelessness, eleven on the establishment or improvement of determination procedures, twelve on improvements to civil registration to prevent statelessness and twelve on studies and surveys of stateless populations. These pledges ensure that there will be continued progress in the short and medium term. UNHCR's biennial Note on Statelessness covering the period 2011–13 provides details on implementation.[54]

Overall, the anniversary of the 1961 Convention helped to demystify issues of statelessness and to slowly put paid to the idea that they are taboo and best left to states to address as they see fit.

4.7. Partnerships

The low level of awareness of statelessness and lack of interest in addressing it at the international level can be explained in large part by the absence of any kind of global coalition to address the problem – until

[53] See UNHCR, 'Media Backgrounder: Millions Are Stateless, Living in Legal Limbo', August 2011, at www.unhcr.org/statelessness, last accessed 21 May 2014.

[54] See UNHCR, 'Note on Statelessness', June 2013, EC/64/SC/CRP.11, at: www.refworld.org/docid/51d2a8884.html, last accessed 21 May 2014.

recently at least. Other major human rights and humanitarian problems such as landmines, child soldiers, human trafficking or refugee protection have given rise to concerted action by government 'champions', NGOs, faith-based organizations and academics, together with the UN and regional organizations. For a very long time, there was nothing of the sort to address statelessness, despite its massive impact around the world. UNHCR has attempted to change this, promoting action by a range of actors. A particular focus has been on NGOs, through training, partnerships in mapping and operational responses, participation in regional meetings with governments, expert meetings on the standards contained in the 1954 and 1961 Conventions and discussion of statelessness at the annual UNHCR consultations with NGOs, held in Geneva.

4.8. Identification of statelessness: beyond numbers

Refugees are often highly visible because by definition they have crossed an international border. Most stateless people, on the other hand, remain in the country of their birth (or a successor state), and are mixed in with the general population. As a result, stateless persons are often difficult to identify and generally they are not identified as such in national statistics. In statistical terms they are often, to use the cliché, 'invisible'. UNHCR's Executive Committee has requested that the office address this through a number of actions, including the undertaking and sharing of research 'with relevant academic institutions or experts, and governments, so as to promote increased understanding of the nature and scope of the problem of statelessness' and 'to establish a more formal, systematic methodology for information gathering, updating, and sharing'.[55] Identification of statelessness goes beyond 'counting', though. It also includes understanding causes of statelessness, looking at the profile of the population (including age, gender and diversity elements), their human rights situation and avenues (and obstacles) to acquisition of a nationality.

While some states have detailed data on stateless persons in their territory, many do not. At the end of 2013, UNHCR possessed up-to-date population data on seventy-five states.[56] This is close to double the data

[55] ExCom 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, No. 106 (LVII) – 2006', paras. (c) and (d) available at: www.unhcr.org/refworld/docid/453497302.html, last accessed 21 May 2014.

[56] Note that when stateless persons are also recognized as refugees, they are reported by UNHCR in its refugee statistics. They are not reported in statelessness statistics to avoid double-counting. In any event, statistical information on stateless refugees is incomplete

coverage of 2004, when population figures were only reported for thirty states.[57] Most population figures are from registration systems, although for some countries data is from censuses or surveys. Some of the figures derived from registration systems are problematic. This occurs for a variety of reasons, for example because they do not provide a full account of the population as there is no fully functioning individual statelessness determination procedure[58] or other identification mechanism, or because the criteria applied for registration are not consistent with the international definition of a stateless person.[59] In some situations UNHCR has worked with governments to register specific populations as a first step towards solutions, as in Turkmenistan with regard to undocumented former Soviet citizens[60] and in Burundi with the population of Omani origin.

The absence of population figures and information on the profiles and protection needs of stateless persons makes it difficult to design effective responses. UNHCR has used various approaches to address these data gaps. It has promoted the use of population censuses as one means of gathering population data and made specific recommendations to this effect at a Joint UNECE/Eurostat Meeting on Population and Housing Censuses in 2008.[61] The impact of the 2010 round of population censuses has yet to be felt but is expected to lead to improved statistical reporting in a number of countries.

Field offices and partners have also intensified efforts to identify stateless populations through survey methodologies and other quantitative

because many national statistical databases do not correctly report them as stateless, in many cases referring to refugees only on the basis of country of origin. For the most recent statistics available at the time of writing see UNHCR, 'UNHCR Global Trends 2013', June 2014 available at: www.unhcr.org, last accessed 12 July 2014.

[57] UNHCR, 'Statistical Yearbook', 2004, 59.

[58] These procedures are designed to determine whether individuals are stateless for the purpose of establishing the standards of treatment to which they are entitled. For more information see UNHCR, 'Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons'(Geneva, 2014), Part Two. See also Chapter 5 by Gyulai in this volume.

[59] See, for example, UNHCR, 'Mapping Statelessness in the Netherlands', November 2011, section 3.2.

[60] See UNHCR, 'Statelessness: More than 3,000 Stateless People Given Turkmen Nationality', 7 December 2011, available at: www.unhcr.org/4edf81ce6.html, last accessed 21 May 2014.

[61] UNHCR, 'Measuring Statelessness through Population Census. Note by the Secretariat of the United Nations High Commissioner for Refugees', 13 May 2008.

methods as in Bangladesh,[62] Kyrgyzstan[63] and Serbia.[64] Studies in industrialized countries such as the United States,[65] Japan,[66] the United Kingdom,[67] the Netherlands[68] and Belgium[69] have tended to take a different approach in large part because the stateless are generally a much smaller proportion of the overall population. In several of these, the research included a review of existing administrative databases to verify whether any information they contained would serve to identify the size of the stateless population in the country. Qualitative methodologies were then used to better understand the profile of the stateless populations in each country.

4.9. Prevention: why wait for people to become stateless?

The mandate responsibility to take preventive action sets UNHCR's work on statelessness apart from its activities with regard to refugees. UNHCR generally reacts to refugee situations only with respect to those individuals who have crossed an international border.[70] With respect to statelessness, however, UNHCR has a responsibility to take preventive action. A broad range of interventions may be undertaken to prevent statelessness. These are often low profile and technical in nature but arguably the most cost-effective means of addressing statelessness. Four areas of activity will be highlighted here. The first two are inter-related: promotion of accession to the 1961 Convention and reform of nationality laws. The third is action in the context of state succession, which generally includes an element of law

[62] A survey of settlements of the Urdu speakers (or 'Biharis'), which was used as a basis for statistical reporting in 2006–7.

[63] UNHCR, 'A Place to Call Home: The Situation of Stateless Persons in the Kyrgyz Republic', 2009, available at: www.unhcr.org/4b71246c9.html, last accessed 21 May 2014.

[64] A survey of the Roma, Ashkali and Egyptian (RAE) households was conducted, which used census data as a sampling frame. The survey confirmed that 6.8 per cent of the population (up to 30,000 persons) face a risk of statelessness. Of these individuals, 21 per cent are children and 26 per cent are displaced from Kosovo.

[65] UNHCR, 'Citizens of Nowhere: Solutions for the Stateless in the US', December 2012, available at: www.unhcr.org/refworld/docid/50c620f62.html, last accessed 21 May 2014.

[66] UNHCR, 'Overview of Statelessness: International and Japanese Context', April 2010, available at: www.unhcr.org/refworld/docid/4c344c252.html, last accessed 21 May 2014.

[67] UNHCR, 'Mapping Statelessness in The United Kingdom', 22 November 2011, available at: www.unhcr.org/refworld/docid/4ecb6a192.html, last accessed 21 May 2014.

[68] UNHCR, 'Mapping Statelessness in the Netherlands', November 2011, available at: www.unhcr.org/refworld/docid/4eef65da2.html, last accessed 21 May 2014.

[69] UNHCR, 'Mapping Statelessness in Belgium', October 2012, available at: www.unhcr.org/refworld/docid/5100f4b22.html, last accessed 21 May 2014.

[70] Increasingly, UNHCR has alerted populations within countries of origin to the dangers of smuggling and perilous sea and overland journeys.

reform. The fourth area is civil registration. Largely because of increased migration, conflicts of law resulting in statelessness continue to occur – with devastating consequences for the people concerned. Therefore, it is in the interest of individuals and of states to ensure that common standards are adopted and applied. The rules set out in an international treaty such as the 1961 Convention give an important degree of certainty to states and to individuals.

Prevention requires, first and foremost, UNHCR to work with states to ensure that nationality laws have in place adequate safeguards to avoid statelessness in accordance with international standards. UNHCR emphasizes the question of safeguards in order to avoid any misunderstandings on the part of states or other actors that the Office is promoting the general application of either *jus soli* or *jus sanguinis*, or recommending that states allow dual nationality in all instances. UNHCR emphasizes that states continue to have a degree of freedom to regulate acquisition, renunciation, loss and deprivation of nationality, but must design their laws to prevent statelessness at birth and later in life.

The global treaty which sets out these safeguards is the 1961 Convention. Fifty years on, the number of accessions to the 1961 Convention was not something to celebrate. At the time of writing, only fifty-one states are party to the 1961 Convention – far less than to any major human rights treaty adopted in the 1960s. Nevertheless, the 1961 Convention is more influential than the number of states parties would appear to indicate. In particular, the convention has influenced subsequent developments in international human rights law such as the Convention on the Rights of the Child and regional treaties such as the American Convention on Human Rights (ACHR), the African Charter on the Rights and Welfare of the Child (ACRWC) and the European Convention on Nationality (ECN). Various safeguards found in the 1961 Convention to prevent statelessness at birth are now found in regional treaties, including the ECN. All told, more than 100 states worldwide now have an explicit obligation to grant nationality to children born in their territory who would otherwise be stateless.[71]

[71] Such an obligation can also be derived from the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child but it is not explicitly set out therein. A list (albeit one which is not completely up to date), of the states referred to here is available in Annex V, UNHCR, 'UNHCR Action to Address Statelessness: A Strategy Note', March 2010, available at www.unhcr.org/refworld/docid/4b9e0c3d2.html, last accessed 21 May 2014.

Moreover, the standards set out in the 1961 Convention (which in some instances reflect pre-existing standards such as those set out in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws), are now reflected in the nationality laws of numerous states, including many which are not states parties. As noted above, the 1961 Convention is complemented by the ACHR, ACRWC and the ECN. But it should be stressed that the regional standards do not replace the global standards – in particular, because common rules are necessary not only within each region, but also globally, in particular between those regions sending or receiving migrants. It is therefore in the interest of all states to not only become parties to the 1961 Convention, but also to encourage states in other regions to do so as well.[72] If states do not wish to become parties to the 1961 Convention immediately, they should take into account the standards set out in the treaty.

The comparative analysis done thus far by UNHCR and partners to analyse nationality laws shows a trend among states to gradually incorporate some of the key safeguards against statelessness into their nationality laws. On the other hand, there are many states with nationality laws that have significant elements dating back many decades, often to independence, and which are not consistent with the international standards adopted in the past five decades. For example, at least twenty-seven states retain provisions that discriminate against women with regard to conferral of nationality on children.[73] Over 100 states have an explicit obligation to grant nationality to children born in the territory who would otherwise be stateless.[74] A number of these states have no such safeguard or only one that is inadequate. This is worrisome, given that this safeguard is the cornerstone of international efforts to prevent statelessness.

[72] Additional information on the importance of accession to the 1961 Convention is set out in UNHCR, 'Preventing and Reducing Statelessness: The 1961 Convention on the Reduction of Statelessness', September 2010, available at: www.unhcr.org/refworld/docid/4cad866e2.html, last accessed 21 May 2014.

[73] See UNHCR, 'Revised Background Note on Gender Equality, Nationality Laws and Statelessness', 8 March 2014, available at: www.unhcr.org/4f5886306.html, last accessed 21 July 2014.

[74] See the list found in Annex V in 'UNHCR Action to Address Statelessness: A Strategy Note', March 2010, available at: www.unhcr.org/refworld/docid/4b9e0c3d2.html, last accessed 21 May 2014. At least seven additional states are bound by this standard as a result of accession to the 1961 Convention since 2010.

Nonetheless, there continues to be steady, if slow, progress towards improved nationality legislation. UNHCR has often been involved through the provision of technical advice on reform of nationality legislation. One set of examples is from Latin America where there is a trend to eliminate conditions on *jus sanguinis* transmission of nationality to children born abroad. Most significantly, a 2007 amendment to the Brazilian Constitution eliminated the requirement that children born to nationals abroad must take up residence in Brazil in order to acquire nationality. Thenceforth, only a consular registration was required. This prevented future cases of statelessness among the large expatriate population and also served to resolve the situation of some 280,000 children born abroad to Brazilian parents. In 2010, Georgia (which is not yet party to the 1961 Convention) introduced reforms to prevent individuals from voluntarily renouncing their nationality if it would leave them stateless and in 2011 Austria eliminated a provision whereby nationality was lost on account of foreign military service, even where this results in statelessness. There are numerous other examples from around the world. All told, at least fourteen states reformed nationality legislation to prevent statelessness from mid-2011 to mid-2013.[75] Recent accessions to the 1961 Convention coupled with pledges at the UNHCR ministerial meeting to accede (or work towards accession)[76] or to amend nationality laws will lead to additional reforms.[77]

Even where nationality laws appear on their face to be consistent with international standards, there may continue to be problems with implementation. Perhaps the highest profile demonstration of this with regard to the 1961 Convention was the failure by Denmark to implement Article 1 of the convention over a number of years.[78]

[75] UNHCR, 'Note on Statelessness', 4 June 2013, EC/64/SC/CRP.11, available at: www.refworld.org/docid/51d2a8884.html, last accessed 21 May 2014.

[76] Pledges were made by thirty-two states, though several of these already have nationality laws that are fully compliant with the Convention. Belgium, Benin, Bulgaria, Côte d'Ivoire, Ecuador, Gambia, Honduras, Moldova, Paraguay, Portugal, Ukraine had fulfilled their pledges to accede to the 1961 Convention at the time of writing. Although they did not make pledges, Jamaica (in 2013) and Turkmenistan (in 2012) both acceded following the Ministerial Meeting.

[77] For a full list of pledges, see page 34 of UNHCR, 'Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais des Nations, 7–8 December 2011)'.

[78] Denmark had an application procedure in place pursuant to Article 1 of the 1961 Convention for individuals born in the territory. A number of applications from stateless persons who satisfied the conditions for nationality were not resolved. See 'European Commission Against Racism and Intolerance, ECRI Report on Denmark (Fourth Monitoring Cycle)', 22 May 2012, para. 13. Among many other media articles, see BBC

In view of gaps in nationality laws and gaps in implementation, exercise by UNHCR of its responsibilities under Article 11 of the 1961 Convention has become increasingly important and will require stepped-up technical advice to states on nationality laws and their implementation, support to individuals (often through partners where high numbers of individuals so require) and court interventions.[79] In addition, to establish better baseline data, UNHCR has entered into a series of partnerships to develop a comprehensive analytical database of nationality laws.

Given the massive human suffering produced by statelessness following state succession[80] in the 1990s, UNHCR has increasingly sought to anticipate and mitigate the risks of statelessness in situations of state succession. Most recently it has worked intensively to prevent statelessness as a result of the independence of South Sudan by promoting application of the principles set out in the Articles on the Nationality of Natural Persons in relation to the Succession of States,[81] advising South Sudan on the drafting of its nationality law and supporting training and deployment of nationality officers to issue documentation to citizens of the new state.

A fourth area of activity where continued efforts are needed is in relation to civil registration and issuance of documents proving identity and nationality. Lack of birth registration is not sufficient to render a person stateless. However, as set out in UNHCR in 2010:

> [b]irth registration establishes in legal terms the place of birth and parental affiliation, which in turn serves as documentary proof underpinning acquisition of the parents' nationality (jus sanguinis), or the nationality of the State based on where the child is born (jus soli). Thus, while nationality is normally acquired independently and birth registration in and

'Danish immigration minister Hornbech fired over scandal', available at: www.bbc.co.uk/news/world-europe-12674360, last accessed 21 May 2014.

[79] See also the efforts to develop authoritative guidance on the 1961 Convention, referred to above, including a 2011 expert meeting (UNHCR, 'Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children: Summary Conclusions', ('Dakar Conclusions'), September 2011, available at: www.refworld.org/docid/4e8423a72.html) and UNHCR, 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness', 21 December 2012, HCR/GS/12/04.

[80] 'State succession' is defined by the International Law Commission in its Articles on Nationality of Natural Persons in Relation to the Succession of States as 'the replacement of one State by another in the responsibility for the international relations of territory'.

[81] UNHCR, 'Sudan Citizenship Symposium – Keynote Address by Ms. Erika Feller, Assistant High Commissioner – Protection, UNHCR', 6 November 2010, available at: www.unhcr.org/refworld/docid/4cf384662.html, last accessed 21 May 2014.

> of itself does not normally confer nationality upon the child concerned, birth registration does constitute a key form of proof of the link between an individual and a State and thereby serves to prevent statelessness.[82]

Given the massive deficits in birth registration, a key challenge is to set a threshold at which a problem of birth registration becomes something that needs to be tackled under the prevention component of UNHCR's mandate. In guidance for field offices, a strategy note issued in 2010 identifies the following categories of persons, which are not mutually exclusive, as being at particular risk of statelessness due to absence of birth registration:

- persons living in border areas where lack of birth registration may lead to confusion as to whether they are nationals of one state or another;
- minorities and persons who have perceived or actual ties with foreign states;
- nomadic or semi-nomadic populations whose territories cross international borders;
- migrant populations where difficulties to prove nationality of the country of origin may occur when one or more generations of children are born abroad (a risk that increases with each successive generation). [83]

The combination of a series of such factors is what has led UNHCR offices in Bosnia, Croatia, Kosovo, Macedonia, Montenegro and Serbia to undertake a wide range of activities with civil society partners to address deficits in birth registration and identity documentation. This has included a series of surveys to document the extent of the problem,[84] provision of free legal aid to over 28,000 direct beneficiaries and some 81,000 indirect beneficiaries (family members), support for technical improvements to some civil registries and advocacy for legal and administrative reform.

In Côte d'Ivoire, for a number of years UNHCR has worked to assist individuals with late birth registration, the first step towards documentation of nationality in many cases. Statelessness in Southern Africa, caused by conflicts between nationality laws and migration, has been compounded by lack of birth registration. Together with partner Lawyers

[82] UNHCR, 'Birth Registration: A Topic Proposed for an Executive Committee Conclusion on International Protection', EC/61/SC/CRP.5, 9 February 2010, para. 3.

[83] 'UNHCR, Action to Address Statelessness: A Strategy Note', March 2010, para. 35, available at: www.unhcr.org/refworld/docid/4b9e0c3d2.html, last accessed 21 May 2014.

[84] See, for example, UNHCR, May 2009, 'Civil Registration and the Prevention of Statelessness: a Survey of Roma, Ashkaelia and Egyptians in Montenegro', Mary 2009, available at www.unhcr.org/4b71228e9.html; UNHCR, August 2011, 'UNHCR Urges the

for Human Rights in South Africa, UNHCR has focused on assisting individuals to complete late birth registration as a first step to untangling their nationality status.[85]

4.10. Reduction: a different way of saying 'durable solutions'

The third component of UNHCR's mandate is the reduction of statelessness. The principal concern in this area is the halting progress to resolve protracted problems.

UNHCR has promoted two approaches to resolve the situation of stateless populations.[86] The first involves changing the law and/or policy defining who belongs in the body of citizens. In a number of situations around the world, additional or amended criteria have been introduced in nationality laws or as policy to recognize specific categories of individuals as nationals based on strong links to the state such as residence or birth in the territory.[87] These changes generally operate automatically and may be accompanied by simplified procedures for acquisition of documentation proving nationality. They are therefore effective for addressing the situation of large stateless populations, and at relatively low cost.

UNHCR played a central role in supporting the implementation of this type of reform in Sri Lanka in 2003. Following a progressive law reform, UNHCR and the Ceylon Workers Congress conducted a citizenship documentation campaign in coordination with local officials that ensured individuals who had automatically acquired nationality were able to acquire documentary proof that they were Sri Lankan nationals.[88] More recently, in Kyrgyzstan, UNHCR has worked with the government and NGOs to bolster capacity to process the cases of individuals who fall under the provisions of the 2007 Law on Citizenship designed to

Government to Amend Legislation', available at http://rs.one.un.org/news.php?id=203, last accessed 21 May 2014.

[85] Despite these efforts, many of the individuals concerned are ultimately found to be stateless.

[86] This is outlined in UNHCR, 'UNHCR Action to Address Statelessness: A Strategy Note', March 2010, paras. 41–6, available at: www.unhcr.org/refworld/docid/4b9e0c3d2.html, last accessed 21 May 2014.

[87] Examples are Sri Lanka (2003) with respect to residence in the territory and the *sui generis* approach adopted by Nepal (2006) with respect to birth in the territory.

[88] A smaller group of individuals who possessed expired Indian passports were able to acquire nationality upon application. See UNHCR, 'Sri Lanka makes citizens out of stateless tea pickers', 7 October 2004, www.unhcr.org/416564cd4.html, last accessed 21 May 2014.

reduce statelessness.[89] UNHCR advocated quietly for a change in policy regarding the Urdu-speaking minority (the so-called Biharis), who were not considered nationals following independence in 1971.[90] This subsequently changed following a judgment of the High Court of Dhaka,[91] which ordered registration of the entire population as nationals and issuance of identity cards – something that occurred for those Urdu speakers who wished to acquire identity cards and to vote in the December 2008 elections.

Many industrialized states, in Europe in particular, have tended to adopt a second approach, which is facilitated naturalization for stateless persons. This is particularly suited to address the situation of individuals, but has in a number of instances been applied so as to resolve the situation of larger populations. One example of this is the impact of the 2002 Law on Citizenship of the Russian Federation which established a simplified procedure for naturalization of stateless former citizens of the USSR, with over 630,000 reported to have acquired nationality in the nine years following adoption of the law.

Although some provisions of the 1961 Convention are of use for the resolution of existing cases of statelessness (e.g. Article 12 in relation to Articles 1 and 4), the principal standard at the global level is Article 32 of the 1954 Convention, which sets out that states parties 'shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.' Apart from these standards, general provisions of human rights law and provisions of the ECN, however, there is little by way of treaty law regulating reduction of statelessness.[92]

Perhaps not surprisingly, almost none of the existing protracted statelessness issues are in states that are party to the treaties referred to. As a

[89] In essence, this law provides that former USSR citizens who are stateless are considered nationals provided that they have legally resided in the country for five years. However, each case must be processed by state bodies called 'conflict commissions'.

[90] Eric Paulsen, 'The Citizenship Status of the Urdu-speakers/Biharis in Bangladesh', *Refugee Survey Quarterly*, 25 (2006), available at: http://rsq.oxfordjournals.org/cgi/reprint/25/3/54.pdf, last accessed 21 May 2014.

[91] *Md. Sadaqat Khan (Fakku) and Others* v. *Chief Election Commissioner, Bangladesh Election Commission*, Writ Petition No. 10129 of 2007, Bangladesh: Supreme Court, 18 May 2008, available at: www.unhcr.org/refworld/docid/4a7c0c352.html, last accessed 21 May 2014.

[92] See Art. 6(4)(g), ECN and the maximum residence period that may be required of applicants for naturalization in Art. 6(3).

consequence, the steps taken thus far to resolve major statelessness situations have generally not followed a detailed prescription laid out in an international treaty. Rather, solutions have been tailored to the situation at hand and have tended to follow the first approach outlined above, changing the basic rule of nationality.

Overall, progress to resolve existing situations of statelessness has slowed in recent years. Data available to UNHCR showed that approximately 348,000 stateless people acquired, re-acquired or confirmed a nationality in 2010–12. In his speech to the Executive Committee in 2012, High Commissioner António Guterres underlined that this was not sufficient, stating that '[t]hese protracted statelessness situations are not a problem to be addressed at some future date. Solutions are needed now, and I call on all States to make a firm commitment to ending statelessness within the next decade.'[93]

4.11. Protection: the value of an overlooked treaty

UNHCR's mandate also requires that it provide technical advice to states to identify and protect stateless persons in accordance with the 1954 Convention relating to the Status of Stateless Persons and human rights law.

Most of the world's stateless persons remain in their countries of residence, but some do travel and seek protection elsewhere. Many are refugees, but most are not. Non-refugee stateless persons are entitled to protection under international human rights law but the 1954 Convention relating to the Status of Stateless Persons specifically regulates the treatment of stateless persons and provides a framework to prevent non-refugee stateless persons from ending up in a situation of legal limbo. The 1954 Convention:

- defines a 'stateless person' as someone who is not considered as a national by any state under the operation of its law;
- establishes an internationally recognized status for stateless persons;
- sets out specific rights which are to be enjoyed by stateless persons including rights requiring treatment at the level of foreigners generally and may require that persons be lawfully present or residing in the country.

[93] See the speech at www.unhcr.org/506987c99.html, last accessed 21 May 2014.

It has been asserted that the 1954 Convention is now of limited value because of developments in international human rights law. Indeed, stateless persons are also covered by a range of international human rights standards. These complement the 1954 Convention through application in states that are not parties to the 1954 Convention, by addressing issues not referred to therein (such as detention and conditions of detention), or by providing for higher standards with regard to some specific rights. UNHCR has emphasized, however, that similar to the 1961 Convention, the 1954 Convention must be viewed as part of a wider web of international legal standards. The convention contains a number of standards which are not contained in any other treaty. These include: Article 25, which sets out obligations for provision of administrative assistance such as issuance of documents and certificates to which the individual would not otherwise have access on account of being stateless;[94] and Article 28, which provides for issuance of an internationally recognized Convention Travel Document to permit international travel. The 1954 Convention does not have any direct equivalent at the regional level.

As of July 2014, the 1954 Convention has eighty-two states parties. Twenty-two states pledged at the UNHCR ministerial meeting to accede (or to take steps towards accession).[95] When advocating for accession, UNHCR has sometimes been confronted with concerns from governments that upon becoming party to the convention, the state will face a flood of stateless persons seeking protection. The experience of states parties demonstrates that these fears are unfounded. Those that are parties and have determination procedures in place show two clear tendencies: first, low numbers of people seek recognition as stateless persons relative to the number who seek refugee status and second, the number of persons granted protection has not risen dramatically over time. Implementation of the 1954 Convention by states parties has been a problem and UNHCR has worked with governments for roughly a decade to

[94] The practical value of this provision is explained in detail in Nehemiah Robinson, 'Convention relating to the Status of Stateless Persons. Its History and Interpretation', 1997, available at www.unhcr.org/refworld/docid/4785f03d2.html, last accessed 21 May 2014.

[95] For a full list of pledges, see page 34 of UNHCR, 'Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais des Nations, 7–8 December 2011)'. Benin, Bulgaria, Côte d'Ivoire, Gambia, Georgia, Honduras, Moldova, Paraguay, Peru, Portugal and Ukraine had all acceded to the convention at the time of writing. Although they did not makes pledges, Burkina Faso, Nicaragua and Turkmenistan both acceded in 2012, following the Ministerial Meeting.

develop determination procedures and adequate protection regimes for stateless persons.[96] With the issuance of guidelines on key aspects of the 1954 Convention, these efforts will be given a significant boost. Eleven states pledged to develop or improve status determination procedures during UNHCR's ministerial meeting in 2011[97] and three have at the time of writing passed the relevant legislation (Georgia, Moldova and Philippines).

A broader problem of implementation relates to the steps that need to be taken by states that have 'in situ' populations, generally people who have been stateless for decades or generations. Is it appropriate to channel individuals through determination procedures and grant them a status as stateless persons? This was addressed in one of UNHCR's expert meetings and the clear answer, later set out in the 2012 Guidelines and 2014 Handbook, was a clear 'no':

> 'For these groups, determination procedures for the purpose of obtaining status as stateless persons are not appropriate because of their long-established ties to these countries. Based on existing international standards and state practice in the area of reduction of statelessness, such ties include long-term habitual residence or residence at the time of state succession. Depending on the circumstances of the populations under consideration, states might be advised to undertake targeted nationality campaigns or nationality verification efforts rather than statelessness determination procedures.[98]

4.12. Moving forward: a global movement to address statelessness

UNHCR's activities to address statelessness have expanded significantly in recent years and the anniversary of the 1961 Convention in 2011 provided new momentum. UNHCR is only one of a series of stakeholders, however,

[96] See, for example, UNHCR, October 2003, 'The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation', October 2003, available at: www.unhcr.org/refworld/docid/415c3cfb4.html, last accessed 21 May 2014. For more recent examples, see the Netherlands and UK mapping studies cited previously.

[97] For full list of pledges, see page 34 of UNHCR, 'Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons (Geneva, Palais des Nations, 7–8 December 2011)'.

[98] UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', 5 April 2012, HCR/GS/12/02, para. 6 and UNHCR, 'Handbook on Protection of Stateless Persons', para. 58.

and additional progress will depend to some degree on its ability to convince others to take action. There are a growing range of actors involved including NGOs, academic institutions and individual researchers and teachers and interested journalists. However, there is nothing even closely resembling an international movement of the kind which currently exists to address child soldiers, landmines, or even refugee rights. There is relatively little academic research being undertaken and teaching on the issue is relatively new. Yet statelessness has numerous dimensions and complexities that mean that it relates to the work of a broad range of civil society work and academic disciplines. UNHCR seeks to use these inter-linkages to 'mainstream' issues of statelessness within the areas of child rights, gender equality and migration, among others.

Needless to say, states are the central actors as they determine the criteria for acquisition and loss of nationality and establish (or not) policies relevant to the protection of stateless persons. States can also play a key role through international diplomacy. Some progress has been achieved in this area, too, with a number of states playing the role of champions in efforts to address statelessness, including by highlighting statelessness concerns in UNHCR's Executive Committee or making recommendations to states with large stateless populations in the Universal Periodic Review of the United Nations Human Rights Council.[99]

In summary, UNHCR's mandate has continued to evolve and activities to address statelessness have now become a central part of what it does around the world. There is also increasing recognition that statelessness is a concern of the international community as a whole. This reflects, at least in part, the increasing effectiveness of action undertaken by UNHCR under its mandate. Yet, the magnitude of the problem is such that even this much-increased level of activity has left many problems untouched or inadequately addressed. It is essential to build on the smattering of recent success stories and increased international concern by achieving the breakthroughs necessary to resolve the major protracted situations which affect millions across the globe.[100] UNHCR is well positioned to play a major role in achieving this.

[99] The number of recommendations relating to nationality and statelessness made by states during the Universal Periodic Review has risen dramatically, going from a mere one recommendation during the first session in 2008 to an average of eighteen recommendations during the eleventh to fifteenth sessions (2011–13). States have expressed particular concern regarding a number or protracted situations.

[100] High Commissioner António Guterres set this out in bold terms in his address to the Executive Committee in 2012: 'These protracted statelessness situations are not a

Questions to guide discussion

1. How does UNHCR's work on statelessness complement its refugee protection and solutions mandate? What is unique to its statelessness mandate?
2. What can UNHCR do to ensure a more effective international response?
3. What role can be played by other UN agencies, regional organizations and by UN and regional human rights supervisory bodies to identify, prevent and reduce statelessness and protect stateless persons?

problem to be addressed at some future date. Solutions are needed now, and I call on all States to make a firm commitment to ending statelessness within the next decade.' See the speech at www.unhcr.org/506987c99.html, last accessed 21 May 2014.

The determination of statelessness and the establishment of a statelessness-specific protection regime

GÁBOR GYULAI

The 1954 Convention relating to the Status of Stateless Persons (1954 Convention) obliges states parties to provide protection to those who are not considered as a national by any state under the operation of its law.[1] An effective statelessness determination mechanism is an indispensable pre-condition of any effort aimed at the protection of stateless persons, or to put it simply: in order to implement protection measures in favour of a certain population, one has to know who the people concerned are. It is, therefore, striking to learn that at the time of writing only a handful of countries (representing less than 10 per cent of all states parties to the 1954 Convention) have established a specific legal mechanism dedicated to both the identification and protection of stateless persons.

In recent decades, the already rather limited public and professional debate on statelessness has tended to focus on the avoidance and reduction of this phenomenon, keeping the protection aspect of statelessness in the shadows. This is an area that deserves far greater attention. Thus, drawing in particular on empirical examples, this chapter outlines the main features and challenges of statelessness-specific protection mechanisms, with an emphasis on the determination of statelessness.[2] In addition, the chapter proposes a structured framework for understanding and classifying national 'protection environments' stateless persons presently face in different countries.

[1] Convention relating to the Status of Stateless Persons, New York, 28 September 1954, in force 6 June 1960, 360 UNTS 117, Art. 1.

[2] Most empirical experiences are, at the time of writing, related to European states. The dominance of European examples of state practice in the present chapter is due to this fact and does not, by any means, indicate disregard of relevant developments in other parts of the world.

Even in the context of what van Waas calls the 'progressive denationalization of human rights', or in other words the gradual transformation of the 'rights of citizens' to the 'rights of all human beings', the international community deemed it necessary to create a specific instrument to protect stateless persons' rights, confirming their position as a vulnerable group.[3] The 1954 Convention outlines states' protection obligations vis-à-vis stateless persons, as well as the set of rights states parties shall guarantee to this group.[4] However, this crucial instrument remains silent about the manner in which beneficiaries of such protection shall be identified, or how such protection shall be provided in practice.[5]

Together with the examination of the guidelines and Handbook issued by the Office of the United Nations High Commissioner for Refugees (UNHCR), and using insights gained from years of closely following state practice in a number of countries, this chapter will put forward a number of definitions and concepts in order to increase the clarity and consistency of the nascent international framework for the protection of stateless persons.

5.1. The content and the limits of protection

Protection, in its broadest sense, means that a stateless person has access to and can enjoy the rights embedded in the 1954 Convention and in other relevant international human rights instruments. Protection also means, in a narrower sense, official recognition as a stateless person and being granted a legal status that ensures the proper enjoyment of the above-mentioned rights. In either event, protection differs from reduction or elimination of statelessness, as it stops short of offering a nationality to the person concerned (who remains stateless).[6]

It is important to recall that statelessness can surface in a wide range of situations, from purely individual cases where gaps in legislation or administrative practice render a person stateless, through to massive populations who have been deprived of their nationality on discriminatory

[3] L. van Waas, 'Nationality and Rights' in B. Blitz and M. Lynch (eds.), *Statelessness and the Benefits of Citizenship: A Comparative Study* (Oxford Brookes University, 2009), 26.

[4] See also Chapter 3 by van Waas in this volume.

[5] Molnár states that part of the problem is the non-self-executing nature of convention obligations: T. Molnár, 'Stateless Persons under International Law and EU Law: A Comparative Analysis Concerning their Legal Status, with Particular Attention to the Added Value of the EU Legal Order', *Acta Juridica Hungarica*, 51 (2010), 293–304, at 296.

[6] Note that reduction does have a role in the protection machinery, see details later in this chapter. On the content of protection more generally, see Chapter 3 by van Waas in this volume on the statelessness conventions.

grounds, such as ethnic affiliation. The Summary Conclusions from UNHCR's Geneva roundtable held in 2011 ('Geneva Conclusions') summarize the 'two different contexts, [as] the first consisting of countries – many industrialized – that host stateless persons who are predominantly, if not exclusively, migrants or of migrant background; and the second consisting of countries that have *in situ* stateless populations (i.e. those that consider themselves to already be "in their own" country)'.[7] The response to statelessness will need to vary, depending on these circumstances.

However important it is, international protection is not always the appropriate response to the statelessness of a certain population. Many people who are currently living without a nationality have strong ties to a certain country, many in fact having lived there since birth, the nationality of which they have reasonable and well-founded grounds to claim. In such situations the most suitable resolution of their statelessness is to move towards naturalization or recognition of the nationality of the population concerned, instead of creating a specific 'stateless person' protection status, which would maintain their situation of statelessness.[8] Examples of where recognition of nationality is the most appropriate response would include stateless Rohingyas in Myanmar, the stateless Kurds in Syria and stateless Nubians in Kenya.

Other stateless populations may not, or may not yet, have sufficiently strong ties with the country where they live (or with any other country).[9] This is commonly the case in a migration context. For example, a number of migrants originating from the former Soviet Union or Yugoslavia remained stateless after the dissolution of these states in the 1990s, but were not able to apply for a new nationality in their country of residence. In such circumstances a meaningful and rights-based protection mechanism may be advisable where the state in question refuses to naturalize its residents to avoid statelessness. Such a mechanism could lay a pathway to a durable solution (i.e. the elimination of statelessness) later on.

[7] UNHCR, 'Expert Meeting – Statelessness Determination Procedures and the Status of Stateless Persons (Summary Conclusions)' (Geneva, December 2010) – hereinafter referred to as the 'Geneva Conclusions', p. 2.

[8] Geneva Conclusions, para. 24 ('For stateless individuals within their own country, as opposed to those who are in a migration context, the appropriate status would be one which reflects the degree of attachment to that country, namely, nationality.'), see also UNHCR, 'Handbook on Protection of Stateless Persons under the 1954 Convention relating to the Status of Stateless Persons' (Geneva, 2014), para. 58.

[9] Consider that different states may have highly diverging views of what can be considered as 'sufficiently strong ties'.

Instead of relying exclusively on the 1954 Convention in these two aforementioned group situations, human rights law may offer some answers. In particular, the legal concept of one's 'own country' and the rights attached thereto may prove to be useful.[10] Article 12 of the International Covenant on Civil and Political Rights, for example, grants individuals the right to freedom of movement including the right to leave and to return to one's 'own country'. The UN Human Rights Committee (HRC) has held that this concept of 'own country' applies not only to nationals but also embraces any non-national who due to their 'special ties to or claims in relation to a given country, cannot be considered to be a mere alien'. The examples provided by the HRC by way of illustration include individuals who have been stripped of their nationality in violation of international law; whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them; stateless persons arbitrarily deprived of the right to acquire the nationality of the country they reside in; as well as long-term residents. It is important to underline that the HRC left this concept open and explicitly recognized that 'other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country',[11] giving rise to rights.

Even with this guidance, establishing whether a certain stateless population is residing in its 'own country' may prove to be challenging in practice. In any event, states should apply an inclusive approach in this respect and move towards the reduction of statelessness wherever possible. This approach gains firm support from international law, in particular based on the universally recognized objective of reducing statelessness[12] on the one hand, and the right to a nationality,[13] including every child's right to acquire a nationality,[14] on the other, as embedded in international instruments.

[10] See also Geneva Conclusions, p. 2.

[11] HRC, 'CCPR General Comment No. 27: Article 12 (Freedom of Movement)', CCPR/C/21/Rev.1/Add.9 (2 November 1999), para. 20.

[12] Convention on the Reduction of Statelessness, New York, 30 August 1961, in force 13 December 1975, 989 UNTS 175, preamble; Council of Europe, European Convention on Nationality, Strasbourg, 6 November 1997, in force 1 March 2000, ETS 166, Art. 4(b).

[13] Universal Declaration of Human Rights, 10 December 1948, GA Res. 217A(III), UN Doc. A/810 at 71, Art. 15(1); American Convention on Human Rights (ACHR), San Jose, 22 November 1969, 18 July 1978, *OAS Treaty Series* No. 36, Art. 20; European Convention on Nationality, Art. 4(a).

[14] Convention on the Rights of the Child (CRC), New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3, Art. 7(1).

In addition to the protection versus reduction dilemma, the boundaries between the protection of stateless persons and refugee protection should also be designated. Many stateless persons are forced migrants. Statelessness often constitutes (or at least is an element of) the 'push factor', while in other cases forced migration results in statelessness.[15] Stateless refugees are explicitly protected under Article 1A(2) of the 1951 Refugee Convention. Regional instruments extending the application of the refugee definition or creating regional complementary protection mechanisms also make explicit or implicit reference to stateless persons.[16] Because of this, and the different protections needed by stateless refugees outside their 'own countries', regimes envisaging protection for stateless persons should concentrate on those who do not qualify for refugee status (or subsidiary protection in the EU). Notwithstanding the numerous shortcomings in the international refugee protection system, it is at least an existing and functioning protection framework in many countries, whilst currently the same cannot be said of the statelessness protection regime. Much more could be said about the interface between statelessness and refugee law. However, this chapter will concentrate on the protection and identification of non-refugee stateless persons.[17]

Outside these particular scenarios – stateless populations living in their own countries in particular – the 1954 Convention still remains very relevant to individual stateless persons, and the remainder of the chapter deals with these situations.

5.2. Classifying the protection environment

If statelessness has remained in the cupboard for several decades, the protection of stateless persons has been kept right at the back, on its dustiest

[15] See Chapter 10 by Nonnenmacher and Cholewinski in this volume.

[16] See Convention Governing the Specific Aspects of Refugee Problems in Africa, Addis Ababa, 10 September 1969, in force 20 June 1974, 1001 UNTS 45, Art. 1(2); Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena, 22 November 1984, para. 3; Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, Luxembourg, 19 May 2004, 2004/83/EC, Art. 2(e).

[17] For more on the inter-relationship between refugee protection and stateless protection, see A. Edwards and L. Van Waas, 'Statelessness' in *Oxford Handbook on Refugee and Forced Migration Studies* (Oxford University Press, 2014) and G. Gyulai, 'Statelessness in the EU Framework for International Protection', *European Journal of Migration and Law*, 14 (2012), 279–95.

shelf. Nearly six decades after the adoption of the 1954 Convention, stateless individuals still lack an opportunity to claim and enjoy protection in most countries, and existing protection regimes are far from ideal. In recent years, this issue has started to attract greater international attention, yet the analytical literature available is extremely limited. A fundamental paradigm shift seems necessary in order to improve this state of play. Therefore, this chapter introduces new terminology and a simple classification method in the hope of stimulating and providing a conceptual foundation for future debates and research initiatives.

In the process of establishing a functioning international protection system for people without a nationality, introducing the concept of a 'statelessness-specific protection mechanism' can be of great utility. This label indicates that statelessness per se provides a ground for protection. One does not need to establish a statelessness-*plus* ground for protection, that is, there is no need to be stateless *and* a refugee, to be stateless *and* a legal resident, or to be stateless *and* present compelling humanitarian grounds for non-returnability. In such a system, an individual is able to claim protection based on her or his statelessness, and if this fact is objectively confirmed, she or he will receive a legal status on this ground alone. The 1954 Convention and international human rights law provide a firm basis for the creation of a statelessness-specific protection regime. Nevertheless, as already noted, most states parties still ignore this obligation.

Some countries do offer some kind of protection status to stateless persons, but not on the ground of their statelessness. The relevant protection ground is rather something commonly related to statelessness, or a phenomenon thereof. In a migratory context, for example, this usually means that legal and/or practical obstacles to expulsion give an entitlement to residence (at least after a certain amount of time). While this 'non-statelessness-specific' protection helps to avoid an enduring situation of legal limbo, it still raises a number of concerns. Rights attached to such statuses regularly remain below the standards set by the 1954 Convention, while this 'half-way' solution maintains the invisibility of statelessness.

Most countries at the time of writing fail to provide any sort of protection machinery at all for stateless people. The negative consequences can be numerous: unjustifiable lengthy immigration detention, enduring legal limbo, social exclusion and destitution – to mention just a few examples.[18]

[18] See, for example, UNHCR, 'Mapping Statelessness in The United Kingdom' (22 November 2011), Chapter 5; UNHCR, 'Mapping Statelessness in the Netherlands' (November 2011), Chapter 3.4.

Based on research into state practice, the following five categories can be used to describe the protection environments and determination machineries that currently exist:

1. A statelessness-specific protection mechanism, based on clear procedural rules established in law (Spain, Hungary, Moldova, Georgia and the Philippines);
2. A statelessness-specific protection mechanism, without clear procedural rules established in law, but with a general 'consensus' on procedural modalities (France);
3. A statelessness-specific protection mechanism, without clear procedural rules established in law and with no general 'consensus' on procedural modalities (Italy);
4. A non-statelessness-specific protection mechanism, where for instance legal and/or practical obstacles to expulsion provide a ground for residence rights (Germany and Poland);
5. Neither a statelessness-specific protection status, nor alternative (non-statelessness-specific) protection is available (the majority of states).

At the time of writing, a positive shift towards categories 1 and 2 can be witnessed. For example, a recent judgment of the Italian Supreme Court of Appeal *(Corte Suprema di Cassazione)* put an end to a decades-long debate concerning the procedural modalities to be applied in judicial statelessness determination, clearly indicating that a centralized procedure be followed.[19] Slovakia has adopted a legislative basis for a statelessness-specific protection regime, the procedural modalities of which will hopefully be elaborated and codified in due course.[20] The same is expected in Mexico, where only a limited set of procedural rules exists in soft law (official guidance) at the time of writing.[21] Two (unfortunately unsuccessful) bills have attempted to establish a statelessness-specific protection framework in the United States of America.[22] Furthermore, a number of other states

[19] Judgment no. 7614 of 4 April 2011 of the Supreme Court of Appeal – the actual consequences of this judgment are yet to be analyzed at the time of writing.

[20] Act no. 404/2011 coll. on the stay of aliens and on the amendment of some other acts of 21 October 2011 (Zákon 404/2011 Z. z. o pobyte cudzincov a o zmene a doplnení niektorých zákonov), s. 46.

[21] Manual of Migration Criteria and Procedures of the National Institute of Migration, 29 January 2010 (Manual de Criterios y Trámites Migratorios del Instituto Nacional de Migración, 29 de enero de 2010), s. L.

[22] Bill no. S.3113, 111th Congress, 2nd Session, s. 24; Bill no. S.1202, 112nd Congress, 1st Session, s. 17.

pledged in December 2011 to establish a statelessness-specific protection mechanism in the near future – or at least to consider this possibility.[23] The forthcoming decade is therefore likely to bring an unprecedented shift towards statelessness-specific protection regimes in different parts of the world. Against this background, the need to better understand how protection systems function becomes all the more evident and this will be turned to next.

5.3. The building blocks of a statelessness protection mechanism

After clarifying the conceptual framework of statelessness-specific protection, it is essential to determine its main building blocks. Practice shows that statelessness has some specific features that should play a crucial role in shaping related protection measures. First of all, statelessness is often a hidden characteristic, and the awareness about this issue, or the relevant protection obligations, appears to be rather weak globally. The lack of visibility and awareness can be particularly striking in countries with very small stateless populations. Secondly, statelessness is usually an enduring phenomenon (for example, once lost, nationality is often unlikely to be recovered within a short period of time); therefore stateless persons in relevant situations (described below) have long-term protection needs. Finally, statelessness usually renders those affected vulnerable in various ways, thus it requires the creation of a sensitive and protection-oriented framework. All nascent protection frameworks should address these specific challenges, for which concrete examples will be offered below.

As stated earlier, due to the lack of practical experience and widely accepted, authoritative procedural norms, government officials or advocates will be in need of a certain level of creativity if they want to establish a national protection mechanism for stateless persons. However, creativity will fortunately not be their only tool. The following can all serve as sources of inspiration.

A handful of countries already have specific identification and protection mechanisms for stateless persons in place (including France, Georgia, Hungary, Italy, Latvia, Mexico, Moldova, the Philippines, Spain and the United Kingdom). While none of these regimes can be presented

[23] Australia, Austria, Belgium, Brazil, Costa Rica, Peru, the United States of America and Uruguay – UNHCR, 'Pledges 2011 – Ministerial Intergovernmental Event on Refugees and Stateless Persons', Geneva, Palais des Nations, 7–8 December 2011.

as ideal, these countries' experiences definitely serve as a source of reflection and guidance. Unfortunately, not many of these systems have been subject to in-depth, practice-focused analysis so far.[24] A limited body of national jurisprudence (in particular from French, Hungarian, Italian and Spanish courts) may also provide useful guidance in some particular aspects.

Meanwhile, the protection of stateless persons shares a number of common characteristics with refugees, including a very similar international legal basis and joint drafting history, as well as the lack of proper protection by one's 'own state' in both cases. This means that in countries where statelessness arises primarily in a migratory context (as in most industrialized states), much can be learned from asylum procedures and regulations.

A further source of guidance is UNHCR's 'guidelines on statelessness', which so far have dealt with the meaning of 'stateless person', the status of stateless persons at the national level, and status determination procedures, which have been consolidated into a Handbook on the Protection of Stateless Persons, in 2014.[25] UNHCR's Executive Committee has also produced a number of relevant conclusions, even though they are of a rather general nature.[26]

Last but not least, general due process safeguards should also be observed and applied to the maximum extent. The prohibition of discrimination,[27] the right to an effective remedy[28] and respect for the child's best interests[29] deserve special reference in this context.

[24] See, for example, G. Gyulai, 'Statelessness in Hungary: The Protection of Stateless Persons and the Prevention and Reduction of Statelessness' (December 2010) Hungarian Helsinki Committee.

[25] UNHCR, 'Handbook on Protection of Stateless Persons', para. 58.

[26] See, in particular, UNHCR Executive Committee, 'Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons' No. 106 (LVII) (6 October 2006); and also UNHCR 'Executive Committee Conclusions No. 50 (XXXIX) – 1988, No. 90 (LII) – 2001 and No. 96 (LIV) – 2003.

[27] See, for example, International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171, Art. 26; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Rome, 4 November 1950, Art. 13; American Convention on Human Rights (ACHR), 22 November 1969, in force 1 June 2010, Art. 14; American Convention on Human Rights, Art. 1(1).

[28] See, for example, (ICCPR), Art. 2(3); ECHR, Art. 13; ACHR, Art. 25.

[29] CRC, Art. 3.

Based on the above-presented general features and sources of guidance, this chapter puts forward a five-step protection model[30] to ensure that all stateless persons have effective access to the protection they are entitled to under international law:

1. *Ratification and due observance of relevant international instruments.* Practice shows that mere accession to the 1954 Convention and other relevant treaties does not, of itself, ensure the establishment or implementation of a national protection framework. Most states parties to the convention do not, at the time of writing, operate any identification and protection mechanism. Nevertheless, accession is key to raising awareness about protection obligations both at the national and international level (for example, reaching a 'critical mass' of states adhering to the convention globally). In addition, it creates a direct legal basis for requiring states to develop a proper identification and protection mechanism.[31]
2. *Ensuring visibility of the issue of statelessness and stateless populations.* To reach any improvement in protection standards, the 'legal ghosts' should be brought to light. Legislators, politicians and advocates should understand the phenomenon of statelessness, the relevant international obligations and who the populations concerned are. Improved and targeted statistical data collection can be pivotal in this respect. Another area for enhanced visibility is legislation. It is preferable that states enact a separate legal Act,[32] or at least a particular chapter in a relevant law,[33] to enable all parties to know where to turn to for legal guidance. Of course, non-legislative measures such as training are also fundamental.

[30] These steps indicate a 'roadmap' for states wishing to establish a statelessness-specific protection mechanism and civil society actors advocating to this end, rather than describing different scales through which a stateless person can access protection.

[31] Cf. Geneva Conclusions, para. 1; UNHCR, 'Handbook on Protection of Stateless Persons', para. 8.

[32] As in the Spanish legislation, see Royal Decree 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons (Real Decreto No 865/2001, de 20 de julio, por el que se aprueba el Reglamento de Reconocimiento del Estatuto de Apátrida).

[33] As in the Hungarian and Moldovan legislation. See Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról), Chapter VIII, and Act 200 of 16 July 2010, on the Regime of Foreigners in the Republic of Moldova (Legea Nr. 200 din 16.07.2010 privind regimul străinilor în Republica Moldova), Chapter X[1] (respectively).

3. *Effective determination of statelessness.* Any protection measure requires the proper identification of those entitled to it.[34] Below I set out a broader overview of challenges and responses with regard to this process.
4. *Providing for a proper protection status.* Stateless persons are entitled to a set of rights under the 1954 Convention and international human rights instruments. The most effective way to ensure these rights for those identified as stateless is the creation of a specific protection status, which can also be crucial in enhancing visibility as mentioned in point 2 above. At the same time, alternative solutions are also possible (where stateless persons gain an entitlement to an already existing, broader or more generous legal status, e.g. permanent residence permit).[35] In any case, the status granted should be protection-oriented, should reflect the enduring protection needs of stateless persons and, as such, should provide meaningful possibilities for economic and social integration.
5. *Offering a route to a durable solution.* Stateless persons, like refugees, require a durable solution, beyond their immediate or medium-term protection needs. UNHCR distinguishes three durable solutions for refugees, namely: voluntary repatriation, local integration in the country of first asylum and resettlement in a third country. These solutions are deemed durable, as they put an end to the 'refugee cycle'[36] and thus the need for international protection. Applying this thinking to statelessness, one can only identify a single durable solution: the acquisition of a nationality. A protection status designed for stateless persons may offer a broad set of rights and a number of social entitlements, yet it will never provide a veritable exit from the 'statelessness cycle'. Besides the likely disadvantages of this status vis-à-vis holding the nationality of the country of residence, one should also not underestimate the

[34] Cf. Geneva Conclusions, para. 1; UNHCR,'Handbook on Protection of Stateless Persons', para. 8.

[35] The line between these two scenarios may sometimes be blurred and mixed solutions are also possible. In Hungary, for instance, stateless persons are issued a humanitarian residence permit, which determines the majority of the rights they enjoy (e.g. legal residence, restricted access to the labour market or right to family reunification). However, statelessness – as a legal ground – is specified on the residence permit and entails some entitlements that are specific to stateless status (e.g. the maximum validity of the permit upon first issuance is longer than in other cases).

[36] See inter alia R. Black and K. Koser, 'The End of the Refugee Cycle?' in R. Black and K. Koser (eds.), *The End of the Refugee Cycle? Refugee Repatriation and Reconstruction* (Oxford: Berghahn Books, 1999), 2–17.

psychological factor of belonging to, or being excluded from, a political, national and cultural community. Therefore, stateless persons' access to nationality should be facilitated in various ways, such as reducing the minimum waiting period, fees and other administrative obstacles.[37]

The same five-step model can – with some adaptations – be used in situations where stateless persons reside in their 'own country'. The main necessary modification will be that identification would be followed immediately by naturalization or recognition of nationality, instead of the granting of a protection status.

5.4. Statelessness determination

Determining statelessness is somewhat similar to proving the existence of an 'invisible' particle in physics. Its 'presence' as such may be impossible to demonstrate – as one needs to prove a negative ('not considered a national of any State under the operation of law')[38] – but identifying the interaction it has with the environment can fulfil the same purpose. Literally speaking, establishing statelessness means proving that someone is not a national of any of the world's nearly two hundred states. This would be an incredibly lengthy and cumbersome (or largely impossible) endeavour. Yet statelessness determination remains an indispensable cornerstone of any statelessness protection mechanism, as already described, and it also plays a crucial role in prevention and reduction measures. Luckily, practice demonstrates that statelessness can be realistically identified through its impact on certain aspects of the person's life, and there are simple methods to reduce the scope of examination to a realistic level. The following parts outline the framework for statelessness determination and the main challenges related thereto.

5.4.1 Access to statelessness determination

Protection mechanisms have no actual impact if those in need of protection are prevented from accessing them. Practice shows that protection-oriented asylum regulations, facilitated naturalization mechanisms and progressive frameworks offering protection to victims of domestic

[37] See 1954 Convention, Art. 32.

[38] 1954 Convention, Art. 1(1). See Chapter 3 in this volume by van Waas on the UN statelessness conventions.

violence too often remain promises on paper, as the machinery that would give access to them is ineffective. These protection mechanisms are like a fancy and perfectly equipped concert hall where no concert ever takes place. They are still good for impressing foreign delegations or the press, but they will never reach the objective for which they have been built.

The first question to answer, therefore, relates to the initiation of the procedure. In most cases, if a person seeks the recognition of a certain legal status or residence entitlement, it is required that she or he – as the interested person – initiates the procedure that would establish this entitlement (e.g. through submitting an application for asylum, a work visa or naturalization). An important argument against simply applying this general principle to statelessness determination is that even the persons concerned may often have difficulties recognizing or accepting that they are stateless, which may significantly delay their access to a proper legal status.[39] This particularly concerns vulnerable groups, such as unaccompanied minors. Another reason for opting for a different approach to immigration procedures is the declaratory character of the recognition of statelessness (i.e. the recognition and the consequent grant of a protection status does not create statelessness, it only recognizes this condition).[40] It is thus unsurprising that UNHCR argues that 'Given that individuals are sometimes unaware of statelessness determination procedures or hesitant to apply for statelessness status, procedures can usefully contain safeguards permitting State authorities to initiate a procedure.'[41]

Nevertheless, there appears to be some general reticence about an *ex officio*-initiated statelessness determination procedure, the main argument being that a state authority cannot 'force someone to be stateless'. At the time of writing, only Spain and Moldova provide for such a possibility in their legislation.[42] Several avenues are available for states seeking

[39] See the general characteristics of statelessness (hidden phenomenon, lack of awareness, vulnerability of the population concerned, etc.) as described earlier.

[40] See UNHCR, 'Handbook on Protection of Stateless Persons', para. 16. The same approach is applied with respect to refugee status: see UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention relating to the Status of Refugees (1979, re-issued 1992 and 2011), para. 28.

[41] Ibid., para. 68.

[42] Royal Decree 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons, s. 2(1); Act 200 of 16 July 2010, on the Regime of Foreigners in the Republic of Moldova (Legea Nr. 200 din 16.07.2010 privind regimul străinilor în Republica Moldova), s. 87(1).

a balance between the two options. For instance, *ex officio* initiation can be allowed, but the explicit consent of those found to be stateless shall be obtained before recognition. Another option is to limit *ex officio* initiation to unaccompanied minors, or other groups or individuals lacking full legal capacity or particular difficulties.[43] A third option only allows the person concerned to initiate the procedure, while placing an obligation on immigration, asylum and/or naturalization authorities to provide information about the system, the possibility of applying for stateless status and the rights that can be acquired in this way to any person whose potential statelessness arises in any of these procedures.[44]

Beyond the 'who', the 'how' question is also essential. Bureaucratic difficulties (such as complicated applications that can only be completed in written form, in the country's official language) can encumber, or even impede access to determination mechanisms. The protection-oriented framework requires a flexible interpretation of such rules, as in the case of Hungary, where claims for stateless status can be submitted both in written and oral form and in any language.[45] Moreover, claims submitted to any state authority should be forwarded to the competent regional directorate of the immigration authority.[46] Similarly in Spain, claims can be entered at immigration offices, police stations or the asylum authority.[47] The reverse is true in the French practice, where such claims are only received if written in the French language and only at one single place in the country (the headquarters of the French Office for the Protection of Refugees and Stateless Persons, *Office français de protection des réfugiés et apatrides* – OFPRA).[48] Beyond the evident difficulties regarding communication and distance one should not forget that the circle of advisors

[43] See, for example, *Report of the Hungarian Parliamentary Commissioner for Civil Rights on cases no. AJB 2629/2010 and AJB 4196/2010*, September 2010, as well as Gyulai, 'Statelessness in Hungary', 43–5.

[44] Hungary applies this approach, see Government Decree 114/2007. (V. 24) on the execution of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals (170/2001. (IX. 26.) Korm. rendelet a külföldiek beutazásáról és tartózkodásáról szóló 2001. évi XXXIX. törvény végrehajtásáról), s. 160(1).

[45] Government Decree 114/2007. (V. 24) on the execution of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s. 159(1).

[46] Act CXL of 2004 on the general rules of administrative procedures and services (2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól), s. 22(2).

[47] Royal Decree 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons, s. 2(3).

[48] While, for example, asylum claims can be submitted at any *préfecture* (local representation of the national government) all over the country.

(NGOs, lawyers, etc.) trained on statelessness and active in supporting stateless people is still extremely limited, even in the industrialized world (as compared in particular to the fields of asylum, immigration or naturalization). This means that such a restrictive approach can significantly hinder access to procedures and protection.

A further challenging issue is whether states are allowed to set any specific admissibility conditions. In Hungary, for example, only lawfully staying foreigners can claim stateless status.[49] This restriction – besides being evidently absurd[50] – is in breach of the 1954 Convention. The latter sets forth an exhaustive list of exclusion grounds and does not allow for further ones. As the Metropolitan Court *(Fővárosi Bíróság)* in Hungary correctly observed:

> it is the Convention that sets the material conditions of the recognition of stateless status, according to which a stateless person is a person who is not recognised as a citizen by any country under its national law. As compared to the Convention, the Aliens Act [...] cannot establish further material conditions for the recognition of statelessness.[51]

Another such limitation can be found in the Spanish legislation, which sets a time limit for applications. Claims for stateless status are only admitted within one month after entry into Spain or following the expiration of a residence entitlement.[52] In any other case, the application will be automatically rejected as manifestly unfounded.[53] This approach is again contrary to the 1954 Convention, in addition to being conceptually erroneous. Statelessness is an objective condition, which does not need to be underpinned by a subjective fear or other specific conditions.[54] While having an effective opportunity and still not applying for refugee status for a long period may, in certain cases, cast doubt on the credibility of the asylum claim, no parallel principle exists in statelessness determination. For example, it is more than realistic that a stateless person only

[49] Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s. 76(1).

[50] Since statelessness in Hungary arises mainly in a migratory context, this rule requires a stateless person to obtain a valid travel document and fulfil a set of difficult material conditions (such as accommodation, livelihood and health insurance) before even being able to claim protection as a stateless person.

[51] Judgment no. 24.K.31.412/2009/6.

[52] An exception is made only for *sur place* cases, in which the one month deadline is counted from the day when the applicant (who already resides in Spain) becomes stateless.

[53] Royal Decree 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons, s. 4.

[54] See Geneva Conclusions, para. 21.

realizes her or his condition as such after numerous unsuccessful (yet time-consuming) attempts to renew her or his passport. Or to put it simply: under the 1954 Convention's definition, a stateless individual is still stateless even if she or he has already stayed in the 'host country' illegally for more than a year. UNHCR overtly rejects both limitations, declaring that neither a condition of lawful stay, nor a time limit for application has any legal foundation in the 1954 Convention.[55]

5.4.2 *The legal status of applicants*

A closely related and similarly challenging question is that of the legal status that should be given to those who apply for stateless status while the determination process is ongoing. The Geneva Conclusions suggest that 'States should afford applicants for statelessness determination a minimum set of rights (including work, education, healthcare and housing rights), subject to this being consistent with the requirements of the 1954 Convention and the norms on non-discrimination contained in international human rights law.'[56] UNHCR guidance advises against the removal of applicants from the territory pending their statelessness determination, as well as calling on states to provide applicants with an identity document, the right to self-employment and freedom of movement. As a practical solution, UNHCR recommends that 'individuals awaiting a determination of statelessness receive the same standards of treatment as asylum-seekers'.[57] Yet, this question sheds light on one of the most significant shortcomings in the formalized determination mechanisms that exist at the time of writing. Currently, no national legislation applies a clear and meaningful legal concept of 'applicant for stateless status' or 'applicant for statelessness determination'.

Research has shown that applicants *may* be provided with a temporary residence permit in other national systems as well, but this only happens as a matter of discretion (in Spain) or on an ad hoc basis, without any clear legal foundation (as in the Italian judicial determination procedure). In France, alien-policing authorities may refrain from expelling applicants for stateless status in practice, but there is no legal obligation to do so. This means that such applicants may be subject to expulsion measures, lengthy administrative detention or destitution during the

[55] UNHCR, 'Handbook on Protection of Stateless Persons', paras. 69–70.
[56] Geneva Conclusions, para. 23.
[57] UNHCR, 'Handbook on Protection of Stateless Persons', para. 145.

determination procedure, even if their claim is well founded. It is therefore especially promising that the three statelessness-specific protection regimes created in 2012 all make important steps towards a proper solution for this *lacuna*. The law of Moldova stipulates that 'the applicant has the right to stay on the territory of the Republic of Moldova during the examination of his/her claim and may only be removed from the territory for reasons of national security and public order'. Moreover, it foresees the issuance of a temporary residence permit for the duration of the determination process.[58] Georgian legislation also prohibits the expulsion of applicants until a decision is made, as well as explicitly stipulating that the applicant's stay shall be considered lawful, even if she or he was staying in the country unlawfully upon the submission of the claim.[59] The Philippines have also adopted rules ordering the suspension of deportation measures during status determination and offering a (non-mandatory) possibility to release the applicant from immigration detention, if relevant.[60]

Whilst the problem is apparent, it is difficult to argue for a fully fledged applicant status solely on the basis of the 1954 Convention, mostly because this instrument remains entirely silent about determination issues. Relevant UNHCR guidance does, however, offer support: 'An individual is a stateless person from the moment that the conditions in Article 1(1) of the 1954 Convention are met. Thus, any finding by a State or UNHCR that an individual satisfies the test in Article 1(1) is declaratory, rather than constitutive, in nature.'[61] This means that a stateless individual does not become a stateless person through the status determination procedure, but is rather recognized as being a stateless person. As a matter of principle, therefore, she or he is already entitled to the rights defined in the 1954 Convention.[62] Meanwhile, as van Waas concludes, the convention's formulation of rights seriously endangers the actual enjoyment of these rights. The precondition of entitlement is usually, at least, lawful presence (if not an even more substantial connection with the state), and instead of

[58] Act 200 of 16 July 2010, on the Regime of Foreigners in the Republic of Moldova, ss. 87^3 (1)–(2).

[59] Decree of the President of Georgia No. 515 of 27 June 2012, s.7(2).

[60] Department Circular No. 058 – Establishing the Refugees and Stateless Status Determination Procedure, Department of Justice, 18 October 2012, s. 7.

[61] UNHCR, 'Handbook on Protection of Stateless Persons', para. 16.

[62] The same line of argumentation is usually followed when interpreting the 1951 Refugee Convention: See UNHCR, 'Handbook on Criteria and Procedures for Determining Refugee Status', para. 28.

an absolute standard, most mandatory provisions prescribe a treatment only on a par with 'aliens generally'.[63] So even if we accept that applicants for stateless status should be considered as entitled to the rights defined by the convention until the contrary is proved, this will only have a limited impact. Practical considerations may then have the final say on this issue: it is not difficult to accept that the lack of a proper legal condition for the applicant renders the entire identification (and protection) framework meaningless. States should aim for efficient and well-regulated procedures that can assist in determining, in a realistic time frame, who is entitled to protection and who is not.

5.4.3 *The institutional framework*

As previously mentioned, when establishing the procedural machinery of statelessness determination, a number of models and sources of guidance can be consulted. The primary institutional question is which authority (immigration, nationality, asylum or other) ought to be in charge of identifying, and determining the status of, stateless persons. The answer can only be context specific. In situations where the population concerned is predominantly in its 'own country' authorities in charge of nationality issues and naturalization appear to be the most appropriate bodies for statelessness determination (given the fact that the likely solution for statelessness will be reduction, instead of protection, by implementing the country's own nationality legislation).[64] In an international protection context – the primary focus of this chapter – the response may be more complex. Populations concerned may be rather limited in countries where most stateless persons are from a migratory background; therefore states are likely to favour the integration of statelessness determination into already existing structures. Existing protection mechanisms tend to delegate this task either to asylum authorities (France, Spain, the Philippines) or immigration authorities (Hungary, Moldova).

The typical procedural acts of statelessness determination are alien to asylum procedures where some of these are even prohibited (e.g. contact with the country of origin). Nonetheless, delegating the task of statelessness determination to asylum authorities may be the preferred option for

[63] L. E. van Waas, *Nationality Matters. Statelessness under International Law* (Antwerp/Oxford/Portland, OR: Intersentia, 2008), 391.

[64] See Geneva Conclusions, para. 5.

a number of reasons. Asylum and statelessness share the same characteristic of being based on international protection obligations. Asylum authorities or judges specialized in this field may prove to be better able to accept and effectively deal with the specific procedural features resulting from the protection-oriented character of the procedure, such as a lowered standard of proof or the scarcity of documentary evidence. An immigration officer, who usually operates in a stricter procedural framework, may have adaptation difficulties, especially if only rarely confronted with statelessness cases. A centralized structure and the specialization of officers dealing with statelessness determination should be supported for the same reason.[65] Such merged procedures could also deal with 'stateless refugees', and ensure that they are processed through the most appropriate procedure.[66]

A further interesting question is whether statelessness determination can be performed in a purely judicial context. At the time of writing, such a system – in the framework of a functional protection apparatus – can only be found in Italy, where it exists in parallel with a largely dysfunctional administrative determination mechanism.[67] Electing for the judicial determination of statelessness may raise a number of concerns, including usually lengthy delays, difficult data collection and diverging decision-making practices. At the same time, the Italian experience shows that such a framework can eventually also provide more space for a progressive, inclusive and human-rights-focused approach and facilitates a continuous and fruitful professional debate on (re-)interpreting statelessness.[68]

[65] See UNHCR, 'Handbook on Protection of Stateless Persons', para. 63. Note that a centralized decision-making structure should not mean a centralized access mechanism (e.g. only one or a very limited number of physical 'points of entry').

[66] The definition of a refugee in the 1951 Refugee Convention includes refugees who have lost their nationality and are stateless: Art. 1A(2), second paragraph.

[67] The administrative procedure is seldom used, as it requires the applicant to be lawfully present in Italy (see concerns regarding the similar regulation in Hungary earlier) and to present a wide range of documentary evidence. In addition it has unrealistic deadlines and the regulation does not create a clear protection obligation for the proceeding Ministry of the Interior, it just offers the possibility. See: Presidential Decree no. 572 of 12 October 1993, executive regulation of Act no. 91 of 5 February 1992 on new citizenship rules, s. 17.

[68] This conclusion is partly based on discussions with Paolo Farci, attorney-at-law, on statelessness in Italy; Budapest, 8 December 2011.

5.4.4 *The procedural framework*

In addition to the above structural issues, a number of procedural guarantees also need to be observed.[69] First, the right to a personal hearing, which provides the most adequate opportunity to collect oral evidence. Here, national practices vary: the applicant's personal hearing is mandatory in Hungary, usual in France and optional in Spain and Italy. Second, given the evident vulnerability of stateless persons, access to state-funded legal aid (a right guaranteed — at least in principle — in Hungary and Italy, but not in France) would be crucial in most cases. Third, access by UNHCR to proceedings, governed by its mandate to protect stateless people's rights, would be important.[70] This may include access to files and overall data, a possibility to intervene in individual cases with expert opinions and assistance in establishing facts and information from the country of origin. At the time of writing, Hungarian regulation shows an exemplary practice in this respect.[71]

Fourth, effective judicial review also constitutes an indispensable procedural safeguard in statelessness determination (regardless of whether the first-instance determination is administrative or judicial).[72] Besides evident due process and quality considerations, practice demonstrates that judicial guidance is crucial in shaping protection mechanisms – particularly in such a 'new' area of protection, where only limited international experience, soft law and academic literature is available. Rules and frameworks for judicial review differ greatly, even within the small group of countries operating a statelessness-specific protection mechanism. A personal hearing is mandatory in Hungary, while Spanish and French courts usually decide *sur dossier*. Spanish, Hungarian and Italian judges can grant stateless status themselves, while their French colleagues can only quash lower-instance decisions. Regardless, the increasing involvement of the judiciary in statelessness-related work (training, research, etc.) seems

[69] See also UNHCR, 'Handbook on Protection of Stateless Persons', paras. 71–3.

[70] See in particular UN General Assembly, 'Office of the United Nations High Commissioner for Refugees: Resolution adopted by the General Assembly' A/RES/49/169 (24 February 1995); UN General Assembly, 'Office of the United Nations High Commissioner for Refugees: resolution adopted by the General Assembly, 9' A/RES/50/152 (February 1996); UN General Assembly, 'Resolution 61/137 Adopted by the UN General Assembly: Office of the United Nations High Commissioner for Refugees' A/RES/61/137 (25 January 2007).

[71] Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s. 81.

[72] See UNHCR, 'Handbook on Protection of Stateless Persons', paras. 76–7.

a crucial objective, as the number of protection mechanisms is likely to multiply in forthcoming years.

The fifth procedural safeguard of relevance to statelessness determination is setting the proper time frame for decision making and establishing deadlines. However, this is not straightforward either. Statelessness determination often requires several months in order to be completed (as in most cases it requires obtaining information from foreign authorities). Unreasonably short procedural deadlines can therefore result in serious difficulties and a failure to meet the aim of effective determination. At the same time, irrationally long deadlines can also render the procedure void, by – among other issues – reducing the authority's motivation to conduct the determination process with due diligence. A striking example is the largely unused Italian administrative procedure, for which the law sets a 350-day deadline, or 895 days if the intervention of the Ministry of Foreign Affairs is required (which seems to be a regular necessity). On the other hand, administrative procedures are usually (even if not always) closed within a couple of months in France and Hungary. UNHCR suggests six months as a realistic time frame for statelessness determination, enabling an extension to twelve months, if official responses are required from foreign states regarding the applicant's nationality.[73]

A sixth issue that has arisen in some countries is the unfortunate codification mistake that states should avoid. This mistake is the use of non-binding language in respect of the granting of status. Both the Italian rules on administrative statelessness determination and the Slovak regulation stipulate that the competent authority *can* grant protection to a stateless individual (instead of *shall*).[74] This language creates legal uncertainty by delegating unreasonable discretion to the officer in charge, and as such, it raises serious concerns regarding compliance with the 1954 Convention.

Finally, failure to regulate the relationship between statelessness determination and asylum procedures may also cause difficulties. Stateless persons can be refugees at the same time, and many may seek protection through the asylum procedure as well. Given that the most common procedural act in statelessness determination (contact with and information gathering from foreign authorities) is strictly prohibited in asylum procedures, the regulatory framework ought to clarify

[73] See also UNHCR, 'Handbook on Protection of Stateless Persons', para. 75.

[74] Presidential Decree no. 572 of 12 October 1993, executive regulation of Act no. 91 of 5 February 1992 on new citizenship rules, s. 17(1); Act 404/2011 Coll. on aliens and the amendment of some laws (Zákon č. 404/2011 Z.z. o pobyte cudzincov a o zmene a doplnení niektorých zákonov), s. 46(2)(b).

the relationship between these two. In most functioning protection regimes, no legal rule has been created to this end. However, in the event of parallel claims, the general practice is to prioritize the asylum application and suspend statelessness determination until a final decision is reached on that question. This approach is correct, in particular because contact with authorities in the country of origin (a usual procedural step in statelessness determination) is strictly forbidden until the validity of the asylum claim is rejected by a final decision. The Philippines was the first country to properly codify this rule in its regulatory framework adopted in 2012, which stipulates that where during statelessness determination 'a refugee claim appears to exist, the stateless status determination shall, with the consent of the Applicant, be suspended and the application shall be considered first for refugee status determination. If the claim to refugee status is denied with finality, the stateless status determination shall recommence automatically.'[75] On the other hand, a rather unreasonable approach has been taken in Mexico, where *all applicants for stateless status shall first go through the asylum channel*, even if they do not refer to any asylum-related protection ground. Such an inflexible obligation causes unnecessary delays, costs and a waste of resources.

5.4.5 *The evidentiary framework*

Establishing statelessness is often a cumbersome exercise and if the evidentiary rules are too strict, this can easily undermine the protection objective of the 1954 Convention. The Geneva Conclusions therefore rightly point out that 'determination procedures should adopt an approach to evidence which takes into account the challenges inherent in establishing whether a person is stateless'.[76] There appears to be a general perception among states and other actors that in order to be qualified as stateless an individual does not need to prove that she or he is not the citizen of any single country of the world. Nevertheless, more concrete principles are still in the making.

The first pivotal issue is the burden of proof, meaning the question of who bears the burden of establishing whether or not the applicant is stateless. The Geneva Conclusions and UNHCR guidance both suggest a shared

[75] Department Circular No. 058 – 'Establishing the Refugees and Stateless Status Determination Procedure', Department of Justice, 18 October 2012, s. 8.

[76] Geneva Conclusions, para. 14.

onus, with the applicant being obliged to cooperate with the determining authority.[77] From a practical standpoint, it would be difficult to argue against this approach: stateless persons often face insurmountable difficulties in demonstrating their lack of nationality, and if they were left alone in this task, most of them would never have access to protection. Moreover, foreign authorities have diverging attitudes towards claims for the confirmation of citizenship coming from individuals and state offices. Research from Hungary,[78] for instance, indicates that some foreign authorities will only respond to such a query if submitted by the person concerned (for reasons of data protection, for example). Others may disregard individual information requests (especially if coming from an individual not perceived as a citizen) and would attach more importance to 'official' claims submitted by a foreign state authority. Sometimes the very same state may apply either of these approaches, depending on the case (or the officer who receives the information request). As such, flexibility and 'labour-division' can seriously enhance the efficiency of the determination procedure.

It is comprehensible, therefore, that most states resort to some sort of burden sharing. In France and Spain, the asylum authority, which processes statelessness claims, has the responsibility to establish whether or not the applicant is stateless, while the applicant solely has the obligation to cooperate in this process (by, for example, submitting all relevant evidence at her or his disposal). In Hungary, the principal burden of proof is incumbent on the claimant, but the competent authority is obliged to provide administrative assistance on request and has the general obligation to establish all relevant facts of the case.

Another key issue in this context is the applicable standard of proof. The difficulty of proving statelessness has been mentioned repeatedly in this chapter. As with the issue of the burden of proof, flexibility and a protection-oriented approach is required in this respect, too. It is important to note that legislators and judges in civil law jurisdictions – unlike their counterparts in the common law context – usually refrain from a formalistic interpretation of the standard of proof.[79] Nevertheless, a growing body of legislation and jurisprudence indicates that 'proving' should be understood flexibly and a high, for example 'beyond all reasonable doubt', standard cannot be expected. Hungarian legislation uses

[77] Geneva Conclusions, para. 13. See also UNHCR, 'Handbook on Protection of Stateless Persons', para. 89.

[78] Gyulai, 'Statelessness in Hungary', 26.

[79] Most states operating a statelessness-specific determination and protection mechanism at the time of writing follow a civil law tradition.

the verb 'substantiate' (*valószínűsít*) instead of 'prove', a term borrowed from national asylum legislation and international refugee law, indicating a lower and more flexibly interpreted standard of proof.[80] Some Italian court decisions also argue for a lowered standard: for instance, the Court of Appeal of Florence (*Corte di Appello di Firenze*) ruled in 2009 that in certain situations, in particular when the applicant has never had any nationality, circumstantial or indicative evidence (*un quadro indiziario*) can be sufficient for the recognition of statelessness.[81]

A more practical question related to evidence assessment is the circle of countries with regard to which a potential nationality tie should be tested. Evidently, this group should be limited and should only reflect realistic possibilities of nationality. To put it simply: if a woman was born in Bangladesh and lived most of her life in the United Kingdom, where she married a Pakistani national, there is no need to check whether she is a national of Ecuador or Cape Verde. Hungarian and Slovak legislation provide, for example, that statelessness shall be tested in particular with regard to the country of birth, the country or countries of former residence and the country of nationality of parents and family members.[82] In the practice of Hungary, this meant a maximum of two or three countries in every case presented in 2007–9. Italian jurisprudence has also adopted a similar approach: since the 1970s, a number of court decisions have ruled that the nationality link should be tested with regard to the country of origin and that of residence (Italy and, if relevant, the last place of residence), if there are significant ties.

The general requirement of flexibility also applies to the types of evidence accepted in statelessness determination, the following types being the most frequently used:

- *Information provided by foreign authorities (consular authorities, civil registry offices, etc.).* The main challenge linked to this type of evidence is that the authorities approached may often fail to respond within a reasonable time frame. Enduring silence could indicate a negative answer, yet it is difficult to set concrete benchmarks for how much time and how many unsuccessful attempts the determining authority should be allotted before arriving at this conclusion. Certainly, no

[80] Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s. 79(1).

[81] Judgment no. 1654 of 17 November 2009 of the Court of Appeal of Florence.

[82] Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s. 79(1); Act 404/2011 Coll. on aliens and the amendment of some laws, s. 46(3).

reaction for a month after the first official request is sent does not, per se, substantiate the lack of nationality. On the other hand, the refusal to answer for eight months and after five official letters is likely to indicate that the person in question does not have a legal bond with the given state.[83]

- *Country information.* Reliable, accurate and up-to-date information about nationality legislation and related practices in foreign countries can provide significant assistance in statelessness determination. Quality standards can be entirely borrowed from the field of asylum, with particular emphasis on individualization and the examination of actual legal practices (instead of the 'law in the books').[84]
- *Information provided by UNHCR.* Through its global presence and relevant mandate, UNHCR may be helpful in obtaining evidence, even in cases where the competent foreign authorities remain silent.
- *Documentary evidence.* Some applicants may be able to submit proof regarding the loss of a previous nationality or a travel document, which indicates that its holder is stateless (e.g. a specific document issued to stateless Palestinians in Kuwait or Lebanon). Other documents may help in establishing the place of birth or previous residence, such that the possible country or countries of nationality can be identified.
- *The applicant's own submissions.* Coherent and relevant statements made by the applicant should be accepted as evidence and should play a central (even if not necessarily self-sufficient) role in decision making.

National practices indicate a mixed use of all these types of evidence, with a clear emphasis on the first two.

Beyond these various considerations of a general scope, national courts have occasionally provided useful guidance on particular issues of interpretation. For example, the Metropolitan Court (*Fővárosi Bíróság*) in Hungary ruled in 2009 that an applicant's previous rejected asylum

[83] A state's usual 'attitude' in dealing with such queries should also be observed: no response after several attempts from a country that is usually diligent in providing such information can be quite indicative. On the other hand, the silence of a small, badly resourced state in the middle of a grave political and economic crisis may simply be due to a general incapacity to react on *any* such request.

[84] See, for example, G. Gyulai, *Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU* (Budapest: Hungarian Helsinki Committee, 2011); Hungarian Helsinki Committee and International Association of Refugee Law Judges, 'Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist', Paper for the 7th Biennial IARLJ World Conference, Mexico City (6–9 November 2006).

claims, expulsion and criminal conviction are all irrelevant facts when deciding upon his application for stateless status[85] (i.e., there is no 'good conduct' requirement in statelessness determination, except for particularly serious cases covered by the exclusion clauses of Article 1(2) of the 1954 Convention). The Italian Supreme Court of Appeal *(Corte Suprema di Cassazione)* held in 2007 that it is not necessary to prove the loss of a former nationality by an official state declaration. The loss of nationality can also be shown through the demonstration of acts by which the state denies protection to the individual concerned.[86] The French Council of State (*Conseil d'État*) ruled in 2000 that the mere legal possibility of recovering one's previously lost nationality does not exclude her or him from stateless status.[87] Overall, it is evident that clear guidance on evidentiary burden, standards and guidance in law or regulations can make the process of determination more fair and efficient, as well as helping to avoid excessively lengthy procedures.

5.5. Conclusion

The current decade is, without a doubt, a crucial one in the struggle against statelessness and for the protection of those affected by this undesirable phenomenon. After half a century of unjustifiable neglect, states, international organizations, the academic world and the civil sector seem to realize the severity of the problem and efforts to find suitable solutions are multiplying. This growing interest is particularly significant in the case of identification and protection of stateless persons, which has so far been *terra incognita* for most states and other actors (while, at least, the issues of avoidance and reduction of statelessness have received some limited attention).

Yet the road to be travelled before stateless persons around the globe receive the support and protection they are entitled to on the basis of the 1954 Convention and international human rights law looks to be long and dusty. To start with, states and other actors must first understand the concept and necessity of statelessness-specific protection, while also becoming familiar with what building blocks are indispensable for the construction of such a regime. As indicated in this chapter, however, to help ensure the effective identification of stateless

[85] Judgment no. 24.K.31.412/2009/6 of the Metropolitan Court.
[86] Judgment no. 14918 of 20 March 2007 of the Supreme Court of Appeal.
[87] Judgment no. 216121 of 29 December 2000 of the Council of State.

persons (a cornerstone of any protection mechanism), states and other stakeholders finally have a growing body of soft law guidance, academic literature and some good state practice to look at.[88] Nevertheless, additional mapping, research and legal analysis remain pivotal in this quickly evolving field. Of particular relevance will be the assessment of newly created identification and protection mechanisms, together with the comprehensive compilation and analysis of national jurisprudence on this matter.

In this process, one fundamental principle should never be overlooked. According to international human rights law, everybody has the right to a nationality, and consequently, statelessness constitutes a grave violation of a basic human right (usually with multiple negative impacts on the enjoyment of other human rights). Therefore, identification and protection mechanisms should always be constructed in an inclusive and rights-based manner. Moreover, for this very same reason, they should never simply aim for a 'practical solution' by offering a quick remedy to the most striking problems (such as lengthy detention or hopeless destitution). In the true spirit of the 1954 Convention and human rights law, these regimes should always promote, sooner or later, an effective way out from the anomalous condition of statelessness and provide a pathway to nationality. This chapter cannot but conclude with expressing hope that the years to come will witness the much-needed shift towards statelessness-specific protection regimes all over the world, and that this issue will find its well-deserved place on the map of international protection.

Questions to guide discussion

1. Is international protection the answer to the problem of statelessness? In what situations are other options more appropriate?
2. What are some of the key challenges to establishing statelessness determination procedures, for states and for individual stateless persons?
3. Outline the five-step protection model proposed by the author. What is your view of this? Are there any suggestions to complete this scenario (e.g. in a specific national context)?
4. What are the seven procedural safeguards the author sees as fundamental requirements in statelessness determination procedures, and

[88] See also: European Network on Statelessness, 'Statelessness Determination and the Protection Status of Stateless Persons', 2013.

what are some of the peculiarities compared with other determination systems?

5. What are some of the procedural differences between refugee status and statelessness determination procedures mentioned in this chapter?