

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 denationalisation 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 established, or how such protection shall be provided in practice.⁵

Together with examination of guidelines 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 roundtable held in 2011 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 been living 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)' (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, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person' (5 April 2012), para. 6.

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 attaching 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 (UN-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 UN-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 UN-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.¹²

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 reduction of statelessness wherever possible. This approach gains firm support from international law, in particular based on the universally recognized objective of reducing statelessness¹³ on the one hand, and the right to a nationality,¹⁴ including every child's right to acquire a nationality,¹⁵ on the other, as embedded in international instruments.

¹⁰ See also Geneva Conclusions, p. 2.

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

¹² *Ibid.*

¹³ 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).

¹⁴ Universal Declaration of Human Rights, Paris, 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).

¹⁵ Convention on the Rights of the Child, New York, 20 Nov. 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.¹⁶ 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.¹⁷ 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.¹⁸

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

¹⁶ See Chapter 10 by Nonnenmacher and Cholewinski in this volume.

¹⁷ 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).

¹⁸ 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, in press) 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 standard 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.¹⁹

¹⁹ 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, for example);
5. Neither a statelessness-specific protection status, nor alternative (non-statelessness-specific) protection is available (the apparent 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.²⁰ 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.²¹ 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.²² Two (unfortunately unsuccessful) bills have attempted to establish a statelessness-specific protection framework in the United States of America.²³ Furthermore, a number of

²⁰ Judgment no. 7614 of 4 April 2011 of the Supreme Court of Appeal – the actual consequences of this judgment are yet to be analysed at the time of writing.

²¹ 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.

²² 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.

²³ Bill no. S.3113, 111th Congress, 2nd Session, s. 24; Bill no. S.1202, 112nd Congress, 1st Session, s. 17.

other states pledged in December 2011 to establish a statelessness-specific protection mechanism in the near future – or at least to consider this possibility.²⁴ 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 Spain, France, Italy, Hungary, Latvia, Moldova, Georgia, the Philippines and Mexico). While none of these regimes can be presented as ideal, these countries' experiences definitely serve as a source of reflection and guidance.

²⁴ 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.

Unfortunately, not many of these systems have been subject to in-depth, practice-focused analysis so far.²⁵ A limited body of national jurisprudence (in particular from Spanish, Italian, French and Hungarian 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.²⁶ UNHCR's Executive Committee has also produced a number of relevant conclusions, even though they are of a rather general nature.²⁷

Last but not least, general due process safeguards should also be observed and applied to the maximum extent. The prohibition of discrimination,²⁸ the right to an effective remedy²⁹ and respect for the child's best interests³⁰ deserve special reference in this context.

²⁵ 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.

²⁶ 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' (20 February 2012); UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person' (5 April 2012); UNHCR, 'Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level' (17 July 2012).

²⁷ 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.

²⁸ 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, Rome, 4 November 1950, Art. 13; Organization of American States, American Convention on Human Rights, 22 November 1969, in force 1 June 2010, Art. 14; American Convention on Human Rights, Art. 1(1).

²⁹ See, for example, 'International Covenant on Civil and Political Rights', Art. 2(3); European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 13; American Convention on Human Rights, Art. 25.

³⁰ Convention on the Rights of the Child, Art. 3.

Based on the above-presented general features and sources of guidance, this chapter puts forward a five-step protection model³¹ 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.³²
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,³³ or at least a particular chapter in a relevant law,³⁴ to enable all parties to know where to turn to for legal guidance. Of course, non-legislative measures such as training are also fundamental.

³¹ 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.

³² Cf. Geneva Conclusions, para. 1; UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', para. 1.

³³ 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).

³⁴ 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 X¹ (respectively).

3. *Effective determination of statelessness.* Any protection measure requires the proper identification of those entitled to it.³⁵ 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).³⁶ 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 social integration.
5. *Offering a route to a durable solution.* Stateless persons, like refugees, require a durable solution, beyond their immediate or mid-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'³⁷ 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 psychological factor of belonging to, or being excluded from, a political,

³⁵ Cf. Geneva Conclusions, para. 1; UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', para. 1.

³⁶ 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).

³⁷ 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.

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 administrative obstacles.³⁸

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')³⁹ – 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 violence too often remain promises on paper, as the machinery that would give access to them is ineffective. These protection mechanisms are like

³⁸ See 1954 Convention, Art. 32.

³⁹ 1954 Convention, Art. 1(1). See Chapter 3 in this volume by van Waas on the UN statelessness conventions.

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.⁴⁰ This particularly concerns vulnerable groups, such as unaccompanied minors. Another reason for opting for a different approach 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).⁴¹ 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.’⁴²

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.⁴³ Several avenues are available for states seeking 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

⁴⁰ See the general characteristics of statelessness (hidden phenomenon, lack of awareness, vulnerability of the population concerned, etc.) as described earlier.

⁴¹ See 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’ (20 February 2012), para. 9.

⁴² UNHCR, ‘Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person’, para. 16.

⁴³ 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).

full legal capacity or particular difficulties.⁴⁴ 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.⁴⁵

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.⁴⁶ Moreover, claims submitted to any state authority should be forwarded to the competent regional directorate of the immigration authority.⁴⁷ Similarly in Spain, claims can be entered at immigration offices, police stations or the asylum authority.⁴⁸ 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).⁴⁹ Beyond the evident difficulties regarding communication and distance one should not forget that the circle of advisors (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

⁴⁴ 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.

⁴⁵ 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).

⁴⁶ 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).

⁴⁷ 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).

⁴⁸ Royal Decree 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons, s. 2(3).

⁴⁹ While, for example, asylum claims can be submitted at any *préfecture* (local representation of the national government) all over the country.

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.⁵⁰ This restriction – besides being evidently absurd⁵¹ – 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.⁵²

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.⁵³ In any other case, the application will be automatically rejected as manifestly unfounded.⁵⁴ 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.⁵⁵ 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 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

⁵⁰ Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s. 76(1).

⁵¹ 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.

⁵² Judgment no. 24.K.31.412/2009/6.

⁵³ 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.

⁵⁴ Royal Decree 865/2001 of 20 July approving the Regulation for the Recognition of the Status of Stateless Persons, s. 4.

⁵⁵ See Geneva Conclusions, para. 21.

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.⁵⁶

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.'⁵⁷ 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 the 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'.⁵⁸ 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 even 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 determination procedure, even if their claim is well founded.

⁵⁶ UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', paras. 17–18; UNHCR, 'Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level', para. 26.

⁵⁷ Geneva Conclusions, para. 23.

⁵⁸ UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', para. 20.

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.⁵⁹ 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.⁶⁰ 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.⁶¹

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.’⁶² 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.⁶³ 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

⁵⁹ Act 200 of 16 July 2010, on the Regime of Foreigners in the Republic of Moldova, ss. 87³ (1)–(2).

⁶⁰ Decree of the President of Georgia No. 515 of 27 June 2012, s.7(2).

⁶¹ Department Circular No. 058 – Establishing the Refugees and Stateless Status Determination Procedure, Department of Justice, 18 October 2012, s. 7.

⁶² 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’, para. 9.

⁶³ 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* (1979, reissued 1992 and 2011), para. 28.

an absolute standard, most mandatory provisions prescribe a treatment only on a par with 'aliens generally'.⁶⁴ 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).⁶⁵ 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

⁶⁴ L. E. van Waas, *Nationality Matters. Statelessness under International Law* (Antwerp/Oxford/Portland, OR: Intersentia, 2008), 391.

⁶⁵ 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.⁶⁶ Such merged procedures could also deal with 'stateless refugees', and ensure that they are processed through the most appropriate procedure.⁶⁷

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.⁶⁸ 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.⁶⁹

⁶⁶ See UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', para. 11. 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').

⁶⁷ 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.

⁶⁸ 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.

⁶⁹ 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.⁷⁰ 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 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.⁷¹ 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.⁷²

Fourth, effective judicial review also constitutes an indispensable procedural safeguard in statelessness determination (regardless of whether the first-instance determination is administrative or judicial).⁷³ 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

⁷⁰ See also UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', paras. 19–21.

⁷¹ 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).

⁷² Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s. 81.

⁷³ See UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', paras. 24–5.

the judiciary in statelessness-related work (training, research, etc.) seems 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.⁷⁴

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*).⁷⁵ 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

⁷⁴ See also UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', para. 23.

⁷⁵ 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).

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 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.'⁷⁶ 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'.⁷⁷ 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.

⁷⁶ Department Circular No. 058 – 'Establishing the Refugees and Stateless Status Determination Procedure', Department of Justice, 18 October 2012, s. 8.

⁷⁷ Geneva Conclusions, para. 14.

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 onus, with the applicant being obliged to cooperate with the determining authority.⁷⁸ 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,⁷⁹ 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 principle 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.⁸⁰ Nevertheless, a growing

⁷⁸ Geneva Conclusions, para. 13. See also UNHCR, 'Guidelines on Statelessness No. 2: Procedures for Determining whether an Individual is a Stateless Person', para. 37.

⁷⁹ Gyulai, 'Statelessness in Hungary', 26.

⁸⁰ All states operating a statelessness-specific determination and protection mechanism at the time of writing follow a civil law tradition.

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 the verb ‘substantiate’ (*valószerűsít*) instead of ‘prove’, a term borrowed from national asylum legislation and international refugee law, indicating a lower and more flexibly interpreted standard of proof.⁸¹ 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.⁸²

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.⁸³ In the practice of Hungary, this meant a maximum of two or three countries in every case presented in 2007–2009. Italian jurisprudence has also adopted a similar approach: since the 1970s, a number of court decisions has 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

⁸¹ Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, s. 79(1).

⁸² Judgment no. 1654 of 17 November 2009 of the Court of Appeal of Florence.

⁸³ 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).

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 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.⁸⁴

- *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’).⁸⁵
- *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 plausible 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.

⁸⁴ 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.

⁸⁵ See, for example, G. Gyulai, *Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU* (Budapest: Hungarian Helsinki Committee, 2011), available at: www.refworld.org/docid/4f13c5f02.html, last accessed 21 May 2014; 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).

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 claims, expulsion and criminal conviction are all irrelevant facts when deciding upon his application for stateless status⁸⁶ (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.⁸⁷ 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.⁸⁸ 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

⁸⁶ Judgment no. 24.K.31.412/2009/6 of the Metropolitan Court.

⁸⁷ Judgment no. 14918 of 20 March 2007 of the Supreme Court of Appeal.

⁸⁸ Judgment no. 216121 of 29 December 2000 of the Council of State.

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 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. 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

- Is international protection the answer to the problem of statelessness? In what situations are other options more appropriate?
- What are some of the key challenges to establishing statelessness determination procedures, for states and for individual stateless persons?
- 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)?

- What are the seven procedural safeguards the author sees as fundamental requirements in statelessness determination procedures, and what are some of the peculiarities compared with other determination systems?
- What are some of the procedural differences between refugee status and statelessness determination procedures mentioned in this chapter?