

SOLVING STATELESSNESS

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Edited by Laura van Waas and Melanie J. Khânna



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Published by:
Wolf Legal Publishers (WLP)
PO Box 313
5060 AH Oisterwijk
The Netherlands
Email: info@wolfpublishers.nl
www.wolfpublishers.nl

ISBN: 9789462403468

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The essays which have been collected in this edited volume all approach statelessness from a solutions perspective, looking at what is being done, and what more can be done, to address the issue. The first part of the book has a thematic focus, exploring perspectives, tools and techniques for solving statelessness which are relevant across different countries and regions. Chapters in the second part each have a regional focus, exploring region-specific challenges, developments and innovations set against the backdrop of the broader context of a global campaign to solve statelessness. With contributions from both scholars and practitioners, the book is likely to be of interest to anyone engaged in studying or implementing solutions for statelessness, including researchers, government policy-makers, staff of international or regional inter-governmental bodies and UN agencies, grass-roots and international civil society organisations, legal practitioners and advanced-level students.

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NOTE: The views contained in these essays are those of the authors and do not necessarily reflect the views of the institutions they work for or are affiliated with.

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Preface

Working in the field of statelessness today is a great privilege. After fighting hard to bring the issue out of the shadows, the small but growing community of people who have taken up the cause have found courage in the momentum achieved – both with respect to putting statelessness on the map and making real progress to resolve situations in a number of countries. A sense of optimism fuels the statelessness agenda today, epitomised by the bold ambition of UNHCR’s #IBelong Campaign. A sense of generosity also permeates our collective interactions on statelessness, which are increasingly characterised by a set of diverse actors all willing to share their knowledge and ideas in order to move the issue forward.

This collection of essays is a reflection of these attributes of the field at large. Every contributor set aside time in his or her demanding work schedule to share important insights into contemporary challenges and opportunities related to “solving” statelessness. The result is a thought-provoking publication that offers a valuable window onto the authors’ particular areas of work or expertise.

While this project began as an effort to draw together some of the lessons from the rich interactions between scholars and practitioners at the First Global Forum on Statelessness, convened in the Hague in 2014, it has since grown into something quite different and, we hope, more valuable. Rather than serving primarily as a record of discussions held in the past, it is now focused on the future, and specifically on promising directions ahead in the pursuit of solutions.

We would like to thank all of the contributors for joining us on this journey and for their dedication to the issue more broadly. We would also like to extend a special thank you to Peggy Brett, whose steady and painstaking support in the final copy-editing stage played a vital role in getting us successfully to the finishing line. Last but not least, we’d like to extend our very profound gratitude to our mentors in the field past and present, as well as to our families, whose endless support and understanding made this work possible.

Laura van Waas and Melanie J. Khanna
October 2016

List of Abbreviations

#IBelong Campaign	UNHCR's #IBelong Campaign to End Statelessness within 10 Years
1930 Hague Convention	1930 Hague Convention on certain questions relating to the conflict of nationality laws
1951 Convention 1951 Refugee Convention	1951 Convention relating to the Status of Refugees
1954 Convention 1954 Statelessness Convention	1954 Convention relating to the Status of Stateless Persons
1961 Convention 1961 Statelessness Convention	1961 Convention on the Reduction of Statelessness
2030 Agenda	2030 Agenda for Sustainable Development
Abidjan Declaration	Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHRD	ASEAN Human Rights Declaration
ASEAN	Association of Southeast Asian Nations
AU	African Union
Bali Process	Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime

LIST OF ABBREVIATIONS

Brazil Declaration	Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean
Brazil Plan of Action	Brazil Plan of Action: A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
Committee on Racial Discrimination CERD	Committee on the Elimination of All Forms of Racial Discrimination
CJEU	Court of Justice of the European Union
CoE	Council of Europe
Committee on Discrimination against Women	Committee on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CRVS	Civil Registration and Vital Statistics
ECHR	European Convention on Human Rights (CoE)
ECJ	European Court of Justice (EU)
ECN	European Convention on Nationality (CoE)
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights (CoE)
ESCAP	United Nations Economic and Social Commission for Asia and the Pacific

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EU	European Union
EU Charter	European Union Charter of Fundamental Rights
GAP	UNHCR Global Action Plan to End Statelessness
Global Indicators	Indicators developed in the 2030 Agenda framework
GRULAC	Group of Latin American and Caribbean Countries (in the UN framework)
IACtHR	Inter-American Court of Human Rights
IAEG-SDGs	Inter-Agency and Expert Group on Sustainable Development Goal Indicators
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IDP	Internally Displaced Person
ILC	International Law Commission
INGO	International Non-Governmental Organisation
LGBTI	Lesbian, Gay, Bisexual, Transsexual and Intersex
MENA	Middle-East and North Africa
MERCOSUR	Southern Americas Common Market
NGO	Non-Governmental Organisation
OAS	Organisation of American States
OAU	Organisation of African Unity

LIST OF ABBREVIATIONS

OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OHCHR	United Nations Office of the High Commissioner for Human Rights
SDGs	Sustainable Development Goals
SuR	State under Review (in the UPR)
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHCR ExCom	Executive Committee of the High Commissioner's Programme
UNICEF	United Nations Children's Fund
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UPR	Universal Periodic Review (UN Human Rights Council)

Introduction

Volker Türk

When I addressed the first Global Forum on Statelessness in The Hague in 2014, I remarked that the event was a testament to how far we had come in our collective efforts to better understand and address the problem of statelessness. We had remarkable diversity among the over 300 participants present, and we all sensed a new dynamism that was already making a meaningful difference in stateless people's lives. In the short time since then, the level of awareness and engagement to resolve statelessness has continued to increase substantially. The '#IBelong Campaign to End Statelessness', launched by the United Nations High Commissioner for Refugees (UNHCR) in November 2014, was endorsed by the United Nations (UN) General Assembly in the same year. Major regional initiatives sprang up soon afterwards, including the Brazil Declaration and Plan of Action for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean, the Abidjan Declaration of Ministers of ECOWAS Member States on the Eradication of Statelessness covering West Africa, the first European Union Council Conclusions on Statelessness, and the adoption of a Ministerial Declaration on Civil Registration by 44 States in the Asia Pacific. A draft Protocol on the Right to Nationality to the African Charter on Human and Peoples' Rights, and regional initiatives to address statelessness in other African sub-regions and in the Middle East and North Africa are also in progress. Also, in the time since the Campaign was launched, more than 85,000 people have signed the Open Letter to End Statelessness, including high-level supporters such as Louise Arbor, Angelique Kidjo, and Archbishop Desmond Tutu.

More than ever before, there is more recognition of the problem and also a willingness to take action by policy-makers, parliamentarians, civil society groups, lawyers, journalists, and development actors, leading to tangible and sustainable solutions for stateless persons. For example, since the launch of the '#IBelong Campaign', countries as diverse as Côte d'Ivoire, Kyrgyzstan, the Philippines, and Thailand, have stepped up their efforts, which have resulted in the grant of nationality to many thousands of formerly stateless persons. Improvements to civil registration systems and in access to birth registration have

helped to reduce the risk of statelessness faced by children in Africa, Asia, and, in particular, the Middle East in the context of the Syrian refugee crisis. New accessions to one or both of the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness continue to strengthen support for the international standards designed to protect stateless persons and prevent new cases of statelessness from arising.

The ethical, rule of law, development, and peacebuilding imperatives that compel the international community to end the plight of stateless people around the world are also clear. The suffering caused by statelessness was amply illustrated once more in UNHCR's 2015 report 'I am Here, I Belong: The Urgent Need to End Childhood Statelessness'. That report, based on first-hand interviews with over 250 people in seven countries, confirmed that statelessness unfairly deprives children of the essential conditions for a normal childhood, such as the ability to go to school or to see a doctor.

The rule of law dimension of statelessness, highlighted so clearly in the UN Secretary General's 2011 'Guidance Note on Statelessness', has been further affirmed through the willingness of States to take this up as an important legal issue during UN Member States' appearances before the Universal Periodic Review (UPR) mechanism of the Human Rights Council, as well as through recent attention to matters of nationality by UN treaty bodies. The international community's resolve to "leave no one behind" with respect to sustainable development reflects a broadly shared recognition that in addition to the ethical and rule of law dimensions, there are clear economic and social development reasons that weigh in favour of all people's right to nationality. In the coming years we can expect to see enhanced activity in the field of Civil Registration and Vital Statistics, and to see this activity make innovative use of new technologies, such as digital ID. The World Bank's new ID4D (Identity for Development) initiative, for example, aspires to support States to achieve universal identification. While identification and nationality are not the same thing, this new interest in registration and identification as development issues presents opportunities for stateless people.

A few years ago there were no civil society networks or non-governmental organisations (NGOs) focused exclusively on statelessness. Now there are dedicated civil society networks in

Africa, the Americas, Asia and the Pacific, Central Asia, and Europe. The Institute on Statelessness and Inclusion, with which UNHCR has collaborated to produce this volume, has become the first global NGO dedicated to advocacy and research on statelessness issues. There is also a UN Member State group of 'Friends of the Campaign to End Statelessness' based in Geneva. The enhanced engagement of all these actors has led to more statelessness-related activity everywhere – from capitals around the world, to remote border areas, to the Human Rights Council in Geneva. Academic literature on statelessness is also flourishing, ranging from the recent 'Nationality and Statelessness under International Law' (Edwards and van Waas) to 'Citizenship and Statelessness in Africa: The Law and Politics of Belonging' (Manby).

It is therefore appropriate that this volume should focus on solutions to statelessness. The global debates have moved beyond the need to explain the problem and its causes and consequences. The time has come to accelerate the momentum to implement durable solutions effectively. The essays in this volume are important contributions in this regard. They cover lessons learned from every region of the world. They also explore opportunities for more coordinated engagement in thematic areas important to the resolution of statelessness, such as human rights and sustainable development.

There are already many principles and tools that are helpful to the cause of resolving statelessness. A number of the essays in this volume give a very timely, fresh appraisal of how these can be better leveraged to promote solutions. These include chapters on addressing statelessness through the right to equality (de Chickera and Whiteman), on the use of facilitated naturalisation (Molnar) and strategic litigation (Bingham and Gamboa) as tools to resolve cases and ensure remedies, as well as on making effective use of the UN human rights mechanisms (Khanna and Brett). At the same time, new challenges and opportunities are emerging that demand closer examination – as offered, for instance, in the essays on securing children's right to nationality in the context of international surrogacy (Achmad) and on what the Sustainable Development Goals offer in terms of new avenues to solutions (Govil).

In seeking to achieve solutions to statelessness, it is prudent to be mindful of how national and regional contexts may differ. I would urge all readers, wherever they may live and work, to explore the essays in this volume that focus on different regional situations, including

those on “new norms and new commitments” relating to the right to nationality in Africa (Manby), the avoidance of statelessness among children displaced by armed conflict in the Middle East and North Africa (Albarazi and Sen), the role of the EU in addressing statelessness (Bittoni, Swider, and van Waas), and on steps being taken towards the eradication of statelessness in the Americas (Mondelli). The lessons that can be learned by both focusing on regional perspectives and taking a step back and assessing challenges, developments, and innovations from the broader perspective of a Global Campaign to End Statelessness, are rich and plentiful.

Collectively, these contributions draw upon those made at the First Global Forum. They show that the path towards a world free of statelessness is within our grasp. My hope is that they will inspire the necessary practical action needed to ensure that in the near future everyone will enjoy the right to nationality.

PART 1

PERSPECTIVES, TOOLS, AND TECHNIQUES

1. Making effective use of UN human rights mechanisms to solve statelessness

Melanie J. Khanna and Peggy Brett¹

1. Introduction

United Nations (UN) human rights mechanisms can play an important role in ending statelessness by raising awareness, spreading good practice and making specific recommendations to States on the changes needed to resolve statelessness. A number of human rights treaty bodies and the Universal Periodic Review (UPR) process have already generated useful recommendations. Likewise, certain resolutions of the UN Human Rights Council have served to affirm and emphasise norms and standards that help prevent and reduce statelessness. This chapter reviews recent developments in this area and argues that, taken together, the human rights mechanisms of the UN offer one of the most promising avenues for addressing statelessness, as practice in this area is dynamic and opportunities for helpful developments are abundant given the number of mechanisms and the frequency and variety of UN human rights meetings.

There is a natural link between efforts to address statelessness and the work of human rights bodies, as the right to nationality is enshrined in a number of human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),² the Convention on the Rights of the Child (CRC),³ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination

¹ Melanie J. Khanna is Chief of the Statelessness Section within the Division of International Protection at UNHCR and Peggy Brett is a fellow with the Institute on Statelessness and Inclusion. This chapter reflects the views of the authors and not necessarily those of UNHCR or of the United Nations.

² International Covenant on Civil and Political Rights, 16 December 1966, entry into force 23 March 1976, 999 UNTS 171, Art. 24.

³ Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3, Art. 7.

⁴ Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, entry into force 3 September 1981, 1249 UNTS 13, Art. 9.

(ICERD).⁵ While the UN Statelessness Conventions⁶ themselves have only a light supervisory regime, these human rights treaties benefit from dedicated treaty bodies capable of influencing doctrine and State practice. Implementation of human rights obligations is also reviewed by UN Member States through the UPR. As of August 2016, human rights treaties also generally had a higher number of States Parties than the Statelessness Conventions. For all of these reasons, human rights law and practice holds opportunities for new developments relating to the right to nationality.

To date statelessness itself has not featured very prominently in human rights discourse or international practice, and as “rights holders” stateless persons have been less visible in the work of the Human Rights Council and human rights treaty bodies than many other groups (such as children, women, racial and religious minorities, indigenous persons, political dissidents, persons with disabilities, migrants and LGBTI persons).⁷ “Statelessness” as a thematic topic is, however, beginning to be discussed more regularly by UN human rights mechanisms, civil society groups and academic institutions thanks in part to the UN High Commissioner for Refugees (UNHCR)’s 2014 launch of the Campaign to End Statelessness by 2024. Notably, in 2016 the Human Rights Council passed by consensus a resolution on the right to a nationality which was co-sponsored by a remarkable 111 States. This and certain other developments discussed in this chapter, including the creation of a UN Member State “Friends of the Campaign to End Statelessness” group, may signal the beginning of a shift towards consistent attention to statelessness. It is difficult to make clear predictions given the fluidity of the UN human rights environment, however, and the data presented in this chapter can necessarily only offer a kind of “snapshot” of practice during a limited period of time.

⁵ International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, entry into force 4 January 1969, 660 UNTS 195, Art. 5.

⁶ Convention relating to the Status of Stateless Persons, 28 September 1954, entry into force 6 June 1960, 360 UNTS 117 (1954 Statelessness Convention) and Convention on the Reduction of Statelessness, 30 August 1961, entry into force 13 December 1975, 989 UNTS 175 (1961 Statelessness Convention).

⁷ Of course there is significant overlap between many of these groups and stateless persons, but as this is also true among these groups, the relative absence of stateless persons as a group in current human rights practice is notable.

As an initial matter, we note that the relative paucity of attention to statelessness in human rights practice sits uneasily alongside U.S. Chief Justice Earl Warren's famous description of the right to nationality as the "right to have rights".⁸ As a "foundational right" that fundamentally affects the ability to enjoy the full range of political, economic and social rights, the right to nationality should be a natural focus of attention and concern by the UN's human rights mechanisms. And yet while there are many thematic resolutions at the UN Human Rights Council that are run on regular cycles - relating to freedom of expression, the protection of human rights while countering terrorism, and human trafficking, to name only a few - there is no such thematic resolution on statelessness. The first resolution on the right to nationality was passed by the Human Rights Council in 2012 and the topic was not taken up again in a dedicated resolution until 2016. The 2016 right to nationality resolution calls for an inter-sessional workshop, and it is possible that this resolution will lead to more regular thematic follow up. There are also other resolutions that are relevant to addressing statelessness, most notably the thematic resolutions on arbitrary deprivation of nationality and on birth registration, that could be strengthened and made more complementary with one another as part of a more coordinated effort based on the current level of interest in the issue.

In order to understand the relatively limited attention that statelessness has received to date, it is important to bear in mind that the right to nationality, although clearly set out in numerous human rights instruments, touches on highly sensitive matters of State sovereignty. Questions of membership, that is to say, questions pertaining to who exactly belongs to the "imagined community" that is the State, to use Benedict Anderson's famous phrasing, go to the very core of a State's being and are critical to the never-ending process by which States define themselves as distinct from others. The current global displacement crisis has made these questions more profound, as have contemporary concerns about security and terrorism. Moreover, matters of inclusion and exclusion are intimately related to power and domination by certain groups over others. Indeed discrimination remains the most significant cause of statelessness in the world today. For example, the 27 States that do not allow women to pass nationality to their children on an equal basis with men perpetuate statelessness,

⁸ USA Supreme Court, *Perez v. Brownell*, 31 March 1958, 356 U.S. 44.

as do those countries that condition nationality on belonging to a certain ethnicity (e.g. Myanmar) or race (e.g. Sierra Leone, Liberia). These issues naturally remain sensitive with certain groups in the States that maintain such forms of discrimination.

This chapter presents information on how the UN's human rights mechanisms, principally the Human Rights Council (including the UPR) and the human rights treaty bodies have addressed the right to nationality and certain related issues in recent years, with most of the data focused on the period between 2012 and 2015.⁹ From this data, we will attempt to draw some conclusions and observations about opportunities that exist for making enhanced use of these bodies. We will not attempt to wade into discussions about whether and to what extent distinctions do and should remain between the rights enjoyed by citizens and non-citizens in an age of widespread acceptance of many human rights as universal. Rather, this chapter assumes that access to nationality and proof of nationality are both important to persons' quality of life.

2. Where and how have statelessness and related issues been raised in UN human rights mechanisms?

2.1 Human Rights Council

The Human Rights Council is the main UN intergovernmental body for addressing human rights issues. Through its discussions, resolutions and reports, States develop their understanding of human rights, establish new standards and mechanisms, draw attention to the implementation of human rights and address particular situations of concern. As an inter-State body, the Council's work reflects the interests and priorities of States. Collectively the members of the Human Rights Council can create international human rights law through the drafting of new treaties. More often their work reflects established understandings of human rights and reaffirms existing standards and norms. It can also highlight areas of disagreement between States on the substance of these standards. The content of resolutions, particularly those adopted without a vote, represents the consensus

⁹ For the UPR and the Human Rights Council, the period covered has been extended to August 2016 as there have been interesting recent developments.

position of States and may therefore be taken as an indication of their understanding of the content of international norms in a given area. This section looks at both the level of attention to statelessness issues in recent years and the substantive content of that attention.

There has been a general trend towards increased attention to statelessness and related issues in the work of the Human Rights Council. In 2012 there were seven resolutions which specifically mentioned statelessness or the right to a nationality,¹⁰ perhaps as a result of the commemorations of the 50th anniversary of the 1961 Convention on the Reduction of Statelessness (1961 Statelessness Convention) the previous year. While this level of attention has not been maintained, a number of thematic resolutions have begun to routinely refer to statelessness or the right to a nationality, including the those on discrimination against women (which include nationality laws in the list of discriminatory provisions that should be amended or repealed)¹¹ and on birth registration (where the increased vulnerability to statelessness of persons without birth registration and the importance of non-discrimination, including on the basis of

¹⁰ Human Rights Council (HRC), Resolution 19/9: Birth registration and the right of everyone to recognition everywhere as a person before the law, adopted without a vote 22 March 2012, A/HRC/RES/19/9; HRC, Resolution 19/21: Situation of human rights in Myanmar, adopted without a vote 23 March 2012, A/HRC/RES/19/21; HRC, Resolution 19/37: Rights of the Child, adopted without a vote 23 March 2012, A/HRC/RES/19/37; HRC, Resolution 20/1: Trafficking in persons, especially women and children: access to effective remedies for trafficked persons and their right to an effective remedy for human rights violations, adopted without a vote 5 July 2012, A/HRC/RES/20/1; HRC, Resolution 20/4: The right to a nationality: women and children, adopted without a vote 5 July 2012, A/HRC/RES/20/4; HRC, Resolution 20/5: Human rights and arbitrary deprivation of nationality, adopted without a vote 5 July 2012, A/HRC/RES/20/5; HRC, Resolution 21/33: From rhetoric to reality: a global call for concrete action against racism, racial discrimination, xenophobia and related intolerance, adopted by a vote (37 in favour, 1 against, 9 abstentions) 28 September 2012, A/HRC/RES/21/33.

¹¹ HRC, Resolution 23/7: Elimination of discrimination against women, adopted without a vote 13 June 2013, A/HRC/RES/23/7, para. 6; HRC, Resolution 26/5: Elimination of discrimination against women, adopted without a vote 26 June 2014, A/HRC/RES/26/5, para. 5; HRC, Resolution 29/4: Elimination of discrimination against women, adopted without a vote 2 July 2015, A/HRC/RES/29/4, para. 10; but omitted from HRC, Resolution 20/6: Elimination of discrimination against women, adopted without a vote 5 July 2012, A/HRC/RES/20/6.

nationality, in access to birth registration have been noted).¹² However neither resolution has engaged with issues of statelessness and access to nationality in any more depth.

As noted above, there has not to date been a Human Rights Council resolution or debate focusing solely on statelessness. However, in addition to the two resolutions on the right to a nationality (discussed in more detail below) a resolution on the arbitrary deprivation of nationality has been a regular part of the Human Rights Council's work since 2008.¹³ From the outset the resolution urged States to "adopt and implement nationality legislation with a view to avoiding statelessness, consistent with fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality and statelessness as a result of State succession", and promote ratification of the 1954 Convention relating to the Status of Stateless Persons (1954 Statelessness Convention) and the 1961 Statelessness Convention.¹⁴ The early resolutions focused primarily on discrimination as a factor rendering deprivation of nationality arbitrary, but in 2012 a reference was added to the need for procedural standards to avoid arbitrariness in decision making.¹⁵ In 2014 paragraphs dealing with the principle

¹² HRC, Resolution 19/9, *supra* n10; HRC, Resolution 22/7: Birth registration and the right of everyone to recognition everywhere as a person before the law, adopted without a vote 21 March 2013, A/HRC/RES/22/7; HRC, Resolution 28/13: Birth registration and the right of everyone to recognition everywhere as a person before the law, adopted without a vote 26 March 2015, A/HRC/RES/28/13. The inconsistency of attention to issues is demonstrated by the fact that the preambular paragraph referring to the increased risk of statelessness for those without birth registration appears in the first and third of these resolution, but not in the intervening one.

¹³ HRC, Resolution 7/10: Human rights and arbitrary deprivation of nationality, adopted without a vote 27 March 2008, A/HRC/RES/7/10; HRC, Resolution 10/13: Human rights and arbitrary deprivation of nationality, adopted without a vote 26 March 2009, A/HRC/RES/10/13; HRC, Resolution 13/2: Human rights and arbitrary deprivation of nationality, adopted without a vote 24 March 2010, A/HRC/RES/13/2; HRC, Resolution 20/5, *supra* n10; HRC, Resolution 26/14: Human rights and arbitrary deprivation of nationality, adopted without a vote 26 June 2014, A/HRC/RES/26/14; and HRC, Resolution 32/5: Human rights and arbitrary deprivation of nationality, adopted without a vote 30 June 2016, A/HRC/RES/32/5.

¹⁴ HRC, Resolution 7/10, *supra* n13, paras. 4-5; HRC, Resolution 10/13, *supra* n13, paras. 4-5; HRC, Resolution 13/2, *supra* n13, paras. 4-5.

¹⁵ HRC, Resolution 20/5, *supra* n10, para. 10. Repeated in HRC, Resolution 26/14, *supra* n13, para. 12 and HRC, Resolution 32/5, *supra* n13, para. 13.

of proportionality and the automatic extension of deprivations of nationality to a person's dependents were added.¹⁶ While the resolution has never defined what constitutes legitimate deprivation of nationality, these additions help to clarify the safeguards needed to prevent a deprivation of nationality from being arbitrary.

The resolution has also included progressively more on States' positive obligations to prevent statelessness and grant nationality to particular groups. These include paragraphs urging "all States to prevent statelessness through legislative and other measures aimed at ensuring that all children are registered immediately after birth and have the right to acquire a nationality and that individuals do not become stateless thereafter"¹⁷ and encouraging States "to grant their nationality to persons who had habitual residence in their territory before it was affected by the succession of States, especially if those persons would otherwise become stateless".¹⁸ The resolution thus helps to identify and promote good practice in the area of nationality law.

The proposal that States refrain from automatically extending deprivation of nationality to dependents¹⁹ and the inclusion of more extensive discussion of the right of the child to nationality and protection of children against statelessness in the 2016 resolution²⁰ seems to fit with the trend towards increasing recognition that women and children should have an autonomous right to nationality rather than one which derives from their husbands or fathers. In this respect subsequent resolutions pick up on the resolution on 'The right to a nationality: women and children' adopted at the March 2012 session.²¹ Unlike the arbitrary deprivation of nationality resolution, this has not been a regular part of the Human Rights Council's work, but the level

¹⁶ HRC, Resolution 26/14, *supra* n13, paras. 16-17. Repeated in HRC, Resolution 32/5, *supra* n13, paras. 16-17.

¹⁷ HRC, Resolution 20/5, *supra* n10, para.9; HRC, Resolution 26/14, *supra* n13, para. 10.

¹⁸ HRC, Resolution 20/5, *supra* n10, para. 11; HRC, Resolution 26/14, *supra* n13, para. 18; and HRC, Resolution 32/5, *supra* n13, para. 6.

¹⁹ HRC, Resolution 26/14, *supra* n13, para. 17; HRC, Resolution 32/5, *supra* n13, para. 17.

²⁰ HRC, Resolution 32/5, *supra* n13, paras. 9-10 and 18-21.

²¹ HRC, Resolution 20/4, *supra* n10.

of support for the 2016 resolution²² as well as the decision to hold an inter-sessional workshop on best practices in promoting women's equal nationality rights are positive indications for the Council's further engagement.

Substantively, the two resolutions on the right to nationality are somewhat cautious about asserting State obligations; they urge States to refrain from enacting or maintaining discriminatory nationality laws and to reform provisions discriminating against women, but stop short of any stronger language on the subject.²³ Both resolutions encourage States to "facilitate, in accordance with their national law, the acquisition of nationality by children born on their territories or to their nationals abroad who would otherwise be stateless"²⁴ while the 2012 resolution also urged them to "grant nationality to foundlings found in their territory in the absence of proof that the foundling is not a national of the State where found".²⁵ These provisions clearly take inspiration from Articles 1(1) and 2, respectively, of the 1961 Statelessness Convention and reassert these provisions as a matter of good practice, but do not purport to represent universally binding legal obligations, presumably because of the large number of States that are still not Parties to that Convention.

Despite these developments, there remain a number of significant omissions in the ways that statelessness and related issues are addressed in the work of the Human Rights Council. For instance, thematic resolutions dealing with specific groups, such as the Roma, the indigenous, and migrants have not mentioned statelessness or access to nationality as issues of concern for these groups.

Between 2012 and 2015, the only country-specific resolution to address statelessness was that on Myanmar, which regularly included

²² HRC, Resolution 32/7: The right to a nationality: women's equal nationality rights in law and in practice, adopted without a vote 30 June 2016, A/HRC/RES/32/7.

²³ HRC, Resolution 20/4, *supra* n10, paras. 5-6; HRC, Resolution 32/7, *supra* n22, paras. 4-5.

²⁴ HRC, Resolution 20/4, *supra* n10, para. 4; HRC, Resolution 32/7, *supra* n22, para. 15.

²⁵ HRC, Resolution 20/4, *supra* n10, para. 7. The omission of this paragraph from the 2016 resolution reflects its focus on women only.

a call for recognition of the right to nationality of the Rohingya.²⁶ The most striking feature of the country resolutions is therefore the dearth of attention to statelessness and the right to a nationality, particularly considering that country-specific resolutions have in recent years dealt with Côte d'Ivoire, Sudan, Somalia and Syria. There may be multiple reasons for these omissions, including lack of knowledge of the problems in these States, the specific focus in the resolutions on other topics²⁷ or strategic decisions not to address these topics through country-specific resolutions, which are generally seen as confrontational by the State concerned. The country-specific resolutions therefore offer clear scope for improvement if enough States become aware of the issues and motivated to address them.

There has also been very limited attention to stateless minorities in the thematic resolution on minorities or through the Human Rights Council's annual Forum on Minorities. This looks set to shift somewhat, as the organisers of the Forum have agreed that the November 2016 Forum will include discussion of stateless minorities, and it can be hoped that the 2017 resolution on minorities will likewise address statelessness. Finally, as interest in a topic cannot be measured solely by the number of Human Rights Council resolutions adopted, it should be noted that the number of informal side events organised by non-governmental organisations (NGOs) and States during Human Rights Council sessions related to statelessness has increased in recent years. At the September 2015 session, for example, there were an unprecedented five side events on statelessness and nationality-related issues.

2.1.1 Special Procedures

Special Procedures are independent experts appointed by the Human Rights Council to focus on either thematic priorities or specific country situations. The work of the Special Procedures falls into three general categories: country visits; communications; and thematic reports.

²⁶ HRC, Resolution 19/21, *supra* n10, para. 9; HRC, Resolution 22/14: Situation of human rights in Myanmar, adopted without a vote 21 March 2013, A/HRC/RES/22/14, para. 8; HRC, Resolution 25/26: Situation of human rights in Myanmar, adopted without a vote 28 March 2014, A/HRC/RES/25/26, para. 10; HRC, Resolution 28/23: Situation of human rights in Myanmar, adopted without a vote 27 March 2015, A/HRC/RES/28/23, para. 11.

²⁷ This explanation may, in particular, apply to the resolutions on Syria which focus explicitly on the conflict.

1. MAKING EFFECTIVE USE OF UN HUMAN RIGHTS MECHANISMS
TO SOLVE STATELESSNESS

The table below shows Special Procedures that addressed access to nationality or prevention of statelessness between 2012 and 2015.

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Mandate	Number of documents mentioning resolving situations of statelessness or access to nationality ²⁸			
	Commu- nications	Country Visit Reports	Thematic Reports	Total
Working Group on the issue of discrimination against women in law and practice	30	1	1	32
Special Rapporteur on trafficking in persons, especially women and children	0	12	2	14
Working Group of experts on people of african descent	1	7	5	13
Special Rapporteur on minority issues	2	5	5	12
Special Rapporteur on the human rights of migrants	3	5	3	11
Special Rapporteur on the situation of human rights defenders	7	0	1	8
Special Rapporteur on extreme poverty and human rights	0	6	2	8
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression	7	0	0	7
Special Rapporteur on the human rights of internally displaced persons	0	4	3	7
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	3	2	2	7
Special Rapporteur on the situation of human rights in Myanmar	0	0	6	6
Special Rapporteur on freedom of religion or belief	2	0	3	5
Special Rapporteur on the rights of indigenous peoples	0	1	3	4
Working Group on enforced or involuntary disappearances	1	0	2	3
Special Rapporteur on contemporary forms of slavery, including its causes and consequences	0	3	0	3
Special Rapporteur on the human right to safe drinking water and sanitation	0	1	2	3
Special Rapporteur on the situation of human rights in Cambodia	0	0	3	3
Independent Expert on the situation of human rights in Haiti	0	1	2	3

²⁸ Since the focus of this chapter is on using these mechanisms to solve statelessness, mandates which have referred to access to rights for stateless persons but not the need to resolve their statelessness are not included in this list.

Mandate	Number of documents mentioning resolving situations of statelessness or access to nationality			
	Communica- tions	Country Visit Reports	Thematic Reports	Total
Special Rapporteur on violence against women, its causes and consequences	0	2	0	2
Special Rapporteur on the situation of human rights in the Islamic Republic of Iran	0	0	2	2
Special Rapporteur on the right to food	0	1	0	1
Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights	0	1	0	1
Independent Expert on the enjoyment of all human rights by older persons	0	1	0	1
Special Rapporteur on the promotion and protection of human rights while countering terrorism	0	0	1	1
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence	0	0	1	1
Independent Expert on the situation of human rights in the Sudan	0	0	1	1

A large number of the Special Procedures have touched on statelessness or the right to a nationality in their work, but few have done so in depth or with any regularity. One exception is the Working Group on Discrimination against Women in Law and Practice which, in 2014, sent communications to those States that maintain gender discriminatory nationality laws indicating the Working Group's concern about such laws.²⁹ The table also shows that the Special Procedures have generally dealt with statelessness, arbitrary deprivation of nationality and access to nationality in the context of particular situations rather than through thematic reports. This has usually meant dealing with clear cut cases in which substantial populations have been denied access to nationality or been deprived of their nationality. In these circumstances, the Special Procedures have tended to reiterate established standards rather than exploring their limits.³⁰ Such references can, of course, be

²⁹ HRC, Communications report of Special Procedures, 19 February 2015, A/HRC/28/85.

³⁰ For instance, HRC, Report of the Special Rapporteur on the right to food, Olivier de Schutter, Addendum: Mission to the Syrian Arab Republic, 27 January 2011, A/HRC/16/49/Add.2, para. 49 refers to the right to nationality and prohibition of arbitrary deprivation of nationality as matters of customary international law.

helpful in reinforcing such standards and clarifying their applicability to particular situations. For instance, the Special Rapporteurs on Minority Issues and on Foreign Debt have both taken the position that States should facilitate the naturalisation of long-term residents and in doing so have clarified what they consider reasonable requirements for naturalisation, in particular with regard to language skills.³¹ However, there is clearly room for the Special Procedures to do more in terms of exploring issues and promoting good practices.

There is also potential for greater use to be made of individual communications to the Special Procedures. Any Special Procedure can receive information relating to the violation of the rights of an individual or group in any State³² and request that the State responsible take action to rectify these violations.³³ To date these communications procedures have not been used extensively to address the right to a nationality; a number of communications have dealt with deprivations of nationality as a result of the exercise of other rights, but these have not focused on the deprivation of nationality itself.³⁴ The only

³¹ HRC, Report of the Independent Expert on minority issues, Rita Izsák, 31 December 2012, A/HRC/22/49, para. 66; HRC, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephass Lumina, Addendum: Mission to Latvia (14 to 18 May 2012), 27 May 2013, A/HRC/23/37/Add.1, paras. 75 and 90(i).

³² In this the Special Procedures differ from the treaty bodies as the latter can only deal with States which are Parties to the relevant treaty.

³³ When they receive such communications, the Special Procedures request information on the situation from the State(s) involved. If, on the basis of the available information, they consider that the rights in question have been violated, they will request that the State provide the individual or group with a remedy. Further information on these procedures is available from the Office of the High Commissioner for Human Rights (OHCHR) website, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>. It should be noted that while the legal opinions of the Special Procedures carry some weight as the opinion of experts mandated to address these issues by the UN, they are not legally binding and there is no mechanism to enforce such opinions. The degree of rigour with which individual cases are considered and findings argued also varies between mandates.

³⁴ See, e.g., HRC, Communications report of Special Procedures, 24 February 2014, A/HRC/25/74, Communication BHR 5/2013, Joint Urgent Appeal to Bahrain by Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Special Rapporteur on the rights to freedom of peaceful assembly and of association, Special Rapporteur on the situation of

communications dealing substantively with this issue have been those relating to deprivation of nationality in the Dominican Republic. However, the mandates responsible for these communications have not entered into a detailed analysis of the substantive issues, instead referring to the position taken by the Inter-American Court of Human Rights.³⁵

2.1.2 Universal Periodic Review

The Universal Periodic Review (UPR) is a Human Rights Council mechanism which examines the human rights situation in every Member State of the UN once every four and a half years. It is an inter-State mechanism; States make recommendations to the State under Review (SuR) and these recommendations are recorded as those of the recommending State rather than collective recommendations by the Human Rights Council. The SuR may choose whether or not to accept recommendations.³⁶ Because it can cover any human rights issue and the time available to each State to make recommendations is limited, the review cannot go into detail. However, the issues on which States choose to make recommendations provide a good indication of their particular priorities and the problems that they are aware of in the SuR. As such it is a valuable source of information on the level of awareness among States and the priority they attach to particular issues. Where assistance could be useful in addressing issues, UPR recommendations can also provide a basis on which to offer aid and technical assistance. The fact that the SuR accepts or rejects recommendations is significant in that an accepted recommendation is a public commitment to address an issue. In theory subsequent UPR cycles should follow up on the implementation of these recommendations, but in practice such

human rights defenders, and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; HRC, Communications report of Special Procedures, 20 August 2014, A/HRC/27/72, Communication BHR 6/2014, Urgent Appeal to Bahrain by Special Rapporteur on freedom of religion or belief.

³⁵ A/HRC/25/74 *supra* n34, Communication DOM 3/2013, Joint Urgent Appeal to Dominican Republic by Special Rapporteur on the human rights of migrants, Independent Expert on minority issues, and Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; HRC, Communications report of Special Procedures, 2 June 2014, A/HRC/26/21, Communication DOM 4/2013, Letter of allegation to Dominican Republic from Working Group on people of African descent.

³⁶ In the terminology of the UPR recommendations are accepted or noted.

follow up has been uneven,³⁷ with some States prioritising it more highly than others.

The second cycle of UPR reviews began in 2012 and concluded in 2016. As of the 25th session (May 2016), the second cycle had included 315 recommendations on statelessness or the right to a nationality, representing around 1% of all UPR recommendations.³⁸ Of these recommendations 131 mention statelessness specifically.³⁹ Of those 131, 76 relate to ratification of the UN Statelessness Conventions. More than two-thirds of the remainder were addressed to three States; Dominican Republic, Kuwait and Estonia. A further 227 recommendations in the second cycle dealt with related issues such as birth registration, access to documentation or gender discrimination but did not refer specifically to statelessness or nationality (in what follows these are referred to as the broadly relevant recommendations).⁴⁰ When considering how to use the UPR, it is worth paying attention to these recommendations as well as those dealing directly with statelessness as they may be more likely to be made and accepted (see below) and, while they may not help to raise *awareness* of statelessness issues *per se*, they can provide opportunities for engaging with the SuR and advocating for change.⁴¹

³⁷ There are some indications that the third UPR cycle, which will begin in 2017, will include a greater focus on following-up on previous recommendations. In particular, OHCHR has developed matrices which aim to consistently collect information on the implementation of previous recommendations.

³⁸ UPR Info, Statistics of UPR recommendations, UPR Info website, <http://www.upr-info.org/database/statistics/index.php?cycle=2> records 30,926 recommendations in the 13th to 24th sessions. At these sessions there were 301 recommendations on statelessness or right to nationality. By way of comparison, UPR Info's statistics record 5,963 recommendations on women's rights, 5,610 on rights of the child, 1,583 on migrants, 1,526 on minorities, 1,183 on persons with disabilities, 578 on indigenous peoples, 528 on asylum seekers or refugees and 103 on internally displaced persons.

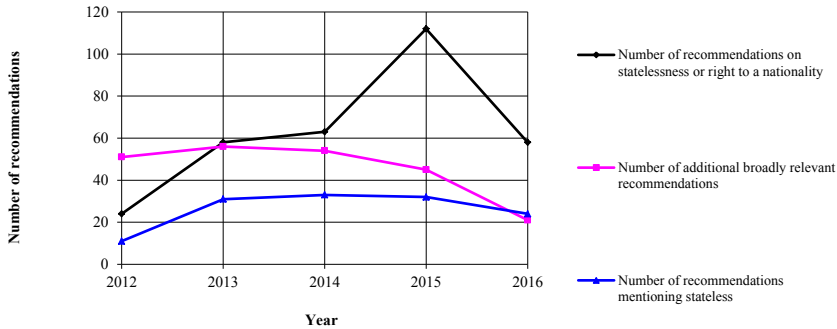
³⁹ This count inevitably omits some recommendations that were in fact intended and understood as referring to stateless persons such as those to Estonia using the term "non-citizens" and those to Kuwait using the term "bidoon". Nevertheless it is interesting to include such figures as they reflect the results that would be seen by someone searching for occurrences of "stateless" in the UPR recommendations.

⁴⁰ Recommendations on withdrawal of reservations to CEDAW which do not make a specific reference to Article 9 are also included in this group.

⁴¹ For instance, any recommendation referring in general terms to reforming national laws which discriminate against women can be used to address discriminatory provisions in nationality laws, although this may not have been the law that the recommending State had in mind.

There has been a slight increase in the number of recommendations referring to statelessness in the second UPR cycle compared with the first,⁴² which tallies with the overall increase in the number of recommendations.⁴³ This has not, however, meant that all the recommendations made in the first cycle were repeated or followed up in the second cycle. For instance, in the first cycle Côte d'Ivoire received four recommendations specifically mentioning the stateless population, but in the second cycle the only broadly relevant recommendations were those on birth registration and none of these referred to the prevention of statelessness.⁴⁴ Figure 1 shows the number of recommendations made per year in the second cycle of the UPR.⁴⁵

Figure 1. Number of recommendations made in the UPR 2012-2016



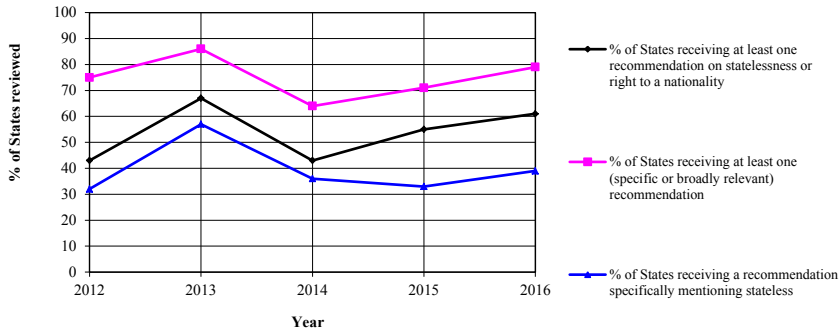
⁴² A total of 187 recommendations on statelessness and the right to nationality were made in the first cycle, including 78 using the term “stateless”.

⁴³ UPR Info, Statistics, *supra* n38 the total number of recommendations in the first UPR cycle was 21,356 compared to 30,926 in the (not yet complete) second cycle.

⁴⁴ HRC, Report of the Working Group on the Universal Periodic Review: Côte d'Ivoire, 4 January 2010, A/HRC/13/9, paras. 101.13, 101.17, 101.20, 101.21; HRC, Report of the Working Group on the Universal Periodic Review: Côte d'Ivoire, 7 July 2014, A/HRC/27/6, paras. 127.43, 127.87, 127.152, 127.153.

⁴⁵ In 2012 and 2016 (at time of writing) only 28 States had been reviewed compared to 42 in the other years. This goes some way towards explaining the lower figures in these years, although 2012 still represents the lowest average number of recommendations per State and it is unlikely that the number of recommendations in 2016 will surpass that in 2015.

Figure 2. Percentage of States receiving relevant recommendations in the UPR 2012-2016



Despite the generally positive trend that these figures show, one of the most striking features of the UPR is its inconsistency. The table below shows the number of recommendations made to the twenty States reviewed so far in the second cycle which have a stateless population of more than 10,000 persons⁴⁶ and, for purposes of comparison, the States which have received the largest number of recommendations. It is noteworthy that seven of these 20 States received no recommendations on statelessness or the right to nationality. A number of other States where there are known to be issues, but the size of the stateless population is unclear (for instance, Albania, Kazakhstan, Turkmenistan, Eritrea, Indonesia, Sri Lanka and Sudan) were also among the States which did not receive any relevant recommendations.⁴⁷

⁴⁶ UNHCR, Statistical Yearbook 2014, 2015, Annex Table 7 Persons under UNHCR's statelessness mandate. Syrian Arab Republic is omitted as it has yet to be reviewed.

⁴⁷ *Ibid.*

Largest Stateless Populations			Highest number of relevant recommendations		
State	Specific mentions of stateless	Statelessness and right to nationality recommendations	State	Specific mentions of stateless	Statelessness and right to nationality recommendations
Myanmar	2	17	Kuwait	13	27
Côte d'Ivoire	0	0	Dominican Republic	14	19
Thailand	0	0	Myanmar	2	17
Latvia	1	15	Latvia	1	15
Dominican Republic	14	19	Oman	2	14
Iraq	0	0	Slovenia	3	13
Russian Federation	1	1	Jordan	1	12
Kuwait	13	27	Estonia	10	11
Estonia	10	11	Lebanon	1	9
Uzbekistan	1	1	Malawi Nepal	1	7
Saudi Arabia	0	2			
Malaysia	1	2	Bahrain	0	7
Ukraine	1	2	Swaziland		
Sweden	0	0	Bahamas	1	6
Brunei Darussalam	2	4	Qatar	0	5
Kenya	2	2	Spain	4	4
Kyrgyzstan	0	0	Denmark	3	4
Germany	0	0	Brunei Darussalam	2	4
Viet Nam	0	0	United Arab Emirates		
Poland	0	0	Liberia Libya	0	4

Where a large number of recommendations were made (Dominican Republic, Kuwait and Myanmar) it was because statelessness has become a high profile issue in these countries. Half of the top ten States in terms of relevant recommendations were ones where the main issue was gender equality in nationality laws. However, even for this issue the lack of consistency is striking; of the 27 States which maintain gender discrimination in their nationality laws that affects mothers' ability to confer nationality on their children, 25 have been reviewed so far and four did not receive recommendations on this subject.⁴⁸ A similar lack of consistency is shown by other measures. For instance,

⁴⁸ This is, however, an improvement over the first cycle in which 11 of these 27 States received no recommendations on the subject.

of the 129 States which were not States Parties to both the 1954 and 1961 Statelessness Conventions at the time of their review, only 49 received recommendations to ratify. The erratic nature of some recommendations is illustrated by the fact that at least two States have received recommendations to ratify both Statelessness Conventions despite already being a party to one or both.⁴⁹

As noted above, an accepted recommendation in theory indicates a commitment by the State to act on the issue and can therefore provide an opening for other actors to offer support or technical assistance, or, if no action is forthcoming, a basis on which to lobby the State. When a State does not accept a recommendation it may indicate or imply that the State does not consider the content of the recommendation a part of human rights law. There may, of course, be other reasons for rejecting recommendations, ranging from political objections to the State making the recommendation to concerns about the ability to implement the recommendation in practice. The table below shows the acceptance rate of relevant recommendations (including broadly relevant recommendations).⁵⁰ While the acceptance of recommendations is desirable, the fact that a recommendation is rejected does not mean that it has no effect. Such recommendations at a minimum indicate interest in an issue and assert the appropriateness of addressing it through human rights mechanisms. They can also serve to raise awareness among other actors, put pressure on the SuR and be tools for advocacy both at the national level and with regard to the need for follow up in subsequent UPR cycles.

⁴⁹ HRC, Report of the Working Group on the Universal Periodic Review: Burkina Faso, 8 July 2013, A/HRC/24/4, para. 135.1 (recommendation to accede to both Statelessness Conventions although Burkina Faso had acceded to the 1954 Convention on 1 May 2012); HRC, Report of the Working Group on the Universal Periodic Review: Hungary, 8 July 2016, A/HRC/33/9, para. 128.5 (recommendation that Hungary acceded to both Statelessness Conventions although Hungary ratified the 1954 Statelessness Convention in 2001 and the 1961 Statelessness Convention in 2009).

⁵⁰ The 'global' acceptance rate of recommendations in the second cycle is 73.7% UPR Info, Statistics, *supra* n38.

Topic	Accepted Recommendations		Rejected (Noted) Recommendations		Total
	Number	%	Number	%	
All relevant recommendations ⁵¹	308	57	234	43	542
Recommendations on statelessness or right to nationality	142	45	173	55	315
Recommendations specifically mentioning stateless	48	37	83	63	131
Existing situations of statelessness	19	30	44	70	63
No child born stateless	21	64	12	36	33
Gender discrimination in nationality laws	62	41	88	59	150
Denial, deprivation or loss of nationality	11	32	23	68	34
Birth registration	163	85	29	15	192
Access to identity documentation	22	79	6	21	28
Accede to 1954 and/or 1961 Statelessness Conventions	21	28	55	72	76

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Examining which recommendations are accepted or rejected shows that, unsurprisingly, recommendations which are perceived as “political”, or interfering with matters of State sovereignty or matters where the State has an established position, are likely to be rejected. This is illustrated by the low acceptance rate for recommendations on specific situations, which by their nature tend to be sensitive and often relate to the situation of minorities. Only five States have accepted recommendations falling under this heading (Brunei Darussalam, Croatia, Italy, Myanmar⁵² and Slovenia).⁵³ The same dynamic likely influenced the Dominican Republic’s rejection of recommendations

⁵¹ Recommendations on statelessness/right to nationality and broadly relevant recommendations.

⁵² The accepted recommendation reads “[a]ccelerate citizenship verification processes so that populations now deprived of identity documents do not remain in an illegal situation”. It should however be noted that Myanmar rejected 14 other recommendations on this subject. HRC, Report of the Working Group on the Universal Periodic Review: Myanmar, 23 December 2015, A/HRC/31/13, para. 143.119 (accepted), paras. 144.86-87 and 145.55-66 (noted).

⁵³ HRC, Report of the Working Group on the Universal Periodic Review: Brunei Darussalam, 7 July 2014, A/HRC/27/11, para. 113.80; HRC, Report of the Working Group on the Universal Periodic Review: Croatia, 20 July 2015, A/HRC/30/14, para. 99.166; HRC, Report of the Working Group on the Universal Periodic Review: Italy, 10 December 2014, A/HRC/28/4, para. 145.18; HRC, Report of the Working Group on the Universal Periodic Review: Slovenia, 10 December 2014, A/HRC/28/15, paras. 115.66, 94-97, 99-100, 102, 149, 161.

on ensuring that no child is born stateless (accounting for six of the rejected recommendations on this topic).⁵⁴ For other States the concordance of these recommendations with the provisions of the CRC may have contributed to making them acceptable.

A similar pattern is visible in the recommendations on denial, loss or deprivation of nationality; recommendations dealing with specific situations or particular groups are significantly less likely to be accepted than those referring only to discriminatory provisions in national laws. The well established nature of the prohibition on arbitrary deprivation of nationality may help in this respect, but this may equally be seen as a recognition that principles of non-discrimination and equality should apply to nationality laws.

The high level of acceptance of recommendations on birth registration may again be related to the near universal acceptance of the CRC as well as the generally uncontroversial nature of the issue. Recommendations linking birth registration to other issues such as the status of migrant workers,⁵⁵ minorities,⁵⁶ the withdrawal of reservations to the CRC,⁵⁷ or the prevention of statelessness⁵⁸ are less likely to be accepted than those without such references. On the other hand including in these recommendations the importance of issuing documentation as well

⁵⁴ HRC, Report of the Working Group on the Universal Periodic Review: Dominican Republic, 4 April 2014, A/HRC/26/15, paras. 98.18, 98.114, 98.116-117, 98.126, 98.131 (while these recommendations do not all specifically mention preventing childhood statelessness their context makes it clear that one of the concerns being addressed in each case was the denial of nationality to children of Haitian descent born in the Dominican Republic).

⁵⁵ HRC, Report of the Working Group on the Universal Periodic Review: Republic of Korea, 12 December 2012, A/HRC/22/10, para. 124.29; HRC, Report of the Working Group on the Universal Periodic Review: Malaysia, 4 December 2013, A/HRC/25/10, para. 146.221.

⁵⁶ HRC, Report of the Working Group on the Universal Periodic Review: India, 9 July 2012, A/HRC/21/10, para. 138.131.

⁵⁷ HRC, UPR Report: Malaysia, *supra* n55, para. 146.33.

⁵⁸ Of the four birth registration recommendations mentioning statelessness, three were rejected. HRC, UPR Report: Republic of Korea, *supra* n55, para. 124.29; HRC, UPR Report: Dominican Republic, *supra* n54, para. 98.113; HRC, Report of the Working Group on the Universal Periodic Review: Lebanon, 22 December 2015, A/HRC/31/5, para. 132.215. The one accepted birth registration recommendation mentioning statelessness was HRC, Report of the Working Group on the Universal Periodic Review: Comoros, 7 April 2014, A/HRC/26/11, para. 112.6.

as registering births does not seem to have a negative effect on the acceptance rate. In fact the majority of the recommendations on identity documents also refer to birth registration. In contrast, recommendations on gender discrimination which refer specifically to discrimination in nationality law are no less likely to be accepted than those that refer generally to gender discrimination.⁵⁹ The low acceptance rate of such recommendations perhaps reflects the extent to which positions on this matter are entrenched. For those considering strategic engagement with the UPR this suggests that there is unlikely to be a “gain” in terms of increased likelihood of acceptance of recommendations on gender discrimination by omitting specific references to nationality law. In contrast, it seems that keeping recommendations on birth registration separate from questions of nationality, statelessness and specific groups improves the likelihood of their acceptance.

An additional factor to consider in relation to the UPR is the State which makes the recommendation. Notable “champions” in this regard include Mexico with respect to birth registration, Slovenia with respect to recommendations to accede to the Statelessness Conventions, and the Nordic countries with respect to the elimination of gender discrimination from nationality laws. Making a recommendation is a public act and indicates the interest of the recommending State in that particular issue. Some States choose to consistently make recommendations on a particular topic. While this is beneficial in ensuring that topic is addressed regularly, there is a risk that it will be neglected if the priorities of that State change. In other cases the recommendations made reflect the particular situation in the SuR or at least the most discussed concerns in relation to that State, with a proportionally higher likelihood that recommendations will be rejected. Which State makes a recommendation can also affect the acceptance or rejection of that recommendation. For instance, the fact that recommendations on gender discrimination in nationality law have predominately been made by Western and Latin American States to Arab States may be a factor in the high level of rejection of these recommendations. It

⁵⁹ Included with these recommendations are those relating to the withdrawal of reservations to Article 9 of CEDAW. Where such recommendations refer specifically to Article 9 they are counted as being recommendations on the right to a nationality, where they refer generically to withdrawing reservations but do not cite specific provisions they are counted as broadly relevant recommendations.

is perhaps no coincidence that Algeria's recommendations on this subject are twice as likely to be accepted as Norway's.⁶⁰

One final note of interest on the UPR: part of the inconsistency in practice to date may have to do with the fact that the background documentation for the UN's input to the UPR during the first and second cycles did not include a dedicated statelessness heading. Any UN information on statelessness in the SuR was typically squeezed in under the heading on migrants, refugees, asylum seekers, and Internally displaced persons. This may change for the better as of the third cycle, when various aspects of the documentation are due to change and a specific heading on statelessness could be included. UPR Info's recent decision to make its database searchable by "statelessness and the right to nationality" will also help support improved recommendations.

3. Treaty Bodies

The UN human rights treaty bodies are committees of international experts which monitor the implementation of the international human rights treaties. Each treaty body reviews, on a regular basis, the implementation of the relevant convention by States Parties.⁶¹ The treaties themselves are legally binding international agreements, but, as such, only apply to States Parties. This geographic limitation distinguishes the work of the treaty bodies from that of the UPR discussed above. A second difference is that whereas the UPR may

⁶⁰ For Algeria's recommendations see, HRC, Report of the Working Group on the Universal Periodic Review: Bahrain, 6 July 2012, A/HRC/21/6, para. 115.143; HRC, Report of the Working Group on the Universal Periodic Review: Vanuatu, 4 April 2014, A/HRC/26/9, para. 99.36; HRC, Report of the Working Group on the Universal Periodic Review: Malawi, 20 July 2015, A/HRC/30/5, para. 110.57.

For Norway's, HRC, UPR Report: Bahrain (*supra*), 115.141; HRC, Report of the Working Group on the Universal Periodic Review: Tunisia, 9 July 2012, A/HRC/21/5, para.116.4; HRC, Report of the Working Group on the Universal Periodic Review: Jordan, 6 January 2014, A/HRC/25/9, paras. 120.6 and 120.26; HRC, UPR Report: Malaysia, *supra* n55, para.146.31; HRC, Report of the Working Group on the Universal Periodic Review: Saudi Arabia, 26 December 2013, A/HRC/25/3, para. 138.95; HRC, Report of the Working Group on the Universal Periodic Review: Qatar, 27 June 2014, A/HRC/27/15, para.124.35; HRC, Report of the Working Group on the Universal Periodic Review: Kuwait, 13 April 2015, A/HRC/29/17, para. 157.118.

⁶¹ Each body also has a procedure for receiving and considering individual cases, but consideration of these procedures is outside the scope of this chapter.

address any human rights issue, the treaty bodies only consider the rights in that particular convention (although in light of the interrelated nature of human rights what is relevant to a particular treaty can be, and often is, interpreted broadly). On the other hand, this limitation allows the treaty bodies to address issues in far greater depth than the UPR and, as the figures below show, they are somewhat more consistent in addressing issues. The third difference between the UPR and the treaty bodies is that the recommendations of the treaty bodies are considered those of the body as whole, unlike the UPR where recommendations are made by individual States. A final difference is that the UPR occurs at fixed intervals (each State is reviewed every four and a half years), whereas the timetable of review by treaty bodies is variable and depends on the submission of reports by States Parties.

Issues of nationality and statelessness could arise in any of the human rights treaty bodies.⁶² For this chapter we have chosen to focus on three treaties: The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC).

3.1 Committee on the Elimination of Racial Discrimination (Committee on Racial Discrimination)

Article 5 of ICERD provides that:

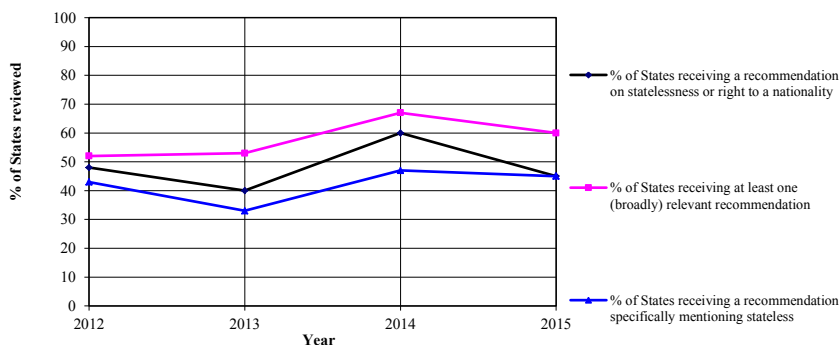
In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...]

(d) Other civil rights, in particular: [...]

(iii) The right to nationality

⁶² A full listing of relevant treaty body provisions can be found in, Institute on Statelessness and Inclusion, *Addressing the Right to Nationality through the Convention on the Rights of the Child: A toolkit for civil society*, 2016, section 8.

Figure 3. Percentage of States receiving relevant recommendations from the Committee on Racial Discrimination 2012-2015.⁶³



In total 67% of the relevant recommendations in this period refer specifically to statelessness and 42% of States reviewed received at least one broadly relevant recommendation. As with the UPR, the Committee on Racial Discrimination is not entirely consistent with respect to which States receive recommendations and which do not. For example, while 20 States received recommendations to ratify the Statelessness Conventions, 26 States which are not parties to one or both Conventions did not receive such recommendations. Poland and Sweden each received no relevant recommendations.⁶⁴

The recommendations cover a wide range of relevant issues, including data collection,⁶⁵ birth registration⁶⁶ and avoiding statelessness in

⁶³ Broadly relevant recommendations are those which deal with birth registration and access to documentation without linking these issues to the right to a nationality or statelessness.

⁶⁴ At the end of 2014 Poland had a stateless population of 10,825 and Sweden one of 27,167. UNHCR, Statistical Yearbook, *supra* n46, Annex Table 7.

⁶⁵ Committee on the Elimination of All Forms of Racial Discrimination (CERD), Concluding observations on the combined six and seventh periodic reports of Kazakhstan, 14 March 2014, CERD/C/KAZ/CO/6-7, para. 19; CERD, Concluding observations on the combined tenth and eleventh periodic reports of the Czech Republic, 25 September 2015, CERD/C/CZE/CO/10-11, paras. 27-28.

⁶⁶ See, e.g., CERD, Concluding observations on the eighteenth to twenty-first periodic reports of Peru, 25 September 2014, CERD/C/PER/CO/18-21, para. 19; CERD, Concluding observations on the combined eighth to tenth periodic reports of the former Yugoslav Republic of Macedonia, 21 September 2015, CERD/C/MKD/CO/8-10, paras. 20-21.

cases of State succession⁶⁷ as well as both direct⁶⁸ and indirect⁶⁹ discrimination. The strongest recommendations are those which deal with arbitrary denial or deprivation of nationality. In 2012 Jordan's withdrawal of nationality from individuals of Palestinian origin was identified as a violation of international law, in particular Article 24 of the ICCPR and Article 7 of the CRC, despite reported safeguards in the application of the law.⁷⁰ The fact that the provisions of other treaties were cited demonstrates the extent to which the treaty bodies are willing to make recommendations drawing on the State's other international law obligations. In this case it is clear that the Committee wished to highlight the particular problems with respect to the deprivation of nationality from children, including as a result of the automatic extension of the withdrawal of nationality to the children when the father's nationality was revoked.

In 2012 recommendations were made to several States to remove gender discrimination from their nationality law,⁷¹ but no recommendations on this topic were made between 2013 and 2015.⁷² On one occasion the Committee on Racial Discrimination explicitly recalled "that the scope of national sovereignty with regard to nationality is limited in terms of respect for human rights, specifically the principle of non-discrimination" and recommended that the State respect the principle of non-discrimination with regard to access to nationality.⁷³

⁶⁷ CERD, Concluding observations on the combined twelfth to sixteenth periodic reports of the Sudan, 12 June 2015, CERD/C/SDN/CO/12-16, para. 19.

⁶⁸ CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Kuwait, 4 April 2012, CERD/C/KWT/CO/15-20, paras. 17-18.

⁶⁹ CERD, Concluding observations on the combined fifteenth to twenty-first periodic reports of Iraq, 22 September 2014, CERD/C/IRQ/CO/15-21, para. 17.

⁷⁰ CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Jordan, 4 April 2012, CERD/C/JOR/CO/13-17, para. 12.

⁷¹ *Ibid.*, para. 11; CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Qatar, 13 April 2012, CERD/C/QAT/CO/13-16, para. 16; CERD, Concluding observations: Kuwait, *supra* n68, para. 18; CERD, Concluding observations concerning the sixteenth, seventeenth and eighteenth periodic reports of Senegal, 24 October 2012, CERD/C/SEN/CO/16-18, para. 19.

⁷² Two States which maintain gender discriminatory nationality laws were reviewed in this period: Iraq in 2014 and Sudan in 2015. However, Oman, which was reviewed in 2016, did receive a recommendation on this subject. CERD, Concluding observations on the combined second to fifth periodic reports of Oman, 6 June 2016, CERD/C/OMN/CO/25, paras. 25-26.

⁷³ CERD, Concluding observations on the thirteenth and fourteenth periodic

The small number of recommendations on naturalisation makes it hard to be certain, but there may be a trend towards stronger wording of these recommendations. For instance, in 2012 the Committee on Racial Discrimination made recommendations that States “consider naturalising”,⁷⁴ “take measures to facilitate access to citizenship”,⁷⁵ and take measures to address statelessness,⁷⁶ whereas in 2014 Estonia received a recommendation to ease naturalisation requirements.⁷⁷ This recommendation is particularly significant because it deals directly with the details of the language requirements for naturalisation, in contrast to previous recommendations which referred more generally to measures to facilitate naturalisation.⁷⁸

3.2 Committee on the Elimination of All Forms of Discrimination against Women (Committee on Discrimination against Women)

Article 9 of CEDAW provides that:

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They 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.
2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

reports of the Dominican Republic, 19 April 2013, CERD/C/DOM/CO/13-14, para. 20. Other recommendations to respect non-discrimination in nationality laws include, CERD, Concluding observations on the seventeenth to twenty-second periodic reports of Cyprus, 23 September 2013, CERD/C/CYP/CO/17-22, para. 18; and CERD, Concluding observations: Sudan, *supra* n67, para. 19.

⁷⁴ CERD, Concluding observations: Kuwait, *supra* n68, para. 17.

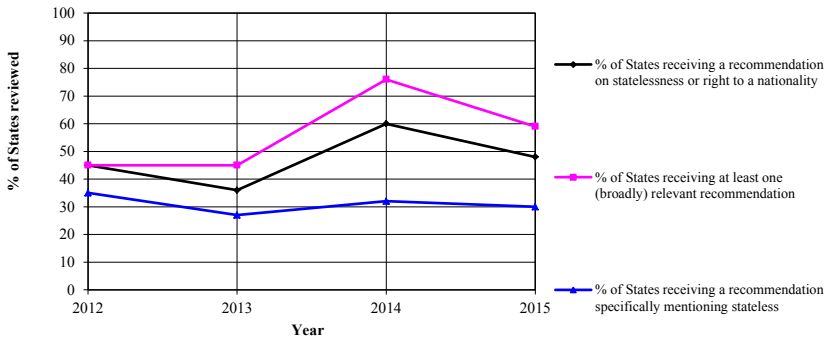
⁷⁵ CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Italy, 4 April 2012, CERD/C/ITA/CO/16-18, para. 24.

⁷⁶ CERD, Concluding observations of the Committee on the Elimination of Racial Discrimination: Turkmenistan, 13 April 2012, CERD/C/TKM/CO/6-7, para. 17.

⁷⁷ CERD, Concluding observations on the combined tenth and eleventh periodic reports of Estonia, 22 September 2014, CERD/C/EST/CO/10-11, para. 11 “(b) Lessen the language requirements for naturalization, in particular for older persons; (c) Ease further the naturalization requirements for persons under 15 years of age”.

⁷⁸ On facilitated naturalisation see also, T. Molnár, “A fresh examination of facilitated naturalisation as a solution for stateless persons”, chapter 8 in this book.

Figure 4. Percentage of States receiving relevant recommendations from the Committee on Discrimination against Women 2012-2015.⁷⁹



Drawing on Article 9, the Committee on Discrimination against Women has consistently recommended that States Parties amend provisions in nationality laws which discriminate on the basis of gender.⁸⁰ In the period surveyed such recommendations were made to all of the States reviewed which maintain such discriminatory laws.⁸¹ Their recommendations in this respect have included recommendations to amend discriminatory provisions in State's constitutions.⁸² It is also worth noting that the Committee on Discrimination against Women consistently makes such recommendations to States which have entered reservations to Article 9.⁸³

⁷⁹ Broadly relevant recommendations are those which deal with birth registration and access to documentation without linking these issues to the right to a nationality or statelessness.

⁸⁰ See, e.g., Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), Concluding observations of the Committee on the Elimination of Discrimination against Women: Jordan, 23 March 2012, CEDAW/C/JOR/CO/5, paras. 33-34; CEDAW, Concluding observations on the fourth periodic report of Benin, 28 October 2013, CEDAW/C/BEN/CO/4, paras. 24-25; CEDAW, Concluding observations on the third periodic report of Bahrain, 10 March 2014, CEDAW/C/BHR/CO/3, paras. 33-34; CEDAW, Concluding observations on the combined fourth to eighth periodic reports of Saint Vincent and the Grenadines, 28 July 2015, CEDAW/C/VCT/CO/4-8, paras. 26-27.

⁸¹ This has not, however, always been the case.

⁸² CEDAW, Concluding observations of the Committee on the Elimination of Discrimination against Women: Bahamas, 6 August 2012, CEDAW/C/BHS/CO/1-5, paras. 29-30.

⁸³ See, e.g., *Ibid.*; CEDAW, Concluding observations: Jordan, *supra* n80, paras. 9-10; CEDAW, Concluding observations on the combined initial and second

In other respects the Committee has been less consistent. Thirty-seven States, including Poland and Kyrgyzstan which each have stateless populations in excess of 10,000,⁸⁴ received no broadly relevant recommendations. Of these 37 States, 23 are not parties to one or both of the UN Statelessness Conventions. While a few States have received recommendations to bring nationality laws into alignment with the 1961 Statelessness Convention,⁸⁵ such recommendations have not been made consistently to States Parties to that Convention. These variations perhaps reflect a greater caution about making recommendations outside the core content of Article 9. The same might be discerned in the recommendations on the application of *jus soli* to the children of migrant women. In 2012 the Committee expressed concern about this issue, but limited its recommendations to cases where the mother is unable to transmit her nationality.⁸⁶ Dealing with a similar problem in the Dominican Republic the following year, CEDAW expressed concern about the broad interpretation of an exception to *jus soli* for foreigners in transit, and recommended that the State:

(a) Review the legal provisions on nationality and their implementation in respect of women of Haitian descent and their children;

(b) Remove all the obstacles for women of Haitian descent and women of uncertain status to obtaining birth certificates for their children, ensuring their access to all rights;

(c) Adopt a flexible procedure for regularizing the status of women of Haitian descent and their children, taking into account the length of their presence in the State party.⁸⁷

periodic reports of Brunei Darussalam, 14 November 2014, CEDAW/C/BRN/CO/1-2, paras. 28-29.

⁸⁴ UNHCR, Statistical Yearbook, *supra* n46, Annex Table 7.

⁸⁵ CEDAW, Concluding observations on the eighth periodic report of Denmark, 11 March 2015, CEDAW/C/DNK/CO/8, paras. 25-26; CEDAW, Concluding observations on the fifth periodic report of Lithuania, 24 July 2014, CEDAW/C/LTU/CO/5, paras. 30-31.

⁸⁶ CEDAW, Concluding observations on the fifth and sixth periodic reports of Chile, 12 November 2012, CEDAW/C/CHL/CO/5-6, paras. 26-27.

⁸⁷ CEDAW, Concluding observations on the combined sixth and seventh periodic reports of the Dominican Republic, 30 July 2013, CEDAW/C/DOM/CO/6-7, paras. 30-31.

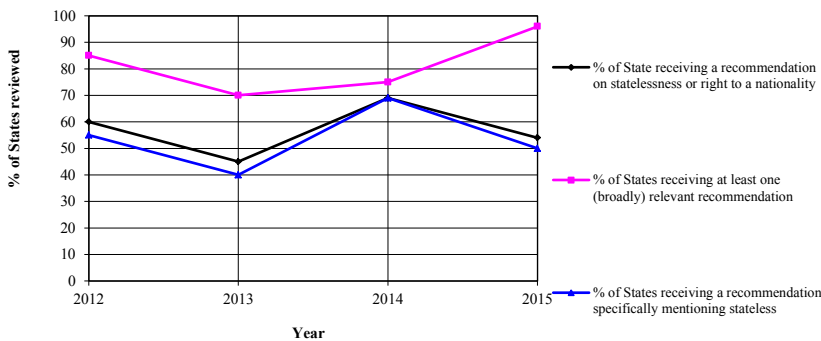
3.3 Committee on the Rights of the Child

Article 7 of the CRC provides that:

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.

Figure 5. Percentage of States receiving relevant recommendations from the Committee on the Rights of the Child 2012-2015.⁸⁸



The particularly high number of relevant recommendations reflects the consistency with which the Committee on the Rights of the Child has made recommendations on birth registration. Approximately two-thirds of the States reviewed received recommendations touching on other issues relevant to statelessness. While only 38% of all relevant recommendations have made specific reference to statelessness, if one excludes the recommendations on birth registration the

⁸⁸ Only recommendations under the Convention have been counted, not those under the two Optional Protocols. Broadly relevant recommendations are those which deal with birth registration and access to documentation without linking these issues to the right to a nationality or statelessness.

rate rises to 83%.⁸⁹ As with the other treaty bodies, there have been some significant omissions. The failure to make any relevant recommendations to certain States with stateless populations and the fact that 30 States did not receive recommendations to ratify the UN Statelessness Conventions are cases in point. In addition, three States which maintain gender discrimination in their nationality laws did not receive recommendations on that subject although this affects children's right to nationality.⁹⁰

The Committee on the Rights of the Child has frequently asked States to respect their international obligations by taking measures to prevent children being or becoming stateless.⁹¹ These recommendations have made specific reference to children of stateless parents and children of foreign nationals who cannot transmit their nationality,⁹² children born out of wedlock⁹³ or outside the country of their parents' nationality,⁹⁴ and foundlings, including those whose birth in the State cannot be proved.⁹⁵ In general these recommendations reflect the position that the child's right to nationality should not be dependent on his or her parent's status.⁹⁶ This approach accords with the approach taken in

⁸⁹ A similar pattern can be seen in the UPR where recommendations on birth registration are among those least likely to include a reference to statelessness.

⁹⁰ Liberia, Nepal and Togo.

⁹¹ Committee on the Rights of the Child (CRC), Concluding observations on the combined second to fourth periodic reports of Guinea-Bissau, 8 July 2013, CRC/C/GNB/CO/2-4, paras. 34-35; CRC, Concluding observations on the combined third to fifth periodic reports of Ghana, 9 June 2015, CRC/C/GHA/CO/3-5, paras. 31-32.

⁹² CRC, Concluding observations on the second periodic report of Malta, 18 June 2013, CRC/C/MLT/CO/2, paras. 34-35.

⁹³ CRC, Concluding observations: Madagascar, 8 March 2012, CRC/C/MDG/CO/3-4, paras. 31-32.

⁹⁴ CRC, Concluding observations: Myanmar, 14 March 2012, CRC/C/MMR/CO/3-4, paras. 41-42; CRC, Concluding observations on the combined third and fourth periodic report of Canada, 6 December 2012, CRC/C/CAN/CO/3-4, paras. 40-41.

⁹⁵ CRC, Concluding observations on the combined second to fourth periodic reports of Fiji, 13 October 2014, CRC/C/FJI/CO/2-4, paras. 26-27.

⁹⁶ See, e.g., CRC, Concluding observations on the combined fourth and fifth periodic reports of Chile, 30 October 2015, CRC/C/CHL/CO/4-5, paras. 32-33, "ensure that all children born in the State party who would otherwise be stateless can acquire Chilean nationality at birth, *irrespective of their parents migrant status*" (emphasis added); CRC, Concluding observations on the combined second to fourth periodic reports of Switzerland, 26 February 2015, CRC/C/CHE/CO/2-4, paras. 30-31; CRC, Concluding observations on

Article 2 of the CRC, which explicitly prohibits discrimination based on a parent or legal guardian's status.⁹⁷ Similarly, a recommendation to Turkmenistan suggesting that the best interests of the child should be considered in statelessness determination procedures⁹⁸ draws on Article 3 of the CRC which sets out the general principle that the best interests of the child should be a primary consideration in all actions concerning the child, but demonstrates an increasingly robust assertion of the relevance of these standards to nationality laws.

The Committee on the Rights of the Child's increasing sensitivity to statelessness and nationality issues is reflected, for instance, by its views on the importance of the removal of gender discrimination from nationality laws (even if there are safeguards against statelessness in national laws)⁹⁹ as well as on the removal of discrimination on the basis of disability from naturalisation requirements.¹⁰⁰

4. Conclusion

Although the level of attention to statelessness and nationality by international human rights mechanisms remains low when compared with many other thematic topics, it has begun to increase in recent years. A number of high profile statelessness situations have undoubtedly served to draw attention to the plight of stateless populations. At the same time, UNHCR's Campaign to End Statelessness has raised the level of awareness of the right to nationality as an important human rights topic and helped to galvanise a network of interested actors who are actively working to open opportunities for further discussion. As this chapter has shown, the Human Rights Council, the Special

the combined second to fourth periodic reports of Turkmenistan, 10 March 2015, CRC/C/TKM/CO/2-4, paras. 24-25; CRC, Concluding observations on the fourth periodic report of the Netherlands, 8 June 2015, CRC/C/NDL/CO/4, paras. 32-33 (criticising a limitation to a proposed law granting nationality to stateless children born in the Netherlands without a legal residence permit, but only if their parents had cooperated with the authorities).

⁹⁷ For further discussion of the relevance of this provision to statelessness see, A. de Chickera and J. Whiteman, "Addressing statelessness through the rights to equality and non-discrimination", chapter 4 in this book.

⁹⁸ CRC, Concluding observations: Turkmenistan, *supra* n96, paras. 20-21.

⁹⁹ CRC, Concluding observations on the combined second to fourth periodic reports of Iraq, 3 March 2015, CRC/C/IRQ/CO/2-4, paras. 31-32.

¹⁰⁰ CRC, Concluding observations on the fourth periodic report of Yemen, 25 February 2014, CRC/C/YEM/CO/4, paras. 39-40.

Procedures, treaty bodies, and the UPR have already approached questions of statelessness and nationality in a variety of ways which open possibilities for future engagement.

The survey of practice in this chapter illustrates that there is considerable scope for more coordinated work. In all the mechanisms reviewed, there have been inconsistencies in the level of attention paid to statelessness and missed opportunities. For instance, as of 2016 there are only 27 States in the world which maintain nationality laws that do not permit mothers to confer nationality on their children on an equal basis with fathers, and yet neither the UPR nor the treaty bodies have addressed relevant recommendations to all of those reviewed. The responsibility for improving the consistency of recommendations falls primarily on those making recommendations: States in the UPR, the Special Procedures mandate holders, and the members of the treaty bodies. However other actors, including UNHCR and civil society, also have a role to play in ensuring that these bodies receive clear, consistent and high quality information.¹⁰¹

While there is ample room for more engagement by existing Special Procedures, the creation of a Special Procedure on the right to nationality deserves consideration, as it would enhance the UN system's dedicated attention to statelessness issues.¹⁰² There is always reluctance to add new mandates, as these require additional resources and take up time on the Human Rights Council's already crowded agenda. The time may nonetheless be ripe to think about a new mandate holder as a longer-term advocacy goal.

Short of a dedicated mandate holder, there are many things the "Friends of the Campaign to End Statelessness", can help to achieve in concert with UNHCR, the Office of the High Commissioner for Human Rights (OHCHR) and interested NGOs. Notable goals might include:

- Ensuring biennial continuity of a dedicated resolution on the right to nationality;

¹⁰¹ Submissions by these other stakeholders are a key source of information for all of the human rights mechanisms discussed in this chapter.

¹⁰² A mandate holder would carry out individual country visits, provide detailed reports and recommendations, and provide opportunities for follow up by the Human Rights Council. A mandate holder could also receive individual communications.

- Ensuring that the thematic resolutions on birth registration and arbitrary deprivation are continued and strengthened as appropriate and that other relevant thematic resolutions address statelessness (e.g. the biennial resolution on the rights of minorities);
- Ensuring that the right to nationality is addressed thoughtfully in Human Rights Council resolutions dealing with relevant country situations;
- Improving the attention paid to statelessness and right to nationality by the Special Procedures of the Human Rights Council;
- Improving the consistency with which recommendations concerning statelessness and right to nationality matters are made in the UPR by making good use of a new heading on statelessness in the background documentation for the third cycle;
- Improving the quality of recommendations made in the UPR, including by considering the strategic advantages of making specific or general recommendations;
- Ensuring that the treaty bodies have complete and up to date information to inform more detailed recommendations;
- Ensuring that the different human rights mechanisms are exploited strategically – taking into consideration their different strengths and weaknesses – to raise awareness, clarify standards, and spread good practices;
- Ensuring more direct follow-up with States (on both UPR and treaty body recommendations) at the international and national levels.

NGOs and Member States interested in advancing the goals of the Campaign to End Statelessness have begun conferring with each other and with UNHCR and OHCHR about how best to go about achieving many of these things. That fact alone holds significant promise, and we are hopeful that this joined up advocacy will yield additional concrete results in the years to come.

2. The Sustainable Development Goals and solutions to statelessness

*Radha Govil*¹

1. Introduction

In his opening address to the First Global Forum on Statelessness on 15 September 2014, United Nations High Commissioner for Refugees Assistant High Commissioner for Protection, Volker Türk, noted that “[p]romoting [...] the right to a legal identity through the post-2015 sustainable development goals will be important to ending statelessness and crucial to dismantling some of the major barriers to sustainable and peaceful development”.² He cited examples from Bangladesh and Myanmar, Côte d’Ivoire and the Gulf to illustrate at the national and regional levels the considerable costs to security, development and human rights of a failure to resolve statelessness. His remarks not only echoed, but expanded upon, the earlier finding of the High-level Panel of Eminent Persons on the Post-2015 Development Agenda, that the securing of an individual’s legal identity is an imperative for development and its recommendation that States adopt a goal relating to free and universal legal identity as part of the goal of ensuring good governance and effective institutions.³

At a United Nations Summit held on 25-27 September 2015 in New York, the Member States of the United Nations (UN) adopted the 2030 Agenda for Sustainable Development (2030 Agenda) which has a Declaration, a set of 17 Sustainable Development Goals (SDGs), and 169 associated Targets at its core, including a Target for the provision

¹ Legal Officer (Statelessness), Division of International Protection, in United Nations High Commissioner for Refugees (UNHCR). This chapter reflects the views of the author and not necessarily those of UNHCR or of the United Nations.

² V. Türk, Keynote Address: Ending Statelessness: An Imperative for the 21st Century, Global Forum on Statelessness, 15 September 2014.

³ The High-level Panel of Eminent Persons on the Post-2015 Development Agenda, A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development, 2013.

of universal legal identity by 2030.⁴ The Inter-Agency and Expert Group on Sustainable Development Goal Indicators (IAEG-SDGs) has also developed a global indicator framework, consisting of 230 global indicators,⁵ to assist in measuring the implementation of Targets. The 2030 Agenda strives for a world that is just, rights-based, equitable and inclusive. It is to be implemented in a manner consistent with the existing obligations of States under international law. The overarching objective of the SDGs is to ensure that “no one is left behind” and that “goals and targets [are] met for all nations and peoples and for all segments of society”,⁶ with dedicated Goals and relevant Targets on combating inequality and discrimination. The SDGs officially came into effect upon expiry of the Millennium Development Goals on 1 January 2016 and will run through to 2030 and apply to every country.

This chapter explores the extent to which the SDGs provide a useful avenue for resolving statelessness. Part 2 examines the problem of statelessness as a development issue. Part 3 analyses which of the SDGs are of relevance to addressing the issue of statelessness and links these to United Nations High Commissioner for Refugees’ (UNHCR) statelessness mandate and the #IBelong Campaign to End Statelessness in 10 Years. Part 4 examines how the relevant SDGs might be practically implemented and what limitations can be foreseen in this respect. In light of the foregoing analysis, the conclusion evaluates the extent to which the SDGs can be useful in the quest to find durable solutions to statelessness.

2. Statelessness as a development issue

Statelessness has traditionally been viewed as a humanitarian and human rights issue, but rarely as one of development. Its humanitarian complexion is linked historically to its close association with refugee crises, notably the large-scale displacement and mass denationalisation of German Jews during the Second World War, and because the UN agency mandated to address the problem - UNHCR - is a high-profile humanitarian emergency response actor. UNHCR

⁴ UN General Assembly (UNGA), Transforming our World: The 2030 Agenda for Sustainable Development, 21 October 2015.

⁵ UN Department of Economic and Social Affairs, Sustainable Development Goals, SDG Indicators – Global Database, <http://unstats.un.org/sdgs/indicators/database>.

⁶ See, UNGA, *supra* n4, para. 4.

was originally mandated to address only the situation of stateless persons who were also refugees.⁷ Following the emergence of large-scale statelessness linked to the collapse of the former Soviet Union, Czechoslovakia and the Federal Socialist Republic of Yugoslavia, UNHCR's statelessness mandate was expanded by the UN General Assembly in 1995.⁸ The General Assembly identified statelessness as a cause of forced displacement, but also indicated that "the prevention and reduction of statelessness and the protection of stateless persons are important also *in the prevention of potential refugee situations*";⁹ thereby acknowledging the importance of addressing statelessness to prevent conflict and persecution from occurring in the first place. It is also true that a number of the largest and most well-known stateless populations continue to live in what could be described paradoxically as a perpetual state of humanitarian crisis, the most obvious example being the Rohingya in Myanmar.¹⁰

The connection between statelessness and human rights is more straightforward; stateless persons are first and foremost human, and the right to nationality (the antidote to statelessness) is a universal human right.¹¹ In practice, possession of a nationality often acts as the gateway to the full panoply of civil, political, economic, social and cultural rights. In particular, nationality brings with it access to political participation, the full right to residence within the State of nationality's territory, and a sense of identity. The slow but steady improvement in the breadth and depth of documented evidence of the impact of statelessness in human rights terms,¹² the greater use of UN

⁷ UNGA, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), para. 6(A)(II) and 1951 Convention relating to the Status of Refugees, 28 July 1951, entry into force 22 April 1954, 189 UNTS 137, Art. 1(A).

⁸ UNGA, Resolution A/RES/50/152, Office of the High Commissioner for Refugees, 9 February 1996.

⁹ *Ibid.* emphasis added.

¹⁰ For example, see, Fortify Rights, *Policies of Persecution: Ending Abusive State Policies against Rohingya Muslims in Myanmar*, 2014.

¹¹ See, for example, Universal Declaration of Human Rights, 10 December 1948, Adopted and proclaimed by General Assembly resolution 217 A (III), Art. 15; International Covenant on Civil and Political Rights, 16 December 1966, entry into force 23 March 1976, 999 UNTS 171, Art. 24; and Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3, Art. 7.

¹² For example, see recent statelessness 'mapping' studies undertaken by UNHCR

and regional human rights mechanisms to encourage States to address statelessness,¹³ and the strengthening of the civil society sector in this area,¹⁴ have all contributed to establishing statelessness as a human rights issue, albeit one that still needs to be mainstreamed.

Hitherto, statelessness has rarely been analysed or addressed as a development issue. Amal de Chickera, of the Institute on Statelessness and Inclusion, has offered a number of theories as to why statelessness and development have taken such an oil and water approach to each other.¹⁵ He has noted that statelessness has long been relegated to the “bottom shelf” of issues and causes, remaining largely the preserve of academic, technical and legal discussions. It is only now that its links with other disciplines and approaches, including development, are being unearthed. De Chickera has also argued that because “the development lexicon does not include the word ‘statelessness’, [...] the development field can almost be excused for not noticing”.¹⁶ This lack of understanding of statelessness has led to it being rendered invisible in development contexts, as is often sadly the case for stateless people themselves. Even the United Nations Development Programme’s (UNDP) annual Human Development Report,¹⁷ recognised as one of the top ten sources of international development data,¹⁸ makes no mention of stateless persons, although interestingly the same report does count the number of refugees and internally displaced persons

and its partner organisations in a number of countries, UNHCR, RefWorld, Statelessness, <http://www.refworld.org/statelessness.html>.

¹³ For a discussion of the use of these mechanisms to address statelessness see, M. Khanna and P. Brett, “Making effective use of UN human rights mechanisms to solve statelessness”, chapter 1 in this book.

¹⁴ For example, the last five years alone have seen the establishment of regional civil society networks dedicated to statelessness in the Americas, Asia (including a dedicated network in Central Asia), Europe and Southern Africa, collectively working with more than 150 NGOs on the issue.

¹⁵ A. de Chickera, Statelessness, Human Rights and Development: It’s time to Connect the Dots, European Network on Statelessness Blog, 8 November 2013, <http://www.statelessness.eu/blog/statelessness-human-rights-and-development-its-time-connect-dots>.

¹⁶ *Ibid.*

¹⁷ United Nations Development Programme (UNDP), Human Development Report, 2015.

¹⁸ J. Holden, The Top 10 sources of data for international development research, The Guardian, 17 March 2016, <https://www.theguardian.com/global-development-professionals-network/2016/mar/16/the-top-10-sources-of-data-for-international-development-research>.

(IDPs) that a country produces to rank States on the development indicator of “human security”.¹⁹

De Chickera has also pointed to the preoccupation of international development programmes with “national and nationalistic outcomes: ‘Kenyan development for Kenyans’ or ‘Sri Lankan development for Sri Lankans’”.²⁰ Stateless people, who are frequently excluded even from national population censuses,²¹ are not factored into the equation when development needs are being assessed and are therefore unlikely to benefit from development outcomes. A fourth charge made by de Chickera is that “development is more concerned with aggregate improvements and less so with equality of access and enjoyment of the improvements made”.²² Although it appears that efforts are being made by development actors to find ways to measure inequality and marginalisation,²³ including through the SDGs, as outlined below, stateless persons frequently exist at the very peripheries of society, making them among the easiest to exclude and their exclusion the least likely to be noticed. De Chickera has asserted, that the problem is that “development promotes aspiration, not obligation”²⁴ and that aspirations will not be realised if not coupled with obligations to treat people equally, to be fair and not to discriminate – in short, good governance and a rule-of-law approach are needed for development to be meaningful for stateless persons and to avoid entrenching their position of inequality. Finally, development has traditionally been seen as something for the ‘developing world’, notwithstanding the fact that thousands of stateless persons live impoverished lives in the ‘developed world’ and therefore miss out on the fruits of development initiatives. The 2030 Agenda seeks to remedy this by seeking to ensure that “[g]oals and targets [are] met for all nations and peoples and for all segments of society”.²⁵

Notwithstanding these and other barriers to statelessness being seen and addressed as a development issue, surveys and studies²⁶ of stateless

¹⁹ See, UNDP, *supra* n17, Statistical Annex, Table 14 – Human Security.

²⁰ See, de Chickera, *supra* n15.

²¹ UNHCR, Global Action Plan to End Statelessness: 2014 – 2024, p. 24.

²² See, de Chickera, *supra* n15.

²³ UNDP, *supra* n17.

²⁴ See, de Chickera, *supra* n15.

²⁵ See, UNGA, *supra* n4.

²⁶ For example, see, Georgetown University Human Rights Institute Fact-

communities consistently show that they score poorly across all key indicators of human development, including longevity, education, gender equality, health, security and perceptions of well-being,²⁷ and lag far behind when it comes to issues of multidimensional poverty, inequality and marginalisation. A recent report by UNHCR, 'I am Here, I Belong: The Urgent Need to Address Childhood Statelessness'²⁸ bears witness to these disparities through the testimony provided by more than 200 stateless children and youth around the world, showing how statelessness significantly impairs the ability of children to learn, grow, play and lead productive and fulfilling lives. It highlights how statelessness can create insurmountable barriers that prevent access to education and adequate health care and stifles job prospects.

Statelessness can exact a devastating toll, not only on affected individuals but also on societies. As the UN Secretary General observed in his 2011 'Guidance Note on the United Nations and Statelessness', "[e]xcluding entire sectors of a population can, for example, create social and political tensions and significantly impair efforts to promote economic and social development".²⁹ In Côte d'Ivoire, for example, the first post-independence nationality law in 1961 defined citizenship in a manner which excluded many residents who originally came from other parts of West Africa. Hundreds of thousands of agricultural workers who had been brought to Côte d'Ivoire from neighbouring countries in colonial times were thereby denied citizenship. This situation has been one of the root causes of a decade of armed conflict in the country. Statelessness has also had an economic impact as the political turmoil damaged the economy of the country, resulting in the loss of foreign investment and slowing of economic growth.³⁰ The negative impact of statelessness on national development was

Finding Project, *Left Behind: How Statelessness in the Dominican Republic Limits Children's Access to Education*, 2014; UNHCR, *Mapping Statelessness in the United Kingdom*, 2011; Open Society Justice Initiative and Refugees International, *Without Citizenship: Statelessness, discrimination and repression in Kuwait*, 2011; Lawyers for Human Rights, *Statelessness and Nationality in South Africa*, 2013.

²⁷ For an explanation of key human development indicators, see UNDP, *supra* n17.

²⁸ UNHCR, *I am Here, I Belong: The Urgent Need to Address Childhood Statelessness*, 2015.

²⁹ UN Secretary-General, *Guidance Note of the Secretary General: The United Nations and Statelessness*, 2011, p. 2.

³⁰ UCLA African Studies Centre, Côte d'Ivoire, 9 March 2015, <http://www.international.ucla.edu/africa/article/96732>.

also acknowledged by the Bangladeshi Supreme Court in 2008, when it ruled that members of the Urdu-speaking minority, who had been treated as stateless for more than 30 years, had in fact been Bangladeshi nationals since independence. In its judgment, the Court observed that, “[b]y keeping the question of citizenship unresolved on wrong assumptions over decades, this nation has not gained anything – but rather was deprived of the contribution they could have made in nation building”.³¹

Although the worlds of statelessness and development have rarely come together in the past, the evidence shows that statelessness is a problem from a development perspective. A positive step is that the development, human rights and humanitarian worlds have recognised the need to better complement each other in the future. The UN High Commissioner for Human Rights, in an open letter on human rights and the post-2015 development agenda stated that, “[...] the Post-2015 Agenda must be built on a human rights-based approach [...]. It means explicitly aligning the new development framework with the international human rights framework – including civil, cultural, economic, political and social rights, as well as the right to development. In essence, it means deliberately directing development efforts to the realization of human rights.”³² The High-Level Panel of Eminent Persons on the Post-2015 Development Agenda also highlighted the importance of ensuring that “no person – regardless of ethnicity, gender, geography, disability, race or other status – is denied universal human rights and basic economic opportunities”.³³ Finally, commitments to transcend the humanitarian-development divide, made by the UN Secretary-General and eight United Nations agencies at the first World Humanitarian Summit in May 2016, acknowledge the historic opportunity presented by the adoption of the 2030 Agenda, “under which both humanitarian and development actors can work together to ensure the safety, dignity and ability to thrive of the most vulnerable”.³⁴

³¹ Bangladesh Supreme Court, Writ Petition No. 10129 of 2007, *Md. Sadaqat Khan (Fakku) and Others v. Chief Election Commissioner, Bangladesh Election Commission*, 18 May 2008.

³² UN High Commissioner for Human Rights, *Human Rights in the Post-2015 Agenda*, 2013.

³³ The High-level Panel of Eminent Persons on the Post-2015 Development Agenda, *supra* n3, Executive Summary.

³⁴ World Humanitarian Summit, *Transcending humanitarian-development*

3. Relevance of the SDGs to addressing statelessness³⁵

Paragraph 23 of the Declaration explicitly recognises the relevance of the 2030 Agenda to meeting the needs of refugees, IDPs and migrants on the basis that they are among the most vulnerable. There is, unfortunately, no such explicit reference to stateless persons, despite the fact that the vast majority of the world's estimated 10 million stateless people live on the lowest rungs of society, including in terms of economic prosperity, political participation and social inclusion. However, since the stated *modus operandi* of the 2030 Agenda is "to reach the furthest behind first"³⁶ it should clearly also apply to those who experience the many negative consequences of not being recognised as citizens of any country.³⁷

A significant number of the SDGs and related Targets are relevant to improving the living conditions of stateless persons.³⁸ For example, SDG 4, Target 4.1 commits States to, "by 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes". Stateless children face significant challenges when it comes to pursuing their education. In some cases, schools deny non-nationals entry or charge non-nationals higher fees that impoverished stateless families cannot afford. In other situations, stateless children may be refused admission to their final exams or have their diplomas or graduation certificates

divides: Changing People's Lives: From Delivering Aid to Ending Need: Commitment to Action, 23 May 2016, para. 2.

³⁵ Part III of this paper is based on a paper by the author, entitled "Is the concept of legal identity relevant to UNHCR's statelessness mandate?" (unpublished), presented at the Hague Colloquium on the Future of Legal Identity in New York on 21 - 24 April 2015. The ideas in this paper were developed further by the author in her capacity as UNHCR Legal Officer (Statelessness) in a UNHCR Briefing Note on the Sustainable Development Goals and Addressing Statelessness in 2016.

³⁶ See, UNGA, *supra* n4, para. 4.

³⁷ See, UNHCR, *supra* n34.

³⁸ For example, see SDGs 1 (End poverty in all its forms everywhere), 2 (End hunger, achieve food security and improved nutrition and promote sustainable agriculture), 3 (Ensure healthy lives and ensure well-being for all at all ages), 4 (Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all), 6 (Ensure availability and sustainable management of water and sanitation for all), 8 (Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all).

withheld, halting their progress to higher education and limiting their job prospects. Stateless children also frequently find themselves ineligible for scholarships or student loans.³⁹ Goals such as SDG 4 are important in that they protect stateless people and ensure that they, like others, have access to basic rights.⁴⁰ Improving the enjoyment of basic rights and the living conditions of stateless persons through such SDGs may also help with the integration of stateless (and formerly stateless) populations, particularly large *in situ* groups, which may in the longer term facilitate initiatives aimed at resolving their statelessness and preventing new cases from occurring.⁴¹ However, a more direct solution to statelessness requires the resolution of existing cases of statelessness and preventing new cases from occurring. In this regard, SDGs 5 (Achieve gender equality and empower all women and girls), 10 (Reduce inequality within and among countries), and 16 (Promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable and inclusive institutions at all levels), and their related Targets are particularly relevant.

SDG 5, Target 5.1 (End all forms of discrimination against women and girls everywhere) is applicable to the issue of gender discrimination in nationality laws, which is a major cause of statelessness. The nationality laws of 27 countries, in almost all regions of the world, prevent mothers from conferring their nationality on their children on an equal basis with fathers.⁴² In these countries, when fathers are missing, dead, have abandoned the family or are unwilling to take the necessary steps to transmit their nationality, children can be left stateless. In more than 50 countries, nationality laws do not afford women the same rights to acquire, change or retain their nationality as men. This can lead to statelessness where nationality laws make women's nationality status contingent on that of their husbands, or prevent (stateless) men from acquiring the nationality of their wives.⁴³

³⁹ See, Georgetown University Human-Rights Institute Fact-Finding Project, *supra* n25, pp. 9-11.

⁴⁰ See, UNHCR, *supra* n35.

⁴¹ With thanks to Nicholas Oakeshott, UNHCR's Regional Protection Officer (Statelessness) for the Asia Pacific and Inge Sturkenboom, UNHCR's Regional Protection Officer (Statelessness) for Europe for highlighting this point. See, UNHCR, *supra* n35.

⁴² UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness 2016, 2016.

⁴³ Equality Now, *The State We're In: Ending Sexism in Nationality Laws*, 2016.

The effects of statelessness caused by gender discrimination in nationality laws are numerous, severe and continuing and have a knock-on effect for the women, their children and families. These include: exclusion from educational opportunities available to nationals; limited access to healthcare, social security and other benefits available to nationals, leading to risk-taking behaviour and a sense of instability and marginalisation; curtailed employment opportunities; and psycho-social effects including anger, resentment, frustration and depression.⁴⁴ Even in countries where reforms have removed discriminatory provisions from laws, gaps in the effective implementation of gender neutral laws can allow problems to persist.⁴⁵ Target 5.1 offers the possibility of ensuring both reform and enforcement of laws that give women and men equal nationality rights.

SDG 10, Target 10.3 (Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard), together with SDG 16, Target 16.b (Promote and enforce non-discriminatory laws and policies for sustainable development) could also reinforce efforts to eliminate gender discriminatory nationality laws. Given that Targets 10.3 and 16.b are not restricted to discrimination on grounds of gender, they may also prove helpful in addressing laws and policies that discriminate on the basis of ethnicity, race, language or religion, which lie at the root of some of the largest and most protracted situations of statelessness. Instances of arbitrary deprivation of nationality continue in a range of countries and, in recent decades, have included situations of deprivation of nationality on the grounds of ethnicity or race, such as in the Dominican Republic,⁴⁶

⁴⁴ UNHCR and Collective for Research and Training on Development – Action, A Regional Dialogue on Gender Equality, Nationality and Statelessness: Overview and Key Findings, 2012; Equal Rights Trust, *My Children's Future: Ending Gender Discrimination in Nationality Laws*, 2015; and Women's Refugee Commission, *Our Motherland, Our Country: Gender Discrimination and Statelessness in the Middle East and North Africa*, 2013.

⁴⁵ UNHCR and the Kenya Human Rights Commission, *Kenya Dialogue on Gender Equality, Nationality and Statelessness*, 2015.

⁴⁶ A 2013 Constitutional Court decision arbitrarily deprived tens of thousands of Dominicans of Haitian descent of their Dominican nationality, leading to the largest statelessness crisis in the Americas. After international outcry, a law was passed to provide a path to “naturalisation” of the newly stateless Dominican-born individuals and regularisation of some migrants. While the Constitutional Court decision and subsequent law were racially neutral

Mauritania⁴⁷ and Myanmar.⁴⁸ Promoting international standards on non-discrimination, the right to nationality and the prohibition of arbitrary deprivation of nationality is therefore critical to preventing and resolving situations of statelessness, and Target 10.3 could bolster these efforts.

SDG 16, Target 16.9 (By 2030, provide⁴⁹ legal identity for all, including birth registration) is relevant to the prevention and reduction of statelessness through the provision of birth registration and, in certain cases, nationality documentation, which are both forms of proof of legal identity.⁵⁰ More than 230 million children around the world have not

on their face, the impact of these decisions has overwhelmingly impacted Dominican-born individuals of Haitian descent, in a context where race has long been a cause of tension and conflict.

⁴⁷ In the late 1980s, tens of thousands of such Mauritians of sub-Saharan descent were expelled from their homes on the basis that they were not truly citizens due to their skin colour.

⁴⁸ The exclusion of more than a million Rohingya from Myanmar citizenship stems from the ethnic discrimination contained in the 1982 Myanmar Citizenship Law and the way in which it is applied.

⁴⁹ It should be noted that the word “provide” in SDG 16, Target 16.9, implies that the Target is concerned with the registration and/or documentation of legal identity, rather than legal identity itself. For more on the differences between “identity”, “registration” and “documentation” see, M. Brewer, N. Menzies and J. Schott, *Making identification systems work for the bottom 40%*, Just Development, World Bank, 2015.

⁵⁰ Although a universal definition of legal identity does not exist, the meaning and scope of the concept can, to an extent, be established through the examination of provisions of relevant international human rights instruments which guarantee legal identity. Under the Universal Declaration of Human Rights, it is established that everyone has the right to be recognised before the law, and that all are equal before the law and entitled without any discrimination to equal protection of the law (Articles 6 and 7). Widely ratified international treaties such as the Convention on the Rights of the Child also guarantee the child’s right to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference (Article 8). One recent proposal for a definition of the concept of legal identity is, “the recognition of a person’s existence before the law, facilitating the realisation of specific rights and corresponding duties,” in L. González López, *et al.* “Civil registration, human rights, and social protection in Asia and the Pacific”, *Asia-Pacific Population Journal* 2015, Vol. 29(1). It should be noted that legal identity exists whether or not it is recognised by a State. For example, in many jurisdictions a person who is arrested on suspicion of committing a crime has rights that attach to their identity as a criminal suspect (for example, the right to remain silent). These rights are inherent to their identity as a

had their birth registered.⁵¹ Individuals can be at risk of statelessness if they have difficulties proving that they have links to a State and a lack of birth registration can create such a risk. This is particularly the case for certain populations, including persons living in border areas where lack of birth registration may lead to doubts about 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; and migrant populations, where difficulties proving 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). Nationality is acquired either on the basis of descent, whereby children acquire the nationality of their parents (*jus sanguinis*), or through a child's birth on a country's territory (*jus soli*) or a combination of these approaches as set out in law. The registration of a child's birth is the first step in establishing his or her legal identity and usually includes key information, such as the identity of the child's parents and the date and place of birth, that will be needed to establish the child's nationality under the law of the State where he or she is born or under the law of the States of which the parents are nationals. Consequently, birth registration can help in realising the child's right to a nationality and preventing statelessness.⁵²

Individuals may also be left stateless if they cannot acquire documents which prove their nationality. In some countries possession of a national identity card is, in practice, regarded as synonymous with an entitlement to nationality. This means that those who may have an entitlement to nationality under the nationality law, but who are unable to obtain a national identity card to prove that entitlement (often due to discrimination or a lack of birth registration) are treated as non-nationals and excluded from the benefits that flow from nationality, such as education, health

person (and a suspect) and are not contingent upon any formal registration (or documentation). Furthermore, people also have multiple legal identities. Depending on the factual circumstances, an individual person can have the identity of "citizen"; "resident"; "spouse"; "voter"; "driver"; "eligible claimant for services/benefits", amongst many others.

For further discussion, see Brewer *et al*, *supra* n49.

⁵¹ United Nations Children's Fund (UNICEF), Birth Registration, 13 January 2014, http://www.unicef.org/protection/57929_58010.html.

⁵² See, Govil, *supra* n35.

care and social welfare entitlements.⁵³ For example, in Kenya, a national identity card (ID card) is often required to demonstrate citizenship and thereby access goods and services. A national ID card is necessary to be admitted to hospital, to enrol in university, to vote, to open a bank or mobile money account, to get married, to obtain a passport and access many other services. Although Kenyan law sets out the various ways in which an individual may acquire Kenyan nationality, it also allows the officials responsible for processing ID applications significant discretion to defer or deny applications or to demand additional forms of documentation, such as parents' or grandparents' birth or death certificates, affidavits from tribal elders, or school leaving, *madrassa* or baptismal certificates.⁵⁴ This discretion has enabled pervasive discrimination against certain groups, such as the Nubians and Somalis, whose legal entitlement to nationality is often eroded by their inability to secure documentary proof of their legal identity.

Target 16.9 can also be helpful in the case of stateless persons in a migratory context,⁵⁵ for example, expatriates who lose or who are deprived of their nationality without having acquired the nationality of their country of habitual residence, as it can support arguments for the identification and protection of such individuals through formal recognition as stateless persons until they are able to acquire a nationality. Most stateless populations living in a migratory situation remain invisible, unrecognised and undocumented, making their existence precarious.⁵⁶ Stateless persons should be afforded a broad range of civil, economic, social and cultural rights as set out in the 1954 Convention relating to the Status of Stateless Persons⁵⁷ and

⁵³ See, Govil, *supra* n35.

⁵⁴ B. Oppenheim and B.M. Powell, Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya, Open Society Justice Initiative Policy Paper, 2015.

⁵⁵ The vast majority of stateless individuals are found in their "own country", that is the country with which they have long-established ties, usually because of long-term residence or birth. For these *in situ* populations, the best course of action is for States to undertake targeted nationality campaigns with the objective of resolving the situation through grant of nationality and the issuance of national identity documentation to such populations if necessary. See UNHCR, Handbook on Protection of Stateless Persons, 2014, paras. 58-59.

⁵⁶ See, for example, UNHCR, Mapping Statelessness in the United Kingdom, *supra* n26.

⁵⁷ Convention relating to the Status of Stateless Persons, 28 September 1954, entry into force 6 June 1960, 360 UNTS 117.

under international human rights law. While these rights are not limited to individuals who have been recognised as stateless following determination by a State, in practical terms it is only once a person has been formally identified as stateless, usually through a dedicated determination procedure, that they will be able to access relevant rights.⁵⁸ As such, formal recognition of statelessness status may provide certain stateless persons with a critical form of legal identity.⁵⁹

The above analysis of the SDGs that are most relevant to addressing statelessness also helps to illuminate the points of connection between the 2030 Agenda, UNHCR's statelessness mandate and the Campaign to End Statelessness in 10 Years. UNHCR's work in the field of statelessness is mandated by UN General Assembly resolutions and through the recommendations of the organisation's own governing body, the Executive Committee of the High Commissioner's Programme (UNHCR ExCom). UNHCR's duties towards non-refugee stateless persons commenced following the entry into force of the 1961 Convention on the Reduction of Statelessness (1961 Convention).⁶⁰ General Assembly resolutions 3274 (XXIV) and 31/36 designated UNHCR as the body mandated to examine the cases of persons who claim the benefit of the 1961 Convention and to assist such persons in presenting their claims to the appropriate national authorities. UNHCR's mandate was expanded significantly during the 1990s as a result of a series of resolutions of the UN General Assembly.⁶¹

In 2004, concerned about the unacceptably high number of stateless persons whose cases had been languishing unresolved for many years, UNHCR ExCom called upon UNHCR to play a more active role in working with the relevant States to find solutions to those situations. In 2006, the UN General Assembly endorsed⁶² UNHCR ExCom Conclusion 106

⁵⁸ See, UNHCR, Handbook, *supra* n55, paras. 144-152 and UNHCR, Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons, 2016.

⁵⁹ See, Govil, *supra* n35.

⁶⁰ Convention on the Reduction of Statelessness, 30 August 1961, entry into force 13 December 1975, 989 UNTS 175.

⁶¹ See, M. Manly, "UNHCR's mandate and activities to address statelessness", in A. Edwards and L. van Waas (eds), *Nationality and Statelessness Under International Law*, Cambridge University Press 2014.

⁶² UNGA, Resolution A/RES/61/137, Office of the United Nations High Commissioner for Refugees, 19 December 2000.

on 'Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons' (ExCom Conclusion 106),⁶³ which confirms the need for UNHCR to:

- work with governments to **identify** stateless populations and populations with undetermined nationality;
- **prevent** the occurrence of statelessness;
- **reduce** statelessness, particularly in protracted statelessness situations; and
- work with States and partners to **protect** and assist stateless persons.

Since 2006, UN General Assembly resolutions have emphasised these four aspects of UNHCR's mandate: identification, prevention and reduction of statelessness and protection of stateless persons.⁶⁴ The years following 2006, saw a marked increase in attention to statelessness by UNHCR in accordance with the four elements of its mandate. The development of key doctrinal guidance relating to the definition and status of a stateless person, the promotion of accession to the two UN Statelessness Conventions, the dissemination of practical tools such as good practices papers, the 2011 Ministerial meeting which saw an unprecedented number of States pledge to address statelessness, and the strengthened engagement with States and civil society are a few examples of the heightened level of activity by UNHCR and the international community.⁶⁵

On 4 November 2014, building on the increased international awareness and momentum around addressing statelessness, UNHCR launched the #IBelong Campaign to End Statelessness within 10 Years⁶⁶ (#IBelong Campaign). A Global Action Plan (GAP)⁶⁷ sets out a framework for achieving this objective through ten practical Actions to be undertaken by States with the assistance of UNHCR and other stakeholders. The 10 Actions are:

⁶³ UNHCR ExCom, Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 6 October 2006, No. 106 (LVII) – 2006.

⁶⁴ See, UNGA, United Nations General Assembly Resolutions of particular relevance to statelessness and nationality, 2014.

⁶⁵ See, Manly, *supra* n61.

⁶⁶ See, UNHCR, #IBelong Campaign, <http://www.unhcr.org/ibelong>.

⁶⁷ UNHCR, Global Action Plan to End Statelessness: 2014 – 2024, 2014.

- Action 1: Resolve existing major situations of statelessness.
- Action 2: Ensure that no child is born stateless.
- Action 3: Remove gender discrimination from nationality laws.
- Action 4: Prevent denial, loss or deprivation of nationality on discriminatory grounds.
- Action 5: Prevent statelessness in cases of State succession.
- Action 6: Grant protection status to stateless migrants and facilitate their naturalisation.
- Action 7: Ensure birth registration for the prevention of statelessness.
- Action 8: Issue nationality documentation to those with entitlement to it.
- Action 9: Accede to the UN Statelessness Conventions.
- Action 10: Improve quantitative and qualitative data on stateless populations.

For each Action, the GAP sets out available information on the current situation (the Starting Point) and the Goals to be achieved within ten years. It also includes Milestones, or interim targets, for 2017 and 2020, to mark progress towards achievement of the Goals. If implemented universally these ten Actions are expected to resolve existing major situations of statelessness, prevent new cases of statelessness from emerging, and lead to the better identification and protection of stateless populations,⁶⁸ thereby effectively discharging UNHCR's statelessness mandate.

The table below shows how the relevant SDGs and Targets correlate with particular Actions of the GAP and the four elements of UNHCR's statelessness mandate.⁶⁹ For example, Action 3 (Remove gender discrimination from nationality laws) is directly relevant to SDG 5, Target 5.1, as implementing Action 3 will ensure that one form of discrimination against women (in laws related to nationality) is removed. Actions 7 (Ensure birth registration for the prevention of

⁶⁸ Improved identification of stateless persons will mean that better baseline data on the number of stateless people will exist and will enable laws and policies aimed at eradicating statelessness to be more effectively implemented. The protection of stateless persons is important as it ensures that stateless persons enjoy basic rights until their situation is resolved, enables better integration once they acquire nationality and promotes practical resolution to their statelessness.

⁶⁹ See, UNHCR, *supra* n35.

statelessness) and 8 (Issue nationality documentation to those with an entitlement to it) of the GAP are relevant to SDG 16, Target 16.9, as each of these Actions relates to the provision of a form of legal identity.

GAP Action	Statelessness Mandate	Key SDGs and Targets
1. Resolve existing major situations of statelessness	Reduction	SDG 10, Target 10.3; SDG 16, Targets 16.9 and 16.b
2. Ensure that no child is born stateless	Prevention/ Reduction	
3. Remove gender discrimination from nationality laws	Prevention/ Reduction	SDG 5, Target 5.1; SDG 10, Target 10.3; SDG 16, Target 16.b
4. Prevent denial, loss or deprivation of nationality on discriminatory grounds	Prevention	SDG 10, Target 10.3; SDG 16, Target 16.b
5. Prevent statelessness in cases of State succession	Prevention	
6. Grant protection status to stateless migrants and facilitate their naturalisation	Identification/ Protection/ Reduction	SDG 10, Target 10.3; SDG 16, Targets 16.9 and 16.b
7. Ensure birth registration for the prevention of statelessness	Prevention	SDG 10, Target 10.c; SDG 16, Targets 16.9 and 16.b
8. Issue nationality documentation to those with entitlement to it	Prevention	SDG 10, Target 10.c; SDG 16, Targets 16.9 and 16.b
9. Accede to the UN Statelessness Conventions	Protection/ Prevention/ Reduction/ Identification	
10. Improve quantitative and qualitative data on stateless populations	Identification	

4. Implementation of the SDGs relevant to statelessness and limits to effective implementation

Implementation of the SDGs will largely be shaped by the nature of the yardsticks used to measure progress in achieving each goal. To ensure tangible progress and to avoid the allegation that “development promotes aspiration, not obligation”, the 2030 Agenda framework includes a set of 230 global indicators (Global Indicators) developed by IAEG–SDGs to assist in the measurement of the SDG Targets. The Global Indicators were considered at the forty-seventh session of the Statistical Commission, which convened from 8 – 11 March 2016 in New York. The Commission agreed to the IAEG–SDGs’ proposed Global Indicator framework as a practical starting point, subject to future

technical refinement.⁷⁰ In its report to the Statistical Commission, the IAEG-SDGs indicated that the Global Indicators should be grouped into three ‘tiers’, based on their level of methodological development and overall availability of data.⁷¹ Tier I Global Indicators are those for which an established methodology exists and where data is widely available. Tier II Global Indicators are those for which a methodology has been established, but for which data is not easily available. Tier III are those for which an internationally agreed methodology has not yet been developed.⁷²

The Global Indicator proposed to track progress in implementation of SDG 5, Target 5.1 is “whether or not legal frameworks are in place to promote, enforce and monitor equality and non-discrimination on the basis of sex” (Global Indicator 5.1.1). This Global Indicator is envisaged to fall within Tier III. Accordingly, until an adequate methodology for its measurement is developed and relevant data sources are identified, there is a risk that States will not seek to implement Target 5.1. It should be noted that the goal of Action 3 of the GAP (which is the #IBelong Campaign’s correlate to Target 5.1), will be achieved when “all States have nationality laws which treat women and men equally with regard to conferral of nationality to their children and with regard to the acquisition, change and retention of nationality”. To ensure that Target 5.1 also results in the reform of nationality laws that discriminate against women and cause statelessness, it will be critical that the methodology developed to measure Global Indicator 5.1.1 includes nationality laws amongst the legal frameworks that are evaluated and asks the following questions of those laws:

⁷⁰ UN Statistical Commission, Report on the 47th session, 23 March 2016, E/2016/24-E/CN.3/2016/34.

⁷¹ Inter-Agency and Expert Group on Sustainable Development Goal Indicators, Provisional Proposed Tiers for Global SDG Indicators, 24 March 2016.

⁷² The tier system was discussed at the third meeting of the IAEG-SDGs from 30 March – 1 April in Mexico City, where it was agreed that the Group would finalise the initial tier system, taking into account inputs from UN entities, by 29 July 2016. See, UN Department of Economic and Social Affairs Statistics Division, Report of the Third Meeting of the Inter-Agency and Expert Group on the Sustainable Development Goal Indicators, 28 April 2016, ESA/STAT/AC.318/L.3.

- Do women have equal rights with men to confer nationality on their children?
- Do women have equal rights with men to acquire, change or retain their nationality?

The methodology developed for Global Indicator 5.1.1 should also measure the extent to which these laws are implemented. To this end it should consider, for example, whether laws and regulations require the promotion of awareness of legal and policy developments granting women equal rights with men to confer nationality on their children or with regard to the acquisition, change and retention of nationality.

The Global Indicators for SDG 10, Target 10.3 and SDG 16, Target 16.b, are substantially the same: “Proportion of population reporting having personally felt discriminated against or harassed in the previous 12 months on the basis of a ground of discrimination prohibited under international human rights law” (Global Indicators 10.3.1 and 16.b.1). Both are envisaged to fall within Tier III. If Global Indicators 10.3.1 and 16.b.1 are the only Global Indicators used to measure progress of Targets 10.3 and 16.b respectively, it is difficult to see how they could be used to effectively address statelessness. The current formulation of these Global Indicators rests on the assumption that individuals who experience discriminatory treatment are in a position to report the mistreatment and, in fact, take the opportunity to do so. Stateless people are frequently denied any standing in society, legally or socially. This lack of any formal legal status in the countries in which they live means that they rarely come forward to complain of their mistreatment for fear of being identified, detained or deported.⁷³ In the case of individuals living in a protracted situation of statelessness or whose statelessness is inherited from previous generations, the discriminatory law or policy that rendered them stateless may have been in existence for years and the discrimination that they face may be highly structural in nature. Basing measurement of Targets 10.3 and 16.b on whether an individual “personally feels” discriminated against may not help stateless persons who have been discriminated against their entire lives and who may not even know that the treatment that they are experiencing is discriminatory. Given that Targets 10.3 and 16.b are both concerned with eliminating discriminatory laws, policies

⁷³ See, UNHCR, Mapping Statelessness in the United Kingdom, *supra* n26, pp. 24–25.

and practices, it is recommended that corresponding indicators are established. Such indicators might be close in formulation to Indicator 5.1.1 (e.g. whether or not laws, policies and practices are in place to promote, enforce and monitor equality and non-discrimination). The methodology developed to measure progress against such indicators would need to include nationality laws amongst the legal frameworks to be evaluated and ask the following questions of those laws:

- Do nationality laws permit loss, denial or deprivation of nationality on discriminatory grounds?
- Are there law, policy and administrative measures in place to restore nationality to those arbitrarily deprived of it?

The sole Global Indicator proposed to measure whether Goal 16, Target 16.9 fulfils its promise of ensuring universal legal identity, including birth registration, is: “Proportion of children under 5 years of age whose births have been registered with a civil authority, by age” (Global Indicator 16.9.1). It falls within Tier I - Indicators for which an established methodology exists and where data is widely available. Attention has focused on birth registration as the most quantifiable, globally comparable measure of progress towards legal identity. Indeed, the United Nations Children’s Fund (UNICEF) already collects data on precisely this measure, and counts nearly 230 million children under the age of five whose births have not been registered in the more than 140 countries for which data is available.⁷⁴ As noted earlier, birth registration proves where a child was born and the identity of its parents; important information needed to establish nationality and prevent statelessness. As such, Global Indicator 16.9.1 will help to improve access to a form of legal identity (birth registration) for children under the age of five. However, Global Indicator 16.9.1 is framed as an aggregate measure and successful progress will be measured by evaluating how close a country comes to registering the births of all children under the age of five. The problem is that even in States that are able to report close to 100% birth registration coverage, stateless children are likely to fall within the small percentage that miss out. Therefore, unless the causes of failure to register births, including discrimination and exclusion are also addressed, this Global Indicator may have little meaning for stateless children under the age

⁷⁴ UNICEF, *Every Child’s Birth Right: Inequities and Trends in Birth Registration*, 2013.

of five. Further, Global Indicator 16.9.1 will not help the millions of children and adults⁷⁵ who lack legal identity and who may be left out of measures that focus on ensuring birth registration for those under the age of five. Indeed, a measure of birth registration on its own provides a limited and inaccurate picture of who has legal identity and who does not.⁷⁶

In countries which require a national ID in order to prove nationality and thereby access rights and services, a single measure to track implementation of Target 16.9, such as that provided in Global Indicator 16.9.1, poses a challenge. However, creating an additional Global Indicator is not the solution, because an appropriate measure in one country would not necessarily be appropriate for other national contexts.⁷⁷ Indeed, creating a new Global Indicator that would, for example, measure the proportion of a country's population over the age of 18 that holds national identity cards, could lead to States adopting more formalised and thus potentially more restrictive systems with respect to the issuing of national IDs, making it even more difficult for certain groups to gain access to such documentation. This could inadvertently expose more people to the risk of statelessness and potentially aggravate the impact of statelessness by making those without an ID more noticeable. Strengthening nationality documentation systems without critically assessing and responding to the broader governance context can lead to a number of consequences that further entrench exclusion and thereby undermine development gains. Action 8 of the GAP (which is the #IBelong Campaign's partial correlate to Target 16.9), requires that those with an entitlement to nationality are able to acquire documentary proof of nationality. Accordingly, it may be most appropriate for supplementary country-specific indicators to be established in those countries which impose proof-of-nationality requirements and for these indicators to be administered through national censuses or other periodic population surveys such as the United States Agency for International Development supported Demographic and Health Surveys.

⁷⁵ For example, it was reported that 750 million children under the age of 16 were without birth registration in 2014. See, C. Dunning, A. Gelb and S. Raghavan, *Birth registration, Legal Identity and the Post-2015 Agenda*, Centre for Global Development 2014, Policy Paper 046.

⁷⁶ See, González López, *et al.*, *supra* n50, p. 1.

⁷⁷ *Ibid.*

A number of commentators have pointed to the fact that neither Target 16.9 nor Global Indicator 16.9.1 encourage the reform of discriminatory laws and practices which may lie at the root of statelessness and lack of legal identity.⁷⁸ For this reason, it is critical that Target 16.9 is applied in concert with Targets 10.3 and 16.b (and appropriately framed Global Indicators – see discussion above), to ensure equality of access to nationally relevant forms of legal identity.

5. Conclusion

The adoption of the 2030 Agenda and the SDGs creates new opportunities for tackling the issue of statelessness through a development approach. SDGs 5, 10 and 16 and associated Targets 5.1, 10.3, 16.9 and 16.b are the most relevant to preventing and resolving statelessness and correlate with specific Actions of the GAP under the #IBelong Campaign. The effectiveness of these SDGs as a vehicle for solving statelessness will depend on whether they are deployed by countries in a manner that will contribute to:

- nationality laws which treat women and men equally with regard to conferral of nationality on their children and with regard to the acquisition, change and retention of nationality (SDG 5, Target 5.1, SDG 10, Target 10.c and SDG 16, Target 16.b);
- laws, policies and practices that avoid loss, denial or deprivation of nationality on discriminatory grounds and that provide for restoration of nationality to those arbitrarily deprived of it (SDG 10, Target 10.3 and SDG 16, Target 16.b); and
- birth registration to prevent statelessness and the provision of nationality documentation to all those who have an entitlement to it (SDG 10, Target 10.c and SDG 16, Targets 16.9 and 16.b).

To maximise the effectiveness of the SDGs and Targets in achieving these statelessness-related results, modifications to the existing Global Indicators associated with the relevant SDGs and Targets are likely to

⁷⁸ See, for example, B. Manby and E.A. Whitely, Questions of legal identity in the post-2015 development agenda, London School of Economics Human Rights Blog, 28 May 2015, <http://blogs.lse.ac.uk/humanrights/2015/05/28/questions-of-legal-identity-in-the-post-2015-development-agenda>; L. van Waas, The right to a legal identity or the right to a legal ID?, European Network on Statelessness Blog, 1 May 2008, <http://www.statelessness.eu/blog/right-legal-identity-or-right-legal-id>; and Brewer *et al.*, *supra* n49.

be needed, as these will influence the manner in which the SDGs are implemented. With respect to SDG 5, Target 5.1, the methodology being developed to measure progress against Global Indicator 5.1.1 must include nationality laws among the legal frameworks that are evaluated and specifically consider whether women are granted equal nationality rights under those laws. In relation to SDG 10, Target 10.3 and SDG 16, Target 16.b, the current Global Indicators 10.3.1 and 16.b.1 are unlikely to lead to outcomes that will effectively address statelessness. This is because they are based on the assumption that individuals who experience discriminatory treatment are in a position to report the mistreatment and, in fact, take the opportunity to do so; assumptions which do not hold water for the majority of stateless persons. It is proposed that additional Global Indicators, which seek to establish whether or not legal frameworks, policies and practices are in place to promote, enforce and monitor equality and non-discrimination, are established in relation to Targets 10.3 and 16.b. This is critical if the SDGs are to be used to address statelessness, as discrimination and exclusion lie at the root of the majority of cases of statelessness and the effectiveness of other SDGs for stateless individuals will rest on their ability to enjoy equal access to the benefits that the SDGs seek to provide. Finally, to encourage the effective implementation of Goal 16, Target 16.9, it is proposed that Global Indicator 16.9.1, which only measures one aspect of legal identity, namely birth registration of children under the age of five, be supplemented by national-level indicators designed to measure access to other nationally relevant forms of legal identity, such as documents which are considered to provide proof of nationality. The task of the international community now is to ensure that stateless persons are explicitly considered as global and country-level Indicators are refined, measurement methodologies developed and national planning systems activated, so that they too may benefit from this initiative which aims at a world that is just, right-based, equitable and inclusive.

3. Ensuring that today's refugees are not tomorrow's stateless: solutions in a refugee context

Lucy Hovil

1. Introduction

This chapter explores the nexus between displacement and statelessness. It argues that today's refugees, particularly those in "protracted" situations of displacement,¹ are in danger of becoming tomorrow's stateless if deliberate action is not taken to resolve their plight; that those whose citizenship is questioned, whether directly in terms of their legal status or more broadly in terms of their belonging, are more vulnerable to displacement; and that displacement can be one of the mechanisms through which what was once a tenuous link with the State can be severed.

It focuses specifically on the Great Lakes region² of Africa where, with the exception of Tanzania, all the countries have generated refugees and internally displaced persons (IDPs) in large numbers since independence. In addition, all have hosted refugees, many of whom remain exiled with no solutions in sight. While the issues discussed in this chapter are unique to the Great Lakes context, they also have broader application to other refugee crises on the continent and globally. The United Nations High Commissioner for Refugees (UNHCR) Global Campaign to End Statelessness provides a lens through which to view the refugee crisis in the region and beyond, both in emphasising

¹ A protracted situation of displacement is considered by the UN to be any situation in which a person is displaced for more than five years. Thus, of the current 60 million refugees in the world today, 14 million are considered to be in a protracted situation. For an excellent article on this, see, B. Rawlence, The other refugee crisis, *New York Times*, 9 October 2015, http://www.nytimes.com/2015/10/10/opinion/the-other-refugee-crisis.html?_r=0.

² For the purposes of this chapter, the author includes the following countries within the Great Lakes region: Tanzania, Burundi, Rwanda, Democratic Republic of Congo, Uganda, Sudan, South Sudan and Kenya. Other definitions, including the definition of the International Conference of the Great Lakes region, also includes Zambia and Angola.

the extent to which failures to belong within a polity are a root *cause* of displacement, and in exposing the fact that failures to *resolve* exile can lead to statelessness if not addressed.

Throughout, the chapter places the legal phenomenon of statelessness within its broader socio-political context. In the Great Lakes region, as elsewhere in the world, legal principles are often in tension with social and legal understandings. Because the legal architecture in the region, as in much of Africa, is weak, social and political understandings are often more dominant in decision making than legal standards. In this context, it is argued, it is important to understand broader socio-political realities and to address social and political tensions in tandem with legal reform.

2. The interaction between displacement and statelessness

The very existence of statelessness is the result of norms that are embedded in the notion of the State as a primary means of organising inclusion and exclusion within a polity. Yet in the Great Lakes region, the context in which discussions around the nexus between displacement and statelessness takes place is particularly challenging given the turbulent history and evolution of “citizenship” in the region. Concepts around belonging were irrevocably changed with the advent of colonialism, which demarcated State boundaries across the continent that defined a person’s relationship to the State and, perhaps more significantly, to a demarcated territory: the movement of people within specific areas now became labelled “cross-border”. It represented a defining moment in the development of notions of belonging, as borders defined the limits of inclusion and exclusion and limited the possibility of fluid forms of allegiance. It defined the jurisdiction of the State, re-defined the parameters of power,³ and regulated the movement of people.⁴ With the creation of national boundaries, anti-colonial struggles were premised on the idea of *national* belonging within its current configuration, and nationalism as a liberation struggle against colonialism brought with it the identification of nation and State.⁵ In the aftermath of such struggles, the repatriation of those

³ A. Kraler, *The State and Population Mobility in the Great Lakes*, Sussex Migration 2004, Working Paper no. 4, p. 10.

⁴ J. Herbst, *States and Power in Africa: Comparative Lesson in Authority and Control*, Princeton University Press 2000, p. 227.

⁵ T. Ranger and R. Werbner (eds), *Postcolonial Identities in Africa*, Zed Books 1996, p. 12.

who had fled anti-colonial struggles was key in the politics of self-determination that eventually led to African decolonisation and the formation of independent States: the return of refugees represented “an important symbolic legitimization of independent African sovereignty” and in return became “a symbolic reclaiming of the state, not only by individuals as citizens, but by the nation as political community”.⁶

However, since then many States in Africa have been characterised as much by their failure to build viable shared identities within the new State structures as their success. As Harrington argues, although legal citizenship was established at independence with African constitutions guaranteeing the equality of citizens, “few states conveyed to their people the political rights generally regarded as inherent in citizenship today, such as to vote or to stand for election”.⁷ They also did not guarantee the right to public and social services. Consequently, “states had little political or financial incentive to deny individuals citizenship”.⁸ Yet in the past two decades, the significance of citizenship has begun to change as a result of growing democratisation, respect for human rights, and pressure on African States to provide basic social services. As a result, citizens, at least in principle, have increasing rights and power.⁹ In other words, the opening up of political space and in particular democratisation – although incomplete and imperfect – has introduced new salience to notions of citizenship. If citizens have the right to vote, then deciding who is and is not a citizen can be a critically important strategy for maintaining power through elections. Although increased democratisation and respect for the rights of citizens is a positive development in many respects, it has also fostered more exclusive understandings of citizenship – and opened the door for the creation of statelessness. In other words, by raising the stakes through increasing the *quality* of citizenship, both the incentive to exclude, and its practical consequences have increased – and, therefore, the possibility of statelessness, as legally defined, has not only been created but is exacerbated.

⁶ K. Long, *State, Nation, Citizen: Rethinking Repatriation*, Refugee Studies Centre 2008, Working Paper No. 48, p. 17.

⁷ “Voiding Human Rights: Citizenship and Discrimination in Africa”, *Justice Initiatives* 2005, p.24.

⁸ *Ibid.*

⁹ *Ibid.*

Another particular aspect of the risk of statelessness in the region is the lack of documentation available to many of the region's citizens. In 2013, UNICEF estimated that Uganda and Tanzania were among the 10 countries worldwide with a combined number of 12 million children under five unregistered.¹⁰ Although birth registration is not proof of nationality in and of itself, it is critical to establishing the elements necessary to establish citizenship, including both parentage and location of birth. In a context in which the evidentiary elements of citizenship are likely to be unavailable, practical measures and the political and social understandings of administrative officials take on particular importance.

The creation of significant numbers of refugees across the region has taken place within this context and inevitably interacts with the complex dynamics of national citizenship. The fundamental premise on which refugee status is configured is that those who are either legally excluded from, or in practice cannot access, the rights of citizenship in their countries of origin as a result of persecution are given a surrogate form of protection – but one that is temporary until such time as they can meaningfully re-assert the bonds of citizenship. But in reality, too often this re-nationalisation does not happen: while the 1951 Convention relating to the Status of Refugees (1951 Refugee Convention) enjoins States Parties to facilitate the naturalisation of refugees in their countries “as far as possible” (Article 34), in practice in the Great Lakes region this seldom happens, leaving return as the only viable means to reassert citizenship.¹¹ Yet return remains elusive for the hundreds of thousands who remain in a protracted situation of displacement for years or even decades, leaving them in a semi-permanent state of emergency. Kenya's Dadaab refugee camp, which has now been in place for 25 years, provides a stark example.

¹⁰ United Nations Children's Fund (UNICEF), *Every Child's Birth Right: Inequities and trends in birth registration*, 2013.

¹¹ For instance refugees from Burundi who have been living in Tanzania had to wait for almost four decades for the Government of Tanzania to offer them naturalisation – and even in this instance, the fact that they were eventually given the option of applying for Tanzanian citizenship was seen as somehow extraordinary. See Centre for the Study of Forced Migration, International Refugee Rights Initiative (IRRI) and Social Science Research Council, *Going Home or Staying Home? Ending Displacement for Burundian Refugees in Tanzania, Citizenship and Forced Migration in the Great Lakes Region: Working Paper 1*, 2008.

Consequently, the discourse of displacement inevitably highlights and emphasises national identity – or lack thereof – at all stages in the trajectory of displacement. As a root cause, notions of inclusion and exclusion have often been the cause of the violence that has led to displacement: people have been violently forced from their homes on the basis of their membership of a particular group or as a result of their presence in a specific territory – or both. Whether or not they were legally stateless prior to flight, their exclusion from the polity has often been a key component to their reasons for flight.

Once in exile, the rights and protection that should be attached to citizenship are effectively denied to refugees, particularly those who have found themselves in “protracted” situations. Unable to assert citizenship rights in their home country, as evidenced by their inability to return home, yet with little prospect of attaining a new citizenship, tens of thousands have had their lives put on hold. While refugees typically retain their nationality of origin, and therefore are not stateless, the line between a protracted situation of exile and statelessness can be extremely blurred. For instance, although in theory nationality can be passed from parents to children in refugee contexts, children born in exile inevitably move one step further away from their parent’s original citizenship – whether by law (for instance through the loss of documentation, or through laws that render nationality acquired through inheritance of lesser value than that acquired through *jus soli*), or in practice (for instance through lack of political recognition of their nationality) – leaving them acutely vulnerable to being stateless. For instance, many Burundian refugees born in Tanzania felt unable to return to Burundi as they did not know where their ancestral land was. They will often not have taken positive steps to ensure that their parent’s citizenship is asserted in practice, by ensuring access to appropriate documentation, etc. and critical documents for establishing their nationality, such as their parents’ IDs, may have been destroyed in flight. And yet, throughout the region, citizenship policies exclude them from accessing citizenship automatically on the basis of birth in the territory (*jus soli*). Indeed, throughout the region, only Tanzania allows citizenship on this basis in law, and even there this legal provision is generally not respected in practice. Their access may be further impeded by a lack of adequate systems in place to register births in situations of displacement, lack of options for naturalisation and other elements that place them at considerable risk of encountering problems when and if they seek to claim citizenship.

Exclusion from the possibility of naturalising can be seen as intimately linked with other refugee policy responses that focus on exclusion, including governments' privileging of repatriation as the only viable solution to the near total exclusion of integration. In a context in which the default position of host governments (and as a result, UNHCR) has often been to house refugees in camps and settlements, while many have technically "enjoyed" international protection under refugee law, in reality the conditions of their exile – constrained by lack of freedom of movement and exclusion from meaningful integration, among other issues – has been characterised by marginalisation from meaningful engagement with the State. UNHCR's new 'Alternatives to Camps' policy, discussed below, offers a significant opportunity to challenge the *status quo* in this regard. While host countries are likely to be reluctant to grant refugees citizenship under any circumstances, this trepidation is only likely to be increased in circumstances in which *de facto* integration has been discouraged by encampment. The reality is that many refugees remain in exile indefinitely and lack of access to naturalisation means that they are effectively left with no State to assert their rights.

Finally, linkages between forced migration and statelessness are particularly pertinent in discussions on "durable solutions" – which, ultimately, are supposed to be about the (re)securing of citizenship ties either through returning "home" or through obtaining a new nationality. Repatriation has been aggressively pursued as the optimal outcome in any situation of displacement, to the neglect of both resettlement and local integration – just as those who are stateless are often told to look elsewhere for their nationality. All too often refugees have, in practice, become pawns in inter-State relationships through tripartite agreements that have had a negative, rather than the intended positive, impact on the basic rights of refugees,¹² and those who are displaced have, at times, been forced to return "home" even though the circumstances that made them flee have not changed or have not changed sufficiently. For instance, in July 2010 Ugandan police, in conjunction with staff of the Office of the Prime Minister's Directorate of Refugees, carried out an operation to round up and remove approximately 1,700

¹² B.H. Bond, "Repatriation: Under What Conditions Is It the Most Desirable Solution for Refugees? An Agenda for Research." *African Studies Review* 1989, Vol. 32(1), pp. 41–69.

Rwandan refugees living in Nakivale and Kyaka II refugee camps and return them to Rwanda.¹³

The international community's emphasis on return to the exclusion of local integration and resettlement is perhaps the strongest reason why refugees – or their descendants – might eventually become stateless. The end of the Cold War was thought to herald a time when everyone could return home, leading High Commissioner for Refugees Ogata to call in November 1991 for a “year of voluntary repatriation”.¹⁴ Yet such optimism was short lived as the conflicts of the 1990s showed sustainable re-establishment after repatriation to be impossible in many cases: the persistence and nature of these conflicts – which were characteristically intra-State rather than inter-State – meant that the notion and durability of “repatriation” became increasingly questionable. As a result of the failures of repatriation and reintegration and the lack of alternatives being offered, many refugees in protracted situations have fallen off the official radar and sought to “invisibly” integrate without the backing of a legitimate national identity as a crucial form of protection. For instance, Burundian refugees who had left the settlements found that they were not included in the naturalisation scheme as a result; and those who live in cities without official permission often encounter greater challenges in accessing protection than those who remain on the official radar.

As a result, there is a possibility that tens of thousands of refugees – and in particular, their children – will eventually become stateless. Of course, the point at which a refugee should or could be defined as stateless is hard to ascertain. As Manby states, there is often no clear line between those who have a nationality and those who are stateless, “and it may only gradually become apparent that a person is, in fact, ‘not considered as a national by any State under the operation of its law’ (the official international law definition)”.¹⁵ Even where statelessness *per se* does not occur, individuals may find that they are unable to access the protection that they need, including tools used by nationals

¹³ Information Note for the African Union Commission, The removal of Rwanda refugees and asylum seekers from Uganda to Rwanda in July 2010, IRRI 2011.

¹⁴ Long, *supra* n6, p. 20.

¹⁵ B. Manby, How will the UNHCR's statelessness campaign affect Africa? African Arguments, 12 November 2014, <http://africanarguments.org/2014/11/12/how-will-the-unhcrs-statelessness-campaign-affect-africa-by-bronwen-manby>.

to access travel documents (in particular if they are unable to access protection from the only State that they have ever known). Indeed, it may be awkward to even speak about “return” in the case of individuals who, though considered to be “refugees” may have been born and lived their entire lives in the host country. Such individuals may find it hard to access rights in the country of their supposed nationality, because they are unable to speak the national language or because they are unable to assert belonging at the local level, critical to accessing land and other resources. Indeed, in the case of Rwanda and the tripartite agreement with the Democratic Republic of the Congo, the very right to repatriate under facilitated return itself was in question for those who were seen as not legitimately Congolese. However, it is certainly clear that if appropriate preventative action is not taken to resolve prolonged exile, over time tens of thousands of former refugees are likely to become stateless.

Furthermore, it is important to note that this challenge is not unique to the Great Lakes region. For instance, former Cambodian refugees in Vietnam who did not return to Cambodia following cessation of their refugee status and lost their ties to Cambodia, such that they were recognised as being stateless, were eventually granted facilitated naturalisation in Vietnam. Many (former) refugees from Liberia are currently stranded in exile because they have not been able to secure recognition and re-documentation of their Liberian nationality; and refugees in, for instance, Europe and the United States of America from the former Soviet Union who missed out on citizenship because they were in exile at the time of dissolution therefore may have failed to qualify for or secure nationality of one of the successor States. As these multiple examples demonstrate, a stronger emphasis on local integration and political will by host States in this regard, up to and including *de jure* naturalisation, may be an important way of both preventing and solving statelessness.

This chapter looks at three case studies in order to explore the complex interaction between the problems of forced displacement and statelessness. Common throughout the cases are a number of key components that revolve around the challenges of statelessness. First, statelessness is a *legal* issue. Despite the shaky political ground on which notions of national belonging often rest in the Great Lakes region, citizenship at the national level remains a crucial form of protection and access to resources. Without formal legal recognition of status, as

will be seen in the Tanzania case, people are left vulnerable. However, it is also a strongly *political* issue, especially in a context in which rule of law is weak and documentation is sparse: without sufficient political buy-in, national legal status can be undermined by both legal and non-legal measures. Finally, a vital component of whether or not someone is *in practice* stateless is empirical citizenship – namely the ability to be included in the specific locality in which you are living. For someone to not only be technically recognised as a citizen of a given country but to also realise the benefits of that citizenship, all three components (legal, political and local recognition of the legitimacy to belong) need to be acknowledged and addressed. The dangers of statelessness are reflected in all three areas, therefore, just as solutions – while focused primarily on *legal* solutions – need also to take account of the broader socio-political context. It follows, therefore, that the refugee policies of States and the international community as a whole need to be re-aligned to promote rather than undermine all of these aspects of national inclusion if statelessness is to be not only resolved, but also prevented.

3. Tanzania: Statelessness averted

The story of a large group of Burundian refugees in Tanzania who transitioned from being refugees to having their nationality questioned (and possibly becoming stateless) to finally receiving Tanzanian citizenship, points to many of the issues at the heart of the relationship between refugees and potential or actual statelessness. It is a story in which, after four decades in exile, and just at the point at which “durable solutions” were supposedly being realised, a group of refugees found themselves without a nationality. Although the situation has now generally been resolved inasmuch as they were finally able to access Tanzanian citizenship, the process itself nearly left them stateless.

This group of approximately 162,000 former refugees fled genocide in Burundi for Tanzania in the early 1970s. As part of then-President Nyerere’s pan-African vision in which African identity superseded colonially-imposed boundaries, they were allocated large areas of land given to them by the Tanzanian government under the country’s *Ujamaa* village system. Organised into three settlement areas, by 1985 they were considered self-sufficient and the administration of the settlements was handed over from UNHCR to the government of Tanzania. By 2007, 82% of this population had been born in

Tanzania.¹⁶ Following the signing of a peace deal for Burundi in 2000 and the apparent stabilisation of the country, discussions began in the mid-2000s about the possibilities of seeking durable solutions for this group of refugees (referred to as the “old” caseload, as opposed to the “new” caseload of those who fled Burundi following a new outbreak of violence in the 1990s). At UNHCR’s October 2007 Executive Committee meeting in Geneva, Tanzania’s Minister of Home Affairs formally announced a willingness to naturalise those who wished to stay. The grant of naturalisation to such a large number of refugees was a somewhat unprecedented offer across the world, let alone in the Great Lakes region. Possibly somewhat surprisingly for the government of Tanzania (given that previous research had pointed to a strong sense of Burundian national identity amongst many of these refugees),¹⁷ 79% opted for naturalisation – a total of 162,256 adults.

Explicit in the rationale for this offer was a recognition that this particular group of refugees had both a problematic standing in Burundi and a high level of *de facto* integration in Tanzania. In just a few years following the signing of the Arusha Accords, more than half a million Burundians returned to the country. However, among these returns, particular concern was expressed about the situation of those known as *sans reference*, individuals who were born abroad and who were unaware of the specific village or commune that their parents were from. The lack of this information disrupted the tidy assumption that individuals must return to the precise area from which they, or their parents, had fled. It also created real problems in terms of access to land and to asserting belonging at the local level (as distinct from the national level, where their citizenship as Burundians was not contested). At the same time, on the Tanzania side, it was acknowledged that this population, due in large part to the accommodating policies of the Nyerere era which allowed them access to land and integration, had achieved a large degree of *de facto* integration. Thus both the weakness of their belonging in Burundi and the strength of their belonging in Tanzania *in practice* were explicitly used to justify the change of status *in law*.

¹⁶ IRRI, ‘I can’t be a citizen if I am still a refugee’: Challenges in the naturalisation process for Burundians in Tanzania, Citizenship and Displacement in the Great Lakes region, Working Paper 8, 2013.

¹⁷ See, L. Malkki, *Purity and Exile: Violence, Memory and National Cosmology among Hutu Refugees in Tanzania*, University of Chicago Press 1995.

From the beginning, the process was on a strange legal footing. The vast majority of the population that was to be naturalised had been born in Tanzania. Acquisition and loss of Tanzanian citizenship is governed by the Tanzanian Citizenship Act No 6 of 1995, which, under Section 4 (2), explicitly provides that those born on the territory of Tanzania after 26 April 1964 are citizens of Tanzania from birth. Yet in practice, Tanzanians, both lawyers and others, who have been questioned on the subject, have asserted that the children of refugees are not citizens, although no cogent legal argument as to why this would be the case in light of the present law has been offered. In practice, therefore, Tanzania proceeded to naturalise these individuals without addressing the apparent legal reality that the vast majority of them should have had automatic access to citizenship from birth.

As the situation of this group appeared set to be resolved, there was little incentive on the part of the former refugees or others to challenge the legal characterisation. Yet seven years after a relatively straightforward process of naturalisation had been initially announced, neither the status of “refugee” nor “citizen” could be clearly applied to this group. The majority of those who had applied for naturalisation had been successful, in as much as their identification numbers were displayed in public places in the settlements announcing that they had been accepted for naturalisation. On that basis, they formally renounced their Burundian citizenship and swore an oath of allegiance to the Tanzanian State. However, by mid-2014 only 744 former refugees, all of whom were living in the capital, Dar es Salaam, had received their certificates. The rest were living without documents and, therefore, without evidence of their new status. The government argued that the process was never completed: “The mere fact that certificates were not issued to the applicants connotes the incomplete part of the process.”¹⁸ Thus, having renounced their Burundian nationality, they were denied their Tanzanian nationality in practice (despite the fact that the acceptance might be argued to have completed the naturalisation process). They were thus facing down a situation of statelessness.

As a result, the former refugees were left in a prolonged state of uncertainty. As one former refugee woman living in Mishamo settlement told researchers in 2012, “[w]e don’t know who we are at

¹⁸ Written communication with Refugees Department, Ministry of Home Affairs, March 2013. On file with IRRI.

the moment. We are like a bat. We are neither birds nor animals.”¹⁹ As a result of the incomplete process, the former refugees were losing out on every front: assistance provided to them as refugees was being withdrawn, but they were not able to access resources as citizens of the country: “We are not allowed to participate in any political activities around here because we have been told (by officials) that we are only 95% Tanzanian and 5% is still incomplete.”²⁰

The sticking point for the incomplete process was the issue of relocation: after making their decision to apply for naturalisation they had subsequently been told that they would only receive their certificates when they relocated elsewhere in the country. However, this relocation, according to the former refugees, was seen to jeopardise the entire process and break crucial forms of *local* belonging that had allowed vital access to livelihoods. Moving away from the place that had been their home for the past 40 years was seen to jeopardise extended family connections and undermine the value of their current fixed assets (such as their houses and land) and, furthermore, would mark them out in their new areas as “outsiders” who did not legitimately belong. The fact that they had not only been supporting themselves, but exporting food to markets around the country, was a further indication of the potential inefficiency of asking them to relocate, not least given the fact that land, and especially arable land with water, is becoming an increasingly scarce resource in Tanzania, and levels of poverty are high. In addition, the programme was undermined by the unwillingness of some of the regions to which the former refugees were supposed to be resettled to accept them. The government eventually backed away from its decision to insist on relocation in 2014, and the vast majority of the former refugees have now received their certificates, thereby completing the process. A minority of cases involving persons who had less documentation to prove their identities is being processed more slowly.

This remarkable case points to three main challenges. First, issues of citizenship or statelessness are intimately connected with discussions around durable solutions. In this case, the promotion of integration as a

¹⁹ Interview with former refugee woman, Mishamo settlement, Tanzania, August 2012. Cited in, IRRI, ‘I can’t be a citizen if I am still a refugee’, *supra* n16.

²⁰ Interview with former refugee man, Ulyankulu settlement, Tanzania, August 2012. Cited in IRRI, ‘I can’t be a citizen if I am still a refugee’, *supra* n16.

policy paved the way for legal naturalisation. It was in part because the population was economically not only self-sufficient but beneficial to the country that naturalisation could be discussed and made politically palatable on the national level. The case also highlights, however, the fragility of this integration where it does not come with legal status. It is worth stating the obvious in this regard: a durable solution is only a durable solution when it leads to meaningful citizenship – including access to all the rights associated with citizenship. As one man said, “I can’t be a citizen if I am still a refugee”.²¹ Unequivocally, the only way in which someone can be said to no longer be a refugee is once they genuinely have a new or renewed citizenship. As a result, both citizenship *and* national refugee policies need to be thought through carefully to ensure that the two processes complement rather than contradict each other. In other words, it is important that integration as a part of refugee policy, and naturalisation as a path to that integration, reinforce rather than undermine each other.

Second, this scenario shows the need to look beyond a strict legal reading of the situation to its practical realities. An exclusively legal reading might have asserted that the majority of the population in question (who had been born in Tanzania) were citizens all along, regardless of the fact that they were not acknowledged or treated as such. But attempting to assert this right might have undermined the practical solution offered by the government of Tanzania. In addition, there is a need to look past the official status to the extent to which rights can be accessed in practice. Following naturalisation, the new citizens should have had access to a wide spectrum of rights. However, the announced relocation programme made them feel that their new status would in practice restrict their rights to freedom of movement and residence. In addition, the problems that emerged over relocation as a condition for receiving citizenship were a symptom of political resistance to naturalisation at both a national and local level. And while the situation of this population has now largely been resolved at a legal level, the initial resistance has not entirely disappeared and the national mood is becoming less welcoming to those perceived as foreigners. The government of Tanzania has increasingly been expelling “irregulars” from the country, and national refugee legislation is only becoming more

²¹ Interview with former refugee man, Katumba settlement, Tanzania, August 2012. Cited in IRRI, ‘I can’t be a citizen if I am still a refugee’, *supra* n16.

restrictive. At a local level, numerous local officials expressed strong levels of xenophobia towards this population – which, in turn, were also reflected by some members of the host community.

Third, national and local belonging interact and need to complement, rather than contradict, each other. Tensions between national and local realities were preventing implementation of the scheme. In a context in which the ability to realise the rights of citizenship is about more than a national identity document, the ability for individuals and groups to be recognised as legitimate within the locality in which they are living – and, therefore, to have access to economic and political resources at a local level – is a crucial component to citizenship. As one woman said, “[t]o me, citizenship is to cooperate if someone is sick and help them to feel at home. It is being able to borrow salt from your neighbour.”²² Solving statelessness, therefore, while undeniably needing to be resolved at a legal level, also needs to take into consideration the broader socio-political context in which access to rights as a citizen of the State takes place.

4. Rwanda: When repatriation fails

While the situation facing this group of former Burundian refugees in Tanzania has been largely resolved, the scenario facing thousands of Rwandan refugees is far more equivocal. In recent years, there has been increasing discussion about the invocation of the cessation clause for Rwandan refugees under Article 1C(5) of the 1951 Refugee Convention, which calls for refugee status to cease when the conditions that gave rise to international protection needs no longer exist. Although UNHCR has recommended application of the clause, it is for governments hosting Rwandan refugees to formally implement. So far, few have done so. The removal of refugee status from Rwandans has left thousands of former refugees from Rwanda living in host countries that invoked the clause in limbo. When not exempted from the exercise of the invocation after individual determination processes, individuals have no continued recognition of refugee status. Yet, many are reluctant to approach the Rwandan government for any affirmation of their original nationality out of fear for their own, and/or their family's security, as a result of having contact with Rwandan government officials, which may impede

²² Interview with former refugee woman, Mishamo settlement, Tanzania, August 2012. Cited in IRRI, 'I can't be a citizen if I am still a refugee', *supra* n16.

access to any other immigration status in the countries that host them – including naturalisation.

Rwanda's official rhetoric claims that all is well in Rwanda. Since 1994, Rwanda's *per capita* gross domestic product has almost tripled, education and health systems have improved dramatically, tourism is booming and there is broadband internet connection throughout much of the country. Kigali, the capital, gives all the appearance of orderliness and progress, and is home to the only parliament in the world with more women than men. Over the past decade, the international community, heartened by rapid economic development and riddled with guilt for their inaction during the genocide, has thrown its support behind President Kagame's government, including support for the return of Rwandan refugees.

However, although many Rwandans *have* returned home, tens of thousands remain in exile throughout the Great Lakes region and the world, and thousands continue to flee Rwanda. Research conducted with Rwandan refugees in Uganda pointed to a number of reasons why people continue to flee Rwanda and why they did not believe it was safe to return. Although Uganda has not formally invoked the cessation clause, my research found that refugees were aware of and fearful of this possibility, and that a number of newer arrivals had difficulty in gaining recognition. Overwhelmingly, those interviewed viewed the current Rwandan government as repressive, with frequent reference to the fact that dissent in many aspects of public and economic life is not tolerated, and that those who question the regime are subjected to human rights violations ranging from discrimination in employment to imprisonment and forced disappearance. Interviewees talked of how ethnicity is used as a basis for repression, with assertions that the genocide – and the legacy of guilt, heart-searching and recriminations that have surrounded it – is used by the government of Rwanda as a smokescreen for political repression, particularly through the association of Hutu identity with the genocide. However, the findings also showed that although repression is often manifest in relation to ethnicity, the real issue is the lack of space for political opposition within Rwanda *regardless* of ethnicity. Therefore, while the genocide and its immediate aftermath might have been the original cause of flight for many, ongoing political repression in Rwanda is not only preventing many refugees from returning, but is generating new refugees. In fact, almost a quarter of all those interviewed for the research had arrived in Uganda since 2001.

Regardless of these realities, there has been an intensive effort by the government of Rwanda, host governments and the international community to repatriate all Rwandans, motivated by both a general understanding of repatriation as the most favourable solution and a strong desire on the part of Rwandan authorities to repatriate its nationals in part to show that the chapter of conflict and flight is behind it. Since 2002, a series of tripartite agreements have been signed throughout the region,²³ reflecting a policy shift on the part of UNHCR from facilitating return to actively promoting it.²⁴ With most neighbouring countries reluctant to offer Rwandans the opportunity to apply for citizenship,²⁵ with their asylum status under threat, and with resettlement all but impossible except in extreme protection emergencies,²⁶ repatriation has become the only durable solution being offered to most former Rwandan refugees. Zambia is a likely exception in this regard, as they pledged to integrate 10,000 Angolan former refugees and are likely to integrate some of the former Rwandan refugees as well.

As a result, the research showed that Rwandan refugees in Uganda – many of whom had had services withdrawn – were living with increasingly unclear legal status. In a context in which many do not view repatriation as an option, there is logically an impetus to hang on to refugee status or to integrate. However, the option of doing either of these legally is becoming more and more restricted, with refugee status being increasingly contested and naturalisation effectively cut off as

²³ Rwanda has signed tripartite agreements with the UNHCR and Burundi, Democratic Republic of Congo, Malawi, Mozambique, Namibia, Uganda, Zambia and Zimbabwe.

²⁴ Human Rights First, *A Decade of Unrest: Unrecognised Refugees in Rwanda and the Future of Protection in the Great Lakes*, 2004, p. 13.

²⁵ As Manby notes, “even where refugees make progress in terms of economic and social integration, there are often no possibilities of converting refugee status into permanent residence and citizenship”. B. Manby, *Struggles for Citizenship in Africa*, Zed Books 2009.

²⁶ For instance, on average only approximately 100 Rwandans have been resettled to the United States of America annually since 2003. See, United States Department of State and Department of Homeland Security and Department of Health and Human Services, “Proposed Refugee Admissions for Fiscal Year 2006”, Report to the Congress, Submitted on behalf of the President of the United States to the Committees on the Judiciary United States Senate and United States House of Representatives in fulfilment of the requirements of Section 207(e) (1)-(7) of the Immigration Act.

a possibility in Uganda as refugees are routinely refused applications for naturalisation. Faced with the lack of access to legal options, many refugees talked of how they were planning to “disappear” into Uganda instead, thereby reinforcing their lack of recognised legal status. They talked of how they were being forced to hide their identities and change their names²⁷ – some pretending to be Congolese refugees and others identifying themselves as Munyankole, a Ugandan ethnic group: “[P]eople who I do not know and who are in civilian clothes, I cannot tell them I’m a refugee from Rwanda. I tell them I am Munyankole because I can speak that language. Or else I tell them I am Congolese [...] And those that I have told that I am a refugee from Rwanda, I will not mention that I am a Hutu.”²⁸ Since the time of the research, however, there has been some hope in this regard, as the Constitutional Court in Uganda issued a ruling in October 2015 clarifying that refugees do, in fact, have the right to apply for naturalisation under Ugandan law.²⁹ Although this has not yet been tested, it raises hope that naturalisation might soon become an option. In addition, there have also been discussions at a political level as part of a broader protection and solutions strategy, which is now integrated into the national development plan.

In a context in which documentation is widely unavailable, and in which social understandings are dominant, it is important to recognise that the displaced can creatively exploit these conditions to bolster their own protection. However, these strategies are ultimately fragile as long as they are not accompanied by legal legitimacy.

It was to deal with circumstances in which return was unviable that the mechanisms of international protection were created by the international community. Refugee status is supposed to fill the gap between an experience of citizenship which is unable to deliver on fundamental human rights protections and the eventual enjoyment of effective citizenship. Indeed, the foundation of refugee law constituted one of the first direct challenges to the exclusivity of the State-citizen link with respect to protection, inserting the refugee into a new community and establishing a basic set of rights to which the persecuted exile was entitled. UNHCR was then charged with assisting

²⁷ Interview with refugee woman, Nakivale, Uganda, 27 November 2009.

²⁸ Interview with refugee man, Nakivale, Uganda, 17 November 2009.

²⁹ See, Constitutional Court of Uganda, Constitutional Petition No. 34 of 2010, *Center for Public Interest Law Ltd Salima Namusobya v. The Attorney General*, 21 October 2015.

States to offer a protective umbrella, identifying persons in need and exercising diplomatic functions where necessary.

For Rwandan refugees in Uganda, however, the official policy response to their plight continues to lack effective recognition of the genuine protection concerns that are preventing them from accessing meaningful citizenship. At the same time, the appropriate alternative in these circumstances – the granting and enjoyment of refugee status as an effective bridge to the three durable solutions – is *in practice and policy* being denied through the way in which cessation is playing out. In other words, the circumstances in which these refugees find themselves can be described as a situation in which they are being denied effective citizenship. They are not only being denied effective national protection, but also most of the rights concomitant with refugee status, the international protective “citizenship” which is intended to create a path to the ultimate re-establishment of a viable State-citizen link. As a result, many of the refugees saw themselves as stateless, although certainly they are not so *de jure* – yet.

Creating a situation in which people have incentives to become officially “invisible” is a recipe for risk of statelessness. For instance, many have had to destroy documentation that proves their status in order to remain under the legal radar. As a result, those who are “invisible” are unlikely to register their children at birth as they have no status against which to register them and even if they manage to hold onto a nationality, their children are certainly vulnerable to being stateless.

Ultimately, greater recognition is needed of the fact that today's protracted refugees are at risk of becoming tomorrow's stateless unless a deliberate effort is made to avert this from happening. By ensuring that appropriate alternatives are offered to those who cannot return “home”, future situations of statelessness can be averted. Of course, this solution relies on the goodwill of governments to offer citizenship to those who originally arrived as refugees – or whose parents did. It is also important to nuance this discussion by drawing attention to the fact that there is a balancing act between pushing for naturalisation on the basis of irreconcilable citizenship problems, and undermining the hope or possibility of return by too readily assessing people as stateless. Suffice it to say, however, that governments need to be persuaded that it is in their best interest from an economic and security perspective to give legal recognition to those living within

their territory, even if it means formalising their presence with the offer of citizenship.

5. Sudan: Moving the boundaries of belonging

In Sudan, the secession of part of its territory into the new State of South Sudan in 2011 created a population of several hundred thousand who continue to live in Sudan and are now at risk of statelessness. This is the result of a new citizenship law which provides for revocation of Sudanese nationality if the person has a right to South Sudanese nationality, regardless of whether or not they have actually acquired it. Furthermore, because there is no mechanism for confirming nationality, persons with a connection to South Sudan risk being made stateless if the Sudanese government believes that they have a claim to South Sudanese citizenship, but the South Sudanese government disagrees. Prior to the referendum on the independence of South Sudan, conservative estimates put the number of Sudanese of southern origin living in Khartoum at 500,000, although the figure was likely to have been in the millions.³⁰ Although some had come to take up jobs as professionals, civil servants and business people, the vast majority had fled as a result of the longest-running conflict in the country between what is now South Sudan and the centralised Sudanese State (often referred to inaccurately as “the north”). Prior to the South’s independence, therefore, they were technically internally displaced persons (IDPs).

However, instead of finding refuge in Khartoum, they found themselves living as outsiders in the political epicentre of a regime that had justified war on their communities on the basis of its inherent cultural and religious superiority. While many benefited from the educational and other opportunities presented by the urban environment and re-contoured their lives to the dominant culture, many others found themselves living in the margins of the city, *de facto* second class citizens and subject to myriad violations of human rights.³¹ The war officially ended with the signing of the Comprehensive Peace Agreement (CPA) by the government of Sudan and the Sudan People’s Liberation Movement/Army (SPLM/A) on 9 January 2005. With the agreement of the CPA, a new era appeared to have dawned, with a new framework

³⁰ United States Institute for Peace, Briefing, Six Important Issues for Sudan and its Future, 2009.

³¹ See for example, Africa Rights, Sudan’s Invisible Citizens, 1995.

for citizenship as the basis for equal rights and duties enshrined in the Machakos Agreement and Power Sharing Protocols.³² The special status and function of the capital city Khartoum as a “symbol of national unity that reflects the diversity of Sudan”³³ was particularly recognised. Part 10 of the Interim National Constitution (still in force) contains a series of provisions on administration of the capital, the operation and representativeness of law enforcement agencies in the capital and the administration of justice, all of which are intended to reinforce “respect for all religions, beliefs and customs”.

Unfortunately, the realisation of the CPA and Interim Constitution's vision of Sudan as a multi-ethnic and multi-religious country of equal citizens failed, and one group of these citizens, “southerners” (as defined by the parties who agreed the CPA), voted overwhelmingly at 98.83% to create their own State. Only 55% of the small number entitled to vote in the north, however, voted for separation. Thus when South Sudan declared independence on 9 July 2011, millions of people potentially found themselves not only on the “wrong” side of the border, but also of the “argument” in the sense that they were living in an area where most people disfavoured independence.

New legislation on citizenship, which was passed before secession on both sides of the border, added to the confusion. The Sudanese parliament (National Assembly) adopted amendments to the 1994 Nationality Act that stipulated that Sudanese nationality “shall automatically be revoked if the person has acquired, *de jure* or *de facto*, the nationality of South Sudan”.³⁴ Against the background of the adoption in South Sudan of a relatively generous text defining the composition of the South Sudanese citizenry – including persons with one great grandparent born in South Sudan – at a stroke potentially hundreds of thousands were denationalised, notwithstanding the provisions of the Constitution.³⁵ Compounding the problem, the amendments contained

³² Machakos Protocol, 20 July 2002; Power Sharing Protocol, 26 May 2004.

³³ See, Interim National Constitution of the Republic of the Sudan, 2005, Art. 152.

³⁴ See Section 10(2) of the Sudanese Nationality Act 1994 (as amended in 2011). For an analysis of the new citizenship laws in both States see, B. Manby, The right to nationality and the secession of South Sudan, Open Society Initiative for East Africa, 2012.

³⁵ The Constitution provides that any person born to a Sudanese mother or father has an “inalienable right” to enjoy Sudanese nationality. It also permits dual nationality.

no recognition of the right to challenge this withdrawal and raised the bar for those who might wish to apply for naturalisation. Among the new criteria were 10 years “lawful and continuous residency” and the conduct of lawful employment or livelihood, conditions that seemed to be particularly intended to exclude communities living on the margins.

Although the legislation at one level seemed to clarify the situation – no one who had a claim to South Sudanese citizenship could retain Sudanese citizenship – it simply added fear to the confusion. There was no guidance on how those claims might be determined or refuted, notwithstanding a context in which myriad legal questions arise, including the constitutionality of the law itself. For example the current Constitution is unequivocal that “[e]very person born to a Sudanese mother or father shall have an inalienable right to enjoy Sudanese nationality and citizenship” (article 7 (2)). The precise scope of South Sudanese citizenship law is also a complex matter. Regulations governing the implementation of the new law had not been issued at the time of our research. Further, although the President of Sudan took an overtly public stance that all those from South Sudan must leave or “regularise” their status by April 2012, there was no clarity on how regularisation could be accomplished.³⁶ In fact, the status of nationals across borders in both Sudan and South Sudan has created a significant amount of insecurity for groups of people living in *both* countries.³⁷ Concerns increased when the grace period afforded southern Sudanese to regularise their status lapsed on 9 April 2012; the situation was further exacerbated by statements made by State governors and political leaders threatening to expel all southern Sudanese.³⁸

In late September 2012, after a series of negotiations, Sudan and South Sudan signed the ‘Framework Agreement on the Status of Nationals of the Other State and Related Matters between the Republic of Sudan and the Republic of South Sudan’ (Framework Agreement).³⁹

³⁶ Khartoum urges its citizens in South Sudan to regularize stay, South Sudan Tribune, 27 February 2012, <http://www.sudantribune.com/spip.php?article41732>.

³⁷ See, IRRI and Darfur Refugees Association in Uganda, Darfurians in South Sudan: Negotiating belonging in two Sudans, Citizenship and Displacement in the Great Lakes region, Working Paper 7, 2012.

³⁸ See, for example, J. Copnall, The dispossessed: the South Sudanese without a nationality, British Broadcasting Corporation (BBC), 6 April 2012, <http://www.bbc.co.uk/news/world-africa-17624075>.

³⁹ Agreement between The Republic of the Sudan and The Republic of South

The instrument guarantees “four freedoms” to the nationals of each State in both territories, namely: freedom of residence; freedom of movement; freedom to undertake economic activity; and freedom to acquire and dispose of property. The Framework Agreement tasks the two States to establish a Joint High Level Committee responsible for the implementation and adoption of these freedoms within two weeks of 27 September 2012. Enjoyment of the four freedoms is to some extent reinforced by the ‘Agreement between The Republic of the Sudan and The Republic of South Sudan on Border Issues’⁴⁰ signed at the same time as the Framework Agreement. The Border Issues agreement recognises the importance of the “common heritage and abiding connections” between the two States, especially of communities living in border regions. It envisages a “soft border” that would allow for commerce and safe, free movement between the States. Security in the border areas generally is the joint responsibility of the two States.

However, there was little movement on the implementation of these agreements and, as a result, hundreds of thousands of people effectively became stateless overnight as the two countries split apart. As a man who was originally from South Sudan, but had been living in Khartoum for decades, said, “here I am like a stranger”.⁴¹ Likewise a woman from the south, when asked if she had been treated differently since secession, said, “yes, of course! Once on the bus I had an argument with the ticket collector. All the passengers stood against me and they threw me off the bus.”⁴² She then went on to describe how her sister had been treated at school: “[O]ne day she came home crying. She said there was noise in the class and the teacher came and addressed the only three Southerners girls and told them they have no right to talk and can only stay if they act as if they are not present. Even once our neighbour disconnected the electricity wire from their house to ours and the man in the family asked his family not to talk to us. When we complained, they said ‘it is our electricity and our land’.”⁴³

The case of Iman Hasan Benjamin provides a telling example of a

Sudan on Border Issues, signed Addis Ababa, 27 September 2012.

⁴⁰ *Ibid.*

⁴¹ Interview with man originally from South Sudan, Khartoum, Sudan, 19 June 2012.

⁴² Interview with woman originally from South Sudan, Khartoum, Sudan, 7 June 2012.

⁴³ Interview with woman originally from South Sudan, Khartoum, Sudan, 7 June 2012.

case in which discrimination tips over into denationalisation.⁴⁴ At the age of 17, Benjamin applied for her national identification number, a document needed to enrol in university. Despite having been born in Sudan and lived there all her life, she was told she was no longer a Sudanese citizen primarily because her father's last name indicated he was from South Sudan – even though he had died six months before South Sudan even existed as a country. When she challenged this denial of her citizenship in the Sudanese Constitutional Court, the court ruled that the automatic revocation of a minor's Sudanese citizenship was constitutional within the bounds of the law, based on Article 10(2) of the Sudanese Nationality Act 1994 (amended 2011), which deprives habitual residents of Sudan of their Sudanese nationality if they are believed to have acquired "*de jure* or *de facto*" the citizenship of South Sudan, without any right to contest the decision.

Although technically Benjamin and the tens of thousands of others who now find themselves in a similar position have the option of reclaiming their South Sudanese citizenship, the ability for this citizenship to have meaning in practice is unrealistic for many people who have lived in Khartoum for decades – or for some, all their lives. Many who are seen as being from the South have put their roots down in Khartoum and do not want to relocate. For instance one woman talked about the fact that she has strong links with the North and would have preferred to stay: "I am linked to the North because three of my children died and were buried here".⁴⁵ A man from South Sudan who has only ever lived in Khartoum talked of how he knows "nothing about the South [...] Suddenly we found that we have to go back to South Sudan although our culture and way of life is totally different from that one of South Sudan. I am wondering how I am going to adapt to living there [...] I don't have any traditional marks on my face like people from South Sudan, but even so people here discriminate against us."⁴⁶

Indeed, the very category "South Sudanese" is far from straightforward. For instance a woman whose parents were from South Sudan, but who

⁴⁴ For more details of this case, see S. Chiasson, Challenging Discriminatory Legislation in Sudan Using African Legal Architecture, IRRI Blog, 14 October 2015.

⁴⁵ Interview with woman originally from South Sudan, Khartoum, Sudan, 14 June 2012.

⁴⁶ Interview with man originally from South Sudan, Khartoum, Sudan, 16 June 2012.

had been born in Khartoum and married someone from the North, argued with her daughter during the interview about whether or not they would “return” to the South. The mother insisted she was going to stay as her husband was there, and the daughter wanted to leave Khartoum.⁴⁷ Likewise, as one woman whose “grandfathers were born in the South” but herself was born in Khartoum, said, “I have no desire to go to the South. All my family have died, I have no home there. I don’t know what is going to happen. I want to stay in Khartoum.”⁴⁸

To a certain extent, the situation shifted – somewhat ironically – with the outbreak of war in South Sudan in December 2013, which made “return” even less viable. In February 2015, the government started to register South Sudanese people and issue ID cards which give them the right to work and access basic services.⁴⁹ It was the result of an agreement signed in December between UNHCR, Sudan’s Commissioner for Refugees and the Directorate General of Passports and Immigration. It remains unclear how many have received these documents, and what impact it has had on their day-to-day ability to access resources. In addition, these documents are not passports: they still remain without a nationality.

The fact remains that nationality is being withdrawn on the basis of an assessment by the government of Sudan that an individual has South Sudanese citizenship without any evidence of this – and regardless of whether or not the person involved would have the ability in practice to take up this status. As a result, it is clear that Sudanese citizenship law must be urgently reformed to ensure that statelessness is avoided, particularly for those who have, or are perceived to have, connections to the territory of South Sudan. Currently the law provides for automatic revocation of nationality for those who have a potential claim to South Sudanese citizenship regardless of whether or not they have actually asserted that claim (or would actually be able to do so under South Sudanese law). Therefore, in order to avoid statelessness, it is clear that revocation should only occur where it is confirmed that an individual has, in fact, obtained South Sudanese nationality. Furthermore, it

⁴⁷ Interview with woman originally from South Sudan, Khartoum, Sudan, 23 June 2012.

⁴⁸ Interview with woman originally from South Sudan, Khartoum, Sudan, 3 June 2012.

⁴⁹ UNHCR, Sudan begins issuing IDs for South Sudanese, Press Release, 3 March 2015, <http://www.refworld.org/docid/54f5c2f44.html>.

is fairly obvious that the simplest way to prevent statelessness is to provide for dual citizenship. It is ironic, therefore, that dual citizenship is permitted under Sudanese law with respect to all nationalities other than South Sudan's (with the exception, in practice, of Israel).

At the same time, it is also clear that the ability to access and realise Sudanese citizenship for those of southern origins is also a sensitive political issue. The Sudanese State continues to exclude not just those of South Sudanese origin, but also millions of its own citizens on the basis of race, creed or geographic origin.⁵⁰ Therefore, the extent to which all Sudanese citizens can enjoy their rights will only improve if there is a fundamental change in the current regime.

6. The way forward?

These three case studies have demonstrated that unresolved situations of displacement can drift into situations of statelessness if deliberate action is not taken to prevent this from happening. In particular, those who find themselves in protracted situations become increasingly vulnerable to being stateless as time progresses. Their plight is often highlighted when they have children in their country of exile, and find themselves unable to claim a nationality for their children.

The UNHCR #IBelong Campaign to End Statelessness can play an important catalytic role, as it can highlight the extent to which refugee and citizenship policies need to be thought through in relation to each other. By drawing attention to the potential linkages between protracted refugee crises and the potential for statelessness, the Campaign can also help with recognition of the need not only to *end* statelessness but also to *prevent* it. This can likewise be a crucial means of promoting genuinely durable solutions for refugees. By drawing attention to the potential for certain populations to become stateless and the dangers associated with this possibility, the Campaign can help prise open a wider discussion on the broader context in which displacement takes place.

A number of key areas can be built upon in this regard. First, the launch of UNHCR's new 'Alternatives to Camps' policy is a welcome

⁵⁰ See, for instance, IRRI, *The disappearance of Sudan? Life in Khartoum for citizens without rights*, 2013.

shift with regards to refugee policy and needs to be leveraged. It is vital that the values that lie behind it are pushed at a political level with individual States. While inevitably there is going to be considerable reluctance on the part of some States to support this policy, it opens up the opportunity to advocate for local integration as both a temporary and permanent solution to exile. The belief that all those displaced will eventually be able to return to where they first came from is not only dangerous but short-sighted. It leads to wasted human potential, to over-stretched aid budgets as refugees have to be maintained in highly inefficient camps or in dispersed communities, and, most importantly, to a stunted approach to durable solutions. By contrast, by raising awareness that today's refugees could become tomorrow's stateless persons, the debate can be re-focused in order to ensure that a far more inclusive and robust approach to durable solutions is taken.

In addition, more can be done to promote changes in law and policy that allow access by refugees to naturalisation in accordance with the 1951 Refugee Convention as a measure to prevent statelessness. Legal mechanisms that exist in some areas in Africa could be further exploited in this regard. For example some national legislation offers nationality to children born on the territory if their parents were also born on the territory such that at least second generation refugees or migrants would automatically get citizenship. Other countries provide for easier access to citizenship for individuals who are born on the territory and are resident for a period of time. It is encouraging to note that the latter has been recommended by the African Commission on Human and Peoples' Rights as a regional standard (with children born on the territory having the option to become citizens at 18 if not earlier).

The Campaign has also highlighted the fact that more needs to be done to facilitate access to documentation. There is an increasing emphasis on ensuring that all refugees have access to birth registration and other documents, and a growing recognition that UNHCR and other actors need to increasingly support facilitation of necessary procedures, such as registrations of birth at consulates or embassies, where appropriate. In addition, to facilitate access to alternative immigration statuses without needing to approach the governments from which they fled, it is encouraging that UNHCR has started to negotiate flexible evidentiary standards for alternative statuses. Finally, and as the case studies clearly show, there is a need for detailed follow up in all of

these areas in order to understand the extent to which law is followed in practice.

Ultimately, while resolving the legal status of those who have no access to citizenship is clearly significant, it is also important to remember that many of the problems that these three cases point to are longstanding and highly complex. They are often inextricably linked to broader root causes of violence, conflict and the mismanagement of State power by those in positions of authority. Therefore, while there is a need to focus on the relatively tightly defined legal notion of “ending statelessness” as put forward in UNHCR’s Global Action Plan, there also needs to be enhanced engagement by the international community with root causes of conflict, including broader issues of governance and the use of State power. The Campaign to End Statelessness, therefore, has the potential to facilitate and support a broader discussion around belonging for all those who do not have a State to belong to.

4. Addressing statelessness through the rights to equality and non-discrimination

Amal de Chickera and Joanna Whiteman¹

1. Introduction

“My neighbours speak badly to me because I am stateless. They tell me that I am not worthy of doing anything. They mean that I can’t study further, I can’t get my certificates, I can’t fight for common man posts, I can’t do anything to make something of myself and so why would they want to speak to me. They are my neighbours, my relatives.” Siwani, Nepal.²

Many statelessness stories, like that of Siwani, are tales of marginalisation and discrimination.³ Sometimes the centrality of discrimination to a person’s story is obvious. Siwani, for example, is stateless because her mother is Nepali but her father is not and Nepal is one of 27 countries that still have discriminatory nationality laws which do not allow women to confer their nationality on their children on the same basis as men. Sometimes the link between

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² Siwani, the stateless daughter of a Nepalese woman, reflecting on her feeling that she faces discrimination from members of the community as well as authorities in Nepal during an interview with the Equal Rights Trust in Kathmandu on 14 October 2015. See, Equal Rights Trust, *My Children’s Future: Ending Gender Discrimination in Nationality Laws*, 2015, p. 23.

³ For example, the United Nations High Commissioner for Refugees (UNHCR) has stated that, “[d]iscrimination on the basis of ethnicity, race, religion, language or disability is a recurrent cause of statelessness. In fact, the majority of the world’s known stateless populations belong to minority groups. Instances of denial, loss and deprivation of nationality on discriminatory grounds leading to statelessness continue to occur in a range of countries. These include situations of mass deprivation of nationality on the grounds of ethnicity or race during recent decades.” UNHCR, *Global Action Plan to End Statelessness: 2014-2024*, p. 14.

discrimination and statelessness is less clear. Rules which appear to apply equally, such as procedures for school enrolment may, on closer examination, disadvantage stateless children and so amount to indirect discrimination. As a result, stateless people's ability to participate in all aspects of life on an equal basis with others and to fully enjoy their human rights is often severely impeded. They are typically excluded from civic life and rarely have full access to key rights such as work, education and healthcare. Whether obvious at first glance or not, discrimination is present in nearly every stateless person's story.

One can neither tell the story of statelessness, nor seek to finish it for good, without addressing the inequality and discrimination faced by its protagonists. This chapter begins by exploring the relationship between inequality and statelessness. It argues that statelessness cannot be eradicated unless discriminatory societal attitudes which view some people as less worthy of inclusion than others are comprehensively tackled. While such attitudes will not change overnight, there are some measures that can be used to put changes in motion now. This chapter posits that an improved use of the legal framework on equality to address statelessness is both possible and important.⁴ This framework is both powerful – enshrined as it is in international human rights law – vital and, to-date, under-used. This chapter provides an overview of the legal framework on equality before reviewing some practical ways in which the framework can be used both to tackle the existence of statelessness and to mitigate its impacts.

2. The relationship between inequality and statelessness

No society is equal. In all societies the privileged disproportionately enjoy social goods and opportunities while other groups battle against socio-economic and political disadvantage. The equality activist's role is to struggle for the utopian world reflected in the Universal Declaration of Human Rights (UDHR), which recognises "the inherent dignity and [...] the equal and inalienable rights of all members of

⁴ The legal framework on equality has multiple sources and continues to develop. For a best practice interpretation of its content see, Equal Rights Trust, Declaration of Principles on Equality, 2008. For further insight into its content and legal sources see also B. Hepple, *Equality: The New Legal Framework*, Hart Publishing 2014; S. Fredman, *Discrimination Law*, Oxford University Press, 2011; T. Khaitan, *A Theory of Discrimination Law*, Oxford University Press 2015.

the human family”.⁵ In this utopia stateless people, indeed all people, would be free to live their lives in dignity and to achieve their potential without being affected by prejudice and discrimination. They would have equal opportunities to participate in society and to enjoy a full range of civil, political, economic, social and cultural rights.⁶ Sadly, in today’s world the stateless are among those situated the furthest from the privileged few. They suffer significant disadvantage and inequality both in their own country, which fails to recognise them as citizens, and in migratory contexts. Moreover, discrimination is often a central cause for their being stateless in the first place.

2.1 Discrimination as a cause of statelessness

The various causes of statelessness are well known and include: nationality laws which are discriminatory on grounds of gender (limiting women’s ability to confer, acquire or retain their nationality), race, ethnicity or religion (denying equal access to nationality for ethnic and religious groups), disability and other grounds; conflict between the laws of different States which leave people stateless when they fall through the gaps of legal recognition; State succession leading to new States (or newly redefined States) setting up new criteria for citizenship which may exclude some; the legacy of colonisation, de-colonisation and subsequent nation-building; bad administrative practices both in determining nationality and in relation to documentation which may be needed to help establish nationality; and (the largest category) the inheritance of statelessness, whereby statelessness imposed on a person or community in the past remains unrectified today and is passed on to new generations.⁷ In many of these circumstances,

⁵ Universal Declaration of Human Rights, 10 December 1948, Adopted and proclaimed by General Assembly resolution 217 A (III), Preamble. See also the UN Sustainable Development Goals, which are based on the fundamental assertion that no one will be left behind. UN General Assembly, *Transforming our World: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1. See, R. Govil, “The Sustainable Development Goals and solutions to statelessness”, chapter 2 in this book.

⁶ These lofty ambitions for the ideal society are influenced by much thinking that has been done on the true meaning of equality. Some of this thinking is articulated in the following, Equality Act 2006 (UK), Section 3; Hepple, *supra* n3; Equal Rights Trust, *Declaration of Principles on Equality*, *supra* n4.

⁷ For a more detailed overview of the causes of statelessness see, Institute on Statelessness and Inclusion, *The World’s Stateless*, Wolf Legal Publishers 2014, pp. 23–27.

statelessness is the result of the denial of nationality which may be arbitrary under international law.⁸ The relevance of discrimination as a key element of each of these causes of statelessness is often underestimated.⁹

Most clearly, statelessness may result from discriminatory laws. As stated above, 27 countries continue to have nationality laws which discriminate between men and women in determining who can confer their nationality on their children. Where a directly sex discriminatory law prevents a mother from conferring her nationality on her child, that child may be at risk of statelessness if they are also unable to acquire nationality from their father (e.g. where he himself is stateless, he is deceased or his identity is unknown, he cannot confer his nationality on his children due to conflict of laws or he refuses to do so).¹⁰ For example, in Nepal, despite much advocacy, the recent enactment of a new Constitution has not resulted in the removal of gender discrimination from the country's nationality laws.¹¹ Accordingly, it remains the case that children born in Nepal to a Nepali mother and a father whose identity is unknown, who is deceased or has deserted the family, who is a foreigner or who refuses to acknowledge his paternity may become stateless.¹² Despite a recent increase in the calls for reform of the laws of these 27 countries, spearheaded by the Global Campaign for Equal Nationality Rights and other actors, the abolition of this cause of statelessness remains some way off.¹³

⁸ See for example, various UN Secretary General reports on arbitrary deprivation of nationality: A/HRC/31/29; A/HRC/25/28; A/HRC/23/23; A/HRC/19/43 etc.; and various UN Human Rights Council Resolutions on the arbitrary deprivation of nationality: Resolution 32/5 (2016); 26/14 (2014); 20/05 (2012) etc.

⁹ The authors explored this link in an earlier article: A. de Chickera and J. Whiteman, "Discrimination and the human security of stateless people", *Forced Migration Review* 2014, Issue 46, p. 56. This article has formed the starting point for the analysis which follows.

¹⁰ See UNHCR, Global Action Plan, *supra* n3, p. 12.

¹¹ Constitution of the Kingdom of Nepal 2015, Section 11, Part 2.

¹² For testimonies from individuals affected by the discriminatory laws in Nepal see Equal Rights Trust, *My Children's Future*, *supra* n2.

¹³ For more information about the campaign and efforts for reform in the twenty seven countries see, Global Campaign for Equal Nationality Rights, www.equalnationalityrights.org. Both ERT and ISI are steering committee members of the campaign and both authors serve on the committee.

Statelessness can also result from direct racial or ethnic discrimination.¹⁴ For example, the Rohingya – an ethnic, religious and linguistic minority are one of the most vulnerable communities in the world, considered by their home country, Myanmar, to be illegal immigrants from Bangladesh, despite having lived in Myanmar for many generations. The Rohingya have been arbitrarily deprived of their nationality and made stateless by Myanmar; its 1982 Citizenship Law clearly discriminates on grounds of ethnicity.¹⁵ In the more recent past, racial discrimination has also caused the statelessness of certain Dominicans of Haitian descent in the Dominican Republic.¹⁶

Less obviously linked to discrimination is statelessness occurring as a result of State succession. Historically this has been seen as a “technical”, almost neutral, cause of statelessness.¹⁷ However, closer analysis reveals that here too discrimination may play a significant role. Indeed, most often, “it is vulnerable minorities who are associated with either the successor or parent State who are deprived of nationality, exposing the discriminatory motivations and arbitrary nature for such exclusion”.¹⁸ This reality has played out in relation to the former Union of Soviet Socialist Republics (USSR), the former Yugoslavia (for example, many Roma are stateless in the Balkan States), Kurds whose country was divided among Iran, Iraq, Syria and Turkey, and Eritreans in Ethiopia.¹⁹ The experience of colonisation and de-colonisation is also an example of State succession and caused many of the most large scale and entrenched situations of statelessness in the world today. In

¹⁴ *Supra* n3.

¹⁵ For more information on the discrimination and arbitrary deprivation of nationality of the Rohingya, see among others, UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, 2 April 2014, A/HRC/25/64; UNHCR Myanmar, 2014 UNHCR Country Operations Profile; Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia*, 2014.

¹⁶ For more information, see among others, Inter-American Commission on Human Rights. Report on the situation of human rights in the Dominican Republic, 2015, K. Shipley, *Stateless: Dominican-born Grandchildren of Haitian Undocumented Immigrants in the Dominican Republic*, 2016; and Inter-American Court of Human Rights, *Case of Expelled Dominicans and Haitians v. Dominican Republic*, Judgment of 28 August 2014.

¹⁷ See, J. Tucker, “Statelessness in Central Asia: From State succession to solutions”, chapter 11 in this book.

¹⁸ Institute on Statelessness and Inclusion, *supra* n7, p. 24.

¹⁹ See, for example, K. Southwick, “Ethiopia-Eritrea: Statelessness and State succession”, *Forced Migration Review* 2009, Issue 32.

such contexts, newly independent States (many of which never had a common pre-colonial national identity) have had to deal with borders arbitrarily drawn (often dividing ethnic groups) peoples forcibly migrated (for labour) and the consequences of decades, sometimes centuries, of colonial rule which successfully pitted different ethnic and religious groups against each other, privileging some and marginalising others, as part of a wider divide and rule policy.²⁰

As contemporary States are responsible for protecting the human rights of all people subject to their jurisdiction, they cannot hide behind the veil of “colonisation” to justify or explain away the discriminatory treatment and disenfranchisement of marginalised groups. However, understanding this historical context and its implications for equality and non-discrimination are an essential pre-requisite to addressing them.

Bad administrative practices often enable discrimination and prejudice to be determinative of whether or not a person will be recognised as a citizen in a given country. This is particularly common where individual officers are given broad discretion to determine the outcome of an application for citizenship documentation. In Madagascar for example, Malagasy identity is perceived by many Madagascans as racially determined. In a recent study, individuals reported that discriminatory attitudes based on race held by local officials influenced the rejection of their applications for citizenship or for a national identity card. For example, those who had names which were “not considered Madagascan – such as Arab, Muslim or Comorian sounding names – often encountered problems” and faced officials who felt they were “not really Madagascan”.²¹ The lack of judicial oversight of these individual decisions means that individuals have little recourse to contest administrative decisions. The cumulative impact of such poor administrative practices can be profound. “In Thailand, Lebanon and Kuwait for instance, statelessness became a feature of the landscape many decades – and several generations – ago, when the nationality laws were first being administered by the State.”²² Almost inevitably, it was vulnerable groups who were excluded – those who live in remote areas, have nomadic lifestyles, are from an ethnic minority,

²⁰ Institute on Statelessness and Inclusion, *supra* n7, p. 25.

²¹ Equal Rights Trust, *My Children’s Future*, *supra* n2, pp. 12-13.

²² Institute on Statelessness and Inclusion, *supra* n7, p. 26.

etc. Their statelessness has since been used as the justification for their continued exclusion from society down the generations. A more subtle form of discrimination can also play out. This is where socio-economically disadvantaged groups – most often the rural poor – cannot acquire documentation due to difficulties in accessing centralised administrative offices. The resulting lack of documentation – while not akin to statelessness (many citizens around the world do not have documentation) – can result in statelessness for those who cannot prove place or date of birth, parentage or other information needed to demonstrate eligibility for citizenship.

Finally, the inheritance of statelessness is the biggest cause of statelessness in the world today. The impact of the causes identified above continues because States have not found solutions for stateless populations and new generations are therefore born into statelessness every day. This lack of will to address existing statelessness situations is often linked to discriminatory attitudes and perceptions about belonging.

2.2 The inequalities of stateless persons

Statelessness is the most extreme consequence of the violation of the right to a nationality. As described above, this is often motivated by discrimination on grounds of race, ethnicity, gender, socio-economic disadvantage or even disability.²³ Discrimination which leads to statelessness often continues to affect the life of the stateless person. Indeed, in addition to continuing to face discrimination on the basis of pre-existing characteristics, a person's status as stateless often becomes a basis for further discrimination. This is despite a recent UN Secretary General's report finding that "there is no legal basis upon which States that have arbitrarily deprived a child of his or her nationality can justify the denial of other human rights to the child on grounds of his or her resulting statelessness".²⁴

²³ According to Article 18(1)(a) of the UN Convention on the Rights of Persons with Disabilities, 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3, disabled persons "[h]ave the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability".

²⁴ UN Human Rights Council, Report of the Secretary General on Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless, 16 December 2015, A/HRC/31/29, para. 28.

At the institutional level, discriminating between citizens and non-citizens in the conferral of civic rights and social benefits is standard. The criteria upon which citizenship is granted or withheld and the extent of the benefits of citizenship are widely understood as matters of State sovereignty. And yet this discretion is limited by international law in ways that not all States adhere to.

As noted above, stateless persons face grave disadvantages. They “face challenges in all areas of life, including: entering or completing schooling; accessing healthcare services [...] obtaining a birth certificate [...] falling back on social security [...] obtaining a passport or indeed being issued any form of identity documentation [...] international travel [...] and] free movement”.²⁵ They are also vulnerable to arbitrary and lengthy immigration detention. In the most extreme cases, stateless persons suffer persecution and endure forced displacement.

While there is general consensus that stateless people face barriers in accessing the services central to the enjoyment of their rights, the connection to discrimination and inequality is not always noted. The obligation of the State to ensure equal access to rights for all (although subject to discretion in certain areas as highlighted below) goes beyond the mere legal statement that (for example) all children have the right to an education. The State must ensure that legal, administrative and practical barriers to accessing education are removed and that all children have access to education that meets a certain minimum standard. It must ensure that those whose particular circumstances and vulnerabilities make them less likely to be able to enjoy equal access to education are identified and steps taken to mitigate the barriers they face.

One such barrier that stateless people face in accessing education and various other rights and services, is that they often lack the documentation required for administrative purposes. A simple attitudinal shift that sees those without documentation (including the stateless) not as (variously) at fault, unworthy, a threat, outsiders or disqualified, but rather as people whose equal access to rights and services is being hampered by the non-fulfilment of an administrative step (that for most people can easily be taken) will go a long way to strengthening the equal access to rights and services of stateless persons.

²⁵ Institute on Statelessness and Inclusion, *supra* n7, pp. 29-30.

Another barrier is simply one of prejudice by individual officials or members of society: “[m]y neighbours speak badly to me because I am stateless. They tell me I’m not worthy of doing anything.”²⁶ Stateless people have reported being exploited by, for instance, employers who know that it is particularly difficult for them to find work and so they may be more willing to work illegally on a low wage.²⁷

As a result of these (and other) factors, the vulnerability of stateless people is often a complex phenomenon. It is not just that they are stateless. It is also that they are an unwanted ethnic minority and are considered to be outsiders and are poor and have faced marginalisation and disadvantage with cumulative effect for many generations. Simplistic, one dimensional “solutions” that, for example, guarantee the right to education for stateless people without taking into account their historical disadvantage and the other factors that shape their reality are not likely to succeed. Equal access to rights for stateless people cannot be ensured only by focusing on their statelessness. A holistic approach is needed.

3. The legal framework on equality

The legal framework on equality is an important tool for solving statelessness. Since the adoption of the UDHR in 1948 equality has been recognised as a fundamental human right of foundational importance. UDHR Article 1 declares that “all human beings are born free and equal in dignity and rights” and Article 2 goes on to provide that all rights shall be enjoyed without discrimination. Since then, the rights to equality and non-discrimination have been an integral part of key international and regional human rights treaties, including the International Covenants on Civil and Political Rights (ICCPR), Article 26,²⁸ and on Economic Social and Cultural Rights (ICESCR) of 1966 (Article 2(1)).²⁹ The right to non-discrimination has also been

²⁶ Equal Rights Trust, *My Children’s Future*, *supra* n2, p. 23.

²⁷ *Ibid*, p. 26.

²⁸ International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, entry into force 23 March 1976, 999 UNTS 171.

²⁹ International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, entry into force 3 January 1976, 993 UNTS 3. At the regional level the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, entry into force 3 September 1953, ETS 005, the American Convention on Human Rights, 22

the basis upon which numerous specific international human rights treaties have been adopted.³⁰ Further, most States have constitutional provisions and some form of civil law protection against discrimination and an increasing number are adopting comprehensive equality laws, which include a variety of protections such as freedom from direct discrimination, indirect discrimination and, in some cases, obligations on the State to take positive measures to tackle historical disadvantage.

The legal framework on equality has developed from and comprises the growing body of international human rights treaties set out above, together with relevant regional and national laws and jurisprudence, custom and best practice. In 2009, key elements of the framework were identified in the Declaration of Principles on Equality, a set of principles developed and launched by the Equal Rights Trust following consultations with 128 human rights and equality experts from 47 countries in different regions of the world.³¹ In the analysis which follows, references are made to these various sources, with best practice approaches identified and applied to the issue of solving statelessness.

Two preliminary points are important to note at the outset. First, any consideration of the equality framework in the context of statelessness has to recognise that States have, as a matter of international law and practice, been granted significant latitude to discriminate between citizens and non-citizens in the enjoyment of a large number of rights including, in particular, civic rights and social and economic rights. Hannah Arendt famously said that the right to a nationality is the “right to have rights”.³² Against this backdrop, it is perhaps unsurprising

November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36, the African Charter on Human and People’s Rights, 27 June 1981, entry into force 21 October 1986, CAB/LEG/67/3 rev. 5 and the ASEAN Human Rights Declaration all have non-discrimination provisions.

³⁰ For example, the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, entry into force 3 September 1981, 1249 UNTS 13; Convention on the Elimination of All forms of Racial Discrimination, 7 March 1966, entry into force 4 January 1969, 660 UNTS 195; Convention on the Rights of Persons with Disabilities, *supra* n23; and Convention on the Rights of the Child (CRC), 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3.

³¹ Equal Rights Trust, Declaration of Principles on Equality, *supra* n4.

³² H. Arendt, *The Origins of Totalitarianism*, 1951. This statement has been widely quoted since as a narrative equating statelessness to lack of rights

that it is often unquestioningly assumed that States are justified in withholding rights from certain non-citizens, including stateless persons. However, the correct starting point as a matter of international human rights law is that, in general, human rights apply to everyone, “irrespective of his or her nationality or statelessness”.³³ Any deviation from this principle is to be seen as an exception. Such exceptions do exist. For example, the principle of progressive realisation allows developing countries to limit the enjoyment of economic rights by non-nationals in certain circumstances.³⁴ Furthermore, international law allows differential treatment between nationals and non-nationals under limited conditions where that treatment is justified by the pursuit of a legitimate aim and is in accordance with the principle of proportionality.³⁵ Political rights, including the right to vote and stand for election, can also be restricted to citizens.³⁶ However, such restrictions “must be construed so as to avoid undermining the basic prohibition of discrimination”,³⁷ and “the ground of nationality should not bar access to [...] rights [...] which] apply to everyone including non-nationals, such as [...] stateless persons”.³⁸ According to the equality framework, any attempt to discriminate between nationals and non-nationals must be strictly scrutinised.

has emerged. See, for example, the judgment of Chief Justice Warren in the landmark case USA Supreme Court, *Trop v. Dulles*, 356 US 86, 31 March 1958, 101-102; See also, C. Batchelor, “Statelessness and the Problem of Resolving Nationality Status”, *International Journal of Refugee Law* 1998, 10(1-2), p. 159; and G.R. de Groot, *A Clarification of the Fundamental Rights Implications of Stateless and Persons Erased from the Register of Residents*, Directorate General Internal Policies of the Union, European Parliament 2007.

³³ Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, 11 April 1986, HRI/GEN/1/Rev.6. The Committee was referring to the rights set forth in the ICCPR, but the principle applies equally to the rights set forth in other international and regional human rights treaties.

³⁴ ICESCR, *supra* n29, Art. 2(3).

³⁵ Office of the High Commissioner for Human Rights, *The Rights of non-Citizens*, 2006.

³⁶ ICCPR, *supra* n28, Art. 25.

³⁷ Committee on the Elimination of Racial Discrimination, General Recommendation No. 30: Discrimination Against Non Citizens, 19 August 2004, CERD/C/64/Misc.11/rev.3, para. 2.

³⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Article 2, Para 2 of the International Covenant on Economic, Social and Cultural Rights), 25 May 2009, E/C.12/GC/20, para. 30.

Second, the equality framework is expansive. The authors cannot, in these few pages, expound upon the full extent of its potential as a tool for solving statelessness. Accordingly, the following analysis seeks to be illustrative rather than exhaustive, with the focus on some of the most interesting potential uses of the equality framework.

3.1 Equality – a developing concept

The scope and content of the rights to equality and to non-discrimination have expanded over time. Initially, the focus was on the formal equality of men and women and different races, meaning that people should be treated the same. At the national level, protection from discrimination was usually restricted to matters such as voting rights rather than being seen as a fundamental principle that is relevant to all areas of life. However, the legal framework has developed and this formalistic approach to equality and non-discrimination has long been seen as inadequate by many. As Khaitan, considering discrimination law, states:

Creative legislators and judges, responding to complex social problems, have crafted increasingly sophisticated tools, recognising concepts such as direct and indirect discrimination, affirmative action, reasonable accommodation, harassment, and positive duties. Various groups, spurred on by identity politics, have successfully obtained protection on grounds such as age, disability, religion and sexual orientation [...]. The contexts in which discrimination law operates have also expanded, albeit in a limited fashion. From relatively humble beginnings (mainly) in the constitutional context, several other areas of human activities, including provisions for goods and services, employment, education, housing and healthcare, now fall within its regulatory remit.³⁹

But what does this mean with respect to the protection that the framework affords to stateless persons?

³⁹ Khaitan, *supra* n4, p. 3.

3.2 Applying the equality framework to statelessness

Many causes of statelessness and the inequalities faced by stateless people violate the rights to equality and non-discrimination in one or multiple respects. What follows are some key, non-exhaustive, examples of why and how the equality framework can be used to defend the rights of stateless people and address statelessness.

3.2.1 Relevant grounds of discrimination

The right to non-discrimination, while not identically formulated in each international human rights treaty, commonly protects people from **all** forms of discrimination including but **not limited to** some of the traditionally identified grounds such as sex, race and religion. As shown in section 2 above, statelessness may be caused by one or more of these grounds. Accordingly, the legal framework on equality can be invoked. However, it is also clear that there are times when stateless people face discrimination because they are stateless or because of circumstances that result from their statelessness, such as poverty. The more difficult question is whether the equality framework protects stateless persons from these forms of discrimination.

As discussed in section 3.1, today people are protected from discrimination on a wider variety of grounds than were initially explicitly identified in human rights treaties. There are two areas of developing jurisprudence which have a particular bearing on how the rights of stateless people can be protected through the equality framework. Firstly, there is the right to be free from discrimination on grounds of nationality, including on grounds of statelessness. We have noted that, since it was enshrined in international law the right to non-discrimination has applied to all people including non-nationals. The Human Rights Committee, in discussing the scope of the ICCPR in 1986, made clear that “[a]liens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof”.⁴⁰ In more recent times it has become clear that this right can be used to protect stateless people from unjustified differential treatment. For example, in 2009, the European Court of Human Rights (ECtHR) handed down its judgment in the case of *Ms Andrejeva*.⁴¹

⁴⁰ UN Human Rights Committee, *supra* n33, para. 2.

⁴¹ European Court of Human Rights, Application No. 55707/00, *Andrejeva*

Ms Andrejeva, who was residing in Latvia, had become stateless upon the dissolution of the USSR in 1991. The application of Latvia's pension laws was such that a Latvian citizen would be entitled to a higher pension than Ms Andrejeva was as a permanently resident non-national. Ms Andrejeva argued that the laws contravened her right to be free from discrimination with respect to her pension rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁴² The ECtHR, finding in Ms Andrejeva's favour, made it clear that the ECHR protected her as a permanently resident non-national⁴³ from discrimination in respect of her enjoyment of a State pension. The Court held that differential treatment between permanently resident non-nationals and citizens could only be justified by "very weighty reasons", which had not been demonstrated by the government in this case. This decision provides an important precedent. In reaching its conclusion, the Court did two particularly significant things: (a) it acknowledged that Ms Andrejeva was protected from discrimination as a result of her status as a permanently resident non-national; and (b) it explained that States that are Parties to the ECHR cannot simply invoke a right to differentiate between citizens and non-citizens without the distinction being scrutinised and the State being required to show "very weighty reasons" for drawing such distinctions when determining who benefits from particular rights under national laws. While (a) does not amount to a direct recognition by the Court that the right to non-discrimination provides protection from discrimination on grounds of statelessness, it comes close. Further, it is the authors' view that there is potential for this jurisprudence to be developed so that statelessness is explicitly recognised as a protected ground of discrimination, if the right cases are taken to court.⁴⁴

v. Latvia, 18 February 2009. For a more detailed discussion of the case see Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, 2010, pp. 41-42.

⁴² The rules relating to State pension were considered by the ECtHR to be within the ambit of Ms Andrejeva's right to peaceful enjoyment of her possessions under Article 1 of Protocol 1 to the ECHR and accordingly, her right to non-discrimination under Article 14 of the ECHR applied.

⁴³ This is the term that Latvia uses to describe its stateless population.

⁴⁴ See, L. Bingham and L. Gamboa, "Litigating against statelessness", chapter 5 in this book.

The second area of note is the growing, albeit relatively nascent, school of thought supporting the argument that the right to non-discrimination protects people from discrimination on grounds of their socio-economic disadvantage.⁴⁵ Stateless people are often among the poorest, most socio-economically marginalised, members of society and this can be as relevant as their statelessness to their lack of access to rights, including the rights to health and education.⁴⁶ Some adjudicating bodies have shown willingness to recognise that the right to non-discrimination provides this protection. For example, in *Alyne da Silva Pimentel v. Brazil*, the Committee on the Elimination of All Forms of Discrimination against Women noted that a woman who died as a result of poor obstetric care had not only been discriminated against because of her sex and her African descent but also because of her socio-economic background.⁴⁷ This development could assist stateless people who endure socio-economic disadvantage. If this approach were more widely accepted, unpacking the extent to which a person's statelessness is the direct reason for their lack of enjoyment of their rights and the extent to which their socio-economic status is the cause of this lack of rights would become less necessary. This may be particularly important in cases where a person suffers discrimination as a result of multiple characteristics for example, their race and religion as well as their statelessness.⁴⁸

3.2.2 Direct discrimination and causes of statelessness

One of the most widely understood elements of the equality framework is the right to be free from direct discrimination. Direct discrimination is less favourable treatment because of a protected characteristic. It can

⁴⁵ For further discussion of this see, Equal Rights Trust, *Economic and Social Rights in the Courtroom*, 2014, pp. 68-76. Key references include, S. Fredman, "Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda", *European Human Rights Law Review* 2010, Issue 3, p. 10.

⁴⁶ See, for example, Institute on Statelessness and Inclusion, *supra* n7.

⁴⁷ Committee on the Elimination of All Forms of Discrimination against Women, Communication No. 17/2008, *Alyne da Silva Pimentel v. Brazil*, 25 July 2011, CEDAW/C/49/D/17/2008, para. 7(7).

⁴⁸ The equality framework recognises that discrimination may occur because of a combination of grounds. Thus, for example, it will be unlawful discrimination to treat a Muslim woman less favourably than you would treat a non-Muslim or a Muslim man where she is being treated less favourably because of the combination of her sex and her religion.

only be justified in very exceptional circumstances.⁴⁹ As with all forms of discrimination, people are protected from direct discrimination on an increasingly wide variety of grounds (i.e. by reference to an increasingly long list of protected characteristics) including gender, race and disability. The equality framework also demands not only that States do not discriminate – including through the introduction of or failure to overturn discriminatory laws – but also that States act to ensure that people do not suffer discrimination by private actors.⁵⁰

Direct discrimination is at the heart of a number of the causes of statelessness outlined in section 2. For example, there can be no justification for distinctions based on gender under the equality framework. A less commonly known and challenged example of direct discrimination is the less favourable treatment of people with disabilities in some nationality laws. For example, the naturalisation criteria of Indonesia require a person to be “sound in health and mind”.⁵¹ This constitutes direct discrimination on grounds of mental disability, something which cannot fall within the “very exceptional” circumstances in which different treatment is permitted by the equality framework.

Further, as also identified in 2.1, nationality laws may be applied by individual State agents in ways which directly discriminate against certain groups. Again in Madagascar there is evidence that an individual’s race or religion will impact whether or not their application for the acquisition of nationality is accepted. Less favourable treatment of minorities such as the Karana community are central to the ongoing fact of that population’s statelessness. The equality framework requires that the State not only prohibit such discriminatory application of nationality laws and punish individuals who breach the right to non-discrimination, but also that it implement protective measures to ensure that individuals are not discriminated against on grounds such

⁴⁹ In some jurisdictions certain forms of direct discrimination can never be justified e.g. under the UK’s Equality Act 2010 only direct discrimination because of age can be justified. However, the best practice approach is that direct discrimination may be permitted but only very exceptionally, see, Equal Rights Trust, Declaration of Principles on Equality, *supra* n4, Principle 5.

⁵⁰ For example, see, Equal Rights Trust, Declaration of Principles on Equality, *supra* n4, Principle 10.

⁵¹ Law of the Republic of Indonesia, Number 12 2006, on Citizenship of The Republic of Indonesia, Art. 9(c).

as their race and religion when interacting with national laws and regulations governing nationality. This includes a requirement that the State ensure that individual officers are adequately trained on their obligation not to discriminate and that individual decisions are subject to sufficient oversight.

3.2.3 Indirect discrimination on grounds of statelessness

The equality framework also helps protect against indirect discrimination. Often less easy to identify than direct discrimination, indirect discrimination occurs when a provision, criterion or practice puts people at a particular disadvantage because of a protected characteristic, in circumstances where the provision, criterion or practice cannot be justified as a proportionate means of achieving a legitimate aim.⁵² As is identified in 2.2 above, in addition to the prejudice and stigma on grounds of their statelessness, race or other characteristics that many stateless people report facing in their day-to-day lives and which limits their ability to enjoy education, work, healthcare and other basic rights (which constitutes direct discrimination), structural and apparently neutral barriers also exist.

A particularly prevalent form of indirect discrimination affecting stateless persons relates to the need for identity documents in order to access services. Many States require individuals to provide identity documents – which stateless people are less likely to have – in order to access their rights. For example, parents of children in Nepal are increasingly being required to show the child's birth certificate in order for the child to be enrolled in school.⁵³ However stateless parents in Nepal have reported being unable to obtain birth certificates for their children.⁵⁴ In addition to the underlying direct discrimination which may have caused their statelessness, this requirement to show

⁵² See, Equal Rights Trust, Declaration of Principles on Equality, *supra* n4, Principle 5. Whether or not the disadvantaged person has to possess the protected characteristic themselves, be associated with someone who possesses that characteristic or simply be disadvantaged by a rule which indirectly discriminates against others, has recently been opened for question by the judgment of the Court of Justice of the European Union in Case C-83/14, *CHEZ Razpredelenie Bulgaria AD v. Komisia za Zashtita ot Diskriminatsia*, 16 July 2015.

⁵³ Equal Rights Trust, My Children's Future, *supra* n2, p. 33.

⁵⁴ *Ibid.*

a birth certificate for enrolment is a practice which applies equally to all children, but puts stateless children at a particular disadvantage. The result is that many stateless children in Nepal are unable to enjoy their right to education. Under the equality framework, in order to be lawful, this practice, which puts some children at a particular disadvantage, must be justified. Schools may be pursuing a legitimate aim in ensuring that they can identify their students, but whether an inflexible requirement to show a birth certificate is proportionate to this aim is questionable. While the underlying (direct) discrimination is commonly challenged (e.g. nationality laws which do not allow women to pass their nationality to their children), the equality framework is not used often enough to challenge whether such indirectly discriminatory practices can be justified. The right to protection from indirect discrimination requires that such measures are scrutinised and that authorities are required to adequately explain how they are justified.

3.2.4 Failure to take positive action for stateless people

The flurry of progress in the development of the legal framework on equality, outlined in 3.1 above, has brought us to a point where the majority of academics and lawmakers recognise that *substantive* equality is necessary, meaning that steps must be taken to correct disadvantages faced by individuals as a result of living in a society which structurally favours some over others, and that the rights to equality and non-discrimination are to be interpreted in this vein.⁵⁵ The implications of this element of the equality framework for stateless people have been little considered or tested.

One area in which this approach has potential is in considering protections provided within the international framework on statelessness as matters requiring positive action to advance the equality of stateless people. Under Article 32 of the 1954 Convention relating to the Status of Stateless Persons, (1954 Convention)⁵⁶ States commit to facilitating the assimilation and naturalisation of stateless persons. Under Article 25 States are required to afford administrative

⁵⁵ For a detailed discussion of the developments in equality jurisprudence, with a focus on the development in the UK legal framework see, B. Hepple, *supra* n4, pp. 17-29.

⁵⁶ Convention relating to the Status of Stateless Persons, 28 September 1954, entry into force 6 June 1960, 360 UNTS 117.

assistance to stateless persons. These are specific obligations which are not explicitly contained in the international human rights framework. The 1954 Convention does not articulate these obligations as a matter of equality, but, with the benefit of a more advanced and comprehensive approach to human rights and equality law, both can be seen as aspects of the State's obligation to take positive action to accelerate progress towards equality.⁵⁷ This is an argument which, to the authors' knowledge, has to date not been made to States. It is an important argument to explore further because this type of cross fertilisation between the 1954 Convention and equality law, by which the latter is applied to and enriches the former, is essential if we are to bring the protection of stateless persons (and ultimately the solving of statelessness) in line with 21st century standards. Furthermore, the equality framework is enriched by being confronted with the 1954 Convention, as an example of how the stateless – who for too long have remained on the very margins (at best) of the equality discourse – can very tangibly benefit from the targeted application of positive action. As *all States* have obligations to not discriminate and to treat all persons with equality, there is an argument to be made for even States which are not party to the 1954 Convention to take these and other positive measures to address the structural discrimination and disadvantage faced by stateless persons.

Positive action demands not only that States acknowledge the disadvantages faced by certain groups, but also that they take action to correct those. Accordingly, it can be argued that, in tackling some of the disadvantages faced by stateless people in accessing other rights (as identified in section 2), States also have the opportunity and indeed obligation to go further and institute positive measures for longer term equality by solving statelessness. For example, while the State obligation to tackle the indirect discrimination faced by undocumented stateless children seeking to access education by removing the requirement for identity documents to have this access is obvious, it can also be argued that the State should treat this point of contact between stateless people and the administrative system as an opportunity to step in and provide stateless people with documents, which would often strengthen their claim to nationality. Such a form of targeted documentation would be an appropriate positive action measure.

⁵⁷ See, T. Molnár, "A fresh examination of facilitated naturalisation as a solution for stateless persons", chapter 8 in this book.

Finally, positive action to address structural disadvantage should continue even after statelessness has been “solved”. Studies conducted in Sri Lanka show that the hill country Tamils of Indian origin – a group whose statelessness has largely been resolved over the past decade – are still the most disadvantaged group in the country.⁵⁸ Such studies are evidence that solving statelessness and ensuring equality are two different things, and that while the former certainly helps with the latter, it does not guarantee it. Therefore, the positive action obligation should endure beyond “solving statelessness” and should serve to promote real equality, inclusion and the enjoyment of rights.

In summary, the effective application of the equality framework is an important solution to statelessness and its effects. Grounded in international human rights obligations, its relevance is clear; the framework not only requires States not to discriminate against individuals in ways which may lead to statelessness, but also imposes certain positive duties on them to identify and tackle discrimination by individuals against stateless persons. In addition, in order to ensure the full equality of stateless persons, States must take positive action to rectify the disadvantage they suffer by identifying the particular needs of the stateless population and taking measures to meet them.

4. Practical applications of the legal framework on equality

As indicated above, the legal framework on equality provides important protection both for the prevention of statelessness and against some of the impacts of statelessness. In this section, we look at the use of litigation and of international mechanisms as fora through which the legal framework on equality can be applied to protect stateless persons and even solve statelessness. These two examples are merely a snapshot of some of the possibilities, and should not be seen in isolation. Indeed, it is comprehensive and integrated strategies which attack the issue from many perspectives and using multiple frameworks that are most likely to succeed in bringing about change. So, for example, while advocacy for law and policy change, which is grounded in principles of equality and non-discrimination, or awareness raising and sensitisation to break down prejudices and

⁵⁸ A.H. Ilyas, “Estate Tamils of Sri Lanka a socio-economic review”, *International Journal of Sociology and Anthropology* 2014, vol 6(6), pp.184-191.

negative stereotypes are not addressed in this section, these are also important strategies which might be pursued.

4.1 Litigation

The courts are often a valuable tool in vindicating the equal rights of stateless people, including their right to a nationality. Since governments are often unwilling to engage with this issue, the courts are particularly important and there is much that can be done by lawyers adopting the equality framework in litigation. In addition to holding governments to account for their failure to uphold the rights of stateless people, courts can provide remedies to victims of discrimination. In some jurisdictions, the powers of courts are not insignificant. The Declaration of Principles on Equality requires that sanctions for breach of the right to equality be “effective, proportionate and dissuasive” (Principle 22). In numerous States, courts are able to award remedies not only to compensate the victim but also to address the systemic problem which may have contributed to the violation.⁵⁹

It is important to note, before extolling the virtues of the court as a tool for solving statelessness, that individual access to justice for the vindication of rights is a critical component of the State’s obligation to respect, protect and fulfil the rights to equality and non-discrimination of the individual. If, as is often the case, stateless people do not have recourse to the courts, either due to their own financial limitations, the lack of an adequate judicial system or even questions regarding their standing before the courts, it is clear that there will be difficulties in ensuring that this tool is available. In such situations lawyers might argue that unequal access to justice is itself a matter of unlawful discrimination against stateless people. The ICCPR obligation to protect equality before the law (Article 14) is an obligation to ensure access to justice for all people, including the stateless.

4.1.1. Using equality law to ensure socio-economic rights

While international human rights law protects the rights of all people to enjoyment of socio-economic rights through the International Covenant on Economic, Social and Cultural Rights, these rights have

⁵⁹ For a more in depth discussion see, Equal Rights Trust, *Economic and Social Rights in the Courtroom*, 2012, p. 94.

a few limitations. Of critical importance, while 164 States are party to the ICESCR and thus have agreed to be bound by its obligations, few States have enshrined the rights it contains within their constitutions or provided adequate protection in their national laws. This is in stark contrast to the widespread inclusion of the rights to non-discrimination and equality before the law in national constitutions and laws. Accordingly, the rights to equality and non-discrimination have an important role to play when litigating for the enjoyment of the socio-economic rights of stateless people. Understood to its fullest extent, the right to equality applies to all areas of activity regulated by law,⁶⁰ meaning that people have a right to equality in their enjoyment of health, education, housing, shelter, food and social security among other socio-economic rights.

As noted above, stateless people often struggle to access education on an equal basis with others, including due to difficulties in showing identity documents for enrolment. Since stateless people are disproportionately represented among the poor, they are likely to be unable to access adequate healthcare in States where only rudimentary emergency care is available for those without an income or where citizenship is a pre-requisite for free healthcare. It is also common for States to limit any State support for housing and other social security to citizens. But in all of these instances, there may be a discrimination claim under the relevant equality framework.

States often assume they are fully entitled to restrict the provision of socio-economic rights to their citizens. This is particularly common with respect to various forms of social security. However, there are limits to this discretion, depending in part on what treaties a State is party to. As the European Court of Human Rights' decision in *Andrejeva v. Latvia*, discussed above indicates, under certain circumstances it will only be possible for Parties to the ECHR to differentiate on the basis of citizenship with respect to benefit entitlement if there are "very weighty reasons" for doing so. In fact, the Equal Rights Trust has identified a large number of cases in which the rights to equality and non-discrimination have been applied by courts to ensure the rights of the most marginalised to key socio-economic provisions.⁶¹ Courts are increasingly willing to consider equality arguments when adjudicating

⁶⁰ Equal Rights Trust, Declaration of Principles on Equality, *supra* n4, Principle 8.

⁶¹ Equal Rights Trust, Economic and Social Rights in the Courtroom, 2014.

cases on matters of service provision, for example. In order for this to benefit stateless people, lawyers need to bring these arguments before the courts. Given the unequivocal relevance of discrimination to the lived experience of stateless persons, these may prove powerful arguments.

4.1.2. Promoting equality in statelessness determination

Stateless migrants often face complex and multiple forms of discrimination, both direct and indirect, in violation of State obligations under international (and often national) law. The obligation to protect stateless migrants from discrimination is impossible to achieve if States fail to identify stateless persons on their territory to begin with. Indeed, the UNHCR ‘Handbook on Protection of Stateless Persons’ clarifies that the State duty to identify stateless persons in their territory is implicit in the 1954 Convention if the State is to “provide them appropriate treatment in order to comply with their Convention commitments”.⁶²

The “hidden” nature of statelessness in migration contexts makes it easier to directly discriminate and more difficult to identify indirect discrimination against stateless persons. This discrimination plays out in all areas (education, access to livelihoods, etc.) but none more starkly and devastatingly than in the context of immigration detention. One of the paradoxes of the modern world is that as international travel and migration becomes more common, those who do not or cannot meet increasingly stringent entry and stay requirements are dealt with more harshly, often by detaining them while measures are taken to remove them to whence they came (or anywhere that will accept them). One of the implications of these inequalities is the growth of the immigration detention industry and with it the arbitrary and discriminatory detention of stateless persons.⁶³ As stated by the UN Special Rapporteur on the human rights of migrants:

The immigration detention of stateless persons is one of the silent tragedies of our globalised world that plays out behind closed doors, away from the gaze of the media, but

⁶² UNHCR, Handbook on Protection of Stateless Persons, 2014, para. 8.

⁶³ For more information on this area see, European Network on Statelessness, Protecting stateless persons from arbitrary detention: a regional toolkit for practitioners, 2015; and Equal Rights Trust, Guidelines to Protect Stateless Persons from Arbitrary detention, 2012.

with significant, irreparable human cost. It is a tragedy that is completely preventable, but due to a lack of will and attention, continues to harm thousands of lives all around the world every year.⁶⁴

As with many situations which can result in the denial of rights, if designed and implemented in the light of equality and non-discrimination-law, the immigration framework can be used to identify and protect stateless persons. Most countries do not have statelessness determination procedures in place and those that do, do not necessarily apply them to immigration detention contexts. Thus, there is an argument to be made for an equality obligation to identify stateless persons before a decision to detain is made. Indeed, this obligation could also be said to apply before a decision to deny equal access to other rights (livelihoods, etc.) is taken. This is because the principles of equality and non-discrimination oblige States to identify and address the characteristics of a person that set them apart from others to the extent that treating them the same way would actually be disadvantageous for them. Stateless people cannot be treated the same was as other irregular migrants, as stateless persons most often cannot be removed. Therefore statelessness must be identified when removal is contemplated and different measures adopted to protect them.

To the knowledge of the authors, there has been no litigation to-date to promote this position. i.e. litigation has not been used strategically to promote the position that access to statelessness determination procedures (where they already exist) must be widened to all those whose rights are being denied because they are (or might be) stateless. And litigation has definitely not been used to advocate for the establishment of statelessness determination procedures as a necessary step to protect stateless migrants from discrimination.

4.2. Using international mechanisms to address statelessness

International human rights mechanisms are also an important tool in the equality practitioner's arsenal. Here we look at both the (more

⁶⁴ F. Crépeau, UN Special Rapporteur on the human rights of migrants, in "Foreword", in European Network on Statelessness, Protecting stateless persons from arbitrary detention: a regional toolkit for practitioners, 2015.

traditional) international human rights mechanisms and the scope for using the new Sustainable Development Agenda to address inequalities and discrimination faced by stateless persons.

4.2.1. International human rights mechanisms

As stated above, the core international human rights treaties, all of which are relevant to statelessness contain strong prohibitions against discrimination. State compliance with each of these treaties is monitored by treaty bodies, which also hear individual complaints.⁶⁵ Through these mechanisms, activists and other actors can engage directly with the treaty bodies to raise issues faced by stateless people in the enjoyment of their rights. Engaging with these monitoring mechanisms provides an opportunity to put direct pressure on States, draw public attention to the issue of statelessness and address individual violations. The principles of equality and non-discrimination provide a strong framework through which the relevance of statelessness can be articulated to these mechanisms. There are a variety of different mechanisms and, while they are not all identical, there are similarities in the ways in which they may be engaged.⁶⁶

The Convention on the Rights of the Child (CRC) and its Committee are a case in point. The CRC has been ratified by all States except the United States of America. Compliance with its obligations is monitored by the Committee on the Rights of the Child. The Committee's monitoring mechanism is a strong forum through which to bring concerns relating to discriminatory causes of statelessness and indeed the inequalities faced by stateless children in relation to their enjoyment of other rights protected by the CRC.⁶⁷

⁶⁵ Individual complaints can only be heard in relation to States which have explicitly recognised the competence of the relevant Committee to hear such complaints.

⁶⁶ M. Khanna and P. Brett, "Making effective use of UN human rights mechanisms to solve statelessness", chapter 1 in this book.

⁶⁷ For a detailed analysis and overview of the jurisprudence of the Committee on the Rights of the Child and how practitioners can engage with it see, Institute on Statelessness and Inclusion, Addressing the right to a nationality through the Convention on the Rights of the Child: A Toolkit for Civil Society (CRC Toolkit), 2016, <http://www.statelessnessandhumanrights.org>.

Article 2 of the CRC, which is one of its Guiding Principles, prohibits all forms of discrimination against the child on the basis of the child's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. Importantly, it also obliges States to "ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's **parents, legal guardians, or family members**".⁶⁸ The scope of Article 2, in prohibiting discrimination but also protecting the child against discrimination on the basis of their carer's characteristics or actions makes it an extensive tool to address statelessness, particularly when combined with the principle that the best interests of the child should be a primary consideration in all decisions concerning the child (Article 3).⁶⁹

Article 7 of the CRC obliges States to ensure the child's right to birth registration, a name and to acquire a nationality. "States Parties shall ensure the implementation of these rights [...] in particular where the child would otherwise be stateless."⁷⁰ An analysis of recommendations made under CRC Article 7 by the Institute on Statelessness and Inclusion has shown that the Committee on the Rights of the Child has made recommendations on addressing gender discriminatory nationality laws; discrimination against children on the basis of their parents' legal or residence status; discrimination against the child on the basis of the child's religion, ethnicity, race, social origin, opinions or activities; and discrimination arising from lack of documentation.⁷¹

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is a detailed and widely ratified treaty with the aim of addressing discrimination against women. Accordingly, it is an important part of the equality framework. Furthermore, CEDAW prohibits discrimination against women in their ability to acquire, change, retain and confer their nationality (Article 9),

⁶⁸ CRC, *supra* n30 Art. 2(2) (emphasis added).

⁶⁹ According to the principle of the best interests of the child, the child's best interests must be assessed and taken into account as a primary consideration in all actions or decisions that concern him or her. The principle must be respected and implemented by States in legislative and administrative acts. For more on information, see, Institute on Statelessness and Inclusion, CRC Toolkit, *supra* n67, p. 9.

⁷⁰ CRC, *supra* n30, Art. 7(2).

⁷¹ Institute on Statelessness and Inclusion, CRC Toolkit, *supra* n67.

making it particularly relevant in addressing concerns regarding the discriminatory causes and consequences of statelessness. State compliance with CEDAW is monitored by the Committee on the Elimination of Discrimination against Women. NGOs can engage directly with the treaty bodies responsible for monitoring CRC and CEDAW by submitting alternative reports on States' implementation of the relevant Convention. These reports can be used to draw attention to discriminatory causes of statelessness and the discriminatory treatment of stateless persons who fall within the remit of each Convention, and secure relevant recommendations by the treaty bodies to States under review. Litigators who have represented stateless persons at the national level may also consider bringing individual complaints of discriminatory treatment to the treaty bodies.⁷² Other treaties including the Convention on the Rights of Persons with Disabilities, ICCPR and ICESCR are also relevant in this regard.

The final key international mechanism through which the inequalities of stateless persons can be raised is the Universal Periodic Review (UPR) – a Human Rights Council mechanism through which the human rights performance of every State is scrutinised by the international community in four and a half year cycles. The use of this mechanism, if coupled with sustained national level follow-up, can be a strong avenue for promoting and protecting the rights of stateless persons and raising awareness of their inequality.

As there is no single treaty against which States are scrutinised by this mechanism (all human rights obligations are considered relevant), the UPR process affords more flexibility and comprehensiveness than the treaty bodies. However, this can also mean that the information that is presented to the Human Rights Council and which forms the primary basis for recommendations that follow lacks focus. NGOs have a role to play in ensuring that strong evidence and information, which draws on the universally accepted norms of equality and non-discrimination, is submitted to the process.

The 23rd, 24th and 25th UPR Sessions (November 2015 – May 2016) in which over 40 States were reviewed saw over 110 recommendations

⁷² See, See, L. Bingham and L. Gamboa, "Litigating against statelessness", chapter 5 in this book.

related to statelessness or the right to a nationality being made.⁷³ Many of these recommendations related to discriminatory causes of statelessness and the inequalities endured by stateless persons. For example, Slovenia recommended that Myanmar “[r]epeal all discriminatory legal provisions such as granting citizenship on the basis of ethnicity or race and providing for different citizenship categories”⁷⁴ and Portugal recommended that Austria “[a]ddress the limitations for children born out of wedlock in accessing Austrian nationality and ensure non-discrimination”.⁷⁵

4.2.2. The international development framework

The Sustainable Development Goals (SDGs), which were adopted in September 2015 and which will enter into force in 2016, offer an extra-legal but nonetheless useful avenue to address discriminatory causes of statelessness and the inequalities faced by stateless persons.⁷⁶ In particular, Goal 10 aims to “reduce inequality within and among countries”. Under this heading Goal 10.2 sets the target “by 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status”, and Goal 10.3 is to “[e]nsure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard”.⁷⁷ These Goals cannot be achieved without using the equality framework, and indeed promoting the universal creation and implementation of equality legislation. In other words, they give impetus to the equality field and are a testament to the fact that development for all cannot be achieved unless it is underpinned by strong equality law. Therefore, equality and non-discrimination actors and statelessness actors alike have a role to play in ensuring that the stateless are not forgotten in the implementation of these goals.

⁷³ See, Institute on Statelessness and Inclusion, Human Rights Engagement, <http://www.institutesi.org/ourwork/humanrights.php>.

⁷⁴ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Myanmar, 20 November 2015, A/HRC/31/13, para. 145.58.

⁷⁵ UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Austria, 20 November 2015, A/HRC/31/12, para. 139.5.

⁷⁶ See, R. Govil, “The Sustainable Development Goals and solutions to statelessness”, chapter 2 in this book.

⁷⁷ For the full list of Sustainable Development Goals and related literature see, UN Department of Economic and Social Affairs, Sustainable Development Goals, <https://sustainabledevelopment.un.org/?menu=1300>.

Furthermore, Goal 16.9 commits States to “by 2030, provide legal identity for all, including birth registration”. This Goal cannot be achieved unless bad administrative practices, which are a discriminatory cause of statelessness, are addressed. The role of equality actors in challenging such discriminatory practices before the courts and advocating for their change is therefore extremely important.

The other aspect of the development agenda to consider is the various facets of life which are part of the agenda and which stateless people face tremendous inequalities and barriers to accessing. These include ending poverty in all its forms everywhere (Goal 1), ending hunger (Goal 2), ensuring healthy lives (Goal 3), ensuring inclusive and equitable quality education (Goal 4) and achieving gender equality (Goal 5) among others. The mantra of the SDGs that no one should be left behind obliges development actors to address the inequalities faced by stateless people or, at the very outset, accept failure. The SDGs are not justiciable, but the rights to equality and non-discrimination are. Challenging inequality in access to the benefits of development through the courts is thus one way in which the application of the equality framework can assist in achieving the SDGs. Indeed, it is only through a coming together of equality, statelessness and development actors that any real and sustainable progress is likely to be made in this regard.

5. Conclusion

This chapter has advocated for and given examples of the use of the equality framework as an important tool to promote solutions to statelessness. As has been shown, there are many avenues, fora and strategies that can be used within this general approach and a holistic approach to the equality framework is likely to be the most sustainable and successful. Such an approach would use the equality framework at all levels (local, national, regional and international) across all grounds (sex, race, socio-economic disadvantage, etc.) and in ways that influence other fields (such as development).

As an example, efforts in Nepal to challenge gender discriminatory nationality laws and secure citizenship for those negatively affected by the law have included widespread advocacy campaigns at the national level, underpinned by the principle of equality for all and successful litigation before the Supreme Court to challenge the discriminatory

non-provision of citizenship certificates to individuals.⁷⁸ At the international level, this work has been supported by the Global Campaign for Equal Nationality Rights and others, who have raised the issue in international fora and made equality and non-discrimination based submissions to the UPR and CRC.⁷⁹ There is also the possibility of bringing individual cases under CEDAW. While these efforts have not yet resulted in full legal reform, they have been partially successful (both in securing rights for individuals and in achieving partial legal reform). Furthermore, they have ensured that the issue remains on the table both nationally and internationally, building towards the possibility of more comprehensive reform in the future.

While it is important to look at the individual grounds of discrimination which cause statelessness (gender, race, etc.), it is equally important to take a more comprehensive “unified” approach which acknowledges the interactions between different grounds of discrimination and the impact of multiple forms of discrimination, and that addresses all forms of discrimination without prioritising one over the other.

Finally, it is worth reiterating that legal interventions alone will not end discrimination and inequality. Minds and attitudes must be engaged in longer-term efforts which challenge prejudice and encourage inclusion. Both encouragement and caution can be taken from the successes of other equality movements such as the civil rights movement in the United States, women’s rights movements across the world and, increasingly, the LGBTI movement. These struggles show us both how much has changed over time, and how much resistance there continues to be to change which requires people to recognise the inherent equality of all and the consequent duty to not discriminate and exclude.

⁷⁸ See, for example, Supreme Court of Nepal, *Forum for Protection of Public Interests v. HMG Nepal*, 2005; Supreme Court of Nepal, Writ no. 0035, *Ranjeet Thapa v. Government of Nepal*, 26 June 2009; Supreme Court of Nepal, Writ no. 0089, *Nakkile Maharjan v. Government of Nepal*, decision 2064/1/4; Supreme Court of Nepal, Writ no 06/0703, *Sabina Damai and FWLD v. Government of Nepal*, 27 February 2011; Supreme Court of Nepal, Writ No. 0880, *Shanti Nagarkoti and Bhola Nagarkoti v. Government of Nepal*, 24, March 2014; and Supreme Court of Nepal, Writ no. 34, *Lily Thapa v. Government of Nepal*, N.K.P. 2062, vol. 9, p. 1054, decision no.7588, 15 December 2005.

⁷⁹ See, for example, Nepal Civil Society Network of Citizenship Rights, the Global Campaign for Equal Nationality Rights and the Institute on Statelessness and Inclusion, Joint Submission to the Human Rights Council at the 23rd Session of the Universal Periodic Review Nepal, 2015.

5. Litigating against statelessness

Laura Bingham and Liliana Gamboa^{1*}

1. Introduction

The right to nationality has been described as a “right without a remedy”.² The act of litigating a violation of this right, then, in itself represents a leap of faith: it demonstrates a belief that a remedy can and will be crafted. In this chapter, we explore the achievements and limitations of using strategic litigation as a tool to address statelessness. We examine cases that tackle the problem of statelessness on many fronts: by constituency (childhood statelessness, women’s equality in nationality rights), through process-based arguments (status determination, failures of due process, lack of effective remedies), and through equality and equal protection arguments (appeals to universal human dignity, challenges to direct or indirect discrimination), to name a few.

In undertaking a broad survey of the field, we reflect on central challenges in combatting statelessness generally: its cascading effects in individual lives – although sometimes those impacted do not know they are stateless at all – and its multiplicity of causes. It may be said, indeed, that there is no single “remedy” to address violations of the right to nationality; in fact there must be many. These aspects of the problem of statelessness make the issue perpetually ripe for litigation. Here, we aim to show how litigation can and has been deployed as a means of achieving positive lasting changes.

¹ “The authors dedicate this chapter to Adam Hussein Adam whose unfaltering activism, deep sense of empathy and universally uplifting, positive spirit inspired a generation of advocates for equal nationality rights and the eradication of statelessness in his home country of Kenya and beyond.

² J.A. Goldston, “Holes in the Rights Framework: Racial Discrimination, Citizenship and the Rights of Non-Citizens”, *Ethics & International Affairs* 2006, Vol. 20(3), pp. 321-347, p. 339. Throughout this chapter, we make reference to Goldston’s 2006 article as a point of reference. The authors are staff members of the Open Society Justice Initiative, the organization that Goldston leads, which has developed extensive thematic programming on statelessness and the right to nationality in the intervening 10 years, including a strong emphasis on the use of strategic litigation as a tool to clarify and extend the right to nationality as a human right and operationalise its enjoyment in practice.

After defining the concept of strategic litigation for our purposes, we identify several tactical reasons why this advocacy tool can be effective in enhancing efforts to combat statelessness and protect the rights of stateless people. We go on to explore some of the significant achievements gained, in whole or in part, through recourse to courts and tribunals. Our study is not comprehensive, but instead provides a framework for taking stock of these gains. We identify four areas where litigation has advanced the cause of eliminating statelessness: (i) constraining State sovereignty over nationality matters; (ii) active engagement of key human rights norms and protections to lend content to the right to nationality; (iii) cementing advances in the political realm, including gains achieved through the elaboration of emerging norms in soft law; and (iv) consolidation and empowerment of wider collective efforts to address statelessness. We close with a section on the limitations of strategic litigation as an advocacy tool, and thoughts on future areas where strategic litigation could usefully be deployed in the global effort to end statelessness.

2. Definitions

2.1 *What is strategic litigation?*

We define strategic litigation as the engagement of judicial or quasi-judicial institutions in order to advance the pursuit of a wider social or political goal than may be achieved through resolution of the individual client's grievance.³ Strategic litigation is often described as a type of public interest litigation, its distinguishing feature being the identification of a specific goal or impact that the case itself will achieve.⁴ Strategic litigation can encompass, or be used alongside, many tools beyond courtroom advocacy, including policy advocacy, community mobilisation, media and public education campaigns.⁵ The desired impact will often therefore be but one step in a wider platform of advocacy for change.⁶

³ See, e.g., Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation*, 2016, pp. 10, 13-15; A. Coomber, "Strategically litigating equality – reflections on a changing jurisprudence", *European Anti-discrimination Law Review* 2012, Vol. 15, p. 11.

⁴ Coomber, *supra* n3, p. 11.

⁵ See, e.g., C.C. Barber, "Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organizations", *International Journal of Human Rights* 2012, Vol. 16, p. 411.

⁶ G.N. Rosenberg, in his seminal work on the role (and limitations) of courts in effecting social change, seeks to describe under what conditions litigation can

Cases may originate as “strategic” or, as has more often been the case in the field of statelessness, they may take on this character after arising as “ordinary” cases.⁷ A handful of examples within the statelessness field can be described as strategic “by design”, at least at the level of regional or international fora, which are our focus.⁸ In this chapter, we are less concerned with how the cases analysed here emerged, and more interested in identifying considerations for future engagement based on a broad examination of the role of litigation in furthering the goal of eliminating statelessness globally.

Statelessness as a social phenomenon is global, multi-causal, and intersectional in its effects on individuals and groups. These factors make the study of how strategic litigation can address statelessness unique and rewarding, but they also mean that the present examination cannot cover all potentially relevant cases, especially at the national level. We include some examination of specific national campaigns

“help bring about significant social reform”. The Hollow Hope, University of Chicago Press 2008 (2d ed.), p. 5 (emphasis added). The skepticism registered in Rosenberg’s study of strategic litigation within the civil rights movement’s desegregation campaign in the United States has influenced scholars and practitioners in defining and deploying litigation as a tool for social change, within and outside the United States. More recently, scholarly attention has focused on the interconnections between various sets of actors engaged in social reform movements, including lawyers. See, e.g., A. Sarat and S.A. Scheingold (eds), *Cause Lawyers and Social Movements*, Stanford University Press 2006.

⁷ A. Coomber, *supra* n3 (cases may be “conceived and constructed by human rights activists in an effort to address a specific problem” – often a resource-heavy approach – or “they can begin as ‘normal cases’ and be argued and pursued in a strategic manner”).

⁸ Examples include Inter-American Court of Human Rights (IACtHR), *Yean and Bosico Children v. the Dominican Republic*, Series C No. 130, Judgment of 8 September 2005, and cases brought on behalf of the Nubian Community in Kenya (African Commission on Human and Peoples’ Rights (ACmHPR), Communication No. 317/06 *Nubian Community in Kenya v. Kenya*, 25 February 2015, and African Committee of Experts on the Rights and Welfare of the Child (ACERWC), Communication No.002/2009, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v. Kenya*, 22 March 2011 (*Kenya Nubian Children case*). A number of important cases in the field may not be defined as “strategic” at all: European Court of Human Rights (ECtHR), Application No. 53124/09, *Genovese v. Malta*, 11 October 2011, for instance, or Court of Justice of the European Union (CJEU), case C-135/08, *Janko Rottmann v. Freistaat Bayern*, 2 March 2010.

that have been influential on the international stage or that bring out important lessons applicable across jurisdictions (including actions in Botswana, Chile, Serbia, Italy, and the Netherlands). Sampling from both international and national jurisdictions is important in our view, as it allows us to interrogate more fully the role of litigation in protecting the human rights of stateless persons. Indeed, it may be argued that domestic litigation is a more effective way of safeguarding the rights of migrants and stateless persons than litigation at the international or regional level.⁹

2.2 What can strategic litigation accomplish?

Litigation can raise expectations, spark indignation and hope, and stimulate a rights consciousness among movement constituents and supporters; it can help legitimize a movement's goals and values, publicize the movement's causes, and provide leverage in bargaining with powerful elites.¹⁰

The study of strategic litigation's impacts is a field unto itself. "Understanding how lawyers shape disputes, make strategic and tactical decisions, and influence the direction of change processes and outcomes has therefore reemerged as a central scholarly project".¹¹ Here, we identify three often-cited impacts that strategic litigation can have which have been or have the potential to be particularly prominent in litigation on statelessness. In the next section, we look more closely at the most significant achievements that specific cases or litigation campaigns have brought about in the field.

Humanise and define stateless persons as rights holders. Statelessness occupies an unhelpful place in the international legal canon from the perspective of those who seek to vindicate the rights of stateless people and other individuals whose right to nationality is under threat. Stateless people, like refugees, are conceptualised as a problem of international relations between States – as opposed to rights

⁹ See, e.g., R. Hansen, "The Poverty of Postnationalism: Citizenship, Immigration, and the New Europe", *Theory and Society* 2009, Vol. 38, pp. 5-7.

¹⁰ S.R. Levitsky, "To Lead with Law: Reassessing the Influence of Legal Advocacy Organizations in Social Movements", in A. Sarat and S.A. Scheingold (eds), *Cause Lawyers and Social Movements*, Stanford University Press 2006, p. 147.

¹¹ S. Cummings, "Empirical Studies of Law and Social Change: What is the Field? What are the Questions?" *Wisconsin Law Review* 2013, p. 175.

holders. Without a nationality, they are also non-citizens everywhere they go, resulting in a restricted existence, ostracism and further dehumanisation. Courts as sites of dispute resolution have the power to equalise parties, although this may not always play out in reality. In seeking justice as a litigant, an individual or group must be recognised as a subject of the law and so entitled to a hearing.¹²

Educate. Statelessness is a widespread phenomenon affecting many millions, yet few people know and understand what it is and have thought about how to solve it. Court cases have a natural storytelling component in their construction and execution, and especially so when cases are brought strategically to achieve a social justice aim. They are vehicles for explaining an issue through a human story.¹³ This storytelling quality of litigation as an advocacy tool is important for addressing statelessness, which is in many respects a technical problem that has, to date, been of interest to a very specialised field of actors.¹⁴ Cases that can show the human impact of seemingly benign technical problems serve a key function in expanding that set of actors who see the harm and wish to address it.

Sound a call to action. Victory – perhaps especially in a novel case where it is least expected¹⁵ – can energise a wide set of actors (not just lawyers) to engage on an issue.¹⁶ In some contexts, active

¹² See, e.g., A. Dolidze, “Lampedusa and Beyond: Recognition, Implementation and Justiciability of Stateless Persons’ Rights under International Law” *Interdisciplinary Journal of Human Rights Law* 2012, Vol. 6, pp. 135-136 (reviewing European Court of Human Rights jurisprudence on access to rights: “the stateless have vindicated a wide array of rights, including the right to receive social security benefits, the right to physical security, and the freedom of movement”).

¹³ See, e.g., M.J. Klarman, *From Jim Crow to Civil Rights: the Supreme Court and the Struggle for Racial Equality*, Oxford University Press 2004 (noting litigation’s potential to inspire and to educate in spite of overall pessimism); Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation*, *supra* n2, p. 18. (“Success in court can lead to greater rights awareness, which in turn spurs further litigation.”)

¹⁴ See, L.N. Kingston, ‘A Forgotten Human Rights Crisis’: Statelessness and Issue (Non)Emergence”, *Human Rights Review* 2013, Vol. 14(2).

¹⁵ See A. Weiss, What is Strategic Litigation? *European Roma Rights Centre Blog*, 6 January 2015, <http://www.errc.org/blog/what-is-strategic-litigation/62>.

¹⁶ S.A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change*, Yale University Press 1974 (litigation can catalyse political mobilisation, create collective identities and help shift prevailing balance of power); Open Society Justice Initiative, *Strategic Litigation Impacts: Roma*

litigation, even prior to a final decision or judgment, can serve as a sustained organising mechanism for campaigns or a repeat catalyst for mobilisation as the case progresses. In litigation on nationality issues, however, cases are generally not well publicised before or after the judgment, and, as explored in more detail later, public and civil society engagement on the issue of statelessness has not, as yet, inspired a broad-based social movement pressing for change.¹⁷ There are important exceptions, some of them to be explored in more depth here; in some cases resort to judicial remedies can – and must – be understood as part of a wider campaign for social change in the field of nationality. We consider this broader context especially relevant in addressing statelessness for two reasons. First, the field of actors focusing on statelessness is continuing to grow, with organised, motivated networks beginning to coalesce and professionalise. This is in turn generating new audiences and spaces which future decisions could help animate. Second, “statelessness cases” frequently resonate within other movements, inspiring new allies to take up the cause.¹⁸

3. Achievements

3.1 Introduction

[C]ombating citizenship deprivation and denial requires the clarification and articulation of new legal norms that make clear the boundaries of state prerogative. Eventually, international law must not simply set forth the individual right to a nationality: it must specify states’ obligations to provide it. Over time, the broad discretion that states enjoy over citizenship questions must be narrowed by the incorporation of human rights concerns, including the prohibition against racial discrimination, into international legal rules on citizenship. The resulting new or modified norms should be rooted firmly in the evolving body of

School Desegregation, *supra* n3, p. 18. (“At its most successful, strategic litigation is part of an ongoing cycle in which successful litigation leads to a judgment and the execution of the judgment, which can further galvanize and mobilize the effected group or individual”)

¹⁷ Exceptions certainly exist, in which considerable attention has been focused on statelessness cases. These include cases in the Dominican Republic and Inter-American system addressing discriminatory deprivation of nationality from Dominicans of Haitian descent, and challenges to the use of citizenship-stripping as a counter-terrorism measure in the UK.

¹⁸ A prime example is the *Unity Dow* case (n37), discussed further below.

international human rights law giving primacy to the principle of human dignity.¹⁹

In this section we identify the most direct impacts of litigation in addressing statelessness so far. It is not within the scope of this chapter to explore in detail the impact that individual cases and their reasoning have had on all of the practices challenged. We believe this topic would however be suitable for a more comprehensive impact study in the future.

3.2 Constraining State sovereignty over nationality matters

Litigation has helped to define a contemporary right to nationality and the obligation to avoid arbitrary deprivation of nationality, building on Article 15 of the Universal Declaration of Human Rights.²⁰ This has involved the progressive development of the right to nationality, rather than a simple effort to enforce Article 15 and the international human rights treaties that took up its mantle through provisions protecting the right to nationality.²¹ Article 15 could not do enough by itself (recall the characterisation of the right to nationality as a “right without a remedy”) and the United Nations Statelessness Conventions were not conceptualised as human rights instruments²² making it harder for lawyers to invoke their protections in order to vindicate individual rights in court. Litigation has been used, successfully, to

¹⁹ Goldston, *supra* n2, p. 341.

²⁰ E.H. Ballin, *Citizens' Rights and the Right to be a Citizen*, Martinus Nijhoff 2014, p. 90. (“A number of decisions by international courts indicate that the denial of nationality constitutes a violation of human rights.”)

²¹ See, e.g., International Covenant on Civil and Political Rights, 16 December 1966, entry into force 23 March 1976, 999 UNTS 171 (Art. 24), International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, entry into force 4 January 1969, 660 UNTS 195 (Art. 5), Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, entry into force 3 September 1981, 1249 UNTS 13 (Art. 9), Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3 (Arts. 7 and 8), International Convention on the Protection of Migrant Workers and Their Families, 18 December 1990, entry into force 1 July 2002, A/RES/45/158 (Art. 29), and Convention of the Rights of Persons with Disabilities, 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3 (Art. 18).

²² S. Mantu, *Contingent Citizenship: The Law and Practice of Citizenship Deprivation in International, European and National Perspectives*, Brill – Nijhoff 2015, pp. 46-47.

help bring nationality matters within the realm of human rights protections, establishing the stateless person as a rights holder rather than a legal object. Simultaneously, litigation – and in particular in this case litigation at the international level – has been an important tool in deconstructing earlier notions of impenetrable State sovereignty over nationality, making space for universal human rights as an area of law that constrains State discretion in meaningful ways. Judgments and decisions have set down important markers: authoritative statements on the progressive development of international law.²³

As others, including Laura van Waas, have observed, we have “come a long way” since the Permanent Court of International Justice’s 1923 opinion in the *Tunis and Morocco Nationality Decrees* case, which was the first to articulate a notion of qualified sovereignty when the State’s prerogatives in setting nationality rules conflict with international human rights standards.²⁴ The strongest and most often cited opinion embracing this view is the Inter-American Court of Human Rights (IACtHR)’s 2005 decision in the *Yean and Bosico v. Dominican Republic* case (the Court first adopted similar language in its 1984 advisory opinion on amendments to the naturalisation provisions of Costa Rica’s Constitution).²⁵

Part of the process of evolving constraints has involved the incorporation of the right to nationality within the human rights instruments animating regional systems in Africa and Europe. In Africa, since 2000, the African Commission on Human and Peoples’ Rights has developed a line of jurisprudence reading the right to nationality into Article 5 of

²³ Goldston, *supra* n2, p. 341.

²⁴ L. van Waas, “Fighting Statelessness and Discriminatory Nationality Laws in Europe”, *European Journal of Migration and Law* 2012, Vol. 14, p. 243. See also, M. Khanna and P. Brett, “Making effective use of UN human rights mechanisms to solve statelessness”, chapter 1 in this book.

²⁵ IACtHR, Advisory Opinion OC-4/84, *Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, 29 January 1984. (“Despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits 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 within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights”)

the African Charter on Human and Peoples' Rights.²⁶ These cases are now complemented by the work of the African Committee of Experts on the Rights and Welfare of the Child, which has developed its own case-law and a General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, which is a dedicated provision protecting children's right to nationality in Africa.²⁷ The European Convention on Human Rights (ECHR) does not contain an express "right to nationality" in its text, but the European Court of Human Rights (ECtHR) has taken up nationality cases under other Articles, most prominently Article 8, which protects an individual's private life, including individual identity, dignity and personal autonomy.²⁸ The Court of Justice of the European Union has also pronounced that Member States rules on acquisition and loss of nationality fall within the scope of EU law and that deprivation of nationality may trigger a proportionality review where loss of EU citizenship results.²⁹

As we highlight throughout this chapter, very often individuals never receive a formal communication from relevant State authorities denying or depriving them of nationality. In considering cases courts have helpfully eschewed formalism, examining State action as a mixed question of law and fact.³⁰ Because of the courts' capacity and willingness to look behind written law in a given case – to develop a factual record on the operation of nationality laws in practice – decisions have (and, we hope, will continue to) close loopholes which enable individuals to be denied or deprived of their nationality.

²⁶ See also, ACERWC, *Kenyan Nubian Children case*, *supra* n8.

²⁷ See, B. Manby with A. Getachew and J. Sloth-Nielsen, "The right to nationality in Africa: New norms and new commitments", chapter 9 in this book.

²⁸ ECtHR, Application No. 55707/00, *Andrejeva v Latvia*, 18 February 2009, ECtHR; Application No. 26828/06, *Kurić and others v. Slovenia*, 26 June 2012; ECtHR, Application No. 53124/09, *Genovese v. Malta*, 11 October 2011; and ECtHR, Application No. 65192/11, *Mennesson v. France*, 26 June 2014. See L. van Waas, *supra* n24, p. 243-260.

²⁹ CJEU, Case C-135/08, *Rottmann v. Freistaat Bayern*, 2 March 2010; J. Shaw, et al., Has the European Court of Justice challenged member state sovereignty in nationality law?, EUI Working Paper Series 2012; L. van Waas, *supra* n24, p 243. See also, K. Swider, G. Bittoni and L. van Waas, "The evolving role of the European Union in addressing statelessness", chapter 13 in this book.

³⁰ UN High Commissioner for Refugees (UNHCR), Handbook on Protection of Stateless Persons, 2014, para. 23.

3.3 Mobilising existing human rights protections

With the recognition that due regard must be paid to human rights standards in the design and administration of nationality rules, litigation has also harnessed existing universal rights protections to constrain bad behaviour and address historical injustices. Here we highlight three rights frameworks that have dominated efforts to build content and close loopholes in protection: human dignity, equality and procedural fairness.

3.3.1 Human dignity

The duty to recognise the common humanity and inherent dignity of all is fundamental to the human rights movement, but divisions between citizens and non-citizens obscure shared experiences and the citizen/non-citizen divide has repeatedly served as justification for violations of human rights.³¹ Strategic litigation has lent force – in the form of positive jurisprudence – to the demand that universal human rights must prevail: that regardless of an individual’s legal status or lack thereof, his or her fundamental personhood must be recognised and respected.³²

In *Yean and Bosico v. Dominican Republic*, the Inter-American Court of Human Rights reflected, in an often-cited passage, on the meaning of human dignity in the context of statelessness; for a stateless individual, “the failure to recognize juridical personality harms human

³¹ Goldston, *supra* n2, p. 324 (“At a conceptual level, citizenship’s very contribution to cohesion for those who belong to a political community may simultaneously engender division and even hostility toward those left outside. The normal empathy that human suffering engenders can be diminished when the victims at issue are noncitizens. Governments often manipulate citizenship access and mistreat noncitizens without incurring political costs from other states or their own citizens. As a result, citizenship creates a giant loophole in the international human rights framework.”) See also, e.g., Human Rights Watch, *All You Can Do Is Pray: Crimes Against Humanity and Ethnic Cleansing of Rohingya Muslims in Burma’s Arakan State*, 2013, p. 109; ACmHPR, Communication No. 318/06, *Open Society Justice Initiative v. Côte d’Ivoire*, 25 February 2015.

³² R.E. Howard-Hassmann and M. Walton-Roberts (eds), *The Human Right to Citizenship: A Slippery Concept*, University of Pennsylvania Press 2015, p. 2. (Article 16 International Covenant on Civil and Political Rights: “every state has to recognize the personhood of every individual, even if she is a noncitizen or stateless”.)

dignity, because it denies absolutely an individual's condition of being a subject of rights and renders him vulnerable to non-observance of his rights by the State or other individuals".³³ The close connection between the principle of human dignity and juridical personality also provided a natural opening for including nationality within the bundle of rights protected under Article 8 of the European Convention on Human Rights. In a separate opinion in *Kuric and others v. Slovenia*, Judge Vučinić elaborated on this link:

[T]he right to legal personality is a normal, natural and logical consequence of human personality and inherent human dignity; it is a natural and inherent part of every human being and his or her human personality. The broad, non-exhaustive and flexible nature of Article 8 of the Convention obviously means that this right is included within its comprehensive ambit. This right is tacitly, but very clearly, included and deeply rooted in the concept of individual personality and inherent human dignity embraced by Article 8 of the Convention.³⁴

Both passages were cited by the African Commission on Human and Peoples' Rights in a recent judgment in the case of *Open Society Justice Initiative v. Côte d'Ivoire*, where the Commission concluded that the "failure to grant nationality as a legal recognition is an injurious infringement of human dignity".³⁵

3.3.2 Equality

Nationality laws perforce make distinctions between groups, establishing a system of differential treatment that is certain to have profound impacts upon fundamental rights. The risk, again, is that these categorisations – including between citizen and non-citizen – can too easily be proxies for invidious discrimination based on personal or group characteristics like ethnicity, religion or class.³⁶ Nationality

³³ IAcHR, *Yean and Bosico v. the Dominican Republic*, *supra* n8, para. 179.

³⁴ ECtHR, *Kurić and others v. Slovenia*, *supra* n28, Grand Chamber Judgment, 26 June 2012, Partly Concurring, Partly Dissenting Opinion of Judge Vučinić See also, K. Swider, G. Bittoni and L. van Waas, "The evolving role of the European Union in addressing statelessness", chapter 13 in this book.

³⁵ ACmHPR, *Open Society Justice Initiative v. Côte d'Ivoire*, *supra* n31.

³⁶ Goldston, *supra* n2, p. 330. (EU Race Equality Directive exemption for unfavorable treatment of non-citizens: employer can refuse to hire African-

laws can also more overtly reproduce forms of discrimination within a society, such as openly discriminatory laws based on disability, sexual orientation, gender and birth out of wedlock. Litigation has played an important role in highlighting the discriminatory nature of such provisions, however it is manifested.

In 1991, the High Court of Botswana considered whether the Citizenship Act of 1984, which barred Botswanan women married to foreign spouses from passing nationality to their children, violated the Constitution. The Constitution's equal protection guarantee did not explicitly extend to sex-based discrimination, but the High Court held that the prohibition was implicit in "the great purpose" of the Constitution,³⁷ and struck down the relevant provisions of the Citizenship Act. Both the High Court and the affirming Court of Appeal referenced international instruments including the Organisation of African Unity Convention on Non-Discrimination, the Universal Declaration of Human Rights and the UN Convention on the Elimination of All Forms of Discrimination against Women.³⁸ Law reform followed, though not immediately, in 1995, and Unity Dow became the first female High Court judge and continues to work as an activist, independent expert and politician to advance equal rights for women. The European Court of Human Rights also more recently found a violation of Article 14 of the ECHR (prohibition on discrimination) in the application of a Maltese law that directly discriminated against children born out of wedlock in the acquisition of Maltese citizenship.³⁹

Litigation has also led regional tribunals to confront the use of nationality regimes as "a tool for restricting the full enjoyment of citizens' rights to those who possess the privileged national identity".⁴⁰ Courts and quasi-judicial institutions are uniquely positioned to scrutinise the construction and practical application of nationality laws for evidence of discriminatory intent or effect. In the African system, both the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child

born applicant, otherwise qualified, on account of citizenship status.)

³⁷ High Court of Botswana, *Unity Dow v. Attorney General*, MISCA. 124/90, Judgment of June 1991, reprinted in Human Rights Quarterly 1991, Vol. 13, pp. 614-626.

³⁸ *Ibid.* See also, J.E. Bond, CEDAW in Sub-Saharan Africa: Lessons in Implementation, Michigan State Law Review 2014, Vol. 2014(2), pp. 248-249.

³⁹ ECtHR, *Genovese v. Malta*, *supra* n28.

⁴⁰ Ballin, *supra* n20.

have examined, for example, the operation of Kenyan nationality and registration laws in the case of Kenyan Nubians, who suffer systemic discrimination in access to documentary proof of their Kenyan nationality. In both cases, the discriminatory nature and operation of Kenyan law – in this case on the basis of ethnicity – was documented, explained and denounced.⁴¹

In a very recent judgment, the Grand Chamber of the European Court of Human Rights held that family reunification rules in Denmark indirectly discriminate against Danish citizens of non-Danish ethnic background, by differential application of an additional “attachment requirement” to couples seeking residence rights for a foreign spouse where the Danish spouse had been a citizen for less than 28 years.⁴² The Danish Supreme Court ignored the ethnicity-based component, analysing the difference in treatment “solely on the length of citizenship” based on the ground of “other status” under Article 14 of the ECHR.⁴³ Because the ECtHR recognized that the 28-year rule resulted in ethnicity-based discrimination, it required very weighty reasons to justify the measure, which the government could not meet, resulting in a violation of the ECHR. The ECtHR’s decision is promising for having identified a trend in Europe toward an equal standard of treatment between nationals by birth and other nationals. “In the field of indirect discrimination between a State’s own nationals based on ethnic origin, it is very difficult to reconcile the grant of special treatment with the current international standards and developments.”⁴⁴

3.3.3 Fairness and due process

Process-based norms have also proven important in making the right to nationality accessible and meaningful. Many of the cases already mentioned, including notably *Yean and Bosico v. Dominican Republic*, *The Nubian Community in Kenya v. Kenya* and *Open Society*

⁴¹ See, e.g., ACERWC, *Kenyan Nubian Children case*, *supra* n8; Open Society Justice Initiative and Institute for Human Rights and Development in Africa, Communication on the Merits in *Nubian Community in Kenya v. Kenya*, 2010; see also ACmHPR, *Nubian Community in Kenya v. Kenya*, *supra* n8, paras. 151 and 171.

⁴² ECtHR, Application no. 38590/10, *Biao v. Denmark*, Grand Chamber Judgment of 24 May 2016.

⁴³ *Ibid.*, para. 130.

⁴⁴ *Ibid.*, para. 131.

Justice Initiative v. Cote d'Ivoire included important discussions of failures of due process and arbitrariness in the practice of nationality determinations. Such violations are often intertwined with the presence of discriminatory treatment against a particular group.

In other cases, the lack of fairness and flexibility in administrative processes stand out as the crux of the problem. One such case involves the Dutch registration system, in which a child's nationality is a mandatory entry, but authorities make liberal use of the category "nationality unknown", which presents a host of problems for children who might otherwise benefit from safeguards against childhood statelessness. In pursuit of a correction in the registration record, the case of a child born in the Netherlands to undocumented migrants of Chinese origin went to the Dutch Council of State, which issued a ruling calling for the legislature to address the lack of a statelessness status determination procedure which would properly consider whether the applicant should receive protection as a stateless child.⁴⁵ This should pave the way for certain reforms in the Netherlands.

Another success story involves a push in Italy for effective and accessible procedures concerning children's right to nationality. Italian law permits children born in Italy to foreign parents to opt for Italian citizenship at age 18, but the application must be made within one year. The case of *Iseni v. Ministry of Interior*⁴⁶ involved a child born in Italy to parents from the former Yugoslavia. The child grew up in foster care and was hearing and speech impaired. His Italian caretakers never informed him of the possibility of acquiring Italian citizenship, although he had not acquired any other nationality through his parents.⁴⁷ Ultimately, Italian courts declared Iseni stateless, granted him Italian citizenship as a child born stateless on Italian territory and extended social benefits retroactively. It remains to be seen whether these individual victories will have wider legal impacts.

⁴⁵ Netherlands Council of State (Administrative Law Division), *X.J. Zhao v. Executive of the Municipality of Utrecht*, Judgment of 21 May 2014 [English trans.], para. 4.4.

⁴⁶ Civil Court of Rome, First Chamber, Judgment no. 17585/2015, *Iseni v. Ministry of Interior*, 2 February 2015.

⁴⁷ See, Open Society Justice Initiative, *Iseni v. Italian Ministry of the Interior*, 2011.

3.4 Operationalising international commitments and soft law

Strategic litigation has also helped to cement and deepen gains made at the level of soft law and regional or international commitments. The use of strategic litigation will be important in following up on campaigns focused on accession to the U.N. Statelessness Conventions and adoption of new regional instruments such as the 'Brazil Declaration and Plan of Action' in the Americas and the campaign for a Protocol on the Right to Nationality within the African Union.

3.4.1 Children's rights

While much may be said of the role of litigation in advancing children's right to nationality, we begin by highlighting the complementarity between strong international safeguards in the field of childhood statelessness and the case-law from human rights bodies tasked with enforcing two of the strongest provisions within this sphere: namely Article 6 of the African Charter on the Rights and Welfare of the Child and Article 20 of the American Convention on Human Rights. In *Institute for Human Rights and Development in Africa v. Kenya*, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) elaborated the content of Article 6 in its first-ever decision on an individual communication, with an expressly "purposive" interpretation.⁴⁸ Purposive interpretation is a method of textual interpretation that resolves uncertainty in the meaning of legal provisions by reference to the purpose of the relevant instrument as a whole. In the case of the Nubian decision by the ACERWC, for example, its purposive approach led to the conclusion that Article 6 requires States to ensure that every child has a nationality *when he or she is born* – not later on in life; the text of Article 6 could be read to support either interpretation.⁴⁹ The decision was then folded into a General Comment on Article 6 of the Charter,⁵⁰ further clarifying State obligations with respect to children's right to nationality.

The Inter-American Court of Human Rights has also devoted itself to the careful stewardship of Article 20 of the American Convention

⁴⁸ ACERWC, *Kenyan Nubian Childrens case*, *supra* n8, para. 42

⁴⁹ *Ibid.*

⁵⁰ ACERWC, General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child: 'Right to Birth Registration, Name and Nationality', April 2014.

on Human Rights, including in the *Case of Expelled Dominicans and Haitians v. Dominican Republic*, which, like *Yean and Bosico* discussed above, addressed in part the systematic discriminatory treatment of Dominican nationals of Haitian descent in access to Dominican nationality. Importantly, the IACtHR specifically rebutted the assertion that the burden of proof lies with the individual in order to access safeguards against childhood statelessness:

[I]f a State cannot be certain that a child born in its territory can obtain the nationality of another State, for example the nationality of a parent by *ius sanguinis*, that State has the obligation to grant it nationality (*ex lege*, automatically), to avoid a situation of statelessness at birth, pursuant to Article 20(2) of the American Convention. This obligation applies in the hypothesis that the parents cannot (owing to the existence of *facto* obstacles) register their children in the State of their nationality.⁵¹

In reaching this conclusion, the Court relied upon the UNHCR 'Handbook on Protection of Stateless Persons', which provides critical guidance on the interpretation and application of rules for determination of statelessness status.

A cluster of cases also focuses on the importance of birth registration, not only as a safeguard against statelessness, but also as a key State duty and a necessary step to ensure that children are able to enjoy juridical personality and receive State protection and access to rights from birth. In Serbia, a recent *actio popularis* case challenged the discriminatory denial of birth registration to Roma children.⁵² Two migrants rights university clinics in Chile have also filed Supreme

⁵¹ IACtHR, *Case of Expelled Dominicans and Haitians v. Dominican Republic (Preliminary Objections, Merits, Reparations and Costs)*, Series C No. 282, Judgement of 28 August 2014, para. 261 (citing 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, 2012, paras. 26 and 27).

⁵² See, Praxis, Praxis and ERRC, with the Support of ENS, Submitted the Initiative for Initiation of the Procedure for Assessing the Constitutionality and Legality of the Law on Registry Books, Praxis Watch, 7 March 2016, <http://praxis.org.rs/index.php/en/praxis-watch/item/1070-roma-in-serbia-still-denied-birth-certificates---human-rights-organisations-take-legal-action-to-challenge-register-offices'-unlimited-power>.

Court challenges on behalf of more than 100 children born in Chile to migrant parents (and entitled to Chilean nationality by law), who are unable to register as Chilean.⁵³ The Supreme Court challenges led to a mediated process for the named plaintiffs and forms part of a wider campaign to ensure that Chile's *jus soli* provisions are fairly implemented throughout the country and particularly in the case of indigenous groups and children born to migrant parents. These and similar cases⁵⁴ focusing on access to registration and documentation of identity for children at risk of statelessness will be an important mechanism for ensuring that current international attention to registration, identification and vital statistics – from the Sustainable Development Goals to regional civil registration and vital statistics ministerial processes – includes these vulnerable groups in the design and rollout of implementation frameworks.⁵⁵

3.4.2 Definition of “stateless person”

Another area where UNHCR's guidance on the protection of stateless persons under the 1954 Convention relating to the Status of Stateless Persons has played a decisive role is in the application of the definition of a “stateless person” in the field of deprivation of nationality. The issue has arisen before the Supreme Court of the United Kingdom. In *Al Jedda*, the Supreme Court relied on UNHCR guidelines (now incorporated into the ‘Handbook on Protection of Stateless Persons’) to reject the Home Secretary's argument that a deprivation order would not result in statelessness if the person concerned *could theoretically* acquire another nationality. The case might otherwise have set a dangerous precedent, given that many States rely on theoretical claims to an

⁵³ See, C.F. Maureira, V.H. Lagos, D. Lawson and M. Rodríguez, 3.000 niños esperando su nacionalidad. La necesidad de contar con remedios colectivos para resolver vulneraciones individuales de derechos, in *Anuario de Derecho Público*, Universidad Diego Portales Centro de Derechos Humanos, Comunicado de Prensa, 11 November 2015, <http://www.derechoshumanos.udp.cl/derechoshumanos/index.php/section-table/item/215-presentan-recurso-de-reclamacion-de-nacionalidad-para-161-ninos-nacidos-en-chile>.

⁵⁴ See, e.g., ECtHR, *Mennesson v. France*, *supra* n28, 26 June 2014 (violation of right to private life (ECHR Article 8) in case of non-recognition of parent-child relationship under French law where child born through surrogacy, as an unjustified interference with child's right to “establish the substance of his or her identity”).

⁵⁵ See, K. Swider, G. Bittoni and L. van Waas, “The evolving role of the European Union in addressing statelessness”, chapter 13 in this book.

alternative nationality in order to withhold or deprive individuals of nationality, often resulting in statelessness.⁵⁶

3.5 Empowerment

As is the case in other spheres, strategic litigation in nationality matters can produce positive effects outside the legal sphere, even when the case itself is not successful.⁵⁷ Within affected communities in the Dominican Republic, for example, litigation to vindicate nationality rights and challenge discriminatory practices in the field has provided a framework for documenting grievances and asserting rights, engaging with the international community, and organising and mobilising as community.

Deprivation of nationality in the Dominican context, as in others, disenfranchised the affected communities, foreclosing direct avenues of political leverage to push the government to remedy its bad practices. In the Dominican Republic, with the *Yean and Bosico* case, for the first time, Dominicans of Haitian descent, a community which had suffered racial discrimination for generations, sat across the table from the government as equal parties. Litigation, in this case within the Inter-American human rights system and culminating with the IACtHR's 2005 decision, provided community activists with language and the tools to go about shifting a grossly disparate balance of political power. These same activists took the decision back to the national level as a rallying point and symbol of their progress. Bridget Wooding called the *Yean and Bosico* decision a "tipping point [...] insofar as Dominico-Haitians have now emerged from the shadows to become part of the political landscape, irrespective of their legal status".⁵⁸

As we know, the process of movement organising may take many different forms. In the case of the Dominican Republic one may

⁵⁶ See, Open Society Justice Initiative, UK Proposal Threatens to Undermine Global Fight against Statelessness, Press Release, 11 March 2014, <https://www.opensocietyfoundations.org/press-releases/uk-proposal-threatens-undermine-global-fight-against-statelessness>.

⁵⁷ See, e.g., D. Nejaime, "Winning through Losing", *Iowa Law Review* 2011, Vol. 96, p. 941.

⁵⁸ See, e.g., B. Wooding, "Like pigs in mud: new challenges faced by civil society in the response to discrimination and statelessness in the Dominican Republic", *The Centre For Studies In Social Justice*, University of Windsor.

argue that, in fact, litigation and the IACtHR's decision have been the driving force necessary for mobilisation on the issue of statelessness. Unfortunately, most of the academic analysis on the impact of the *Yean and Bosico* case has focused on the State's compliance with the ruling as the only measurement of its impact. This perspective has failed to recognise that it is the ruling itself that engendered a movement and caused it to be recognised nationally and internationally, including access to critical financial support that in turn resulted in a more comprehensive strategy for change.

Following the IACtHR's decision, activists built a coalition spanning national and international spheres, embedding the issue of statelessness within the human rights agenda in the Dominican Republic. Indeed,

statelessness and migrant rights would supersede contemporary slavery as the dominant issue through which international human rights organizations were to frame strategy in favor of Haitian descendants' rights, thus broadening the spectrum of rights claimants accorded international visibility.⁵⁹

In 2013, in a stinging turn, the Dominican Constitutional Tribunal denationalised Dominicans of Haitian descent going back generations, to 1929. The ruling was devastating to the movement for equal nationality rights, but in the aftermath affected individuals were there at the forefront of the issue; President Danilo Medina himself met several affected individuals to better understand the situation.⁶⁰ This was a great advantage in negotiation and advocacy, and even empowering for the affected individuals, such as Juliana Deguis, a plaintiff who received worldwide recognition for her plight and the fight to win equal access to nationality for individuals of Haitian descent in the Dominican

⁵⁹ S. Martinez, *Yean and Bosico, Ten Years After: Claiming rights for Haitian descendants in the Dominican Republic*, Oral Presentation, Caribbean Studies Association Annual Conference, 26 May 2015, New Orleans, Louisiana.

⁶⁰ See, e.g., *Presidente Medina se disculpa a nombre de la República con afectados de Sentencia TC*, 24horas.com.do, 8 October 2013, <http://www.24horas.com.do/Articulo/10855/Presidente-Medina-se-disculpa-a-nombre-de-la-Republica-con-afectados-de-Sentencia-TC>. See also, S. Reynoso, *Presidente Medina se reúne con representantes de desnacionalizados*, 7dias.com.do, 7 October 2013, http://www.7dias.com.do/portada/2013/10/07/i149425_presidente-medina-reune-con-representantes-desnacionalizados.html#.V-6ulE0rLIU.

Republic. The fact that the *Juliana Deguis* ruling rejected the IACtHR's binding decision in *Yean and Bosico* helped attract support from actors engaged in a wider field of rule of law promotion who were previously unconnected to the specific issue of statelessness and deprivation of nationality. Thus, even a devastating ruling had some level of positive impact. States understand this, and will frequently move to settle cases rather than wait for any public ruling, positive or negative.

The high level of State control over the complex processes that are critical to documenting and establishing nationality is a vector of disempowerment within many societies. Individuals exposed to arbitrariness may not perceive the experience as a violation, but instead as a personal bureaucratic problem, so individuals do not feel that they are part of an affected collective. Litigation opens up the space to build a record of structural harm. In the case of the Dominican Republic, for example, the government repeatedly denied discriminatory practices against Dominicans of Haitian descent.⁶¹ However, the deeply problematic ruling in the 2013 *Juliana Deguis* case left the executive no other option but to acknowledge and address a history of intentional, systemic discrimination against Dominicans of Haitian descent in respect of their access to Dominican nationality.⁶² In 2014, the Dominican government passed legislation that attempted to remedy the impact of the ruling.⁶³ Although the law and its implementation in practice have failed thus far to fully remedy

⁶¹ UN Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia, and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall: Mission to the Dominican Republic, UN Doc. A/HRC/7/19/Add.5, A/HRC/7/23/Add.3, par. 88 page 24, March 18, 2008.

⁶² Inter-American Commission of Human Rights, Report on the Situation of Human Rights in the Dominican Republic, Country Report: Dominican Republic, 31 December 2015, OEA/Ser.L/V/II. Doc. 45/15, para. 76 page 45, Chapter 2, 31 December 2015. The Commission found that: "[t]his practice has gradually expanded to the point that it has now been adopted into various measures, laws, and judicial decisions taken by the other branches of the Dominican State. Within this context, the Constitutional Court's judgment TC/0168/13 of September 23, 2013, represented one more stage in a denationalization process underway in the Dominican Republic, in order to "protect its national identity" by arbitrarily and retroactively stripping Dominicans born to parents in an irregular migratory situation of their right to Dominican nationality, particularly in the case of those of Haitian descent".

⁶³ Ley de Régimen Especial y Naturalización 169-14, 2014 (Dominican Republic).

the damaging consequences of the *Juliana Deguis* ruling,⁶⁴ thousands of individuals have been confirmed as Dominican nationals as a result, including Juliana Deguis. The law was adopted by both the Dominican House of Representatives and Senate unanimously and in the first reading.⁶⁵ This level of national consensus would not have occurred without litigation.

This voice given to affected individuals to participate in policy and decision-making processes can have long-lasting effects. Violeta Bosico, for example, although a child when her case was brought, grew up to become a lawyer and now works to defend the rights of Dominicans of Haitian descent herself. She observes in her own words that:

My cousins, my neighbours, my friends and in general all Dominicans of Haitian descent today are being denied their identity documents, unlike me they cannot attend university, they cannot work, they cannot even move freely. The Dominican Republic has not complied with the ruling that favored me and thus far it cannot even guarantee that my children and even myself will not suffer from that situation again. However, thanks to the Inter American system today I have an identity. I am a law student and I am volunteer teacher for marginalized children. I can proudly say that I am a contribution to my country and I know that all Dominicans of Haitian descent would like their chance to do the same.⁶⁶

⁶⁴ For a more detailed analysis of the law, see e.g., Open Society Justice Initiative, Dominican Republic's New Naturalization Law Falls Short, Press Release, 3 June 2014, <https://www.opensocietyfoundations.org/press-releases/dominican-republics-new-naturalization-law-falls-short>.

⁶⁵ See, e.g., T. Bonilla, Senadores aprueban en unanimidad proyecto Ley Naturalización, *El Nacional*, 21 May 2014, <http://elnacional.com.do/senadores-aprueban-en-unanimidad-proyecto-ley-naturalizacion>. See also, R.P. Reyes, Apoyo total de diputados a proyecto naturalización, *Listin Diario*, 17 May 2014, <http://www.listindiario.com/la-republica/2014/05/17/322250/apoyo-total-de-diputados-a-proyecto-naturalizacion>.

⁶⁶ This is a quote extracted from an interview given by Violeta Bosico from *Yean and Bosico v. Dominican Republic* case at the Inter American Court of Human Rights to a group of journalist students from the Walter Cronkite School of Journalism and Mass Communication for a project on statelessness in the Dominican Republic, see: http://cronkite.asu.edu/buffett/dr/landmark_ruling.html.

The fight against statelessness in the Dominican Republic encompasses a strong network of activists, supporters and, most importantly, a vast number of empowered, vocal, organised and mobilised affected individuals and strategic litigation has helped play a role in shaping this national landscape.

4. Limitations and Critiques

In this section, we draw attention to two important notes of caution in considering the value and nature of strategic litigation. First, it is important to understand the particular dynamics of a given field in order to judge how and when to turn to courts as a means of advancing a social change agenda. In the case of statelessness as a field, this will almost certainly entail a complex, multi-tiered assessment, taking into account national, regional and international spaces within which a given case or series of cases may resonate. Second, because of the “slippery” nature of citizenship and statelessness as lived experiences or social phenomena,⁶⁷ lawyers and other activists seeking to cement in law specific protections or to progress the law in a particular direction must take into account the limitations of law itself to define and address the harms associated with statelessness. Law tends to propel us toward binary classification (you are either a citizen or a non-citizen), but the strategic implications of how we define the wrong at issue and its impact in relation to statelessness (because of X, Y, Z State action, our client is stateless, or our client is at risk of statelessness) can be especially unpredictable. We close this section with some thoughts for future study of the impact of strategic litigation in this field.

4.1 The challenge of organising activists and coordinating action against statelessness

[A] major challenge is that the principal constituency for any action—persons who are not citizens of the states where they reside—is not a unified political force. To the contrary, noncitizens are dispersed geographically; are divided by language, religion, and ethnicity; and are intimidated by the

⁶⁷ R.E. Howard-Hassmann, “Introduction”, in *The Human Right to Citizenship: A Slippery Concept*, *supra* n31, p. 17 (“[C]itizenship is slippery, even though, legally speaking, you are a citizen or you are not, either a legally authorized migrant or an unauthorized one.”)

threat of arrest and deportation. Identity, a crucial variable for policy on so many other questions, is equally important. Many noncitizens will understandably prioritize their identification with persons who share other characteristics—gender, ethnic origin, skin color—rather than citizenship status.⁶⁸

A distinguishing factor in strategic litigation addressing statelessness has been the absence of a dedicated activist base coupled with a diffuse and diverse constituency of affected individuals. In terms of the actors driving litigation in the field, what we are really talking about is a set of loosely or not at all connected lawyers, some associated with the cause of countering statelessness or related issues, but most not. Many stateless individuals do not identify as stateless and experience the status in vastly different and often deeply personal ways — solutions do not necessarily align from case to case and may even diverge.⁶⁹ Furthermore, an individual solution — granting a naturalisation application on an exceptional basis, for example — avoids the question of a wider remedy for the root cause of statelessness of which each case is only a symptom.⁷⁰ This option of an individual rather than a systematic remedy is often readily available due to the degree of discretion that authorities exercise in the administration of nationality matters.

The body of academic literature on State compliance with and effectiveness of judicial decisions consistently underscores that the impact of decisions through implementation is enhanced when courts and tribunals are in sync with activist forces mobilising within States.⁷¹

⁶⁸ Goldston, *supra* n2, p. 346.

⁶⁹ See, e.g., M.L. Johansen, *Fighting for Citizenship in Kuwait*, MA Thesis in Middle East and North Africa Studies at the Department of Culture Studies and Oriental Languages, University of Oslo 2014, pp. 40-43 (noting that all informants identified the heterogeneity of the *Bidoon* in Kuwait as a factor limiting political organisation and a fulcrum for “divide and rule” tactics by the Kuwaiti government to prevent coordinated efforts to campaign for citizenship rights).

⁷⁰ The question of approaches to settlement offers raises the quintessential ethical issue in representing clients in strategic cases.

⁷¹ See, e.g., J.L. Cavallaro and S.E. Brewer, “Reevaluating Regional Human Rights Litigation in the Twenty-First Century: the Case of the Inter-American Court”, *American Journal of International Law* 2008, Vol. 102, p. 770. (“[T]he primary actors who provoke such improvements are generally the social movements, human rights activists, members of the media, members of government with progressive views on human rights, and others carrying on long-term advocacy

Compliance literature is mostly focused on implementation (i.e., matching the specific language of often non-binding recommendations to specific actions taken by States in response to a judgment or decision) as a barometer of effectiveness of *institutions*. This tends to limit the scope of relevant inquiry on institutional impacts and means that these studies do not look directly at strategic litigation and its impact overall as a tool.⁷² With this note of caution in mind, we stress again that the absence of a “political force” or movement behind litigation on statelessness remains a weakness today. A recent illustration in the European context is *Ramadan v. Malta*, a case challenging the denationalisation of a man who had acquired Maltese nationality by his marriage to a Maltese citizen, which was later annulled. The Chamber of the European Court of Human Rights found no violation of the applicant’s ECHR rights even though the deprivation of citizenship left the applicant stateless, further weakening what was already a lacklustre jurisprudence in respect of the right to nationality, protecting the human rights of stateless people and solving statelessness.⁷³ The case raises issues of growing importance to the field given the trend toward use of punitive denationalisation by States, particularly in the counterterrorism context, and yet it was not connected to a wider campaign to develop European safeguards and place a check on State action in this area.

campaigns or pushing for better policies on a given issue”) (citing O.C. Okafor, “The African System on Human and Peoples’ Rights, Quasi-Constructivism, and the Possibility of Peacebuilding” in “African States”, *International Journal of Human Rights* 2004, Vol. 8, p. 431; F. Viljoen and L. Louw, “State Compliance with the Recommendations of the African Commission on Human and Peoples’ Rights, 1994-2004”, *American Journal of International Law* 2007, Vol. 101, p. 5).

⁷² J. Harrington and L. Bingham, “Never-ending story: The African Commission Evolving through Practice in *Malawi Africa Association et al. v. Mauritania*”, *Human Rights & International Legal Discourse* 2013, Vol. 7(1), p. 8 (citing R. Howse and R. Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, New York University School of Law, Public Law & Legal Theory Research Paper Series 2010, Working Paper No. 10-08, pp. 2-3 (a rule-compliance lens “obfuscates the character of international legal normativity” and “leads to inadequate scrutiny and understanding of the diverse complex purposes and projects that multiple actors impose and transpose on international legality [...]”).

⁷³ ECtHR, Application No. 76136/12, *Ramadan v. Malta*, 21 June 2016; see also, M.-B. Dembour, *Ramadan v. Malta: When will the Strasbourg Court understand that nationality is a core human rights issue?*, Strasbourg Observers Blog, 21 June 2016, <https://strasbourgobservers.com/2016/07/22/ramadan-v-malta-when-will-the-strasbourg-court-understand-that-nationality-is-a-core-human-rights-issue>

In the cases discussed here, we have shown that the equality principle often features prominently in legal arguments given the strength of the norm,⁷⁴ not to mention the fact that discrimination is nearly always present in statelessness cases.⁷⁵ The lessons of history tell us that social change will not occur through litigation alone, particularly when challenging deeply entrenched, institutionalised discrimination.⁷⁶ A prime example is the *Yean and Bosico* case. While a watershed from the perspective of doctrine and for anti-discrimination activists internationally, the decision met with formidable backlash in the Dominican Republic from all quarters.⁷⁷ In their study of the effectiveness of the IACtHR as a human rights actor in its own right, Cavallero and Brewer trace the backlash against the decision to the lack of “widespread public pressure for equal treatment” of Dominicans of Haitian descent.⁷⁸ The case is emblematic of the authors’ wider conclusion that “inter-American jurisprudence that does not fit within a larger campaign is unlikely to trigger concrete benefits on the ground when governmental authorities are resistant to the judgment.”⁷⁹

⁷⁴ Goldston, *supra* n2, p. 322.

⁷⁵ See, e.g., K.A. Belton, “Statelessness: A Matter of Human Rights” in R.E. Howard-Hassmann and M. Walton-Roberts, (eds), *The Human Right to Citizenship*, University of Pennsylvania Press 2015, p. 34 (citing M. Manly, “The Spirit of Geneva: Traditional and New Actors in the Field of Statelessness”, *Refugee Survey Quarterly* 2007, Vol. 25(4), p. 256); Institute on Statelessness and Inclusion, *About Statelessness: Causes*, <http://www.institutesi.org/world/causes.php>.

⁷⁶ See, e.g., G.N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?*, University of Chicago Press 1991; D. Bell, “Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation”, *Yale Law Journal* 1986, Vol. 85, p. 470; S.D. Carle, “How Myth-Busting about the Historical Goals of Civil Rights Activism Can Illuminate Further Paths”, *Stanford Journal of Civil Rights and Civil Liberties* 2011, Vol. 7, p. 167; S.L. Cummings and D.L. Rhode, “Public Interest Litigation: Insights from Theory and Practice”, *Fordham Urban Law Journal* 2009, Vol. 36, p. 603.

⁷⁷ Compare discussion of backlash to the ECtHR decision in *D.H. and others v. Czech Republic* on segregated schooling for Roma children in the Czech Republic, where political elites and the general public were not primed to receive such a progressive decision calling for revolutionary reforms to the education sector: Open Society Justice Initiative, *Strategic Litigation Impacts: Roma School Desegregation*, *supra* n3, p. 67.

⁷⁸ Cavallero and Brewer, *supra* n71, p. 790.

⁷⁹ *Ibid.*, p. 778.

There is ample reason for optimism that future cases will emerge from and find resonance within organised political movements. Activists working on statelessness are more networked than ever before, (modestly) better resourced and show signs of consolidation at regional and international levels around a defined set of goals.

Regional networks dedicated to tackling statelessness have emerged since 2012, starting with the European Network on Statelessness (ENS).⁸⁰ ENS has launched campaigns on childhood statelessness and statelessness and detention and has associate members (organisations and individuals) in over 30 countries.⁸¹ Through its strategic litigation project, ENS is also supporting a case brought by two associate member groups in Serbia, challenging the denial of birth registration to Roma children.⁸² ENS is a promising platform for conducting advocacy around litigation in European States, particularly where associate members have strong links with grassroots and affected communities, as well as at the regional level. The regional network approach has been adapted to the Americas context by the Americas Network on Nationality and Statelessness (ANA). A new network in the Asia Pacific region (Statelessness Network Asia Pacific, SNAP) was launched in 2016. The organisation of civil society and regional experts within networks acting around common themes and campaigns is a promising sign for future litigation on the topic, given that these networks will be a natural forum for supporting and mobilising around litigation. Success will likely depend on how well the networks link themselves to and build the capacity of national movements. The use of statelessness as a framing device may not always be strategic⁸³ — cases may be brought in the name of women's rights, children's rights, indigenous rights, health, documentation, education, etc., depending on the context — making strategic communications around cases that the networks are supporting a critical consideration.

⁸⁰ European Network on Statelessness, <http://www.statelessness.eu>.

⁸¹ See, A. Weiss, Strategically litigating statelessness: ENS's three-year strategy, European Network on Statelessness Blog, 2 February 2015, <http://www.statelessness.eu/blog/strategically-litigating-statelessness-ens's-three-year-strategy>.

⁸² *Ibid.*

⁸³ See, Kingston, *supra* n14, p.11.

4.2 A “slippery” concept

One inherent tension in using law to defend citizenship rights and protect the stateless is the fact that law is a system of classification, heavily laden with binaries: citizen/non-citizen, stateless/not stateless. In order to mount a defence, advocates must define their client’s problem, and often their legal status, within the available categorisations, or develop new ones. But the litigation itself is often an act of becoming for the client — legally we are seeking to force States to re-categorise, reclassify, recognise; there are inevitable strategic questions about how we describe our clients’ status in the interim. In litigating citizenship cases, we have struggled with the juridical definitions available to articulate the wrong at stake and the specific harm caused to our clients. We find resonance in our experience as litigators with the notion that citizenship is not always “a simple binary entity that one either possess or does not; citizenship can be partial, soft, obscured by political realities, or nonexistent”.⁸⁴ This is true not only as a matter of social reality, but also in terms of the lived reality of those who experience statelessness. The threat or lived experience of “statelessness” does not neatly align with the legal definition.

A prime example is the rhetorical use of terms like “effectively” or “*de facto*” stateless in litigation and non-litigation advocacy. For example, in Kenya, discriminatory practices frustrate minority communities access to documentation of Kenyan nationality, meaning that affected individuals lack access to a host of civil, political, social and economic rights.⁸⁵ By law, nationality is transmitted automatically from parent to child (*jus sanguinis*) and Kenya lacks a mechanism for determining Kenyan citizenship. The post-independence law and practice presents a complex story for many groups, including Kenyan Nubians, who were present in Kenya before independence but whose nationality is contested. Litigation to challenge discriminatory documentation practices often presented the Nubian community as “stateless” and one outcome of legal and political advocacy was the adoption of a provision, in the 2011 citizenship law that would allow “stateless” persons to acquire Kenyan nationality by registration. However, this is

⁸⁴ Howard-Hassmann and Walton-Roberts, *supra* n32, p. 2.

⁸⁵ See, e.g., B. Oppenheim and B.M. Powell, Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya, Open Society Justice Initiative 2015.

not the appropriate avenue for Kenyan Nubians, who should, according to the law, be nationals by birth.

Another similar challenge arises in contemplating litigation to press States to adopt statelessness status determination procedures. Such a procedure would be especially useful in cases where individuals face obstacles in establishing their status — for instance where they cannot establish their own identity or reach competent authorities that might be able to clarify their status. The result of this is that many potential claimants need the remedy first, in order to demonstrate their statelessness and therefore make a clear and compelling case that they are in need of protection.

Several important decisions do reflect this nuance in dicta recognising that nationality itself is a social construct and whether one is a national or not is based on a set of facts that can have remarkably wide-ranging social and political dimensions. The International Court of Justice's decision in the *Nottebohm* case has been influential in its articulation of the social — and slippery — underpinnings of nationality status, defining the concept as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments”.⁸⁶ Other international courts have adopted a similar approach in defining nationality from a human rights perspective.⁸⁷ Even so, the human rights toolkit still lacks a ready response to the problem of inequality within citizenships. Not surprisingly, as the problem intersects in a complex manner with the rights of non-citizens, including undocumented migrants and asylum seekers in the context of the migration crises engulfing many parts of the world. There is also interplay with the multiple drivers of rising xenophobia against minority groups increasingly associated in the public imagination with terror and criminality.

Statelessness is also often the product of multiple system failures not to mention overlapping layers of exclusionary politics and practice and by its nature creates rippling violations of rights. Litigation itself may leave clients vulnerable to reprisals, raising ethical questions that must

⁸⁶ International Court of Justice, *Lichtenstein v. Guatemala (Second Phase) (Nottebohm Case)*, 1955 ICJ Reports, pp. 4, 23.

⁸⁷ See, e.g., IACtHR, *Yean and Bosico v. Dominican Republic*, *supra* n8; ACmHPR, *Open Society Justice Initiative v. Côte d'Ivoire*, *supra* n31.”

be taken into consideration in each case throughout its often very long lifespan. It can be challenging in a single case to address both causes and symptoms well. Advocates confront these challenges in individual and group representations, and in cases brought by NGOs as an *actio popularis*.

In litigation brought by the Nubian community in Kenya described above, for example, the knotted question of belonging (indigeneity and *autochthony*) is linked with both land rights and citizenship rights, with violations of these rights locked in mutual reinforcement.⁸⁸ Positive decisions by international bodies – the African Commission on Human and Peoples’ Rights (2015) and the African Committee of Experts on the Rights and Welfare of the Child (2011) — register the relationship between the right to nationality and other rights as “consequential”, and the claims were formulated as such.⁸⁹ But in defining the problem within the legal logic of human rights, the social reality at the heart of the problem is not fully captured, and the resulting recommendations to the Kenyan government address symptoms in separate spheres — security of tenure and discrimination in access to documentation of citizenship — rather than responding to the situation as a whole. An important practical lesson to be drawn for advocates is that the strategic framework within which such cases are brought must be primed to receive and grapple with the categories — in this example “primary” and “consequential” — within which the law classifies remedies.

The political nature of legal claims may also change over the course of a single case, taking into account the average length of a case especially when recourse to regional or international bodies is envisioned.⁹⁰ The *Open Society Justice Initiative v. Côte d’Ivoire* case brought in 2005 addressing arbitrary deprivation of nationality of a large segment of Cote

⁸⁸ See, e.g., S. Balaton-Chrimes, *Ethnicity, Democracy and Citizenship in Africa: Political Marginalisation of Kenya’s Nubians*, Ashgate, 2015, p. 19. (“[I]t is increasingly not only indigeneity but autochthony [literally: to be ‘born of the soil’], and the notion that every true Kenyan tribe has a homeland, that governs belonging and citizenship in Kenya. Compared to indigeneity, autochthony is not usually thought of as a widespread discourse for determining or asserting belonging outside francophone Africa but it is nevertheless salient in Kenya [...]”).

⁸⁹ See ACmHPR, *Nubian Community in Kenya v. Kenya*, *supra* n8.

⁹⁰ S.B. Coutin, “Cause Lawyering and Political Advocacy: Moving Law on Behalf of Central American Refugees”, in A. Sarat and S.A. Scheingold (eds), *Cause Lawyers and Social Movements*, Stanford University Press 2006, p. 101.

d'Ivoire's population — namely, those with ties (actual or perceived) to northern neighbouring states and identifying as Muslim — was ultimately decided by the African Commission on Human and Peoples Rights in 2015, following a complete political reversal with the instalment of a famous northerner, Alassane Ouattara, in the presidency.⁹¹ Such changes are not unique to the field of statelessness, but precisely because of the absence of strong norms and settled definitions for key legal concepts in the field, a lot can change over the course of a ten-year timeframe. In the example of Côte d'Ivoire, shifts in the national political scene meant that the decision, which found wide-scale systematic violations of the right to a nationality in respect of northerners, would need to be translated into a present-day context where a new set of actors identify as the out group in the construction of national belonging.

The challenges examined in this section relate to the fit between law and its social and political context in this field. Strategic litigation is an important tool in documenting, articulating and finding solutions for some of the most vexed causes and consequences of statelessness. Lawyers and activists turning to strategic litigation must remain intentional in their approach to the frontiers (or what some might call, the fringe)⁹² of the law in this field.

5. Future Directions

We include here some thinking on where strategic litigation might be usefully deployed in the future.

Bureaucratisation of citizenship. Though hardly a new phenomenon, the role that State-issued documentation of identity plays in mediating the enjoyment of human rights increases in scale and scope every day.⁹³ Technological innovation in the design and delivery of digital identification systems, including biometrics, has attracted States, private industry and major multilateral and bilateral donors to focus on identity documentation and identification.⁹⁴ These systems bear an uncertain relationship to traditional civil registration processes,

⁹¹ ACmHPR, *Open Society Justice Initiative v. Côte d'Ivoire*, *supra* n31.

⁹² D. Weissbrodt and M. Divine, "Unequal access to human rights: the categories of noncitizenship", *Citizenship Studies* 2015, Vol. 19(8), pp. 870-891.

⁹³ See, e.g., World Bank Group, *Identification for Development (ID4D)*, Strategic Framework, 25 January 2016, p. 4.

⁹⁴ *Ibid.*

especially in States that currently experience high levels of under-registration of births, deaths and other major civil events and vital statistics. Technological innovation does not guarantee inclusion or a lighter bureaucratic footprint as experienced by the average “end user”. We see in the rise of new bureaucratic approaches to integrating service delivery around State-issued identification the same genre of risks that inhabit nationality law proper; loopholes lurk in the practical implementation of e-governance strategies. The introduction of a next generation national ID card, incorporating new authentication technologies like iris scans, for example, tends to exclude the same minority populations that have in the past faced problems in gaining access to identity documentation, leaving these groups at risk of statelessness. Litigation may play a role in establishing or enforcing State responsibility, particularly with respect to the role of front-line government officials who make pivotal decisions about inclusion or exclusion from identity management systems. Practically speaking, this may simply be a matter of devoting more resources to understanding the role that identity management innovations, like next generation biometric ID cards, are playing in States where problems in access to documentation already exist. There may equally be a role for litigation, or the threat of litigation, in establishing non-State actors’ responsibility in the field of privately developed documentation systems that have disparate impacts on socially and economically marginalised groups.

National security denationalisations. Citizenship stripping has made a comeback in recent years, recast as a counterterrorism tool with dubious policy justifications, but potent symbolism.⁹⁵ So far, litigation and advocacy has been reactive in this sphere — with interventions seeking to hold the line on when, in fact, the State’s power to denationalise contravenes international commitments.⁹⁶ Many of these cases intersect with other controversial components of the modern counterterrorism toolkit, including drone strikes,

⁹⁵ See, e.g. L. Esbrook, “Citizenship Unmoored: Expatriation as a Counter-Terrorism Tool”, *University of Pennsylvania Journal of International Law* 2016, Vol. 37, pp. 1273, 1328. (“If lawmakers have not viewed their proposals with an eye towards historical trends, these new revocation laws seem innovative and firm in their stance towards banishment. But viewed in the light of history, the current focus on revocation seems anachronistic and medieval as a form of punishment.”)

⁹⁶ Supreme Court of the United Kingdom, *Al Jedda v. Secretary of State for the Home Department*, [2013] UKSC 62, 9 October 2013.

renditions, mass surveillance and profiling, and wide-ranging criminal liability, including for inchoate support to alleged terrorist enterprises. The United Kingdom's liberal use of denationalisation as a counterterrorism strategy has led to a line of cases that threaten to undermine a growing consensus about how the international definition of a stateless person should apply in practice. The British government has, in both the *Al Jedda* and the *Pham* cases, argued that a deprivation order will not result in statelessness, contrary to UNHCR's guidance on the interpretation of the 1954 Convention definition of a stateless person.⁹⁷ States have new incentives, it would seem, to use the ambiguities inherent in identifying statelessness as a weapon to avoid responsibility for arbitrary deprivation of nationality. Does this new appetite for citizenship stripping – once called a punishment “more primitive than torture”⁹⁸ — signal the degradation of citizenship as a legal status? Here, strategic litigation, particularly at the regional or international level, could play an important role in placing a check on punitive denationalisations. For example, if the Court of Justice of the European Union could address the issue of interpretation of the 1954 Convention definition of a stateless person, it might restrain States (although not the UK) within its sphere of influence from eroding protections against the creation of statelessness.⁹⁹ The European Court of Human Rights' jurisprudence on deprivation of nationality and its impact on rights protected in the ECHR is thus far weak in this regard.

6. Conclusion

New global and regional campaigns consolidating around a shared set of ambitions for addressing statelessness provide important opportunities to develop coordinated strategic engagements with States. This includes — or should include — the deployment of litigation as part of a wider framework of interventions to bring about positive changes in laws, policies and practice in the field of nationality and statelessness. Campaigns should seek out opportunities to use litigation not only as a means of clarifying the content of the right to nationality and securing remedies for violations, but also as a platform for education and empowerment. The concern remains that efforts to

⁹⁷ *Ibid.*; Supreme Court of the United Kingdom, *Pham v. Secretary of State for the Home Department*, [2015] UKSC 19, 25 March 2015.

⁹⁸ USA Supreme Court, *Trop v. Dulles*, 356 U.S. 86, 31 March 1958, p. 102.

⁹⁹ See, Open Society Justice Initiative, Intervention in *Pham (previously B2) v. Secretary of State for the Home Department*, 2014.

combat statelessness and vindicate the rights of stateless persons may not tackle the ongoing, widely tolerated denial of core human rights to non-citizens, leaving a core problem — loopholes in the rights framework — for another day.

Finally, as we have emphasised, this chapter provides a brief survey of the role litigation can and has played in addressing the problem of statelessness; the field would benefit from a more detailed analysis of the goals and achievements of strategic litigation, including a closer look at national-level initiatives. State compliance with decisions by international and regional tribunals is closely linked to, and often treated as a referendum on, status and effectiveness of such institutions.¹⁰⁰ The question of metrics and methodologies to evaluate the impact of strategic litigation at the level of social change is “fundamentally contested”,¹⁰¹ and our survey, while drawing from this literature on impacts, does not purport to be a definitive evaluation of the questions taken up here. The evaluation of impact depends on the goals of using law in the first place: to develop doctrine, to effect change in social practice, to achieve legislative reform?¹⁰² As we have noted, the cases we mention cannot genuinely be described as “movement” driven; most are not the product of coordinated efforts or brought as strategic by design.¹⁰³ It would be misleading to subject the body of case-law considered here to an empirical analysis akin to that examining, e.g., the marriage equality movements in various national jurisdictions, or the US civil rights movement in the 1950s and 1960s. Nevertheless, a more comprehensive study including the development of an appropriately tailored methodology for assessing the impact of strategic litigation addressing statelessness would be a welcome addition to the literature and the field.

¹⁰⁰ See, e.g., Cavallaro and Brewer, *supra* n71, p. 768.

¹⁰¹ Cummings, *supra* n11, p. 186.

¹⁰² *Ibid.*, p. 186.

¹⁰³ Cf. M.V. Tushnet, *The NAACP's Legal Strategy against Segregated Education, 1925-1950*, University of North Carolina Press 1987 (noting that NAACP campaign was less systematic and coordinated than often portrayed).

6. “Benchmarking” legal protection against statelessness

Olivier Willem Vonk, Costica Dumbrava, Maarten Peter Vink and Gerard-René de Groot

1. Introduction

It is estimated that over 10 million people in the world are stateless, meaning that they do not possess a nationality¹ in any country.² The phenomenon of statelessness affects many countries and regions and, despite concerted actions aimed at reducing it,³ there is no clear sign that statelessness in the world is on the wane overall. Indeed notwithstanding the steady reduction in the number of stateless persons in certain countries,⁴ the global total of identified stateless persons rose by a million between 2005 and 2010, although this change may have been caused mainly by improvements in identification procedures and information sharing. Recent developments related to changes of borders, inter-ethnic conflict and social struggles have increased the risk of statelessness in many parts of the world.

Statelessness is a highly contextual phenomenon, which is often caused by complex historical, social and political factors. In this chapter we focus on nationality laws because nationality is above all a formal status defined by law. While the possession of a legal status of nationality does not guarantee full access to a uniform and comprehensive set of

¹ In this chapter we use the term “nationality” to designate the legal bond between a person and a State, as defined by national laws and recognized by the international community. This term is equivalent to that of “citizenship”, which is used by the EUDO CITIZENSHIP Observatory.

² UN High Commissioner for Refugees (UNHCR), UNHCR Global Trends 2014: World at War, 2015, p. 8.

³ See, UNHCR, A Campaign to End Statelessness Launched on the 60th Anniversary of the 1954 Convention relating to the Status of Stateless Persons, 2014.

⁴ See, UNHCR, UNHCR Statistical Yearbook 2012, 2013, Annex 7; UNHCR, UNHCR Statistical Yearbook 2013, 2015, Annex 7; and UNHCR, UNHCR Statistical Yearbook 2014, 2015, Annex 7, showing reductions in the stateless population over recent years in a number of States including, for instance, Bosnia and Herzegovina, Estonia, Kyrgyzstan, Latvia, Russia, Thailand and Turkmenistan.

rights and privileges, the lack of any legal status of nationality makes people vulnerable to risks, such as limitations of rights, discrimination, dispossession, deportation and human trafficking.⁵

This chapter analyses legal provisions on the acquisition and loss of nationality in order to assess the levels of formal protection against statelessness in different countries. For this purpose it develops a set of benchmarks to measure legal protection against statelessness across the globe. Due to constraints related to access to data on nationality laws, these benchmarks are applied systematically only to countries from Europe and the Americas. Nevertheless, the proposed legal standards and analytical framework have been developed with a global scope in mind. The study builds on the research of the European Union Democracy Observatory on Citizenship (EUDO CITIZENSHIP), which established a comprehensive typology of modes of acquisition and loss of nationality, and launched the Global Database on protection Against Statelessness – developed in collaboration with the United Nations High Commissioner for Refugees (UNHCR).⁶

The chapter is structured as follows: the first section discusses the standards used for assessing legal protection against statelessness and explains general methodological issues; the following sections measure and discuss the degrees of legal protection against statelessness focusing mainly on countries from Europe and the Americas (including the Caribbean);⁷ the concluding section provides more general reflections on the findings.

2. International standards and methodology

It must be noted at the outset that there are different ways of assessing legal rules on nationality with a view to addressing problems related to

⁵ See, L. van Waas, *Nationality Matters: Statelessness under International Law*, Intersentia 2008; L. van Waas, C. Rijken, M. Gramatikov and D. Brennan, *The Nexus between Statelessness and Human Trafficking in Thailand*, Wolf Legal Publishing 2015.

⁶ EUDO CITIZENSHIP. *Global Database on Protection against Statelessness*. San Domenico di Fiesole: European University Institute 2015, available at: <http://eudo-citizenship.eu/databases/protection-against-statelessness>.

⁷ Information on nationality laws in Europe and the Americas is available through the EUDO CITIZENSHIP country profiles (<http://eudo-citizenship.eu/country-profiles>). Additional information on the Americas is available through the Americas Network on Nationality and Statelessness (<http://www.americasns.org>).

statelessness, and this chapter does not purport to present definitive evaluations or rankings of the nationality laws reviewed, nor does it assess State practice in the implementation of nationality law. In analysing nationality laws for purpose of this chapter, the authors have used a broad standard of inclusiveness to assess the degree to which nationality laws offer protection to any person who is at risk of becoming stateless. This general standard of inclusiveness is based on the idea that full legal protection against statelessness is achieved if nationality laws grant automatic access to nationality and prevent the loss of nationality for persons who would otherwise be stateless. In this view, any provision on the acquisition or loss of nationality that generates a risk of statelessness would be regarded as exclusionary to a certain extent. While comprehensive from the perspective of statelessness protection, this standard does not differentiate between the normative claims of inclusion of various persons (e.g. children born in the country vs. persons who take up residence in the country) and does not consider the different positive obligations of States. We therefore opted for an alternative standard that focuses more strictly on legal compliance. The standard of legal compliance allows us to assess the degree to which nationality laws comply with international legal norms on protection against statelessness.⁸

We can further distinguish between two versions of the standard of legal compliance: a narrow version and a broader version. The narrow version refers strictly to State compliance with international norms, which the State has explicitly assumed and with which they are legally obliged to comply. The broader version of the legal compliance standard is defined with reference to a set of general international legal standards that are widely recognised by the international community, regardless of whether or not they have been explicitly accepted by a particular State. In this chapter we use the broader version of the legal compliance standard. In other words, we assess the compatibility of specific nationality laws with international standards, regardless of whether or not a country is party to a particular legal instrument. In this chapter we use the set of international legal standards identified in the EUDO CITIZENSHIP Global Database on Protection against Statelessness as providing protection against each of the seventeen

⁸ See, for example, O. Vonk, M. Vink and G.R. de Groot, "Benchmarking the Protection against Statelessness in Europe: Comparative Findings", *Tilburg Law Review* 2014, Vol. 19, pp. 294-302.

"modes" of statelessness used in the database.⁹

We rely in particular on the following international treaties:

- The Convention on the Reduction of Statelessness (the 1961 Convention);¹⁰
- Convention relating to the Status of Stateless Persons (the 1954 Convention);¹¹
- Convention on the Rights of the Child (CRC);¹²
- European Convention on Nationality (ECN).¹³

3. Methodology

In order to measure the level of formal protection against statelessness, we have compared legal rules on the acquisition and loss of nationality on 1 January 2015 in 76 countries.¹⁴ Formal protection against statelessness is

⁹ O. Vonk, M. Vink and G.R. de Groot. Protection against statelessness: trends and regulations in Europe, EUDO Comparative Report 2013; G.R. de Groot "Children, their right to a nationality and child statelessness", in A. Edwards and L. van Waas (eds), *Nationality and Statelessness under International Law*, Cambridge University Press 2014, pp. 144-168; G.R. de Groot, K. Swider and O. Vonk, *Practices and Approaches in EU Member States to Prevent and End Statelessness: Study for the LIBE Committee*, European Parliament 2015.

¹⁰ Convention on the Reduction of Statelessness, 30 August 1961, entry into force 13 December 1975, 989 UNTS 175.

¹¹ Convention relating to the Status of Stateless Persons, 28 September 1954, entry into force 6 June 1960, 360 UNTS 117. The interpretations of the two UN Statelessness Conventions by UNHCR are taken into account in defining the relevant international standards. See, UNHCR Handbook on Protection of Stateless Persons, 2014; 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, 2012; and UNHCR, Expert Meeting - Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions"), 2014, which addresses Articles 5-9 of the 1961 Convention.

¹² Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3.

¹³ European Convention on Nationality, 6 November 1997, entry into force 1 March 2000, CETS 166.

¹⁴ The individual country scores provided in this study may be affected by amendments from 2015 onwards, which are not yet implemented in the EUDO CITIZENSHIP Global Database on Protection against Statelessness. For more updated information on nationality laws (as of 1 January 2016) see EUDO CITIZENSHIP Databases on Modes of Acquisition and Loss of Citizenship, http://eudo-citizenship.eu/index.php?option=com_content&view=article&id=1359 and http://eudo-citizenship.eu/index.php?option=com_content&view=article&id=1349.

measured by assessing the legal position of different categories of persons who are at risk of becoming or remaining stateless through the operation of nationality laws (see Table 1). These categories are derived from the typology of modes of protection against statelessness developed by the EUDO CITIZENSHIP Global Database on Protection against Statelessness. The level of formal protection against statelessness is measured for each country and across all risk categories using a scale from 0.00 to 1.00, where 0.00 stands for absolutely no formal protection and 1.00 for full formal protection. If the nationality law provides for partial protection against statelessness for a specific risk category, the degree of formal protection is measured through an assessment of the restrictiveness of the legal conditions limiting the protection against statelessness in that situation. For each condition we subtract a fixed value from the maximum score of 1.00. The value to be subtracted is obtained by dividing the maximum score by the number of major conditions that exist for each mode. For example, there are 10 major conditions that are sometimes applied to the acquisition of nationality by children born in a country who would otherwise be stateless. To calculate a country's score for this mode, we subtract 0.10 ($1.00/10$) from the maximum score (1.00) for each condition imposed by a nationality law.

Table 1. Categories of persons at risk of becoming/remaining stateless

Category	Mode
Children born in a country who would otherwise be stateless	S01
Children found in a country or of unknown parentage	S02
Children born to a national of a country – birth in that country	S03
Children born to a national of a country – birth abroad	S04
Persons who are recognised refugees	S05
Stateless persons or persons with undetermined nationality	S06
Persons who voluntarily renounce the nationality of their country	S07
Persons who involuntarily lose the nationality of their country	S08-S13

The legal conditions for the acquisition of nationality by stateless persons or persons who are at risk of becoming stateless vary widely with regard to their material scope and degree of restrictiveness. Although we want to avoid in so far as possible normative debates about how inclusive nationality laws should be (i.e., who should be granted nationality and on what grounds), in this chapter we take

the view that certain legal conditions restricting access to nationality for stateless persons or persons at risk of becoming stateless are more onerous, and thus normatively dubious, than others. We mark conditions that are manifestly discriminatory (e.g. on grounds of gender, race, ethnicity, etc.¹⁵) and treat them as more exclusive than other conditions. Thus, when calculating specific scores we subtract twice as much for manifestly discriminatory conditions as for other conditions. For example, in the mode S01 (acquisition of nationality by children born in a country who would otherwise be stateless) we subtract 0.10 if the condition regarding child's residence applies and 0.20 (2x0.10) if an additional condition relating to the parents' race or ethnicity applies. We agree that it is both technically difficult and normatively questionable to try measuring and weighing the exclusiveness of different restrictive conditions. However, by treating discriminatory conditions as twice as exclusive as other conditions, we intend to signal the problematic character of these conditions. If the final score for a specific mode is negative (due to one or more manifestly discriminatory conditions), we ascribe 0.00 as the score in order to avoid registering negative scores.

4. Children born in a country who would otherwise be stateless (S01)

The failure of children born in a country to acquire the nationality of that country is one of the major causes of statelessness. This is the case when children cannot acquire nationality from their parents via *jus sanguinis*. There are relatively strong international standards protecting this particularly vulnerable category of persons against statelessness. The 1961 Convention (Article 1 and Article 3) imposes an obligation on the country of birth to grant such a child its nationality either automatically at birth or upon application. The ECN (Article 6(2)) imposes an obligation on the country of birth to grant its nationality to minor children who are born on its territory and who do not acquire at birth another nationality. Finally the CRC (Article 7(1)) stipulates that every child has the right to a nationality.

¹⁵ See generally, L.A. Rehof, Guide to the travaux préparatoires of the United Nations Convention on the elimination of all forms of discrimination against women, Martinus Nijhoff 1993, pp. 102-109; M. Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary, N.P. Engel 2006; R. Govil and A. Edwards. "Women, nationality and statelessness: the problem of unequal rights", in A. Edwards and L. van Waas (eds), Nationality and Statelessness under International Law, Cambridge University Press 2014, pp.169-193.

Formal protection against statelessness for children born in the country who would otherwise be stateless can be realised either directly through special provisions guaranteeing the access to nationality for this category or indirectly via general provisions of *jus soli*. In our assessment we treat cases where the nationality law provides for automatic *jus soli* for all children born in the country as providing full protection against statelessness for this group (score 1.00) even if the law does not have specific provisions regarding children born in the country who would otherwise be stateless. However, we treat cases where the nationality law provides for discretionary acquisition of nationality by children born in a country who would otherwise be stateless as incompatible with international standards. There are ten general conditions restricting access to nationality for children born in a country who would otherwise be stateless, one of which is manifestly discriminatory treatment. When calculating the score for this mode we subtract 0.10 (from 1.00) for each regular condition and 0.20 for each manifestly discriminatory condition (see Table 2).

Table 2. Protection scores for children born in a country who would otherwise be stateless

Provisions of nationality law	Score
A. Unconditional acquisition of nationality / unconditional <i>jus soli</i>	1.00
B. No <i>jus soli</i> provisions and no special safeguards against statelessness (including cases where the grant of nationality is discretionary)	0.00
C. Conditional acquisition	
C01. Conditions regarding the timing of application and the age of the child	-0.10
C02. Conditions regarding child's type of residence	-0.10
C03. Conditions regarding child's duration of residence	-0.10
C04. Conditions regarding child's criminal record (including security check)	-0.10
C05. Conditions regarding child's command of language and social integration	-0.10
C06. Conditions regarding the duration of child's statelessness status	-0.10
C07. Conditions regarding parents' residence	-0.10
C08. Conditions regarding parents' nationality (unknown nationality)	-0.10
C09. Conditions regarding parents' civil status	-0.10
C10. Discriminatory treatment on grounds of gender, ethnicity, race, etc. (not covered by C09)	-0.20

As shown by previous research on statelessness protection in Europe¹⁶ many violations of international standards are related to conditions of residence. In Sweden, for example, a child who is otherwise stateless has to be in possession of a permanent residence permit in order to qualify for protection against statelessness, while in the Czech Republic at least one of the child's parents should possess such a permit. Our comparative analysis shows notable differences between the countries of Europe and the Americas (see Figures 1 and 2 and Annexes). Less than half of the countries in Europe (19 out of 42) provide for full protection against statelessness for children born in the country who would otherwise be stateless. Cyprus, Denmark, Norway and Switzerland score the lowest in our ranking (0.00) because they do not have any safeguards against statelessness for this category of persons. The situation is better in the Americas because most countries in this region have general *jus soli* rules, which allow most children born in the territory of a country to acquire the nationality of that country automatically. Thirty American countries provide for full protection against statelessness for children born in the country who would otherwise be stateless, although there are still five countries that offer only partial or no protection (Bahamas, Colombia, Dominican Republic, Haiti and Suriname). For example, Bahamas does not automatically grant nationality based on *jus soli* and does not provide for a special protection mechanism for stateless children. Colombia does not automatically grant nationality based on *jus soli* but provides for a (discretionary) protection mechanism through which stateless children can acquire nationality if they can prove that their parents' country of nationality does not grant them nationality by descent.¹⁷ Although this requirement is considered permissible under the 1961 Convention by UNHCR,¹⁸ we treat it as below international standards because the procedure is fully discretionary.

One highly problematic issue linked to statelessness, which cannot be captured in our analysis focused on formal protection, is the systematic denial of birth registration and documentation to children born in the country. This is the case, for example, for children of Haitian migrant workers living in the Dominican Republic. Without a Dominican birth certificate these persons cannot obtain a national identity card (*cédula*

¹⁶ O. Vonk, M. Vink and G.R. de Groot, *supra* n9.

¹⁷ C. Escobar, Report Colombia, EUDO Country Report 2015, p. 11.

¹⁸ UNHCR, Guidelines on Statelessness No. 4, *supra* n11, para. 25.

de identidad y electoral) and thus are excluded from the political, economic and civil rights guaranteed by Dominican law. Unregistered children cannot prove where they were born nor to whom and therefore do not readily have access to Dominican nationality in practice. This denial of documentation has played a role in the problems that many persons of Haitian descent face in the Dominican Republic in accessing nationality and been one of the factors which has contributed to statelessness among this population.¹⁹

5. Children found in a country or of unknown parentage (S02)

Foundlings and children of unknown parentage are specific categories of persons who are at great risk of becoming stateless if rules of birthright nationality are narrow and highly conditional. For example, in countries where nationality at birth can be obtained only by virtue of descent from nationals (*jus sanguinis*), children without known parents are rendered stateless. According to the 1961 Convention (Article 2) and the ECN (Article 6(1)b), children found in a country or of unknown parentage should, in the absence of proof to the contrary, be considered to have been born within that territory to parents possessing the nationality of that country.

In our assessment of nationality laws we consider cases where the nationality law provides for automatic *jus soli* for all children born in the country as providing full protection against statelessness (score 1.00) even if the law does not have specific provisions containing safeguards against statelessness for children found in a country of unknown parentage. This is because general *jus soli* provisions provide for strong territorial inclusion, which effectively counters the risks of statelessness at birth. However, if a country provides for unconditional *jus soli* but limits the acquisition of nationality by foundlings to more specific categories, such as newborn infants, we treat this as a restrictive rule. This can lead to a somewhat paradoxical situation, in

¹⁹ The literature on this matter is vast and also deals with the important judgment of the Inter-American Court: Inter-American Court of Human Rights, *Yean and Bosico Children v. the Dominican Republic*, Series C No. 130, Judgment of 8 September 2005. For further references see, O. Vonk, *Nationality Law in the Western Hemisphere*, Martinus Nijhoff 2014. For an analysis of the *Yean and Bosico* judgment see, M.B. Dembour, *When Humans become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford University Press 2015, chapter 10.

which countries that grant explicit protection to foundlings in addition to their general *jus soli* provisions score worse than countries that do not have any statelessness protection mechanism for foundlings. We nevertheless consider that it is more problematic to disregard the strongly inclusive character of *jus soli* provisions just because the law does not have additional provisions regarding the acquisition of nationality by foundlings.

There are five main conditions that restrict access to nationality for children found in a country or of unknown parentage. We subtract 0.20 for each such condition (see Table 3).

Table 3. Protection score for children found in a country or of unknown parentage

Provisions of nationality law	Score
A. Unconditional <i>jus soli</i> or special unconditional acquisition	1.00
B. No <i>jus soli</i> provisions and no special safeguards against statelessness (including cases where the grant of nationality is discretionary)	0.00
C. Conditional acquisition	
C01. Conditions regarding the timing of application & the age of the child	-0.20
C02. Conditions regarding proof of the place of birth	-0.20
C03. Conditions regarding provisional acquisition – triggering loss after new evidence emerges, even if the child would be stateless	-0.20
C04. Procedural delays	-0.20
C05. Discriminatory treatment on grounds of gender, ethnicity, race, etc.	-0.40

The great majority of countries in Europe (32 out of 42 countries) provide full protection against statelessness for children found in the country or of unknown parentage. In nine cases, this protection is partial because nationality law imposes additional conditions that are not in line with international standards (Austria, Czech Republic, Greece, Ireland, Malta, Portugal, Russia, Ukraine and the United Kingdom of Great Britain and Northern Ireland (UK)). Cyprus is the only European country that fails to provide protection against statelessness for these children. There are several countries that limit the grant of nationality to newborn children (Austria) or young children (up to the age of three years in the Czech Republic). A similar picture can be found in the Americas where 26 out of 35 countries provide for full protection against statelessness for children found in a country or of unknown parentage. Although many countries in the Americas do not have an

explicit protection mechanism for foundlings,²⁰ this is counterbalanced by the strong provisions of *jus soli*.²¹ There are eight countries in the Americas that offer only partial protection against statelessness for these categories of persons (Antigua and Barbuda, Barbados, Canada, Guyana, Peru, Saint Kitts and Nevis, Saint Lucia and the United States of America (USA)). Bahamas is the only country in this region that does not have any legal safeguard against statelessness for foundlings or children of unknown parentage.

6. Children born to a national of a country – birth in that country (S03) or abroad (S04)

Despite the fact that the acquisition of nationality on grounds of descent from a citizen is one of the most widespread modes of acquisition, there are still cases in which this mode applies only conditionally and partially. If countries do not provide for additional rules of *jus soli* nationality, children of nationals born in the country are at risk of becoming stateless. In the case of children of nationals born abroad, limited *jus sanguinis* provisions can lead to statelessness if the country of birth does not have *jus soli* provisions or safeguards.

Article 6(1) of the ECN stipulates that, subject to any exceptions for children born abroad, the country shall provide for its nationality to be acquired by operation of law by children one of whose parents is a citizen. The Committee of Ministers of the Council of Europe Recommendation 2009/13 on the Nationality of Children, Recommendation 1 stipulates that Member States should “provide for the acquisition of nationality [...] *jure sanguinis* by children without any restriction which would result in statelessness”. Article 8 and Article 14 of the 1950 European Convention on Human Rights (ECHR) prohibit discrimination, including in respect of the acquisition of nationality (cf. European Court of Human Rights (ECtHR) judgement in *Genovese v. Malta*).²² With regard to children of nationals born abroad, the 1961 Convention (Article 4) imposes an obligation on the country of which the parents are citizens to grant its nationality if the child is not born in a Contracting State to the 1961 Convention. The

²⁰ Antigua and Barbuda nonetheless has a special provision for foundlings in addition to granting nationality automatically to children born on its territory.

²¹ See Vonk, *supra* n19, pp. 10-11.

²² European Court of Human Rights, Application No. 53124/09, *Genovese v. Malta*, 11 October 2011.

CRC (Article 7(1) in conjunction with Article 3(1)), the 1950 European Convention on Human Rights, (Article 8 and Article 14 (cf. ECtHR judgment in *Genovese v. Malta*)) and the ECN (Article 5(2)) prohibit discrimination between different categories of citizens.

There are five main conditions that restrict access to nationality for children of nationals born in the country, two of which we treat as manifestly discriminatory. We subtract 0.20 for each regular condition and 0.40 for each manifestly discriminatory condition (see Table 4). As in the case of automatic *jus soli* provisions, we treat cases where the nationality law provides for automatic *jus sanguinis* for all children born to at least one national parent as providing full protection against statelessness.

Table 4. Protection score for children born to a national of a country – birth in that country

Provisions of nationality law	Score
A. Unconditional <i>jus sanguinis</i> or unconditional <i>jus soli</i>	1.00
B. No <i>jus soli</i> provisions and no special safeguards against statelessness	0.00
C. Conditional acquisition	
C01. Discretionary procedure	-0.20
C02. Conditions regarding the timing of application & the age of the child	-0.20
C03. Conditions regarding parents' nationality (e.g. common nationality; mode of acquisition) or parents' residence in the country	-0.20
C04. Conditions regarding parents' civil status (e.g. additional restrictions for children born out of wedlock)	-0.40
C05. Discriminatory treatment on grounds of gender, ethnicity, race, etc. (not covered by C04)	-0.40

With regard to the acquisition of nationality by children of nationals born abroad, we have identified five main limiting conditions, one of which is manifestly discriminatory. We subtract 0.20 for each regular condition and 0.40 for each manifestly discriminatory condition (see Table 5).

Table 5. Protection score for children born to a national of a country - birth abroad

Provisions of nationality law	Score
A. Unconditional <i>jus sanguinis</i>	1.00
B. No <i>jus sanguinis</i> provisions and no special safeguards against statelessness	0.00
C. Conditional acquisition	
C01. Discretionary procedure	-0.20
C02. Conditions regarding the timing of application & the age of the child	-0.20
C03. Conditions regarding child's or parents' residence in the country of nationality (e.g. establishment of residence in the country)	-0.20
C04. Conditions regarding parents' nationality (e.g. common nationality; mode of acquisition)	-0.20
C05. Discriminatory treatment on grounds of gender, ethnicity, race, etc. (e.g. restrictions for children born out of wedlock)	-0.40

With the exception of Haiti, in most countries in the Americas children born in the country to a national of that country qualify automatically for *jus soli* nationality. Whether the parent is a national or not is therefore irrelevant if the child is born on the country's territory.²³ In Europe, by contrast, the prevalence of *jus sanguinis* generates a number of problems. Several countries discriminate against men with regard to the transmission of nationality *jure sanguinis* to children born out of wedlock. For example, Iceland and the Netherlands require proof that the father is also the biological father (although in the Netherlands only if the child has reached the age of seven years). This discriminatory treatment violates international standards in this area, as established by the ECtHR judgment in *Genovese v. Malta*.²⁴

²³ The use of the term "national" is in fact very ambiguous in the Americas context, but we will not elaborate here on the considerable terminological confusion in the Americas relating to nationality. Suffice it to say that the Spanish-speaking countries often describe the concept of "by birth" differently. Thus, we may find the terms *por nacimiento* in Venezuela, *de origen* in Guatemala, *nacionales* in Nicaragua and *naturales* in Uruguay. Moreover, the terms used for 'naturalisation' are equally diverse in the Spanish-speaking countries, e.g. *por adopción* in Colombia, *nacionalización* in Chile and *naturalización* in Guatemala. On these issues, see the different country reports produced by EUDO CITIZENSHIP, available at <http://eudo-citizenship.eu/country-profiles>.

²⁴ European Court of Human Rights, *Genovese v. Malta*, *supra* n22.

Despite the fact that nationality by descent has assumed a greater role in Latin American countries in recent years,²⁵ only nine countries in the region provide adequate protection against statelessness in the case of children of nationals born outside the country. While the overwhelming majority of the countries offer only partial protection, Cuba and Saint Kitts and Nevis do not provide for any safeguard against statelessness for this category of persons. Jamaica, Bahamas and Haiti provide for very limited protection.

The increasing importance of *jus sanguinis* is exemplified by the case of Chile. Until 2005, in Chile at least one parent of a child born abroad – not a parent *or* grandparent, as is the case under the current law – must have held Chilean nationality by birth in Chile, by ordinary naturalisation, or by naturalisation granted as a special favour. It was additionally required that one parent, not necessarily the parent holding Chilean nationality, resided abroad in the service of the government or that the child established residence in Chile for at least one year. By making it easier to acquire Chilean nationality under the *jus sanguinis* principle, the risk of statelessness among children born abroad to Chilean parents has obviously decreased under the current law.

Concerns about statelessness triggered a reform in Brazil in 2007. As explained by UNHCR:

Until 1994, children born abroad to a Brazilian mother or father could acquire Brazilian nationality provided they registered with a Brazilian consular representation. From 1994 onwards, due to an amendment of Article 12 of the Brazilian Constitution, Brazilian nationality could only be conferred on a child born abroad to a Brazilian father or mother if the child returned to reside in Brazil and applied for Brazilian nationality.²⁶

To avoid cases of statelessness, it was therefore decided to reintroduce the possibility of registering with a Brazilian consulate in 2007.

²⁵ This could be attributed to the countries' growing emigrant populations. Nonetheless, Margheritis calls the situation of children born abroad to Uruguayans "ambiguous" and refers to pending legislation that may clarify their status. A. Margheritis, Report Uruguay, EUDO Country Report 2015, p. 13.

²⁶ UNHCR, Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness, 2015.

7. Persons who are recognised refugees (S05), stateless or have undetermined nationality (S06)

The situation of recognised refugees, stateless persons and persons with undetermined nationality is particularly precarious and requires special arrangements with regard to access to nationality. In these cases legal protection against statelessness is best ensured when countries provide for special acquisition procedures or for facilitated naturalisation.

The international standards require States to grant refugees facilitated access to nationality (1951 Convention relating to the Status of Refugees, Article 34; ECN Article 6(4)g in conjunction with Article 16). This preferential treatment should also apply to stateless persons and persons with undetermined nationality (1954 Convention, Article 32; ECN, Article 6(4)g).

We treat cases where the nationality law does not have any special provisions or exceptions to existing conditions for access to nationality by recognised refugees, stateless persons or persons with unclear nationality as providing no protection against statelessness, even if the law allows these persons to obtain nationality through other procedures, such as residence-based naturalisation. Moreover, we consider that providing for a discretionary naturalisation procedure (rather than an entitlement to nationality) is problematic and not in line with the international standards. We are aware that the scores are not always able to capture all the nuances of the rules found in different nationality codes. When dealing with highly complex or ambiguous codes we chose to disregard certain provisions for the sake of simplicity and comparability. For example, we leave out rules that require stateless persons to be involuntarily stateless in order to fully benefit from the protection mechanism (e.g. in Finland). Moreover, we do not take into account conditions regarding the recognition of a person's statelessness if this does not lead to facilitated access to nationality. Thus while Honduras provides in Article 54 of the Nationality Act that it recognises a person's statelessness if he or she is present on national territory and lacks a specific nationality, the country is still given a score of zero (0.00) because there is no mention of an easier path to Honduran nationality.

There are five main conditions that restrict access to nationality for persons who are recognised refugees, one of which is manifestly

discriminatory. There are also five main conditions that restrict access to nationality for stateless persons and persons with undetermined nationality, one of which is manifestly discriminatory. For both categories of persons, we subtract 0.20 for each regular condition and 0.40 for each manifestly discriminatory condition (see Tables 6 and 7).

Table 6. Protection score for persons who are recognised refugees

Provisions of nationality law	Score
A. Unconditional acquisition of nationality	1.00
B. No facilitated naturalisation for refugees and no special safeguards against statelessness	0.00
C. Conditional acquisition	
C01. No exception regarding the period of residence	-0.20
C02. No exception regarding language, knowledge about the country or integration (if applicable)	-0.20
C03. No exception regarding self-sufficiency (if applicable)	-0.20
C04. No exception regarding security check or proof of loyalty (if applicable)	-0.20
C05. Discriminatory treatment on grounds of gender, ethnicity, race, etc.	-0.40

The comparative analysis shows that the great majority of countries from Europe and the Americas fail to provide adequate legal protection against statelessness for recognised refugees, stateless persons and persons with undetermined nationality. The highest score for mode S05 (refugees) is 0.60, which is only obtained by three European countries (Bosnia and Herzegovina, Montenegro, and Ukraine). Nineteen European countries and all American countries do not provide for any kind of special protection for these persons. The situation is comparable for stateless persons and persons with undetermined nationality (mode S06). Eighteen European countries and all American countries except Guatemala fail to provide any special provisions for access to nationality for this category of persons. Bosnia and Herzegovina, Greece, Montenegro and the UK are the best performing countries in Europe (score 0.60), while in the Americas Guatemala grants stateless persons facilitated access to nationality by reducing the residence period from five to two years (score 0.40).

Table 7. Protection score for stateless persons or persons with undetermined nationality

Provisions of nationality law	Score
A. Unconditional acquisition of nationality	1.00
B. No facilitated access to nationality for stateless persons and no special safeguards against statelessness	0.00
C. Conditional acquisition	
C01. No exception regarding the period of residence	-0.20
C02. No exception regarding language, knowledge about the country or integration (if applicable)	-0.20
C03. No exception regarding self-sufficiency (if applicable)	-0.20
C04. No exception regarding security check or proof of loyalty (if applicable)	-0.20
C05. Discriminatory treatment on grounds of gender, ethnicity, race, etc.	-0.40

It must be noted that naturalisation rates are generally very low in the Americas, hence the number of stateless persons naturalising in those countries is negligible. These very low naturalisation rates and the general lack of statistics suggest that granting stateless persons access to nationality under more favourable naturalisation conditions has to date not constituted a high priority in the Americas, although implementation of the Brazil Declaration and Plan of Action may help usher in changes in this regard. The situation with respect to lack of data is broadly comparable with that in Africa. According to Manby:

It is indicative of the difficulty of naturalisation that there are almost no published statistics about the numbers naturalised in most African countries. Those statistics that are available reveal that the numbers of naturalised persons vary hugely across countries, but are generally low.²⁷

8. Persons who voluntarily renounce the nationality of their country (S07)

Apart from failing to acquire a nationality, the loss of one's nationality is another major source of statelessness. In cases where nationality is renounced voluntarily, statelessness may occur if countries do not

²⁷ See B. Manby, *Citizenship and Statelessness in Africa: The Law and Politics of Belonging*, Wolf Legal Publishing 2015, p. 198.

provide for adequate safeguards for the retention of nationality by persons who fail to acquire another nationality. The 1961 Convention (Article 7(1)) and the ECN (Article 7(3)) allow persons to renounce their nationality provided that this does not result in statelessness.

There are five main situations or conditions that may lead to statelessness in the case of persons who voluntarily renounce their nationality, two of which are manifestly discriminatory. We subtract 0.20 for each regular situation or condition and 0.40 for each manifestly discriminatory condition (see Table 8).

Table 8. Protection score for persons who voluntarily renounce the nationality of their country

Provisions of nationality law	Score
A. Full protection against statelessness - safeguards in all procedures for renunciation	1.00
B. No safeguards against statelessness in any procedure for renunciation	0.00
C. Partial protection against statelessness	
C01. No condition regarding proof of actual possession of another nationality	-0.20
C02. No condition regarding proof of future acquisition of another nationality	-0.20
C03. No provision for the automatic re-acquisition of nationality in the case of failure to acquire another nationality	-0.20
C04. Discriminatory treatment on grounds of modes of acquisition of the original nationality (e.g. by birth or by naturalisation)	-0.20
C05. Discriminatory treatment on grounds of gender, ethnicity, race, etc. (not covered by C04)	-0.40

There are considerable differences between European and American countries as regards voluntary renunciation of nationality. While in Europe only Greece allows a person to voluntarily render him- or herself stateless, this is possible in fourteen countries of the Americas.²⁸ In the USA the prohibition against the renunciation of nationality where such renunciation would result in statelessness is seen as conflicting with domestic law, "which has long recognized the right of Americans to renounce their nationality, even if doing so would lead to statelessness".²⁹ Furthermore, it is striking that five

²⁸ It is noted that nationality can in fact never be renounced in Argentina, Costa Rica, Dominican Republic, Honduras and Uruguay.

²⁹ Quoted in UNHCR and Open Society Justice Initiative, *Citizens of Nowhere: Solutions for the Stateless in the U.S.*, 2012, p. 16.

countries only allow naturalised nationals to renounce their nationality (Ecuador, Haiti, Mexico, Nicaragua and Venezuela). As we shall see below, this differentiation between nationals by birth and nationals by naturalisation is in fact widespread in the Americas when it comes to the loss of nationality.

Finally, it is worth noting that some countries have used the procedure of “nonforfeiture” or *irrenunciabilidad* of nationality in order to advance various policy goals. The example of Mexico is revealing in this respect. Following changes to the law in 1998, Mexican nationality cannot be renounced by nationals by birth – only by naturalised nationals. This rule should be seen in light of Mexico’s decision to accept dual nationality. By making nationality non-renounceable, Mexico aims to prevent nationals from renouncing Mexican nationality at the request of the countries where they wish to naturalise.

9. Persons who involuntarily lose the nationality of their country (S08-13)

Nationality laws typically provide for a great variety of grounds for the (non-voluntary) loss of nationality. These legal provisions are particularly likely to cause statelessness. The 1961 Convention (Articles 7-8) and the ECN (Article 7) prescribe that the involuntary loss of nationality should not result in statelessness, although both standards make an exception if nationality is acquired by fraud.

The provisions of nationality laws with regard to the involuntary loss of nationality are particularly diverse and complex. In our analysis we treat together the most important modes of involuntary loss of nationality by focusing exclusively on the existence or absence of explicit clauses providing safeguards against statelessness. The analysis does not consider loss of nationality acquired by fraud because international standards do not impose on States the obligation to prevent statelessness in such cases.³⁰ There are ten major modes of involuntary loss of nationality and we assess the extent to which the nationality law provides for explicit safeguards against statelessness for each mode. We subtract 0.10 for each mode in which there is no

³⁰ This is a clear case in which one could judge international standards as providing insufficient protection against statelessness because they fall short of an absolute safeguard against statelessness.

safeguard against statelessness. In addition, we subtract 0.20 for each manifestly discriminatory condition applicable in at least one mode of involuntary loss of nationality (see table 9).

Table 9. Protection score for persons who involuntarily lose the nationality of their country

Provisions of nationality law	Score
A. Full protection against statelessness - safeguards in all procedures for involuntary loss of nationality	1.00
B. No safeguards against statelessness in any procedure for involuntary loss of nationality	0.00
C. Partial protection against statelessness	
C01. Fully discretionary procedure	-0.10
C02. No safeguard against statelessness in the procedure for involuntary loss due to residence abroad	-0.10
C03. No safeguard against statelessness in the procedure for involuntary loss due to service to a foreign country or due to military service to a foreign country	-0.10
C04. No safeguard against statelessness in the procedure for involuntary loss due to disloyalty or prejudice to national interest	-0.10
C05. No safeguard against statelessness in the procedure for involuntary loss due to other criminal offences	-0.10
C06. No safeguard against statelessness in the procedure for involuntary loss due to adoption or annulment of descent from a national	-0.10
C07. No safeguard against statelessness in the procedure for loss due to change in civil status due to marriage with a national or dissolution of a marriage	-0.10
C08. No safeguard against statelessness in the procedure for involuntary loss due to loss of nationality by spouse or registered partner or due to loss of nationality by parents	-0.10
C09. Discriminatory treatment on grounds of modes of acquisition of the nationality of the country in one or more modes of involuntary loss of nationality	-0.10
C10. Discriminatory treatment on grounds of gender, ethnicity, race, etc. (not covered by C09) in one or more modes of involuntary loss of nationality	-0.20

Seventeen European countries provide for full protection against statelessness in their provisions on loss of nationality. The remaining European countries provide for various partial levels of protection, with Cyprus, Bulgaria and Lithuania the countries providing the least protection. The situation is worse in the Americas, where only ten countries have adequate safeguards against statelessness in these circumstances. Most English-speaking countries in the Caribbean have numerous modes of loss of nationality that can lead to statelessness. However, in many of these cases, the grounds for loss apply only to naturalised nationals. This is why in our table (Annex 2) the English-speaking Caribbean countries score markedly lower than other countries in the Americas, as well as countries in Europe.

In ten countries, the majority of which are in the Americas, nationality of naturalised nationals can be revoked due to prolonged residence abroad, even if this results in statelessness (mode S08). It is important to note that in all these countries the fact that only naturalised nationals are at risk of losing their nationality this way, means that the States in question are in compliance with international standards. For example, Jamaica's law on loss of nationality for naturalised nationals who have been resident abroad for a seven-year period complies with its commitments under the 1961 Convention, which provides that:

A naturalized person may lose his nationality [and become stateless] on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality.³¹

Many countries treat disloyalty or treason (including terrorism) as a valid ground for withdrawal of nationality and, in the majority of countries, there is no protection against statelessness when nationality is withdrawn for these reasons. This ground for loss of nationality has recently attracted attention following discussions in several countries on the deprivation of nationality from those who take part in terrorist activities.³² There are as yet no signs that this issue plays a significant role in Latin America, but the Canadian Executive's power to revoke nationality on this ground have recently been broadened.

10. Comparative analysis

In order to produce a more general overview of the level of protection against statelessness provided by different countries we count the number of categories of persons at risk of statelessness (modes) for which a country provides a certain degree of formal protection against statelessness. Figures 1 and 2 represent graphically the levels of formal protection against statelessness in Europe and the Americas. The countries are colour coded according to the number of modes for which their protection score is greater than 0.80.

³¹ 1961 Convention, *supra* n10, Art. 7(3) and 7(4).

³² A. Macklin and R. Bauböck (eds), *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?*, Robert Schuman Centre for Advanced Studies and EUDO Citizenship Observatory 2015, EUI Working Papers RSCAS 2015/14.

As shown in Figure 1 (and Annex 1), the vast majority of European countries provide medium high to medium low protection against statelessness (i.e. there are four or five modes for which their protection scores are 0.80 or higher). Austria and Denmark offer low formal protection, partly due to their discriminatory rules as regards the transmission of nationality to children born out of wedlock by male citizens. However, the nationality laws of both countries have recently been amended in order to comply with the ECtHR decision in *Genovese v. Malta*, which establishes that the ECHR prohibition of discrimination applies to the acquisition of nationality.³³ Greece and Cyprus also offer low formal protection. While Cyprus fails to offer adequate protection to stateless children (modes S01-S02),³⁴ Greece scores low across a broad range of modes.

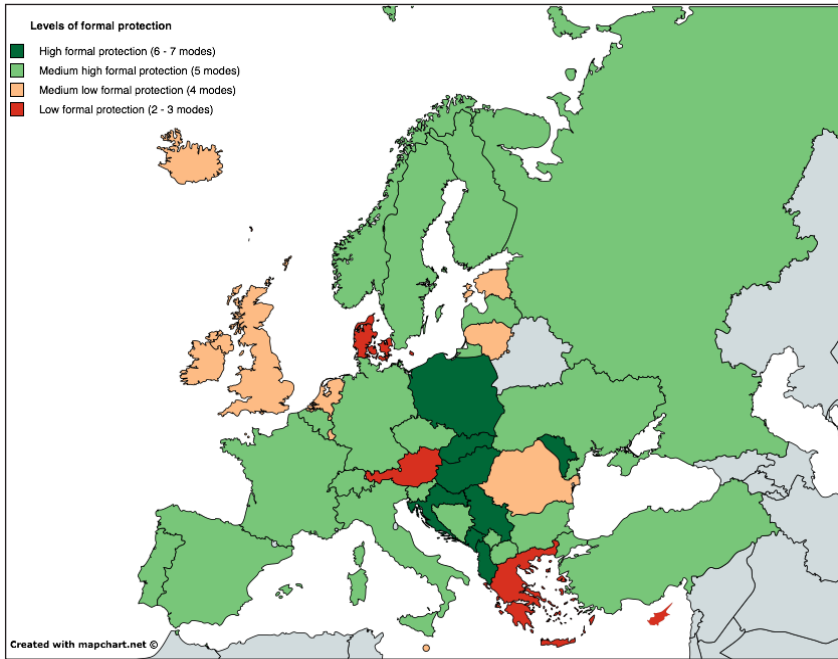
It must be recalled that our analysis and rankings reflect only the levels of formal protection against statelessness provided by various nationality laws. Although this provides an indication of the legal environment in which statelessness occurs, it does not shed light on the concrete problems that affect stateless people or persons at risk of becoming stateless in different national contexts. Praxis and the European Network on Statelessness, for example, have recently pointed to the "challenges in the realisation of the right of every child to acquire a nationality and the avoidance of childhood statelessness in Serbia as a result of discrimination, poor implementation of the law and challenges related to birth registration, faced in particular by the Roma community".³⁵

³³ See our explanatory remarks *supra* n14.

³⁴ See also the comments in, Council of Europe Commissioner for Human Rights, Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Cyprus from 7 to 11 December 2015, 31 March 2016, CommDH(2016)16.

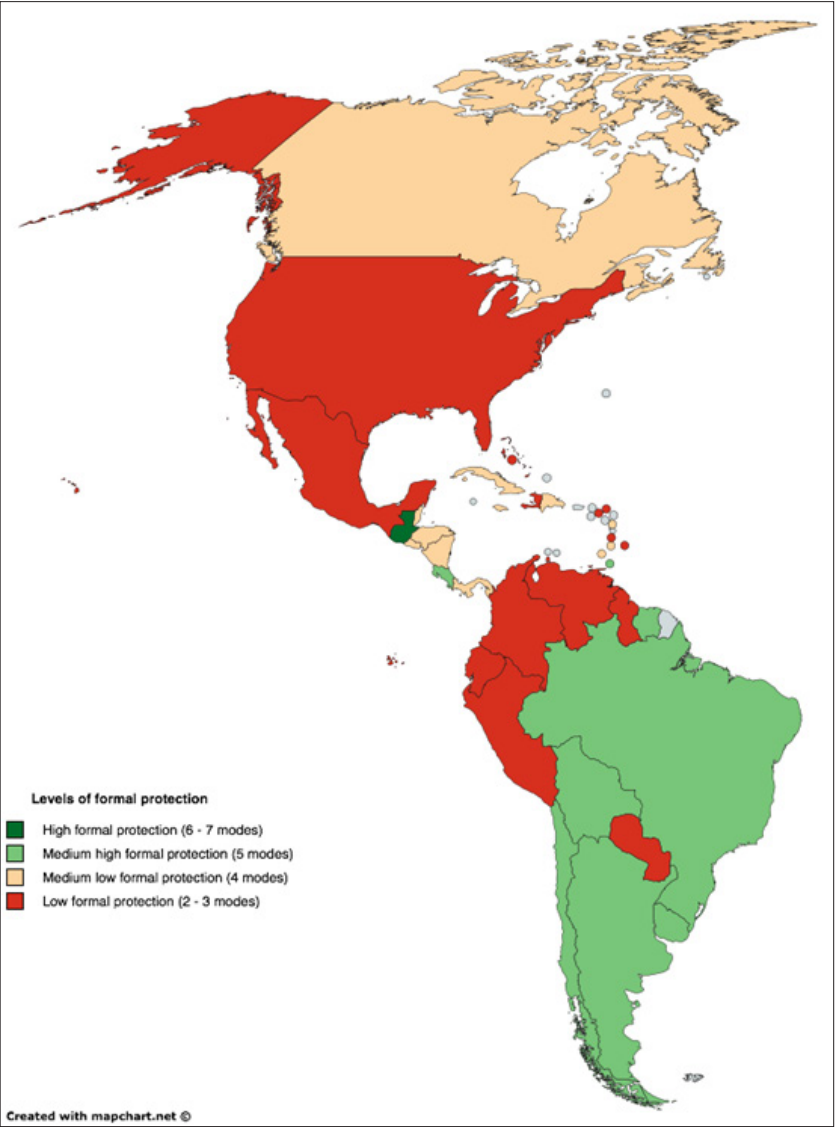
³⁵ Praxis, the Institute on Statelessness and Inclusion and the European Network on Statelessness, Civil Society Submission on the right of every child to acquire a nationality under Article 7 CRC: Serbia, 2016.

Figure 1. Levels of formal protection against statelessness in Europe (no. of modes with protection scores > 0.80)



It is commonly assumed that the Americas do not have a statelessness problem, as nationality is primarily acquired *jure soli*. However, our analysis reveals that a considerable number of countries in this region offer low levels of formal protection against statelessness (see Figure 2 and Annex 2). This situation can be explained by three factors: the lack of protection in some countries for children born abroad to a national; the absence of any facilitated access to nationality for refugees and stateless persons; and insufficient mechanisms to protect against statelessness in cases of voluntary or involuntary loss of nationality as well as discrimination against naturalised citizens in respect of loss of nationality.

Figure 2. Levels of formal protection against statelessness in the Americas (no. of modes with protection scores > 0.80)



11. Conclusions

The main goal of this chapter was to assess the compliance of national nationality laws with international legal standards on the prevention and reduction of statelessness. The analysis built on our previous research focused on Europe,³⁶ and was expanded to include the countries in the Americas. We discovered that while protection gaps exist in some European countries in respect of children born in a country who would otherwise be stateless, such gaps are largely absent in the Americas due to the strong tradition of *jus soli* in most of the countries.

Apart from providing a systematic comparative overview of the level of protection against statelessness afforded by nationality laws in Europe and the Americas, this chapter also touched on important questions about the scope of international legal standards and the lack of consistent terminology in the field. For example, the distinctions between native born and naturalised nationals, which are common in the Americas, are hard to interpret and assess. Apart from a few scattered examples in Europe (e.g., Cyprus), European nationality laws do not discriminate between these two categories of nationals and moreover such discrimination is prohibited by the ECN (Article 5(2)). In the Americas, by contrast, where existing norms do not prohibit such discrimination, it is widespread and deliberate. In Mexico, for example, “one of the most relevant inequities in the [...] citizenship regime has to do with the legal and practical differentiation between ‘categories’ of Mexicans with regard to their citizenship and its associated rights”.³⁷ As noted by Henio Hoyo, “such legally-sanctioned discrimination goes against the fundamental equality principle upon which the concept of citizenship is based. In any case, it has led to a number of Mexicans being second, or even third-class citizens for some purposes”.³⁸

Statelessness is a highly contextual phenomenon, which is often caused by complex historical, social and political factors. As a first step towards understanding how individuals become and remain stateless, this chapter applied benchmarks to Europe and the Americas – that is, regions where there are not large numbers of stateless persons (although substantial pockets of statelessness exist in Eastern Europe

³⁶ Vonk, Vink, and de Groot, *supra* n9, p. 105.

³⁷ H. Hoyo, Report Mexico, EUDO Country Report 2015, p. 18.

³⁸ *Ibid.*

and the Baltic States) and where countries generally have a good record in complying with the international standards on the prevention and reduction of statelessness. Nonetheless our analysis has shown that significant problems do exist in both Europe and the Americas. EUDO CITIZENSHIP now plans to expand its geographical scope by collecting information on Africa, Asia, the Middle East and Oceania.³⁹ This expansion is particularly timely in light of UNHCR's statement that the problem of statelessness is particularly acute in South East Asia, Central Asia and the Middle East.⁴⁰ This expansion will bring further understanding of the formal protection afforded against statelessness by nationality laws worldwide, while applying the benchmarks to more problematic regions will allow the development of a truly global comparative benchmark analysis in the context of statelessness.

³⁹ Information on citizenship laws in Africa, Asia, the Middle East and Oceania will gradually be made available by EUDO CITIZENSHIP during 2016-2017 through the comparative databases and country profiles.

⁴⁰ UNHCR, UNHCR launches campaign to combat statelessness, Press Release, 25 August 2011, <http://www.unhcr.org/4e54e8e06.html>.

Annexes

Annex 1. Comparative table of protection scores for European countries

Country	S01	S02	S03	S04	S05	S06	S07	S08-17	No. protection modes (> 0.80)
Albania	0.90	1.00	1.00	1.00	0.00	0.60	1.00	0.90	6
Croatia	0.90	1.00	1.00	1.00	0.00	0.00	1.00	0.90	6
Hungary	0.90	1.00	1.00	1.00	0.40	0.40	1.00	1.00	6
Liechtenstein	0.90	1.00	1.00	1.00	0.00	0.40	1.00	1.00	6
Moldova	1.00	1.00	1.00	1.00	0.40	0.40	1.00	1.00	6
Montenegro	1.00	1.00	1.00	1.00	0.60	0.60	1.00	1.00	6
Poland	0.90	1.00	1.00	1.00	0.40	0.40	1.00	0.90	6
Serbia	1.00	1.00	1.00	1.00	0.00	0.00	1.00	1.00	6
Slovakia	1.00	1.00	1.00	1.00	0.40	0.40	1.00	1.00	6
Belgium	1.00	1.00	1.00	1.00	0.00	0.40	1.00	0.70	5
Bosnia and Herzegovina	1.00	1.00	1.00	1.00	0.60	0.60	1.00	0.80	5
Bulgaria	1.00	1.00	1.00	1.00	0.40	0.40	1.00	0.70	5
Czech Republic	0.90	0.80	1.00	1.00	0.00	0.00	1.00	1.00	5
Finland	1.00	1.00	1.00	1.00	0.40	0.40	1.00	0.80	5
France	1.00	1.00	1.00	1.00	0.40	0.00	1.00	0.50	5
Germany	0.90	1.00	1.00	1.00	0.40	0.40	1.00	0.80	5
Italy	1.00	1.00	1.00	1.00	0.40	0.40	1.00	0.80	5
Kosovo	1.00	1.00	1.00	1.00	0.40	0.40	1.00	0.80	5
Latvia	0.80	1.00	1.00	1.00	0.00	0.00	1.00	1.00	5
Macedonia	0.90	1.00	1.00	1.00	0.40	0.40	1.00	0.80	5
Norway	0.00	1.00	1.00	1.00	0.00	0.40	1.00	1.00	5
Portugal	1.00	0.80	1.00	1.00	0.00	0.00	1.00	1.00	5
Russia	0.90	0.80	1.00	1.00	0.40	0.40	1.00	1.00	5
Slovenia	0.90	1.00	1.00	1.00	0.40	0.40	1.00	0.80	5
Spain	1.00	1.00	1.00	1.00	0.40	0.00	1.00	0.50	5
Sweden	0.90	1.00	1.00	0.60	0.40	0.40	1.00	1.00	5
Switzerland	0.00	1.00	1.00	1.00	0.00	0.40	1.00	0.90	5
Turkey	1.00	1.00	1.00	1.00	0.00	0.00	1.00	0.50	5
Ukraine	0.90	0.80	1.00	1.00	0.60	0.40	1.00	1.00	5
Estonia	0.80	1.00	1.00	1.00	0.00	0.40	1.00	0.40	4
Iceland	0.90	1.00	0.60	0.60	0.40	0.00	1.00	1.00	4
Ireland	1.00	0.80	1.00	0.90	0.00	0.00	1.00	0.60	4
Lithuania	0.80	1.00	1.00	1.00	0.00	0.00	1.00	0.40	4
Luxembourg	1.00	1.00	0.80	0.80	0.00	0.00	1.00	1.00	4
Malta	1.00	0.80	1.00	1.00	0.00	0.00	1.00	0.50	4
Netherlands	0.90	1.00	0.60	0.60	0.00	0.40	1.00	0.90	4
Romania	0.00	1.00	1.00	1.00	0.40	0.00	1.00	0.60	4
UK	1.00	0.80	1.00	0.60	0.00	0.60	1.00	1.00	4
Austria	0.90	0.80	0.60	0.60	0.40	0.00	1.00	0.90	3
Cyprus	0.00	0.00	1.00	1.00	0.00	0.00	1.00	0.20	3
Denmark	0.00	1.00	0.60	0.60	0.40	0.40	1.00	1.00	3
Greece	1.00	0.80	1.00	1.00	0.40	0.60	0.40	0.70	3

Annex 2. Comparative table of protection scores for American countries

Country	S01	S02	S03	S04	S05	S06	S07	S08-17	No. protection modes (> 0.80)
Guatemala	1.00	1.00	1.00	1.00	0.00	0.40	1.00	1.00	6
Argentina	1.00	1.00	1.00	0.80	0.00	0.00	1.00	1.00	5
Bolivia	1.00	1.00	1.00	1.00	0.00	0.00	0.40	1.00	5
Brazil	1.00	1.00	1.00	1.00	0.00	0.00	1.00	0.80	5
Chile	1.00	1.00	1.00	0.80	0.00	0.00	1.00	0.90	5
Costa Rica	1.00	1.00	1.00	0.80	0.00	0.00	1.00	1.00	5
Suriname	0.00	1.00	1.00	1.00	0.00	0.00	1.00	1.00	5
Trinidad & Tobago	1.00	1.00	1.00	0.80	0.00	0.00	1.00	1.00	5
Uruguay	1.00	1.00	1.00	0.80	0.00	0.00	1.00	1.00	5
Belize	1.00	1.00	1.00	1.00	0.00	0.00	0.40	0.20	4
Canada	1.00	0.80	1.00	0.80	0.00	0.00	1.00	1.00	4
Cuba	1.00	1.00	1.00	0.00	0.00	0.00	0.40	1.00	4
Dominica	1.00	1.00	1.00	0.80	0.00	0.00	1.00	0.40	4
Dominican Republic	0.80	1.00	1.00	1.00	0.00	0.00	1.00	0.20	4
El Salvador	1.00	1.00	1.00	1.00	0.00	0.00	0.40	0.80	4
Grenada	1.00	1.00	1.00	0.80	0.00	0.00	1.00	0.40	4
Honduras	1.00	1.00	1.00	0.80	0.00	0.00	1.00	0.80	4
Jamaica	1.00	1.00	1.00	0.60	0.00	0.00	1.00	0.40	4
Nicaragua	1.00	1.00	1.00	1.00	0.00	0.00	0.00	0.80	4
Panama	1.00	1.00	1.00	0.80	0.00	0.00	0.40	0.90	4
Saint Vincent and the Grenadines	1.00	1.00	1.00	0.80	0.00	0.00	1.00	0.40	4
Antigua and Barbuda	1.00	0.80	1.00	0.80	0.00	0.00	1.00	0.30	3
Barbados	1.00	0.80	1.00	0.80	0.00	0.00	1.00	0.30	3
Colombia	0.00	1.00	1.00	1.00	0.00	0.00	0.40	0.60	3
Ecuador	1.00	1.00	1.00	0.80	0.00	0.00	0.00	0.60	3
Guyana	1.00	0.80	1.00	0.80	0.00	0.00	1.00	0.40	3
Mexico	1.00	1.00	1.00	0.80	0.10	0.00	0.80	0.40	3
Paraguay	1.00	1.00	1.00	0.80	0.00	0.00	0.40	0.80	3
Peru	1.00	0.80	1.00	0.80	0.00	0.00	0.40	1.00	3
Saint Kitts and Nevis	1.00	0.80	1.00	0.00	0.00	0.00	1.00	0.40	3
Saint Lucia	1.00	0.80	1.00	0.80	0.00	0.00	1.00	0.60	3
Venezuela	1.00	1.00	1.00	0.80	0.00	0.00	0.00	0.60	3
Bahamas	0.00	0.00	1.00	0.40	0.00	0.00	1.00	0.30	2
Haiti	0.90	1.00	0.80	0.40	0.00	0.00	0.00	0.70	2
United States of America	1.00	0.80	1.00	0.08	0.00	0.00	0.40	0.40	2

7. Securing every child's right to a nationality in a changing world: The nationality implications of international surrogacy

Claire Achmad

1. Introduction

The past decade has seen a growth in children being conceived through alternative, medically assisted methods as a result of assisted reproductive technology (ART). This is an area of scientific advancement responding to and driving the development of new methods of family formation and new family forms. During this time, International Commercial Surrogacy (ICS) has emerged as one such family formation method, resulting in families being built across borders, enabled by ART and surrogate mothers. ICS uses reproductive technology and leverages globalisation and an international regulatory lacuna to meet the demand of 'commissioning parents' from a range of States, engaging in ICS for diverse reasons. ICS presents a number of human rights challenges to the parties involved, most significantly to the rights of children conceived and born through ICS who are particularly vulnerable given factors such as their lack of agency in infancy. One such challenge is that children are being born stateless in some ICS scenarios.

All children, including those conceived and born through ICS, have the right to acquire a nationality, explicitly established by Article 7(1) of the United Nations Convention on the Rights of the Child (CRC).¹ The challenge of securing a nationality has manifested acutely for children conceived and born through ICS, where the child does not acquire nationality at birth *jus soli* (by birthplace) or *jus sanguinis* (by descent). In ICS, children are born in one State to a surrogate mother via the use of ART, but intended as children of 'commissioning parents' originating from another State; in most ICS arrangements, such children are expected to travel to and reside in their 'commissioning parents' State

¹ Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3, Art. 7(1). Nationality is also explicitly referred to as an element of the child's identity under Article 8(1) of the CRC.

of nationality or residence. Due to the application of existing domestic nationality and citizenship laws, gaps in international and domestic laws and policies regarding ICS, and a lack of public education about the implications of birth through ICS for the child's rights and legal status, such children are falling victim to conflict of laws and facing difficulties in acquiring nationality following birth. In some cases children are born stateless, stranded in their birth State, despite the fact that, as Edwards asserts, "the duty to prevent statelessness, at least in respect of children, is emerging as a norm of customary international law".²

This chapter examines the challenge of securing the child's right to a nationality in our changing world, where having a child through ICS is a real – although sometimes last-resort – option for a growing number of prospective parents globally. It discusses the various scenarios of child statelessness in ICS, building an understanding of ICS as a new cause of statelessness occurring within the broader context of twenty-first century family formation. The wider human rights implications of statelessness for this group of children are examined through reference to illustrative cases and situated within the framework of relevant international legal provisions and standards. This chapter demonstrates that nationality is key to unlocking the child's wider rights and that upholding the child's right to nationality is critical if this group of children are to receive the rights they are entitled to under international law, consistent with the principle of the best interests of the child established by the CRC. This chapter shows that practical solutions to statelessness in ICS are within reach and should be implemented urgently, before the scale of ICS-caused statelessness grows.³

² A. Edwards, "The meaning of nationality in international law in an era of human rights: procedural and substantive aspects", in A. Edwards and L. van Waas (eds), *Nationality and Statelessness under International Law*, Cambridge University Press 2014, p. 29.

³ It is acknowledged that securing the child's right to a nationality does not present a stand-alone solution to the broader human rights and legal status challenges faced by children conceived and born through ICS. As discussed later in this chapter, other challenges to the child's rights may well persist, despite the child securing their right to a nationality. See, e.g. European Court of Human Rights (ECtHR), Application No 65192/11, *Mennesson v. France*, 26 June 2014; ECtHR, Application No 65941/11, *Labassee v. France*, 26 June 2014. For further discussion of these cases see, C. Achmad, "Children's rights to the fore in the European Court of Human Rights' first international commercial surrogacy judgments", *European Human Rights Law Review* 2014, Vol. 6, pp. 638-646.

2. Understanding the problem

2.1 ICS as a new method of family formation

ICS has become more widely available over the past decade as a new method of family formation. It involves a person or persons residing in one State (the ‘commissioning parents’) paying money to conceive a child and to have that child carried to term by a surrogate located in another State. ICS arrangements are premised on the intention of the ‘commissioning parents’ that the child will not live and grow up in the State of his or her birth, but rather in the State in which his or her ‘commissioning parents’ reside. ICS regularly uses ART techniques and procedures and, since the child is brought to term by a surrogate, is an attractive method of family formation for same-sex couples and single persons as well as heterosexual couples. Little data has been collected to date on the numbers of children born through ICS, and gathering accurate data on ICS remains difficult.

2.2 International Commercial Surrogacy as a new cause of statelessness

ICS has developed over the last decade in a largely unregulated manner, with particular supply-side growth located in States in Asia such as India, Thailand and Nepal.⁴ Demand for ICS is flowing predominantly from ‘commissioning parents’ living in more developed States such as Australia, New Zealand, the United Kingdom of Great Britain and Northern Ireland (UK) and the United States of America.⁵ The near-certainty of having a child, decreasing intercountry adoption options⁶ and the desire of many ‘commissioning parents’ to have their own genetic child or a child who is at least genetically related to their partner make surrogacy attractive to such parents. The availability of

⁴ Although certain states in the United States of America (USA) are significant ICS suppliers and have been for much longer, they are not covered in this chapter since children born in the USA through ICS always receive US nationality as a result of being born on US territory, so statelessness does not arise.

⁵ R. Deonandan, “Recent trends in reproductive tourism and international surrogacy: ethical considerations and challenges for policy”, *Risk Management and Healthcare Policy* 2015, Vol. 8, p. 115. Australia is said to be emerging as the highest *per capita* user of international surrogacy: Chief Federal Magistrate J. Pascoe, “State of the Nation – Federal Circuit Court of Australia”, *Federal Judicial Scholarship* 2014, Vol. 21.

⁶ J.F. Mignot, “L’adoption internationale dans le monde: les raisons du déclin”, *l’Institut national d’études démographiques Report No. 519*, 2015.

practices unavailable in their countries of residence, lack of regulation in supply States and the low cost and relative speed further make ICS appealing.

Despite ICS being viewed by many prospective 'commissioning parents' as a panacea enabling them to have a child, in practice it is a complex procedure due to the involvement of multiple parties, ART techniques and processes, as well as its trans-boundary character. There is no international regulation of ICS and national laws remain patchy and piecemeal. Therefore ICS arrangements are often made in contexts with limited legal clarity and certainty regarding their ultimate outcome. Pre-existing State level surrogacy laws are often formulated with a view to domestic surrogacy only; in many States such legislation outlaws commercial surrogacy and is silent on international surrogacy. While States take diverse approaches in relation to domestic surrogacy, provisions on this subject fall largely into three categories, namely: prohibitive (all forms of surrogacy are illegal); limitedly permissive (surrogacy is allowed in some situations, limited for example to altruistic surrogacy and situations of medical necessity); or silent (says nothing about surrogacy and has no policy on surrogacy). Attempts by States to apply these laws to ICS lead to situations where national laws of the States involved conflict, or where the gaps in national laws make the situation unclear. In recent years a small number of States have adopted legislative measures explicitly addressing ICS and recognising it as a specific form of surrogacy. Some have established legislative bans on ICS within their territory;⁷ others make clear that engaging in ICS amounts to a criminal offence, applying extraterritorially.⁸ One rationale underlying such bans on ICS is the argument that ICS amounts to the sale of children and must be guarded against.

Within this context, ICS has emerged as one of the newest causes of statelessness in the twenty-first century. Smerdon observes that, "[i]nternational surrogacy arrangements have created paradoxical situations of 'legal orphanhood' where highly desired surrogate

⁷ See, e.g., Thailand's Protection for Children Born through Assisted Reproductive Technologies Act 2015; for a detailed overview of the Act, see S. Umeda, Thailand: New Surrogacy Law, Library of Congress, 6 April 2015, http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404368_text.

⁸ See e.g., New South Wales (Australia) Surrogacy Act 2010 (2010 No. 102), Sections 8 and 11.

babies with arguably multiple parents are not recognised by either the child's country of birth or the country of the child's commissioning parent(s).⁹ 'Commissioning parents' may enter into ICS arrangements without comprehending the risk of statelessness for a future child. The complications surrounding the child's ability to acquire a nationality are inherently related to their relationship with their various biological and 'commissioning' parents, which may include all those involved with the child's conception and/or birth as a 'commissioning parent', surrogate mother, or gamete donor. A child born through ICS may face difficulties in acquiring nationality in a number of ways. As the three scenarios discussed below show, the risk of statelessness for children born through ICS depends on the positions on surrogacy of the birth State, the States of nationality of 'commissioning parents' and the nationality and parentage laws applicable in those States.

2.2.1 Scenario one: Lack of recognition of the child's parentage prevents nationality acquisition

Statelessness can occur in ICS where the child's birth State does not grant nationality on a *jus soli* basis and the child is unable to acquire the nationality of either the 'commissioning parents' or the surrogate, as none are recognised as the child's legal parent(s). This scenario can arise when there is confusion regarding who the child's birth State recognises as a legal parent of the child, and the 'commissioning parents' State does not recognise them as the child's legal parents, leading to no one being recognised as the child's legal parent(s). A child can also become stateless under scenario one when the 'commissioning parents' State of nationality requires the child to have a genetic link to at least one of the 'commissioning parents' to receive that State's nationality, but DNA tests are negative.

Scenario one can also arise in instances where the surrogate is not a national of the child's birth State, but a third-country national; for example, until recently, ICS was permitted in Nepal in instances where the surrogate was not a Nepalese national (but, for example, an Indian national).¹⁰ In such situations, given that Nepal grants nationality *jus*

⁹ U.R. Smerdon, "Birth registration and citizenship rights of surrogate babies born in India", *Contemporary South Asia* 2012, Vol. 20(3), p. 341.

¹⁰ Following a Cabinet decision by the Nepalese Government on 18 September 2014, ICS was allowed in Nepal but prohibited the involvement of Nepalese women as surrogates, the donation of gametes by Nepalese citizens, and the

sanguinis, the child will be stateless if he or she is not recognised as a national by the 'commissioning parent's' State of nationality or the surrogate mother's State of nationality. Finally, under this first scenario statelessness can occur when the child's birth State introduces a temporary or permanent prohibition on ICS within that State without clarifying the legal status of children currently *in utero* through an ICS arrangement, or children born in the State through ICS following the imposition of such a ban (as arose in Nepal in 2015).¹¹

2.2.2 Scenario two: Application of conflicting nationality and parentage laws by child's birth State and 'commissioning parents' State of nationality

The second scenario in which children conceived and born through ICS can end up stateless appears, in practice, to be more common than that discussed in scenario one. Here, children are unable to acquire a nationality following their birth due to national laws and policies of the child's birth State regarding the status of children, parentage and nationality conflicting with those applied by their 'commissioning parents' State of nationality.

The initial factor leading to children being rendered stateless in this scenario is that their birth State does not view children born through ICS within that State as nationals, given that under its laws, they are the legal children of their 'commissioning parents' and therefore regarded as nationals of their 'commissioning parents' State of nationality. Such States do not recognise the child's surrogate mother (and her partner, if she has one) as the child's legal parents and one or both 'commissioning parents' are listed as the child's parents on any birth registration document issued by the child's birth State. This is the case,

use of surrogacy services by Nepalese citizens. See R. Parajuli, Surrogacy in Nepal: Threat to reproductive right, *The Himalayan Times*, 18 August 2015, <http://thehimalayantimes.com/opinion/surrogacy-in-nepal-threat-to-reproductive-right>. However, following a decision by the Nepal Supreme Court on 18 September 2015, international surrogacy in Nepal is now prohibited. See, Embassy of the United States, Kathmandu, Nepal, Surrogacy in Nepal, 14 June 2016, <http://nepal.usembassy.gov/service/surrogacy-in-nepal.html>.

¹¹ L. Kerin, Australian dad pleads for Government help after twin babies stranded in Nepal, *Australian Broadcasting Corporation (ABC) News*, 21 October 2015, <http://www.abc.net.au/news/2015-10-21/australian-twin-babies-stranded-in-nepal/6871840>.

for example, in Ukraine¹² and in India.¹³ Children born through ICS in Ukraine are not able to acquire Ukrainian nationality,¹⁴ and in India such children are usually precluded from acquiring Indian nationality on the basis of their birth through ICS to foreign ‘commissioning parents’.¹⁵

The second part of the recipe leading to child statelessness in this scenario is that the ‘commissioning parents’ State of nationality takes the position that the child is not one of its nationals either. This may be because the ‘commissioning parents’ State of nationality confers nationality on the basis of *jus soli* or places limitations on the transfer of nationality to children born abroad, and/or because the national law of the ‘commissioning parent’s’ State of nationality (and/or residence) concerning the status of children views the child’s surrogate and her partner (if she has one) as the child’s legal parent(s).

A number of cases illustrate scenario two. A leading case is that of the Balaz twins who were born in India to an Indian surrogate mother on 4 January 2008 and were stateless from birth.¹⁶ The twins are the genetic

¹² Ukrainian law views the ‘commissioning parents’ as the child’s legal parents in surrogacy situations. See, Family Code of Ukraine 2004, Arts. 123(2) and 139(2).

¹³ Indian Council of Medical Research and National Academy of Medical Sciences, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India, 2005, para. 3.5.4 states that, “the birth certificate shall be in the name of the genetic parents”. However, the National Guidelines do not have binding force of law in India.

¹⁴ Law on Citizenship of Ukraine 2001, Art. 7 states that, “a person, whose parents or one of the parents were citizens of Ukraine at the time of his/her birth is a citizen of Ukraine”. When combined with the provisions of the Family Code of Ukraine 2004, *supra* n12, this means children born through ICS in Ukraine are unable to acquire Ukrainian nationality as they are not viewed as having a Ukrainian parent.

¹⁵ This has been the clear position taken by the Indian Government, e.g., in proceedings in the on-going case Supreme Court of India, Civil Appeal No. 8714, *Union of India and ANR v. Jan Balaz and others*, 2010. However, it is worth noting the wording of India’s Citizenship Act 1955 section 3(c), which states that every person born in India shall be a citizen of India by birth where “(i) both of his parents are citizens of India; or (ii) one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth”. Smerdon, *supra* n9, p. 345 observes that, “the law remains unclear as to whether a child born to an Indian surrogate is a citizen of India”.

¹⁶ High Court of Gujarat at Ahmemabad, Letters Patent Appeal No. 2151, 2009 in Special Civil Application No. 3020, 2008 with Civil Application No. 11364 of 2009

children of their 'commissioning father', Jan Balaz, and an anonymous third-party Indian egg donor.¹⁷ Their 'commissioning mother', Susanne Lohle (married to Mr Balaz) is not genetically related to the twins. Mr Balaz and Ms Lohle are both German citizens, and initially sought to gain German visas for the twins to enter Germany, but the applications were rejected.¹⁸ Subsequently these 'commissioning parents' sought Indian citizenship for the twins. However, India viewed the 'commissioning parents' as the twins' legal parents; without an Indian citizen parent they were unable to acquire Indian nationality.

Almost two years after the twins' birth, the High Court of Gujarat ruled that because the twins were born in India to an Indian surrogate mother, they could be regarded as having one Indian citizen parent and were entitled to Indian citizenship under section 3(1)(c)(ii) of the Citizenship Act.¹⁹ The Court further held the twins were entitled to Indian passports, as denying them passports would not fall within the grounds of refusal of passports under the Indian Passports Act.²⁰ However, the twins' statelessness persisted because the Indian government continued to take the position in subsequent Supreme Court proceedings that the 'commissioning parents' were the legal parents and therefore the twins could not acquire Indian nationality.²¹ Following protracted attempts by the 'commissioning parents' to leave India with the twins (during which time the German government took a hard-line approach, in line with the German prohibition on surrogacy),²²

in Letters Patent Appeal No. 2151, 2009 with Special Civil Application No. 3020, 2009, *Jan Balaz v. Anand Municipality and ANR*, 11 November 2009, para. 3.

¹⁷ *Ibid.*, para. 2.

¹⁸ As surrogacy is illegal in Germany: Embryonenschutzgesetz 1990 (Act on the Protection of Embryos, Germany), section (1)(1)(7).

¹⁹ *Jan Balaz v. Anand Municipality and ANR*, *supra* n16, para. 17.

²⁰ *Ibid.*, paras. 17-18. In para. 22, the Court held that, "[w]e, in the present legal frame-work, have no other go [sic] but to hold that the babies born in India to the gestational surrogate are citizens of this country and therefore, entitled to get the Passports".

²¹ Smerdon, *supra* n9, p. 347.

²² See, e.g., the comments of the then German Ambassador to India, Thomas Matussek, in K. Schoch, Deutschland verweigert indischer Leihmutter die Einreise, *Sudwest Presse*, 4 March 2010, <http://www.swp.de/ulm/nachrichten/politik/Deutschlandverweigert-indischer-Leihmutter-dieEinreise;art4306,389187>. See also the comment by Ambassador Matussek regarding the possibility of granting the twins a German entry visa, "[w]e have to be very careful. We don't want to set a precedent [...] We don't want to encourage people to go down this path. This is not the way to put children

an *ad hoc* solution was reached, enabling the intercountry adoption of the twins by the ‘commissioning parents’.²³ Exit documentation was then issued by the Indian government, along with a one-off German entry visa.²⁴

Three other cases similar in nature to the Balaz case and falling under scenario two demonstrate the contexts in which measures are needed to avoid statelessness in ICS. The Volden twins were stateless from their birth in India on 24 January 2010,²⁵ resulting from an ICS arrangement commissioned by a single Norwegian woman using an anonymous Danish sperm donor and anonymous Indian egg donor.²⁶ They remained stateless in India for over a year given the Indian position on legal parentage and nationality in ICS, combined with the Norwegian legal position that the twins were not Norwegian nationals given their birth to an Indian mother in India²⁷ and the fact that surrogacy is not permitted in Norway.²⁸ It was not until 15 March 2011 that Norwegian immigration authorities decided, on an

into the world.” Reported in R. Bhatnagar, Germany might consider visas for surrogate twins, DNA India News, 5 January 2010, <http://www.dnaindia.com/india/report-germany-might-consider-visas-for-surrogate-twins-1331021>.

²³ A. Malhotra and R. Malhotra, “All Aboard For the Fertility Express”, Commonwealth Law Bulletin 2012, Vol. 38(1), p. 33.

²⁴ Smerdon, *supra* n9, p. 351. If the twins’ intercountry adoption was fully concluded, it can be assumed the twins acquired German nationality through this process; however, no evidence is publicly available confirming that this occurred. Proceedings in the Supreme Court of India remain pending in this case, with the Court yet to rule on the substantive issue of the acquisition of a nationality by children born through ICS in India: http://supremecourtfindia.nic.in/clist_bm/2012/bm_dl25022015.pdf, case 101.

²⁵ S. Lysvold *et al.*, Kari Ann Volden får komme hjem, Norsk rikskringkasting (NRK), 16 April 2011, <http://www.nrk.no/nordland/kari-ann-volden-far-komme-hjem-1.7596488>.

²⁶ D. Deomampo, “Defining Parents, Making Citizens: Nationality and Citizenship in Transnational Surrogacy”, Medical Anthropology 2014, Vol. 34(3), p. 14, n. 5.

²⁷ M. Melhuus, Problems of Conception: Issues of Law, Biotechnology, Individuals and Kinship, Berghahn Books 2012, p. 84. Norway regarded the twins’ Indian birth mother as their legal mother, applying Norway’s Children Act 1981 (Act No. 7 of 8 April 1981), section 2. Also relevant is Norway’s Act on Biotechnology 2003 (Act No. 100 of 5 December 2003), sections 2-15, the effect of which is that it is prohibited to implant embryos into a woman other than the egg donor herself.

²⁸ See Norwegian Government, Surrogacy, 23 January 2015, <https://www.regjeringen.no/en/topics/families-and-children/innsiktsartikler/surrogate-maternity/id660199>.

exceptional basis, that they could enter and reside in Norway.²⁹ In May 2011 a Norwegian court granted the twins' 'commissioning mother' guardianship of the twins, including financial and legal responsibility, but did not recognise her as the twins' legal mother. As a result the twins did not acquire nationality at this point and therefore remained stateless in Norway.³⁰ The case of *X and Y (Foreign Surrogacy)*³¹ concerned twins born stateless in Ukraine, commissioned by British 'commissioning parents' using the 'commissioning father's' sperm and anonymous donor eggs.³² The twins' statelessness occurred given the application and subsequent conflict of the Ukrainian and UK legal regimes relating to surrogacy and nationality.³³ UK law viewed the twins as Ukrainian nationals with their legal parents being their birth mother and her partner,³⁴ while Ukrainian law stipulates that children born through surrogacy in Ukraine are the legal children of their 'commissioning parents' and therefore not entitled to Ukrainian nationality.³⁵ The twins were only able to leave Ukraine and enter the UK due to the UK granting them discretionary leave to enter for one year under exceptional circumstances following DNA tests proving the existence of a genetic link between the twins and their 'commissioning father',³⁶ however, even once the twins had entered the UK and their 'commissioning parents' had been granted a parental order under

²⁹ Lysvold *et al.*, *supra* n25.

³⁰ B. Johansen and B.M. Pettersen, Volden får beholde tvillingene, NRK, 7 May 2011, <http://www.nrk.no/nordland/volden-far-beholde-tvillingene-1.7622605>. It remains unreported whether or not the twins were adopted or acquired Norwegian nationality.

³¹ UK High Court of Justice Family Division, Case No. FD08P01466, *Re: X & Y (Foreign Surrogacy)*, EWHC 3030 (Fam), 9 December 2008.

³² *Ibid.*, para. 4.

³³ E. Nelson, "Global Trade and Assisted Reproductive Technologies: Regulatory Challenges in International Surrogacy", *The Journal of Law, Medicine and Ethics* 2013, Vol. 41(1), p. 246; L. Theis, N. Gamble and L. Ghevaert, "Re X and Y (Foreign Surrogacy): 'A Trek Through a Thorn Forest'", *Family Law*, March 2009, p. 239.

³⁴ UK, Human Fertilisation and Embryology Act 1990, 1990 c. 37, section 27 defines the mother as "[t]he woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs".

³⁵ Mr. Justice Hedley was explicit about the twins' statelessness, summarising the effect of the application of these conflicting laws to the twins as meaning that they "were effectively legal orphans and, more seriously, stateless". *X & Y (Foreign Surrogacy)*, *supra* n31, para. 9.

³⁶ *Ibid.*, para. 10.

UK law, they remained stateless.³⁷ Finally in relation to scenario two, Samuel Ghilain was born in Ukraine on 28 November 2008³⁸ through an ICS arrangement commissioned by a Belgian same-sex couple using the sperm of one ‘commissioning father’ and anonymous donor eggs.³⁹ Given the application of Belgian and Ukrainian laws, Samuel was born stateless,⁴⁰ stranded in Ukraine for over two years, finally acquiring Belgian nationality after protracted legal proceedings.⁴¹

2.2.3 Scenario three: Children abandoned by commissioning parents

The third scenario whereby children conceived and born through ICS are stateless is when they are abandoned in their birth State by their ‘commissioning parents’. In this scenario, ICS arrangements are not completed due to ‘commissioning parent(s)’ deciding they do not want to parent the child they commissioned. Abandonment may occur

³⁷ Mr Justice Hedley noted that, “the grant of a parental order does not of itself confer citizenship although the evidence suggests that it is very unlikely to be denied if sought”. *Ibid.*

³⁸ Associated Press, Baby, stranded in Ukraine, to join Belgian parents, Fox News, 21 February 2011, <http://www.foxnews.com/world/2011/02/21/baby-stranded-ukraine-join-belgian-parents-1916799428>.

³⁹ I.G. Cohen, *Patients with Passports: Medical Tourism, Law and Ethics*, Oxford University Press 2014, p. 376.

⁴⁰ T. Lin, “Born Lost: Stateless Children in International Surrogacy Arrangements”, *Cardozo Journal of International and Comparative Law* 2013, Vol. 21, p. 547 explains, “[b]ecause Belgian law is silent on the legality of surrogacy, the Belgian government denied Samuel citizenship on the grounds that it had no legal basis to recognise the Ukrainian birth certificate, despite the fact that Samuel’s biological father is a Belgian citizen. Samuel also could not be a Ukrainian citizen because Ukrainian law recognises the intended parents as the child’s legal parents.”

⁴¹ D. Melvin, Boy stuck 2 years in Ukraine arrives in Belgium, *The Washington Post*, 26 February 2011, <http://www.washingtonpost.com/wpdyn/content/article/2011/02/26/AR2011022601088.html>. The Brussels Court of First Instance formally recognised the genetic link between Samuel and one of his ‘commissioning fathers’, see, C. Kindregan and D. White, “International Fertility Tourism: The Potential for Stateless Children in Cross-Border Commercial Surrogacy Arrangements”, *Suffolk Transnational Law Review* 2013, Vol. 36(3), p. 617. The Belgian government complied with the judgment, granting Samuel a passport, see, Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation, Steven Vanackere – surrogate motherhood, 18 February 2011, http://diplomatie.belgium.be/en/Newsroom/news/press_releases/foreign_affairs/2011/02/ni_1802110_vanackere_surrogate_motherhood.

either during the pregnancy or following the child's birth. If a child is abandoned by their 'commissioning parents' following birth in a State where they are unable to acquire nationality due to nationality laws based on *jus sanguinis* and the view that the 'commissioning parents' are the child's legal parents, they are likely to be stateless and parentless.

Examples of this third scenario of child statelessness in ICS are more difficult to detect than those falling under scenario two, given that without 'commissioning parents' involved, they may be less likely to come before national courts for resolution; moreover, cases falling under scenario three may not come to the attention of the authorities in either the child's State of birth or the 'commissioning parents' State of nationality and/or residence at all. However, one case reported by the media involved a child abandoned in India by Australian 'commissioning parents'. In this case, following the birth of twins – a boy and a girl – their 'commissioning parents' decided they only wanted to take the girl home to Australia. As they already had a son, the girl would complete their family and they could not afford to support both the twins.⁴² The Australian government warned the 'commissioning parents' that the boy could be left stateless if they did not apply for Australian citizenship for him⁴³ (given the application and effect of Indian and Australian laws concerning nationality and parentage in ICS situations). However, the 'commissioning parents' took no such action and the boy was left stateless and parentless in India.⁴⁴

2.3 Key findings distilled from the three ICS child statelessness scenarios and associated cases

The three scenarios and associated cases discussed above highlight the contexts within which child statelessness can arise in ICS. They show that children conceived and born through ICS may face

⁴² J. Ireland, Fresh surrogacy concerns over boy abandoned in India, Sydney Morning Herald, 14 April 2015, <http://www.smh.com.au/federal-politics/political-news/fresh-surrogacy-concerns-over-boy-abandoned-in-india-20150414-1mjy3.html>.

⁴³ *Ibid.*

⁴⁴ S. Hawley, S. Smith and M. McKinnon, India surrogacy case: Documents show New South Wales couple abandoned baby boy despite warnings, ABC News, 13 April 2015, <http://www.abc.net.au/news/2015-04-13/australian-couple-abandon-baby-boy-in-india-surrogacy-case/6387206>.

difficulties securing a nationality following birth in a number of ways which connect to gaps and conflicts in national laws in ICS supply and demand States relating to legal parentage and nationality and the available modes of nationality acquisition. Indeed, child statelessness in ICS is often linked to challenges faced by the child regarding legal recognition of their parentage. The cases discussed show that when a conflict between parentage laws of the various States involved in an ICS arrangement occurs, the child is likely to be without legal parentage for a time. This in turn impacts on children's ability to acquire a nationality if they are born in a State which does not allow nationality acquisition by *jus soli*. However, the cases also highlight that even if legal parentage is established in ICS cases, this does not automatically lead to nationality for the child. Therefore, while there are strong connections between parentage and nationality issues in ICS cases, legal recognition of parentage does not always lead to a child gaining nationality.

The scenarios discussed illustrate the non-existence in many jurisdictions of domestic legislation and policy explicitly designed to apply to ICS situations. In the majority of States, no national laws have been adopted explicitly addressing ICS situations, including issues such as the child's nationality when conceived and born through ICS. Therefore, many States are attempting to fill a legal vacuum by applying domestic laws which legislators did not envisage applying to ICS situations. The three scenarios also bring into sharp relief the gaps at the international level regarding ICS. No international law explicitly addresses or regulates ICS, and to date no international agreements have been reached between States regarding the practice.

The cases are further significant given that they are representative of the reality that when statelessness occurs in ICS situations, it occurs from birth. As de Groot observes, birth is a key moment for children regarding nationality, "[t]he pivotal juncture in guaranteeing a person's right to a nationality is the moment of birth. If a child does not secure a nationality at birth, he or she may be left stateless for many years, or even a lifetime – with severe consequences."⁴⁵ The cases also highlight the wide range of factual variations in ICS situations: no

⁴⁵ G.R. de Groot, "Children, their right to a nationality and child statelessness", in A. Edwards and L. van Waas (eds), *Nationality and Statelessness under International Law*, Cambridge University Press 2014, p. 144.

ICS arrangement is exactly the same as another, given factors such as the States involved and therefore which national laws apply, whether or not the States have clear positions on nationality of children in ICS, and the status of the 'commissioning parents' both in relation to each other (heterosexual married; heterosexual unmarried; same-sex) and whether or not a 'commissioning parent' shares a genetic link with the child.

2.3.1 Examining the wider child rights impacts of child statelessness in ICS

Significant findings relating to the wider child rights impacts of statelessness in ICS can be identified based on the outcomes in the cases discussed above. The first is that in all the cases, the actions taken by the States involved were inconsistent with the principle of the best interests of the child. Moreover, in all the cases, the children were arguably discriminated against on the basis of their birth status tied to their birth through ICS given (in many instances) the uncertain nature of ICS under national law, with this status being the basis for decisions leading to their statelessness.

A further finding regarding the child rights consequences highlighted by these cases is that nationality is important to access many other rights guaranteed to all children by the CRC given the interlocking and interdependent nature of rights. As de Groot notes, "childhood statelessness threatens access to education, an adequate standard of living, social assistance, health care and other specific forms of protection to which children are entitled".⁴⁶ As a result of their statelessness, the children's freedom of movement outside their State of birth was restricted in all the cases discussed. Statelessness also meant all of the children had a highly uncertain legal status (in some cases for years), and were unable to gain social security and the State support services that they would have been entitled to from their birth State if they were recognised as nationals. Mr Justice Hedley noted in the case of *X and Y (Foreign Surrogacy)* that "the children had no rights of residence in or citizenship of the Ukraine and there was no obligation owed them by the state other than to accommodate them as an act of basic humanity in a state orphanage".⁴⁷

⁴⁶ *Ibid.*

⁴⁷ *X & Y (Foreign Surrogacy)*, *supra* n31, para. 8.

Another result of statelessness in ICS evident in the cases discussed is that this sometimes leads to the children being separated from their ‘commissioning parents’ and prevented from having a relationship with the very people who are often the only adults wanting to parent the children. The Balaz twins were separated from their ‘commissioning mother’⁴⁸ and in the judgment of *X and Y (Foreign Surrogacy)* it was observed that the twins “were marooned stateless and parentless whilst the applicants could neither remain in the Ukraine nor bring the children home”.⁴⁹ Both Samuel Ghilain’s ‘commissioning parents’ were unable to remain in Ukraine, and he was initially placed with a foster family. Later, when they were unable to continue to finance this care he was placed in an orphanage for a year.⁵⁰ If we are to view the child’s ‘commissioning parents’ as the child’s parents, being separated in this way impacts on the child’s right under Article 7 of the CRC to know and be cared for by his or her parents as far as possible.

A final child rights impact illustrated by the cases discussed is that such children are at risk of being trafficked or becoming the subject of illegal cross-border movement. While the risk from third parties should not be under-estimated, in several cases ‘commissioning parents’ themselves have taken desperate measures in their attempts to secure the child’s exit from their birth State and entry into their intended State of residence. Samuel Ghilain’s ‘commissioning parents’ made a (failed) attempt to smuggle him out of Ukraine in March 2010⁵¹ and the Volden twins’ ‘commissioning mother’ falsified an adoption application to the Norwegian government.⁵²

The fact that children are stateless as a result of their birth through ICS means that their rights under international law are being breached; the next section focuses on the standards and norms under international

⁴⁸ Relief for German surrogate twins, The Times of India, 17 March 2010, <http://www.timesnow.tv/Relief-for-German-surrogate-twins/articleshow/4340782.cms>. While it is unclear why the twins’ ‘commissioning mother’ did not stay in India with them, the practical reality in such situations is that financially it may be untenable to remain away from home and work for extended periods of time, or travel visas to remain in the child’s State of birth may expire.

⁴⁹ *X & Y (Foreign Surrogacy)*, *supra* n31, para. 10.

⁵⁰ Baby, stranded in Ukraine, to join Belgian parents, *supra* n38.

⁵¹ *Ibid.* The abduction or trafficking of children is prohibited under international law see, e.g., CRC, *supra* n1, Art. 36.

⁵² C. Kroløkke, “From India with Love: Troublesome Citizens of Fertility Travel”, *Cultural Politics* 2012, Vol. 8(2), p. 318.

law governing the child's right to acquire a nationality, which help inform how we can secure the child's right to nationality in ICS.

3. International law governing the child's right to acquire a nationality

3.1 General nationality provisions and nationality provisions pertaining specifically to children

Article 15(1) of the Universal Declaration of Human Rights (UDHR)⁵³ establishes the right to nationality as a universal right; Article 15(2) further states that no one shall be arbitrarily deprived of nationality. Subsequent international human rights law instruments have confirmed and elaborated on Article 15 of the UDHR with specific reference to children. Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) asserts that, "every child has the right to acquire a nationality";⁵⁴ Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that, "each child of a migrant worker shall have the right to [...] a nationality".⁵⁵ Regional human rights instruments also recognise the right of the child to a nationality, with the American Convention on Human Rights and the African Charter on the Rights and Welfare of the Child guaranteeing nationality to children on a *jus soli* basis where they would otherwise be stateless.⁵⁶

The CRC also addresses the child's right to nationality. Article 7(1) restates the right of the child to acquire a nationality, alongside the right to, as far as possible, know and be cared for by his or her parents,

⁵³ Universal Declaration of Human Rights, 10 December 1948, Adopted and proclaimed by General Assembly resolution 217 A (III), Art. 15.

⁵⁴ International Covenant on Civil and Political Rights, 16 December 1966, entry into force 23 March 1976, 999 UNTS 171, Art. 24(3).

⁵⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, entry into force 1 July 2002, A/RES/45/158, Art. 29.

⁵⁶ American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36, Art. 20; African Charter on the Rights and Welfare of the Child, 11 July 1990, entry into force 29 November 1999, CAB/LEG/24.9.49, Arts. 4 and 6(3). In Europe, European Convention on Nationality, 6 November 1997, entry into force 1 March 2000, ETS 166, Art. 6(2) requires States Parties to provide under their domestic law for nationality to be acquired by children born on its territory who do not acquire another nationality at birth.

and stipulates that the child “shall be registered immediately after birth”. Importantly, Article 7(2) is directed towards guarding against statelessness, requiring States Parties to “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”.

Two of the central principles of the CRC are important to note regarding the child’s right to nationality insofar as they colour how the child’s rights should be interpreted and implemented. Article 2 establishes the principle of non-discrimination, with the inclusion of ‘birth or other status’ in Article 2(1) providing scope for the application of this provision to ICS situations. The ‘best interests of the child’ principle enshrined in Article 3(1) of the CRC, establishes that, “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. De Groot notes that “the almost universal ratification of the CRC suggests that an otherwise stateless child should acquire the nationality of the country of birth immediately at birth or as soon as possible thereafter”.⁵⁷ This is also reflected in the Dakar Conclusions which are based on the idea that from the moment of their birth it will never be in the child’s best interests to be stateless given the adverse associated consequences.⁵⁸ Applying the principle of the best interests of the child to children seeking to acquire nationality in ICS when they would otherwise be stateless means that in making decisions regarding whether or not a child can acquire a particular nationality, the best interests of the child should be a primary consideration.⁵⁹

3.2 Key provisions in the Statelessness Conventions

While the 1930 Hague Convention on certain questions relating to the conflict of nationality laws (1930 Hague Convention) asserts that, “[i]t is for each state to determine under its own law who are its nationals”⁶⁰

⁵⁷ de Groot, *supra* n45, p. 150.

⁵⁸ UNHCR, Expert Meeting – Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children (‘Dakar Conclusions’), 2011, para. 5.

⁵⁹ The importance of the best interests of the child to such cases was discussed by the European Court of Human Rights in *Mennesson v. France*, *supra* n3. This is discussed further in section 4.3.1 of this chapter.

⁶⁰ Convention on Certain Questions Relating to the Conflict of Nationality Laws,

and that, “[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State”,⁶¹ as indicated above, subsequent international human rights law instruments have imposed limits and obligations in relation to the freedom of States in this regard. A number of limits on a State’s discretion in nationality matters exist, “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”.⁶² The Convention on the Reduction of Statelessness (1961 Convention)⁶³ aims to give effect to the universal right to nationality and the customary norm that statelessness should be avoided. It sets out a framework codifying the norms and standards relating to the conferral of nationality and limiting or eliminating circumstances in which the operation of national laws may result in statelessness.

The provisions of the 1961 Convention most relevant to ICS situations are those dealing with the prevention of statelessness at birth. Article 1(1) of the 1961 Convention sets out a clear primary safeguard integral to the prevention of statelessness at birth: “[a] Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless”. Applying this principle to the ICS context means that birth States of children conceived and born through ICS should, in situations where the child would otherwise be stateless, grant the child nationality. Therefore, Article 1(1) is potentially a very powerful tool in the ICS context. The 1961 Convention stipulates that such a grant of nationality can occur at birth⁶⁴ or later as a result of an application lodged on behalf of the child.⁶⁵ However, to avoid statelessness in ICS situations, ideally a grant needs to occur at or soon after the child’s birth. If the child is able to leave their State of birth prior to acquiring a nationality (i.e. if the ‘commissioning parents’ home State grants the child entry but not nationality), statelessness will not be avoided. States must, therefore, pay close attention to

13 April 1930, entry into force 1 July 1937, League of Nations Treaty Series vol. 179, p.89, No. 4137, Art. 1.

⁶¹ *Ibid.*, Art. 2.

⁶² Edwards, *supra* n2, p. 25.

⁶³ Convention on the Reduction of Statelessness, 30 August 1961, entry into force 13 December 1975, 989 UNTS 175.

⁶⁴ *Ibid.*, Art. 1(1).

⁶⁵ *Ibid.*, Art. 1(b).

implementing the requirement under the CRC that nationality should be able to be acquired immediately after birth.

Although Article 1(1) of the 1961 Convention offers a potentially powerful mechanism to prevent statelessness in ICS situations, it is dependent on ICS supply States which are States Parties to the 1961 Convention implementing this obligation, or on ICS supply States adopting this protection even though they are not Parties to the Convention. Currently, some of these States are not States Parties to the 1961 Convention.⁶⁶ However, Article 1(1) of the 1961 Convention should be viewed as codifying an important aspect of the customary norm that statelessness should be prevented; non States Parties to the 1961 Convention should be encouraged, in situations where a child would otherwise be stateless – including in ICS situations – to apply the safeguard established in Article 1(1), to implement their duty to prevent statelessness and secure the universal right to nationality. Such an approach is consistent with Articles 7(1) and 7(2) of the CRC.

Beyond the safeguard established by Article 1(1), the 1961 Convention incorporates further provisions directed at ensuring that no one falls through the cracks when it comes to nationality. Article 4(1) establishes that, “[a] Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person’s birth was that of that state”. Article 1(4) codifies another relevant safeguard: “[a] Contracting State shall give its nationality to a person, otherwise stateless, who is legally precluded from assuming his/her birth nationality, where that State’s nationality was held by either parent at the time of the birth”. Both Article 4(1) and Article 1(4) rely on children securing the nationality of the State of one of their parents. The application of these safeguards to children who are otherwise stateless in ICS situations may therefore be problematic, since these provisions would require proof of the connection between the child and a parent in order for the child to benefit from their protection. The 1961 Convention does not envisage the possibility of a lack of clarity or agreement regarding the child’s parentage through

⁶⁶ For the current list of signatories and parties to the Convention on the Reduction of Statelessness see, United Nations Treaty Collection, Convention on the Reduction of Statelessness, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5&lang=en.

situations such as ICS; however, as discussed earlier in this chapter, when born through ICS, children may have multiple potential parents and may not be genetically related to their 'commissioning parents'. Therefore, while it is the child's 'commissioning parents' who in most ICS cases seek recognition as the child's legal parents and try to secure the child the same nationality as their own, it might be difficult to establish that the 'commissioning parents' should be recognised as the child's parents. This raises a potential hurdle to applying the safeguards of Articles 4(1) or 1(4) of the 1961 Convention to children born through ICS who are otherwise stateless.

4. Securing the child's right to nationality in ICS

4.1 The limitations of the solutions applied in the cases discussed

The actions and inaction of the States involved in the cases discussed in this chapter suggest that solving statelessness and preventing it in the three scenarios discussed in section two is not currently a priority among States. This is despite the acute risk of statelessness for children conceived and born through ICS in States where they will not automatically receive nationality on the basis of *jus soli*. Solving this problem is dependent on States being willing to take steps to prevent statelessness for children born through ICS. On the supply-side of ICS, States may be hesitant to take on the perceived burden of granting nationality to children born through ICS in their territory who would otherwise be stateless, given the potential costs involved and its associated politically unpalatable nature. However, under the customary international norm that statelessness is to be avoided, all States have a responsibility to give effect to the right to nationality. In this context it should be noted that neither India nor Ukraine have a general safeguard in their nationality law ensuring the right to nationality of otherwise stateless children born in the State. India's long-awaited legislation regarding ICS continues to languish in the Indian parliamentary system; the contents of the latest draft of the Assisted Reproductive Technology (Regulation) Bill (2013) remain publically unknown.⁶⁷ However, earlier drafts have not included provisions relating to the child's nationality.

⁶⁷ A. Malhotra, Ending discrimination in surrogacy laws, *The Hindu*, 3 May 2014, <http://www.thehindu.com/opinion/op-ed/ending-discrimination-in-surrogacy-laws/article5970609.ece>. The most recent publically available version of Bill is the 2010 version: http://icmr.nic.in/guide/ART_REGULATION_Draft_Bill1.pdf.

With respect to States on the demand-side of ICS, there are a number of implications for nationality policy and legislation stemming from some of the cases discussed in this chapter. However, the responses of these States to the cases do not indicate a willingness to take a prevention approach to statelessness in ICS situations.

The Committee on the Rights of the Child asked the German government to “provide measures taken by the State party to address the rights of children residing in the State party territory but whose surrogate mothers are not from the State party [...] please provide information on measures to prevent children in such situations from becoming Stateless”.⁶⁸ Germany responded by outlining that pursuant to Section 4(1) of the Nationality Act, children attain German citizenship by birth when one parent is a German national and that on the basis of Section 1591 of the Civil Code, the mother of a child is always the woman who bore the child; moreover Section 1592(1) establishes the child’s father is the mother’s husband (at the time of the child’s birth). Germany said, “[i]n order to derive a claim to German citizenship from a (German) sperm donor, it is not sufficient to simply determine biological paternity by submitting a DNA analysis, parentage must be determined in the legal sense”,⁶⁹ and that, “[e]ven if a child born in a foreign country to a surrogate mother generally does not attain the genetic father’s (German) citizenship by birth, it is still not stateless, since as a rule, it at least attains the mother’s citizenship”.⁷⁰ Germany’s response is problematic, failing to address the reality of the situation in the Jan Balaz case, since States such as India do not recognise the surrogate mother as the child’s legal mother and therefore do not grant nationality on the basis of a *jus sanguinis* relationship with the surrogate mother, leaving the child stateless. Unfortunately, the Committee on the Rights of the Child’s Concluding Observations did not follow-up on this issue.⁷¹

⁶⁸ Committee on the Rights of the Child, List of issues in relation to the combined third and fourth periodic reports of Germany, 23 December 2013, CRC/C/DEU/3-4, para. 7.

⁶⁹ Committee on the Rights of the Child, List of issues in relation to the third and fourth periodic reports of Germany: Addendum, Replies of Germany to the list of issues, 23 December 2013, CRC/C/DEU/Q/3-4/Add.1, para. 43.

⁷⁰ *Ibid.*, para. 45.

⁷¹ Committee on the Rights of the Child, Concluding observations on the combined third and fourth periodic reports of Germany, 25 February 2014, CRC/C/DEU/CO/3-4.

The case of the Volden twins triggered public debate in Norway regarding ICS and new family forms facilitated by ART. Human rights lawyer Gro Hillestad Thune argued that by rejecting Ms. Volden's adoption application Norway had inflicted statelessness on the twins, in breach of international law.⁷² She further criticised the government for attaching little weight to the children's rights and interests, noting that the children themselves did not ask to be born.⁷³ However, Budfir (Norwegian Directorate of Child Welfare and Adoption) said because of the commercial nature of the surrogacy arrangement, it fell under the international definition of sale of children⁷⁴ and approving the adoption would be inconsistent with the CRC. Budfir held the view that significant public interests outweighed the interests of the twins in the case and said rejecting the adoption application would set an example discouraging other prospective 'commissioning parents' from entering into ICS arrangements. Hillestad Thune argued that Budfir was wrong to use the CRC to justify its decision rather than using it to protect child rights; she said the balance should have led to a decision ensuring that the children were placed in a safe situation as regards their care.⁷⁵

Despite the position taken by the Norwegian government in the Volden case, Norway subsequently passed 'provisional' (temporary) legislation dealing directly with the nationality of children born through ICS with the involvement of Norwegian 'commissioning parents'. Article 5(a) was added to the Norwegian Nationality Act,⁷⁶ which refers to a provisional law passed at the same time pertaining to transfer of legal parenthood for children born abroad to surrogate mothers.⁷⁷ Article 5(a) has the effect that children born through ICS

⁷² N.M. Smith Rustad and G. Pettersen, *Mener norske myndigheter gjør tvillinger statsløse*, NRK, 23 March 2011, <http://www.nrk.no/fordypning/statslose-tvillinger-1.7553860>.

⁷³ *Ibid.*

⁷⁴ *Ibid.* See Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 25 May 2000, entry into force 18 January 2002, Article 2(a).

⁷⁵ Smith Rustad and Pettersen, *supra* n72.

⁷⁶ Temporary amendment to the Norwegian Nationality Act (Lov om norsk statsborgerskap (statsborgerloven)) June 10 2005, passed by the Stortinget 8 March 2013.

⁷⁷ Temporary law on the transfer of parenthood for children in Norway born through a surrogate mother abroad (Midlertidig lov om overføring av foreldreskap for barn i Norge født av surrogatmor i utlandet mv), passed by

to a Norwegian ‘commissioning parent’ who are residing in Norway and whose legal parenthood is transferred to a Norwegian national automatically become Norwegian nationals (if the child is under 18 years at the date of the decision on legal parenthood). However, applications for transfer of legal parenthood under the temporary parenthood legislation had to be made by 1 January 2014.⁷⁸ The effect of these laws is therefore likely to have been quite limited in practice. Olsen notes, “[t]he law was passed to secure the rights of children born by surrogate mothers before a more permanent legal solution is decided by the Norwegian Parliament. It is still unclear what a more permanent solution may look like as surrogacy is at present not legal under Norwegian law”.⁷⁹

In the UK, in the years since *X & Y (Foreign Surrogacy)*, the UK government has issued policy guidance on nationality for children in ICS situations involving British ‘commissioning parents’.⁸⁰ This makes clear that, “[e]ven if the surrogate mother’s home country sees the commissioning couple as the ‘parents’ and issues documentation to this effect, UK law and the Immigration Rules will not view them as ‘parents’. Only where the surrogate mother is single is there a chance of UK law viewing the sperm donor/commissioning male as the legal ‘father’”.⁸¹ Therefore, even in instances where ‘commissioning parents’ are named on birth certificates in the child’s birth State, “a baby born to a foreign national surrogate mother who is married will not be automatically eligible for British nationality”.⁸² The guidance outlines a number of situations and the relevant steps which can be taken for the child to acquire British nationality.⁸³ Some of these envisage children entering the UK while they are stateless and subsequently having their

the Stortinget 8 March 2013.

⁷⁸ *Ibid.*, Art. 4.

⁷⁹ E.D.H. Olsen, Update on 2012 and 2013 Revisions of Norwegian Citizenship Law: Procedural issues and citizenship for infants born abroad to surrogate mothers, Citizenship News, European Union Democracy Observatory on Citizenship, 12 January 2014, <http://eudo-citizenship.eu/news/citizenship-news/1030-update-on-2012-and-2013-revisions-of-norwegian-citizenship-law-procedural-issues-and-citizenship-for-infants-born-abroad-to-surrogate-mothers>.

⁸⁰ See UK Foreign and Commonwealth Office, *Surrogacy Overseas*, 2014 and U.K. Home Office, *Inter-country Surrogacy and The Immigration Rules*, 2009.

⁸¹ *Ibid.*, p. 2.

⁸² *Ibid.*, p. 2.

⁸³ *Ibid.*, pp. 6-11.

legal parentage regularised through a parental order (under section 30 of the Human Fertilisation and Embryology Act 2008), with the possibility of applying for British nationality based on this recognition of the parent-child relationship. However, in instances where the child has no genetic link to a British 'commissioning parent', the guidance states that recognition of legal parentage in the UK will not be possible;⁸⁴ the child will not be able to acquire British nationality. This means that not all children born through ICS will have the possibility of acquiring nationality.

Finally, in Belgium the resolution of Samuel Ghilain's case did not trigger a discussion of the wider implications of the case. Given that the resolution to Samuel's statelessness was a passport issued under Ministerial discretion, it remains true that "the legal and nationality status of a child born abroad in a commercial surrogacy arrangement to a Belgian citizen is completely uncertain".⁸⁵

4.2 Possible solutions to child statelessness in ICS

4.2.1 Jus soli based solutions

One possible solution to the challenge of securing the child's right to acquire a nationality in ICS is the implementation of the safeguard established by Article 1(1) of the 1961 Convention in conjunction with Article 7 CRC by the birth States of such children. This means all children born through ICS in the territory of a State would acquire the nationality of that State at birth if they would otherwise be stateless, resulting in the outcome that no child is born stateless through ICS. This solution would ensure at least one State recognises the child as a national, avoiding discrimination on the basis of the child's birth status and resolving any conflict of domestic nationality laws. It would also ensure that children who have no genetic link to their 'commissioning parents' or who are abandoned by their 'commissioning parents' in ICS situations are not left without nationality as a result of their 'commissioning parents' actions. As already indicated, to be fully effective in avoiding statelessness in ICS,

⁸⁴ *Ibid.*, para. 50 reads: "If you know that neither of you will be able to provide any genetic material towards the creation of a child, you will not be able to commission a child under a surrogacy arrangement and then obtain a Section 30 Parental Order".

⁸⁵ Kindregan and White, *supra* n41, p. 618.

this would need to be an automatic conferral of nationality at birth or soon after birth.

From a statelessness prevention perspective, this solution would mean all the instances of child statelessness in the cases discussed would have been avoided, enabling the children to secure their right to nationality under Article 7(1) CRC. Although not all States are States Parties to the 1961 Convention and therefore bound by its provisions, it is suggested that all States should implement Article 1(1) including for children born on their territory through ICS. Such a solution is consistent with the customary norm that statelessness should be avoided and that all States have a duty to give effect to the universal right to nationality.

However, there are some limitations to this first proposed solution. It centres on avoiding statelessness, and is therefore a solution founded on a safeguard rather than a positive recognition of the child's right to a nationality. More problematic is the underlying premise of all ICS arrangements that the 'commissioning parents' intend the child to reside with them. Therefore, the child's acquisition of the nationality of their birth State on a *jus soli* basis does not align with the intention upon which ICS arrangements are premised, and may have limited practical benefit and effect for children in ICS, other than preventing statelessness. Although the fact they have a nationality may enable them to gain a passport and travel to their 'commissioning parent's' State of nationality or residence, once in that State, given their foreign-national status, they may not have access in practice to social and health services, education and social security.⁸⁶ In such situations, the child will continue to be in a position of legal insecurity with a consequent impact on his or her life and access to services, inconsistent with his or her best interests; ultimately, the child may not retain the right to reside in his or her 'commissioning parents' State of nationality or residence after a certain duration or at a certain age, depending on applicable national laws.

⁸⁶ This is what happened to the twins in the case of *Mennesson v. France* and *Labassee v. France*, *supra* n3; the children involved in these cases were born through ICS in the USA in 2000 and 2001 and gained US nationality upon birth. However, France (their 'commissioning parent's' State of nationality) refused to register the children in France and recognise them as French nationals. The European Court of Human Rights found a violation of the children's right to respect for private life.

Although this chapter has not discussed in detail the decision of the European Court of Human Rights (ECtHR) in the case of *Mennesson v. France*⁸⁷ because it did not involve child statelessness, in the search for solutions it is worth noting some key principles reflected in that judgment. The case dealt with twins who acquired US nationality at birth (as a result of the USA's *jus soli* law) but who were not recognised as nationals by France (their 'commissioning parents' State of nationality), since surrogacy is illegal in France.⁸⁸ The Mennesson twins lived as foreign nationals in France for the first 15 years of their lives until the ECtHR decision was implemented in 2015.⁸⁹ The ECtHR found a violation of the twins' right to respect for private life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹⁰ Key elements of the judgment relating to the child's right to nationality and not to be stateless are:

- The child's right to identity is a central aspect of the right to respect for private life, and essential parts of this are legal parentage and nationality;⁹¹
- Uncertainty regarding the acquisition of the nationality of their State of residence, consistent with that of their 'commissioning parents' is likely to have a negative impact on children's ability to form their identity;⁹²
- The existence of a biological (genetic) link between a child and a 'commissioning parent' is another important aspect of identity that should be recognised under law. Not to do so fails to reflect the reality of the child's situation and has a negative impact on the child's identity formation;⁹³ and
- The best interests of the child must be appropriately weighed and upheld.⁹⁴

⁸⁷ *Mennesson v. France*, *supra* n3.

⁸⁸ *Ibid.*, para. 18-25.

⁸⁹ For details of the implementation of the judgment by France, including the delivery of certificates of French nationality to the Mennesson twins see, Council of Europe, Pending Cases: Current state of execution, http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=mennesson&StateCode=&SectionCode.

⁹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, entry into force 3 September 1953, ETS 005.

⁹¹ *Mennesson v. France*, *supra* n3, para. 96-101.

⁹² *Ibid.*, para. 97.

⁹³ *Ibid.*, para. 100.

⁹⁴ *Ibid.*, para. 99.

The ECtHR is clear that legal recognition of both nationality and legal parentage in the State in which children reside is likely to be in their best interests, even where surrogacy remains illegal in a given State. The ECtHR is therefore of the view that the acquisition of nationality on a *jus soli* basis is unlikely to be enough to give effect to the child's best interests under the CRC in ICS situations where the child is intended to reside and grow up in a different State.

However, it is important to recognise that this solution is likely to be consistent with the best interests of the child in instances of scenario three, where the child is abandoned by 'commissioning parents' in the State of birth either before or after birth through ICS. Given the uncertainty in scenario three situations regarding whether the 'commissioning parents' State of nationality will assume responsibility for the child's care and protection, it is likely to be in the children's best interests to acquire the nationality of the birth State, given that in the foreseeable future following the abandonment the child will remain in and be reliant on that State to give effect to his or her rights under the CRC. Therefore, the first proposed solution – whilst having significant associated limitations – remains important to bear in mind for situations of child abandonment in ICS. It may also be relevant in situations where the child has no genetic link with the 'commissioning parents', as discussed below.

4.2.2 *Jus sanguinis* based solutions

An alternative approach which could overcome the limitations inherent in the first proposed solution is for the State of residence of the 'commissioning parents' (that is, the State they intend the child to live with them in) to grant the child nationality *jus sanguinis*, either pre-birth through a court order granting nationality prospectively in the event that the child is born, or after birth. This would not only result in the child being able to secure the right to a nationality, but the nationality acquired would be more aligned with best interests in terms of the child's lifetime outcomes. The acquisition of nationality *jus sanguinis* presupposes that the 'commissioning parents' State of nationality recognises that a parent-child relationship exists between the child and at least one of their 'commissioning parents'.⁹⁵ A pre-birth

⁹⁵ From a best interests of the child perspective, it remains questionable whether it will always be in the child's best interests to be in the care of

grant, contingent on the child's birth with a proven genetic link to a 'commissioning parent', is an attractive option as it would secure legal certainty for the child regarding nationality status. It has the benefit of putting the process of nationality acquisition in motion at the earliest possible stage (that is, prior to the child being born), making the acquisition of nationality a non-issue for the child once born (as long as a genetic link can be proved, so in practice, nationality would be acquired shortly after birth). However, securing the child's nationality *jus sanguinis* via a pre-birth grant contingent on a genetic link being proved post-birth may well be cumbersome to implement in practice. Additionally, this would be a completely new approach, outside the usual methods of nationality acquisition at birth.

A solution centring on a post-birth *jus sanguinis* grant of nationality may be more workable and sit more comfortably with existing legal norms regarding conferral of nationality. As previously mentioned, this has been the solution applied by some ICS demand States on an *ad hoc* basis to regularise the nationality status of children born through ICS in a foreign territory but who have entered and reside in their State. The Council of Europe (CoE) has also suggested this to avoid statelessness in international surrogacy.⁹⁶ Principle 12 of CoE Recommendation CM/Rec(2009)13 proposes that, "[i]f the child-parent family relationship is recognised in the state of nationality of the commissioning mother or father the provisions of that state on the acquisition of nationality *jure sanguinis* have to be applicable. The child will be fully integrated into the family of the 'commissioning parents', which justifies – as in the case of adopted children – the acquisition of the nationality of the parents."⁹⁷

However, Principle 12 does not go as far as ensuring that all children born through ICS will have the right to a nationality on a *jus sanguinis* basis. The CoE states that, "[i]t should be stressed, however, that principle

their 'commissioning parents'. For example, in instances where a child's 'commissioning parent' has previous convictions for child abuse or sexual abuse, it is unlikely that a best interests of the child assessment would lead to the child remaining in their care. However, a balancing exercise will likely be necessary, especially in instances where the child is genetically related to such a person. However, this is outside the scope of this chapter.

⁹⁶ Council of Europe Committee of Ministers, Recommendation CM/Rec(2009)13 and explanatory memorandum of the Committee of Ministers to member states on the nationality of children, adopted 9 December 2009, CM/Rec(2009)13.

⁹⁷ *Ibid.*, Explanatory Memorandum, para. 32.

12 does not oblige the recognition of the child-parent relationship as an automatic consequence of the use of surrogacy. Whether such recognition takes place depends on the private international law and, if applicable, the domestic law of the country of the commissioning parents.”⁹⁸ The fact that this is not a comprehensive safeguard is further stressed by the caveat that, “[t]he principle simply underlines that if recognition takes place this should also have consequences in nationality law”.⁹⁹

Moreover, there are significant limitations to the efficacy of a solution based on a *jus sanguinis* mode of acquisition to the challenge of securing nationality for children in ICS. As the CoE has identified, this relies on the recognition of the ‘commissioning parents’ legal parentage. This raises a large problem in the ICS context, given that a blood tie will not always exist between ‘commissioning parents’ and the child, because of the involvement of third-party gamete or embryo donors. This puts such children without a genetic link to their ‘commissioning parents’ beyond the reach of a solution based on acquisition of nationality *jus sanguinis* in instances where ‘commissioning parents’ are not recognised as the child’s legal parents in States requiring such a genetic link to be in existence in order to recognise legal parentage. Although States requiring a genetic link to at least one ‘commissioning parent’ in order to recognise legal parentage and nationality in ICS have not explained the rationale underpinning this requirement, one possible reason is the need to avoid the sale of children. The strict genetic link requirement of some States exposes the limitations of such a *jus sanguinis* solution to avoiding child statelessness in ICS. For children born through ICS, nationality acquisition contingent on legal parentage will not be feasible in all cases, given the complexities arising from the multiple possible ‘parents’ involved, and the inability to guarantee a blood tie/genetic link between at least one ‘commissioning parent’ and the child. Furthermore, single female ‘commissioning parents’ or same-sex female ‘commissioning parents’ may in some instances be unable to confer nationality by descent on the child even if they have a genetic connection, given the discriminatory nature of some State’s nationality laws.

In situations where nationality is acquired *jus sanguinis* either pre- or post-birth, in practical terms it may be some days or weeks after

⁹⁸ *Ibid.*, para. 33.

⁹⁹ *Ibid.*

a child is born before the acquisition of nationality can be confirmed, given that States may require proof of a genetic link through DNA testing in ICS situations. Furthermore, it is important to recognise that a post-birth grant of nationality *jus sanguinis* after the child has already entered and is residing in the 'commissioning parents' State of nationality and/or residence does not resolve the problem that in order to have entered and be residing in that State, the child may have had to secure an entry permit or a visa for that State, which may be time-limited. An exit permit may also be required from the child's birth State.

4.2.3 A practical and effective solution and residual secondary safeguards to secure the child's right to nationality in ICS

The above discussion highlights that it is difficult to find a solution centring on a positive obligation to ensure a child's right to acquire a nationality. Acquisition of nationality *jus soli* has the advantage of securing the child's right to a nationality from birth, thereby preventing children born through ICS being stateless at birth. Beyond this, however, having secured the nationality of their birth State may have little practical benefit for children who reside in their 'commissioning parents' State of nationality, since as foreign nationals they will remain without the full protection flowing from nationality of that State. It may not align with what is in the child's wider best interests, in terms of giving effect to rights under the CRC and safeguarding lifetime outcomes. Indeed, as *Mennesson v. France* illustrates, significant issues around the child's identity may remain. However, acquisition of nationality *jus sanguinis* is dependent on recognition of the 'commissioning parents' legal parentage. Although this solution is likely to be more consistent with the best interests of the child, the weakness of a *jus sanguinis* approach to securing the child's nationality in ICS is that recognition of 'commissioning parents' as legal parents is far from guaranteed, for example due to the lack of a genetic link between the child and one or both of the 'commissioning parents'.

On the basis of the preceding discussion of possible solutions to secure nationality for children born through ICS who would otherwise be stateless, the optimum solution is one which not only guarantees the right to a nationality, but also avoids discrimination on the basis of birth status and aligns with and gives effect to the best interests of the child. On balance, nationality acquisition based on a *jus sanguinis*

approach is preferred in the context of ICS. This could be undertaken on a pre-birth or post-birth basis; however, the ultimate aim should be to ensure that the child secures nationality as soon as possible following birth, thereby limiting the time during which the child's nationality is uncertain.

As the optimum solution outlined above will not secure nationality for all children in ICS (where a genetic link does not exist with 'commissioning parents' or the child is abandoned by 'commissioning parents'), implementing additional safeguards is necessary to avoid child statelessness in ICS. In such situations, birth States should apply the principle codified in Article 1(1) of the 1961 Convention to ensure that otherwise stateless children born in their territory through ICS acquire nationality. For this group of ICS children, this mode of nationality acquisition is most likely to be consistent with their best interests as it will mean they are not stateless, even though the acquisition of nationality will not necessarily have the effect of resolving other aspects of their situation. For children without a genetic link to their 'commissioning parents', this will mean they have a nationality, but it will not necessarily lead to resolution of the question of their legal parentage. For abandoned children, applying this solution will mean they are recognised as nationals of the State they are likely to remain in, even if their wider legal status in terms of guardianship remains uncertain.

Given the gaps in international guidance and the need for cooperation between States in the context of ICS, an international agreement would be helpful in ensuring that safeguards are in place in all States. An instrument or guidance developed under the auspices of an international organisation with global reach in the area of nationality and statelessness would provide a useful starting point, as it would provide States with information on how to approach ICS situations to ensure that statelessness is avoided and the best interests of the child are protected. Such an instrument or guidance document should reflect and re-assert the pre-existing international law norms codified in the 1961 Convention and the CRC. Eventually it may be useful for States to negotiate a legally binding agreement, which could for example take the form of a protocol to the 1961 Convention. However, in the first instance any new tools to address the problem of statelessness in ICS need to be simple and flexible enough to encourage as many States as possible to take action to prevent children from being born stateless.

through ICS. The development of non-legally binding guidance could thus provide a useful initial roadmap for States to follow in ICS situations where they are faced with children who would otherwise be stateless.

In light of these observations, UNHCR may wish to consider the possibility of issuing guidance on securing nationality for all children in international surrogacy situations so as to avoid childhood statelessness. This would help to shine a spotlight on child statelessness as a particular problem within ICS and to identify ways in which problems can be avoided. This could happen in the short-term without having to wait for long-term international agreement on the broader practice of ICS (a matter more suited to the mandate of the Experts Group relating to international surrogacy convened by the Hague Conference on Private International Law).¹⁰⁰ Ideally, UNHCR would prepare and issue this guidance in cooperation with the Committee on the Rights of the Child, as this would send a strong message to States regarding the need to take cooperative, targeted action to solve the problem of child statelessness in ICS. Such guidance should rest on the principle of shared State responsibility and encourage States to cooperate to ensure that all children born through ICS can secure a nationality, consistent with their right under Article 7(1) of the CRC. Substantively, it is suggested the guidance reflect the following:

1. A State which is the intended State of a child's residence will, either prior to the birth of that child through ICS or as soon as possible following birth, grant nationality to the child if he or she would otherwise be stateless, as long as a genetic link between the child and one of his or her 'commissioning parents' is proved.

1(1) In order to ensure that the child is able to acquire nationality as soon as possible after birth through ICS, DNA testing will be made available immediately following the child's birth.

2. States will grant nationality to an otherwise stateless child born on their territory through ICS. The child should be assumed to be stateless if he or she:

¹⁰⁰ See, Hague Conference on Private International Law, The Parentage/Surrogacy Project, <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy>.

- a. has no genetic link to either of the ‘commissioning parents’ on the basis of DNA testing; or
- b. is abandoned pre- or post-birth by their ‘commissioning parents’ in the territory of the birth State, regardless of whether or not he or she has a genetic link to his or her ‘commissioning parents’.

Guidance of this kind can function perfectly well despite the current absence of international agreement on the legality or illegality of ICS. Currently, given the wide divergence of views among States regarding the practice of ICS, achieving consensus on this issue itself remains extremely challenging. However, as children continue to be conceived and born through ICS, this lack of consensus on the practice of ICS itself should not hinder States from cooperating to solve the particular problem of child statelessness, consistent with international principles concerning the right to nationality and the importance of avoiding statelessness.

5. Conclusion: The future of the child’s right to acquire a nationality in ICS

This chapter has provided an overview of the problem of child statelessness in the context of ICS and the challenges associated with securing the child’s right to acquire a nationality in this setting. ICS has emerged as a new cause of statelessness at a time when the international community is galvanising around the goal of eradicating statelessness by 2024. Statelessness has a negative impact on children’s ability to access other human rights and thus diminishes their chances for better futures.¹⁰¹ However, the push and pull factors drawing ‘commissioning parents’ to engage in ICS in situations leading to child statelessness remain, and the conception and birth of children through ICS is unlikely to end anytime soon.

Despite the considerable complexities involved, children do not need to be born stateless in ICS. The solutions proposed in this chapter offer an approach to addressing the challenge of ensuring the right to acquire a nationality is secured for every child born through ICS. Such an approach is consistent with the objective that no child should be born stateless and, as Boll observes, “a grant of nationality has important

¹⁰¹ United Nations Secretary General, Guidance Note of the Secretary-General: The United Nations and Statelessness, 2011, p. 2.

practical as well as emotional consequences for the individual”.¹⁰² While the proposed solutions rely on States prioritising the rights of children born through ICS, they are intended to be practical and achievable, without States needing to make comprehensive changes to their nationality and parentage laws. If applied to the cases of child statelessness in ICS discussed in this chapter, statelessness would have been prevented in all instances. Implementation of the guidance outlined in this chapter would ameliorate the vulnerability of such children by providing a degree of certainty as regards acquisition of nationality, drawing on the framework provided by international human rights law. This would enable the child to establish the nationality element of their identity, and will facilitate access to other rights.

In the long-term, States should consider the harmonisation of national laws and policies regarding the nationality of children born through ICS. Harmonisation on an international scale in this regard would be a complex and challenging task. It must be informed by the principle of the best interests of the child and the right of every child to acquire a nationality. Any development of an international agreement addressing or regulating ICS (which is certainly desirable if a comprehensive solution to the problems arising from ICS is to be found) will need to grapple with larger questions concerning whether forming families through the practice of ICS is consistent with international human rights standards and norms, States' policy preferences and whether and to what extent States are willing to facilitate ICS. Given that such discussions could take years, if not decades, it is important that action be taken sooner, ideally by UNHCR and the CRC in concert, to provide States with guidance about practical steps to prevent children being born stateless in ICS.

¹⁰² A.M. Boll, *Multiple Nationality and International Law*, Brill 2007, p. 11.

8. A fresh examination of facilitated naturalisation as a solution for stateless persons

*Tamás Molnár*¹

1. Introduction

Despite the expansion of the concept that universal human rights determine one's legal status irrespective of nationality or the lack of it ("denationalisation of rights"),² in practical terms nationality holds central importance as "the right to have rights".³ Sir Hersch Lauterpacht eloquently pointed out the continuing significance of nationality even in our times: "In the past, nationality was viewed as a privilege of somewhat rigid and almost mystical character, conferred by the State. It is now increasingly regarded as an instrument for securing the rights of the individual in the national and international spheres."⁴ As a result,

¹ The views expressed in this chapter are solely those of the author and its content does not necessarily represent the views or the position of the European Union Agency for Fundamental Rights.

² See e.g., United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Note by the Secretary-General, The Problem of the Applicability of Existing International Provisions for the Protection of The Human Rights of Individuals Who Are Not Citizens of The Country in Which They Live, Survey of international instruments in the field of human rights concerning distinctions in the enjoyment of certain rights as between nationals and individuals who are not citizens of the States in which they live, 16 August 1973, E/CN.4/Sub.2/335; UN Human Rights Committee, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986. In legal scholarship, see e.g., L. van Waas, Nationality and rights in B.K. Blitz and M. Lynch (eds), *Statelessness and Citizenship: A comparative study of the benefits of nationality*, Edward Elgar Publishing 2011, pp. 23-44.

³ "Citizenship is man's basic right, for it is nothing less than the right to have rights" Chief Justice Earl Warren in United States of America Supreme Court, *Trop v. Dulles*, 356 U.S. 86, 31 March 1958, quoted e.g. in Independent Commission on International Humanitarian Issues, *Winning the Human Race?*, Zed Books 1988, p. 107; United Nations High Commissioner for Refugees (UNHCR), *Nationality and Statelessness. A Handbook for Parliamentarians*, 2005, back cover; or L. van Waas, *Nationality Matters: Statelessness under International Law*, Intersentia 2008, p. 217.

⁴ H. Lauterpacht, "Foreword to the First Edition", in P. Weis, *Nationality and*

although core human rights conventions are applicable to *everyone* under the jurisdiction of States Parties, including stateless people, the harsh reality is that the enjoyment of human rights continues to be largely dependent on one's nationality status, making stateless persons particularly vulnerable to human rights abuses.⁵

"Durable solutions" for non-refugee stateless persons (covered by the 1954 Convention relating to the Status of Stateless Persons (1954 Convention)⁶) are different from those available for refugees, but there are common elements. Such solutions should be long-lasting and genuine and address existing stateless populations both *in situ* and in a migratory context. What both types of stateless populations have in common is that they are missing nationality, the fundamental and most comprehensive legal bond between an individual and a State.⁷ Truly durable solutions thus should tackle this. Besides confirming nationality for those people who are stateless in the country of their birth and ancestry, or granting nationality to them *ex lege*, the other appropriate durable solution for stateless persons found in a migratory situation is *facilitated naturalisation*. Acquisition of nationality by *naturalisation*, triggered by individual application, is an obvious and appropriate solution for statelessness, notably in migration-related statelessness situations. However, it is not an easy exercise. The main reason is that nationality matters continue to fall largely within the domestic jurisdiction (*domaine réservé*) of States. This authority flows from the general customary international law principle that "it is for each State to determine under its own law who are its nationals".⁸

Statelessness in International Law, Sijthoff & Noordhoff 1979, p. xi.

⁵ See also, G. Gyulai, The Black Box of Nationality. The naturalisation of refugees and stateless persons in Hungary, Hungarian Helsinki Committee 2016, p. 6.

⁶ Convention relating to the Status of Stateless Persons, 28 September 1954, entry into force 6 June 1960, 360 UNTS 117.

⁷ In that sense, see the judgment of the International Court of Justice in the *Nottebohm* case, International Court of Justice, *Liechtenstein v. Guatemala (second phase)*, 6 April 1955, ICJ Reports 1955, 4, p. 23, "nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred [...] is in fact more closely connected with the population of the State conferring nationality than with that of any other State."

⁸ Convention on Certain Questions Relating to the Conflict of Nationality Laws, 13 April 1930, entry into force 1 July 1937, League of Nations Treaty Series,

Being a traditional and core attribute of State sovereignty, acquisition of nationality, including by naturalisation, is essentially governed by the domestic legislation of each State. Therefore, international law has only a limited say on that matter. The State itself has exclusive power to actually confer nationality and this task cannot be assumed by third States or international organisations (such as the Office of the United Nations High Commissioner for Refugees (UNHCR)).⁹

This chapter will focus on provisions relating to the facilitated naturalisation of stateless persons under international law and the domestic law and policy of States in this respect. A distinctive feature of naturalisation procedures is that they can only be initiated based on an individual application by the person concerned. While State discretion always plays a certain role, its extent varies from one country to another. This “durable solution” offers solutions to stateless persons in a migratory context; those residing in a country other than their “own”.¹⁰ The question of access to nationality for large-scale *in situ* stateless populations (who reside in their own country) raises other challenges and engages other (international) legal norms. In the latter scenario, acquisition of nationality need not be dependent on the will of the person concerned and thus on his/her individual application, nor should State discretion necessarily be involved, but nationality can be guaranteed by operation of law (*ex lege*) or through non-discretionary procedures. The applicable international legal framework is also different. While the facilitated naturalisation of stateless individuals is essentially governed by the 1954 Convention on the universal plane and the 1997 European Convention on Nationality (ECN)¹¹ on the regional level (in Europe), granting nationality to large stateless populations in their homeland rather falls under the purview

Vol. 179, No. 4137, p. 89, Art. 1; this principle was later restated in the 1997 European Convention on Nationality (ECN), 6 November 1997, entry into force 1 March 2000, ETS No. 166, Art. 3, adopted under the aegis of the Council of Europe.

⁹ C. Batchelor, “Statelessness and the Problem of Resolving Nationality Status”, *International Journal of Refugee Law* 1998, Vol. 10 (1-2), p. 174; van Waas, *Nationality Matters*, *supra* n3, p. 261.

¹⁰ Despite the lack of nationality, stateless persons can also have their “own country”; see, UN Human Rights Committee, CCPR General Comment No. 27: Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, para. 20.

¹¹ ECN.

of the 1961 Convention on the Reduction of Statelessness.¹² Each approach has its opportunities and limitations, which it is important to recall at the very outset. Nonetheless, examples exist of situations in which facilitated naturalisation has been used as a tool to reduce *in situ* cases of statelessness, such as the simplified naturalisation of former Soviet citizens in the Russian Federation between 2003 and 2009 through an amendment to the Citizenship Law which enabled over 600,000 people, who were permanently residing in the country, to acquire Russian nationality.¹³ In fact, this legal technique was not perhaps the most appropriate way to resolve such situations, given that granting nationality *ex lege* may be more efficient, since it avoids the State investing resources in case-by-case assessment of applications as well as preventing problems which might be caused by State discretion in naturalisation procedures, and remedies the underlying problem of a particular population being excluded under the existing nationality legislation.

Exploring and promoting facilitated naturalisation of stateless persons has recently re-appeared on the agenda of the international community. Lately, UNHCR has attempted to generate significant change in this regard through a global campaign launched in November 2014, which aims to eradicate statelessness by 2024 (under the slogan “#IBelong”). Its core document, the ‘Global Action Plan to End Statelessness: 2014-2024’ establishes a guiding framework of 10 Actions to be undertaken by all UN Member States, with the support of UNHCR. Action 6 specifically focuses on granting protection status (which leads to a legal status that permits residence and guarantees the enjoyment of basic human rights) to stateless migrants and on facilitating their naturalisation. The Action sets the goal of procedures for granting protection status being in place in a further seventy States by 2024. Nevertheless, this goal is expressed in a single sentence, and there is no separate benchmark or milestone on facilitated naturalisation as apart from the protection status goal. Regrettably, the problem of facilitated naturalisation for stateless persons is still quite overlooked in the academic literature as well, and there is hardly any research or empirical data available on the practical application of the relevant

¹² Convention on the Reduction of Statelessness, 30 August 1961, entry into force 13 December 1975, 989 UNTS 175.

¹³ Example mentioned by M. Manly, “UNHCR’s Mandate and Activities to Address Statelessness in Europe”, *European Journal of Migration and Law* 2012, Vol. 14, p. 274.

international or domestic legal norms.¹⁴ The aim of this chapter is to show the potential of this “durable solution”, but also to demonstrate that in practice the problems of naturalisation for stateless persons are more complicated than they first appear or than the international legal instruments suggest. In addition to mapping and evaluating the current state of international law and general trends in State practice (including highlighting existing shortcomings and gaps), the chapter will assess whether there is an emerging human rights norm, namely the “right to be considered for naturalisation”, on the basis of a genuine connection with the State (*jus connectionis*).

2. Facilitated naturalisation for stateless people: Evolution of the norm and the current state of affairs

According to the European Union Democratic Observatory on Citizenship (EUDO CITIZENSHIP), *naturalisation* is “the most debated and densely regulated form of access to citizenship” and can be defined as “any acquisition after birth of a citizenship not previously held by the person concerned that requires application to public authorities and a decision by these”.¹⁵ In other words, naturalisation stands for the non-automatic, discretionary manner of acquiring nationality later in life,¹⁶ which is one of the most overt manifestations of States’ sovereign prerogatives in nationality matters. For naturalisation, States lay down various and diverse criteria, but some common requirements can be identified, such as a certain period of residence in the country (waiting time) as a reflection of the *jus domicili* principle; clear criminal record (and/or proof of good character); sufficient means of subsistence; and tests of language skills and/or civic knowledge proving the applicant’s integration into society.¹⁷ Besides ordinary naturalisation, there exist special or facilitated (simplified) naturalisation procedures in almost

¹⁴ See, similarly, Gyulai, *supra* n5, p. 6.

¹⁵ R. Bauböck and S.W. Goodman, Naturalisation, EUDO CITIZENSHIP 2010, Policy Brief No. 2, p. 1.

¹⁶ Cf., Gyulai, *supra* n5, p. 5.

¹⁷ For an overview of conditions for naturalisation see, e.g., N. Guimezanes, “The Current Status of Nationality Law”, in Organisation for Economic Co-operation and Development (OECD), *Naturalisation: A Passport for the Better Integration of Immigrants?*, OECD Publishing 2011, pp. 69-72; Bauböck and Goodman, *supra* n15; A. Edwards, “The meaning of nationality in international law in an era of human rights: procedural and substantive aspects”, in A. Edwards and L. van Waas (eds.), *Nationality and Statelessness under International Law*, Cambridge University Press 2014, pp. 18-19.

all States. These provide more favourable naturalisation criteria for certain groups of foreigners, according to the country's own choice (e.g. because of their ethnic, linguistic, religious or historical ties to the country's population). Some other groups are able to benefit from facilitated naturalisation due to their vulnerability, as a result of obligations stemming from international law (most prominently refugees and stateless persons, whose rights in this respect come from the 1951 Convention relating to the Status of Refugees and the 1954 Convention respectively).

International law does not spell out specific criteria for the granting of citizenship through naturalisation, so this remains largely within the discretion of States, circumscribed by general limitations stemming from international human rights law such as the principle of non-discrimination.¹⁸ International human rights law has a greater impact in respect of the naturalisation of certain vulnerable groups, such as stateless persons. The human rights basis for facilitated naturalisation of individuals without nationality can clearly be traced back to the universally recognised "right to a nationality".¹⁹ Facilitated naturalisation is of particular significance in tackling existing cases of statelessness. In exploring the articulation of the requirement of facilitated naturalisation for stateless persons in international law, an important starting point must be Article 32 of the 1954 Convention. It is the first and, as of August 2016, only obligation in a universal instrument for States to grant nationality, by individual application, to stateless people physically present on their territory under certain conditions. It can be argued that the overall philosophy behind the 1954 Convention considers the protection offered to stateless persons through the substantive provisions (Articles 2-31) as an interim or temporary measure in order to ensure that they enjoy certain minimum standards until such time as a nationality is acquired.²⁰ In other words, "applying the provisions of the 1954 Convention is not a

¹⁸ On the applicability of the human rights principle of non-discrimination in naturalisation procedures see e.g., UN Human Rights Committee, Communication No. 2001/2010, *Q (represented by the Documentation and Advisory Centre on Racial Discrimination) v. Denmark*, 1 April 2015, CCPR/C/113/D/2001/2010, para. 7.3. See also, A. de Chickera and J. Whiteman, "Addressing statelessness through the rights to equality and non-discrimination", chapter 4 in this book.

¹⁹ See similarly, van Waas, *Nationality Matters*, *supra* n3, p. 360.

²⁰ *Ibid.*, p. 364.

substitute for granting nationality".²¹ Given the importance of Article 32 as a reference point, it is worth reproducing the entire provision here:

The Contracting States 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.

Looking back at the drafting history of the Statelessness Conventions, there appears to have been a failed attempt, in parallel with the adoption of the 1954 Convention, at codifying the right of access to naturalisation. The 'Draft Convention on the elimination of present statelessness' in its entirety aimed at establishing legal avenues for stateless persons to put an end to the anomaly of living without nationality. The draft convention, which was elaborated under the aegis of the UN International Law Commission (ILC) in 1954,²² would have created the category of "protected national", a legal status to be granted by the State concerned to *all stateless persons* living on its territory. "Protected nationals" would have been assimilated to nationals in many aspects, and would have been entitled to naturalise with the same conditions as other aliens.²³ Afterwards, the ILC Special Rapporteur

²¹ UNHCR, *Nationality and Statelessness, A Handbook for Parliamentarians*, 2014 (2nd edition), p. 28.

²² It is worth summarising here the process leading to the ILC's involvement in the drafting process. In the summer of 1949, the UN Economic and Social Council (ECOSOC) decided to appoint an *ad hoc* committee to consider means of eliminating the problem of statelessness, including the desirability of requesting the International Law Commission to prepare a study and make recommendations on this subject (ECOSOC, resolution 248 B (IX), 8 August 1949). The Ad Hoc Committee on Statelessness and Related Problems requested the ILC to prepare the necessary draft documents for the purpose of eliminating statelessness (Report of the Ad Hoc Committee on Statelessness and Related Problems, E/1618, 16 January to 16 February 1950, E/AC.32/5). After that, in 1950, ECOSOC adopted a resolution by which it, *inter alia*, urged the ILC to "prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness" (ECOSOC, resolution 319 B III (XI)). For more on the procedural history, see G.S. Goodwin-Gill, *Convention on the Reduction of Statelessness* (New York, 30 August 1961), United Nations Audiovisual Library of International Law.

²³ Alternative Convention on the Elimination of Present Statelessness, Article 2 (ILC, *Nationality Including Statelessness – Third Report on the Elimination*

withdrew the proposed draft convention, and the only one that the ILC discussed was the 'Alternative Convention on the Reduction of Present Statelessness'.²⁴ Nevertheless, the diplomatic conference convened on this matter changed the topic to the elimination or reduction of *future* statelessness, which finally led to the adoption of the 1961 Convention on the Reduction of Statelessness. The latter, however, because of the very logic of its subject matter, does not contain a naturalisation clause. Consequently, only the 1954 Convention contains such a clause calling for the facilitated acquisition of nationality for stateless persons actually present on the territory of the States Parties.

If one takes a closer look at the text of Article 32, it is clear from the wording that this has not created an individual right for stateless persons, but rather offers an opportunity to gain citizenship (naturalisation) if provided for in the domestic legislation of the State of residence. The addressees of this rather vague provision are the Contracting States, who are urged to facilitate stateless persons' access to nationality, but it remains within their discretion how to do so. Put differently, Article 32 contains a "shall clause", so State Parties are obliged to act accordingly, but the content of the obligation is not very clear.- It requires that States make every effort in this regard, but again the content of those efforts is left quite open (the wording "as far as possible" indicates this is an obligation of means).²⁵ Although the treaty article specifically mentions expedition of proceedings and reduction of related charges and costs it provides no further details on these points. The term "expedition of proceedings" can be conceived in two ways: a) shortening of the waiting period before lodging the application; and b) issuing the decision in a speedy manner or in a procedure which is not time consuming.²⁶ In understanding the

or Reduction of Statelessness by Mr. Roberto Cordova, Special Rapporteur, A/CN.4/81 and Corr. 1, reproduced in ILC, Yearbook of the International Law Commission 1954, vol. II, pp. 36-37). The same provision was incorporated in the Alternative Convention on the Reduction of Present Statelessness (*Ibid.*, p. 39).

²⁴ ILC, Report of the International Law Commission covering the work of its sixth session, 3 June – 28 July 1954, A/2693 (reproduced in the Yearbook of the International Law Commission, 1954, vol. II).

²⁵ van Waas, Nationality Matters, *supra* n3, p. 365. Weissbrodt likewise notes that this provision is weak and subject to flexible interpretation (D. Weissbrodt, *The Human Rights of Non-Citizens*, Oxford University Press 2008, p. 103).

²⁶ See also, J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press 2005, p. 986.

other conditions, the *travaux préparatoires* of the Convention as supplementary means of treaty interpretation under the 1969 Vienna Convention on the Law of Treaties²⁷ might give guidance. Manley O. Hudson, the first ILC Special Rapporteur on the topic, identified some issues impairing naturalisation, for instance: complicated and expensive procedures, requirements for documents from the country of former nationality or the country of birth (e.g. birth certificate), or stringent requirements as to the possession of property.²⁸ Nowadays stateless applicants also face further challenging requirements such as proof of integration demonstrated by a certain level of command of the State language, or history and civics exams.²⁹ Another shortcoming stemming from the too broad wording of this provision is the lack of indication as to the procedural issues and safeguards against arbitrary decision-making in stateless persons' applications for naturalisation.

Although imprecise in dealing with the question of naturalisation,³⁰ the strength of this treaty provision lies in the fact that Article 32 applies to *all* stateless people, irrespective of the lawfulness of their stay in a given State. It opens the door for benefiting from facilitated naturalisation via further ties with the State concerned, be it simple physical presence on its territory, birth or marriage (although this is not really reflected in State practice).³¹ This interpretation is reinforced by the regulatory logic of the 1954 Convention which applies a differentiated treatment and a classification for access to rights enshrined in the Convention on the basis of the level of attachment of the stateless person to the State concerned (whether this is mere physical presence, lawful stay or habitual residence). Therefore, if the drafters had wished to include further conditions or require a certain level of attachment for naturalisation, they would certainly have done so. Furthermore, no matter how lax the formulation of the obligation enshrined in Article

²⁷ Vienna Convention on the Law of the Treaties, 23 May 1969, entry into force 27 January 1980, 1155 UNTS 331, Art. 32.

²⁸ M.O. Hudson, Report on Nationality, including statelessness, Annex III—Statelessness, 21 February 1952, A/CN.4/50, p. 22 (reproduced in ILC, Yearbook of the International Law Commission 1952, vol. II).

²⁹ For more on these requirements, see E. Mrekajová, "Facilitated Naturalization of Stateless Persons", *Tilburg Law Review* 2014, Vol. 19, pp. 206-208.

³⁰ van Waas, Nationality Matters, *supra* n3, p. 385.

³¹ According to UNHCR, Final Report concerning the Questionnaire on Statelessness pursuant to the Agenda for Protection, 2004, only 59.5% of the 74 responding States provide for facilitated naturalisation of stateless persons. For further details and reports on State practice, see section 3 of this chapter.

32 is, States are bound to interpret, to apply and to implement this provision in good faith, and therefore give it *effet utile*.³² Consequently, regardless of the large margin of manoeuvre left for governments in implementing this provision calling for the facilitated naturalisation of stateless persons, they cannot completely empty it of meaning or simply fail to apply it, or they will be in breach of their obligations under international law. As a result, it is necessary that State Parties fill this “non-self-executing” treaty provision with some meaningful content of their own choice through domestic legislation.

While subsequent legal developments at the international level have not developed the standards in Article 32 of the 1954 Statelessness Convention, richer “soft law” norms have recently blossomed on this matter. This has been driven by UNHCR’s Executive Committee of the High Commissioner’s Programme (UNHCR ExCom),³³ which has tried to set global standards on this issue. A number of UNHCR ExCom Conclusions between 2006 and 2008 call on States to take action and especially to consider facilitating the naturalisation of habitually and lawfully residing stateless persons, and to consider active dissemination of information regarding access to naturalisation procedures.³⁴ Notwithstanding the fact that these Conclusions are not legally binding, their potential reach goes beyond that of the 1954 Convention. The latter has 88 Contracting Parties as of August 2016, so this number of States is bound by the treaty law obligation to offer facilitated naturalisation for stateless persons living in their territory. On the other hand, the UNHCR ExCom, which is a State-driven subsidiary organ of the UN

³² This customary principle of international law can be found in, United Nations General Assembly (UNGA), Resolution 2625 (XXV) on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970, 25 UN GAOR, Supp. (No. 28), A/5217, Annex, para. 1, last principle (“States shall fulfil in good faith the obligations assumed by them in accordance with the Charter”).

³³ UNHCR ExCom was constituted by the UN Economic and Social Council in 1958 (ECOSOC, Resolution 672 (XXV): Establishment of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees, 30 April 1958, E/RES/672 (XXV)).

³⁴ UNHCR ExCom, Conclusion No. 106 (LVII) Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons, 2006; UNHCR ExCom, Conclusion No. 107 (LVIII) Conclusion on Children at Risk, 2007; UNHCR ExCom, Conclusion No. 108 (LIX) General Conclusion on International Protection, 2008

General Assembly, currently consists of 98 members (States). Although the Conclusions are not legally binding, they do possess considerable authoritative force. ExCom Conclusions on international protection “constitute expressions of opinion which are broadly representative of the views of the international community”,³⁵ to which the “specialist knowledge of ExCom and the fact that its Conclusions are taken by consensus add further weight”.³⁶ In that light, the recommendations adopted by ExCom aiming at advancing facilitated naturalisation of stateless persons can be considered to reflect the views of the majority of the international community in a geographically balanced manner, and it is arguable that these Conclusions are addressed at least to all States Parties to the 1951 Geneva Convention (145 States as of August 2016), if not all UN Member States.³⁷ To sum up, it would be difficult to claim that as a matter of principle facilitated naturalisation of stateless people is not a commonly shared goal of the international community, nonetheless the character of universal standards in this area (whether it is a settled customary law norm, a “programmatic norm”³⁸ or just political declaration and pure aspiration), beyond the provisions of the 1954 Statelessness Convention, are subject to discussion and debate.

The need for facilitated acquisition of nationality for stateless persons has also been recognised by certain regional instruments, namely the ECN³⁹ (generally), then the 2006 Council of Europe (CoE) Convention on the Avoidance of Statelessness in relation to State Succession⁴⁰ (with specific focus on situations of State succession). As van Waas notes, “[n]owhere is the trend towards limiting States’ freedom in nationality matters more evident than in Europe”,⁴¹ which also explains why no regional codification efforts have occurred or succeeded outside Europe thus far (although soft law instruments touching on

³⁵ See, UNHCR, Executive Committee, <http://www.unhcr.org/en-us/executive-committee.html>.

³⁶ *Ibid.*

³⁷ UNHCR ExCom Conclusions use the general designation “States” or “governments” when they call for action or address recommendations to States.

³⁸ The so-called programmatic norms are a form of soft law when law is just *in statu nascendi*.

³⁹ ECN, *supra* n8.

⁴⁰ Council of Europe Convention on the avoidance of statelessness in relation to State succession, 19 May 2006, entry into force 1 May 2009, CETS No 200.

⁴¹ L. van Waas, “Fighting Statelessness and Discriminatory Nationality Laws in Europe” *European Journal of Migration and Law* 2012, Vol 14, p. 244.

this issue have recently been adopted in Latin America and in West Africa).⁴² The ECN sets forth the general obligation of facilitated naturalisation, without offering further guidance, in Article 6(4)(g), “[e]ach State Party shall facilitate in its internal law the acquisition of its nationality for the following persons: [...] stateless persons [...] lawfully and habitually resident on its territory”. Another provision sets out a minimum standard which is applicable to all naturalisation procedures in respect of the “waiting period”, namely that a State “[i]n establishing the conditions for naturalisation [...] shall not provide a period of residence exceeding ten years before the lodging of an application” (Article 6(3) of the ECN). The Explanatory Report to the ECN has elaborated on the above rules by indicating the ways in which conditions for naturalisation may be made more favourable (e.g. reduction of the length of required residence, less stringent language requirements, easier procedure, and lower procedural fees).⁴³ In spite of those promising and protection-sensitive explanations, the progressive spirit of the guidance is regrettably weakened by an escape clause for States when the Explanatory Report notes, “[w]here the generally required conditions are already very favourable (for example a short period of residence for all applicants for naturalisation), such States are not required to take additional measures”.⁴⁴ Some authors understand the above provisions of the ECN as bringing about a “right to legislation on facilitated naturalisation” (*droit à une législation sur la naturalisation*), whether or not this is the case, they at least generate legitimate expectations for the individuals concerned.⁴⁵ Nine years later, the 2006 CoE Convention on the Avoidance of Statelessness in relation to State Succession echoed what was laid down in the ECN,

⁴² In the Americas, the Brazil Plan of Action: A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity and the Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean, adopted 3 December 2014 (Brazil Declaration and Plan of Action); in West Africa Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness, 25 February 2015.

⁴³ Council of Europe, Explanatory Report to the European Convention on Nationality, 6 November 1997, para. 52.

⁴⁴ *Ibid.*, last sentence.

⁴⁵ J.F. Flauss, “Naturalisation et droit international des droits de l’homme” in *Chemins d’Europe: Mélanges en l’honneur de Jean Paul Jacqué*, Éditions Dalloz 2010, p. 284.

specifically in the context of State succession, but did not include further details. The 2006 Convention requires successor States to grant nationality to those who, despite the applicable guarantees, actually become stateless.⁴⁶

CoE Member States were more progressive when drafting the Committee of Ministers 'Recommendation R(1999) 18 on the Avoidance and Reduction of Statelessness' and went considerably beyond the generalities above. This non-binding instrument sheds more light on various aspects of facilitated naturalisation procedures and identifies some important factors. The Recommendation reaffirms the principles that access to nationality should be possible whenever a person has a genuine and effective link with that State, in particular through birth, descent or residence and the acquisition of nationality by stateless persons should be facilitated and not subject to unreasonable conditions.⁴⁷ Furthermore, it invites States to take the following measures: to reduce the required period of residence in relation to the normal waiting period of residence; not to require more than an adequate knowledge of one of the official languages; to ensure that procedures are easily accessible, not subject of undue delay and available on payment of reduced fees; and that offences, when they are relevant for the decision concerning the acquisition of nationality, should not unreasonably prevent stateless persons seeking naturalisation.⁴⁸ The CoE Committee of Ministers dealt with this issue subsequently, in relation to a particularly vulnerable group: children, through 'Recommendation CM/Rec(2009)13' relating to the nationality of children.⁴⁹ After setting out the aim of facilitating children's access to a nationality as an overarching principle of the document, Principle no. 5 (facilitation of naturalisation of stateless children) sets out that CoE Member States should "provide that stateless children have the

⁴⁶ Council of Europe Convention on the avoidance of statelessness in relation to State succession, *supra* n40, Art. 9, "A State concerned shall facilitate the acquisition of its nationality by persons lawfully and habitually residing on its territory who, [...], are stateless as a result of the State succession."

⁴⁷ Council of Europe Committee of Ministers, Recommendation No. R (99) 18 of the Committee of Ministers to member States on the avoidance and reduction of statelessness, 15 September 1999, point I(b) and (d).

⁴⁸ *Ibid.*, point II. B. See also, Mrekajová, *supra* n29, p. 207.

⁴⁹ Council of Europe Committee of Ministers, Recommendation CM/Rec(2009)13 of the Committee of Ministers to member states on the nationality of children, 9 December 2009.

right to apply for their nationality after lawful and habitual residence on their territory for a period not exceeding five years immediately preceding the lodging of the application". This principle offers a way out of statelessness for those children who were either stateless at birth and did not acquire the nationality of the State of birth, or who became stateless after birth. On this point, the Explanatory Memorandum to the Recommendation recalls that the 1997 ECN "contains no provision on the individual naturalisation of children. Thus, states are free to determine that only persons having reached the age of majority can apply for naturalisation."⁵⁰ Because of this, some CoE Member States still do not permit stateless children to acquire their nationality individually. Thus they are often forced to wait until reaching the age of majority before they can apply for naturalisation in their country of residence. Given that such a long period of statelessness is contrary to the best interests of the child, "stateless children should be able to apply individually for naturalisation – in principle represented by their legal representative – before reaching the age of majority" – argues the Explanatory Memorandum.⁵¹ The commentaries continue, "the situation of these children differs from that of other children of foreign origin because of their increasing familiarity with the language(s), habits, customs and culture of their state of residence".⁵² Against this backdrop, the Committee of Ministers considered it appropriate, with reference to Article 32 of the 1954 Convention, to accord preferential treatment to stateless children, and therefore recommended a not too long waiting period (5 years of lawful and habitual residence) in this case.

Collectively, the Council of Europe instruments lay down additional principles and detailed rules which represent concrete, more precise obligations to facilitate the naturalisation of stateless persons and more specifically, stateless children as compared to the provisions of the 1954 Convention. It is worth noting that the ECN is currently the only international convention setting a maximum waiting period (10 years) that a State can impose before lawful and habitual residents (including stateless individuals) become eligible to apply for naturalisation.⁵³

⁵⁰ Council of Europe Committee of Ministers, Explanatory Memorandum to the Recommendation CM/Rec(2009)13, 9 December 2009, para. 17.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ ECN, Art. 6(3). See also van Waas, "Fighting Statelessness and Discriminatory Nationality Laws in Europe", *supra* n41, p. 248; Manly, *supra* n13, pp. 273-274.

Recent developments have put Latin America and the Caribbean on the map of regional efforts to provide durable solution for stateless persons by offering them facilitated naturalisation. Although not taking the form of a legally binding treaty, the ‘Brazil Declaration’ (‘A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean’) and ‘Plan of Action’ (‘A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity’) of 3 December 2014⁵⁴ are documents with great political significance and represent a significant step forward by explicitly confirming the firm commitment of the States in the region to provide facilitated naturalisation for stateless persons in accordance with the terms of the 1954 Statelessness Convention.⁵⁵ The Declaration acknowledges that facilitating the naturalisation of stateless persons “through appropriate procedures [is] part of a comprehensive durable solutions strategy”,⁵⁶ and this solemn aim is complemented with more detailed measures in the Plan of Action. The latter first affirms the governments’ objective to be in the position by 2024 to “protect stateless persons arriving in their territories while providing access to definitive solutions such as naturalization”,⁵⁷ and as a means to reach this goal, declares that States should “[f]acilitate naturalization in accordance with article 32 of the 1954 Convention”.⁵⁸ This suggests that the stricter standard of “lawful and habitual residence”, reflected in certain European legal instruments, is not required in this region as a precondition for the facilitated naturalisation of stateless persons. Rather, this durable solution should be applicable to *all* stateless persons, without the need of lawful status in the country concerned. The difference between the emerging normative framework in Europe and in the Americas on this matter is notable, the latter subscribing to a more generous approach and closely following the spirit of the 1954 Convention.

Soon after this encouraging initiative in the Americas, the issue also surfaced in West Africa, in the framework of the Economic Community of

⁵⁴ Brazil Declaration and Plan of Action, *supra* n42.

⁵⁵ See, J. Ignacio Mondelli, “Eradicating statelessness in the Americas: The Brazil Declaration and Plan of Action”, chapter 10 in this book.

⁵⁶ Brazil Declaration and Plan of Action, *supra* n42, p. 5.

⁵⁷ Brazil Plan of Action, *supra* n42, Chapter Six, second paragraph.

⁵⁸ *Ibid.*, para. (f).

West African States (ECOWAS). In the 'Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness', adopted in February 2015, ECOWAS countries have solemnly undertaken to ensure "that existing procedures for acquisition of nationality are available to stateless persons".⁵⁹ This Declaration is complemented by the 'Conclusions and recommendations of the Ministerial Conference on Statelessness in the ECOWAS Region', which contain more specific commitments in this respect; in particular calling on States "to facilitate acquisition of nationality to those with relevant links to their territories"⁶⁰ and to implement Article 32 of the 1954 Convention in order to facilitate the naturalisation of stateless persons. This non-binding document also recommends that naturalisation procedures "conform to the rule of law, are fair and equitable, and, in particular, set out reasonable conditions and procedures that are clearly communicated and accessible to all".⁶¹

Overall, there appears to be a gradual strengthening of the norm obliging States to grant facilitated access to nationality for those lacking it. It has become a more developed rule than at the time of the drafting of the 1954 Statelessness Convention, primarily due to the adoption of regional (European and, to some extent, Latin American and West African) instruments. Nonetheless, regional human rights law developments in Europe appear to require an additional element, not present in Article 32 of the 1954 Convention, in order to benefit from this durable solution. This is the establishment of lawful and habitual residence on the territory of a given State before an application can be made for naturalisation, which precondition explicitly appears in all the Council of Europe instruments analysed above. The dynamics are different elsewhere, as demonstrated by the Brazil Declaration and Plan of Action, which stick to the regulatory logic of the 1954 Convention and do not introduce extra requirements for providing stateless people with facilitated acquisition of nationality. Under UNHCR ExCom's approach, "facilitating the naturalization of habitually and lawfully residing stateless persons in accordance with national legislation" is highly recommended,⁶² which might be interpreted as an

⁵⁹ Abidjan Declaration, *supra* n42, para. 19.

⁶⁰ Ministerial Conference on Statelessness in the ECOWAS Region, Conclusions and Recommendations of the Ministerial Conference on Statelessness in the ECOWAS Region, Abidjan, Côte d'Ivoire, 25 February 2015, para. 57.

⁶¹ *Ibid.*, para. 59.

⁶² UNHCR ExCom, Conclusion No. 106 (LVI), *supra* n34, para. (u).

argument that States Parties to the 1954 Convention cannot (or at least should not) make the facilitated naturalisation of stateless persons conditional on their lawful and habitual residence. The additional requirement of “lawful and habitual residence” indicates that stateless persons first need to be identified and regularised before they can naturalise, with the effect that the lack of statelessness determination procedure in many countries effectively excludes stateless persons from any prospect of naturalisation.⁶³

The substantive normative standards elaborated in the framework of the Council of Europe give further guidance on this matter. Chapter IV of the ECN requires States to ensure that applications or decisions relating to the acquisition of nationality will “be processed within a reasonable time” (Article 10), “contain reasons in writing” (Article 11), “be open to an administrative or judicial review in conformity with its internal law” (Article 12), and that “the fees [...] be reasonable [and] the fees for an administrative or judicial review be not an obstacle for applicants” (Article 13).⁶⁴ The Explanatory Report of the ECN sheds more light on various practical aspects of these requirements, thus complementing meaningfully the above treaty provisions.⁶⁵ Given that facilitated naturalisation of stateless individuals falls under the category of acquisition of nationality, the above procedural guarantees apply to naturalisation as well. At the same time, the whole of Chapter IV of the ECN can be subject to reservations, and some States have entered reservations to its provisions, thereby indicating that they are not applying some of the procedural safeguards in their domestic law.⁶⁶

⁶³ C. Nash, Access to Citizenship and its Impact on Integration: Growing attention on the role of the European Union in tackling statelessness?, European Network on Statelessness Blog, 26 February 2013, <http://www.statelessness.eu/blog/access-citizenship-and-its-impact-integration-growing-attention-role-european-union-tackling>.

⁶⁴ In the legal literature, see similarly, Mrekajová, *supra* n29, p. 210, footnote 26; and van Waas, Nationality Matters, *supra* n3, p. 117.

⁶⁵ Explanatory Report to the European Convention on Nationality, *supra* n43 paras. 83-93.

⁶⁶ e.g. Bulgaria (in respect of Articles 11 and 12), Denmark (in respect of Article 12), or Hungary (in respect of Articles 11 and 12). A full list of reservations can be found on Council of Europe, Reservations and Declarations for Treaty No.166 - European Convention on Nationality, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/166/declarations?p_auth=yKjT0C4D.

3. Facilitated naturalisation of stateless persons in State practice

If one turns to actual State practice and domestic legislation on facilitated naturalisation for stateless persons, the picture is less rosy than the above mapping of the international legal framework might suggest. First of all, empirical data is limited since there is no worldwide inventory of the domestic laws of all States with regard to facilitated access to citizenship for stateless persons. Only a few partial surveys and reports are available,⁶⁷ principally covering European⁶⁸ and American countries; information on the law and policy of African⁶⁹ or Asian States⁷⁰ on this matter is even more sporadically available. These

⁶⁷ Chronologically the first source of information was a ground-breaking survey conducted by UNHCR in 2003 to scrutinise domestic laws and practices on facilitated naturalisation of stateless persons. According to this UNHCR report, published in 2004, only 59.5% of the responding States indicated that facilitated access to naturalisation was provided for *permanent and lawfully resident* stateless persons under national law (altogether 74 of the UN Member States replied). 27% of the replying States indicated that they *did not provide* for facilitated naturalisation in these cases, while 13.5% did not provide an answer (UNHCR, Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection, *supra* n31).

⁶⁸ See e.g., C. Batchelor, "The 1954 Convention relating to the Status of Stateless Persons: Implementation within the European Union Member States and Recommendations for Harmonisation" in *Refuge* 2005, Vol. 22, p. 50 and footnotes 109-110; R. Schärer, *Promoting the Acquisition of Citizenship as a means to Reduce Statelessness – a Feasibility Study*, Bureau of the European Committee on Legal Co-operation 2006, 18 October 2006, CDCJ-BU (2006) 18, pp. 12-13.

⁶⁹ A 2011 report on Southern African countries reveals that the laws of many countries in principle allow for the naturalisation of stateless persons on the same or similar terms as other foreigners (through the normal procedures). Few countries have undertaken effective measures to facilitate naturalisation specifically for stateless persons; though Malawi and Lesotho, for example, have specific measures in place (B. Manby, "Statelessness in Southern Africa", Briefing paper for UNHCR Regional Conference on Statelessness in Southern Africa, 1-3 November 2011. Another scholarly paper shows how facilitated naturalisation for stateless persons as a specific category has not been addressed in the Middle East and North Africa region (L. van Waas, "A Comparative Analysis of Nationality Laws in the MENA region", 2014).

⁷⁰ The Japanese Nationality Act foresees naturalisation by a stateless person and has provisions that facilitate naturalisation procedures for stateless persons in certain cases, e.g. if they were born in Japan and have resided in the country for more than three years since birth (A. Kohki, *Overview of Statelessness: International and Japanese Context*, UNHCR 2010, p. 42. With respect to Central Asia, it was reported that none of these States (Kazakhstan, Kyrgyzstan, Tajikistan and Turkmenistan) offers simplified naturalisation for recognised

studies show that many States have yet to introduce provisions into their legislation to facilitate naturalisation for stateless persons. For instance, a recent initiative, the 'Global Database on Protection Against Statelessness' includes information on laws in force in 41 European and 35 American and Caribbean States, focusing *inter alia* on how these States facilitate the naturalisation of stateless persons living in their territory.⁷¹ Out of the 76 countries reviewed, the majority (41 States) do not have in place a procedure facilitating access to citizenship for stateless people. These include States Parties to the 1954 Convention, in non-compliance with its provisions.⁷² In terms of the particular procedures provided in the countries under review, reduced residency requirements; exemption from language and citizenship tests as well as documentary evidence requirements (e.g. birth certificate); lowering the age limit to file the naturalisation application (to below the age of majority); simplifying the procedure for the acquisition of nationality by stateless persons; or exemption from the requirements regarding sufficient means are the most common.⁷³ Article 33 of the 1954 Convention implies that States Parties have to adopt domestic implementing legislation to make the Convention effective, since it obliges them to communicate those domestic laws that implement the Convention to the UN Secretary General. Information on the domestic implementation of Article 32 on facilitated naturalisation does not appear to have been provided to the UN Secretary General, however.

stateless persons. Stateless persons are however entitled to naturalise by the ordinary procedure available for foreigners in general (UNHCR, *Statelessness in Central Asia*, 2011, p. 23).

⁷¹ EUDO CITIZENSHIP, *Global Database on Protection against Statelessness*, San Domenico di Fiesole: European University Institute 2015, <http://eudo-citizenship.eu/databases/protection-against-statelessness>.

⁷² The overwhelming majority of States without mechanisms to facilitate naturalisation of the stateless are from the Americas and the Caribbean region (e.g. Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Brazil, Canada, Chile, Costa Rica, the Dominican Republic, Haiti, Honduras, Mexico, Panama, Peru, the United States of America or Venezuela), although a considerable number of European States also fall short of implementing international standards which they have accepted (Article 32 of the 1954 Convention and/or Articles 6(3) and 6(4)(g) of the ECN), such as Austria, Croatia, Iceland, Lithuania, Luxemburg, Romania or Serbia.

⁷³ For details on 15 European countries, see, R. Bauböck et al. (eds.), *Acquisition and Loss of Nationality. Policies and Trends in 15 European States. Volume 2: Country Analyses*, Amsterdam University Press 2006.

This chapter will next examine issues related to implementation of the rules and emerging norms that exist in this area. The available data on the practical application of norms in this area is incomplete (e.g. there is virtually no access to administrative or judicial decisions; properly disaggregated and detailed statistical data is lacking).⁷⁴ As regards the waiting period before an application for naturalisation can be lodged, it seems that all States require some years of physical presence on their territory. Although this criterion is legitimate, States usually require more than simple physical presence, notably that the minimum number of years of stay in the country is calculated after the establishment of lawful and/or habitual (permanent) residence, which runs against the spirit of Article 32 of the 1954 Convention. In reality, this may unnecessarily prolong the required period of residence, since even if such a residency period is shortened for stateless persons in law, they are often unable to establish “lawful and/or habitual” residence, or only do so after being in other immigration statuses for many years (e.g. temporary residents or even illegal migrants). Likewise, the requirement of sufficient means of subsistence and/or meeting certain other economic prerequisites are commonly applied preconditions for naturalisation. This requirement may be particularly problematic for stateless persons, especially if they have not been able to obtain a work permit and gain access to the labour market, which are common problems. Therefore, this precondition, while generally justified, should allow for some exceptions.⁷⁵ Some States, while facilitating access for stateless applicants in some respects, require the proof of the renunciation of a former nationality. As Bianchini

⁷⁴ See also Gyulai, *supra* n5, p. 6. Let me bring some rare examples with concrete figures. In Hungary, only 38 stateless persons acquired nationality between 2011 and October 2015. Due to the usual methodological difficulties in measuring the dimension of statelessness (underreporting, lack of awareness, data based on self-identification etc.) this figure may easily be significantly lower than the actual number of persons living without a nationality in Hungary. In statistical terms, stateless persons have a much lower chance to successfully naturalise than the average, their “success” rate is only 33% (Gyulai, *supra* n5, p. 22). Another example is Japan: in the period between 1999 and 2008, although the number of stateless applicants during that period was not published, interviews with the Ministry of Justice’s Civil Affairs Bureau have indicated that every year there are roughly around 10 to 20 stateless applicants (Kohki, *supra* n70, p. 42).

⁷⁵ K. Bianchini, *The Implementation of the 1954 Convention Relating to the Status of Stateless Persons in Selected EU States*, Ph.D. thesis, University of York 2015, p. 151; Mrekajová, *supra* n29, pp. 208-209.

observes, “it may be a problem for stateless persons demonstrating that they have no nationality, if it had not been established before”.⁷⁶ The length of the procedure may cause problems as well, given that in many national jurisdictions the law does not specify a time limit for deciding on applications.⁷⁷ However, reducing the processing time is a means of “expediting the naturalisation procedures” as required by the 1954 Convention, so there is clearly room for improvement. Moreover, stateless applicants for naturalisation have to bear considerable costs in many countries, including tuition fees for language courses, the costs of providing official translations and certification of documentation, and substantive administrative fees for processing applications, although Article 32 of the 1954 Convention stipulates that charges and costs of proceedings shall be reduced.⁷⁸ Finally, when applicants for naturalisation must present extensive official documentation, this disproportionately affects stateless applicants. For instance, presenting an original birth certificate or providing other official documents from their country of origin or former country of habitual residence is usually extremely arduous, if not impossible, for stateless persons. Moreover, the certification of all these documents, if required, is often very costly and can create further obstacles to naturalisation for stateless people.

Naturalisation policies for stateless persons vary from one State to another, in accordance with the State’s perceived national identity and interests; and in many cases there is no provision for facilitated naturalisation at all in domestic law. Even if some States have adopted a few specific provisions with regard to the naturalisation of stateless persons, these are not sufficient or adequate to facilitate their acquisition of a nationality, especially in light of other criteria that make the whole procedure onerous. Unfortunately, the trend, contrary to the object and purpose of Article 32 of the 1954 Convention, is not to provide genuine and effective naturalisation to stateless persons. What is more, on the level of the individual, the lack of access to naturalisation may lead to serious human rights violations on several accounts. Measures which in practice limit access to naturalisation for stateless persons also inhibit the emerging “right to be considered for naturalisation”, which is receiving more and more robust recognition

⁷⁶ Bianchini, *supra* n75, p. 152.

⁷⁷ Bauböck and Goodman, *supra* n15, p. 8.

⁷⁸ Bianchini, *supra* n75, p. 153.

in international jurisprudence (see the next section), and becoming a tangible reality in the domestic sphere. With a view to changing this untenable situation, naturalisation requirements should be crafted and put into practice with flexibility, to ensure tangible facilitation and preferential treatment for stateless applicants. Simplifications in the process of acquiring nationality should not be stand-alone, but combined and applied together. For example, legal provisions reducing the number of years of residence required before applying should be coupled with reduced administrative fees, waiver of unduly burdensome language or financial requirements, acceptance of alternative forms of evidence where certain documents cannot be presented or rules providing that the burden of proof shifts to the State if a person is, through no fault of his or her own, unable to deliver some documents, as well as waiving other administrative obstacles such as strict language and financial requirements.⁷⁹

The less than robust efforts made so far in this respect are essentially due to the highly sensitive political character of the issue, given that it is intrinsically related to the question of which outsiders are worthy of being admitted to full membership of the political community.⁸⁰ As a consequence, despite existing legal standards on the universal and regional levels and the relevance of ever-increasing human rights considerations, these political motivations frequently decide whether restrictive, exclusionary or more relaxed naturalisation policies are applied on the national level with regard to stateless persons. Even in those States where procedures for facilitated naturalisation are in place for those lacking any nationality, these individuals face practical impediments because of the numerous difficulties to meet the conditions provided for by law, as outlined above. Another major obstacle in practice lies in the fact that statelessness is still rarely identified (only a handful of States have fully-fledged statelessness determination procedures as of yet),⁸¹ as a result of which stateless persons may have difficulty proving their eligibility for facilitated naturalisation. For these reasons, UNHCR regularly invites States to

⁷⁹ Similarly, see, Bianchini, *supra* n75, p. 158, 177; Mrekajová, *supra* n29, p. 210.

⁸⁰ van Waas, *Nationality Matters*, *supra* n3, p. 360, with further bibliographical references in footnote 5.

⁸¹ For more on this, consider, G. Gyulai, "The determination of statelessness and the establishment of statelessness-specific protection regimes", in A. Edwards and L. van Waas (eds), *Nationality and Statelessness under International Law*, Cambridge University Press 2014, pp. 116-143.

review their national legislation with a view to providing facilitated access to nationality for permanent and lawfully resident stateless persons,⁸² and recommends that such a facilitated access to nationality may include a reduction in the numbers of years of residency required, reduced fees or administrative requirements, as well as less stringent requirements concerning language or other skills. On the regional level, the same call has recently been made by the Council of Europe Parliamentary Assembly to all forty-seven Council of Europe Member States, namely that naturalisation of stateless persons should be facilitated through, for example, waiving language proficiency requirements and reducing the number of years of lawful residence required for applying for naturalisation and that free legal aid and access to appeal procedures should be provided to stateless persons seeking naturalisation.⁸³ It is time that States lived up to the international standards they have created and undertaken in order to afford durable solutions via naturalisation to the stateless persons living on their territory.

4. Is there an individual human right to be considered for naturalisation in case of stateless persons?

As already highlighted, access to nationality through the application of the domestic law of a particular State is the only genuine and durable solution to resolve existing cases of statelessness. This is particularly true owing to the fact that there is still no alternative to State-conferred nationality (domestic citizenship). As van Waas puts it, “the idea of developing a form of international citizenship, although raised many times, never gained any real ground”⁸⁴ and this also holds true for the “citizenship of the Union” established the European Union, which only complements and does not replace the national citizenship of the Member States.⁸⁵

⁸² See, e.g., UNHCR, Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection, *supra* n31.

⁸³ Council of Europe, Committee on Legal Affairs and Human Rights, Rapporteur: Mr. Boriss Cilevics, Access to nationality and the effective implementation of the European Convention on Nationality – Report, para. 53; then Council of Europe Parliamentary Assembly, Recommendation 2042 (2014) Access to nationality and the effective implementation of the European Convention on Nationality, adopted on 9 April 2014, paras. 5.2.3-5.2.4 and 8.2.

⁸⁴ van Waas, Nationality Matters, *supra* n3, p. 362 (and footnote 15 for further bibliographical references).

⁸⁵ Treaty on the Functioning of the European Union, Article 20(1).

The question arises whether a “right to be considered for naturalisation” for stateless persons (primarily those in a migratory context) exists as an emerging human right aimed at reducing existing statelessness. As a matter of principle, naturalisation is a discretionary procedure and States are generally free to set the conditions for it, as long as they do not discriminate against applicants on the basis of race, ethnic origin, sex, religion, nationality or any of the grounds prohibited by general international law.⁸⁶ Nevertheless, the “right to a nationality” as a human right and a customary norm of international law, together with the obligation to avoid statelessness, arguably suggests that States have a duty to facilitate access to citizenship for stateless individuals. The emergence of the “right to be considered for naturalisation” as a human right, on the basis of a form of *jus connectionis*,⁸⁷ has been advocated by some scholars in this field.⁸⁸ The theoretical category of *jus connectionis* (right of attachment) had been first proposed by the International Law Association in 1936, and then taken up by the ILC Special Rapporteur on nationality and statelessness, Manly O. Hudson, in the early 1950s,⁸⁹ and was sporadically echoed in later scholarship.⁹⁰ According to this principle, a person should acquire the nationality of the State to which he/she has proved to be most closely attached in his/her conditions of life. This concept takes into consideration all aspects of a stateless person’s attachment to a given place and his/her identity in order to determine nationality, thus it fills a gap left by the traditional birth-right *jus soli* (law of the soil) and *jus sanguinis* (law of the blood) principles. *Jus connectionis* incorporates the principle of

⁸⁶ See e.g. Non-Discrimination in International Law. A Handbook for Practitioners, Interights 2011.

⁸⁷ This term is borrowed from Manley O. Hudson.

⁸⁸ e.g. van Waas, Nationality Matters, *supra* n3, pp. 362, 366, 369-370; P.J. Spiro, “Citizenship, nationality and statelessness” in V. Chetail and C. Bauloz (eds.), Research Handbook on International Law and Migration, Edward Elgar Publishing 2014, p. 288.

⁸⁹ International Law Association, Report of the Thirty Ninth Conference held in Paris, September 10th to 15th, 1936, R. Clay 1937, pp. 13-51, quoted by M. O. Hudson, Report on Nationality, including statelessness, Annex III—Statelessness, document A/CN.4/50, p. 22 (reproduced in the Yearbook of the International Law Commission, 1952, vol. II).

⁹⁰ Consider e.g. Batchelor, Statelessness and the Problem of Resolving Nationality Status, *supra* n9, p. 180; E. Wakelin, “The Implications of Statelessness on the Politics of Protection”, E-International Relations (E-IR), 6 August 2012, <http://www.e-ir.info/2012/08/06/the-implications-of-statelessness-on-the-politics-of-protection>.

jus domicili (long-term residence in the territory), which is the most frequent basis for naturalisation, but the “right of attachment” goes beyond that concept and provides a more complex assessment of the relationship between individual and State. Using Batchelor’s words, “in this sense, a right of attachment might more accurately reflect an individual’s genuine effective link than any one factor on its own can successfully portray”.⁹¹ As a result, *jus connectionis* “could serve as a safeguard against statelessness for persons who are excluded from the citizenry since they have no legal claims to citizenship through birth or through blood but do have a claim through their social fact of attachment to their homeland”.⁹² The “right to be considered for naturalisation” can be understood in the context of this very principle. *Jus connectionis* would not only eliminate potential conflicts between *jus soli* and *jus sanguinis* which negatively affect the individual concerned, but could also tangibly contribute to reducing statelessness, as all persons have some strong ties to at least one State.⁹³ Besides the links one is born with (via the soil or blood), there may be other ties which one acquires over time.⁹⁴ Recognition of the importance of all these links and establishing the principle that they constitute a basis for granting nationality should enable all persons to obtain a nationality (by naturalisation on the basis of a connection with the State if not at the time of birth). Inevitably this would ensure the possibility of access to nationality by naturalisation for stateless persons, or even more it may give rise to a right to be considered for naturalisation in the case of stateless persons.

Article 6(3) of the ECN represents a significant step in this direction, by formulating the individual’s right to apply for naturalisation after a maximum period of 10 years of lawful and habitual residence. This “shall” clause means that non-nationals, including stateless persons,

⁹¹ C. Batchelor, “UNHCR and Issues Related to Nationality”, *Refugee Survey Quarterly* 1995, Vol. 14, p. 112.

⁹² UNHCR, 2014 Statelessness Research Award interviews - Maria Jose Recalde Vela, Weblog, 27 October 2014, http://statelessprog.blogspot.hu/2014/10/unhcr-2014-statelessness-research-award_27.html.

⁹³ See also. C. Batchelor, “Developments in International Law: The Avoidance of Statelessness Through Positive Application of the Right to a Nationality”, in *Proceedings of the First European Conference on Nationality – Trends and Developments in National and International Law on Nationality, 2000, CONF/ NAT (99) PRO 1*, p. 57.

⁹⁴ *Ibid.*

are allowed to try to naturalise.⁹⁵ Furthermore, the waiting period should be logically less for stateless persons, as Article 6(4)(g) goes on to say that the access of such individuals to naturalisation should be facilitated. This interpretation is strengthened by ‘Recommendation 564 (1969)’ of the Consultative Assembly of the Council of Europe,⁹⁶ which instructs Member States to reduce the period of residence required before applying for naturalisation to five years for refugees, and this interpretation might be applied by analogy to the facilitated naturalisation of stateless persons.⁹⁷ Similarly, ‘Recommendation CM/Rec(2009)13’ of the Committee of Ministers suggests to Member States that in the case of stateless children the waiting time before lodging the application for naturalisation should not exceed five years of residence.

There is growing evidence for the progressive development of the right to be considered for naturalisation with respect of stateless people under international human rights law.⁹⁸ The emergence of such a right is implicitly supported by the practice of certain human rights treaty bodies and judicial instances. At the international level, the UN Human Rights Committee, in the case of *Stewart v. Canada*, referred to the “right to acquire the nationality of the country of residence” in connection with a stateless person.⁹⁹ Along the same lines, the Committee on the Elimination of Racial Discrimination (CERD) issued a general recommendation in 2004 advising States to “pay due attention to possible barriers to naturalisation that may exist for long-term or permanent residents”,¹⁰⁰ implicitly suggesting that non-nationals, including stateless persons, develop a right to naturalise after a certain period of residence.¹⁰¹ These pronouncements can be conceived as arguing for *jus domicili* as a more prominent ground for acquiring nationality by stateless persons in a facilitated way. The

⁹⁵ Cf. Batchelor, Statelessness and the Problem of Resolving Nationality Status, *supra* n9, pp. 162-163.

⁹⁶ Consultative Assembly of the Council of Europe, Recommendation 564 (1969), Acquisition by refugees of the nationality of their country of residence, paras. 8 and 9.1.

⁹⁷ Mrekajová, *supra* n29, p. 204.

⁹⁸ See similarly, van Waas, Nationality Matters, *supra* n3, p. 366.

⁹⁹ Human Rights Committee, Communication No. 538/1993, *Charles E. Stewart v. Canada*, 1 November 1996, CCPR/C/58/D/538/1993, para 12.4.

¹⁰⁰ CERD, General Recommendation XXX on Discrimination Against Non Citizens, 19 August 2004, para. 13.

¹⁰¹ van Waas, Nationality Matters, *supra* n3, p. 367.

call for facilitated naturalisation is even more noticeable in case of children. The UN Committee on the Rights of the Child has repeatedly called for “expedited” or “facilitated” procedures for the acquisition of nationality to reduce the number of stateless children.¹⁰² The concept that stateless children born in a given country cannot be considered as “mere aliens”, and are thus entitled to preferential treatment in that country, flows from the interpretation of the Human Rights Committee. In its ‘General Comment No. 27’, the Human Rights Committee took the position that not only do nationals have an “own country”, but also that for “stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence” and other long-term residents,¹⁰³ the country in which they live is their “own country” under Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR).

In addition, the customary international law norm of non-discrimination as expressed in Article 26 of the ICCPR and interpreted by the Human Rights Committee, may be useful for stateless people in their quest for facilitated naturalisation. The point of departure here is that States are not allowed to discriminate against any particular group (including stateless people) in determining the conditions for access to naturalisation, a dictum echoed by CERD.¹⁰⁴ The Human Rights Committee elaborated more on the meaning and scope of the general prohibition of discrimination under the ICCPR in its ‘General Comment No. 18’:

[Article 26] prohibits discrimination in law or in fact in *any field regulated and protected by public authorities*. Article 26

¹⁰² See e.g. CRC. Concluding Observations: Czech Republic, 4 August 2011, CRC/C/CZE/CO/3-4, para. 38 as well as CRC. Concluding Observations: Czech Republic, 18 March 2003, CRC/C/15/Add.201, para. 38; CRC, Concluding Observations: Estonia, 17 March 2003, CRC/C/15/Add.196, para. 29; CRC, Concluding Observations: Kazakhstan, 10 July 2003, CRC/C/15/Add.213, para. 33; CRC, Concluding Observations: Latvia, 28 June 2006, CRC/C/LVA/CO/2, para. 27; CRC, Concluding Observations: Romania, 18 March 2003, CRC/C/15/Add.199, para. 33; CRC, Concluding Observations: Syrian Arab Republic, 10 July 2003, CRC/C/15/Add.212, para. 33. See also, van Waas, Nationality Matters, *supra* n3, p. 60, footnote 46.

¹⁰³ Human Rights Committee, CCPR General Comment No. 27. *Supra* n10.

¹⁰⁴ CERD, General Recommendation XXX *supra* n100, para. 13 according to which States must “[e]nsure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization”.

is therefore concerned with the obligations imposed on States parties in regard to their *legislation* and the *application* thereof. [...] In other words, the application of the principle of non-discrimination contained in article 26 is *not limited to those rights which are provided for in the Covenant*.¹⁰⁵

Without doubt, the attribution of nationality is such a field, regulated and protected by public authorities. Then the question arises: what constitutes discrimination in naturalisation procedures? Many possible distinctions and obstacles might qualify as discrimination if there are identifiable groups (such as stateless people as a homogenous group) against whom these are directed. For instance, various UN treaty-bodies have expressed their concern about discriminatory naturalisation policies in Japan (which has required ethnic Koreans to change their names),¹⁰⁶ Republic of Korea (because of the bar on the naturalisation of ethnic Chinese),¹⁰⁷ and Kuwait (concerning the ineligibility of non-Muslims).¹⁰⁸ The Human Rights Committee's position that States are not allowed to place "unreasonable impediments" on the acquisition of nationality¹⁰⁹ should be interpreted in this context and taken to cover naturalisation procedures. For instance, where a country directly or indirectly impedes access to naturalisation procedures for stateless persons specifically, compared to other groups of non-nationals, this would amount to an "unreasonable impediment" and thus a prohibited distinction. The standard of "unreasonable impediment" therefore gains particular force when the access of stateless persons to naturalisation is assessed.¹¹⁰ Amongst the various criteria for naturalisation, some requirements, while initially appearing legitimate (e.g. presenting a birth certificate from their country of origin; language proficiency), in fact amount to "unreasonable impediments" when applied with

¹⁰⁵ Human Rights Committee, General Comment 18: Non-discrimination, 10 November 1989, para. 12 (emphasis added).

¹⁰⁶ CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Japan, 27 April 2001, CERD/C/304/Add.114, para. 18.

¹⁰⁷ CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Republic of Korea, 24 September 1996, CERD/C/304/Add.12, para. 14.

¹⁰⁸ Human Rights Committee, Concluding Observations of the Human Rights Committee: Kuwait, 27 July 2000, CCPR/CO/69/KWT, para. 18. The examples are mentioned by Spiro, *supra* n88, p. 296.

¹⁰⁹ Human Rights Committee, Communication No. 558/1993, *Capena v. Canada*, 3 April 1997, CCPR/C/59/D/558/1993, para. 11.3.

¹¹⁰ van Waas, Nationality Matters, *supra* n3, p. 368.

respect to stateless persons.¹¹¹ It is in fact facilitating the naturalisation of stateless persons that guarantees full compliance with the standards of non-discrimination and thereby international human rights law by removing “unreasonable impediments” in relation to the access to citizenship. In other words, it is necessary to be flexible and/or to waive conditions that, because of their specific circumstances as individuals with no nationality, otherwise block access to naturalisation entirely for stateless persons.

At the regional level, the case-law of the European Court of Human Rights (ECtHR) deserves greater attention, as it contains some significant indications with regard to the existence of a putative “right to be considered for naturalisation”. Although the European Convention on Human Rights and Fundamental Freedoms (ECHR) does not include the “right to a nationality”, unlike the Universal Declaration of Human Rights (Article 15) and many other regional human rights instruments,¹¹² the ECtHR has repeatedly referred to the link between access to nationality and the individual’s ability to enjoy the right to private life as set out in Article 8 ECHR. A considerable body of ECtHR jurisprudence has emerged (concerning mainly cases of stateless persons, and typically cases where statelessness is a result of State succession) ranging from *Karashev v. Finland*¹¹³ through *Slivenko and Others v. Latvia*¹¹⁴ and *Kurić and Others v. Slovenia*¹¹⁵ to *Genovese v. Malta*¹¹⁶ or, more recently, *Petropavloskis v. Latvia*.¹¹⁷ In these rulings, the ECtHR pointed out that an arbitrary denial of a citizenship might, in certain circumstances, amount to the violation of the right to private

¹¹¹ *Ibid.*

¹¹² e.g. the 1969 American Convention on Human Rights; the 1990 African Charter on the Rights and Welfare of the Child; the 1995 Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms; or the 2004 Revised Arab Charter on Human Rights.

¹¹³ ECtHR, Application No. 31414/96, *Karashev v. Finland*, Admissibility decision of 12 January 1999.

¹¹⁴ ECtHR, Application No. 48321/99, *Slivenko and Others v. Latvia*, Admissibility decision of 12 January 1999, para. 77.

¹¹⁵ ECtHR, Application No. 26828/06, *Kurić and Others v. Slovenia*, Chamber Judgment of 13 July 2010 and Grand Chamber Judgment of 26 July 2012, para. 336.

¹¹⁶ ECtHR, Application No. 53124/09, *Genovese v. Malta*, Judgment of 11 October 2011.

¹¹⁷ ECtHR, Application No. 44230/06, *Petropavloskis v. Latvia*, Judgment of 13 January 2015, paras. 73, 80.

life (Article 8) and/or the principle of non-discrimination (Article 14). In *Genovese v. Malta*, this link between the denial of citizenship and interference with private life has been set out even more powerfully than previously:

[T]he denial of citizenship may raise an issue under Article 8 because of its impact on the private life of an individual, which concept is wide enough to embrace aspects of a person's social identity. While the right to citizenship is not as such a Convention right and while its denial in the present case was not such as to give rise to a violation of Article 8, the Court considers that its impact on the applicant's social identity was such as to bring it within the general scope and ambit of that Article.¹¹⁸

The above passage has introduced the concept of “social identity” into the Court's toolkit of arguments. This can be interpreted as opening up avenues for a closer link between the right to private life and access to nationality to be made. The broader term “denial of citizenship” implies a scenario in which a stateless person's application for naturalisation is rejected in an arbitrary or discriminatory manner. The negative impact of this on the individual's “social identity” can easily be demonstrated in case of a stateless applicant, particularly if the person concerned has strong social, cultural, economic or linguistic connection with the country in question, whereas no comparable links exist with other States.¹¹⁹ While clear and crystallised standards developed by the ECtHR applicable to naturalisation procedures *per se* do not yet exist, the seeds for the above claim have been definitely planted by the ECtHR, and these openings could be developed further in the future.

Following this line of reasoning, if arbitrary or discriminatory denial of a nationality could be adjudicated indirectly as a form of violation of the right to private life (Article 8) and/or non-discrimination (Article 14), the right to an effective remedy under Article 13 ECHR should also be triggered and applied. In *Petropavloskis v. Latvia*, the stateless applicant (a “non-citizen” of Russian ethnicity) complained under Article 13 ECHR that he did not have any effective domestic remedy in respect of the decision rejecting his naturalisation.¹²⁰ Therefore,

¹¹⁸ ECtHR, *Genovese v. Malta*, *supra* n116, para. 33.

¹¹⁹ Gyulai, *supra* n5. p. 10.

¹²⁰ In the case concerned, the challenge was not successful: The Court dismissed

the alleged substantive right to be considered for naturalisation that can be deduced from the jurisprudence is backed up with procedural safeguards, namely legal remedies (*ubi jus ibi remedium*). If one assumes that in the case of stateless persons the “right to be considered for naturalisation”, or its infringement, can be justiciable before the ECtHR (albeit indirectly, if sufficiently linked to the right to private life and heavily affecting the applicant’s social identity), such an individual right – or in the Court’s parlance, an “arguable complaint” under the ECHR – should be accompanied with an *effective legal remedy* (before a national authority) according to the logic of the ECHR. This procedural safeguard (or its absence) is also subject to further judicial review by the Court. Claiming that naturalisation decisions are amenable to legal review is not new. It is consistent with Article 12 of the ECN, which clearly sets forth that “decisions relating to the acquisition [...] of [...] nationality [shall] be open to an administrative or judicial review”. Its Explanatory Report unequivocally confirms that it applies to (negative) decisions on naturalisation as well.¹²¹ This procedural right is therefore explicitly recognised in another CoE convention, although one over which the ECtHR is not entitled to exercise jurisdiction. The above explanation aims to bridge the gap between the “convention recognizing such a procedural right in nationality matters, but without a monitoring body” (ECN), and the “convention not dealing with nationality issues, but having a supervisory judicial body” (ECHR). By virtue of ECtHR jurisprudence, the remedy offered by a national judicial or non-judicial body (1) should allow the competent domestic authorities to deal with the substance of the complaint and to grant appropriate relief; and (2) should be effective in practice, not only in law, considering the individual circumstances and the general legal and political context.¹²² I see thus great potential in the ECtHR case law to push the claim of facilitated naturalisation of stateless persons forward and to make it a more tangible reality in the European context. While the current status of law does not yet establish a right to be considered for naturalisation, it provides a solid stepping stone in this direction.

this claim, since no violation of substantive Convention rights had been established (see, ECtHR, *Petropavloskis v. Latvia*, *supra* n117, paras. 88-92). In the legal literature, the possibility of invoking Article 13 ECHR is also envisaged e.g. by Flauss, *supra* n45, pp. 291-292.

¹²¹ Explanatory Report to the European Convention on Nationality, *supra* n43, para. 87.

¹²² Summarised by Gyulai, *supra* n5. p. 10, for the jurisprudential references see footnotes 30-32.

To sum up, it is arguable that the “right to be considered for naturalisation” for stateless persons is starting to be recognised as a human right both in universal and regional settings, as a corollary to the universally accepted “right to a nationality”. This position fits smoothly into the more general trend towards recognising the relevance of human rights to nationality law, including naturalisation regimes,¹²³ which was eloquently articulated by the Inter-American Court of Human Rights some thirty years ago in an advisory opinion concerning domestic legislation on naturalisation (although not specifically in the context of stateless persons):

(D)espite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manners in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights. [...] The classic doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues.¹²⁴

5. Conclusions

This chapter has explored facilitated naturalisation as a durable solution for stateless persons and attempted to summarise the current state of international law with respect to legal avenues for stateless persons to acquire nationality, as well as to reflect on emerging norms and possible future standards. Present-day international law on the reduction of statelessness, including by facilitated naturalisation, is far from being detailed or universal, to say nothing of the challenges associated with enforcement of the rules that do exist given the vague formulation of some applicable standards and the absence of dedicated monitoring bodies. However, there have been some significant

¹²³ See also, e.g., Flauss, *supra* n45, pp. 279-280.

¹²⁴ Inter-American Court of Human Rights, Advisory Opinion OC-4/84, *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Series A No. 4, 19 January 1984, paras. 32-33.

developments over the last sixty years, with the most noteworthy developments at the regional level both with respect to norm-setting and jurisprudence (mainly under the aegis of the Council of Europe, but with notable progress in Latin America and West Africa as well).

States seem to be more willing to undertake obligations to prevent future cases of statelessness than to commit themselves to reduce or eliminate existing statelessness through individual applications for (facilitated) naturalisation. As a result, providing stateless people with nationality, or recognising a right to be considered for naturalisation is an extremely complex and sensitive matter. Attributing nationality is the “decisive act that restores the ‘right to have rights’ and paves the way for full integration/reintegration into society through the exercise of these rights”.¹²⁵ Yet, State sovereignty is robust when it comes to granting nationality to the stateless, and combined with political considerations it can hinder efforts to overcome statelessness, “the antithesis of legal identity in a world construct of states”.¹²⁶ Much depends on the good faith implementation by States of the international obligations that they have undertaken to close the gap between law and reality. Even more crucial are political will and the goodwill of States to make the stateless their own nationals.

Resolute action to combat statelessness is now relatively high on the agenda of the international community, due largely to the robust advocacy work carried out by UNHCR and others. The “#IBelong” Campaign launched by UNHCR in November 2014 to eradicate statelessness by 2024 is an important reflection of these efforts.¹²⁷ It sets an ambitious goal, indeed. On the regional level, the Council of Europe also continues to attach great importance on working towards the elimination of this legal anomaly affecting the lives of hundreds of thousands of people in Europe. The CoE Committee of Experts on Nationality have envisaged considering “whether further instruments are required specifically relating to the acquisition of nationality

¹²⁵ van Waas, *Nationality and rights*, *supra* n2, pp. 40-41.

¹²⁶ C. Batchelor, *The International Legal Framework Concerning Statelessness and Access for Stateless Persons*, Contribution to the European Union Seminar on the Content and Scope of International Protection, 8-9 January 2002, pp. 2-3.

¹²⁷ See the campaign updates of April 2016, December 2015, September 2015, May 2015, and January 2015 (available at UNHCR, *Statelessness*, <http://www.refworld.org/statelessness.html>).

by [...] stateless persons and their dependants”,¹²⁸ and the access of stateless people to nationality has also been recently highlighted by the CoE Parliamentary Assembly.¹²⁹ The ‘Brazil Declaration and Plan of Action’ as well as the ECOWAS initiatives on statelessness likewise represent encouraging signs for better implementation of the relevant international norms, as they set out the unconditional objective to foster naturalisation as a means to help stateless people resolve their situation. Since the beginning of the global #IBelong Campaign to End Statelessness, a number of States have recognised the negative impact of statelessness, e.g. from the human security perspective, and have taken steps to resolve large-scale situations of statelessness. As UNHCR pointed out, “they have shown that the key factor is political will and that relatively simple and low-cost reforms can have an immediate, permanent impact”.¹³⁰ Such efforts can be further supported by the emerging “right to be considered for naturalisation”, which is receiving more recognition in international and regional jurisprudence. We will see where the combined efforts of the international community and the evolving case-law of various international bodies such as the ECtHR will lead during the life of the #IBelong Campaign. In that sense it may be interesting to consider this chapter as a kind of time capsule to be revisited in 2024.

¹²⁸ CoE Committee of Experts on Nationality, Report on Conditions for the Acquisition and Loss of Nationality, 14 January 2003, para. 43.

¹²⁹ See, Council of Europe Parliamentary Assembly, Resolution 1989 (2014), Access to nationality and the effective implementation of the European Convention on Nationality, 9 April 2014 and Council of Europe Parliamentary Assembly, Recommendation 2042 (2014), Access to nationality and the effective implementation of the European Convention on Nationality, 9 April 2014.

¹³⁰ UNHCR, Good Practices Paper – Action 1: Resolving Existing Major Situations of Statelessness, 2015, p. 7.

PART 2

REGIONAL DEVELOPMENTS

9. The right to a nationality in Africa: New norms and new commitments

Bronwen Manby, with Ayalew Getachew and Julia Sloth-Nielsen

Abstract

This chapter presents two ground-breaking initiatives on the right to a nationality and the prevention of statelessness in Africa undertaken by the African Committee of Experts on the Rights and Welfare of the Child and the African Commission on Human and Peoples' Rights. The chapter outlines the current trends in nationality laws in the continent and identifies the populations left at risk of statelessness by those laws. It summarises existing provisions and jurisprudence on the right to a nationality in the African human rights system and the extent to which issues relating to statelessness have been considered by the other institutions of the African Union. Finally, it sets out the process leading to and the content of the General Comment adopted by the African Committee of Experts on the Rights and Welfare of the Child in 2014 on the right to a name, birth registration, and a nationality; as well as steps taken by the African Commission on Human and Peoples' Rights towards the elaboration of a draft protocol to the African Charter on Human and Peoples' Rights on the eradication of statelessness and the right to a nationality in Africa.

1. Introduction

Statelessness in Africa is closely tied to the continent's history of colonisation, and the inheritance both of borders that cut across pre-existing political and cultural boundaries and of institutions that had been founded on systematic racial and ethnic discrimination. The nationality laws adopted on the departure of the colonial powers were largely based on European models and poorly adapted to the realities of the States concerned, especially the legacy of forced and voluntary migration during the colonial period, the existence of substantial populations following a nomadic lifestyle, and the difficulty of determining which State a person belonged to when connections existed to several States and birth registration was minimal or non-existent. Lack of recognition of nationality has been central to some of

Africa's most intractable conflicts, and nationality laws have frequently been manipulated by politicians for electoral advantage or to silence political opponents and critics.

Despite, or perhaps because of, this history, there has been widespread recognition of the need to address statelessness and strengthen the administration of nationality, especially since the transformation of the Organisation of African Unity (OAU) into the African Union (AU) in 2001 brought a renewed emphasis on human rights and on institutional reform at national and continental level. The AU's two principal human rights institutions have adopted important standards on the obligations of States in relation to the rights to birth registration and to a nationality. In 2014, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), the treaty body responsible for monitoring compliance with the African Charter on the Rights and Welfare of the Child (ACRWC),¹ adopted a General Comment explaining the scope of State Parties' obligations under Article 6 of the ACRWC which deals with the right to a name, birth registration, and a nationality. In 2015, the African Commission on Human and Peoples' Rights (ACmHPR), the treaty body responsible for monitoring compliance with the African Charter on Human and Peoples' Rights (ACHPR),² adopted the draft text of a proposed protocol to the ACHPR which would create detailed obligations on the right to a nationality and the eradication of statelessness.

This chapter outlines the content and significance of the General Comment and the draft protocol in the context of statelessness in Africa today, the jurisprudence of the ACERWC and the ACmHPR, and the discussions on economic development, continental integration and freedom of movement in other institutions of the African Union

¹ African Charter on the Rights and Welfare of the Child, 1 July 1990, entry into force 29 November 1999, CAB/LEG/24.9/49 (1990). 47 out of 54 AU Member States are parties to the ACRWC and the others have all signed.

² African Charter on Human and Peoples' Rights, 27 June 1981, entry into force 21 October 1986, CAB/LEG/67/3 rev. 5. All AU Member States except South Sudan are parties to the ACHPR; South Sudan signed in 2013. Note that Morocco is not a member of the AU, having withdrawn when the Sahrawi Arab Democratic Republic was recognised in 1984 and is therefore not a party to the ACHPR. A list of the States Parties to the ACHPR is available on the AU website, OAU/AU Treaties, Conventions, Protocols & Charters, <http://www.au.int/en/treaties..>

which have touched on statelessness or the right to nationality. These developments represent a recognition by the two principal African human rights bodies and by the AU's political institutions of the particular challenges that Africa faces in ensuring the right to a nationality thanks to its colonial past and the weakness of many African State structures today. Despite the many hurdles that remain, they also hold out the hope of substantial progress towards eradication of statelessness in Africa within the coming decades.

2. The colonial legacy

The leaders of newly independent States in Africa were faced with the challenge of nation-building in countries where it was not unusual to have populations speaking several hundred different languages and practising half a dozen different religions, among them perhaps many tens of thousands following a nomadic lifestyle or large settler or migrant worker populations imported (often forcibly) from other parts of Africa or other parts of the world during the colonial period. Before independence, registration of births and documentation of the population had been rudimentary and often discriminatory on grounds of race, religion or ethnicity. Even Ethiopia, which was never colonised, had its borders set by the European annexations around its edges, while historical States that continued to exist in some form, such as Rwanda or Swaziland, had the boundaries of their territory radically adjusted. The decision of the newly formed OAU to respect the borders established by the colonial powers³ committed the continent to the task of moulding these units into political communities. Adding to these challenges, the provisions on attribution of nationality upon succession of States were often unclear when the African territories gained independence in the 1960s and 70s; while the new laws were largely copied and pasted from European texts, with little discussion to engender understanding of or support for their provisions from the wider population or even representatives in national legislatures.

The British government negotiated more or less standard-form provisions on State succession that should have ensured nobody would be left stateless; but their implementation relied on the existence of an effective and country-wide documentation system (for

³ OAU Assembly of Heads of State and Government, Resolution 16(I) Border Disputes among African States, July 1964, AHG/Res 16(I).

birth registration, above all) that simply did not exist. In the French territories nationality was largely left up to the new governments. Sometimes several years elapsed before a new nationality code was adopted, leaving the status of those born or who migrated during that period uncertain. The Belgians left a legal confusion in the Congo over the status of workers forcibly imported from Rwanda and Burundi (but prevented from acquiring Belgian nationality by the League of Nations mandate over those formerly German territories) that still haunts the country today. Similar challenges existed in North Africa, perhaps above all in Algeria, whose previous status as a part of metropolitan France made nationality questions particularly challenging and politically controversial.

The *jus soli* citizenship law established by the British in their former colonies should have been completely inclusive of those born after independence, but proved to be both politically unsustainable and unclear on the status of those who had the potential right to two nationalities in an era when tolerance of dual nationality for adults was unusual. Almost all Commonwealth States took measures to remove the right to citizenship based purely on birth in the territory in the decades after independence — as Britain itself did in 1981. The former French civil law principle of double *jus soli* (i.e. both the child and one of their parents were born in the State) and, in some countries, the right to acquire citizenship based on birth and residence until majority, proved generally more stable (but, notably, was not applied in Côte d’Ivoire).

3. Nationality laws in Africa today

Africa has shared the global trends towards greater gender equality in nationality law and acceptance of dual nationality. Children of national mothers and foreign fathers are now able to obtain citizenship on equal terms with the children of national fathers and foreign mothers in 42 of Africa’s 54 States.⁴ Dual nationality is allowed in at least

⁴ The States which maintain gender discrimination to a greater or lesser extent on the face of the law are: Benin, Burundi, Cameroon, Guinea, Liberia, Libya, Madagascar, Mauritania, Somalia, Sudan, Swaziland, and Togo. The lists here include Morocco as an African country although it is not currently a member of the African Union; and exclude the Sahrawi Arab Democratic Republic, which has no published law on nationality.

some circumstances in all but nine.⁵ However a trend to reduce rights based on birth in the territory has left many countries (especially Commonwealth countries, but also Côte d'Ivoire, Algeria and Niger) with provisions granting nationality at birth exclusively by descent. Only 13 African countries specifically provide in their nationality laws that children born in their territory who would otherwise be stateless have the right to nationality,⁶ while some 17 countries do not have a provision granting nationality to children of unknown parents.⁷ In addition a number of States initially adopted nationality laws that explicitly discriminated on the basis of race, ethnicity or religion. Around ten have such provisions today (including the Democratic Republic of Congo, Uganda, Somalia, Liberia, Sierra Leone, and several of the North African States).⁸ There has been little progress in amending national laws and procedures to protect children born in the territory of a State against statelessness if they do not have a parent who is documented as a national of that State. Some new constitutions and laws have introduced protections that did not previously exist, but these reforms have faced challenges in implementation and some countries have moved in the other direction.

In Kenya, for example, the 2010 Constitution included a new provision for citizenship to be conferred on children of unknown parents up to the apparent age of eight when found and a temporary process for acquisition of nationality by those resident in Kenya since independence who had never been recognised as Kenyans. It also removed gender discrimination in transmission of nationality. However, in the absence of administrative measures on implementation, the Kenyan reforms had yet to have a major impact in providing access to nationality for stateless populations five years later. In any event they did not provide protection against statelessness for children born in Kenya whose

⁵ Those not permitting dual nationality are Cameroon, Democratic Republic of the Congo, Equatorial Guinea, Eritrea, Ethiopia, Lesotho, Liberia, Malawi, and Tanzania.

⁶ Those providing for "otherwise stateless" children are: Angola, Burkina Faso, Cameroon, Cape Verde, Chad, Guinea Bissau, Lesotho, Malawi, Namibia, Rwanda, São Tomé and Príncipe, South Africa, and Togo.

⁷ The countries that have no provision either for foundlings or for children of unknown parents are Botswana, Côte d'Ivoire, Equatorial Guinea, Gambia, Lesotho, Liberia, Malawi, Mauritius, Namibia, Nigeria, Seychelles, Sierra Leone, Somalia, South Africa, Tanzania, Togo, and Zambia.

⁸ For further details on all these provisions, see tables in B. Manby, *Citizenship Law in Africa*, Open Society Foundations 2016.

parents do not have a connection with Kenya dating back to 1963. Meanwhile in Mauritania, amendments in 2010 to the nationality law moved in the opposite direction, removing rights based on birth in the territory to create a pure *jus sanguinis* regime (the only exception being for foundlings) and making proof of entitlement to nationality more difficult.

4. Stateless populations in Africa

There are no meaningful statistics on the number of stateless people in Africa today, given the challenges of distinguishing stateless persons (those “not considered as a national by any State under the operation of its law”⁹) from the many millions of Africans who are simply undocumented.¹⁰ It is only as individuals seek documentation that it gradually becomes apparent that they are, in fact, stateless. However, the characteristics of the populations at risk of statelessness are the same as in other regions of the world.

Firstly, there are the descendants of people who migrated, or were forced to move, during the colonial period. This group is divided in turn into two main sub-categories: those whose ancestors came from outside Africa (from Europe, Asia or the Middle East); and — far more numerous — those whose ancestors came from elsewhere in Africa (farmworkers in Zimbabwe, tenant farmers on cocoa plantations in Côte d’Ivoire, Nubian soldiers in Kenya, and many others).

Secondly, ethnic groups whose pre-colonial boundaries cross modern borders, so that communities speaking the same language or who formed part of the same pre-colonial political entity now find themselves in two (or more) different States. Amongst these border groups we must include nomadic pastoralists, a population of millions in Africa, who face the suspicion about their loyalties that settled populations have always had of those who lack a fixed home, and populations affected by transfers of territory in the resolution of border disputes (such as the Bakassi peninsula transferred to Cameroon from Nigeria by a 2002 decision of the International Court of Justice).

⁹ Convention relating to the Status of Stateless Persons, 28 September 1954, entry into force 6 June 1960, 360 UNTS 117, Art. 1.

¹⁰ B. Manby, How will the UNHCR’s statelessness campaign affect Africa?, African Arguments, 12 November 2014, <http://africanarguments.org/2014/11/12/how-will-the-unhcrs-statelessness-campaign-affect-africa-by-bronwen-manby>.

Thirdly, African States face the same contemporary challenges of migration as do States in other parts of the world in this era of globalisation: the conundrum of how to integrate new migrants and refugees (and their children) into the national polity. Perhaps most at risk of statelessness are the descendants of former refugees from conflicts where the cessation clause has been invoked under the 1951 Convention relating to the Status of Refugees (Angola, Liberia, Rwanda, and Sierra Leone), who may lack proof of their connection to the country “of origin” which would enable recognition or (re)acquisition of nationality there, but who also cannot acquire nationality in the country of refuge.

Finally, scattered throughout the continent and not belonging to any recognised “community”, there are the children of foreign fathers affected by gender discrimination in the law; those born out of wedlock; adopted children; child workers; trafficked children (even within their own country); the children of mothers with mental disability or illness; abandoned infants and orphans; and those separated from their parents for whatever reason. Even where the law is not at fault, weak civil registration and other documentation systems and burdensome or discriminatory administrative requirements may mean that connections establishing the right to nationality in the State of birth or in the State(s) of nationality of one or both parents cannot be proved.

Across Africa there are people who can obtain recognition of nationality neither in the State where they live and to which they have the closest connections nor in the State to which they are perceived as belonging on the basis of their last name. Lack of any rights based on birth in the territory under some nationality laws as well as explicit racial, religious or ethnic discrimination in some cases leaves many people excluded from the society where they were born and have always lived. In the most egregious cases, such as the Democratic Republic of Congo, a refusal to recognise the nationality of substantial and identifiable groups has been central to later conflict.

To these general categories, we must add those affected by the targeted and political use of nationality law. This includes politicians such as Kenneth Kaunda in Zambia and Alassane Ouattara in Côte d’Ivoire — a former president and a former prime minister — who were both denied the right to run for office again on the grounds that their citizenship

had been recognised in error. Other less well known cases encompass not only politicians, but also union leaders, journalists and academics whose opinions and activities have troubled the government of the day.

Similar approaches have been used to disenfranchise groups as well as individuals. In Côte d'Ivoire, for example, the nationality law was never amended to create explicit discriminatory provisions, but amendments to the Constitution, to the electoral code, to the laws on identification and civil registration, and to the implementing decrees for the nationality law itself were enacted to remove potential voters from particular ethnic groups from the electoral roll. In Zimbabwe, meanwhile, it was the provisions prohibiting dual nationality that became a tool of disenfranchisement for those with the potential — but never claimed — right to another nationality. This included not only white Zimbabweans, but also, in much larger numbers, people with a parent originally from a neighbouring southern African State. Similar techniques have been used at times in many countries across the continent.¹¹

5. The right to a nationality in the African human rights system

Questions related to nationality, including mass expulsions of alleged non-nationals as well as arbitrary deprivation or non-recognition of nationality, have been among the most common themes in cases coming to the two principal African human rights bodies, the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child.

5.1 *The African Charter on Human and Peoples' Rights*

The ACHPR does not contain a specific provision on nationality.¹² Despite this, many of the complaints brought to the ACmHPR have concerned human rights violations that relate to the denial of a person's nationality. These range from the Kaunda and Ouattara cases

¹¹ B. Manby, *Struggles for Citizenship in Africa*, Zed Books 2009.

¹² The Draft of what became the African Charter on Human and Peoples' Rights prepared by Kéba Mbaye for the Meeting of Experts held in Dakar, Senegal from 28 November to 8 December 1979 (CAB/LEG/67/1) did contain a provision on nationality. There is no record of the discussions on how it came to be removed. See, African Commission on Human and Peoples' Rights (ACmHPR), *The Right to Nationality in Africa*, 2014, p. 5.

and similar denationalisations to provisions on land ownership that discriminate against non-nationals to mass expulsions of alleged foreigners, whether migrants or refugees, in which nationals have also been caught up.

The ACmHPR has drawn on articles of the ACHPR relating to due process, the right to family life and non-discrimination¹³ to find States in violation of their obligations in these cases. Perhaps most significantly it has found that Article 5 of the ACHPR, which provides that “[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status” applies to attempts to denationalise individuals and render them stateless.

In the long-running case of John Modise, who spent years confined to the South African “homeland” of Bophuthatswana or the no-man’s land between South Africa and Botswana because of the Botswanan government’s refusal to recognise his nationality, the ACmHPR found against the Botswanan government and ruled, *inter alia*, that Modise’s “personal suffering and indignity” violated Article 5.¹⁴ Similarly, in *Amnesty International v. Zambia*, the ACmHPR considered the deportations of William Banda and John Chinula from Zambia to Malawi and found that “[b]y forcing [the complainants] to live as stateless persons under degrading conditions, the government of Zambia has deprived them of their family and is depriving their families of the men’s support, and this constitutes a violation of the dignity of a human being” thereby violating Article 5 of the ACHPR.¹⁵

In the cases relating to Kaunda and Ouattara, the ACmHPR found against both Zambia and Côte d’Ivoire in relation to the conditions to run for presidential office, where these included requirements relating to the nationality of the parents of the candidate as well as the nationality of the candidate him- or herself.¹⁶ In its ruling on the 1998 land law in Côte d’Ivoire, whose Article 26 restricted ownership

¹³ ACHPR, Articles 7, 18 and 2.

¹⁴ ACmHPR, Communication 97/93, *Modise v. Botswana*, 6 November 2000, para. 91.

¹⁵ ACmHPR, Communication No. 212/98, *Amnesty International v. Zambia*, 5 May 1999, para. 58.

¹⁶ ACmHPR, Communication 211/98, *Legal Resources Foundation v. Zambia*, 7 May 2001; ACmHPR, Communication No.246/02, *Mouvement ivoirien des droits humains (MIDH) v. Côte d’Ivoire*, 29 July 2008.

of property to Ivorian citizens, the ACmHPR found Côte d'Ivoire in violation of Articles 2 and 14 of the ACHPR (equality before the law and right to property), since the application of the law "would give rise to the expropriation of their land from a category of the population, on the sole basis of their origin".¹⁷

Although they did not include a provision on nationality, the drafters of the ACHPR responded to a pattern of human rights violations already apparent on the continent by including a provision on "mass expulsion of non-nationals"; a provision that is not included in other similar international treaties. Article 12(5) of the ACHPR reads "[t]he mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups." The ACmHPR has ruled against Guinea, Angola, and Zambia in cases invoking this provision, confirming that there must be a right to challenge on an individual basis both the decision to expel the individual and the determination or assumption that the person being expelled is in fact a foreigner and does not hold the nationality of the State in question.¹⁸

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in 2003, in general includes strong non-discrimination provisions, but allows exceptions in gender equality in the right to transmit nationality to a spouse or child, as a result largely of amendments to the draft introduced by the North African States.¹⁹ No cases relating to the rights of women to transmit

¹⁷ ACmHPR, Communication No.262/02, *Mouvement ivoirien des droits humains (MIDH) v. Côte d'Ivoire*, 22 May 2008, para. 78.

¹⁸ ACmHPR, Communication No.159/96, *Union Interafricaine des Droits de l'Homme and Others v. Angola*, 11 November 1997; ACmHPR, Communication No.71/92, *Rencontre Africain pour la Défense des Droits de l'Homme v. Zambia*, October 1996; ACmHPR, Communication No.292/04, *Institute for Human Rights and Development in Africa v. Angola*, 22 May 2008; ACmHPR, Communication No.249/02, *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea*, 7 December 2004.

¹⁹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 7 November 2003, entry into force 25 November 2005, CAB/LEG/66.6, Art. 6 provides that: "g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband; h) a woman and a man shall have equal rights with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests". For discussion of the drafting process see, F. Banda,

nationality have yet come before the ACmHPR for it to interpret these provisions.

5.2 The African Charter on the Rights and Welfare of the Child

While the ACHPR lacks a specific provision on nationality, the ACRWC, drafted ten years later, establishes strong protections in this area. Article 6 recognises four interlinked rights and imposes an obligation on States Parties to take legislative measures to prevent statelessness among children. Article 6(1) establishes the right to a name, Article 6(2) enshrines the right to birth registration immediately after birth, and Article 6(3) provides for the right of every child to acquire a nationality. Article 6(4) adds to these commitments, which echo the UN Convention on the Rights of the Child, by drawing on the requirements of the 1961 Convention on the Reduction of Statelessness and imposes an obligation on States “to ensure that their constitutional legislation recognizes the principles according to which a child shall acquire the nationality of the State in the territory of which he/she has been born if, at the time of the child’s birth, he/she is not granted nationality by any other State in accordance with its laws”.

The very first decision by the ACERWC, adopted in 2011, found against Kenya in relation to the right to nationality of children born in Kenya of Nubian descent (Kenyan Nubian Children case).²⁰ The Nubians had been conscripted into the British army from what is now Sudan, and subsequently demobilised and settled in Kenya. In theory, many of them should have become Kenyan automatically at independence, and the remainder should have had the right to register as Kenyans in a non-discretionary process. In practice, many struggled to obtain recognition of Kenyan citizenship. The decision highlighted the consequences of statelessness for those affected:

Whatever the root cause(s), the African Committee cannot overemphasise the overall negative impact of statelessness

“Protocol to the African Charter on the Rights of Women in Africa,” in M. Evans and R. Murray (eds), *The African Charter on Human and Peoples’ Rights: The System in Practice 1986-2006*, Cambridge University Press 2008.

²⁰ African Committee of Experts on the Rights and Welfare of the Child (ACERWC), Communication No.002/2009, *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya vs. Kenya* (Kenyan Nubian Children case), 22 March 2011.

on children. While it is always no fault of their own, stateless children often inherit an uncertain future. For instance, they might fail to benefit from protections and constitutional rights granted by the State. These include difficulty to travel freely, difficulty in accessing justice procedures when necessary, as well as the challenge of finding oneself in a legal limbo vulnerable to expulsion from their home country. Statelessness is particularly devastating to children in the realisation of their socio-economic rights such as access to health care and access to education. In sum, being stateless as a child is generally an antithesis to the best interests of children.²¹

The ACERWC found the government of Kenya in violation of Articles 6(2), 6(3) and 6(4) of the ACRWC. It also “drew the attention of the State Party” to the fact that the citizenship provisions of the new Constitution adopted in 2010, after the complaint had been filed, still did not provide sufficient protections against statelessness. The Committee recommended that the government of Kenya should take all necessary legislative, administrative, and other measures in order to ensure that children of Nubian descent in Kenya that are otherwise stateless can acquire a Kenyan nationality and the proof of such a nationality at birth; that it should also take measures to ensure that existing children of Nubian descent whose Kenyan nationality is not recognised are systematically afforded the benefit of these new measures as a matter of priority; and that it should implement its birth registration system in a non-discriminatory manner, and take all necessary legislative, administrative, and other measures to ensure that children of Nubian descent are registered immediately after birth.

6. Statelessness and the other priorities of the African Union

The question of statelessness, previously rather a niche concern of a small group of human rights lawyers, has come to be seen as overlapping with several other priorities of the African Union. Statelessness has been highlighted by African institutions as having an impact on peace and security, migration and border management. Statelessness has been part of the debate around reform of African institutions and promotion of greater continental integration that received new impetus with the adoption of the Constitutive Act of the African Union

²¹ *Ibid.*, para. 46.

in 2000. The AU has also initiated a new focus on civil registration and documentation of African populations as part of a broad drive to strengthen State capacity to plan and deliver public services, including health and education, and in response to advocacy from the United Nations Children's Fund (UNICEF) and child rights groups on the importance of birth registration for child protection. This push at the AU level to strengthen systems for civil registration and vital statistics has begun to converge with the agenda on statelessness.

The first driver in the debate on nationality and statelessness at the AU level is the agenda for African integration and freedom of movement. In 2002, a high-level meeting of the AU adopted a consensus statement urging Africa to “move towards a common citizenship, through the initial steps of harmonizing citizenship, naturalisation, immigration and employment laws, and through progressively removing restrictions on travel”.²² In 2004 and 2005, further meetings endorsed the idea of an African passport,²³ and in 2007 an African diplomatic passport was launched for staff and representatives of the AU structures. The AU's Agenda 2063 commits Member States to “[i]ntroduce an African Passport, issued by Member States, capitalising on the global migration towards e-passports, and with the abolishment of visa requirements for all African citizens in all African countries by 2018”.²⁴ To date, however, the implementation of this commitment has not progressed far beyond the idea of common-form passports and relatively limited zones of free movement. Despite the fanfare at the July 2016 AU Summit in Kigali, Rwanda, over the issuance of the first AU passports to heads of State and AU staff members, visa-free travel is only a reality among the fifteen member States of the Economic Community of West African States (ECOWAS), and partially realised among some of the six members of the East African Community.

The AU Migration Policy Framework adopted in 2006 urged measures to address statelessness.²⁵ Statelessness has also

²² Symposium on the African Union, Statement of Consensus, African Development Forum III: Defining Priorities for Regional Integration 3 March 2002.

²³ Commission of the African Union, Strategic Plan of the Commission of the African Union, 2004 – 2007, May 2004; African Union, Report of the First Conference of Intellectuals of Africa and the Diaspora, 9 October 2004, Rapt/Rpt/CAID (I); African Union Executive Council, Report on the African Union Conference of Ministers of Immigration, 2 July 2005, EX.CL/197 (VII).

²⁴ African Union, Agenda 2063: The Africa We Want, August 2014, para. 67(k).

²⁵ The Migration Policy Framework included among its other recommendations

featured in several documents adopted during discussion of the AU Border Programme — though not in the Niamey Convention on Cross-Border Cooperation adopted in 2014.²⁶ Ongoing concerns about mass expulsions — including from Libya — led AU ministers to call for a specific protocol to the ACHPR on deportations and expulsions during a meeting on immigration in June 2005. Such a protocol would address the concerns of due process and respect for human rights.²⁷ In 2007, African national human rights institutions discussed the question of statelessness in the context of conflict and displacement, and adopted a resolution calling on States to reform their nationality laws.²⁸ A meeting of State representatives convened by the AU Department of Political Affairs in 2012 focused on the role of statelessness in conflict situations and urged African States to “develop an African regional instrument on statelessness that reflects African realities and context such as nomadic, historical migrations and border dimensions of the phenomenon”.²⁹

that AU Member States should “incorporate key guidelines as recommended in the 1954 and 1961 Statelessness Conventions”, and “develop national legislative and policy frameworks to counter statelessness, particularly in cases of long-term residents, by reforming citizenship legislation and/or granting rights similar to those enjoyed by foreigners residing in the country”. African Union Executive Council. Migration Policy Framework for Africa, 25 June 2006, EX.CL/276 (IX), para. 3.7.

²⁶ See, in particular, African Union Border Program, Draft African Union Strategy for Enhancing Border Management in Africa, May 2012. For more on the Border Program see, African Union, Peace and Security, Border Programme, <http://www.peaceau.org/en/resource/79-theme-border-programme>.

²⁷ African Union, Report on the African Union Conference of Ministers of Immigration, Ex.CL/197(VII); see also, African ministers push for protocol on deportation, mass expulsion, PANA, 30 June 2005.

²⁸ The Sixth Conference of African National Human Rights Institutions took place in Kigali, Rwanda in October 2007 with the participation of UNHCR and had the theme “Role of National Institutions in the Protection of Refugees, Internally Displaced Persons and Stateless Persons”. Participants adopted a communique in which, “concerned about the intractable problems of refugees, IDPs and stateless persons in Africa”, they recommended that African States should “evaluate and review existing legislations on citizenship and nationality and ensure that they do not create situations that could lead to statelessness” and work with international and regional organisations, including the African Union, for the “promotion, protection of rights of refugees, IDPs and stateless persons in Africa”. Sixth Conference of African National Human Rights Institutions, Kigali Declaration, 10 October 2007.

²⁹ African Union, Recommendations of the African Union Symposium on Citizenship in Africa: Preventing Statelessness, Preventing Conflicts, 24

At the sub-regional level too, nationality and statelessness have gained more attention, especially in the West Africa region with its long-standing legal framework around freedom of movement. In February 2015, ECOWAS ministers adopted the Abidjan Declaration on the eradication of statelessness, in which they committed to “prevent and reduce statelessness by reforming constitutional, legislative and institutional regimes related to nationality in order to include appropriate safeguards against statelessness, in particular to ensure that every child acquires a nationality at birth and that all foundlings are considered nationals of the State in which they are found”.³⁰ The ECOWAS summit of Heads of State and Government later that year approved the Abidjan Declaration, calling on Member States to join the global campaign to end statelessness, “in particular through the review of the relevant normative frameworks, adherence to, and compliance with, international conventions adopted to prevent and reduce statelessness”.³¹

In a parallel initiative, the African Union launched a major effort to improve civil registration and vital statistics (CRVS) in Africa in collaboration with the UN Economic Commission for Africa, UNICEF, the World Health Organisation and other international agencies. Based in the first instance on a recognition of the “importance of civil registration for public policy, good governance, human rights, rights of children, and as a basis for reliable vital statistics”,³² the discussions around this initiative increasingly integrated discussion of birth registration as a means to reduce statelessness. In February 2015, the 3rd ministerial meeting on “Promoting the use of CRVS in support of good governance in Africa” adopted the Yamoussoukro Declaration, committing AU States to a comprehensive programme to strengthen vital statistics systems, including a strong focus on child rights.³³

October 2012, recommendation 8.

³⁰ Ministerial Conference on Statelessness in the ECOWAS region, Abidjan, Côte d’Ivoire, 23- 25 February 2015. See conference webpage, which includes statements and presentations at the meeting as well as its conclusions and recommendations, at <http://unhcr.org/ecowas2015>.

³¹ Forty-Seventh Ordinary Session of the Authority of ECOWAS Heads of State and Government, Final Communiqué, 19 May 2015, para. 26.

³² First Conference of African Ministers Responsible for Civil Registration, Declaration of African Ministers Responsible for Civil Registration: Improving Civil Registration and Vital Statistics in Africa, 14 August 2010. See generally resources at <http://www.uneca.org/crvs>.

³³ The Third Conference of African Ministers Responsible for Civil Registration,

7. New standards on nationality and statelessness in the African human rights system

The African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child have each taken up the question of statelessness and the right to a nationality by developing new norms to fill the gaps in existing documents. Their initiatives have both drawn from and influenced the discussion of statelessness within the broader AU agenda on continental integration and freedom of movement, border management and migration, and the strengthening of civil registration systems for development.

7.1 The General Comment on Article 6 of the ACRWC

The ACERWC, like the ACmHPR, holds biannual sessions at which it considers State reports, individual complaints, and general questions related to child rights in Africa. These sessions are attended by representatives of States, as well as child rights organisations from around the continent, international agencies and NGOs. The ACERWC decided to hold a Day of General Discussion on birth registration and the rights of the child during its 20th ordinary session in November 2012. As a result of these discussions, the ACERWC decided to develop a General Comment on Article 6 of the ACRWC. Committee member Julia Sloth Nielsen, a South African law professor and child rights expert, was appointed the focal point for the development of the General Comment, supervised the development of preliminary drafts which were presented at the 2013 sessions of the ACERWC, and convened a meeting with partner organisations in Nairobi in January 2014 to discuss ways to strengthen the draft text.³⁴

The January 2014 meeting brought together technical experts in the field of birth registration and right to nationality, and made extensive revisions to the draft. In particular, the meeting agreed to strengthen

Yamoussoukro Declaration, 13 February 2015.

³⁴ The consultative meeting brought together participants from the Legal Counsel of the African Union Commission, the African Court of Human and Peoples' Rights, the African Commission of Human and People's Rights, partner organizations (UNHCR, ChildFund, Africa Child Policy Forum, Institute for Human Rights and Development in Africa, Open Society Foundations), and consultants who have worked at the regional and national level with various aspects of birth registration, civil registry systems, refugee, and nationality issues.

the discussion of statelessness and the right to a nationality in the General Comment — Articles 6(3) and (4) of the ACERWC — which had initially been a less significant focus than birth registration, the area of expertise of most of those who had initially engaged with the text. After revisions, the ACERWC adopted the General Comment on Article 6 in April 2014 at its 23rd Ordinary Session,³⁵ and it was formally launched at the 3rd ministerial conference on CRVS in February 2015. The Yamoussoukro Declaration included amongst its commitments that States would, “[p]ursue actively the ideal of ‘leaving no country behind’ and ‘leaving no one out’ especially the vulnerable including the refugees, Internally Displaced Person (IDP) and stateless people as well as implement the General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child”.³⁶

The General Comment itself sets out three main reasons that convinced the ACERWC to develop guidance on the detailed interpretation of the obligations of States under this article: the fact that the Concluding Observations and Recommendations following examination of State reports — including to the governments of Kenya, Tanzania, Burkina Faso, Cameroon, Libya, Mali and Uganda — have consistently highlighted lack of implementation of Article 6;³⁷ the scale of the problem of unregistered births in Africa and the impacts of lack of registration; and the strong link between lack of birth registration and statelessness. The ACERWC noted that AU ministers responsible for civil registration had recognised the strengthening of CRVS systems across the continent as a development imperative.³⁸

After considering the “key principles underlying implementation of article 6”, including the best interests of the child, non-discrimination, development and survival, and a child’s right to participate as far as possible in decisions concerning his or her welfare, the General Comment highlights the “interdependence and indivisibility of the

³⁵ ACERWC, General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, 16 April 2014, ACERWC/GC/02 (2014); see, ACERWC, Report of the twenty-third ordinary session of the ACERWC, ACERWC/RPT(XXIII).

³⁶ Yamoussoukro Declaration, *supra* n33, para. 24(B)(d).

³⁷ All Concluding Observations available at, ACERWC, State Reports, <http://acerwc.org/state-reports>.

³⁸ See, documentation for the Third Conference of African Ministers responsible for Civil Registration, February 2015, <http://www.uneca.org/crmc3>.

rights within Article 6". In particular, it notes the strong link between the lack of effective birth registration systems and the prevalence of statelessness. Even though birth registration is not usually proof of nationality, the General Comment notes that registration records the identity and (usually) the nationality of the parents and the place of birth of the child, which are the two most important grounds for acquisition of nationality at birth. The General Comment recalls the statement in the Kenyan Nubian Children case that there is "a strong and direct link between birth registration and nationality", reinforced by the inclusion of both rights in the same Article under the ACRWC (as in the Convention on the Rights of the Child).³⁹

After this introduction, the General Comment then devotes four paragraphs to the right to a name (Article 6(1)), 39 paragraphs to birth registration (Article 6(2)), and 18 paragraphs to the right to acquire a nationality and the obligation to grant nationality to children born on a State's territory who can claim no other nationality (Articles 6(3) and (4)).

Considering the role of birth registration in establishing the child's nationality, the General Comment observes that:

Registration of birth is a fundamental right of a child. Birth registration is the act of recording the birth of a child by an administrative authority. It establishes the existence in law of a child, and sets the foundation for the recognition of the child as a legal person. A child who is not registered does not legally exist and runs a substantial risk of falling outside of the reach of government's protective actions towards the realization of child rights.⁴⁰

The General Comment commences the discussion on Article 6(3), the right of every child to acquire a nationality, by elaborating the benefits of nationality, including for civic and political participation, economic empowerment, and mobilisation of the protection of the State of nationality when the enjoyment of human rights is threatened.⁴¹ Although noting that these benefits assume greater importance when

³⁹ ACERWC, General Comment on Article 6, *supra* n35, para. 23.

⁴⁰ *Ibid.*, para. 43.

⁴¹ *Ibid.*, para. 84.

the child reaches adulthood, the ACERWC nevertheless regards the right to a nationality as critical for children as well, a point emphasised in its finding in the Kenyan Nubian Children case.

The General Comment then quotes the ACERWC's decision in the Kenyan Nubian Children case to note that:

Article 6(3) does not explicitly read, unlike the right to a name in Article 6(1) that 'every child has the right from his birth to acquire a nationality'. It only says that 'every child has the right to acquire a nationality'. Nonetheless, a purposive reading and interpretation of the relevant provision strongly suggests that, as much as possible, children should have a nationality beginning from birth. This interpretation is also in tandem with Article 4 of the Charter that requires 'in all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration'.⁴²

The General Comment draws on this decision to recommend that States should adopt provisions giving children born in their territory the right to acquire nationality after a period of residence, so that the child is not required to wait until majority before nationality can be confirmed. In this, the recommendations go beyond the obligations in the 1961 Convention on the Reduction of Statelessness. The General Comment also endorses as "good practice" the automatic conferral of nationality on children born of parents who are habitually and lawfully resident and the possibility of acquisition of nationality by people who were not born in the territory but who arrived there as children and reside there for a substantial part of their childhood.⁴³

The General Comment follows the Convention on the Elimination of All Forms of Discrimination against Women rather than the Protocol to the African Charter on the Rights of Women in Africa, in stating that gender discrimination in transmission of nationality from parent to child is contrary to the non-discrimination provision of Article 3 of the ACRWC. The General Comment emphasises State responsibility for ensuring that children of unknown parents found in the territory may acquire the nationality of that State and endorses as best practice

⁴² *Ibid.*, para. 90, quoting the Kenyan Nubian Children Case.

⁴³ *Ibid.*, para. 92.

the reforms in some countries specifying that this right applies to older children as well as to abandoned infants. Finally, the General Comment sets out State obligations in relation to adopted children and the nationality of children where a parent acquires a new nationality (for example, through marriage or naturalisation) or loses his or her nationality or is deprived of it. The General Comment highlights the basic principle that it is in the best interests of the child to possess the nationality of the person(s) who is (are) primarily responsible for his or her care.⁴⁴

As regards the nature of the obligation engendered by Article 6(4) of the ACRWC, the General Comment notes that this goes beyond the generalised obligation to reduce statelessness amongst children implied by Article 6(3) (and included in the UN Convention on the Rights of the Child) to place a specific obligation on the State where the child is born if that child has not been granted another nationality at birth. This entails that the State of birth must determine (if the child is not already presumed to be its national) whether the child has or will acquire the nationality of another State at the time of birth or very soon thereafter. Drawing on United Nations High Commissioner for Refugees (UNHCR) guidance, the ACERWC notes that this requires an analysis both of that other State's nationality laws (usually the State of presumed nationality of one or both parents) and the manner in which they are usually implemented. It may involve consultations with the authorities of the child's parents presumed or documented country of nationality in order to ascertain whether the child is considered a national of that State or States. Unanswered enquiries must lead to the assumption that the child is not a national of that State, which should then lead to the conferral of the nationality of the State of birth.⁴⁵

Finally, the General Comment highlights that when applying Article 6(4), the situation must be considered from the perspective of the rights of the child. It is insufficient to explore only whether or not the parents are stateless, since it may be that the nationality of the parents cannot be transmitted to the child (for example, due to discrimination against women in regard to the conferral of nationality or limitations

⁴⁴ *Ibid.*, para. 96-98.

⁴⁵ *Ibid.*, para. 100-101. 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, 2012, HCR/GS/12/01.

on conferral of nationality on children born outside the territory of the State of nationality]). Flowing from this, the ACERWC calls on States to cooperate to resolve cases where an individual may have more than one nationality to ensure that the child's nationality in at least one State is recognised.⁴⁶

In the concluding section of the General Comment, the ACERWC elaborates a range of recommendations for implementation of the rights discussed, including legal and administrative reforms, strengthening of access to justice, awareness-raising, and capacity building across both the government and non-governmental sectors.

7.2 The Draft Protocol on the Right to a Nationality

The African Commission on Human and Peoples' Rights was debating the right to a nationality during the same period that the ACERWC was preparing its General Comment. Members of a civil society network had been advocating for the ACmHPR to strengthen its work on nationality and statelessness from at least 2009, holding a series of side-events at ACmHPR sessions and an expert briefing for the Commission members in private session in 2011. In 2013, the ACmHPR adopted a resolution that affirmed that the right to a nationality is implicit in Article 5 of the ACHPR on the right to dignity and legal status, called on States to prevent and reduce statelessness, and decided to conduct a study on the right to a nationality in Africa. This task was assigned to the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa, Professor Maya Sahli-Fadel of Algeria.⁴⁷

An interim draft of the study was presented to the ACmHPR at its November 2013 session and debated by an expert meeting in Midrand, South Africa, in April 2014, with a final version approved by the ACmHPR at its April 2014 session.⁴⁸ The ACmHPR, in consultation with the AU Department of Political Affairs, decided to move towards the drafting of a protocol on the right to a nationality. The study was formally launched on the margins of the AU summit held in Addis Ababa in January 2015, at which the idea of a protocol on the right

⁴⁶ ACERWC, General Comment on Article 6, *supra* n35, para. 112.

⁴⁷ ACmHPR, Resolution 234 on the Right to Nationality, 23 April 2013.

⁴⁸ ACmHPR, The Right to Nationality in Africa, *supra* n12, approved by ACmHPR, Resolution 277 on the drafting of a Protocol to the African Charter on Human and Peoples' Rights on the Right to Nationality in Africa, 12 May 2014.

to nationality was endorsed by the speakers, who included President Alassane Ouattara of Côte d'Ivoire, UN High Commissioner for Refugees António Guterres, and Chairperson of the African Union Commission Nkosazana Dlamini Zuma, as well as ACmHPR members.⁴⁹ ECOWAS Member States called for the preparation and adoption of a protocol in the February 2015 Abidjan Declaration on the Eradication of Statelessness.⁵⁰

In August 2015, following several expert meetings, the ACmHPR adopted a proposed text of a Draft Protocol to the African Charter on the Specific Aspects of the Eradication of Statelessness and the Right to a Nationality in Africa, together with a detailed explanatory memorandum setting out the sources and inspiration for the text in international and African law, including guidance from the General Comment of the ACERWC, the Guidelines on Statelessness published by UNHCR, and the work of the International Law Commission. In particular, the draft text endorsed the ACERWC's recommendations on an expansion of the rights of children to nationality beyond the basic protections for foundlings and "otherwise stateless" children in the 1961 Convention, to provide broader (though not absolute) rights based on birth in the territory of a State. The draft also included specific and innovative provisions on nomadic and cross-border populations, amongst those most severely affected by statelessness in Africa. In October 2015, the text of the draft protocol was considered and approved, with proposed amendments, by the AU Commission on International Law meeting in Cairo, Egypt.

⁴⁹ Présidence de la Cote d'Ivoire, Cérémonie de lancement de l'Etude sur le droit à la nationalité en Afrique, Discours du Président de la République, 29 January 2015; Remarks by António Guterres, United Nations High Commissioner for Refugees: Launch of the African Commission's Study on the Right to Nationality in Africa, 29 January 2015; Intersession Report by Mrs Maya Sahli-Fadel, Commissioner and Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, 56th Ordinary Session of the African Commission on Human and Peoples' Rights Banjul, 21 April to 7 May 2015.

⁵⁰ Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness, 25 February 2015, para.5; see webpage for the meeting at UNHCR, ECOWAS 2015, <http://unhcr.org/ecowas2015>. ECOWAS Heads of State endorsed the Abidjan Declaration at their May summit. Forty-Seventh Ordinary Session of the Authority of ECOWAS Heads of State and Government, Final Communiqué, *supra* n26, para. 26.

In July 2016, the AU Executive Council of Ministers approved the idea of a protocol formally put forward in the ACmHPR report to the AU summit.⁵¹ The AU Office of the Legal Counsel was then expected to lead a formal process of discussion, revision, and approval of the proposed text, with the participation of State representatives at both expert and then ministerial level, before eventual adoption by the AU Assembly of Heads of State and Government.

8. Conclusion

The adoption of the General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child and the proposal for a Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Eradication of Statelessness and the Right to a Nationality in Africa create the possibility for the African continent to become a leader in setting norms on the right to a nationality for all, and perhaps also in ending statelessness. The General Comment builds on the recommendations of UNHCR in relation to the nationality of children and endorses measures by States that would rapidly reduce the number of stateless people in Africa; the Draft Protocol takes these proposals and puts them into treaty form.

Given existing trends towards gender equality in nationality law it is likely that a woman's right to transmit nationality to her spouse and children will become near-universal in Africa well before the target date of UNHCR's #IBelong Campaign in 2024. Increased acceptance of dual nationality, though commonly thought to affect mainly the African diaspora in other continents, should also help to resolve many cases of statelessness where it has been asserted by governments — as for instance in Zimbabwe — that those with a potential right to another nationality are not nationals of the State of birth and residence. But progress on providing at least minimal rights based on birth in the territory in those countries with purely descent-based regimes will be more difficult. Political arithmetic continues to trump human rights principles in some States: in Kenya, for example, despite the ACERWC's findings in the Kenyan Nubian Children case, the presence of several hundred thousand Somali refugees over several decades

⁵¹ AU Executive Council of Ministers, Decision on the Activity Report of the African Commission on Human and Peoples' Rights, AU Doc. EX.CL/968(XXIX), 15 July 2016.

has meant that ending statelessness remains a highly sensitive topic and decisive government action difficult even in support of other less controversial communities and individuals. In October 2016, however, hope was kindled by President Uhuru Kenyatta's announcement that descendants of Makonde migrant workers brought to Kenya from Mozambique in the 1950s would be registered as Kenyan citizens.⁵²

Strengthening civil registration systems is a less overtly political process than reform of nationality law and can well make an important contribution to ending statelessness even in those African States where the right to a nationality is a controversial proposition. The increased push to strengthen identification systems, exemplified in the target of the Sustainable Development Goals to "provide legal identity for all, including birth registration"⁵³ by 2030, also provides opportunities. Nonetheless, these initiatives cannot avoid the need for the underlying laws to be reformed to provide protections against statelessness.

There is therefore a long way to go before the new norms on statelessness and the right to a nationality have an impact; not least because the proposal to adopt a protocol to the ACHPR is likely to face significant resistance from some States. There is, however, widespread recognition that the current situation where millions of people are of undetermined nationality — and thus at risk of statelessness — cannot continue. The African continent may yet be able to claim to have the most progressive standards on nationality, and also to have made most progress in legal reform at national level within the decade of the UNHCR #IBelong Campaign to End Statelessness. But it will take sustained advocacy and attention from UNHCR, civil society and affected groups for this to be the outcome; and it will require still more effort for the changes in international norms and national laws to have real impact on state practice in issuing documents and recognising rights.

⁵² W.L. Munaita, Kenya's stateless Makonde people finally obtain papers, UNHCR, 27 October 2016, <http://www.unhcr.org/news/latest/2016/10/5810c5414/kenyas-stateless-makonde-people-finally-obtain-papers.html>.

⁵³ For further discussion of the Sustainable Development Goals see R. Govil "The Sustainable Development Goals and solutions to statelessness", chapter 2 in this book.

10. Towards the eradication of statelessness in the Americas: The Brazil Declaration and Plan of Action

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1. Introduction

In early November 2014, the United Nations High Commissioner for Refugees (UNHCR)'s Global Action Plan to End Statelessness (GAP) proposed ending statelessness throughout the world within ten years.² In mid-November, during the launch of the #IBelong Campaign in Washington, D.C., the then High Commissioner, António Guterres, said he hoped that the Americas would be the first continent to end statelessness.³ Two weeks later, the countries of Latin America and the Caribbean adopted the Brazil Declaration 'A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean' (Brazil Declaration) and Plan of Action 'A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity' (Brazil Plan of Action).⁴ They reaffirmed their commitment

¹ Regional Protection Officer (Statelessness), Regional Legal Unit for the Americas, United Nations High Commissioner for Refugees (UNHCR). This chapter reflects the views of the author and not necessarily those of UNHCR or of the United Nations.

² UNHCR, Global Action Plan to End Statelessness: 2014-2024 (GAP), 2014. The Office of the United Nations High Commissioner for Refugees developed the GAP within the framework of the #IBelong Campaign that promotes the global eradication of statelessness.

³ Antonio Guterres, Statement to Out of the Shadows: Ending Statelessness in the Americas Event, UNHCR 18 November 2014, <https://goo.gl/PhC9O9>.

⁴ Brazil Plan of Action: A Common Roadmap to Strengthen Protection and Promote Sustainable Solutions for Refugees, Displaced and Stateless Persons in Latin America and the Caribbean within a Framework of Cooperation and Solidarity (Brazil Plan of Action), adopted in Brasilia on 3 December 2014, together with the Brazil Declaration: A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean (Brazil Declaration).

to the eradication of statelessness, endorsed the GAP and proposed to implement a series of actions to achieve this goal in the Americas.

In this article I will address three points. Firstly, I will explain from a regional perspective what “eradicate statelessness” means, offering three complementary approaches. Secondly, I will outline how a programme for the eradication of statelessness emerged from the Brazil Plan of Action. Finally, I will refer to the content of this programme and how States are working towards achieving this goal through implementing the following actions: (a) accession to the UN Statelessness Conventions;⁵ (b) promoting the harmonisation of regulations and internal practice pertaining to nationality with relevant international standards; (c) facilitating universal birth registration and the issuing of documentation; (d) establishing statelessness determination procedures; (e) adopting legal frameworks for the protection of stateless persons; (f) providing facilities for naturalisation; (g) confirming citizenship of people with undetermined nationality; and (h) facilitating the restitution and reacquisition of nationality.⁶

2. What does “eradicate statelessness” mean?

The goal of the GAP and of chapter six of the Brazil Plan of Action is to eradicate statelessness. But, what does “eradicate” really mean? In order to answer this question we must integrate three different perspectives. First, we must take a *human rights approach* in order to understand the content and scope of the right to an identity and a nationality, as well as the problem of discrimination as an underlying cause of statelessness. Secondly, we must adopt a *programmatic approach*. Ending statelessness requires setting goals, implementing actions and, above all, achieving concrete results. Finally, States must assume an idealistic approach. While many States have recognised that statelessness contradicts the fundamental values of the rule of law, ending statelessness requires concerted actions at the international level. Eradicating statelessness is a global problem that requires a global response and international cooperation.

⁵ Convention relating to the Status of Stateless Persons, 28 September 1954, entry into force 6 June 1960, 360 UNTS 117 (1954 Statelessness Convention) and Convention on the Reduction of Statelessness, 30 August 1961, entry into force 13 December 1975, 989 UNTS 175 (1961 Statelessness Convention).

⁶ Brazil Plan of Action, *supra* n4, sixth chapter (“Eradication of Statelessness” programme), pp. 17-18.

2.1 *The human rights approach*

Statelessness is defined as the absence of the legal bond by which a person is linked to a particular State (nationality).⁷ It constitutes an *anomaly* in the international system, since people usually hold a nationality. It is also a *flaw* because while international law establishes that without a population of nationals a State cannot be considered a subject of international law,⁸ it tolerates the possibility that a person or population is not considered as a national of any State.

In order to mitigate the humanitarian impact of statelessness, States adopted the 1954 Convention relating to the Status of Stateless Persons (1954 Convention). They also sought to prevent statelessness through the 1961 Convention on the Reduction of Statelessness (1961 Convention). However, neither of these conventions explicitly included the right to a nationality. It was with the emergence of international human rights law that the system developed a perspective that considers statelessness as a violation of the individual's right to a nationality.

As we shall see, from a human rights approach, the eradication of statelessness involves: (1) preventing discrimination which is an underlying cause of the problem; (2) ensuring that a person belongs to a State, by means of the acquisition and retention of nationality; and (3) respecting the right to an identity.

2.1.1 *Equality and non-discrimination: The cornerstone of eradication*

Frequently discrimination is the underlying cause of statelessness. Discrimination may stem from the letter of the nationality law or can be hidden within State practice. Thus, eradicating statelessness requires working on this root problem. Otherwise, eradicating statelessness, through the acquisition of the formal legal bond of nationality, might not ensure effective access to the rights enjoyed by citizens.⁹

⁷ Art. 1(1) of the 1954 Statelessness Convention defines the term "stateless person" as "a person who is not considered as a national by any State under the operation of its law".

⁸ Montevideo Convention on the Rights and Duties of States, 26 December 1933, entry into force 26 December 1934, Arts. 1 and 9.

⁹ These issues are discussed in more detail in A. de Chickera and J. Whiteman, "Addressing statelessness through the rights to equality and non-discrimination", chapter 4 in this book.

It is often said that by its fruits you will know the tree. Let us imagine that our house has a garden with a poisonous tree growing in it. Would we allow our children or our neighbour's children to eat its fruit? Would we ask a gardener to do something about the tree? What if the gardener suggests gathering up the fallen fruit regularly? Would we think the problem is solved if the gardener prunes the tree frequently? I dare say we would not. We would probably ask the gardener to uproot the tree. The common meaning of "eradicate" is none other than that: uprooting and discarding the tree.¹⁰ The same applies to statelessness; if we are serious about its eradication we must address the root causes, which usually include discrimination, when we think about how to prevent and resolve the problem.

The Inter-American Court of Human Rights (IACtHR) has made the following statements in relation to the principle of non-discrimination: (i) all States, as members of the international community, are obliged to respect and guarantee human rights with no discrimination whatsoever; (ii) there is an intrinsic link between the principle of equality and non-discrimination and that of equal protection under the law; (iii) this principle is a peremptory norm of international law (*jus cogens*) that pervades State action, in all its manifestations. This means that a State cannot act against a specific group of people directly, nor can it discriminate indirectly or protect discriminatory acts by any of its agents or allow third parties to discriminate due to its tolerance, acquiescence or negligence.¹¹

The IACtHR has made it clear that the principle of non-discrimination applies to all the rights in the American Convention on Human Rights (ACHR),¹² including the right to a nationality. In this respect, in legislating on the acquisition of nationality, the Court has indicated that States must refrain from producing discriminatory regulations or regulations having a discriminatory effect on the groups of people that

¹⁰ Real Academia Española, Spanish Dictionary, "Erradicar: 1. tr. Arrancar de raíz". Similarly, in English "eradicate" means "to completely get rid of something such as a disease or a social problem", Longman, Dictionary of Contemporary English.

¹¹ Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-18/03, *Judicial Condition and Rights of the Undocumented Migrants*, Series A. 18, 17 September 2003, paras. 97-101.

¹² American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36.

make up its population. Furthermore, they must combat discriminatory practices at all levels. Similarly, legislation or practice concerning nationality should not favour increasing the number of stateless persons.¹³

2.1.2 *Nationality as a human right: The right not to be stateless*

The goal of eradicating statelessness is based on the premise that States have recognised that every person is entitled to a nationality.¹⁴ In this context, ending statelessness amounts to realising this individual right. International instruments tend not to specifically indicate the nationality to which an individual has a right. Moreover, some treaties enshrine the right to a nationality only as child's right, or limit it to the mere *acquisition* (but are silent with regard to its retention).¹⁵

Although the scope of the right to a nationality is debateable,¹⁶ at the very least it is recognised that the right to a nationality entails an

¹³ IACtHR, *Yean and Bosico Children v. the Dominican Republic*, Series C No. 130, Judgment of 8 September 2005, paras. 140-2.

¹⁴ Universal Declaration of Human Rights, 10 December 1948, Art. 15; Declaration of the Rights of the Child, 20 November 1959, UN General Assembly Resolution 1386 (XIV), Principle 3; International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, entry into force 4 January 1969, 660 UNTS 195, Art. 5(d)(iii); International Covenant on Civil and Political Rights, 16 December 1966, entry into force 23 March 1976, 999 UNTS 171, Art. 24(3); Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, entry into force 3 September 1981, 1249 UNTS 13, Art. 9; Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3, Arts. 7 and 8; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, entry into force 1 July 2003, 2220 UNTS 3, Art. 29; Convention on the Rights of Persons with Disabilities, 13 December 2006, entry into force 3 May 2008, 2515 UNTS 3, Art. 18; International Convention for the Protection of All Persons from Enforced Disappearance 20 December 2006, entry into force 23 December 2010, 2716 UNTS 3, Art. 25(4). At the level of the Americas, American Declaration of the Rights and Duties of Man, 2 May 1948, Art. XIX; American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, OAS Treaty Series No. 36, Art. 20.

¹⁵ G.R. de Groot, "Children, their right to a nationality and child statelessness", in A. Edwards and L. van Waas (eds), *Nationality and Statelessness under International Law*, Cambridge University Press 2014, pp. 145-148.

¹⁶ A. Edwards, "The meaning of nationality in international law in the era of human rights: procedural and substantive aspects", in A. Edwards and L. van Waas (eds), *Nationality and Statelessness under International Law*, Cambridge University Press 2014, pp. 14-16.

obligation on the State to prevent statelessness.¹⁷ That is, one could speak of the human right not to be stateless, if we define this right as the flipside of the State's obligation to take effective measures to safeguard the right to a nationality.

With respect to child statelessness, the UN Secretary-General recently recalled the guidance of the Human Rights Committee¹⁸ that, although States are not obliged to grant their nationality to all children born in their territory, they do have to take all appropriate steps, both domestically and in cooperation with other States, to ensure that every child acquires a nationality at birth. One such measure is granting nationality to children born in its territory who would otherwise be stateless.¹⁹ It should be noted that this obligation to ensure that the child acquires a nationality at birth concerns all the countries with which the child has a relevant link, for example due to place of birth, kinship or residence.²⁰

In the Americas, Article 20 of the ACHR establishes a "right to nationality" that encompasses: (i) the right to a nationality (Art. 20(1)); (ii) the right to automatically acquire the nationality of the State in whose territory the person was born if they do not have the right to any other nationality (Art. 20(2)); (iii) protection against the arbitrarily deprivation of nationality (Art. 20(3)); and (iv) the right to change one's nationality (Art. 20(3)).

The text of the ACHR says nothing about statelessness, yet the IACtHR has held that the discretion of States to regulate nationality, and hence determine who their nationals are, is restricted by their duty to prevent and reduce statelessness. In particular, States have the obligation to

¹⁷ In relation to Art. 7(2) of the Convention on the Rights of the Child see, J.E. Doek, "The CRC and the Right to Acquire and to Preserve a Nationality", *Refugee Survey Quarterly* 2006, Vol. 25(3), pp. 26-32, p. 28.

¹⁸ UN Human Rights Committee, General Comment No. 17, Rights of the Child (Article 24), 7 April 1989, para. 8.

¹⁹ UN Human Rights Council, Report of the Secretary-General: Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless, 16 December 2015, A/HRC/31/29, para. 10.

²⁰ 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, 2012, HCR/GS/12/04, para. 11.

not adopt practices or legislation on the acquisition of nationality that favour statelessness.²¹

Given that Article 20(2) of the ACHR prescribes the automatic acquisition of the nationality of the country in which a child is born, if the child would otherwise be stateless,²² and that Article 20(3) prohibits denial and arbitrary deprivation of nationality,²³ the material scope of application of Article 20(1) must be construed as something more than a mere undetermined right to citizenship with no concrete content.

The language of Article 20(1) (right to *a* nationality) indicates that, under the ACHR, there is not a right to double or multiple nationalities, but to acquire one nationality. In other words, the Convention provides for a right not to be stateless. Given that Article 20(1) must be construed in a manner not to overlap with the safeguard against statelessness in Article 20(2), it can be argued that this provision covers all other possible approaches to preventing statelessness at birth under the 1961 Convention.²⁴ In other words, it can be said that Article 20(1) should be understood in light of the standards of the 1961 Convention, insofar as that Convention reflects an international consensus on how to prevent statelessness.²⁵ As a result, the right of *all persons* to

²¹ IACtHR, *Yean and Bosico Children v. the Dominican Republic*, *supra* n13, paras. 140 and 142. It is important to note that the Court referred to the general duty of States to prevent statelessness in a case involving a State that is a signatory but not a State Party to the 1961 Convention. Thus, it is clear that the general duty to prevent statelessness arose from Arts. 1(1), 2 and 20 of the ACHR, and applies *a fortiori* to those countries that are parties to the 1961 Convention.

²² UNHCR, Guidelines on Statelessness No. 4, *supra* n20, para. 12; de Groot, *supra* n15, p. 147.

²³ Generally speaking, the deprivation of nationality leading to statelessness is arbitrary, unless the decision responds to a legitimate aim and is proportionate. UN Human Rights Council, Report of the Secretary-General: Arbitrary Deprivation of Nationality, 26 January 2009, A/HRC/10/34, para. 51; UN Human Rights Council, Human Rights and the Arbitrary Deprivation of Nationality: Report of the Secretary-General, 14 December 2009, A/HRC/13/34, para. 27.

²⁴ For example, cases of children born in the territory of a State not party to the 1961 Convention, whose father or mother is a national of a State Party. It also covers the situation of foundlings and those born aboard a ship or aircraft.

²⁵ While the IACtHR has never expressly affirmed that Art. 20 must be construed in line with the 1961 Convention, the Court did say that States have the obligation to not adopt nationality laws and policies that favour statelessness.

nationality, provided for in Article 20 of the ACHR must be interpreted as including the right to not be born or become stateless.

This interpretation is reinforced by the case law of the IACtHR that indicates that, where applicable, the ACHR must be read in light of the Convention on the Rights of the Child (CRC).²⁶ This means, in turn, that the guidance of the Committee of the Rights of the Child is of the utmost relevance to determine the scope and content of State obligations.²⁷ Concerning the right to acquire a nationality the Committee has recommended that States take all necessary measures to: (1) ensure the child's right to a nationality, including with regard to children born to their nationals abroad;²⁸ and (2) avoid children found abandoned in the country becoming stateless.²⁹ Hence, like Articles 7(1) and 7(2) of the CRC, Article 20(1) of the ACHR should be construed as encompassing appropriate measures to prevent child statelessness.

2.1.3 Identity as a human right: I belong

A key message of the #IBelong Campaign is that everyone has the right to say "I belong".³⁰ Human rights treaties seek to ensure that everyone has the broadest possible freedom to define their identity with respect to gender, thought, religion, etc. They also aim to create the conditions

To this end, the Court cited the 1961 Convention as an example of a treaty that prevents statelessness. Moreover, the Court has always resorted to other relevant treaties on human rights that may complement or develop the rights protected in the ACHR to define the scope of States' international obligations. For instance, the Court has held that the 1951 Convention relating to the Status of Refugees and its 1967 Protocol are relevant to defining the scope and content of the right to seek and be granted asylum. IACtHR, *Pacheco Tineo Family v. Plurinational State of Bolivia (Preliminary Objections, Merits, Reparations and Costs)*, Series C No. 272, Judgment of 25 November 2013.

²⁶ IACtHR, *Case of Expelled Dominican and Haitian persons v. the Dominican Republic (Preliminary Objections, Merits, Reparations and Costs)*, Series C No. 282, Judgment of 28 August 2014 (*Dominican Peoples case*), para. 260.

²⁷ Institute on Statelessness and Inclusion, *Realising the right of every child to a nationality through the Convention on the Rights of the Child - An analysis of the work of the Committee of the Rights of the Child*, 2015.

²⁸ Committee on the Rights of the Child (CRC), *Concluding observations: Cuba*, 3 August 2011, CRC/C/CUB/CO/2, paras. 30-31.

²⁹ CRC, *Concluding observations on the combined second to fourth periodic reports of Fiji*, 13 October 2014, CRC/C/FJI/CO/2-4, paras. 26-27.

³⁰ UNHCR, Video "IBELONG - End Statelessness Now", 6 November 2014, <https://goo.gl/FfKXcG>.

for full social, cultural and economic integration into society. Finally, human rights treaties seek to ensure that, from birth, every person legally belongs to a specific country and enjoys a nationality throughout their life.

In the Americas, the ACHR does not explicitly enshrine the right to identity. However, generally speaking, the IACtHR has defined identity as the set of attributes and characteristics that allow a person to be individualised in society. In the Court's view, the right to an identity includes, *inter alia*, the person's name, nationality and family relations, which are rights protected by the ACHR.³¹ Given that, on the one hand, the ACHR does not explicitly enshrine the right to identity and, on the other hand, it protects the right to a nationality, the question arises as to what practical purpose the right to identity has when it comes to eradicating statelessness.

First of all, it should be noted that the IACtHR has reserved the possibility of specifying the content of the right to identity in the future. As Judge Vio Grossi has warned, from the Court's point of view the right to identity would be more than the sum of the right to a name, a nationality and family protection, and would include not only the relevant rights provided for in the text of the ACHR but also others that are not included in that text.³² It appears that the Court has not wished to provide a limited definition of the meaning of identity, but prefers to analyse its meaning on a case-by-case basis, in light of the impact that, for instance, the violation of the right to a nationality may have on the person concerned.

Secondly, it seems that the right to identity is the prism through which the IACtHR analyses the violation of the right to a nationality where this does not result in statelessness. In the *Gelman* case, for example, the Court concluded that Uruguay had arbitrarily deprived of her Argentinian nationality the daughter of a victim of forced disappearance

³¹ IACtHR, *Gelman v. Uruguay (Merits and Reparations)*, Series C No. 221, Judgment of 24 February 2011, para. 122; IACtHR, *Contreras et al v. El Salvador (Merits, Reparations and Costs)*, Series C No. 232, Judgment of 31 August 2011, para. 128; and IACtHR, *Fornerón and daughter v. Argentina (Merits, Reparations and Costs)*, Series C No. 242, Judgment of 27 April 2012, para. 123. The Court has warned that, depending on the case, these rights must be interpreted in light of the Convention on the Rights of the Child.

³² IACtHR, *Gelman v. Uruguay*, *supra* n31, concurring opinion of Judge Vio Grossi.

who was illegally transferred to Uruguay - the country where the child was eventually born. The Court stated that Uruguay had obstructed the birth of the child in Argentina, which was the country of the nationality of her biological parents and where she would normally have been born. Thus, she acquired Uruguayan nationality (*jus soli*) due to an arbitrary situation (suppression of the girl's Argentinian identity). The Court made it clear that, in this context, the violation of rights only ceases when the victim's true identity is revealed and legal and factual possibilities of recovering it are guaranteed.³³

Finally, it appears that when the IACtHR analyses a case in light of the right to identity it develops a comprehensive view of the problem and the solutions (remedies). In the *Dominican Peoples* case, for example, the clear Dominican identity of the victims led the Court to conclude that the problem of the denial and arbitrary deprivation of nationality was not resolved by forcing the victims to be recognised as foreigners so that they could then apply for naturalisation as Dominicans.³⁴ In the Court's view, this solution was incompatible with the right to be recognised as Dominicans by birth. In other words, in the context of the restoration of nationality, naturalisation is not a solution that respects the identity of the victims as Dominicans.³⁵

Therefore, understanding the meaning of "eradication" from the perspective of the individual's identity is key. Whilst the acquisition of a citizenship of one of the countries with which the person has ties may end the problem of statelessness, in instances where the nationality which is acquired does not reflect and respect the individual's identity, issues related to nationality may remain. As a result, ending statelessness is not only a question of ensuring a nationality, but of finding the proper nationality solution. That is to say, the citizenship that best respects the individual's identity in a given case.

In short, since the ACHR protects the right to a name, a family and a nationality, it safeguards some of the elements that make up the right to identity, and protects the individual's right to belong to a particular community, society and country.

³³ *Ibid.*, paras. 131 and 312.3.

³⁴ IACtHR, *Dominican Peoples case*, *supra* n26, para. 325.

³⁵ *Ibid.*, para. 324.

2.2 The programmatic approach of the Global Action Plan

In addition to a human rights approach, the eradication of statelessness requires targeted actions and tangible results (programmatic approach). This is precisely one of the strengths of the GAP, which provides States with a guidance framework for: (1) resolving the main existing situations of statelessness; (2) preventing the emergence of new cases of statelessness; and (3) identifying and protecting stateless persons.

For each of the ten proposed actions, the GAP describes the context and the current situation (baseline), proposes milestones for measuring the progressive achievement of certain goals (by 2017, 2020 and 2024), and also suggests specific implementation activities. Similarly, the GAP contains a general strategy (i.e. to develop and implement national action plans), and links each action with applicable international standards (human rights approach).

2.3 The idealistic approach of the Brazil Declaration

No State can end global statelessness by itself. Even if a State achieves all the targets foreseen by the actions of the GAP that are relevant domestically, the eradication of statelessness requires that other countries also achieve the relevant targets, particularly those countries with major situations of statelessness or with serious gaps in their nationality laws and policies. This explains why it is essential to have collective strategies such as the GAP and the Brazil Plan of Action, which clearly contribute to generating a sense of collective responsibility.

To say that the Brazil Declaration follows an idealistic approach when it proposes to end statelessness is not to affirm that it pursues an unrealisable goal, or a remote ideal that should only guide States' actions. On the contrary, upholding an idealistic approach implies that States must address the problem of eradicating statelessness as a matter of principle.³⁶

States in the region have followed this idealistic approach when they welcomed the GAP and expressed their shared commitment

³⁶ UNHCR considers the prevention of statelessness a general principle of international law. See, UN Human Rights Council, A/HRC/10/34, *supra* n23, para. 51.

to ending statelessness as a regional goal.³⁷ In this same line, the idealistic approach stems from the fact that in the Brazil Declaration States have recalled that every person has the right to a nationality, that statelessness is a violation of an individual right, and that States' prerogative to regulate nationality is limited by international law.³⁸ In other words, States' idealism is also reflected in the prominent role that international human rights law plays *vis-à-vis* the eradication of statelessness.

Other countries in the region, such as the United States of America, that were not part of the adoption of the Brazil Declaration, also follow this idealistic approach. In effect, the United States of America supports this approach as it considers that statelessness robs people of their rights and of the protection of the law, and is opposed to the values of the country.³⁹ It also upholds this approach when the Department of State engages in diplomacy to prevent and resolve statelessness, advocates on behalf of stateless people with foreign governments, or supports global initiatives to ensure gender equality in nationality laws around the world.⁴⁰

3. What is the Brazil Declaration and Plan of Action?

3.1. Background: Regional instruments on statelessness

Concern over the problem of statelessness is not new in the Americas. In 1952, the Inter-American Juridical Committee drafted a Convention on Nationality and Statelessness.⁴¹ Although the draft convention mainly dealt with the issue of naturalisation, its Article 19 considered

³⁷ Brazil Declaration, *supra* n4, p. 5.

³⁸ *Ibid.*, p. 3.

³⁹ A.C. Richard, Assistant Secretary, Bureau of Population, Refugees, and Migration, Remarks at the UNHCR Event Out of the Shadows: Ending Statelessness in the Americas, Washington, DC, 18 November 2014 (where she stated the need for ending statelessness as a form of indignity and unnecessary suffering).

⁴⁰ Former Secretary of State Hillary Rodham Clinton launched the Women's Nationality Initiative at the UNHCR Ministerial event in 2011. US Department of State, Statelessness, <http://www.state.gov/j/prm/policyissues/issues/c50242.htm>.

⁴¹ OAS, Inter-American Juridical Committee, Opinion and Draft Convention on Nationality and Statelessness, 8 July 1952. Prepared in compliance with Inter-American Council of Jurists, Resolution VII, No. 2, adopted at its First Meeting in Rio de Janeiro held from 22 May - 15 June 1950.

as “stateless” a person who lacked a nationality due to loss of a previous nationality or because he has never had a link with a State. Article 20 further set out that the domestic legal provisions that were applicable to aliens in general would apply to stateless persons who were in transit, or had their residence or domicile in the country. The draft convention was, however, never adopted.

In the last two decades, the Organization of American States (OAS)’s General Assembly has also addressed the issue on several occasions,⁴² calling on States to: (1) accede to the UN Statelessness Conventions; (2) enact domestic laws to comprehensively regulate all matters relating to the identification and protection of stateless people; (3) prevent statelessness through the inclusion of appropriate safeguards in their nationality laws; (4) resolve existing cases of statelessness; and (5) strengthen existing institutions responsible for civil records, building their capacity, and ensuring data security and confidentiality.

Significantly, in 2014 OAS’s resolution on statelessness invited Member States to:

[U]se the commemorations of the 30th anniversary of the 1984 Cartagena Declaration on Refugees and the 60th anniversary of the 1954 Convention relating to the Status of Stateless Persons to identify the challenges and the actions necessary to eradicate statelessness from the Americas, and to include a chapter on the subject in the future regional strategic framework arising from the commemorative process.⁴³

Finally, after the adoption of the Brazil Plan of Action, the 2016 resolution on ‘Promotion and Protection of Human Rights’: (1) welcomed the GAP and the Brazil Declaration and Plan of Action, as well as the #IBelong Campaign, as the global and sub-regional strategic frameworks for ending statelessness; (2) underscored the importance of and invited Member States to consider ratifying or acceding to the Statelessness Conventions; (3) invited Member States to establish fair and efficient statelessness determination procedures, and to facilitate

⁴² See *infra* n54 and 55.

⁴³ OAS General Assembly, Resolutions AG/RES. 2826 (XLIV-O/14), Prevention and Reduction of Statelessness and Protection of Stateless Persons in the Americas, 4 June 2014, para. 1.

the naturalisation of stateless persons; (4) urged Member States that have not yet done so to eliminate discrimination against women from the legal framework pertaining to nationality; and (5) urged States to include appropriate safeguards to prevent cases of statelessness and to duly resolve existing cases of statelessness, in line with their international obligations relating to human rights and statelessness.⁴⁴

It should be noted, however, that in line with previous OAS's resolutions, the Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas (2010) had already urged countries in the Americas to consider accession to the Statelessness Conventions, review their national legislation to prevent and reduce situations of statelessness, and strengthen national mechanisms for comprehensive birth registration. Interestingly, the Brasilia Declaration underscored the non-political and humanitarian nature of the protection of stateless persons, and recognised their rights and obligations as well as their positive contributions to society.⁴⁵

The Brasilia Declaration served as a regional contribution to the Intergovernmental Ministerial Event on Refugees and Stateless Persons (2011), where several American countries pledged to take action related to statelessness and demonstrated a renewed interest in the problem.⁴⁶

However, the immediate antecedent of the Brazil Plan of Action was the 'Cartagena+30' in 2014, a commemorative process that favoured the adoption of a programme on the eradication of statelessness in line with the OAS General Assembly resolution on statelessness.⁴⁷

⁴⁴ OAS, General Assembly, AG/RES. 2887 (XLVI-O/16), Promotion and Protection of Human Rights, Declarations and Resolutions adopted by the General Assembly (Provisional version subject to review by the Style Committee), OEA/Ser.P, AG/doc.5557/16, 16 June 2016.

⁴⁵ Brasilia Declaration on the Protection of Refugees and Stateless Persons in the Americas, 11 November 2010, paras. 7-8. The Declaration was adopted by 18 countries: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Guatemala, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic, Uruguay, and the Bolivarian Republic of Venezuela.

⁴⁶ Ministerial Intergovernmental Event on Refugees and Stateless Persons, held to commemorate the 60th anniversary of the 1951 Convention relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness, Geneva, 7-8 December 2011.

⁴⁷ OAS General Assembly, Resolution AG/RES. 2826 (XLIV-O/14), *supra*

3.2 Discussion, negotiation and adoption of the Brazil Plan of Action

'Cartagena+30' marked the commemoration of the 30th anniversary of the adoption of the Cartagena Declaration on Refugees (1984). This declaration and the instruments that followed it⁴⁸ were focused primarily on the problems faced by asylum seekers, refugees, internally displaced persons and returnees. The Brazil Plan of Action is, therefore, a major and ground-breaking milestone in that it includes the problem of statelessness for the first time.

During 'Cartagena+30' States, UNHCR, civil society and other international organisations reflected on the progress and challenges of international protection, as well as on pragmatic ways to address them. As part of the process, four sub-regional consultations were conducted in: Argentina, for the MERCOSUR countries; Ecuador, for the Andean countries; Nicaragua, for the countries of Mesoamerica and finally in Grand Cayman, for the countries and territories of the Caribbean. In all the consultations, except for Quito, the problem of statelessness was discussed.

The four sub-regional consultations adopted documents with conclusions and recommendations that were used to prepare the drafts of the Brazil Declaration and Plan of Action. These drafts were then discussed and negotiated by the countries of the Latin American and Caribbean Group (GRULAC) in Geneva and were eventually adopted by acclamation at the ministerial final event held in Brazil.⁴⁹

n43, para. 1 (where Member States were invited to take advantage "of the commemorations of the 30th anniversary of the 1984 Cartagena Declaration on Refugees and the 60th anniversary of the 1954 Convention relating to the Status of Stateless Persons, to identify challenges and actions needed to eradicate statelessness in the Americas, including a chapter on the issue in the future regional strategic framework resulting from the commemorative process").

⁴⁸ San Jose Declaration on Refugees and Displaced Persons, 7 December 1994 and the Mexico Declaration and Plan of Action to Strengthen the Protection of Refugees in Latin America, 16 November 2004.

⁴⁹ UNHCR, "Background Information, Commemoration of the 30th Anniversary of the Cartagena Declaration 'Cartagena +30'", in Commemorative Process of the 30th Anniversary of the Cartagena Declaration on Refugees, 2015, pp. 12-17.

Unlike the GAP, that was developed by UNHCR in consultation with States, international organisations and civil society, the Brazil Plan of Action is an instrument that was discussed, negotiated and adopted by States. Ultimately, the Brazil Plan of Action represents the response of Latin America and the Caribbean to UNHCR's call to eradicate statelessness and, as such, both plans are complementary and should be read together.

4. How will Latin American and Caribbean countries eradicate statelessness?

In order to end statelessness, the Brazil Plan of Action proposes adopting a series of actions, as applicable in each country. These actions could be grouped under three pillars: actions related to the prevention of cases of statelessness; actions pertaining to the protection of stateless persons; and actions oriented towards the resolution of this humanitarian problem.

The Brazil Plan of Action affirms that in 2024, the countries of Latin America and the Caribbean will be able to say that they managed to eradicate statelessness if: (1) their legislation and practices pertaining to nationality do not cause new cases of statelessness in the region (*prevention*); (2) they ensure effective access to human right to stateless migrants arriving in their territories (*protection*); and (3) they reduce existing cases of statelessness by means of solutions such as the naturalisation of stateless migrants and refugees, the automatic restoration of nationality to persons arbitrarily deprived of it, and the reacquisition of nationality for persons who had become stateless as a result of loss or renunciation of nationality (*resolution*).⁵⁰

4.1 Prevention

For many years, countries in the region overlooked the question of how to avoid a child being born without a nationality, or a person losing his citizenship later in life without acquiring a new one. A number of convergent reasons, including the lack of adequate understanding of the problem of statelessness and the relatively low number and lack of visibility of stateless persons in the Americas, may explain why countries did not pay much attention to these issues. The false

⁵⁰ Brazil Plan of Action, *supra* n4, p. 17.

belief that the combination of *jus soli* and *jus sanguinis* criteria for acquisition of nationality is enough to avoid the problem contributed to this view. Precisely, one of the merits of the Brazil Plan of Action is the recognition that in the Americas “there are still some legislative gaps and omissions in State practices to prevent statelessness”.⁵¹

4.1.1 Accession to the 1961 Convention

The global eradication of statelessness requires countries to take joint action. To this end, countries should act on the basis of a shared understanding of how to prevent the problem in the first place. Since the aim and purpose of the 1961 Convention is precisely that of preventing statelessness, States should become party to this treaty with a view to ending this problem.⁵² Thus, Action No. 9 of the GAP and Action (a) of the Brazil Plan of Action promote adherence to the 1961 Convention.

Over the years, the UN General Assembly has promoted accession to the Statelessness Conventions.⁵³ Similarly, the OAS General Assembly promoted accession in its resolutions concerning refugees in 1999, 2001, 2002, 2003, 2004 and 2009,⁵⁴ and in 2010, 2011, 2013 and 2014

⁵¹ *Ibid.*, p. 8, last paragraph.

⁵² There are a number of additional reasons that justify accession, see UNHCR, *The Statelessness Campaign: Why States Should Accede to the 1954 and 1961 Statelessness Conventions*, 2011.

⁵³ UN General Assembly (UNGA), Resolution A/RES/69/152, Office of the United Nations High Commissioner for Refugees, 18 December 2014, para. 8; UNGA, Resolution A/RES/68/141, Office of the United Nations High Commissioner for Refugees, 18 December 2013, para. 8; UNGA, Resolution A/RES/67/149, Office of the United Nations High Commissioner for Refugees, 20 December 2012, para. 5; UNGA, Resolution A/RES/66/133, Office of the United Nations High Commissioner for Refugees, 19 December 2011, para. 5; UNGA, Resolution A/RES/66/92, Nationality of natural persons in relation to the succession of States, 9 December 2009, para. 5; UNGA, Resolution A/RES/64/127, Office of the United Nations High Commissioner for Refugees, 18 December 2009, para. 4; UNGA, Resolution A/RES/63/148, Office of the United Nations High Commissioner for Refugees, 18 December 2008, para. 4; UNGA, Resolution A/RES/62/124, Office of the United Nations High Commissioner for Refugees, 18 December 2007, para. 5; UNGA, Resolution A/RES/61/137, Office of the United Nations High Commissioner for Refugees, 19 December 2006, para. 4; UNGA, Resolution A/RES/51/75, Office of the United Nations High Commissioner for Refugees, 12 December 1996, para. 18.

⁵⁴ OAS General Assembly, Resolution AG/RES. 2511 (XXXIX-O/09), Protection of

it did so in regard to its resolutions on the 'Prevention and Reduction of Statelessness and Protection of Stateless Persons in the Americas'.⁵⁵

The issue of accession was also present in the Brasilia Declaration (2010),⁵⁶ and at the Ministerial Intergovernmental Event on Refugees and Stateless Persons⁵⁷ where, of the 33 States that undertook to accede to one or both Statelessness Conventions, several were American countries: Argentina (1961 Convention), Colombia (1961 Convention), Ecuador (1961 Convention), Haiti (both Conventions), Honduras (both Conventions), Paraguay (both Conventions) and Peru (both Conventions).⁵⁸ By August 2016, all these countries except Haiti had fulfilled their commitment. In turn, Chile has indicated that it will progress towards adherence.⁵⁹

Asylum Seekers and Refugees in the Americas, 4 June 2009, para. 2; OAS General Assembly, Resolution AG/RES. 2047 (XXXIV-O/04), Protection of Asylum Seekers, Refugees, Returnees, and Stateless Persons in the Americas, 8 June 2004, para. 2; OAS General Assembly, Resolution AG/RES. 1971 (XXXIII-O/03), Protection of Refugees, Returnees, and Stateless and Internally Displaced Persons in the Americas, 10 June 2003, para. 2; OAS General Assembly, Resolution AG/RES. 1892 (XXXII-O/02), Protection of Refugees, Returnees and Internally Displaced Persons in the Americas, 4 June 2002, para. 2; OAS General Assembly, Resolution AG/RES. 1832 (XXXI-O/01), Protection of Refugees, Returnees and Internally Displaced Persons in the Americas, 5 June 2001, considering; OAS General Assembly, Resolution AG/RES. 1762 (XXX-O/00), Protection of Refugees, Returnees and Internally Displaced Persons in the Americas, 6 June 2000, para. 1; OAS General Assembly, Resolution AG/RES. 1693 (XXIX-O/99), Situation of Refugees and Returnees in the Americas, 8 June 1999, para. 1.

⁵⁵ OAS General Assembly, Resolution AG/RES. 2826 (XLIV-O/14), *supra* n43, para. 2; OAS General Assembly, Resolution AG/RES. 2787 (XLIII-O/13), Prevention and Reduction of Statelessness and Protection of Stateless Persons in the Americas, 3 June 2013, para. 1; OAS General Assembly, Resolution AG/RES. 2665 (XLI-O/11), Prevention and Reduction of Statelessness and Protection of Stateless Persons in the Americas, 7 June 2011, para. 2; OAS General Assembly, Resolution AG/RES. 2599 (XL-O/10), Prevention and Reduction of Statelessness and Protection of Stateless Persons in the Americas, 8 June 2010, para. 2.

⁵⁶ Brasilia Declaration, *supra* n45, para. 7.

⁵⁷ Ministerial Communiqué, 8 December 2011, para. 3; issued during the "Ministerial Intergovernmental Event on Refugees and Stateless Persons" held to commemorate the 60th anniversary of the 1951 Convention relating to the Status of Refugees and the 50th anniversary of the 1961 Convention on the Reduction of Statelessness, Geneva, Palais des Nations, 7-8 December 2011.

⁵⁸ UNHCR, Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011, 2012, p. 34.

⁵⁹ Speech by Ambassador Alejandro Marisio Cugat, Director General of Consular

Of the 68 States currently party to the 1961 Convention, 16 are American countries. Although this is a low number and represents less than half of the 35 Member States of the OAS, the fact that 10 of the accessions by American States occurred after 2011 shows States' renewed interest in accession to the 1961 Convention. In fact, between 2011 and 2015, the accession rate in the Americas represented 35.71% of the number of accessions registered globally,⁶⁰ second only to Europe.

4.1.2 Harmonisation of internal regulations and practices pertaining to nationality with international standards

The Brazil Plan of Action promotes the harmonisation of domestic regulations and practices pertaining to nationality with international standards. Through this formula, the Brazil Plan of Action includes Actions 2, 3 and 4 of the GAP, namely to ensure that no child is born stateless; eliminate gender discrimination in nationality laws; and prevent denial, loss or deprivation of nationality on discriminatory grounds.

In spite of the generous nationality legislations in the Americas, the Brazil Plan of Action makes it clear that there are remaining gaps and loopholes which must be resolved. The paradigmatic *loophole* case is that of foundlings since many States' laws do not resolve their nationality, leaving the issue subject to variable administrative or judicial practices. Similarly, the United States of America allows for renunciation of nationality without appropriate safeguards to prevent statelessness.⁶¹

Affairs and Immigration, Ministry of Foreign Affairs of Chile, Brazil, 3 December 2014. On 6 November 2015, the Presidential Guidelines No. 5, Guidelines and Instructions for the National Migratory Policy indicated that the Board of Migratory Policy and its Technical Council should promote adherence to both Conventions.

⁶⁰ Between 2011 and 2015, of the 28 countries that acceded to the 1961 Convention, 11 are European, 10 are American, six are African and one is Asian.

⁶¹ USA Immigration and Nationality Act (INA), 8 U.S.C. 1481(a)(5), Section 349(a)(5). The law provides for the loss of nationality due to voluntary renunciation formalised before a diplomatic or consular officer. According to the State Department, the waiver could result in these persons becoming stateless. See, US Department of State, Renunciation of Nationality, <http://travel.state.gov/content/travel/english/legal-considerations/us-citizenship-laws-policies/renunciation-of-citizenship.html>. Art. 7(1)(a)

There are also *loopholes* as a result of laws that contradict prevention standards or that are discriminatory. In El Salvador⁶² and Mexico,⁶³ for example, naturalised persons may lose their nationality if they reside in a foreign country for less than seven years, although the 1961 Convention requires States to allow a minimum of seven consecutive years abroad before naturalised citizens lose their nationality.⁶⁴ On the other hand, the constitutions of Barbados and The Bahamas have norms that are discriminatory on grounds of gender.⁶⁵ Although The Bahamas recently called for a constitutional referendum to solve the problem,⁶⁶ the result was negative.

Cases of statelessness may also arise due to the impossibility of children born abroad acquiring the nationality of their parents or of

of the 1961 Convention stipulates that renunciation of nationality should be effective only if the person concerned possesses or acquires another nationality.

⁶² Constitution of El Salvador 1983, Art. 94(1) stipulates that the status of naturalised Salvadoran is lost if the person resides for more than two consecutive years in their country of origin or if they are absent from the territory for more than five consecutive years, except in cases of permission granted under the law.

⁶³ Constitution of Mexico, Art. 37(B)(II) and Nationality Act 1998 (last reform published DOF 23/04/2012), Art. 27 states that Mexican nationality by naturalisation is lost if the person resides abroad for five continuous years.

⁶⁴ 1961 Convention, Art. 7(4).

⁶⁵ UNHCR, Background note on gender equality, laws on nationality and statelessness, 2015, p. 6. In 2014, Suriname eliminated gender discrimination from its nationality law. Act of 12 September 2014, amending the Law of 24 November 1975, which regulates the nationality and residence of Suriname, 1975 GB no. 171, as amended by the SB. 2002 no. 22. See UNHCR, UNHCR applauds Suriname for ensuring gender equality in nationality laws, Press Release, 25 July 2014, <http://www.unhcr.org/news/press/2014/7/53d20b756/unhcr-applauds-suriname-ensuring-gender-equality-nationality-laws.html>.

⁶⁶ UNHCR, UN refugee agency salutes Bahamas shift to ensure gender equality on citizenship, Press Release, 10 March 2016, <http://www.unhcr.org/news/press/2016/3/56fbb544/un-refugee-agency-salutes-bahamas-shift-to-ensure-gender-equality-on-citizenship.html>.

the country where they were born. In Cuba,⁶⁷ Panama⁶⁸ and Paraguay⁶⁹ the acquisition of nationality by descent is subject to the requirement that children born abroad must establish their residence in the country.

Since 2014, Chile has applied the notion of “in transit aliens” as an exception to the constitutional principle of automatic acquisition of nationality by *jus soli*. The current regulation limits the exception to cases concerning tourists and the crew members of ships or aircraft, but does not apply to the children of foreigners with irregular migration status who intend to stay in the country. It also established a mechanism for reviewing the registration of children on a case-by-case basis so that the child can be re-registered as a national.⁷⁰ This new approach, based on the well-established jurisprudence of the Supreme Court, is expected to become law.⁷¹

In Colombia, Article 96 of the Constitution states that “children of foreigners, if either parent is domiciled in the Republic at the time of birth” are Colombian by birth. In March 2015, Colombia expanded

⁶⁷ Constitution of Cuba, Art. 29, “Cuban citizens by birth are: [...] c) those born abroad, of a Cuban father or mother, prior compliance with the formalities that the law indicates”. Pursuant to Decree 358 of 1944, a child born abroad must set residence in Cuba (*avecindarse*) as a requirement to acquire Cuban nationality. If the child’s parents are émigrés, they cannot set permanent residence in Cuba, unless expressly authorised. Also see, CRC, Concluding Observations: Cuba, *supra* n28.

⁶⁸ Constitution of Panama 1972 (with reforms of 1978, 1983 and 1994), Art. 9(3) states that “persons who are Panamanian by birth: 3. Children whose father or mother are naturalised Panamanians born outside the national territory, if they establish their domicile in the Republic of Panama and express their will”.

⁶⁹ Political Constitution of Paraguay 1992, Art. 146(3) states that “those of Paraguayan nationality are: 3. the children of a Paraguayan mother or father born abroad, when they reside permanently in the Republic”.

⁷⁰ Civil and Identification Registry Service (Chile), National Directorate, Exempt Resolution No. 102 of 20 March 2015 on birth registration with entry of a child of a transient alien and revokes Resolutions No. 3,207 and No. 3,509 exempt, of 2014; Exempt Resolution No. 3,207, Instructions on entry indicated, 1 September 2014; Exempt Resolution No. 3,509, complements Exempt Resolution No. 3,207 of 9 September 2014.

⁷¹ The Immigration Bill, which is being prepared by the Department of Immigration (DEM) will provide for a limited definition of transient, in line with the administrative regulations adopted in 2014 and 2015. Similarly, there is a bill that “[e]stablishes [an] Interpretative Law of Article 10 of the Republic’s Political Constitution, in regard to the nationality of children of foreigners born in Chile”. (Bulletin No. 9831-07), January 2015, in the same vein.

the list of eligible immigration categories for demonstrating the requirement of domicile.⁷² This confirms the tendency of countries to eliminate loopholes in their nationality laws and limit the few exceptions provided for in the automatic acquisition of nationality.

4.1.3 Facilitating universal birth registration and the issuing of documentation

Most American countries provide for the automatic acquisition of nationality by birth in the territory (*jus soli*). However, a risk of statelessness may occur by virtue of lack of birth registration coupled with insurmountable legal or practical difficulties in proving the person's link with a country. This situation often affects indigenous communities and temporary migrant workers living in rural border areas, where the lack of birth registration makes the authorities uncertain whether or not the person is a national of their country.

According to Article 7(1) of the Convention on the Rights of the Child, children should be registered immediately after birth and have the right to acquire a nationality. Following Action 7 of the GAP, Action (c) of the Brazil Plan of Action promotes “[f]acilitating universal birth registration and the issuance of documentation, implementing the activities proposed in Conclusion No. 111 of the UNHCR Executive Committee [...]”. Among other activities, the Brazil Plan of Action suggests: “i) the adoption of simplified administrative procedures; ii) the regular organisation of awareness campaigns and community outreach activities; iii) the implementation of appropriate measures to ensure rural or remote areas are reached, for example, by means of mobile registration units”.

Birth registration contributes to the realisation of the right to identity given that it documents where a child was born and who their parents are, which, in turn, allows for their nationality to be determined. In this vein, Action (c) of the Brazil Plan of Action is particularly relevant because, according to recent estimates, in the American continent there are 1.3 million births that are not registered each year, and 6.5 million children who do not have a birth certificate. Although the level

⁷² National Civil Status Registry (Colombia), Newsletter No. 59, Guidelines for the registration at the Civil Registry of children of foreigners born in Colombia for the purpose of proving their nationality, 26 March 2015.

of underreporting among children aged between one and five has decreased from 18% to 7%, 11% of children under five years of age in rural areas are still not registered.⁷³

While it is true that only a small number of these children could face risks of statelessness, the possibility has not been totally eliminated. Therefore, following an initiative of the GRULAC, in 2013 the UNHCR Executive Committee adopted a 'Conclusion on Civil Registration' in which States are encouraged, in cooperation and with the support of UNHCR, to implement the necessary legal and practical measures for overcoming the difficulties in undertaking registration procedures at the civil registry.⁷⁴ The Universal Civil Identity Project of the Americas (PUICA) was also designed for this purpose.

OAS's General Assembly created the PUICA through Resolution AG/RES. 2362 (XXXVIII-O/08),⁷⁵ to assist Member States in their efforts to achieve universality and accessibility of the civil registry, and comply with the goal of universal birth registration by 2015. Since 2010, PUICA has implemented projects in 17 countries of Central and South America and the Caribbean in five strategic areas, including mobile campaigns in border areas, and the identification and exchange of good practices, mainly through the Latin American and Caribbean Council of Civil Registries, Identity and Vital Statistics (CLARCIEV).⁷⁶

4.2 Protection

Preventing statelessness is only a first step in the path towards ending the problem. Protecting the rights of those persons who have become stateless is also a necessary step to address the consequences of a problem that, for whatever reasons, was not avoided in the first place.

⁷³ Parliamentary workshop on the right to identity: promoting universal birth registration in Latin America and the Caribbean, Regional meeting hosted by the Parliament of the Republic of Peru and co-organized by the Inter-Parliamentary Union and the United Nations Children's Fund (UNICEF), Lima, 7-8 June 2013.

⁷⁴ UNHCR Executive Committee, Conclusion No. 111 (LXIV), Conclusion on civil registration, 2013.

⁷⁵ OAS General Assembly, Resolution AG/RES. 2362 (XXXVIII-O/08), Inter-American Program for Universal Civil Registry and the "Right to Identity", 3 June 2008.

⁷⁶ OAS, Universal Civil Identity Project of the Americas, <http://www.oas.org/en/spa/depm/PUICA.asp>.

In other words, ensuring the basic rights of those persons affected by the problem of statelessness, until such a time they can acquire a nationality, is a major aspect of efforts to eradicate statelessness.

4.2.1 Accession to the 1954 Convention

Action 9 of the GAP and Action (a) of the Brazil Plan of Action promote accession to the 1954 Convention. Given that the aim and purpose of this Convention is to ensure the widest possible enjoyment of stateless persons' human rights,⁷⁷ adherence is important for ensuring their safety and dignity until they can access a nationality.

To date, of the 89 States Parties to the 1954 Convention, 19 are countries within the American continents. This represents almost 54% of the Members States of the OAS. In South-America, Chile,⁷⁸ Colombia,⁷⁹ Guyana, Suriname and Venezuela⁸⁰ are not States Parties. In Central America it only remains for El Salvador to accede to the 1961 Convention for all the countries to be Parties to both Conventions. In North America, Canada⁸¹ and the United States of America are not States Parties. For its part, in 2014 Mexico lifted its reservation to Article 31 of the Convention on the expulsion of stateless persons.⁸²

⁷⁷ UNHCR, Handbook on Protection of Stateless Persons under the 1954 Convention Relating to the Status of Stateless Persons, 2014, para. 14.

⁷⁸ *Supra* n59.

⁷⁹ Colombia signed the Convention on 30 December 1954. In 2012, Congress approved it through Law 1588, and the Constitutional Court declared its constitutionality, through Decree C-622/13 of 10 September 2013. All that remains is the deposit of the instrument of ratification.

⁸⁰ In 2001, Venezuela rejected a recommendation on accession as premature and requiring the need for further consultation and analysis as to whether the instruments comply with domestic legislation and the respective institutions. See, UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Venezuela (Bolivarian Republic of), 16 February 2012, A/HRC/19/12/Add.1, para. 18.

⁸¹ In 2013 Canada indicated that it is not considering the possibility of acceding to the 1954 Convention. See, UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Canada, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, 17 September 2013, A/HRC/24/11/Add.1, para. 6.

⁸² Decree of 6 February 2014 by which the withdrawal of the express reservation to article 31 of the Convention relating to the Status of Stateless Persons (date of filing 20 March 2014) was approved.

It is likewise expected to lift its reservations to Articles 17 and 32.⁸³ Finally, the Caribbean region has the lowest number of accessions. Out of the 14 non-Spanish speaking countries, only five countries are States Parties.

Between 2011 and 2015, of the 21 countries that adhered to the 1954 Convention, eight were African, six American, five European, and two Asian. Therefore, the accession rate in the region amounts to 28.57% of the global number of adhesions for that period. Interestingly, of the 19 accessions to the 1954 Convention that have been registered in the Americas, 11 occurred after 1995 when the UN General Assembly entrusted UNHCR with the mandate to promote accessions. Before 1995, of the eight American countries that became parties, four did so through succession. This shows the key role that UNHCR has played in the Americas in terms of promoting accession to the Statelessness Conventions.

In fact, if we consider accession to both Statelessness Conventions UNHCR's role becomes even clearer; since 2011, when UNHCR launched the global campaign for accession 16 of the 49 accessions registered globally with respect to both Conventions correspond to countries in the Americas, the cumulative rate is equivalent to 32.65%. In other words, together with Europe, the Americas recorded the highest overall number of accessions since 2011.

4.2.2 Establishing statelessness determination procedures

Establishing statelessness determination procedures allows a State to identify stateless persons and provide them with adequate protection, thereby fulfilling its obligations under the 1954 Convention.⁸⁴ In line with Action 6 of the GAP, the Brazil Plan of Action recommends establishing or strengthening such procedures, and including this competence within the responsibilities of the National Commissions for Refugees (CONARE) or equivalent institutions.

⁸³ At the time of accession to the 1954 Convention, Mexico indicated that it does not consider itself obliged to guarantee stateless persons more facilities for their naturalisation or for obtaining gainful employment than those it generally grants to foreigners. Mexico is the only State Party that maintains a reservation with respect to Article 32. Regarding Article 17, although Italy considers it a mere recommendation and the Philippines expressly reserved it, none of the other States Parties have reservations to it.

⁸⁴ UNHCR, UNHCR Handbook on Protection of Stateless Persons, 2014, para. 58.

The IACtHR has stated that establishing such procedures is a positive obligation of States,⁸⁵ and it has made it clear that States should determine the nationality of the child or, where appropriate, their statelessness.⁸⁶ In effect, the Court considers that, in a migratory context, it is an obligation of the host State to determine whether or not the child is a stateless person in order to ensure their protection as such and, depending on the reasons for leaving the country of habitual residence, to refer them to a refugee status and/or statelessness determination procedure or a complementary protection mechanism.⁸⁷ In turn, this requires establishing or strengthening fair and efficient procedures for determining whether the child is stateless, which are sensitive to his or her different needs, and appropriate in light of his or her age, gender and other characteristics.⁸⁸

Following UNHCR guidelines, the IACtHR has held that the determination of nationality or statelessness is relevant in diverse situations including: (i) when a person's right to stay in a country during expulsion proceedings is questioned; (ii) in identifying the country or countries for which the person claims to have a well-founded fear of persecution, within the meaning of the refugee definition; or (iii) when a person seeks the application of the guarantees established in the 1961 Convention.⁸⁹

In 2011 at the Intergovernmental Ministerial Event on Refugees and Stateless Persons, Brazil,⁹⁰ the United States of America,⁹¹ Peru⁹² and Uruguay⁹³ pledged to adopt measures or procedures for the determination of statelessness. Similarly, Costa Rica pledged to strengthen such measures,⁹⁴ and Panama pledged to ensure the

⁸⁵ IACtHR, Advisory Opinion OC-21/14, *Rights and guarantees of children in the context of migration and/or in need of international protection*, Series A No. 21, 19 August 2014, para. 82.

⁸⁶ *Ibid.*, para. 86.

⁸⁷ *Ibid.*, para. 96.

⁸⁸ *Ibid.*, note 169; UNHCR, UNHCR Handbook, *supra* n84, paras. 118-119.

⁸⁹ *Ibid.*, para. 95; UNHCR Guidelines on Statelessness No. 2: Procedures for determining whether an individual is a stateless person, 2012, HCR/GS/12/02, para. 2.

⁹⁰ UNHCR, Pledges 2011, *supra* n58, p. 56.

⁹¹ *Ibid.*, pp. 91-92.

⁹² *Ibid.*, p. 103.

⁹³ *Ibid.*, p. 126.

⁹⁴ *Ibid.*, p. 61.

protection of stateless persons.⁹⁵ All these countries have taken actions to fulfil their pledges through the development or adoption of regulations and legal frameworks.

At present in the Americas, two countries have statelessness determination procedures in place, three countries have assigned authority to administrative bodies to adjudicate applications without establishing clear procedures, and five countries are developing domestic frameworks to establish such proceedings. Mexico has an established comprehensive procedure,⁹⁶ whilst Costa Rica, which had an *ad-hoc* mechanism,⁹⁷ recently adopted a new regulation and procedure.⁹⁸ In Bolivia, the CONARE has the authority to assess applications for recognition, but does not have a specific procedure.⁹⁹ Likewise, in Honduras¹⁰⁰ and Nicaragua¹⁰¹ authorisation was assigned to a State body without a set procedure.

4.2.3 Adopting protection frameworks

Action (e) of the Brazil Plan of Action proposes the adoption of normative frameworks (laws, decrees or administrative regulations) that ensure the protection of stateless persons, and give full effect to the rights recognised in the 1954 Convention and other relevant human rights treaties.

Although Argentina, Costa Rica, Honduras, Mexico and Nicaragua have regulated some aspects of legal residence and documentation, in general, the countries of the Americas lack comprehensive protection regulations. Therefore, the resolutions of the OAS on statelessness have drawn attention to the importance of internal regulations on this subject.¹⁰²

⁹⁵ *Ibid.*, p. 101.

⁹⁶ Decree by which is issued the Regulation of the Migration Act (Mexico), Official Journal, 28 September 2012, Arts. 149 *et seq.*

⁹⁷ General Law of Migration 2009 (Costa Rica), Law 8764, Art. 13(19) and Art. 110.

⁹⁸ Ministry of Foreign Affairs, Costa Rica to recognise stateless persons in order to guarantee their human rights, Press Release, 8 April 2016, <http://www.mgp.go.cr/wordpress/?p=1064>.

⁹⁹ Supreme Decree 1440 (2012), Regulation of Law 251 (2012) on the “Protection of Refugees” (Bolivia), Single Transitional Provision.

¹⁰⁰ Immigration Act 2013 (Honduras), Decree No. 208-2003, Art. 54.

¹⁰¹ General Law on Migration, 2011 (Nicaragua), Law 761, Art. 40; Decree 31/2012, Regulation of Law 761 of 20 September 2012, Art. 74.

¹⁰² OAS General Assembly, Resolutions AG/RES. 2826 (XLIV-O/14), *supra*

At present, Argentina has a bill on the protection of stateless persons that develops a statelessness determination procedure,¹⁰³ while Uruguay developed a draft law, which lost parliamentary support but will be reviewed and submitted to Congress, with improvements, in 2016.¹⁰⁴ As for Brazil, which had a draft bill prepared by the Ministry of Justice,¹⁰⁵ it now hopes to regulate protection in the immigration bill, as does Ecuador in its human mobility bill.¹⁰⁶ Panama, in turn, has made progress in preparing a draft decree¹⁰⁷, which is still under review. For the time being, legislation in Panama simply indicates that the procedure to be adopted should be in line with international treaties.¹⁰⁸

Again, UNHCR has played a key role in promoting the adoption of domestic frameworks that establish statelessness determination procedures and regulate the protection of stateless persons. In fact, with the exception of the United States of America all the draft laws and decrees that have been developed in the region followed UNHCR's Model Law for the Protection of Stateless Persons. This Model Law, which was first released by UNHCR in 2011 and reviewed in 2012, targeted Latin-American countries. While the Model Law is being reviewed to include recent regional developments, best practices and new UNHCR guidelines, the Inter-American Juridical Committee has already recommended that States in the Americas follow it.

n43, para. 4; AG/RES. 2787 (XLIII-O/13), *supra* n55, para. 3; AG/RES. 2665 (XLI-O/11), *supra* n55, para. 3; AG/RES. 2599 (XL-O/10), *supra* n55, para. 2.

¹⁰³ General Recognition of Statelessness Bill 2015 (Argentina), File S-1003-15.

¹⁰⁴ House of Representatives (Uruguay), File No. 2146, Handout No. 1094, March 2013.

¹⁰⁵ Draft Bill on "Establishing the Statute of Protection for Stateless Persons, through Law N°. 9,474, of 22 July 1997, in order to transform the National Committee for Refugees into the National Committee for Stateless Persons and Refugees, and other measures", Ministry of Justice (Brazil), September 2014.

¹⁰⁶ Bill Establishing the Migration Law 2015 (Ecuador), PL 2516-2015.

¹⁰⁷ National Assembly (Panama), Draft Law on Human Mobility, 16 July 2015, Procedure No. 219452. The bill expressly refers to the eradication of statelessness, the establishment of a statelessness determination procedure and the granting of facilities for the naturalisation of stateless persons, among other topics relevant to statelessness.

¹⁰⁸ Law 3 2008 (Panama), which creates the National Immigration Service, the Immigration Career and establishes other provisions, Art. 23.

4.3 Resolution

4.3.1 Granting facilitated naturalisation

Action (f) of the Brazil Plan of Action recommends facilitating the naturalisation of stateless persons, in accordance with Article 32 of the 1954 Convention. This Action is in line with Action 6 of the GAP, which also promotes facilitating the acquisition of nationality for stateless migrants.

At present, the legislation of American countries does not provide for facilitated access to naturalisation. However, Bolivia recently approved a regulation that significantly reduces the costs associated with naturalisation applications.¹⁰⁹ Interestingly, this regulation refers to Article 34 of the 1951 Convention relating to the Status of Refugees and Article 32 of the 1954 Convention, as well as to the Brazil Plan of Action. Mexico provides for a certain level of facilitation for refugees, including stateless refugees; while Article 20 of the Nationality Act requires five years of residence before an application for naturalisation can be made,¹¹⁰ Article 14 exempts refugees from proving their immigrant status.¹¹¹ Moreover, Article 15 exempts them from taking tests on Mexican history and culture.

It is important that the countries within the region that are developing regulatory protection frameworks provide for facilitated naturalisation such as through exemption from payment of fees or duties to begin the procedure, reducing the number of years of residence required, exemption from submitting documentation that the person cannot reasonably obtain, and no requirement for a specific category of legal residence for submitting the application (e.g. permanent residence).

4.3.2 Confirming nationality

Action (g) of the Brazil Plan of Action promotes confirmation of nationality, for example by facilitating late registration of birth and issuing relevant documentation. It also indicates that this goal may

¹⁰⁹ Ministry of the Interior (Bolivia), Ministerial Resolution No. 050/2016, 9 March 2016.

¹¹⁰ Nationality Act 1998 (Mexico), pursuant to the last amendment published in 23 April 2012.

¹¹¹ Regulations of the Nationality Law (Mexico), New Regulations published in the Official Journal of the Federation on 17 June 2009. Last reform published DOF 21 March 2013.

require strengthening dialogue and bilateral or multilateral cooperation between the authorities responsible for civil registration, as appropriate, as well as bi-lateral projects for civil registration and documentation.

This Action finds its counterpart in Action 8 of the UNHCR GAP on the issuing of nationality documents to those entitled to them. The overall goal is that no State should have populations with the right to nationality according to their laws, but who cannot acquire documentary evidence of it.

After the adoption of the Brazil Plan of Action, the *Chiriticos* Project was developed as a bi-lateral initiative between Costa Rica and Panama to ensure late birth registration and granting of nationality documentation to the indigenous Ngäbe-Buglé community that live in the border area. In 2014, UNHCR estimated that around 1,200 Ngäbe-Buglé children and adults born to Panamanian parents in Costa Rica faced difficulties in obtaining birth certificates. Since some of them had not been registered at birth, their nationality remained undetermined, and some adults who were about to reach the age of 25 years old were at heightened risk of statelessness.¹¹²

Through mobile brigades, the authorities in Costa Rica approached members of the Ngäbe-Buglé community, and provided them with legal information and guidance throughout the late birth registration procedure. Awareness raising and sensitisation campaigns were also conducted, and UNHCR facilitated training for public officials and co-organised a round-table with the Civil Registry Offices of both countries, aimed at harmonising registration and documentation procedures. Finally, in August and November 2015, two joint registration and documentation missions took place in the areas of San Vito de Coto Brus and Sixaola. As a result, 163 persons benefited from late birth registration, 348 persons obtained Costa Rican nationality documentation and 692 obtained Panamanian nationality documentation.¹¹³

¹¹² Pursuant to Article 13(3) of the Constitution, a child born in Costa Rica to foreign parents acquires the Costa Rican citizenship, provided he is registered as such by the will of either parent during his minority, or by his own will up to the age of twenty-five. While in practice, children born in public hospitals or medical centres are automatically registered as Costa Rican, when the birth occurs at farms, the father or mother needs to approach the authorities and make a declaration in line with the constitutional provision.

¹¹³ For a video that documenting the project see, Proyecto Chiriticos, 28 January

4.3.3 *Facilitating the re-acquisition and restitution of nationality*

Action (h) of the Brazil Plan of Action proposes to “[f]acilitate the restoration or recovery of nationality through legislation or inclusive policies, especially the automatic restoration of nationality as a solution for cases in which the person had been arbitrarily deprived of nationality”. This Action is related to Action 1 of the GAP, which promotes changes in legislation and government policies for recognising as nationals those persons who were excluded from the nationality criteria and, thus, resolving the main existing situations of statelessness.

In the Americas, several countries do not allow citizens to renounce their nationality, although in certain cases they provide for the suspension of political rights for their nationals abroad. Other countries allow renunciation provided that the person does not become stateless. Facilitating the re-acquisition of nationality is relevant when a person becomes stateless as a result of renouncing their single nationality. It should be noted, however, that while Action (h) is a measure for resolving statelessness, States should, in the first place, review their legislation in order to prevent such cases of renunciation from occurring.

Action (h) also refers to the automatic restoration of nationality as a solution for cases of arbitrary deprivation of nationality, in line with generally accepted international standards.¹¹⁴ In this vein, the IACtHR has stated that facilitating naturalisation is not the appropriate nationality solution in instances of arbitrary denial or deprivation of nationality.¹¹⁵ Similarly, the Inter-American Commission has declared that, in such cases, a State must fully restore nationality. In order to remedy the situation, the State must adopt general and automatic

2016, <https://www.youtube.com/watch?v=SwrQXGEwTBU>.

¹¹⁴ The UN Human Rights Council urged States to “ensure access of persons arbitrarily deprived of their nationality to means of effective reparation, including, but not limited to, the restoration of nationality”, UN Human Rights Council, Resolution No. 20/5, Human rights and the arbitrary deprivation of nationality, 16 July 2012, A/HRC/RES/20/5, para. 12. Similarly, the UN Secretary-General has indicated that “States must ensure there is an effective resource in place when the conclusion is that the decision concerning nationality is unlawful or arbitrary. Among other solutions, this resource must include the possibility of restoring nationality”, UN Human Rights Council, Human rights and the arbitrary deprivation of nationality, Report of the Secretary-General, 19 December 2013, A/HRC/25/28, para. 34.

¹¹⁵ IACtHR, *Dominican Peoples case*, *supra* n26 para. 324.

measures to guarantee the right to nationality of those affected by the arbitrary denial or deprivation of nationality. The respective mechanisms must be simple, clear, prompt and fair, they cannot be discretionary or implemented in a discriminatory manner, and they should be accessible in economic terms.¹¹⁶

5. Conclusion

As we have seen, the eradication of statelessness requires three things: (1) guaranteeing the human right to a nationality, by means of solutions that are respectful of the right to identity, and that aim to address the problem of discrimination when it is the underlying cause of statelessness (*human rights approach*); (2) implementing the actions of the GAP and the Brazil Plan of Action that are relevant in each country, since both strategic frameworks aim to achieve tangible results, not allowing this ambitious goal to be reduced to an aspiration or wishful thinking (*programmatic approach*); and (3) responding to the problem as a matter of principle, since statelessness undermines the rule of law (*idealistic approach*).

The Brazil Plan of Action is a milestone because, for the first time, the Caribbean countries joined Latin American States to discuss, negotiate and adopt a common plan of action that identifies the main regional challenges and actions needed to address them. The Brazil Plan of Action is also a fundamental tool for the eradication of statelessness in the Americas because, for the first time, a regional strategic framework, which includes a chapter on this issue, was adopted. And finally, it is the first time that these countries have declared their support for the goal of global eradication of statelessness.

The eradication of statelessness must not only be an aspiration but, fundamentally, an imperative based on the intrinsic dignity of every human being. Ultimately, ending statelessness rescues millions of persons from a life of exclusion and segregation. Even though ten years might not be enough to end statelessness in the world, a century would not be enough if States do not begin today. The Brazil Plan of Action and the GAP are good starting points in the Americas.

¹¹⁶ Inter-American Commission on Human Rights, Report on the human rights situation in the Dominican Republic, 31 December 2015, OAS/Ser.L/V/II, Doc. 45/15, paras. 330 and 331.4.

11. Statelessness in Central Asia: From State succession to solutions

Jason Tucker

1. Introduction

When State borders shift, when States divide or new ones are created, States are required to define who will be their future citizens. State succession¹ is a significant cause of existing situations of statelessness across the world today. It also represents a risk in terms of the creation of future cases of statelessness because a large number of people are likely to be affected by any conflict in citizenship laws that results from State succession.²

Common types of state succession which have resulted in large-scale statelessness are the dissolution of federal states into independent republics (for instance, in the countries of the former Soviet Union and Yugoslavia) and the more recent cases of state secession (for instance, with the splitting off of Eritrea from Ethiopia and South Sudan from Sudan). Situations of emerging or contested statehood complicate this picture further, leading to unique challenges around nationality and statelessness (for instance, for the Palestinians and the Sahrawi).³

There are estimated to be at least 620,000 people globally who are stateless as a result of State succession which has occurred within the last 30 years.⁴ Moreover, in countries which do not have safeguards

¹ The definition of State succession used in this chapter is that provided by the Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, entry into force 6 November 1996, 1946 UNTS 3, Art. 2(b) “succession of States’ means the replacement of one State by another in the responsibility for the international relations of territory”.

² Institute on Statelessness and Inclusion, *The World’s Stateless*, Wolf Legal Publishers 2014.

³ *Ibid.*, p. 24.

⁴ UN High Commissioner for Refugees (UNHCR), *Global Action Plan to End Statelessness*, 2014, p. 15.

to ensure that children born on their territory are able to acquire citizenship the impact of post-succession statelessness can be passed on for generations.

Due to the protracted nature of many situations of statelessness that have arisen from State succession and the ongoing shifting of State borders there is a need to better understand how to address and prevent statelessness in these situations. This is reflected by the inclusion of the prevention of statelessness in cases of State succession in the Global Action Plan to End Statelessness of the United Nations High Commissioner for Refugees (UNHCR).⁵

There has been some interesting discussion of statelessness that arises out of State succession and how we can counter it, most notably from a legal perspective.⁶ However, it is argued here that in trying to address and prevent statelessness in cases of State succession, broader historical, economic, political and socio-psychological factors should be considered alongside legal ones. With this in mind, this chapter will explore statelessness in Central Asia,⁷ and how Kyrgyzstan has attempted to resolve cases of statelessness arising from its succession from the Union of Soviet Socialist Republics (USSR).

Many former Soviet republics are still struggling to resolve cases of statelessness which arose following their independence, and hundreds of thousands of former USSR citizens in the Baltic States, Eastern Europe and Central Asia have still not acquired a citizenship. In some circumstances these people are passing their statelessness to their children, perpetuating the impact of the dissolution of the USSR.

As of 2014 there were reportedly over 110,000 stateless persons in Central Asia.⁸ While there are several causes of statelessness in the region, by far the most significant is the dissolution of the USSR. Although there is still a large stateless population in Central Asia,

⁵ *Ibid.*

⁶ Examples of this include I. Ziemele, "State succession and issues of citizenship and statelessness", in A. Edwards and L. van Waas (eds), *Nationality and Statelessness under International Law*, Cambridge University Press 2014, pp. 217-246.

⁷ For the purposes of this chapter, the Central Asia region will refer to Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan.

⁸ UNHCR, Central Asia Fact Sheet, 2014.

there have been significant, innovative and as yet underexplored developments in the region aiming to resolve this situation. By looking at the recent efforts of Kyrgyzstan to overcome some of the past disjuncture between the citizenship law, its implementation and the context within which it is being applied, we can develop a greater understanding of why these efforts succeeded and so contribute to resolving other cases of statelessness that have arisen following State succession and pre-empt problems in the future.⁹

With regard to terminology, citizenship of the USSR is referred to as “USSR citizenship”, and citizenship of the newly independent States is referred to as “citizenship”. While under international law the terms citizenship and nationality are used interchangeably, in USSR legislation and in the current legal provisions in Central Asia the notion of “nationality” relates to ethnicity rather than a legal status. The term “nationality” is therefore generally not used in this chapter.

2. Statelessness in Central Asia following the dissolution of the USSR

2.1 The USSR legacy on statelessness: USSR citizenship and mass migration

The first USSR Citizenship Law came into force in 1938.¹⁰ Article 1 of this law, which was based on Article 21 of the USSR Constitution of 1936, established that there was a single Union citizenship (USSR citizenship), with the right of residence of one of the Union’s republics.¹¹ While this law was modified several times during the existence of the USSR, USSR citizenship continued to be citizenship of a Federal Union of States and not citizenship of one of its constituent republics. USSR legislation did, however, distinguish between “citizenship” and “nationality”. “Citizenship” reflected a legal status, while “nationality”

⁹ While Kyrgyzstan is the case study chosen in this chapter, this is not to say that other States in the region have not also made significant strides towards ending statelessness. However, Kyrgyzstan is the most useful case study to draw on, being the closest to resolving all cases of statelessness that arose as a result of succession. Therefore, it provides the best model to consider and reflect on how successes can be replicated in other cases of State succession, both in the post-USSR context and beyond.

¹⁰ A. Salenka, Report Russia, EUDO Country Report 2012, p. 5.

¹¹ T.A. Taracouzio, “The Soviet Citizenship Law of 1938”, *The American Journal of International Law* 1939, Vol. 33(1), pp. 157-160.

referred to ethnicity, such as Russian, Tatar, Armenian or Turkmen.¹² “Nationality” was included in USSR passports, but did not relate to a legal or residency status. So it would not be uncommon for, say, a person born in Uzbekistan to hold a USSR passport, which reflected their USSR citizenship, and noted that they were of Tajik nationality (ethnicity) with a *propiska* (residence registration stamped in the passport signifying the right to reside in a specific place only) to live in Almaty, Kazakhstan.

In addition to USSR citizenship, the USSR period saw significant fluctuations in the scale of migration between the constituent republics. An overview of these migratory patterns helps to explain a significant factor in the post-dissolution statelessness situation. Migration within the USSR can be divided into several categories, the predominant ones being the movement of people to fill labour gaps, deportations and migration for education or military service. Migration for labour purposes and deportations constituted by far the largest migration movements in the USSR. With regard to labour migration, a variety of policies aiming to distribute workers to areas with labour shortages ran throughout the USSR period and were organised by the *orgnabors*, an organisation for recruiting and distributing labour throughout the Union. In Central Asia, migrants arrived from Russia in large numbers to work in mining, construction and other specialised industries.¹³ The scale of these labour movements was vast, with 28 million people relocating to the region between 1930 and 1970.¹⁴ As well as people moving over borders, the borders themselves moved, as the boundaries of the USSR republics shifted, leaving “accidental diasporas”.¹⁵ This included the decision to delineate Tajikistan as a separate constituent republic in 1929, leaving a large ethnic Tajik population as a diaspora in Uzbekistan.

¹² UNHCR, *Nationality Laws of the Former Soviet Republics*, 1993.

¹³ R. Shigabdinov and G. Nikitenko, “Migration Processes in the West of Central Asia in the Late Nineteenth and the Twentieth Centuries”, in H. Komatsu, C. Obiya and J.S. Schoeberlein (eds), *Migration in Central Asia: Its History and Current Problems*, Japan Center for Area Studies Symposium Series 9 2000, pp. 87-111, 104.

¹⁴ D. Rahmonova-Schwarz, “Migrations during the Soviet Period and in the Early Years of USSR’s Dissolution: A Focus on Central Asia”, *Revue européenne des migrations internationales* 2001, vol. 26 (3).

¹⁵ R. Brubaker, *Accidental Diasporas and External ‘Homelands’ in Central and Eastern Europe: Past and Present*, Institute of Advanced Science 2000, Political Science Series no.71.

In addition to population movements through the *orgnabors*, deportations of “dissident” individuals or groups was a common policy. These people or groups were often exiled to the peripheries of the Union, away from the centralised power of Moscow or away from areas that bordered States to which the individual/population were seen to have potential affiliations. Central Asia, being on the periphery of the USSR, played host to many such deportees. For example, 171,781 ethnic Koreans were deported to Kazakhstan and Uzbekistan in the late 1930s following fears that the population, which previously resided in the far east of the Union, would align with the Japanese.¹⁶

Military service was compulsory in the USSR, with all men being required to serve for two or three years, often outside their republic of residence or origin.¹⁷ With regard to education, while most cities had a range of higher education facilities, specialised universities were spread throughout the USSR. Students who met the entry requirements were able to travel and live in other parts of the Union to study at these universities.¹⁸

During Stalin’s rule (1929 to 1953), migration outside State sanctioned labour movements, deportations, military service or education was very restricted. However, this control slackened after 1956 under Khrushchev’s leadership.

The experience of migration and idea of citizenship as a Federal matter rather than one linked to place of residence continue to have an effect on how former USSR citizens think about citizenship today. This legacy has had a significant impact in Central Asia and contributed to the creation of a large stateless population following succession.

¹⁶ R. Shigabdinov and G. Nikitenko, *supra* n13, p. 104.

¹⁷ N. Podgoftny and M. Georgadze, “Law on Universal Military Service of the Union of Soviet Socialist Republics”, *Soviet Law And Government* 1968, Vol. 6(4).

¹⁸ A. Goodman, “Estimates and Projections of Specialized Manpower in the U.S.S.R: 1950-1975”, United States of America Department of Commerce, *International Population Report*, Series P-91, No.21, 1970.

2.2 USSR citizenship in the post-succession context: The legacy of the USSR system, transitional issues, and gaps in the citizenship laws of the newly independent States

In December 1991, the USSR dissolved and was succeeded by fifteen independent States. As a result of this, some 60 million people in Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan were rendered stateless.¹⁹ Following independence, the Central Asian States drafted new citizenship laws. Post-independence citizenship laws were adopted in Kazakhstan in 1991, Turkmenistan and Uzbekistan in 1992, Kyrgyzstan in 1993 and Tajikistan in 1995.

These initial citizenship laws and policies failed to prevent statelessness arising following succession. While there is not room here to analyse these laws in full, several key gaps which allowed statelessness to occur should be highlighted. Following succession, States in the region defined their citizenry as all those who were permanently resident on the territory of the State on the date of the enactment of the citizenship law or constitution.²⁰ A *propiska* for that Republic in the individual's USSR passport or birth certificate (for those not old enough to have received a passport under USSR legislation) therefore played a significant role as evidence of permanent residence on the date in question. Those who did not have a *propiska* for the State in which they were residing were not able to secure citizenship of that State and those without birth certificates or a USSR passport also faced significant barriers in confirming their citizenship. While the Turkmen legislation allowed persons who were born in the State but were residing abroad for various reasons to confirm in writing that they wished to be considered citizens of Turkmenistan, this had to be done within a year of the entry into force of the citizenship law.²¹

For the majority of former USSR citizens, confirming or acquiring citizenship of the newly independent States was therefore a simple

¹⁹ M. Tulsii, "Naselenie SNG k nachalu 20003 goda – 277,5 milliona chelovek", Demoscope Weekly 2003, No 103- 104.

²⁰ Law of the Republic of Kazakhstan on Citizenship of the Republic of Kazakhstan 1991 (last amended 2012), Art. 3; Law on Citizenship in the Republic of Uzbekistan 1992, Arts. 4; Constitutional Law of the Republic of Tajikistan on Nationality of the Republic of Tajikistan 2015, Art. 1; Law of the Republic of Turkmenistan on Citizenship 1992, Art. 49 and 50. For Kyrgyzstan see, UNHCR, Nationality Laws of the Former Soviet Republics, 1993.

²¹ Law of the Republic of Turkmenistan on Citizenship 1992, Arts. 49 and 50.

procedure involving the exchange of their USSR passports for new passports at the relevant local authority. However, hundreds of thousands of people did not manage to confirm or acquire a citizenship by the relevant cut off dates and were rendered stateless. Children born to parents who did not confirm their citizenship also became stateless as acquisition of citizenship at birth in each of the five States in Central Asia was at the time, and to a certain extent is still today, primarily based on descent (*jus sanguinis*).²² As a result statelessness that occurred following succession has been and is being passed down through the generations.

The legislative legacy of the USSR citizenship laws can be seen across Central Asia today. While the Central Asian States' citizenship laws drew on numerous sources, several legal provisions were copied directly from USSR legislation. The most striking example of this is the definition of a stateless person. The 1938 USSR Citizenship Law introduced a specific provision that all persons permanently residing on the territory of the USSR who were not USSR citizens and who *did not possess any proof of foreign citizenship* were considered stateless persons.²³ This definition is replicated, almost word for word, in all Central Asian States' citizenship laws²⁴ and has survived reforms and amendments to these citizenship laws. The fact that this definition is not in line with that set out in the 1954 Convention on the Status of Stateless Persons (1954 Convention),²⁵ continues to hamper some post-succession efforts to reduce statelessness. While the aforementioned USSR definition of a stateless person may seem more generous than the 1954 Convention definition, it can actually be detrimental to States in determining who is stateless. Two common examples of how this definition has led to incorrect determinations of citizenship or statelessness in Central Asia can be provided. First, a person who has lost their citizenship may still possess documents which would indicate that they are citizens of their former State of

²² See, UNHCR, *Statelessness in Central Asia*, 2011.

²³ A. Salenka, Report Russia, *supra* n10, p. 6.

²⁴ See, Nationality law of Turkmenistan 2013, Art. 8.2; Nationality Law of Kyrgyzstan 2007, Art. 3; Constitutional Law of the Republic of Tajikistan on Nationality of the Republic of Tajikistan 1995, Art. 14.C; and Law of the Republic of Kazakhstan on Citizenship of the Republic of Kazakhstan 1991 as amended in 2009, Art. 5.

²⁵ Convention relating to the Status of Stateless Persons, 28 September 1954, entry into force 6 June 1960, 360 UNTS 117.

citizenship. As such they may be considered by the State to be foreign citizens when they are in fact stateless. Second, the definition creates the possibility that migrants who *are* foreign citizens may be found to be stateless if they have no documents to prove their citizenship. Lack of documentation can arise for a variety of reasons such as lack of consular services or the prohibitive cost of reacquiring lost documents or renewing expired ones. The focus on “proof of foreign citizenship” negates the need to consider the interplay between law and fact in determining a person’s citizenship or statelessness.

A further example of the USSR’s legislative legacy is the inclusion in Kazakhstan, Tajikistan and Uzbekistan’s post-independence citizenship laws of provisions requiring citizens resident abroad to register with the consulate in order to retain their citizenship.²⁶ These laws were derived from Article 22 of the 1990 USSR Citizenship Law, which specified the grounds for loss of USSR citizenship, including for a USSR citizen with permanent residence abroad who, without reasonable justification, failed to register with the USSR consulate for five years after leaving the USSR.²⁷ This provision was drafted in the USSR during a time of high concern about dissidents seeking refuge outside the USSR, but its ongoing application has proved to be problematic and a cause of statelessness following succession. Due to migration for economic opportunities, family reunification and people seeking refuge in other States, many former USSR citizens have resided abroad for many years and are unaware of the need to register with their consulate given the relatively free movement and frequency of movement between republics during the USSR period.

In addition to the legal gaps, we should remember that the socio-economic and political climate in post-succession Central Asia was one of significant turmoil and uncertainty for the people of the region.

²⁶ Constitutional Law of the Republic of Tajikistan on Nationality of the Republic of Tajikistan 1995, Art. 29; Law on Citizenship in the Republic of Uzbekistan 1992, Art. 21; and Law of the Republic of Kazakhstan on Citizenship of the Republic of Kazakhstan 1991, Art. 21(4). These provisions have now been removed from the citizenship laws of Tajikistan and Kazakhstan.

²⁷ Law of the USSR About the Citizenship of the USSR 1990, N 1518-1, Svod Zakonov SSSR, Vol.1. p.47.

The completely unexpected challenges of nation building were superimposed on the transition from a centrally planned to a market-based economy, which had begun in the late 1980s but had little influence on Central Asia before the Soviet economic system began to unravel in 1991[...] Under these multiple adverse conditions, even the ability of the countries to survive was uncertain.²⁸

Social, economic and political issues sometimes manifest themselves in conflict, such as the civil war in Tajikistan between 1992 and 1997. Many of those who fled the country during the conflict were unable to confirm their citizenship when Tajikistan's first citizenship law was adopted in 1995, as presence in the country on the day of adoption of the Constitution was required.²⁹

Another regional trend is that some people who lived in border areas did not confirm or acquire citizenship of a successor State. The reasons for this are similar to those affecting other populations living in border areas around the world. They live across these borders, having links with multiple States, involving frequent travel, and/or cross border marriages. The new division of States may not have been clear to people or they may be excluded from citizenship in both States, as each State claims they belonged to the other.

2.3 Understanding the creation of statelessness in Central Asia following succession

It is argued that the historical, social and political context influence the ways in which laws relating to the acquisition of citizenship are understood and applied, which contributed to the creation of statelessness in Central Asia following the dissolution of the USSR. This suggests that an understanding of the broader context and public attitudes towards citizenship may be significant in preventing and addressing statelessness in future.

Considering the context of the large scale migration that occurred in the USSR and the relatively free movement of border populations between

²⁸ R. Pomfret, *Central Asia Economies Since Independence*, Princeton University Press 2006, p. 1.

²⁹ Constitutional Law of the Republic of Tajikistan on Nationality of the Republic of Tajikistan 1995, Art. 2.

Republics, the problems faced by the newly independent States in defining their initial citizenry becomes apparent. Conflict, and social, economic and political turmoil meant that many people were unable to, or did not prioritise, confirming their citizenship by exchanging their USSR passports. We should also remember that the transition from USSR citizenship to citizenship of the newly independent States was by no means clear cut. Following independence, USSR passports could still be used, formally and informally, as identification documents, even allowing the holder to travel between the former Soviet Republics for several years. For example, the Kazakh government allowed the exchange of USSR passports for Kazakh ones until 1 March 1999, while in practice people could still travel on these documents until 2002.³⁰ Kazakhstan is not an exception here, but is indicative of a larger trend within the Commonwealth of Independent States; USSR passports were accepted as valid documents long after they had ceased to be officially recognised. Therefore, for many people there was not a clear end to USSR citizenship and beginning of the citizenship of the independent States, while the ability to continue to work, access State services and travel on USSR passports meant that the significance of confirming or acquiring citizenship of the newly independent States was unclear to some people.

In Central Asia the experience of USSR citizenship created an understanding of citizenship that was not tied to the nation-state nor strongly linked to place of residence. This understanding of citizenship may have been particularly prevalent because few of those involved had any experience of other forms of citizenship. One result of this was that at the time of the dissolution of the USSR, the population did not understand the significance of citizenship in the context of a world of nation States and were unused to the idea that the individual might have to actively seek or confirm citizenship. Policy and awareness-raising to reduce and/or prevent statelessness needs to account for and address these perceptions and encourage people to act. Even with very inclusive notions of the initial body of citizens following succession, if people do not recognise the importance of confirming or acquiring citizenship and the policy and practice of States fails to provide the population with information on the significance of doing so, statelessness will arise. Central Asian States provide an example of

³⁰ Cabinet of Ministries of the Republic of Kazakhstan, On Approval of Instruction on Passport System in Kazakhstan, 5 April 1993, No. 256.

how this can cause statelessness and the importance of understanding and addressing the various understandings of citizenship held by the population in order to prevent statelessness from the outset.

3. Solutions to statelessness in Central Asia: The example of Kyrgyzstan

To illustrate efforts to reduce statelessness following succession we can draw on the example of Kyrgyzstan. Kyrgyzstan has taken an active, flexible and responsive approach to resolving the issue of stateless former USSR citizens who have not acquired citizenship despite residing in the country for many years. Other States in the region have also made progress in reducing statelessness, for example Turkmenistan has undertaken mobile registration of persons of “undetermined citizenship”, many of whom were stateless former USSR citizens.³¹ The efforts of Central Asian States to reduce statelessness also include stateless persons who are not former USSR citizens. Some of these people, who were born in Central Asia, either did not acquire citizenship at birth or have been rendered stateless later in life. This is a result of the lack of safeguards to prevent childhood statelessness and the lack of safeguards on loss, deprivation and renunciation of citizenship in citizenship laws across the region. Others are stateless migrants or refugees from outside the region.

However, to allow us to consider in detail how successor States can overcome statelessness or prevent it occurring during State succession, this chapter will focus on Kyrgyzstan. It does so by exploring the reformed citizenship law, related policies and their implementation as well as how Kyrgyzstan has addressed the legacy of the USSR, including the understanding of citizenship.

3.1 The causes of statelessness in Kyrgyzstan

The first Law on Citizenship of the Kyrgyz Republic was adopted in December 1993 (1993 Citizenship Law). The 1993 Citizenship Law set out broad criteria which, in theory, recognised the majority of former USSR citizens in the country as Kyrgyz citizens.

³¹ For more detail on the achievements of Turkmenistan, please see, UNHCR, Good Practices Paper - Action 1: Resolving Existing Major Situations of Statelessness, 2015.

Article 1 - The citizens of the Kyrgyz Republic are:

1. persons who belonged to the citizenship of the Kyrgyz Republic as at the date of its adoption of the Declaration of the State Sovereignty of the Kyrgyz Republic (December 15, 1990) and have not yet stated that they belong as citizens of another state;
2. persons who belonged to the citizenship of the Kyrgyz Republic according to the procedures established with the Law upon the adoption of the Declaration of the State Sovereignty of the Kyrgyz Republic and have not lost it at the time when this Law is enforced;
3. persons who obtained the citizenship of the Kyrgyz Republic according to the provision of this Law.³²

A *propiska* in a USSR passport indicating residence in Kyrgyzstan, or a birth certificate showing birth on the territory, were required as proof that a person “belonged to the citizenship of the Kyrgyz Republic” upon adoption of the Declaration of the State Sovereignty of the Kyrgyz Republic in 1990.³³ Problems arose for people born and raised in Kyrgyzstan who migrated between the former Soviet Republics during or immediately after independence (and so had a *propiska* in another Republic). Because of this they were unable to acquire Kyrgyz citizenship. Some of these persons were also unable to acquire citizenship from other States with which they had links and so became stateless. Other people missed the deadline for confirming their Kyrgyz citizenship or had lost the USSR documents needed to confirm their claim to Kyrgyz citizenship.

There were also problems in the implementation of the 1993 Citizenship Law. As mentioned previously this was a time of significant socio-political and economic turmoil and uncertainty, meaning that some people were unaware of the importance of exchanging their passports or were unable to do so. Some people lived too far away from

³² Law on Citizenship of the Kyrgyz Republic (as amended by the Law of the Kyrgyz Republic of 25 July 2002 No. 130) 1993, 1333-XII.

³³ Refugees International, Kyrgyz Republic: Powerful neighbors imperil protection and create statelessness, Reliefweb 2007.

registration offices to be able to make the journey, whether due to the cost of travel, the lack of transportation, or the inability to take time out from their work or household responsibilities.³⁴ Due to the fines for late confirmation, those who delayed were sometimes unable to afford the cost of confirmation.³⁵ In other cases people were unaware of the importance of confirming their citizenship by the cut-off date, which is understandable since they could continue to use their USSR passports as an identity document post-succession in addition to the general instability and uncertainty surrounding the State formation. As a result of these factors, as in other States in the region, a significant *in situ* stateless population was created and the initial law and policy on citizenship failed to prevent or resolve this.

3.2 Citizenship law and policy reform in Kyrgyzstan

It soon became apparent to the government of Kyrgyzstan that the system of confirming or acquiring citizenship was not achieving the desired results and a significant number of former USSR citizens residing in the country had become stateless. It was recognised that to address post-succession statelessness required both legal reform and policies sensitive to the reasons for people not confirming their citizenship.

In 2007 Kyrgyzstan enacted the relevant legal changes with the adoption of the Law on Citizenship of the Kyrgyz Republic (2007 Citizenship Law).³⁶ This was supplemented by a new Regulation on Procedures to Consider Issues of Kyrgyz Republic Citizenship, which specifies how the law is to be implemented.³⁷ The 2007 Citizenship Law significantly broadens which stateless former USSR citizens are automatically considered citizens of Kyrgyzstan and simply requires these individuals to complete an administrative procedure for issuance of a Kyrgyz passport (which is considered proof of citizenship). The 2007 Citizenship Law notes in Article 5(2) that:

³⁴ UNHCR Central Asia, Ending Statelessness, Newsletter Issue 7, 2014.

³⁵ *Ibid.*

³⁶ Law of the Kyrgyz Republic on Citizenship of the Kyrgyz Republic 2007.

³⁷ Regulation on the Procedure for Considering Issues of Citizenship of the Kyrgyz Republic, 10 August 2013, Resolution Number 174.

Citizens of the Kyrgyz Republic are: persons who used to be USSR citizens and who have lived continuously for the previous five years on the territory of the Kyrgyz Republic and [...] have not made any application regarding belonging to the citizenship of another state.³⁸

By automatically considering former USSR citizens who have not applied for citizenship of another State and have been living in the country for five years as citizens and not requiring a USSR passport as proof of the place of residence pre-succession, Kyrgyzstan has managed to overcome many potential barriers to resolving these cases. For example, these people are exempt from criteria for naturalisation to which other stateless persons are subject.³⁹ Stateless former USSR citizens can therefore approach the relevant authorities who will determine if the person meets the criteria to be considered as a Kyrgyz citizen and issue documentation confirming this. With the residency requirements for a stateless former USSR citizen being five years' residence before applying to the Internal Affairs agencies, rather than a requirement of residence after approaching the authorities, people's statelessness can be resolved quickly.

Assessment of the applications is done at a local level through a Conflict Commission, later named the Commission on Citizenship Determination. Decentralising this decision-making has increased the speed at which these applications can be processed, with a decision reached no later than one month after the person submits their documents. The administrative penalties for late registration of citizenship have been removed and only a minimal fee remains as a means of encouraging people to look after their documents. However, this fee is waived for those who are unable to afford it.

The amendments and reforms did not, however, end there. Recognising the difficulties that some stateless former USSR citizens have in establishing that they meet the criteria for Kyrgyz citizenship, Presidential Decree 473 includes flexible requirements for what is to be considered proof that a person has been residing in the country

³⁸ Law of the Kyrgyz Republic on Citizenship of the Kyrgyz Republic 2007.

³⁹ *Ibid.*, Art. 13 states that the criteria for naturalisation included knowledge of the State or official language sufficient for communication, proof of source of subsistence and commitment to comply with the Constitution and legislation of the Kyrgyz Republic.

for five years.⁴⁰ Following this Decree, when applying for confirmation of citizenship the applicant has to bring their USSR passport or a notification that they have lost it. Both those with a USSR passport and those without have to provide a detailed biography, two photographs and documentation showing that they have been permanently residing in the country for five years. The 2007 Citizenship Law and aforementioned procedures have enabled the majority of stateless former USSR citizens in the country to confirm their citizenship; between 2009 and 2012 nearly 45,000 such persons received confirmation of their Kyrgyz citizenship.⁴¹

The success in Kyrgyzstan has been due to the political will of the State to address the issue and to the fact that law and policy reforms were responsive, flexible and based on an understanding of the needs, concerns and barriers faced by the population they aimed to assist. Since the 2007 Citizenship Law entered into force, the Kyrgyz Government has collaborated with civil society and international organisations to find ways to implement the law and policies on citizenship to reduce statelessness. In collaboration with the government, UNHCR commissioned Kyrgyz civil society organisations to conduct three field studies in 2007 and 2008 to gain a better understanding of the remaining problems. These studies provided crucial information for the development of by-laws and administrative procedures relating to citizenship and documentation, which enabled more stateless former USSR citizens to confirm their Kyrgyz citizenship. It was noted that despite the law reform, stateless former USSR citizens faced a range of barriers to confirming their Kyrgyz citizenship. One such barrier was that they did not have the right identity documents to establish their eligibility for citizenship through the improved legal framework. Furthermore, many people remained unaware of the legal reforms that would enable them to resolve their situation. This problem was particularly prevalent in remote areas and among older persons. Other participants noted that they were aware of the reforms, but were unable to reach regional registration centres or could not afford the fees related to confirmation of citizenship.

Realising that some people could not meet the evidentiary requirements, more flexible criteria have been implemented through

⁴⁰ Presidential Decree of the Kyrgyz Republic 473, Regulation on Procedures to Consider Issues of Kyrgyz Republic Citizenship, 25 October 2007.

⁴¹ UNHCR, Good Practices Paper - Action 1, *supra* n31.

paragraph 53 of the 2013 Citizenship Regulation which grants the Commission for Citizenship Determination greater flexibility in the documents they can accept as proof of residence.⁴² The documents which may now be considered as proof of residence in Kyrgyzstan include a USSR passport with a *propiska* for Kyrgyzstan, a USSR military service book, certificates from places of work, diplomas from educational institutions and other certificates from the place of residence. Testimony from a residence committee or village chief, with the participation of a district police officer and three neighbours of the individual concerned, is also included as a possible form of evidence of habitual residence if the person has no other form of proof.⁴³ This flexibility has allowed many stateless former USSR citizens, who had not previously been able to confirm their citizenship, to do so.

To overcome issues related to access and lack of awareness, the government, supported by UNHCR and civil society, undertook nationwide information campaigns to raise awareness among the population explaining the changes in the procedures, the waiving of fines, the new evidentiary standards and the importance of confirming citizenship. This sustained effort led to the majority of the remaining stateless former USSR citizens confirming their citizenship. However, some stateless former USSR citizens still faced the issue of access to the registration centres to exchange their documents. Many of these people live in very remote areas and would have to spend a significant amount of time and money to reach the regional registration authority. In some instances their remoteness also meant they were not informed about the possibility of confirming their citizenship as the information campaigns did not reach them.

In response to this, mobile registration centres were established in 2014 and ran until 2016. These centres covered the entire country to ensure that as many people as possible had the opportunity to confirm their citizenship. The registration was organised to ensure that the majority of people could access the mobile registration centres. For example, the location of and distance between remote villages was mapped. Starting at the most remote places the teams then moved towards regional centres. Doing so meant that people who were not

⁴² Regulation on the Procedure for Considering Issues of Citizenship of the Kyrgyz Republic, Resolution Number 174, 10 August 2013.

⁴³ *Ibid.*

able to access the mobile registration centres while they were nearby were able to use local transport to get to the next registration site (as transport links to regional centres are better than between remote villages). The dates and locations of the mobile registration sites were widely disseminated in local communities well in advance of the team's arrival. A related information campaign informed individuals of the importance of exchanging their passports as well as the dates and location of the mobile registration sites. Local television advertisements (in multiple languages, including the language of neighbouring States in border areas) proved particularly effective. Posters in local transport hubs, local village centres and buses were also used. Local village leaders were informed and encouraged to spread the word among their community. Such individuals were often able to target individuals who were known to be stateless. All parts of the information campaign gave the details of an NGO legal aid call centre which provided more information.

Rather than tackle the problem at a national level, the country was divided into regions which were dealt with in turn by the registration campaign. This meant that the information campaign could be further targeted and resources could be focused by working closely with the local community in each region before and during the registration. This also allowed the capacity of local registration authorities and the regional offices of the Commission on Citizenship Determination to be bolstered for specific periods of time during registration in their area. With a large number of applications being received, it was crucial that these bodies had the human resources to cope with the increased demand.

3.3 Summarising the solutions to statelessness in Kyrgyzstan

The achievements of Kyrgyzstan can be summarised as the continuous development of law and policy, responding to the causes of statelessness following succession from the USSR. Once the government became aware of the prevalence of stateless former USSR citizens who had failed to confirm their Kyrgyz citizenship, the first step was law reform. However, even with a legal basis that provided a theoretical solution for these people, new policy guidelines on the implementation of this law had to be developed and reformulated based on research with the population in question. This shows that policies to implement the law have to be sensitive to the situation of those affected; in Kyrgyzstan a

combination of lack of documents, lack of information and the inability to access the relevant authorities.

It is also important to note the timing of efforts to address statelessness; by 2007 it was becoming clear to many of the stateless former USSR citizens that their old USSR citizenship documents no longer provided access to services on a par with Kyrgyz citizens. USSR passports were no longer widely accepted as proof of identity and the lack of valid documentation was increasingly impacting peoples' daily lives and their aspirations for the future.

Therefore, the achievements of Kyrgyzstan cannot simply be explained by looking at law reform, but also require us to consider the efforts of the Kyrgyz government to engage with the population and develop policies that made confirmation of citizenship accessible. By acknowledging the variety of factors that caused statelessness following State succession, Kyrgyzstan was better placed to address the issue, and as a consequence, is near to resolving all cases of post-succession statelessness.

4. Preventing and resolving statelessness in cases of State succession

The impact of succession on citizenship and statelessness has been of interest to the international community since before the dissolution of the USSR, for example during decolonisation in the 1960s and 1970s. More recently we have seen problems arising with the dissolution of the Socialist Federal Republic of Yugoslavia in the early 1990s, the division of Ethiopia and Eritrea in 1993 and of Sudan and South Sudan in 2011.

To counter the risk of statelessness during State succession, the 1961 Convention on the Reduction of Statelessness (1961 Convention) provides that:

Article 10.

1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that

any such treaty made by it with a State which is not a party to this Convention includes such provisions.

2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.⁴⁴

The United Nations General Assembly resolution 55/153 on the International Law Commission's Articles on the Nationality of Natural Persons in Relation to the Succession of States (ILC Articles on Nationality),⁴⁵ and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession⁴⁶ set out more detailed standards on the prevention of statelessness in these situations. Both the ILC Articles on Nationality and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession note that States should take "all appropriate measures" to prevent statelessness.⁴⁷ "All appropriate measures" should include a truly contextualised consideration of relevant legal provisions and their implementation. Where possible, clear agreement on the parameters for "appropriate measures" should also be set out in bilateral or multilateral treaties between successor States to ensure there are no gaps in the international cooperation on citizenship, especially for populations living across the new borders.

As these standards indicate, there is agreement on the need for watertight legal provisions that prevent people being rendered stateless during State succession. States should ensure that the risk of statelessness is minimised through the signing of bilateral or multilateral agreements and, where this is not possible, grant citizenship to those who would otherwise be stateless. Such arrangements should be

⁴⁴ Convention on the Reduction of Statelessness (1961 Convention), 30 August 1961, entry into force 13 December 1975, 989 UNTS 175, Art 10.

⁴⁵ International Law Commission, Articles on Nationality of Natural Persons in Relation to the Succession of States (With Commentaries), 3 April 1999, Supplement No. 10 (A/54/10).

⁴⁶ Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, 15 March 2006, entry into force 1 May 2009, CETS 200.

⁴⁷ International Law Commission, *supra* n45, Art. 4 and Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, *supra* n46, Art. 3.

included in the citizenship laws and policies of new States, providing a foundation for the prevention of statelessness during succession.

Such legal provisions need to be supplemented with policy and practice that is sensitive to broader historical, economic, political and socio-psychological considerations which, as reflected in Central Asia, are an important part of how law is received and how it takes effect. Such a contextualised view will make these legal provisions more effective in preventing and reducing statelessness. Based on the experience of Central Asia, the following are suggested as key considerations for those attempting to prevent or reduce statelessness in cases of State succession.

4.1 The population's perception of citizenship

The first of these considerations is the perception of citizenship by the population in question. We do not have an equivalent of the USSR in today's world, with its citizenship of a union of States rather than a specific nation-state. Nevertheless, we can still learn from this example that populations do not necessarily think of citizenship or understand its importance in the same ways as those developing citizenship law and policy. If a person has a citizenship, they often do not perceive its significance and impact on their daily lives or give thought to other forms or conceptions of citizenship or, indeed, life without a citizenship. This is especially true for those living in remote or rural areas who have little interaction with the State or those who live close to and move freely across State borders. It cannot, therefore, be assumed that a population affected by State succession share or understand the international legal understanding of citizenship.

This is important because the understanding of citizenship by the population has an impact upon the effectiveness of laws and policies which seek to prevent or reduce statelessness. The perception of citizenship is especially important in cases where a person is required to take active steps to confirm or acquire citizenship.⁴⁸ Even with the political will of States and a legal foundation which should ensure the avoidance of statelessness during State succession, if people are not aware of the importance of confirming or acquiring citizenship of one

⁴⁸ Based on personal interviews, observations and experiences with stateless people in Central Asia between 2014 and 2015.

or other successor State, the law may prove only partially effective in preventing statelessness. As we can see from the example of Kyrgyzstan, it was only decades after succession and the end of USSR citizenship that many people realised they were stateless, because it began to have a direct impact on their lives. It was at this point that the importance of citizenship became apparent to these people, though they were unaware of the law and policy reforms that allowed them to resolve their status or faced barriers in so doing.

Overcoming this lack of awareness of the importance of confirming or acquiring citizenship requires States to understand and actively engage with their population, setting out clearly and persuasively the importance of confirming citizenship. This may require information campaigns that target specific groups' concerns, such as those in border or remote areas. Where individuals have to make a decision on which citizenship they wish to acquire, this will involve two or more States cooperating and sharing information with the population in question. In situations where succession is caused by, or results in, animosity between the successor States, such cooperation may not be realistic. In such cases, States should recognise these difficulties and develop laws and policies which seek to overcome them. Article 10(2) of the 1961 Convention notes that States who transfer or acquire territory should grant citizenship automatically to those on their territory who would otherwise be stateless. Where States do not grant citizenship automatically but require individuals to confirm or acquire citizenship, this may necessitate transitional provisions permitting the use of documentation from the predecessor State for an extended period of time.

One means of overcoming many of these problems is through legal provisions that automatically grant citizenship to those in a State's territory who would otherwise be stateless. Such provisions overcome the need to inform and persuade the population to take steps to acquire or confirm their citizenship and provide a strong safeguard against statelessness following succession. This does not necessarily mean that the population would not have a choice in determining their fate. Legal provisions could provide for the possibility of opting out of the automatic grant of citizenship for those persons who secure citizenship of another State. Such provisions would provide an element of choice for the population, while maintaining strong safeguards against statelessness.

4.2 Transitional provisions which 'blur' citizenship

The blurring of citizenship during succession can be seen in the case of the USSR and, more recently, during the succession of Eritrea from Ethiopia. Although Ethiopian law does not permit dual citizenship, during the referendum and succession of Eritrea both countries agreed that "until the issue of citizenship is settled in both countries, the traditional rights of citizens of one side to live in the other's territory shall be respected".⁴⁹ As a result many of those who would later have to confirm or acquire their citizenship were for a while *de facto* citizens of one State or the other. This was a pragmatic and largely beneficial provision, allowing people to continue their lives as *de facto* citizens until a decision was reached on how citizenship of the two States was to be arranged. This is similar to the way stateless former USSR citizens were able to use their pre-succession documents as travel documents and to access State services for a period after succession. This blurring of citizenship can also be seen in the European Convention on Nationality, which stipulates that non-nationals of a predecessor State who are habitually resident in a territory which is transferred to a successor State and who do not acquire the citizenship of the successor State should have the right to remain in that State and should be allowed to enjoy the same social and economic rights as nationals.⁵⁰

There are several advantages and disadvantages in allowing people to continue to use their pre-succession documents and/or effectively be considered as *de facto* citizens for a period of time following succession, especially where confirmation or acquisition of citizenship is required. Among the advantages are that it allows individuals who have not confirmed their citizenship to avoid the day-to-day problems of statelessness. In cases where the individual may choose which citizenship they wish to acquire it allows States time to provide the information needed for the population to make an informed decision. It also gives the population time to make arrangements to move to another country if they chose to so do, as well as allowing time for the confirmation of citizenship where individuals have other competing priorities.

⁴⁹ K. Southwick, "Ethiopia-Eritrea: statelessness and State succession", *Forced Migration Review* 2009, Issue 32, p. 15.

⁵⁰ European Convention on Nationality, 6 November 1997, entry into force 1 March 2000, ETS 166, Art. 20 (1) (a),(b).

Where succession entails socio-economic and political turmoil, allowing people to continue to use their pre-succession documents or continue to live as *de facto* citizens may be necessary. Depending on the causes and type of succession, State succession can cause a loss of confidence in the successor State – particularly where the succession is the result of armed conflict or follows occupation. This in turn may lead people to question the legitimacy or worth of confirming or acquiring citizenship of the new State.⁵¹ Conflict also often leads to a reduction in the ability of the State to function, including those agencies who confirm citizenship, and time may be required to rebuild capacity in this area. Allowing people to live as *de facto* citizens and/or continue to use pre-succession documents gives the State time to prepare for large numbers of people seeking to confirm their citizenship as well as allowing time to formulate laws and policies with regard to citizenship. This is likely to be particularly useful where succession is unplanned and/or abrupt.

However, drawing on the experience of Central Asia, there are also disadvantages to transitional forms of status. Allowing people to continue to use pre-succession documents can be a disincentive for people to act to rectify their citizenship status. The perception that they will be able to continue using their old documents indefinitely can be difficult to overcome.⁵² Doing so requires considerable effort and resources to provide information about deadlines for confirming citizenship. The population should also be informed of the impacts of not confirming or acquiring citizenship and, where populations are too remote to reach the relevant authorities, the authorities must go to them. While this may be less problematic in urban areas, in remote rural areas, where some people have very little contact with State services, it can prove a real challenge.

Allowing people to continue to use their pre-succession documents or be considered *de facto* citizens pending their confirmation or acquisition of a citizenship is a temporary measure. A deadline for confirmation of citizenship and the development of incentives and disincentives for so doing are still needed. From the Kyrgyz example it seems clear that once the benefits of confirming or acquiring citizenship

⁵¹ Based on personal interviews, observations and experiences with stateless people in Central Asia between 2014 and 2015.

⁵² *Ibid.*

are made clear to the population and their access to these services is facilitated, including waiving fines and, in certain circumstances, fees, cases of post-succession statelessness can be effectively resolved. By contrast, the previous policy which imposed fines for late application served as a disincentive for people to come forward if they failed to meet the initial deadline.

4.3 Ensuring that no child is born stateless, halting the perpetuation of statelessness

The creation of statelessness during State succession does not just impact the population at that time, but is often passed on to the next generation. This is an issue that can be seen across the former USSR. For example, in Estonia and Latvia, which still host large stateless populations resulting from succession from the USSR (in these States these persons are commonly referred to as “non-citizens” or “persons of undetermined citizenship”), the lack of safeguards to prevent childhood statelessness have meant that:

Today, a quarter of a century after dissolution [from the USSR] and long after anyone who was already alive at the time has attained adulthood, statelessness continues to affect children in countries of the former Soviet Union. According to the most recent figures, there are 7,846 stateless children in Latvia and 936 in Estonia [...] Both states’ nationality laws exhibit flaws that have allowed children born in the territory to parents left stateless upon independence to inherit their parents’ statelessness.⁵³

The United Nations Convention on the Rights of the Child obliges States to ensure that every child has the right to acquire a citizenship.⁵⁴ Safeguards specifically designed to prevent childhood statelessness following State succession can be found in both the ILC Articles on Nationality, which note “[a] child of a person concerned, born after the date of the succession of States, who has not acquired any nationality, has the right to the nationality of the State concerned on whose

⁵³ European Network on Statelessness, *No Child Should Be Stateless*, 2015, pp. 5 and 13.

⁵⁴ Convention on the Rights of the Child, 20 November 1989, entry into force 2 September 1990, 1577 UNTS 3, Art. 7.

territory that child was born”⁵⁵ and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, which stipulates that children born on the territory of the State, whose parent, at the time of State succession, had the citizenship of the predecessor State, should automatically acquire the State’s citizenship at birth, if that child would otherwise be stateless.⁵⁶

For this reason, when devising or reforming citizenship law and policy in cases of State succession, States should include provisions on access to citizenship for children born on their territory or born abroad to their citizens. International and regional law sets out obligations and guidance for States in ensuring that no child is born stateless, or remains stateless for a prolonged period of time.⁵⁷ Furthermore to ensure that “all appropriate measures” have been taken to avoid statelessness during State succession, States should also consider potential problems with documentation, in particular that demanding birth registration as proof of place of birth and parentage may not be reasonable where disruptions and reduced State capacity have affected the birth registration system.

An appreciation of the difficulties faced by populations in providing proof of eligibility for citizenship following succession and how States should seek to accommodate these through appropriate policy is included in the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, which stipulates that:

A successor State shall not insist on its standard requirements of proof necessary for the granting of its nationality in the case of persons who have or would become stateless as a result of State succession and where it is not reasonable for such persons to meet the standard requirements.⁵⁸

⁵⁵ International Law Commission, *supra* n45, Art. 13.

⁵⁶ Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, *supra* n46, Art. 10.

⁵⁷ 1961 Convention, *supra* n44, Arts. 1 and 4 set out States’ obligations with regard to the prevention of stateless for children who would otherwise be stateless born on their territory or born abroad to their nationals. European Convention on Nationality, *supra* n50, Art. 6(2) sets out States’ obligations toward preventing childhood statelessness.

⁵⁸ Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, *supra* n46, Art. 8(1).

5. Conclusion

This chapter has looked at the causes of statelessness in Central Asia following the dissolution of the USSR and the efforts to resolve this situation. From this it has drawn out the advantages and disadvantages of some of the strategies adopted and suggested questions which it may be useful to consider in other cases of statelessness resulting from State succession. It has highlighted that laws and policies which aim to prevent and reduce statelessness in cases of State succession are most effective when they are built around an understanding of broader historical, economic, political and socio-psychological considerations. In the case of the dissolution of the USSR, such an understanding has to consider the nature of USSR citizenship, mass migration within the USSR, the transitional blurring of citizenship and the socio-economic and political turmoil that followed succession.

The challenges faced by States in ensuring the prevention of statelessness in cases of State succession seem daunting. However, many problems can be avoided if citizenship is granted automatically, without the need for confirmation. Providing an opt-out option which has appropriate safeguards to prevent people rendering themselves stateless accommodates cases where individuals have a link to two or more successor States. With regard to reducing statelessness following State succession, lessons can be drawn from the experience of Kyrgyzstan. This country's success is due to the fact that Kyrgyzstan's law and policy reforms were responsive and flexible and evolved based on a developing understanding of the needs, concerns and barriers that the population faced in confirming their citizenship. This approach has enabled Kyrgyzstan to move towards closing the chapter on statelessness that resulted from succession from the USSR.

Ensuring that people act to confirm or acquire citizenship can be problematic and resource intensive. States should undertake all appropriate measures to avoid statelessness in cases of State succession. Pragmatically, this means that States should be sensitive to the way in which citizenship and its importance are understood by the population and consider the impact this will have on the effectiveness of law and policy. Where people are required to confirm their citizenship, States must weigh up the advantages and disadvantages of policies such as the transitional blurring of citizenship, the implementation of deadlines for confirmation of citizenship, incentives and disincentives to encourage people to confirm their citizenship and how to ensure

the population are well informed about procedures for resolving their citizenship status. Furthermore, States should be aware that some of the population may fail to understand the importance of confirming their citizenship. This is reinforced by instances where people can continue to use pre-succession documents or are considered as *de facto* citizens for a certain period of time after succession.

Automatic acquisition of citizenship without the requirement of confirmation provides a means to avoid many of the post-succession challenges mentioned in this chapter. Whether citizenship is automatic or not, safeguards to prevent statelessness being passed on to the next generation should also be introduced. Such safeguards ensure that even if people fail to confirm or acquire a citizenship, their statelessness is not passed to their children.

This chapter has argued that an understanding of the relevant historical, economic, political and socio-psychological factors can help ensure that laws and policies are responsive, flexible and adapted to the particular situation they aim to address. Such considerations may help States identify and implement all appropriate measures to prevent and reduce statelessness during State succession and its aftermath. Combined with legal safeguards, this sensitivity to the context will help to combat mass statelessness resulting from future State succession and could contribute to resolving existing cases.

12. The search for solutions to statelessness in Southeast Asia: State practice and recent developments

*Nicholas Oakeshott*¹

1. Introduction

On 4 November 2014, António Guterres, who was then the United Nations High Commissioner for Refugees,² launched his Office's Campaign to End Statelessness within 10 years and an accompanying Global Action Plan,³ with an imperative and moral call on States to act:

Statelessness is a profound violation of an individual's human rights. It would be deeply unethical to perpetuate the pain it causes when solutions are so clearly within reach. This Global Action Plan sets out a strategy to put a definitive end to this

¹ Regional Protection Officer (Statelessness), Regional Office for Southeast Asia, UNHCR. The analysis in this chapter has benefited from many interesting discussions over the years with numerous UNHCR colleagues, in particular Ms. Bongkot Napaumporn. The proceedings of the Regional Workshops that the ASEAN Intergovernmental Commission on Human Rights and Viet Nam's Representatives to the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children have respectively co-hosted with UNHCR have provided a window into the complex challenge that States face in realising the right to as nationality in the region. Conversations with academics and researchers have been thought-provoking, most notably at the Workshop on Researching Statelessness and Citizenship in Asia and the Pacific co-hosted by UNHCR and the University of Melbourne on 27-29 January 2016. Members of Civil Society who are committed to improving the situation of communities affected by statelessness in Southeast Asia have provided important insights, including Chris Lewa (The Arakan Project), Nanthini Romalo and Suravanan Sinapan (Development of Human Resources in Rural Araes (Malaysia)). Any views expressed are solely those of the author and do not necessarily reflect those of UNHCR, the United Nations or its Member States. Any errors remain the sole responsibility of the author.

² Hereinafter "UNHCR".

³ UNHCR, Global Action Plan to End Statelessness: 2014 - 2024, 2014. Hereinafter "GAP".

human suffering within 10 years. I count on your support to help make this ambitious goal a reality.⁴

The Campaign and the GAP are premised on the notion that the “end” or “solution” to statelessness is the acquisition of a nationality. It is the lack of enjoyment of the right to a nationality itself which is “a profound violation of an individual’s human rights” and must be remedied. UNHCR’s website is unequivocal about the Campaign’s goal for people who are currently stateless:

There is one solution for statelessness – acquisition of nationality, usually of the country with which stateless people have the strongest ties⁵.

The GAP indicates that to achieve the Campaign’s goal initiatives should be focused on three priorities: “resolve existing major situations of statelessness; prevent new cases of statelessness from emerging; and better identify and protect stateless populations”.⁶ These priorities were said to be achievable if States, supported by UNHCR, international organisations and civil society, consider implementing 10 key actions, adjusted as appropriate to national contexts.⁷ States were also encouraged to adopt National Action Plans for this purpose.⁸

For the High Commissioner’s “ambitious goal” of ending statelessness within 10 years to be achieved, States in Southeast Asia⁹ would need to be a key area of focus for two key reasons. First of all, UNHCR’s statistics relating to persons of concern under its statelessness mandate,¹⁰ published a few months after the launch of the Campaign,

⁴ *Ibid.*, pp. 2-3.

⁵ UNHCR, How UNHCR helps Stateless People, <http://www.unhcr.org/how-unhcr-helps-stateless-people.html>.

⁶ UNHCR, GAP, *supra* n3, p.4.

⁷ For an overview of the GAP’s 10 actions, see R. Govil, “The Sustainable Development Goals and solutions to statelessness”.

⁸ UNHCR, GAP, *supra* n3, p.5.

⁹ For the purposes of this chapter, Southeast Asia is defined as being ASEAN’s Member States, namely Brunei Darussalam, Cambodia, Indonesia, Lao People’s Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

¹⁰ Note that these statistics include stateless persons, *de facto* stateless persons and persons of undetermined nationality. They do not include refugees or internally displaced persons who are also stateless persons, who are reported

showed that over 40 per cent of those counted resided in this region. In addition, there were two countries in respect of which UNHCR had information about stateless persons but no reliable statistical data was available.¹¹ UNHCR (and the GAP itself) openly recognised that comprehensive statistics on the number of persons of concern under UNHCR's statelessness mandate were not yet available (including with regard to refugees who are also stateless).¹² However, the force of the existing numbers called for concentrated action in Southeast Asia.¹³

Secondly, and of equal or greater measure, was the situation of the community that self-identifies as Rohingya predominantly in Myanmar and the emphasis that the international community has placed over decades on the need to improve respect for their human rights and resolve their nationality status.¹⁴ The importance of finding solutions for this situation was highlighted by the regional and global focus on the "maritime crisis" in the Andaman Sea and the Bay of Bengal in May and June 2015, including the recognition by States in Southeast Asia of the need to address the root causes of the displacement.¹⁵

However, challenging questions arise about how and in what way progress towards the goal can be achieved in Southeast Asia by those seeking to realise UNHCR's vision. The 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness remain "orphan Conventions" in the region.¹⁶ Only one State is a Party to either of the Statelessness Conventions; the

in other tables. See UNHCR, *UNHCR Handbook*, Chapter 4: Annual Statistical Report, Section 6.8, pp. 15-17.

¹¹ UNHCR, *UNHCR Statistical Yearbook* 2013, 2015, pp. 78-80.

¹² UNHCR, *UNHCR Statistical Yearbook* 2014, 2015, pp. 101-102.

¹³ UNHCR, Executive Committee of the High Commissioner's Programme, Sixty Sixth Session, Update on UNHCR's Operations in Asia and the Pacific, 2015, <http://www.unhcr.org/excom/excomrep/560505949/update-unhcrs-operations-asia-pacific.html>, p. 4.

¹⁴ See, for example, UN Human Rights Council, Resolution 25/26, *The Situation of Human Rights in Myanmar*, 15 April 2014, A/HRC/RES/25/26, para. 10. For a critical view of the response of the International Community to this situation, see K. Southwick "Preventing Mass Atrocity Crimes Against the Rohingya in Myanmar: A Call for Solutions", *Journal of International Affairs* 2015, Vol. 68(2), pp. 137-156.

¹⁵ UNHCR, *South-east Asia: Mixed Maritime Movements*, 2015.

¹⁶ UNHCR, *Information and Accession Package: The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness*, 1999, para. 5.

Philippines ratified the 1954 Convention in 2011 having been one of the original signatory States. By way of comparison, there are two States in Southeast Asia that are Parties to the 1951 Convention relating to the Status of Refugees; Cambodia and the Philippines. The prospects of further accessions to the Statelessness Conventions in the region in the short to medium term appear limited, with only one State having made a so far unfulfilled accession pledge at the 2011 Ministerial Intergovernmental Event on Refugees and Stateless Persons.¹⁷ In contrast to some other regions, progress on ending statelessness in Southeast Asia is therefore unlikely to be made by concentrating on the promotion of accession to the Statelessness Conventions.¹⁸

This chapter will suggest some reasons why important steps towards UNHCR's vision have nonetheless been possible and how further progress could be achieved. It is divided into three parts. The first part will set out an overview of the causes and consequences of statelessness in Southeast Asia, the profiles of communities affected by statelessness and the way in which the issue is considered. The second part will discuss a number of approaches that States in the region, sometimes in partnership with civil society and or UNHCR, have taken to address statelessness and related matters. It will also examine the potential role and contribution of regional bodies or initiatives. These examples will help to highlight a number of issues of international law or UNHCR doctrine that may deserve further examination. In the third part, some conclusions will be drawn from the discussion, which could inform further progress in the region, including in Myanmar, and, potentially, beyond. At the outset it is worth noting that there has been another recently published consideration of how to end statelessness in Southeast Asia, which has come to a number of similar as well as some different conclusions.¹⁹

¹⁷ The Philippines pledged to "[i]nitiate the process of accession to the 1961 Convention on the Reduction of Statelessness", see, UNHCR, Ministerial Intergovernmental Event on Refugees and Stateless Persons - Pledges 2011, 2012, p.105.

¹⁸ UNHCR, Good Practices Paper – Action 9: Acceding to the UN Statelessness Conventions, 2015.

¹⁹ See, M. Caster, Eliminating Statelessness in Southeast Asia, *The Diplomat*, 24 May 2016, <http://thediplomat.com/2016/05/eliminating-statelessness-in-southeast-asia>.

2. An overview of statelessness in Southeast Asia

In February 2015, three months after the High Commissioner's launch of the Campaign, UNHCR reported that 1,393,739 persons of concern under the statelessness mandate resided in Southeast Asia. UNHCR's statistics indicated that there are four countries in this region which hosted major non-refugee stateless populations when the Campaign was launched, namely Brunei Darussalam, Malaysia, Myanmar and Thailand.²⁰ Existing populations of concern under the statelessness mandate whose size is unknown reside in Cambodia and Indonesia.²¹ Statelessness in the region has many underlying and historic causes including the establishment of modern, post-colonial States and recognised national borders alongside the formation of national identity. Other contemporary challenges also have an impact such as the treatment of minorities, the management of large-scale undocumented migration and developing stronger institutions and governance.

The majority of the populations of concern under UNHCR's statelessness mandate in the region live in protracted situations in the country in which they were born and have always resided. From the point of view of the norms of international human rights law they are living in their "own country". UNHCR uses the term "*in situ* stateless persons" to describe these populations.²² They are usually ethnic minorities. It is important to recognise that these *in situ* populations are not migrants even if their ancestors may have originally migrated from the territory of other countries within or outside Southeast Asia. Parents as well as children will often be stateless. For these populations, the country in which they were born and reside is likely to be the primary, and often only, State that could be responsible for realising their right to a nationality.²³ It will also almost always be the country with which they have the "strongest ties". Acquiring that country's nationality is therefore the most likely solution to their statelessness.²⁴

The fact that these communities are not themselves migrants and have lost or never had any link to another country by which

²⁰ UNHCR, GAP, *supra* n3, p.7.

²¹ UNHCR, Statistical Yearbook 2013, *supra* n11, pp. 78-80.

²² UNHCR, Handbook on Protection of Stateless Persons, 2014, para. 1.

²³ *Ibid.* para. 18 and UNHCR, GAP, *supra* n3, p. 10.

²⁴ UNHCR, How UNHCR helps Stateless People, *supra* n5.

nationality could be established has meant that States have adopted policy responses to their situation which are not usually based in migration management. Rather progressive policies have focused on civil registration, the provision of identity documentation, access to rights, legal status and, in some cases, amending nationality laws to prevent and reduce statelessness. Although these communities are at risk of being perceived as outsiders or migrants and can sometimes be vulnerable to immigration enforcement measures as a result, it is often the Government bodies who are responsible for civil registration and nationality, rather than those responsible for immigration control, that are responsible for managing their situation. In this way their treatment is different from refugees or stateless persons who have recently migrated.

Mirroring established provisions in international human rights law²⁵ the ASEAN Human Rights Declaration recognises the rights of people “living in their own country” to freedom of movement. It provides that “[e]very person has the right to leave any country including his or her own, and to return to his or her country”.²⁶ However the extent to which this provision is realised at a national level varies, reflecting the spectrum of protection and integration offered by States to these populations.

The community which self-identifies as Rohingya are at one end of that spectrum. They also comprise the largest refugee population in the region, with large numbers having fled abroad by boat, often risking their lives in the process.²⁷ In contrast, registered stateless people in Brunei Darussalam, Singapore and Thailand enjoy significantly greater protection. For example, in Brunei Darussalam access to subsidised healthcare and education is available to stateless “Permanent Residents” or holders of a “Certificate of Identity”, which Travel Documents also allow them to leave and return to the country.²⁸

²⁵ International Covenant on Civil and Political Rights, Art. 12 (2) and (4).

²⁶ ASEAN, ASEAN Human Rights Declaration, 18 November 2012, Art. 15 (hereinafter “the AHRD”) and the Phnom Penh Statement of Adoption, 19 November 2012.

²⁷ UNHCR, South-east Asia: Mixed Maritime Movements, 2015.

²⁸ United States Department of State, 2015 Country Reports on Human Rights Practices - Brunei, 2016.

The technical causes of statelessness in the region also vary from country to country and population to population. Some States have nationality laws that contain direct gender discrimination. In other cases, groups have been arbitrarily deprived of or denied nationality as a result of amendments to or the implementation of nationality laws, including on the grounds of race. Sometimes the causes are more complex still, linked to a combination of a failure to register the births of children or the difficulties in acquiring identity documentation over generations, resulting in an inability to prove entitlement to nationality under the law. Safeguards against statelessness for children born on the territory are found in the nationality laws of some States hosting large stateless populations, but there is little evidence that they are applied to the benefit of children who would otherwise be stateless.

The risk of statelessness also affects migrants and refugees in Southeast Asia. The level of regular and irregular migration in Southeast Asia is high, including between ASEAN Member States. The International Labour Organisation has estimated that in 2013 there were 9,498,000 migrants residing in ASEAN Member States compared to a total population of 617,594,000.²⁹ Irregular migration can create a risk of statelessness, particularly if migrants or their children lose or do not have any way of proving their link to their country of nationality. Some migrants originating from Southeast Asian States and their descendants face an additional risk of statelessness due to nationality laws that result in loss of nationality for those who reside abroad and which do not contain sufficient protections to prevent statelessness arising in these circumstances. There is no evidence that safeguards against statelessness that exist in the nationality laws of key receiving States are applied to avoid statelessness amongst the children of migrants or refugees born on their territory.³⁰ This could reflect the receiving State's view that the State from which the children's parents originated is responsible for realising these children's right to a nationality. This is an area which would benefit from further research, engaging all stakeholders, including the relevant Government authorities.

²⁹ International Labour Organisation and the Government of Canada, *ILMS Database for ASEAN: International Migration in ASEAN: At a Glance*, 2015, <http://apmigration.ilo.org/resources/ilms-database-for-asean-international-migration-in-asean-at-a-glance>.

³⁰ For example, in respect of the children of Rohingya refugees born in Malaysia, see Equal Rights Trust, *Equal Only in Name: The Human Rights of Stateless Rohingya in Malaysia*, 2014, pp. 66-67.

A further element within the complex and varied panorama is the close attachment of States in the region to and their strong respect for State sovereignty. This can be seen in the first principle articulated in the ASEAN's Charter, which is the Association's founding treaty. It mandates ASEAN and its Member States to act with "respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States".³¹ The respect given to this principle results in a strong emphasis on consensus-building to develop regional approaches, and a continued reliance on practical cooperation rather than standard setting through legally binding agreements. Bilateral agreements to regulate matters of mutual concern to States, including migration, are still common. Such agreements can also include clarifying the nationality status of migrants or people living in border areas, where the exact demarcation of international frontiers may only have relatively recently been agreed. The agreement of or uncertainty about the demarcation of frontiers can lead to statelessness or the risk of statelessness amongst communities residing in contiguous districts or provinces on either side of newly agreed borders.³²

Although these contours of the landscape of statelessness in Southeast Asia are reasonably clear, gaps exist in both quantitative and qualitative data on populations potentially affected by statelessness. There is a lack of a consistent understanding of the terminology used in the media. For example, irregular and undocumented migrants are often called "stateless" in newspaper articles even when there is no doubt about their nationality.³³ If consensus on the size, nature and scope of the issue in different countries is not established, it will continue to be difficult to achieve agreement on solutions and how to implement them.

3. National and regional approaches to address statelessness in Southeast Asia

A number of States in Southeast Asia have taken measures which lay the framework for addressing statelessness in the future. Some of

³¹ ASEAN, Charter of the Association of Southeast Asian Nations, 20 November 2007, entry into force 15 December 2008.

³² R. Amer and N. Hong Thao, *Regional Conflict Management: Challenges of the Border Disputes of Cambodia, Laos, and Vietnam*, 2009.

³³ For example see, Filipino Envoy feels stateless kids in Sabah deserve schooling, *The Daily Express*, 14 December 2014, <http://www.dailyexpress.com.my/news.cfm?NewsID=95066>.

these have already been extensively documented in publications on regional³⁴ or global good practices.³⁵ This section will examine five different national approaches, reflecting on the reasons underlying successes and where there are opportunities for further progress towards realising UNHCR's goal of ending statelessness. It will also discuss some of the regional engagement with these issues to date. These case studies have been selected because they provide examples of how States in the region have found solutions to issues that cause large-scale protracted statelessness or create a risk of statelessness, particularly amongst undocumented migrants. States in the region facing similar challenges are increasingly interested in exchanging good practices about addressing statelessness, including in ASEAN Bodies.

3.1 Thailand

As with many countries in Southeast Asia, issues relating to nationality and statelessness in Thailand have multiple causes, including both contemporary and historical factors. The Royal Thai Government has developed and implemented strategies and passed legislative reforms which have resulted in the better identification and protection of stateless persons and the prevention and reduction of statelessness. Until 2016, the strategy adopted was specific to the Thai context and focused on solutions to issues of legal status, increasing access to rights for affected populations whilst preventing statelessness amongst undocumented migrants from neighbouring States and, in some circumstances, allowing access to Thai nationality for existing stateless populations.³⁶ In 2016, the Royal Thai Government's policy further developed with a political endorsement of the goal of "zero statelessness" and support for UNHCR's #IBelong Campaign. This

³⁴ UNHCR, Regional Expert Roundtable on Good Practices for the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons in South East Asia, 2011 and UNHCR, UN High Commissioner for Refugees and ASEAN Intergovernmental Commission on Human Rights, Report of the ASEAN Regional Workshop on Statelessness and the Rights of Women and Children, 2011.

³⁵ UNHCR, Good Practices Paper - Action 1: Resolving Existing Major Situations of Statelessness, 2015, pp. 31-35.

³⁶ The Actions of the GAP that relate most closely to elements of the approaches adopted in Thailand are: Action 1: Resolve existing situations of statelessness, Action 7: Birth registration to prevent statelessness and Action 8: Issue Nationality Documentation to everyone entitled to it.

section will describe the past approach and more recent developments. At the time of the launch of the Campaign, UNHCR's statistics indicated that there were 506,197 stateless persons in Thailand which was the third largest population in the world reported at the time. This reflected the number of stateless persons registered by the Government by the end of 2011.³⁷ They were predominantly members of "Hill Tribe" communities. Historically, these communities are said to have chosen to live in the remote and mountainous areas on the borders of Thailand, Myanmar, China, Cambodia, Lao Peoples Democratic Republic³⁸ and Viet Nam to avoid the demands of "State" authorities in the rice-growing valleys, such as taxation and military service.³⁹ At present there is little doubt that these communities that are resident in Thailand now want to be recognised as Thai citizens.⁴⁰ Many of them or their ancestors were deprived of Thai nationality as a result of a Revolutionary Decree passed in 1972, which retroactively removed nationality from those who had acquired it as a result of being born on Thai territory.⁴¹

An even larger scale challenge of more recent origin that the Royal Thai Government faced was how to address the situation of undocumented migrant workers from neighbouring ASEAN States in Thailand, including preventing statelessness arising. This group was not reflected in the statistics on stateless persons reported by UNHCR immediately after the launch of the #IBelong Campaign. Prior to 2002, the Royal Thai Government's attempts to implement unilateral amnesties to allow this group to remain temporarily as unskilled labourers had proved unsuccessful. A different, 2-stage approach was adopted which began with registration of the migrant workers and was followed by regularisation of their immigration status in Thailand. This approach was reflected in the '2004 National Strategy on Management of Migrant Workers from Cambodia, Lao PDR and Myanmar'. Separate

³⁷ UNHCR, Statistical Yearbook 2013, *supra* n11.

³⁸ Hereinafter "Lao PDR".

³⁹ J.C. Scott, *The Art of not being Governed: An Anarchist History of Upland South East Asia*, Yale University Press 2010.

⁴⁰ UNHCR, *I Am Here, I Belong: The Urgent Need to End Childhood Statelessness*, 2015, pp. 20-21.

⁴¹ For a detailed analysis of the history of Thai Nationality law until 2006, see P. Saisoonthorn "Development of the Concept of Nationality and Efforts to Reduce Statelessness in Thailand", *Refugee Survey Quarterly* 2006, Vol. 25(3), pp. 40-53.

bilateral memoranda of understanding were agreed by the Royal Thai Government with those source countries. They included agreements for nationality verification to take place as an essential part of the 2-stage approach, allowing undocumented migrant workers to acquire passports or travel documents from the authorities of the countries of origin, providing evidence of nationality and the basis for their legal status to be regularised.

In 2005 Thailand's Cabinet adopted the "National Strategy on the Administration of Legal Status and the rights of Persons". It aimed to provide a framework of solutions for different categories of non-nationals by "balancing human rights, human security and national security" and ensure that non-nationals in Thailand would be granted an "appropriate legal status".⁴² At that time, the Royal Thai Government estimated that there were up to 300,000 undocumented migrant workers who would be unable to verify their nationality through the nationality verification process. The Strategy envisaged that those rejected by the nationality verification procedure would be allowed access to basic rights and, if return to the country of origin as former residents rather than nationals was not possible, they would be granted temporary residence. In the event this estimate proved to be unduly pessimistic and by January 2013, over 1.5 million formerly undocumented migrant workers had had their nationality verified. By December 2011 only 884 people had been rejected by the nationality verification process.⁴³

For the long-term resident stateless population that had lost any connection with their country of origin and the *in situ* stateless population, the 2005 National Strategy envisaged a range of what UNHCR would consider to be either solutions or important steps towards integration. They included registration by the authorities, issuing identity documentation, facilitating access to fundamental rights, and temporary or permanent residence or nationality.

⁴² Translation by B. Napaumporn, on file with the author.

⁴³ For a detailed examination of these arrangements which is the primary source for this analysis see, B. Napaumporn Analysis of Nationality Verification of Migrant Workers in Thailand: The Case of Workers from Cambodia, Lao PDR and Myanmar, Thesis, Master of Arts (Human Rights), Mahidol University 2012 (Unpublished).

The civil registration, confirmation of legal identity and the acquisition of nationality for different profiles amongst the long-term resident and *in situ* populations was facilitated by two key legislative reforms. In 2008 Thailand's civil registration law was amended to allow the children of non-nationals born in Thailand to have their births registered in the civil registration system. This reform is reported to have been implemented effectively with near universal birth registration reported for children under 5 years old between 2010 and 2015.⁴⁴ It permitted Thailand to withdraw its reservation to Article 7, CRC in 2010.⁴⁵ Thailand also reformed its nationality law in 2008, addressing one of the underlying causes of statelessness. The amendment provides that anyone whose nationality was revoked by the 1972 Revolutionary Decree that was referenced above or who failed to acquire nationality while this Decree was in force (between 1972-1992) can acquire Thai nationality on application if they have evidence of their birth and subsequent domicile in Thailand and can demonstrate good behaviour.⁴⁶ Provisions are also in place to enable people who are not Thai citizens but who were born abroad to be considered for permanent residence, a status which can increase the level of rights enjoyed. Related schemes provide a framework for access to healthcare and education. Importantly children born in Thailand whose parents are both permanent residents automatically acquire Thai nationality at birth.

By February 2016, the Royal Thai Government figures showed that over 23,000 registered stateless persons had acquired Thai nationality since the end of 2011, contributing to the reduction of the total registered stateless population to 438,821.⁴⁷ In recent years UNHCR has worked with the authorities to reach out to affected communities while also trying to streamline application procedures to ensure the

⁴⁴ United Nations Children's Fund (UNICEF), *State of the World's Children 2016*, 2016, p. 168.

⁴⁵ Ministry of Foreign Affairs, Thailand, Thailand has withdrawn its reservation to Article 7 of the Convention on the Rights of the Child (CRC), which guarantees the right of the child to be registered immediately after birth, the right from birth to a name and the right to acquire a nationality, Press Release, 14 January 2011, <http://www.mfa.go.th/main/en/media-center/14/7753-Thailand-has-withdrawn-its-reservation-to-Article.html>.

⁴⁶ L. van Waas *et al.*, *Researching the nexus between statelessness and human trafficking: The example of Thailand*, Wolf Legal Publishers 2015, pp. 88-91.

⁴⁷ UNHCR, #IBelong Campaign Update, July 2016, p. 3.

timely processing of eligible applicants. UNHCR has helped to build capacity among decision makers at the district level and funded the deployment of mobile teams to remote villages to facilitate the processing of applications. It has also worked with partners to sensitise and advise communities, assist in completing nationality applications and to follow up on pending applications.⁴⁸

The Royal Thai Government has recently made a series of important policy announcements and introduced new initiatives resulting in the further development of policy in this area. In March 2016, the Royal Thai Government's delegation at the 65th Meeting of UNHCR's Standing Committee expressed its commitment to achieving the goal of "zero statelessness" including facilitating the naturalisation of stateless persons, universal birth registration and access to fundamental rights for stateless persons. At the same time the delegation expressed its strong support for UNHCR's Campaign to End Statelessness by 2024. Thailand has also become one of the leading members of the Group of Friends of the Campaign, which is primarily made up of Diplomatic Missions and meets in Geneva.⁴⁹ The Royal Thai Government referred to some of these developments in its intervention during the Agenda Item at the 67th Executive Committee Meeting in September 2016.⁵⁰

This new and impressive Government commitment to ending statelessness made at the global level is reflected in a series of progressive measures at the national level. A number of important initiatives by Her Royal Highness Princess Maha Chakri Shrinthorn to provide access to nationality for school aged children in Thailand have been matched by the Ministry of the Interior's announcement in early 2016 of a nationwide review to verify the number of stateless students and determine their eligibility for Thai nationality as a matter of priority. It was estimated that these measures could benefit up to 65,000 students or 15 per cent of the currently registered stateless population.⁵¹

⁴⁸ UNHCR, Thousands of Stateless People given nationality in Thailand, Press Release, 1 December 2015, <http://www.unhcr.org/news/latest/2015/12/565db8939/thousands-stateless-people-given-nationality-thailand.html>.

⁴⁹ UNHCR, Campaign Update, *supra* n47, p. 2

⁵⁰ Royal Thai Government, Draft Intervention, 67th UNHCR Executive Committee, Agenda 4(a) International Protection.

⁵¹ UNHCR, #IBelong Campaign Update, April 2016, p. 3.

In May 2016, the Permanent Secretary of the Ministry of Interior issued 'Guiding Procedures on Determination of Nationality Law and Solutions for Resolving the Issue of Individual Legal Status'. This guidance aims to implement key elements of King Bhumibol Adulyadej's address of 18 February 2001, which have been at the heart of policy consideration in this area, “

[...] There are groups of people who have lived in Thailand for a long time, but they are never considered as real Thais. They have lived here and some of them were even born here, but they do not benefit from belonging to Thailand. They should be equally treated on the same basis. If people in Thailand feel unhappy and neglected while living in the country, this will definitely affect national security [...].⁵²

On 5 August 2016, the Royal Thai Government's Ministry of the Interior promulgated a special regulation under the Immigration Act, which extended freedom of movement of the registered stateless persons from the districts to the provinces in which they reside. This provision was to come into force in September 2016 and will facilitate the stateless population's increased integration, their greater enjoyment of rights and access to services.

In the years leading up to 2016, the Royal Thai Government's approach achieved a series of important policy and operational successes in preventing and reducing statelessness, as well as putting in place measures to integrate and increase access to rights and services for registered stateless persons. The implementation of a nationality verification scheme for undocumented migrant workers in cooperation with their countries of origin constitutes a remarkably successful measure which prevents statelessness and provides migrants with nationality documentation. The 2008 civil registration and nationality law reforms provide a legal foundation for resolving existing situations of statelessness for a proportion of the long-term resident and *in situ* stateless population. The civil registration and the provision of identity documentation for stateless persons, coupled with temporary and, for some, permanent residence alongside access to fundamental rights were important steps towards integration and the realisation of rights. In particular, the birth registration of stateless children may

⁵² UNHCR, Campaign Update, *supra* n47, p. 3.

facilitate the acquisition of nationality under present nationality law or following future reforms. These measures are broadly consistent with a number of key Actions in UNHCR's GAP, even if the GAP was developed and published after many of these measures were devised and implemented. The Royal Thai Government's 2016 policy commitments and initiatives will facilitate further progress towards resolving existing situations of statelessness⁵³ within an overarching framework of realising the goal of "zero statelessness".

To further implement this commitment, a number of additional reforms could be considered using the GAP as a reference point. Improving the safeguards in place to prevent childhood statelessness is a possible key area of focus. Thailand's nationality law includes a provision which enables children born in Thailand whose parents are permanent residents (including some stateless persons) to acquire nationality automatically at birth. However, not all of the long-term residents and *in situ* stateless populations are currently able to access permanent residence. Policy options could include either extending permanent residence to the registered stateless population or amending the nationality law to ensure that children born in Thailand who do not acquire another nationality at birth acquire Thai citizenship. Improving safeguards against statelessness for foundlings could also be considered. Closing gaps in these areas would contribute to ensuring that no child is born stateless in Thailand.⁵⁴ One of the advantages of taking an approach based on extending access to permanent residency for the long-term resident and the *in situ* population is that it will also help to increase access to rights and economic development under the current legal framework. Adopting a new, broader safeguard would create a safety-net to prevent childhood statelessness for all born in Thailand.

Further research into the extent to which past and recent measures to register, provide identity documentation, legal status and access to rights have facilitated integration and development for stateless and host communities as well as a sense of belonging amongst the beneficiary population could provide informative results. Such research could contribute to establishing indicators for assessing progress towards the ultimate solution of ending statelessness

⁵³ UNHCR, GAP, *supra* n3, Action 1.

⁵⁴ *Ibid.*, Action 2.

through the acquisition of nationality. Any such examination could explore how States and development partners can best meet UNHCR's guidance on the need to promote social and economic integration of communities affected by statelessness. The Guidance provides that "[a]s statelessness is often a result of discrimination, efforts to promote economic and social integration may also be necessary for solutions. UNHCR therefore sometimes needs to undertake advocacy for integration of stateless persons in development programmes carried out by other UN agencies, the State, multilateral and national development agencies, or NGOs".⁵⁵

The policy imperatives underlying the measures adopted by the Royal Thai Government are multifaceted. State action appears to have been motivated by national security and stability, addressing historic issues, realising rights, concepts of integration and belonging as well as addressing the contemporary challenges caused by large-scale undocumented migration. At the same time the Royal Thai Government has accepted that ending statelessness is a legitimate matter of international concern that can increase the enjoyment of human rights and works closely with UNHCR at domestic, regional and global levels. The adoption in 2016 of the new policy goal of "zero statelessness" offers further opportunities for progressive measures and may well prove to be a historic step from a country that, at the start of UNHCR's Campaign, hosted the third largest population in the world. Its influence may be felt in the immediate region and beyond.

3.2 The Philippines

Since 2009, the Government of the Philippines has made significant progress in addressing statelessness. Key developments have included the ratification of the 1954 Convention and establishing a statelessness determination procedure to implement its provisions⁵⁶ The overall approach adopted has been strategic, with UNHCR working in close cooperation with a Unit in the Department of Justice that was identified as the focal point to work on this issue.⁵⁷ Potential populations of concern were identified along with steps that could be taken towards solutions. At the same time the Government has also

⁵⁵ UNHCR, UNHCR Action to Address Statelessness: A Strategy Note, 2010, para. 57.

⁵⁶ Department Circular No. 058 - Establishing the Refugees and Stateless Status Determination Procedure [Philippines], 18 October 2012.

⁵⁷ UNHCR, Good Practices Paper – Action 9, *supra* n18, pp. 3-5.

considered closing gaps in its nationality law to prevent and reduce statelessness, and, as noted above, pledged to commence the process of accession to the 1961 Convention on the Reduction of Statelessness at the 2011 Ministerial Intergovernmental Event on Refugees and Stateless Persons.⁵⁸

One of the populations identified as being at risk of statelessness were persons of Indonesian descent who were established, long-term residents in the Philippines, in the southern part of Mindanao. Many had ancestors who had migrated from islands which are now Indonesian territory, sometimes before either the modern Filipino or Indonesian States were established. The application of Indonesia's old Citizenship Law could have resulted in the loss of citizenship by the original migrants and their descendants. The law provided that Indonesian citizenship would be automatically lost if a citizen resided abroad without returning to Indonesia and without declaring their intention to retain nationality. Indonesia's revised 2006 Nationality Law provided a route for the re-acquisition of Indonesian nationality by application before 1 August 2009 or via naturalisation. The revision also inserted a safeguard that prevented loss of nationality in this way if it would result in statelessness.

A proportion of this group have direct Filipino ancestors which should have the consequence that they acquire Filipino citizenship automatically. However, some may not be in a position to establish an entitlement to either nationality and may require confirmation of legal residence in the Philippines and access to naturalisation. The results of an initial mapping study showed that an estimated population of 6,015 people of undetermined nationality and provided important qualitative data about their profile and history. The data was validated with the community and both Governments. A proportion of this group appear to have direct Filipino ancestors which should have the consequence that they acquire Filipino citizenship automatically. However, some may not be in a position to establish an entitlement to either nationality and may require confirmation of legal residence in the Philippines and access to naturalisation. Following the mapping study, discrete and time-bound development projects focused on improving livelihood opportunities and self-sufficiency for these communities were delivered by an NGO partner, PASALI.⁵⁹

⁵⁸ UNHCR, Pledges 2011, *supra* n17.

⁵⁹ UNHCR, Stateless in the Philippines: Indonesian Descendants feel torn between

At the Joint Committee on Bilateral Cooperation between the Philippines and Indonesia in February 2014, the two governments agreed to address the legal status of this group. Subsequently a process to register and confirm the nationality of this population was established by the two Governments. It included the collection of bio-data, registration and documentation, and legal counselling for those who took part, provided by the Philippines' Public Attorney's Office.⁶⁰ By September 2016, 8,745 people had been registered, and 1,230 people had been assisted to obtain identity documentation which confirms that they are either Indonesian or Filipino nationals.⁶¹ At time of writing, it was envisaged that this process would continue, in consultation with the communities, at the same time as policy solutions were found to overcome any remaining barriers to resolve the legal status of this group.

The approach of the Government of the Philippines is generally consistent with the methodology of UNHCR's GAP, pursuing key actions which fit with the national context. Indeed consideration is being given to adopting a draft National Action Plan to End Statelessness. The cooperation established by the Government with UNHCR and, subsequently, the Government of Indonesia has facilitated steps to begin resolving an existing situation of statelessness,⁶² and to address the legal status and livelihood issues of the affected community (although the level of exclusion faced by this group was not as significant compared to some other communities affected by statelessness).⁶³ At the same time, the Philippines' ratification and implementation of the 1954 Convention and consideration of accession to the 1961

two lands, Press Release, 15 September 2014, <http://www.unhcr.org/news/latest/2014/9/5416d3519/stateless-philippines-indonesian-descendants-feel-torn-lands.html>.

⁶⁰ Presentation of Atty. P. de Jesus, State Counsel, Department of Justice, Republic of the Philippines at the UNHCR/Vietnam's Representatives to the ASEAN, Commission on the Promotion and Protection of the Rights of Women and Children, 21-22 September 2016.

⁶¹ UNHCR, Hundreds Finally Out of Legal Limbo in Groundbreaking pilot between Indonesia and the Philippines, Press Release, 14 March 2016, <http://unhcr.ph/news-stories/hundreds-finally-out-of-legal-limbo-in-groundbreaking-pilot-between-indonesia-the-philippines>.

⁶² UNHCR, GAP, *supra* n3, Action 1.

⁶³ For the impact of statelessness on children and youth see, UNHCR, I Am Here, I Belong, *supra*, n40.

Convention⁶⁴ may result in further structural and legal adjustments needed to end statelessness. Research may assist in identifying the extent of statelessness amongst other “at risk communities”, including the Sama Dilaut people, a historically nomadic, seafaring community with strong links to similar populations in Malaysia and Indonesia. The former President of the Philippines announced that 2015-2024 will be the Civil Registration and Vital Statistics⁶⁵ decade in the Philippines with the aim of achieving a universal CRVS system by 2024, in line with the Asia Pacific CRVS Declaration discussed below.⁶⁶ This may provide an opportunity for UNHCR to promote birth registration to prevent statelessness for groups “at risk” of statelessness.

3.3 Indonesia

The amendment of nationality laws has contributed to the prevention and reduction of statelessness in Southeast Asia. Indonesia’s 2006 revision of its nationality laws is a good practice example of legislative reform in the region. It took place in the context of the country’s wider transition to democratic government following the resignation of President Suharto in 1998 and can be understood as part of a broader nation-building process. The key changes have been explained in this way:

In the new law, references to “indigenous” or “nonindigenous” groups have been removed, thereby facilitating the confirmation of nationality for Indonesia’s ethnic minorities. Previously, many individuals of Chinese and Indian descent had faced difficulties in asserting their claim to Indonesian nationality, despite having been settled in the country for several generations.

Second, the new law established gender equality in the enjoyment of nationality rights, where women can now transmit their Indonesian nationality to their children on the same terms as men; this has lowered the risk of childhood statelessness by allowing children to acquire nationality from either parent.

⁶⁴ UNHCR, GAP, *supra* n3, Action 9.

⁶⁵ Hereinafter “CRVS”.

⁶⁶ UN Economic and Social Commission for Asia and the Pacific (ESCAP), Statistics Division, President declares 2015-2024 as CRVS decade in Philippines, <http://getinthepicture.org/news/president-declares-2015-2024-crvs-decade-philippines-0>.

Finally, the 2006 law provides critical protection against statelessness for Indonesians abroad. Under the old law, Indonesians who resided abroad for more than five years would lose their nationality if they did not declare their intention to remain a citizen. However, the new law specifies that nationality will not be lost in this manner if a person would thereby become stateless.⁶⁷

These amendments are significant and combined with other important protections against childhood statelessness for children born on the territory⁶⁸ result in a nationality law that aims to respect international human rights law and is consistent with key Actions in the GAP. The Government's motivation in proposing this reform has been described as an effort to secure equality and non-discrimination and respect human rights principles rather than being exclusively focused on addressing the situation of ethnic groups.⁶⁹ There are specific measures in the new law which aim to address statelessness caused by gaps in the old law, including loss of nationality through residence abroad and the restriction on women passing their nationality to their children by descent.⁷⁰ Areas of potential future focus, in line with the GAP, could include identifying potential at risk populations amongst the undocumented population, increasing levels of civil registration (including birth registration) and issuing national identity documentation to at risk populations.⁷¹ The President's plan to achieve 85 per cent birth registration coverage by the end of 2019 as part of improving CRVS systems to allow improved monitoring of health-related Sustainable Development Goals may complement and facilitate progress in those areas.⁷²

⁶⁷ F. Teoh, *The Underlying Issue of Statelessness*, Jakarta Post, 25 August 2011, <http://www.thejakartapost.com/news/2011/08/25/the-underlying-issue-statelessness.html>.

⁶⁸ Law of the Republic of Indonesia No. 12 on Citizenship of the Republic of Indonesia, 1 August 2006, Art. 4 (9), (10) and (11). Note that nonetheless these safeguards do not reach the standard envisaged in Action 2 of the GAP.

⁶⁹ Presentation of the Indonesian Delegation at the UNHCR/Ministry of Labour, Invalids and Social Affairs/ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (Viet Nam), Regional Workshop, 14-15 January 2016.

⁷⁰ UNHCR, *Good Practices: Addressing Statelessness in South East Asia*, 2011, p. 5.

⁷¹ P. Duff *et al.*, "Barriers to birth registration in Indonesia", *The Lancet* 2016, Vol 4; and Australia and Indonesia Partnership for Justice, AIPJ's baseline study on legal identity: Indonesia's Missing Millions, 2014.

⁷² PUKSAPA, Centre for Child Protection, University of Malaysia, *Inclusive*

3.4 Malaysia

The Government of Malaysia has implemented a series of measures to address documentation and legal status amongst persons of Tamil origin in West Malaysia. This community had migrated to Malaysia during British colonial times in order to work on plantations, but after the closure of these estates moved to urban areas. Whilst living on the plantations, many never had their births registered with the authorities, resulting in large number not having documentation to prove that they are Malaysian citizens. As a result, they are treated as non-nationals and commonly known as “stateless Malaysians”. To address these issues, the Government implemented the “MyDaftar” Campaign in 2011. A body called the Special Implementation Task Force was established under the Prime Minister’s Office and worked with the National Registration Department and the affected community to facilitate access to birth registration, permanent residence and nationality documentation. It has been reported that over 9,000 people were registered as a result of this campaign.⁷³

A community organisation, Development of Human Resources in Rural Areas,⁷⁴ began a project in 2003 to address documentation issues amongst this group. Its scope was expanded in 2014 to include the registration of the stateless population and providing them with community legal assistance so that they can make applications for birth certificates and nationality documentation. UNHCR has provided technical assistance to DHRRA supporting the expansion of the scope of the project and DHRRA also receives funding from the Government for this work.⁷⁵ DHRRA co-operates closely with the relevant Government Departments and stakeholders to facilitate the processing and resolution of applications for nationality. By July 2016, 700 out of 12,341 stateless persons who had been registered with DHRRA in the latest phase of the project had acquired Malaysian nationality documentation, 7,918 nationality applications had been submitted to the authorities while 3,723 applications were at the

development starts with inclusive civil registration and statistics, <http://www.puskapa.org/activities-impact/inclusive-development>.

⁷³ UNHCR, Report of the UNHCR/ASEAN Intergovernmental Commission on Human Rights Regional Workshop on Good Practices in Birth Registration, 2012.

⁷⁴ Hereinafter “DHRRA”.

⁷⁵ Asia DHRRA General Assembly, DHRRA Reports, 2014, p. 11.

“pre-submission phase”.⁷⁶ Qualitative research indicates that those who acquire nationality are likely to have increased access to public services, including healthcare, as well as political rights.⁷⁷ Once the project is complete its impact on access to social entitlements and community benefits could be reviewed to assess its additional impact in this area.

As a result of DHRRA’s work, by the end of 2015 UNHCR was able to report a figure of 11,641 persons of concern under the statelessness mandate, compared to the previously reported estimate of 40,000 persons of concern amongst that community. The significant efforts made towards establishing a more accurate baseline figure for this population are particularly important because the estimates given are often much higher, causing political controversy.⁷⁸ The previous efforts undertaken by DHRRA to survey the population had not proven to be successful because of concerns that affected members of the community had about coming forward.⁷⁹ Through the provision of community-based legal advice to help resolve the situation of registered individuals the project establishes a link between improving baseline data and realising solutions for the people who are registered and counted. The approach also allows DHRRA to provide detailed information to its Government partners to facilitate solutions.⁸⁰

Finding solutions for nationality and statelessness in Malaysia have, to date, primarily been addressed by initiatives from the Government and Malaysian civil society, which also undertakes campaigning and advocacy to encourage further measures to address statelessness.⁸¹ UNHCR has taken a less prominent role compared to its work in, for example, the Philippines or Thailand. There remain other populations of potential concern in Malaysia, where quantitative and qualitative data could be improved in line with Action 10 of the Global Action

⁷⁶ UNHCR, #IBelong Campaign Update, July 2016, p. 3.

⁷⁷ UNHCR, I Am Here, I Belong, *supra* n40.

⁷⁸ The Stateless Hindus of Malaysia: A Whitepaper, Indiafacts, 8 September 2015, <http://indiafacts.org/the-stateless-hindus-of-malaysia-a-whitepaper>.

⁷⁹ UNHCR, Good Practices: Addressing Statelessness in South East Asia, 2011, p. 18.

⁸⁰ DHRRA Malaysia, Legal Documentation Issues, <http://dhreramalaysia.org.my/legal>.

⁸¹ UNHCR, Campaign Update, *supra* n76, p. 5.

Plan.⁸² This could potentially be linked to facilitating the Government's development planning. Furthermore, the Government's engagement with the Regional CRVS initiative and in development of the Bali Process Civil Registration Toolkit, both of which are discussed below, may provide opportunities to improve levels of civil registration in East Malaysia, which would be a step towards the prevention of statelessness and the inclusion of potential population of concern.

3.5 Viet Nam

The Government of Viet Nam has taken a series of measures to prevent and reduce statelessness at a national level and has led the engagement of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children⁸³ on the right to a nationality for women and children. In all of these activities the Government has worked in close cooperation with UNHCR, in particular through the Ministry of Justice and the Ministry of Labour, Invalids and Social Affairs.

The good practices adopted by Viet Nam in addressing statelessness through facilitating the naturalisation of former Cambodian refugees and preventing and reducing statelessness in the context of Vietnamese women migrating abroad for marriage have been described in detail in a UNHCR publication and will not be repeated here.⁸⁴ However, it is important to note that these measures included surveys of the potentially affected populations, amendments to nationality laws to facilitate solutions for particular populations, and operational responses to facilitate the implementation of the new measures adopted, as well as a willingness to work closely on these matters with international organisations, including UNHCR.

In addition to the significant progress made in these areas, Viet Nam has taken further steps that may help to prevent and reduce statelessness. First of all, the Government of Viet Nam is working to implement a bilateral agreement with Lao PDR on "the settlement of free migration issues and illegal marriage in the border areas of both

⁸² Institute on Statelessness and Inclusion, *The World's Stateless*, Wolf Legal Publishers 2014, pp. 84-87.

⁸³ Hereinafter "the ACWC".

⁸⁴ UNHCR, *Good Practices Paper - Action 1: Resolving Existing Major Situations of Statelessness*, 2015, pp. 31-35 and UNHCR, *Good Practices: Addressing Statelessness in South East Asia*, 2011, pp. 17 and 19.

countries” in a way that resolves civil status and nationality issues for the population resident in Vietnamese territory.⁸⁵ Viet Nam is also considering reviewing its nationality law and its implementation to examine whether further amendments are required to prevent and reduce statelessness. The 2008 Nationality Law itself was amended in 2014 to allow Overseas Vietnamese to maintain their citizenship indefinitely, removing a deadline for registration,⁸⁶ and to simplify registration procedures for this group. The Government’s new initiative could provide opportunities for the further reduction of statelessness and improved safeguards against statelessness could contribute to facilitating the enjoyment of the right to a nationality and the goal of ending statelessness.

3.6 Regional engagement

Regional organisations, processes and initiatives have engaged with matters relating to civil registration, statelessness and nationality in recent years. ASEAN sectoral bodies in particular have a role to play in promoting solutions, particularly through capacity building, exchanging national good practices and facilitating the implementation of relevant global standards. This section will discuss three areas of regional engagement with these issues to date, their strengths and potential for the future development.

3.6.1 The ASEAN Community and its Human Rights Commissions

All ASEAN States are parties to the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, although some States retain relevant reservations.⁸⁷

⁸⁵ Presentation of Mdm. Luong Thi Lanh, Deputy Director General, Ministry of Justice Viet Nam at the UNHCR/Ministry of Labour, Invalids and Social Affairs/ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (Viet Nam) Workshop, 14-15 January 2016.

⁸⁶ Viet Kieu’s Citizenship Registration Rule lifted, The Saigon Times, 25 June 2014, <http://english.thesaigontimes.vn/35195/Viet-Kieu's-citizenship-registration-rule-lifted.html>.

⁸⁷ For example, Malaysia and Singapore retain reservations relevant to CRC, Article 7 (see, UN Treaties Collection, CRC, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=en#EndDec) and Malaysia and Brunei Darussalam retain reservations to CEDAW, Article 9 (2), UN Treaties Collection, CEDAW, <https://treaties.un.org/>

These Conventions all contain important provisions of the right to a nationality. On 22 November 2012, ASEAN countries adopted the AHRD and made a Statement of Adoption which endorsed the Universal Declaration of Human Rights.⁸⁸ The provision in respect of the right to a nationality in the Declaration differs in a small but important way from equivalent provision in the Universal Declaration on Human rights. It provides that:

Every person has the right to a nationality *as prescribed by law*. No person shall be arbitrarily deprived of such nationality nor denied the right to change that nationality.⁸⁹

It has been observed that this provision could be interpreted to mean that ASEAN Member States can comply with this provision simply by applying current nationality laws, regardless of their content. However, such an interpretation would be inconsistent with ASEAN Member States' existing Treaty obligations and the UDHR which recognise a freestanding right to a nationality.⁹⁰ The AHRD's language may reflect the strength of the principle of non-interference in domestic affairs in Southeast Asia and the absence of consensus amongst all ASEAN Member States at the time the AHRD was adopted on the extent to which nationality and statelessness are matters that should be addressed by ASEAN's sectoral bodies.

UNHCR has worked with the ASEAN Intergovernmental Human Rights Commission⁹¹ and the ACWC to identify good practices relating to addressing statelessness, to promote the importance of birth registration to prevent statelessness and to consider the linkages between realising the right to a nationality and ASEAN's policy priorities.⁹² Within the terms of their respective mandates, both

pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en#EndDec).

⁸⁸ ASEAN Human Rights Declaration and the Phnom Penh Statement of Adoption, *supra* n26.

⁸⁹ Emphasis added.

⁹⁰ American Bar Association, Rule of Law Initiative, The ASEAN Human Rights Declaration: a legal analysis, 2014.

⁹¹ Hereinafter "the AICHR".

⁹² UNHCR, UN High Commissioner for Refugees and ASEAN Intergovernmental Commission on Human Rights, Report of the ASEAN Regional Workshop on Statelessness and the Rights of Women and Children, 2011.

Commissions are well-placed to coordinate and facilitate studies, build capacity, facilitate the exchange of good practices and peer-to-peer experience sharing, as well as engaging with other regional organisations which are concerned with similar issues. An approach based on practical cooperation and developing necessary common understanding or consensus on solutions to statelessness are most likely to leverage the progress that is being made at the national level, including the progress described in detail above. The inter-connections between solving statelessness in ASEAN Member States, building the ASEAN Community and the achievement of the Sustainable Development Goals, provide potential areas of policy convergence.

However, further extensive consensus building is likely to be required before the time could be considered ripe for the promotion of a regional Declaration on ending statelessness similar to those that have adopted in West Africa⁹³ or in Latin America.⁹⁴ The need for “consultation and consensus” in decision-making, which are reflected in the Terms of Reference of both the AICHR⁹⁵ and the ACWC,⁹⁶ and ASEAN’s respect for the principles of sovereignty and non-interference in domestic affairs, are likely to mean that ASEAN’s human rights bodies’ work in this area will occur in parallel and in complement to global human rights bodies.⁹⁷

*3.6.2 The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime*⁹⁸

The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime is a forum for States to undertake policy dialogue, information sharing and practical cooperation to help the region address these challenges. The potential link between preventing and reducing statelessness and displacement, and the need to address the root causes of displacement, was recognised in the Bali Declaration

⁹³ Abidjan Declaration of Ministers of ECOWAS Member States on Eradication of Statelessness, 25 February 2015.

⁹⁴ Brazil Declaration and Plan of Action, 3 December 2014.

⁹⁵ ASEAN, Terms of Reference of the AICHR, paragraph 6.1.

⁹⁶ ASEAN, Terms of Reference of the ACWC, paragraph 7.1.

⁹⁷ For a discussion of the role of global human rights bodies in addressing statelessness, see, M. Khanna and P. Brett, “Making effective use of the UN human rights mechanisms to solve statelessness”, chapter 1 in this book.

⁹⁸ Hereinafter “the Bali Process”.

in March 2016, adopted by Member States of the Bali Process.⁹⁹ The Bali Process therefore potentially provides an opportunity for States to develop areas of practical cooperation to promote solutions to statelessness to the extent that it is linked to other migration management issues. The Declaration also recognises the importance of civil registration in providing basic protection.¹⁰⁰ In 2016, the Bali Process' Regional Support Office began a project to develop a 'Toolkit on Civil Registration' which will facilitate States' work to register stateless persons and persons of undetermined nationality.¹⁰¹

3.6.3 The Asia Pacific CRVS Decade (2015-2024)

In November 2014, States across the Asia-Pacific region adopted a Ministerial Declaration endorsing the "shared vision" of universal CRVS systems by 2024, including the universal registration of births, deaths and other life events. The Declaration recognised the role that civil registration can play in preventing and reducing statelessness and noted that measures may be required to ensure the registration of vital events of asylum-seekers, refugees and stateless persons (population groups that are rarely referenced expressly in other regional instruments). A Regional Action Framework was also adopted under which States will set national CRVS improvement targets. In May 2015, the Economic and Social Commission for the Asia Pacific, endorsed the membership of the Regional Steering Group that will support the implementation of national CRVS improvement plans.¹⁰² By April 2016, 35 States had submitted baseline reports to the Regional Steering Group, which guides the initiative.¹⁰³

The role that civil registration can play in preventing statelessness and realising legal identity was discussed in articles and guidance prepared for the 2014 Ministerial Meeting at which the Declaration

⁹⁹ The Bali Declaration on People Smuggling, Trafficking in Persons and related Transnational Crime, 23 March 2016, para. 4.

¹⁰⁰ *Ibid.*, para. 7.

¹⁰¹ Regional Support Office, Bali Process, Concept Note: Bali Process Civil Registration Assessment Toolkit, 2016.

¹⁰² ESCAP, Report on the Ministerial Conference on Civil Registration and Vital Statistics in the Asia Pacific, 10 December 2014, E/ESCAP/MCCRVS/4.

¹⁰³ United Nations Economic and Social Council, Report of the Regional Steering Group for Civil Registration and Vital Statistics in Asia, 14 April 2016, E/ESCAP/72/22.

was adopted.¹⁰⁴ For States to realise their commitments in the Regional Declaration they will have to address any disparities in civil registration levels for “marginalized and hard to reach groups” including populations covered by UNHCR’s Core Mandate. CRVS system improvement not only provides an important opportunity to promote birth registration to prevent statelessness¹⁰⁵ but also enables the mainstreaming of communities affected by statelessness or at risk of statelessness within national development planning, in particular, monitoring of health-related Sustainable Development Goals. In addition, in Southeast Asia identity management systems are often based on civil registration, with birth certificates acting as breeder documents for identity cards. Consequently civil registration may be necessary for stateless persons and those at risk of statelessness to be included in population databases and be in a position to acquire national identity documentation, in accordance with a State’s nationality or residency laws.¹⁰⁶

4. Conclusions

The national approaches surveyed in the previous section provide context specific examples of the sorts of approaches that may be able to be considered and applied by other States in Southeast Asia to contribute towards realising UNHCR’s vision of solving statelessness. They reveal a variety of approaches, linked to national contexts, the profile of the affected populations, the underlying causes of statelessness and the policies through which it has been addressed. They also reveal that a number of the Actions in the GAP can be adapted to the national context and have been applied, often with success.

The approaches to addressing issues related to statelessness, nationality and access to rights for affected communities have included common aspects. For instance, in four out of five cases establishing baseline data on the number of the affected population

¹⁰⁴ L. González López, *et al.*, “Civil registration, human rights and social protection in Asia and the Pacific”, Asia Pacific Population Journal 2014, Vol. 29(1) and Get every one in the picture, Information Note Civil Registration, Nationality and Human Rights, 2014.

¹⁰⁵ UNHCR, GAP, *supra* n3, Action 7.

¹⁰⁶ For an explanation of the links between CRVS and Identity Management Systems see, The World Bank Group, Global Civil Registration and Vital Statistics Scaling up Investment Plan 2015-2024, 2014.

through a registration procedure was an important measure. These registration processes were usually Government-led but in one case a community-based organisation has taken the initiative, with technical support from UNHCR. Establishing a baseline allows the challenge to be quantified and the data obtained also permitted the diagnosis and implementation of new policy or legal solutions. In the Philippines, Malaysia, Thailand and Viet Nam community engagement and awareness-raising helped to facilitate community acceptance of processes linked to registration and applications for nationality. In three out of the four cases considered in this chapter civil society organisations played an important role in that process.

In three situations the inclusion of affected communities within the civil registry was an important first step towards resolving statelessness. In the case of undocumented migrants from neighbouring countries in Thailand, their functional registration by the Royal Thai Government combined with the acquisition of nationality documentation from the country of origin was linked to the regularisation of immigration status in Thailand. An incremental approach was adopted which saw the granting of a residency status with increased access to rights, either temporary or permanent for the long-term resident and *in situ* populations, with access to nationality immediately available to some. This is consistent with the importance placed in the GAP and UNHCR's policy guidance on addressing underlying discrimination as part of steps towards solutions, facilitating the greater integration of previously relatively excluded populations. This may be particularly relevant where the level of social exclusion of a stateless population is high and the provision of documentation, legal status and the greater enjoyment of rights can, in practice, help to facilitate integration, even if nationality is not to be accessible in the short or medium term. Including stateless and "at risk" populations in development planning to realise the SDGs and to realise the commitments made in the regional CRVS Declaration may also contribute to this endeavour. This is particularly true where there is a link between civil registration and identity management systems. However, the acquisition of nationality as the one durable solution to statelessness will often require further policy change or legislative amendment of the nationality law to realise solutions.

In all cases examined with the exception of Malaysia, legislative amendments to either the nationality or immigration law were made in order to facilitate the prevention or reduction of statelessness or to increase protection of stateless persons. These amendments were

sometimes aimed to meet international human rights standards and obligations. Despite these improvements, even reforming States have not closed all the gaps between national law and international standards, particularly those relating to the prevention of childhood statelessness and the prohibition on discrimination in the acquisition and conferral of nationality.

When looking at the factors that have motivated policy responses in the region, it is clear that the #IBelong campaign is beginning to have an effect, particularly in Thailand. The measures that different States in Asia adopted to address statelessness even prior to the launch of the Campaign indicate policy concerns and preferences which must be understood and taken into account so that UNHCR's goal of ending statelessness can be made more context-sensitive.

Regional approaches, particularly the engagement of ASEAN's Human Rights bodies, have a potentially important role to play particularly in helping to deepen understanding of the issues through research in cooperation with ASEAN Member States, building capacity, facilitating peer-to-peer exchange of information on good practices from within and outside the region. If approached in a careful, appropriate and informed way, good practices from within the region could help to unlock currently intractable situations, including those in Southeast Asia. The importance of preventing statelessness in the context of migration in the region provides an important convergence with building the ASEAN Community.

Realising UNHCR's goal of making progress towards ending statelessness across Southeast Asia is thus likely to require context specific approaches that build on and amplify progress already being made. The journey is likely to be long, but there are important and tangible prospects of making further progress across the region notwithstanding the scale and complexity of the issue.

13. The evolving role of the European Union in addressing statelessness

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1. Introduction

The European Union (EU) is a powerful supra-national regional organisation, which has been compared to a federal State insofar as it has its own currency, common asylum and migration policy, and an EU citizenship. The latter is of particular importance when considering the EU's ability to deal with the problem of statelessness, even though the EU does not have legislative powers to decide on the composition of its citizenry.¹ In this chapter, we discuss how legal principles governing EU citizenship status can be applied to address statelessness problems within the EU's borders. In addition to the long term solution of ensuring that every stateless person has access to nationality, there is largely unexplored potential for the EU to introduce regulations on the position of stateless persons in the context of its migration policy. Common European minimum standards granting legal residence to stateless persons in the EU would be beneficial for numerous reasons and achievable within the current EU treaty regime. Finally, the EU's influence extends far beyond its borders, and we discuss how the EU can address statelessness in the context of its Common Foreign and Security Policy.

¹ The EU is only competent to legislate in areas where this power has been conferred by the EU treaties (the Treaty on European Union of which the latest version is the Consolidated version of the Treaty on European Union (TEU), 13 December 2007, and the Treaty on the Functioning of the European Union of which the latest version is Consolidated version of the Treaty on the Functioning of the European Union (TFEU), 26 October 2012, OJ C 202, 7.6.2016). EU law is therefore characterised by a system of exclusive competences (where the EU has sole legislative power) and shared competences (where both the EU and its Member States can legislate), as well as areas in which the EU is not empowered to legislate or require that Member States harmonise their legislation. In the exercise of its competences, the EU is also subject to the principles of proportionality and subsidiarity. See, TFEU, Title I.

The first part of this chapter explains why EU action in the field of statelessness is important, highlighting the reality of statelessness within the EU's borders and the EU and its Member States' policy interests and commitments relevant to statelessness. The second part explores more closely what concretely the EU can do to solve and mitigate statelessness within its own borders due to its competence in the field of migration and asylum-related policy and through the peculiar concept of EU citizenship. In the third and final part we look at what role the EU is playing in efforts to address statelessness beyond its borders, discuss the extent to which a statelessness-specific agenda has now emerged and how that agenda is being shaped, including the frameworks and actors involved in EU external engagement on statelessness.

2. The importance of EU engagement on statelessness

To understand when and how the EU can play a role in addressing statelessness, it is important to pinpoint the ways in which the issue intersects with EU interests. The following paragraphs explore four particular reasons why stepped up EU action in the field of statelessness is warranted, drawing on factors inherent to the phenomenon of statelessness itself, as well as those relating to EU policy areas and objectives.

2.1 The contours of the statelessness phenomenon in the EU

The United Nations High Commissioner for Refugees (UNHCR) estimates that statelessness affects more than 10 million people around the world and almost 600,000 in Europe.² Contrary to popular belief, the EU is home to many stateless persons and many stateless persons are still born in or migrate into the territory of EU Member States. While establishing an exact figure for the number of stateless persons living in the EU is challenging,³ it is estimated that there are over 400,000 stateless persons in the European Union.

² UN High Commissioner for Refugees (UNHCR), UNHCR Global Trends: Forced displacement in 2015, 2016, p. 60.

³ States are sometimes reluctant and/or unable to provide accurate statistics on the stateless population living on their territory and "frequently, stateless persons are not only undocumented but also ignored by the authorities and uncouned in national administrative registries and databases". UNHCR, UNHCR Statistical Yearbook 2013, 2015, p.38.

The table below offers an overview of the number of stateless persons in the EU Member States according to the latest statistics collated and reported by UNHCR. These statistics show a wide disparity in the number of stateless persons who are resident in the territory of the EU Member States including between States which are equivalent in terms of population.

Table 1. Statelessness statistics for EU Member States⁴

Country	Number of stateless persons reported (mid-2014)	Country	Number of stateless persons reported (mid-2014)
Austria	828	Italy	747
Belgium	5,776	Latvia	252,195
Bulgaria	67	Lithuania	3,466
Croatia	2,873	Luxembourg	82
Cyprus	-	Malta	-
Czech Republic	1,502	Netherlands	1,951
Denmark	6,580	Poland	7,138
Estonia	85,301	Portugal	14
Finland	2,427	Romania	240
France	1,326	Slovakia	1,523
Germany	12,569	Slovenia	4
Greece	198	Spain	440
Hungary	132	Sweden	31,062
Ireland	99	UK	41
		TOTAL	410,879

Latvia and Estonia are the EU countries with the highest number of stateless persons and host the two largest of the EU's *in situ* stateless populations: "situations where stateless persons are in their 'own country'" (as compared to stateless migrants).⁵ In EU Member States,

⁴ As reported by UNHCR in, UNHCR, Global Trends, 2016. A dash (-) indicates that the value is zero or not available. Please see UNHCR's full Global Trends report for footnotes to these statistics that contain important qualifications to these numbers and which form an integral part of UNHCR's statistical reporting.

⁵ G. Gyulai, "Statelessness in the EU Framework for International Protection", European Journal of Migration and Law 2012, Vol. 14, p. 279.

in situ statelessness arose mainly as a result of the break-up of the Soviet Union, Yugoslavia and Czechoslovakia. With the disintegration of these States, some of their former citizens were left without any nationality. In Latvia and Estonia, for instance, the way in which the post-independence nationality laws were drafted and implemented left a significant number of persons on their territory stateless – although many of these persons were subsequently given a special legal status under national law and enjoy a broad range of rights.⁶ Statelessness also affects children of stateless persons who have not been able to acquire any nationality.

After the break-up of the Socialist Federal Republic of Yugoslavia, both persons who had been forcibly displaced within the Balkans and persons who emigrated – predominantly Roma populations – were affected by statelessness. Of the States created from the former Yugoslavia, two are now Members of the European Union: Slovenia and Croatia. The case of the so called “Erased” in Slovenia is particularly noteworthy; these were people who had failed to obtain Slovenian citizenship at the moment of the country’s declaration of independence, some of whom also had not acquired the nationality of another State and were thereby left stateless.⁷ Subsequently, several thousand of these persons who lived in Slovenia at the time of its succession were removed (“erased”) from the Register of Permanent Residents of Slovenia in 1992 and so lost the right to reside in Slovenia. Meanwhile, some of the other successor States of the former Yugoslavia (Montenegro, Serbia and the former Yugoslav Republic of Macedonia)

⁶ Under Latvian law, persons who hold “non-citizen” status under the 1995 law on “non-citizens” are entitled to rights and benefits greater than those considered stateless under Latvia’s separate domestic law on stateless persons. See, European Network on Statelessness (ENS), *Ending Childhood Statelessness: A Study on Latvia*, 2015, Working Paper 07/15. Non-citizens are not considered stateless by Latvia as a matter of domestic law, although they meet the international legal definition of stateless persons. For more information see, UNHCR, *Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights’ Compilation Report for the Universal Periodic Review of Latvia*, 2010, p.5.

⁷ European Court of Human Rights (ECtHR), Application No. 26828/06, *Kurić and others v. Slovenia*, 26 June 2012, para. 33. For further details on the situation of the “Erased” see, J. Zorn, “Non-citizens in Slovenia: erasure from the register of permanent residents” in C. Sawyer and B.K. Blitz (eds), *Statelessness in the European Union, Displaced, Undocumented, Unwanted*, Cambridge University Press 2011, p. 195.

are candidate countries to accede to the EU; EU accession negotiations were started in 2012 with Montenegro and in 2014 with Serbia. In 2009 the European Commission recommended opening negotiations for the former Yugoslav Republic of Macedonia's accession to the European Union. Bosnia and Herzegovina and Kosovo are potential candidate countries; they have been offered the prospect of joining the EU once they are ready to take on the political and economic reforms necessary for accession. Accession of these States to the EU would present a new opportunity to push for steps to address causes of statelessness in those countries such as problematic laws and practices in relation to birth and other types of civil registration as well discrimination against Roma.

The break-up of Yugoslavia also had consequences for Yugoslav citizens who had emigrated to EU Member States, especially during the 1980s and 1990s. Some of these persons did not acquire the nationality of one of the successor States because they did not satisfy the necessary conditions or they did not apply for nationality in time. Situations of statelessness also arise for the children of these refugees and migrants. For example, many Roma born in Italy to parents who left the former Yugoslavia now find themselves stateless because they have neither acquired Italian nationality nor acquired a nationality through their parents. It has been estimated that at least 15,000 Roma children are stateless or at risk of statelessness in Italy.⁸

More generally, children born in an EU Member State to foreign parents may be at risk of statelessness for various reasons. In countries in which nationality is conferred by *jus sanguinis*, children of foreign parents may be stateless if the parents are unable to pass on their nationality – for instance, because they themselves are stateless or hold the nationality of a country which maintains restrictive or discriminatory nationality legislation.⁹ The risk of statelessness is also present among

⁸ Associazione per gli Studi Giuridici sull'Immigrazione, *Out of Limbo, Verso uno status legale per le persone rom prive di documenti, apolidi o a rischio di apolidia*, 2015, p. 5. See also, D. di Rado, L. Cefisi and S. Doria, *In the sun – Survey on the phenomenon of statelessness among Roma living in Italy as a tool to influence the National Roma integration strategy*, 2013.

⁹ For example, 27 countries worldwide do not recognise the right of women to pass nationality to their children on equal terms with men – which can leave children without nationality. See UNHCR, *Background note on Gender Equality, Nationality Laws and Statelessness*, 2016.

refugees and migrants who come to Europe. Some are in fact already stateless: during the large refugee and migrant influx in 2015, close to 19,000 persons sought asylum in the EU and were recorded as stateless in this process.¹⁰ Others may face statelessness as a result of their displacement or migration, for instance because the nationality law of their country of origin provides for loss of nationality following long-term residence abroad.¹¹ Children born in Europe to refugee or migrant parents may also face difficulties accessing a nationality, given that “many refugees in Europe come from countries with problematic nationality legislation”.¹²

Finally, statelessness in the EU can arise from the withdrawal of nationality. For example, some Member States have laws permitting the withdrawal of nationality if a person has been involved in serious crimes, such as acts of terrorism, or has acquired nationality through fraud or false information. This issue has become topical since several EU Member States (for example, Belgium and France) recently debated the possibility of enacting specific legislation or revising existing legislation on the withdrawal of nationality for persons who obtained nationality by naturalisation and have committed acts of terrorism.¹³ It is essential to monitor these situations and whether such withdrawal is possible even if the person concerned does not possess another nationality.¹⁴ If withdrawal occurs where a person has not yet recovered his or her previous nationality, statelessness could arise. Such situations can already occur in some EU Member States.¹⁵

The possibility that withdrawal of an EU Member State’s nationality may lead to new cases of statelessness within the EU’s borders has already been brought to the attention of the European Court of Justice.

¹⁰ Eurostat statistics, <http://ec.europa.eu/eurostat/web/main/home>.

¹¹ See, in particular, ENS, No Child Should Be Stateless, 2015.

¹² *Ibid.*, p. 11.

¹³ See, for example, P. Wautelet, “Priver les djihadistes de leur nationalité belge : les garde-fous à respecter”, *Journal des Tribunaux* 2015, pp. 183-184. See also, J.J. Urvas, Rapport d’information sur l’indignité nationale, Commission des lois constitutionnelles, de la législation et de l’administration générale de la République, Assemblée Nationale, 25 March 2015, n° 2677.

¹⁴ To date, in France and Belgium, the withdrawal of nationality is only possible if it does not result in statelessness.

¹⁵ British Nationality Act 1981, Section 40. See, *inter alia*, M. Gower, Deprivation of British citizenship and withdrawal of passport facilities, Library House of Commons, 30 January 2015, standard note SN/HA/6820.

The judgment of the European Court of Justice in the case related to the national proceedings between Janko Rottmann and Freistaat Bayern (the Free State of Bavaria) centred on this very problem, as Germany sought to withdraw nationality from someone who had acquired it fraudulently.¹⁶ This case testifies to the fact that statelessness is a reality within the EU and must be given due attention.

2.2 Intersections between statelessness and the EU's human rights priorities

The scale and reach of the phenomenon of statelessness in EU Member States as outlined in the previous section is alone cause for concern, but the challenge of statelessness should not be measured by numbers alone. Central to an appreciation of the urgency of addressing statelessness is an understanding of its human impact. Childhood statelessness interferes with the enjoyment of human rights and impairs children's well-being.¹⁷ Unless and until it is resolved, the denial of nationality leaves people excluded from most political rights and democratic processes since these remain reserved to citizens. Statelessness can also have a wider detrimental impact on the enjoyment of many civil as well as economic, social and cultural rights, including the right to own property, to get married or register the birth of a child, to education, work and healthcare, and to freedom of movement.¹⁸ In extreme cases, stateless persons can be caught in a legal limbo characterised by destitution and arbitrary and repeat detention.¹⁹

The EU's commitment to human rights was central to its establishment and purpose. According to Article 2 of the Treaty on the European Union (TEU), "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

¹⁶ European Court of Justice (ECJ), case C-135/08, *Janko Rottmann v. Freistaat Bayern*, 2 March 2010.

¹⁷ UNHCR, 'I am here, I belong'. The urgent need to end childhood statelessness, 2015.

¹⁸ UNHCR, A special report: Ending statelessness within 10 years, 2014.

¹⁹ See, for instance, UNHCR, Mapping Statelessness in the United Kingdom, 2011; UNHCR, Mapping Statelessness in the Netherlands, 2011; ENS, series of reports on "Protecting stateless persons from arbitrary detention", 2015, <http://www.statelessness.eu/protecting-stateless-persons-from-detention>.

In 2000, the EU consolidated the progressive development of its human rights policy in a single document, the 'EU Charter of Fundamental Rights' (EU Charter). This became binding for EU institutions, as well as for Member States when implementing EU law, with the entry into force of the Lisbon Treaty in 2009.²⁰ Promoting democracy and human rights is also a key objective of the EU's foreign policy.²¹ The nexus between statelessness and human rights provides an important incentive for the EU to pay attention to statelessness both within and beyond its borders.²²

The EU Charter does not include the right to a nationality,²³ but the EU places great emphasis on tackling discrimination, including against national minorities²⁴ and has an entire policy area dedicated to the economic and social integration of the Roma.²⁵ Statelessness can be both a product of and a catalyst for discrimination against minorities,²⁶ including for Roma, some of whom have been unable to secure a nationality.²⁷ The presence and specific vulnerabilities of stateless

²⁰ TEU, *supra* n1, Art. 6 (1).

²¹ *Ibid.*, Art. 21(2).

²² See also, for instance, European Parliament Directorate-General for External Policies of the Union, Study: Addressing the human rights impact of statelessness in the EU's external action, 2014, chapter 3, pp. 14-18.

²³ The majority of the core UN human rights treaties include, in some form or other, the right to a nationality (including the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, International Convention on the Rights of Persons with Disabilities) and many regional human rights treaties also affirm this right. In the framework of the Council of Europe, the right to nationality is a central principle of the European Convention on Nationality and the Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, and nationality has been recognised by the European Court of Human Rights as an element of a person's social identity, protected under article 8 (private life) of the European Convention on Human Rights.

²⁴ See also, TEU *supra* n1, Art. 2.

²⁵ For a summary of policies and instruments see, European Commission, EU and Roma, http://ec.europa.eu/justice/discrimination/roma/index_en.htm.

²⁶ As noted in the previous section, the two largest stateless groups in the EU – in Latvia and Estonia – are national minorities. See also, European Parliament Resolution of 14 January 2009 on the Situation of Fundamental Rights in the European Union 2004-2008, 2007/2147.

²⁷ See, for instance, J. Dedic, "Roma and Statelessness", presentation at a hearing of the European Parliament on 26 June 2007, <http://www.europarl.europa>.

persons in Europe should therefore be given special attention in the context of EU fundamental rights protection. Moreover, Title V of the EU Charter covers “Citizens’ Rights”. It enumerates the specific rights and entitlements of EU citizens. At present, EU citizenship is tied to nationality of an EU Member State. As a result, the benefits offered in this section of the Charter are beyond the reach of stateless persons – even where they have a real and enduring link to one or more EU Member State or when they are stateless as a result of a violation by an EU Member State of its international obligations with respect to the prevention and reduction of statelessness.

Similarly, there are significant connections between the EU’s priorities for its external human rights action and the global challenge of statelessness. For instance, protecting children’s rights, enhancing gender equality, promoting the enjoyment of economic, social and cultural rights, strengthening democracy and protecting the rights of minorities are all key EU human rights foreign policy interests and all interact in various ways with statelessness.²⁸ The ‘EU Strategic Framework on human rights and democracy’²⁹ and the new EU ‘Action plan on human rights and democracy (2015-2020)’³⁰ both acknowledge this by explicitly referring to the need to address issues of statelessness in the EU’s relations with relevant Third Countries. Section 4 of this chapter looks more closely at the role of the EU in addressing statelessness around the world, including as an element of its human rights engagement.

2.3 EU Member States’ common international commitments to addressing statelessness

Another reason strengthened EU intervention in the matter of statelessness is important relates to the status of accessions to

eu/hearings/20070626/libe/dedic_en.pdf; J. Parra, “Stateless Roma in the European Union: Reconciling the doctrine of sovereignty concerning nationality laws with international agreements to reduce and avoid statelessness”, *Fordham International Law Journal* 2011, Vol. 34.

²⁸ European Parliament Directorate-General for External Policies of the Union, *supra* n22, pp. 18-19.

²⁹ Council of the European Union, EU Strategic Framework on human rights and democracy, 25 June 2012, Action 14(d).

³⁰ Council of the European Union, Action plan on human rights and democracy (2015-2020), 20 July 2015, Action 24(h).

international conventions relating to statelessness and the EU's other indications of commitment to addressing statelessness. Among EU Member States, only Cyprus, Malta, Poland and Estonia have yet to become States Parties to the 1954 UN Convention relating to the Status of Stateless Persons (1954 Convention).³¹ This Convention sets out the international definition of a "stateless person" and minimum standards for their treatment. Thus, stateless persons have the right to receive treatment at least as favourable as that accorded to nationals with respect to, for instance, freedom of religion and education for children. Other provisions require States to treat stateless persons in the same way as other non-nationals or the same way as nationals with regard to particular rights.

As of August 2016, nineteen EU Member States are State Parties to the 1961 Convention on the Reduction of Statelessness (1961 Convention).³² This Convention establishes rules for preventing statelessness in the field of the conferral and withdrawal of nationality. A number of other EU Member States already have in place such safeguards against statelessness.³³ Nevertheless, the ratification of or accession to this UN legal instrument by all EU Member States remains important,³⁴ even where their legislation is already in line with the provisions of the 1961 Convention, because it can encourage non-EU States to accede to this Convention and give more credibility to the EU's external action in the context of its dialogue with Third States on measures to prevent and reduce statelessness.³⁵

³¹ Convention relating to the Status of Stateless Persons (1954 Convention), 28 September 1954, entry into force 6 June 1960, 360 UNTS 117.

³² Convention on the Reduction of Statelessness, 30 August 1961, entry into force 13 December 1975, 989 UNTS 175. EU Member States which have not ratified the 1961 Convention are: Cyprus, Estonia, France, Greece, Luxembourg, Malta, Poland, Slovenia and Spain. See also Table 2.

³³ See, for instance, ENS, *supra* n11.

³⁴ This is reflected in a pledge made by the EU on behalf of its Member States that the EU Member States that have not yet done so will consider ratification of the 1961 Convention on the Reduction of Statelessness. European Union, High-level meeting on the rule of law at the national and international levels: Pledge registration form, September 2012.

³⁵ European Parliament Directorate-General for External Policies of the Union, *supra* n22.

At the European regional level, two Conventions of the Council of Europe³⁶ deal with statelessness: the 2006 Convention on the Avoidance of Statelessness in relation to State Succession³⁷ and the 1997 European Convention on Nationality (ECN).³⁸ To date the only EU Member States to have ratified the former are Austria, Hungary and the Netherlands. This instrument is limited in scope since its provisions relate only to the situation in which a State replaces another State in the responsibility for the international relations of a territory. A larger number of EU Member States have ratified the ECN.³⁹ The ECN has a wider application since it establishes general principles and rules relating to the nationality of natural persons.⁴⁰ Article 4 provides that the rules on nationality of each State Party shall be based on the principle that “statelessness shall be avoided”. It establishes rules on the granting of or facilitating the acquisition of nationality by children who would otherwise be stateless and for stateless persons lawfully and habitually resident in the State Party (Article 6). It also governs the avoidance of statelessness in case of loss of nationality (Articles 7 and 8).

There are other international instruments binding EU Member States and dealing with the right to a nationality and with statelessness. For instance, all EU Member States are Party to the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination, which both include the right to a nationality. The Convention on the Rights of the Child has also been ratified by all EU Member States. Paragraph 1 of Article 7 provides that every child has the right to acquire a nationality and paragraph 2 specifies that:

States Parties shall ensure the implementation of [...] [the right to acquire a nationality] 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.

³⁶ All EU Member States are also members of the Council of Europe.

³⁷ Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession, 19 May 2006, entry into force 1 May 2009, CETS No. 200.

³⁸ European Convention on Nationality (ECN), 6 November 1997, entry into force 1 March 2000, ETS No. 166.

³⁹ See Table 2.

⁴⁰ ECN, *supra* n38, Art. 1.

Article 8 of the same convention sets out the child's right to preserve his or her identity, *including nationality*, and requires that it be speedily re-established if the child is illegally deprived of it.

The European Convention on Human Rights (ECHR) does not explicitly provide for the right to a nationality, but the European Court of Human Rights (ECtHR), in its decisions, has recognised that nationality is an element of a person's identity and is therefore protected by Article 8 which provides for the right to private and family life.⁴¹ Although the EU itself has not acceded to the ECHR, all EU Member States are parties to the convention and therefore bound by its provisions.

In addition to these treaty obligations taken on by EU Member States, there have recently been other signs of an increased commitment to addressing statelessness. For instance, at the ministerial meeting organised by UNCHR in 2011, half of the EU's current Member States – Austria, Belgium, Bulgaria, Croatia, Denmark, France, Hungary, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden and the UK – “committed themselves to taking action in the area of statelessness”.⁴² The following year, at a high-level UN event on the Rule of Law, the EU pledged on behalf of all of its Member States to address the remaining gaps in the ratification record of the UN Statelessness Conventions.⁴³ With these common international obligations and political pledges relating to statelessness in mind, there is scope for the EU to play a role in encouraging those EU Member States' which have not yet done so to accede to relevant instruments as well as to facilitate the effective implementation of these commitments.

2.4 Diverging approaches to statelessness among EU Member States

Despite their common international commitments, EU Member States have widely divergent laws on nationality and statelessness

⁴¹ See, in particular, ECtHR, Application No. 53124/09, *Genovese v. Malta*, 11 October 2011 and ECtHR, Application No. 65192/11, *Mennesson v. France*, 26 June 2014.

⁴² European Union Agency for Fundamental Rights, Annual Report 2012, Fundamental rights: challenges and achievements in 2012, 2013, p. 45. These commitments “ranged from considering joining the 1961 Convention (Belgium, Luxembourg, Portugal and Spain) to reviewing the implementation of the 1954 Convention (Austria and the United Kingdom)”.

⁴³ EU Pledges, *supra* n34.

determination procedures. It is evident that further harmonisation, including through the exchange of information and good practices, would be highly desirable. This was called for by the EU Council in its December 2015 Conclusions on Statelessness.⁴⁴

A central safeguard against statelessness is to ensure that a child who would otherwise be stateless can acquire the nationality of the country of his or her birth. Research by the European Network on Statelessness has revealed that less than half of EU Member States have “full safeguards” for children born in their territory, as shown in Table 2 below. “Full safeguards” means that these States provide nationality to all children born on their territory who would otherwise be stateless, in full compliance with relevant international standards. A further 13 Member States have “partial safeguards”, setting conditions that may exclude children in certain circumstances and thereby fail to prevent all cases of statelessness. More specifically, some countries will only grant nationality to the child if one or both parents are stateless (Czech Republic, Estonia, Hungary, Latvia and Lithuania) or of unknown nationality (Croatia) or either stateless or of unknown nationality (Poland and Slovenia). Other States (including Czech Republic, Germany, Netherlands and Sweden) have safeguards contingent on the residence status of the child, the parents or both. Finally, Cyprus does not have any safeguards and Romania has only a system for naturalisation for stateless children born on the territory.⁴⁵ As a result, which EU Member State a stateless child is born in will be decisive for the question of whether he or she will be able to realise the right to a nationality.

⁴⁴ European Council, Conclusions of the Council and the Representatives of the Governments of the Member States on Statelessness, 4 December 2015.

⁴⁵ ENS, *supra* n11.

Table 2. Status of key prevention standards in the EU

Country	1961 Convention on the Reduction of Statelessness	European Convention on Nationality	Safeguard for children born stateless in the country
Austria	X	X	Partial
Belgium	X		Full
Bulgaria	X	X	Full
Croatia	X		Partial
Cyprus			No/minimal
Czech Republic	X	X	Partial
Denmark	X	X	Partial
Estonia			Partial
Finland	X	X	Full
France			Full
Germany	X	X	Partial
Greece			Full
Hungary	X	X	Partial
Ireland	X		Full
Italy	X		Full
Latvia	X		Partial
Lithuania	X		Partial
Luxembourg			Full
Malta			Full
Netherlands	X	X	Partial
Poland			Partial
Portugal	X	X	Full
Romania	X	X	No/minimal
Slovakia	X	X	Full
Slovenia			Partial
Spain			Full
Sweden	X	X	Partial
UK	X		Full

Another difference between the nationality laws of EU Member States concerns the possibility of facilitated naturalisation for stateless persons – i.e. providing a route through which stateless persons can resolve their situation. As shown in Table 3 below, just over half of

EU Member States provide for preferential treatment for stateless persons in naturalisation procedures, such as requiring a shorter period of residence than is normally required for foreign nationals to be eligible for naturalisation.⁴⁶ If stateless persons are not identified, it is impossible to ensure that they are able to access facilitated naturalisation procedures or receive an adequate level of protection meanwhile. To date, however, the majority of EU Member States have not established a specific procedure for the determination of statelessness status (as Table 3 shows).⁴⁷ Only a few EU Member States have specific legislation on statelessness determination procedures, separate from the asylum procedure.

Table 3. Status of protection standards in the EU

Country	1954 Convention relating to the Status of Stateless Persons	Statelessness determination procedure	Facilitated naturalisation for stateless persons
Austria	X		
Belgium	X	Partial	X
Bulgaria	X		X
Croatia	X		
Cyprus			
Czech Republic	X		
Denmark	X		X
Estonia			
Finland	X		X
France	X	X	X
Germany	X		X
Greece	X		X
Hungary	X	X	X
Ireland	X		X
Italy	X	X	X

⁴⁶ For more detailed information see, European Union Democracy Observatory on Citizenship, Global Database on Modes of Acquisition of Citizenship, <http://eudo-citizenship.eu/databases/modes-of-acquisition>.

⁴⁷ For more details on the differences in statelessness determination procedures in different States, see ENS, Statelessness determination and the protection status of stateless persons, 2013; and UNHCR, Good Practices Paper – Action 6: Establishing Statelessness Determination Procedures to Protect Stateless Persons, 2016.

Country	1954 Convention relating to the Status of Stateless Persons	Statelessness determination procedure	Facilitated natural- isation for stateless persons
Latvia	X	X	
Lithuania	X		
Luxembourg	X		
Malta			
Netherlands	X		X
Poland			X
Portugal	X		
Romania	X		
Slovakia	X	X	X
Slovenia	X		X
Spain	X	X	
Sweden	X		X
UK	X	X	X

Moreover, even where such procedures are in place, different Member States take different approaches. For example, different authorities may be put in charge of the statelessness determination (asylum authority, immigration authority, civil or administrative courts), different pre-conditions may be imposed for applicants for stateless status, a different burden of proof may be prescribed and even the definition of a stateless person may be different.⁴⁸ This divergence of rules and procedures can lead to different outcomes depending on the jurisdiction in which a person seeks recognition of their statelessness status, with some Member States recognising as stateless, persons who would not be considered stateless in other EU Member States.⁴⁹ This is illustrated by the situation of Palestinians; a Palestinian from the West Bank seeking protection is likely to be found stateless in some EU Member States (such as Spain, Hungary, Italy and France) and not in others (such as Greece and Sweden).⁵⁰ Consequently, EU action could

⁴⁸ K Bianchini, *The Implementation of the Convention to the Status of Stateless Persons: Procedures and Practice in selected EU States*, PhD thesis, 2015, p. 124.

⁴⁹ G. Bittoni, *Statelessness in the European Union: The Case of the Cuban Migrants*, *Tilburg Law Review* 2014, Vol. 19(1-2), pp. 52-63.

⁵⁰ Nevertheless, the response might be different if the Palestinian fell under the mandate of the United Nations Relief and Works Agency for Palestinian

be useful to ensure equal and effective implementation of international standards and to avoid different treatment between stateless persons in different Member States.

3. The role of the EU in addressing statelessness within its borders

The European Union is a peculiar organisation, being neither a State nor a classical inter-governmental organisation. Its *sui generis* nature as a non-State entity with extensive State-like legislative powers makes it in many ways particularly suited to addressing statelessness. States jealously guard their ability to determine their populations, not least because a stable population is one of the main defining features of statehood.⁵¹ Any measures, therefore, which appear to interfere with the State's freedom to include or exclude particular individuals as citizens might be perceived as threatening State sovereignty. Statelessness discussions within and among States are therefore often coloured by sovereignty-related concerns, which do not necessarily lead to optimum outcomes for addressing statelessness. An approach that emerges in a supra-national entity such as the EU can overcome a number of these concerns. Although the EU does have a citizen body in that nationals of all EU Member States are considered EU citizens and benefit from the rights attached to that status, it is not burdened with the task of controlling its composition, as explained in section 3.2 below. The EU existed before the formal status of EU citizen was introduced and the relationship and interdependence among the EU, its citizens and third country citizens is construed differently than is typical in the case of a State.

On the other hand, the fact that the EU is not a sovereign State imposes a number of limitations on what it can achieve in the field of statelessness. The EU cannot legislate on certain issues to the same extent that a sovereign State can – it is limited by a number of rules that aim to create a particular balance of power between the EU and its Member States.

Refugees in the Near East (UNRWA). Bianchini, *supra* n48, pp.127-132.

⁵¹ Montevideo Convention on the Rights and Duties of States, 26 December 1933, entry into force 26 December 1934, Art. 1.

Is statelessness one of the issues on which the EU can legislate? At first, it may appear that the answer is “no”, as the EU does not have competence to legislate on the acquisition and loss of EU citizenship and of the citizenship of EU Member States,⁵² and statelessness is nothing other than the lack of any citizenship.⁵³ While statelessness is indeed primarily a question of nationality, the legal issues with which it interacts cover various fields of law. For instance, in migration law it may matter whether an applicant for a residence permit is stateless, and statelessness is likely to impact whether or not the State can deport (and to where) an individual to whom no right of residence was granted. Under private international law, a person’s ability to acquire and change a name can depend on his or her statelessness,⁵⁴ and the statelessness of the parties involved can play a role in the choice of a court to adjudicate a divorce case.⁵⁵ Thus, statelessness is a complex issue that cannot be effectively regulated through a single law, or even though a single domain of law. When discussing the EU’s potential to address statelessness, it is therefore important to distinguish among the various legal fields relevant to statelessness, as the EU’s ability to act will differ in each field.

The EU cannot solve statelessness-related problems on its territory singlehandedly in all fields of law, but neither can any other national or international organisation. It can, however, make a significant contribution to addressing some of these problems, and is in some cases better placed to do so than its Member States. Below we look specifically at how statelessness can be addressed through EU legislation on migration, as well as through the peculiar institution of EU citizenship.

3.1 Granting stateless persons the right to legal residence in the EU

Not all stateless persons are migrants. Some are stateless *in situ* – they live in the country where they were born and have never crossed a State border.⁵⁶ However, even these individuals often depend on migration

⁵² See more below in section 3.2.

⁵³ 1954 Convention, *supra* n31, Art. 1.

⁵⁴ Judgment of the Dutch Council of State (Raad van State) of 23 July 2014, No. 201310945/1/A3 (ECLI:NL:RVS:2014:2760).

⁵⁵ See, for example, Dutch Civil Code, book 10 (Burgerlijk Wetboek Boek 10, Internationaal Privaatrecht), art. 16.

⁵⁶ See previous section 2.1.

law for access to their rights. Nationals have an undisputed right of residence in their State of nationality. Non-nationals, on the other hand, need permission to reside. Stateless persons by definition belong to the category of non-nationals, even if they have never “immigrated” into the country. The regulation of their residence status and the rights attached to it therefore fall within the sphere of migration law. Under EU law all stateless persons are regarded as “third country nationals”, even those who are stateless *in situ*.

The most effective way to provide protection to stateless persons within the EU, apart from resolving their statelessness, is to grant them a right to residence. Persons enjoying legal residence in the EU have, at least in theory, access to a wide package of rights. However, protection in the context of migration law does not always need to take the form of providing a residence permit in the current State of residence. Stateless persons on the territory of a State may not be interested in establishing residence in that State – they may aspire to settle abroad, but be unable to organise this without the assistance of the State. If protection in the form permanent of residence in another country is available, the host State has discretion to provide a status that is more transitional,⁵⁷ and facilitate the implementation of a more permanent settlement elsewhere. Deportations and voluntary assisted returns also play a role in finding solutions for stateless persons. In order to provide any form of legal protection to a stateless person in the EU Member States, whether through a residence permit, or an assisted move to a third country, it is essential to identify the person in question as stateless. If a residence permit is granted on the basis of statelessness, the person’s statelessness status obviously needs to be determined in order to gain access to the residence permit.

If the EU were to legislate on the creation of an EU residence permit for stateless persons, a decision would need to be taken on whether to group statelessness under the umbrella of asylum-related statuses or treat it as a regular immigration status, since a different treaty base applies to the regulation of asylum and non-asylum types of migration. Article 78 of the Treaty on the Functioning of the European Union (TFEU) regulates the procedure for adopting legislation in the field of the Common EU Asylum Policy, and Article 79 TFEU empowers

⁵⁷ See, for example, UNHCR, Handbook on the Protection of Stateless Persons. 2014, pp. 54-57.

the EU to legislate on other forms of immigration to the EU. The wording of both TFEU articles provides sufficient flexibility to serve as a basis for EU legislation on the identification and protection of stateless persons, bearing in mind that statelessness would be a peculiar ground for a residence permit in this context. On the one hand, stateless persons are vulnerable due to the lack of a nationality bond with any State and require a residence permit to be shielded from that vulnerability, making their situation comparable to statuses under the Common EU Asylum Policy. On the other hand, stateless persons are not necessarily refugees,⁵⁸ as the definition of a stateless person does not involve a well-founded fear of persecution nor does it refer to other humanitarian hardships which usually form the basis of grants of subsidiary protection or humanitarian leave to remain. Some EU Member States group statelessness determination procedures together with asylum-related procedures, while others approach it as a non-asylum issue. In France, stateless persons and asylum seekers are assisted by the same State authority, the French Office for Protection of Refugees and Stateless persons.⁵⁹ In the Netherlands, on the other hand, the residence status originally intended for stateless persons – but later expanded to a more general category of unremovable persons – the *buiten schuld vergunning* – is grouped together with non-asylum residence statuses.⁶⁰

Even if the EU has the legal basis to legislate on the migratory status of stateless persons, it does not necessarily mean that it should. It needs to consider whether it is indeed better placed to address these issues than its Member States. In the EU jargon, it is important to illustrate that an EU measure on the migration status of stateless persons complies with the principle of subsidiarity. This principle ensures that if the EU and its Member States share competence in a specific field of law, as is the case with migration law, the EU can only

⁵⁸ Except of course if a stateless person also happens to be a refugee, in which case the asylum considerations would form the basis for protection. See UNHCR, Handbook on the Protection of Stateless Persons, 2014, paras. 78-82.

⁵⁹ Office français de protection des réfugiés et apatrides (OFPRA), www.ofpra.gouv.fr.

⁶⁰ Decision implementing the Dutch Law on Foreigners (Vreemdelingenbesluit) 2000, art. 3.4 (1w). It has been demonstrated that this type of residence permit in practice does not offer adequate protection to stateless persons see, S. Jaghai and C. Vlieks, “Buitenschuldbeleid schiet tekort in bescherming staatlozen” *Asiel- en Migrantenrecht* 2013, Nr. 05/06, pp. 287-292.

act if it is better placed to regulate a specific issue than its Member States.⁶¹

There are a number of reasons why access of stateless persons to a legal residence status within the EU is best regulated at the EU level. Firstly, by analogy with the Common European Asylum System, a protection regime for vulnerable groups in the EU should be coordinated at the EU level to avoid a “race to the bottom” effect. This effect is caused by the fear that stateless persons in the EU will choose to seek protection in the Member State which is offering the easiest access to recognition of their status as a stateless person and the best subsequent protection.⁶² A Member State might therefore be tempted to have a less generous statelessness protection regime than the neighbouring State in order to avoid attracting stateless persons who need assistance. This could eventually lead to an overall low level of protection for stateless persons in the EU and possibly to violations of relevant international obligations. There is no evidence that any significant numbers of stateless persons actually engage in such “forum-shopping” behaviour or that the fears that might lead to the “race to the bottom” are in any way justified. However, in the context of open borders, it is the EU’s responsibility to ensure that such considerations do not play a role in domestic policies.⁶³ Member States which strive to comply with their international law obligations on statelessness should not be hindered in these efforts by fears of attracting disproportionate numbers of stateless persons from other Member States which avoid complying with these standards.

Secondly, the EU needs a comprehensive approach to statelessness in order to ensure that its existing legislation is implemented coherently and effectively throughout its territory. The TFEU was the first EU treaty to mention stateless persons.⁶⁴ Even though statelessness is not

⁶¹ TEU, *supra* n1, Art. 5.

⁶² See, for example, E. Thielemann “The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach”, European Policy Analysis 2007, Issue 1, p. 2.

⁶³ The worries of “forum-shopping” were frequently invoked in the context of the need to create the Common European Asylum System by politicians and scholars. See, for example, S. Gallagher “Towards a Common European Asylum System: Fortress Europe Redesigns the Ramparts”, International Journal 2002, Vol. 57(3), p. 378.

⁶⁴ TFEU, *supra* n1, Art. 67(2).

a separate protection ground within the Common European Asylum System, there are a number of references to stateless persons in other EU instruments,⁶⁵ which require that stateless persons are identified in a consistent manner across the Member States. The divergence in statelessness determination outcomes in different Member States can lead to discrepancies in the implementation of some provisions. For example, Article 36 of the Directive 2013/32/EU of 26 June 2013 ‘On common procedures for granting and withdrawing international protection’ reads:

1. A third country designated as a safe country of origin in accordance with this Directive may, after an individual examination of the application, be considered as a safe country of origin for a particular applicant only if:
 - (a) he or she has the nationality of that country; or
 - (b) he or she is a stateless person and was formerly habitually resident in that country.

This means that if a person is not stateless, his or her “safe country of origin” can only be the country of his or her nationality, even if he or she enjoyed habitual residence in another country. The way in which a Member State decides on whether a person is stateless has an influence on the effects of this provision. Section 2.4 above illustrates that different Member States may reach different conclusions about whether individuals in exactly the same circumstances are stateless, which can lead to inconsistent application of existing EU legislation that relies on the concept of a stateless person. It is undesirable that EU legislation applies differently to the same person in different Member States, which necessitates the establishment of common standards for statelessness status determination.

⁶⁵ See, for example, European Parliament, Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, Art. 36; European Parliament, Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection.

3.2 Promoting access to EU citizenship for stateless persons

EU citizenship is an unusual status. While the EU regulates the rights of EU citizens and has come a long way in advancing those, it has no power to shape rules about admission to and revocation of that status. That power still lies with the Member States, as the only way to become an EU citizen is to acquire the nationality of one of the Member States. The rules for the acquisition and loss of the nationalities of Member States are regulated by the respective Member States.

The EU Member States have been protective of their sovereignty on nationality since the concept of European citizenship started gaining increasing importance. The Treaty of Lisbon contains a disclaimer to the Article on European citizenship, which reads, “[c]itizenship of the Union shall be additional to and not replace national citizenship”.⁶⁶

This disclaimer has been in force since the Treaty of Amsterdam in 1997, albeit with slightly different wording.⁶⁷ When the Treaty of Maastricht introduced the concept of European citizenship into the Treaty texts in 1992, Member States had already expressed their intention to retain sovereignty on nationality matters in a number of documents.⁶⁸ The Edinburgh Decision, adopted by the Representatives of the Member State Governments meeting in the framework of the European Council to clarify the Treaty of Maastricht, affirms that “[t]he question whether an individual possesses the nationality of a Member State will be settled solely by reference to the national law of the Member State concerned”.⁶⁹ Exactly the same message features in Declaration No. 2 on nationality of a Member State,⁷⁰ annexed to the Treaty on European Union in 1992. Interestingly, this declaration has been dropped during the latest amendment of the European Union Treaties by the Treaty

⁶⁶ TFEU, *supra* n1, Art. 20 (1).

⁶⁷ Treaty Establishing the European Community, as amended by the Treaty of Amsterdam of 1997, Art. 8(1) reads “[c]itizenship of the Union shall complement and not replace national citizenship”. For the commentary on the change of wording see, N. Nic Shuibhne “EU Citizenship After Lisbon” in D. Ashiagbor, N. Countouris and I. Lianos (eds) *The European Union After the Treaty of Lisbon*, Cambridge University Press 2012, p. 139.

⁶⁸ Edinburgh Decision of 1992, OJ 1992, C 348, p. 1; Declaration No. 2 on Nationality of a Member State, annexed to the Treaty on European Union, OJ 1992 C 191, p. 98.

⁶⁹ Edinburgh Decision of 1992, OJ 1992, C 348, 31/12/1992, p. 1.

⁷⁰ Declaration No 2 on Nationality of a Member State, *supra* n68, p. 98.

of Lisbon in 2009. The disappearance of the declaration from the Treaty texts has largely gone unnoticed and the declaration is still occasionally referred to in post-Lisbon documentation.⁷¹ However, the removal of the Declaration from the TFEU was not a coincidence and could be seen as part of the continuing search for balance between the EU's and Member States' competences.

Even though the EU cannot legislate either on acquisition and loss of the nationalities of Member States or on the acquisition and loss of EU citizenship, it has some influence on the nationality laws and policies of its Member States.

First, the legislation on the rights of EU citizens and on asylum and immigration has an impact on the regulation of access to nationality in Member States. For example, legal residence for a certain number of years is usually a central requirement for access to nationality through naturalisation. Individuals who derive their right to reside in a Member State from EU legislation may qualify for naturalisation because of such legislation.⁷² The case of *Zhu and Chen v. Secretary of State for the Home Department*⁷³ and the amendment of the Irish nationality law⁷⁴ which followed this judgment present an interesting example of how the EU free movement rights affected a Member State's policy on the acquisition of nationality at birth by *jus soli*. In this case, Mrs. Chen, who was a Chinese national temporarily residing in the UK, chose to give birth to her daughter, Catherine Zhu, in Northern Ireland, to profit from Irish nationality legislation that – at the time – granted citizenship to all persons born anywhere on the island of Ireland, including Northern Ireland. By virtue of this law Catherine Zhu obtained Irish nationality, and thus EU citizenship, which enabled her

⁷¹ See, for example, ECJ, Opinion of the Advocate General Szpunar of 20 May 2014 in Case C202/13 *McCarthy and others v. Secretary of State for the Home Department*, para. 45, footnote 24.

⁷² See, K. Swider, Pre-Accession Changes to Residence-based Naturalisation Requirements in Ten New EU Member States, European University Institute Working Paper Series 2010, pp. 3-4.

⁷³ ECJ, case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004.

⁷⁴ Irish Nationality and Citizenship Act of 2004, No. 38, Amending Irish Nationality and Citizenship Act of 1956. See also, Act on the Twenty-Seventh Amendment of the Irish Constitution of 24th June 2004, based on the referendum on the 11th of June 2004 and K. Rostek and G. Davies, The Impact of Union Citizenship on national citizenship, European Integration Online Paper 2006, part 3.3.

family to establish permanent residence in the UK, relying on Catherine Zhu's free movement rights, much to the dissatisfaction of the British authorities. Soon after the case was decided by the European Court of Justice (ECJ), Ireland amended its law, making acquisition of nationality by *jus soli* conditional on possession of a genuine link to Ireland.⁷⁵ EU law thus already affects the nationality laws of Member States and the consequences that these laws have in practice, sometimes leading States to amend their laws. If the EU passed legislation granting legal residence rights to stateless persons, by analogy with the residence rights of refugees in the EU, stateless persons would be more likely to be able to comply with the requirement of legal residence that is essential for naturalisation in Member States. EU law would thus indirectly have influence on who qualifies for naturalisation in its Member States.

Second, ECJ case law requires Member States to have "due regard" to EU law when regulating access to nationality.⁷⁶ The exact meaning of the broad concept of "due regard" and what this entails is gradually being defined by the ECJ in its case law on EU citizenship. The *Rottmann* judgment⁷⁷ clarified that, when statelessness is at stake, the ECJ is prepared to hold Member States' nationality practices to high international standards. Such case law could help establish the rights of stateless persons to access the nationalities of EU Member States.⁷⁸

Third, Member States are also bound by the general principles of EU law when creating law and policy relating to nationality.⁷⁹ For example,

⁷⁵ See, Irish Nationality and Citizenship Act, *supra* n74, Arts. 6-6B. Irish citizenship can also be acquired by descent and on other grounds at birth and later in life.

⁷⁶ See, ECJ, case C-369/90, *Mario Vicente Micheletti and others v. Delegación del Gobierno en Cantabria*, 7 July 1992, and other judgments that followed on nationality matters within Member States, such as ECJ, case C-192/99, *The Queen v. Secretary of State for the Home Department, ex parte: Manjit Kaur*, 20 February 2001; ECJ, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, *supra* n73.

⁷⁷ ECJ, *Janko Rottmann v. Freistaat Bayern*, *supra* n16.

⁷⁸ K. Swider and G.R. de Groot, *Litigating Strategically: Stateless children born in the EU*, European Network on Statelessness Blog, 14 November 2014, <http://www.statelessness.eu/blog/litigating-strategically-stateless-children-born-eu>.

⁷⁹ R.G. de Groot, "Towards a European Nationality Law", in H. Scheinder (ed) *Migration, Integration and Citizenship. A Challenge for Europe's Future*, Forum Maastricht 2005, Volume I, pp. 23-34.

EU law stands in the way of Member States passing nationality laws that violate the principle of solidarity among the Member States, the general principles of EU law relating to human rights, and the fundamental EU right of freedom of movement of persons. The dynamic development of the body of general principles of EU law may lead to other influences on the nationality laws and policies of Member States in future.

4. The role of the EU in addressing statelessness outside the EU

Statelessness poses a real and ongoing challenge to the EU due to the presence of stateless individuals, and even sizeable groups of stateless persons, in EU Member States. Beyond the EU's borders, statelessness is as an equally, if not more, pressing international concern. Over 10 million people are stateless worldwide⁸⁰ – more if stateless refugees are added to this tally.⁸¹ Without intervention the stateless population will continue to grow, not least due to transmission of statelessness from parents to their children. It is estimated that a child is born stateless every 10 minutes somewhere in the world.⁸² As highlighted in section 2, statelessness leaves people vulnerable to discrimination and other human rights violations. In extreme cases, statelessness can result in or exacerbates extreme forms of marginalisation and even persecution. It can lead to insecurity, forced displacement or conflict.⁸³ Given the scale and consequences of statelessness, it is an issue that warrants the EU's attention from a foreign policy perspective.

Since the early days of the EU's history, it has sought to define and re-define its position in the world, including through the progressive development of its external relations. Initially, the focus was "trade and aid"; shaping a common policy on trade relations with Third States and providing financial and technical support for countries transitioning through decolonisation as well as broader development and humanitarian assistance.⁸⁴ In 1993, the EU formally established a

⁸⁰ UNHCR, *Global Trends*, 2016, *supra* n4.

⁸¹ Institute on Statelessness and Inclusion, *The World's Stateless*, Wolf Legal Publishers 2014; UNHCR, *Statistical Yearbook 2013*, *supra* n3, chapter 3.

⁸² UNHCR, *I am here, I belong*, *supra* n17.

⁸³ Consider the example of the stateless Rohingya minority in Myanmar, whose situation is well documented. See, for instance, Human Rights Watch, *Southeast Asia: Accounts from Rohingya boat people*, 2015.

⁸⁴ European Commission, *The EU in the World: The Foreign Policy of the European Union*, 2007.

'Common Foreign and Security Policy' (CFSP), creating a framework for joint action when the EU's strategic interests are at stake. Over the past decade, the EU's foreign policy capacity and engagement has been strengthened through such innovations as the appointment of an 'EU High Representative for Foreign Affairs and Security Policy' and the formation of a diplomatic corps, the 'European External Action Service'.⁸⁵

Title V of the TEU defines the principles and objectives of EU external action, which underlie the CFSP. The principles which "have inspired its own creation, development and enlargement and which it seeks to advance in the wider world are: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".⁸⁶ As such, among the specific aims to be pursued by the EU through common policies and actions globally are safeguarding its values and security, consolidating and supporting democracy and human rights, preserving peace and preventing conflicts, and fostering sustainable economic, social and environmental development.⁸⁷

A wide range of general EU foreign policy areas and instruments have emerged alongside specific policies relating to its interaction with neighbouring regions.⁸⁸ Many of these could contribute to addressing situations of statelessness. For instance, conflict prevention is a central component of the CFSP and includes addressing the root causes of conflicts and supporting post-conflict stabilisation.⁸⁹ That nationality disputes and statelessness can fuel communal tensions has been demonstrated through the experiences of a number of countries on the African continent, including Côte d'Ivoire and the Democratic Republic of Congo.⁹⁰ This has prompted a key African human rights

⁸⁵ These were created under the Lisbon Treaty, adopted in 2009.

⁸⁶ TEU, *supra* n1, Art. 21(1).

⁸⁷ TEU, *supra* n1, Art. 21(2).

⁸⁸ For an overview and access to further information on these different policy areas and instruments see, European External Action Service, http://eeas.europa.eu/policies/index_en.htm.

⁸⁹ Council of the EU, Draft EU programme for the prevention of violent conflicts, June 2001, 9573/1/01.

⁹⁰ See, for instance, B. Manby, *Citizenship and Statelessness in Africa: The Law*

body to conclude that “the lack of the right to a nationality, and the lack of recognition as a full participant in the political and social life of the country where a person has been born and lived all his or her life, has been at the heart of many of Africa’s most intractable political crises and civil conflicts”.⁹¹ Another area of EU external action is the management of migration and asylum outside the EU. In this area there is also a growing emphasis on addressing root causes – in this context factors which contribute to forced and irregular migration.⁹² Because of the vulnerability and human rights challenges that it creates, statelessness is one such driver of forced or irregular migration, as evidenced by the high number of stateless refugees and situations such as that of the stateless Rohingya of Myanmar, many hundred thousand of whom now live in exile.⁹³ In terms of the EU’s regional external action policies, many of the priority countries face considerable statelessness challenges. For instance, several of the partnership countries in the EU Neighbourhood Policy (such as Lebanon and Ukraine) have significant stateless populations.⁹⁴ Given that one of this programme’s aims is to promote greater social justice and build fully functioning democracy,⁹⁵ dealing with vulnerable and excluded communities such as the stateless is highly relevant to the EU’s objectives.

More generally, in the EU’s efforts to promote and protect human rights, democracy and the rule of law around the world addressing statelessness is pivotal.⁹⁶ The EU’s latest ‘Action plan on human rights and democracy (2015-2020)’ points to the ongoing commitment to

and Politics of Belonging, Wolf Legal Publishers 2015, pp. 210 forward.

⁹¹ African Committee of Experts on the Rights and Welfare of the Child, General Comment on Article 6 of the African Charter on the Rights and Welfare of the Child, 16 April 2014, ACERWC/GC/02, para. 38.

⁹² Council of the EU, Draft Council Conclusions on the implementation of the Global Approach to Migration and Mobility, April 2014, 8443/14.

⁹³ European Commission, The EU in the World, *supra*, n84. See also Norwegian Refugee Council and Tilburg University, Statelessness and Displacement: A scoping paper, 2015.

⁹⁴ In the EU/Lebanon Action Plan, improving the situation of stateless persons is explicitly identified among the targeted actions. See, Action Plan for EU-Lebanon Partnership and Cooperation 2013-2015. For related statelessness statistics see, UNHCR, Global Trends, 2016, *supra* n4.

⁹⁵ Joint Communication by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission, A new response to a changing neighbourhood: A review of the European Neighbourhood Policy, May 2011.

⁹⁶ See section 2.2 of this chapter.

raise issues of statelessness in EU relations with Third Countries, with a focus on “preventing the emergence of stateless populations as a result of conflict, displacement and the break-up of States”.⁹⁷ In 2014, the European Parliament Directorate-General for External Policies commissioned a study to explore “how the EU can play a greater role in the fight against statelessness around the world as part of its external action on human rights issues”.⁹⁸ The resulting report provides an account of some of the specific contexts in which the EU has engaged on statelessness and the methods used. These have included efforts geared towards the prevention of statelessness, such as supporting information campaigns on citizenship rules and procedures, birth registration campaigns and research to better understand the underlying causes of statelessness. It also demonstrates that the EU has a range of instruments at its disposal which can be used to address statelessness, including: calling attention to statelessness situations that require acute attention through official statements or parliamentary hearings; raising statelessness issues in bilateral diplomacy, EU Human Rights Dialogues and multilateral venues such as the UN Human Rights Council; supporting activities undertaken by UNHCR as part of its statelessness mandate; and using financial instruments to strengthen the efforts of stakeholders to tackle statelessness.⁹⁹ So, while statelessness does not enjoy a prominent or widely publicised place in EU foreign policy – and the study concludes that much of the related external action to date “appears to be rather *ad hoc*”¹⁰⁰ – there have been tangible efforts in this field and there is real scope for these to be strengthened and expanded.¹⁰¹

5. Conclusion

Addressing statelessness is becoming a more explicit part of the EU’s policy goals,¹⁰² as there is growing awareness of the EU’s ability to

⁹⁷ Action plan on human rights and democracy, *supra* n30.

⁹⁸ European Parliament Directorate-General for External Policies of the Union. *supra* n22.

⁹⁹ *Ibid.*, pp. 23-25.

¹⁰⁰ *Ibid.*, p. 26.

¹⁰¹ See also the recommendations laid out in the study for the European Parliament of how the EU’s role in addressing statelessness around the world can be strengthened and which areas should be prioritised as part of this engagement. *Ibid.*, chapters 5 and 6.

¹⁰² See, for example, Conclusions of the Council and the Representatives of the Governments of the Member States on Statelessness, *supra* n44.

address a range of statelessness-related problems inside and outside the EU. This chapter shows that the EU's interest in statelessness is increasing and that this presents opportunities for certain improvements to be led by the EU itself. There are numerous reasons to develop and implement an EU-wide approach to statelessness, rooted in the EU's shared human rights values, and in the need for coherent migration-related practices to sustain the EU's system of open internal borders.

The existing treaty regime of the European Union provides for a number of possibilities for EU legislation on statelessness in the migratory context, in particular ensuring that stateless persons in the EU enjoy protection in the form of a legal residence permit which may open up the possibility of naturalisation, enabling solutions to be realised. Although statelessness is a sensitive issue that touches upon Member States' sovereignty in nationality matters, this chapter has shown that legislation on the legal residence status of stateless persons would remain well within the EU's area of competence and have an acceptable level of influence on the internal affairs of Member States, including with regard to nationality. The authority to pass legislation on acquiring and losing the nationality of Member States undoubtedly remains with the Member States, but this can never be fully isolated from the EU legal system, and in particular from the developing concept of EU citizenship. In the context of statelessness, these inevitable and widely accepted influences offer opportunities to tackle statelessness related problems without the risk of distorting the delicate division of roles between the EU and its Member States.

While, internally, the EU institutions need to be cautious and stay within the scope of their competence when addressing statelessness, there may be room for greater boldness when it comes to the EU's external relations agenda. The European Union has already shown interest in statelessness outside its borders through its Common Foreign and Security Policy, and this chapter has suggested how such practices can be built on and developed further. Nevertheless, for such an outward-looking agenda on statelessness to be persuasive, it must be aligned with sufficient inward-looking policy debate and development. Ultimately, the EU can and must find a way to combine a true commitment to tackling statelessness "at home" with contributions to addressing statelessness beyond its borders.

14. Efforts to prevent statelessness amongst children displaced by conflict in the Middle East and North Africa

*Amit Sen and Zahra Albarazi*¹

“Inshallah, inshallah it won’t be a problem. I don’t really think about it. The only thing I let myself believe is that it won’t matter. Someone somewhere will do something to solve this problem, and then Khalid won’t suffer.”²

Zeina has not registered her son. She is a refugee from Syria living in Akkar, Lebanon. She fled the war in 2013 — a war that has contributed significantly to the displacement of people on a scale not witnessed since World War II³ — and she has no idea as to the whereabouts of her husband, the father of her two children. Her youngest child, Khalid, was born in Lebanon. Zeina did not register him when he was born and he does not have a birth certificate. She said she does not know how to register him, and even if she did, she assumes the procedure would be costly. That is money that she simply does not have. What she did not know was that not obtaining a birth certificate for Khalid could leave him stateless.

The crisis in Syria is now entering its sixth year, and the conflict is affecting millions. The Middle East and North Africa (MENA) region

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² Interview with Zeina (name anonymised for confidentiality), a Syrian refugee living in Akkar, Lebanon. Interview carried out by Zahra Albarazi, 3 November 2015

³ Norwegian Refugee Council, *The Global Displacement Figures*, 20 June 2016, <https://www.nrc.no/the-global-picture-of-displacement>

hosts over 4.8 million Syrian refugees, while another 6.5 million are internally displaced within Syria. An estimated 13.5 million people are in need of urgent humanitarian assistance inside the country, including 5.47 million people in hard-to-reach-locations.⁴

Conflict and displacement on this scale are placing children at significant risk of statelessness. While the MENA region has attracted attention primarily in relation to these crises, it is also the region of the world with the greatest concentration of nationality laws that deny women the right to confer nationality on their children on an equal basis with men.⁵ These laws have generated calls for reform to comply with international standards, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) — Article 9 of which requires that women enjoy equal rights with men in relation to the acquisition, retention, or change of their own nationality, as well as in being able to confer nationality on their children.⁶

Under Syrian law and practice, a child acquires nationality at birth on the basis of having a Syrian father.⁷ It is of particular concern, therefore, that the conflict has left over a quarter of all Syrian refugee families — over 145,000 refugee households — with no physical or legal presence of a Syrian father, presenting a potential challenge to confirming these children's Syrian nationality.⁸

⁴ See United Nations Office for the Coordination of Humanitarian Affairs (OCHA), Syria Crisis: Regional Overview, <http://www.unocha.org/syrian-arab-republic/syria-country-profile/about-crisis>

⁵ Of the 27 States worldwide that maintain gender discriminatory nationality laws, 12 can be found in MENA. UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness 2016.

⁶ CEDAW is universally ratified in the MENA region, but several States maintain reservations to Article 9.

⁷ Syria's nationality law establishes that "anyone born inside or outside of the country to a Syrian father" is a citizen of the country at birth. Legislative Decree 276 - Nationality Law 1969 (Syrian Arab Republic), Art. 3. In principle, the law establishes an exception permitting a Syrian mother to confer nationality on a child in cases where the identity of the father is not legally established, and also features a provision to grant nationality to children born in the country who do not acquire another nationality at birth by virtue of their parentage. Attention to State practice in Syria, however, reveals that these provisions remain unused and children in these circumstances are not able to acquire Syrian nationality.

⁸ UNHCR, *Woman Alone: The fight for survival by Syria's refugee women*, 2014. As noted in the report, Syrian refugee women are increasingly taking sole responsibility for their families after their husbands are killed, captured, or

In this context, not only is birth registration a tool to combat immediate protection risks faced by forcibly displaced and conflict-affected children — such as family separation, trafficking, and illegal adoption — it is also critical to documenting a Syrian child's nationality on the basis of his or her paternity.

Statelessness, once entrenched, is often a complex issue to resolve. It is ultimately only the State that holds the power to recognise someone as its citizen, and examples from other regions demonstrate that the resolution of statelessness can often take decades.⁹ In the midst of conflict and massive displacement, it may seem that any solutions or preventative measures would be even more difficult to realise. As this chapter will illustrate, however, it is precisely at this time that concerted advocacy and interventions are most needed. If the situation is not dealt with now, the risk of statelessness among Syrian children could exacerbate the vulnerability of those displaced, while further complicating prospects for return, reintegration and reconstruction. The chapter will therefore highlight measures that can be implemented immediately, as work continues towards achieving an overarching political solution to the crisis in Syria.

This chapter will first provide an introduction to the issue of statelessness in the MENA region. It will then discuss the emerging link between conflict, forced displacement and increasing risks of statelessness. While these risks appear to be present in relation to several conflict-affected

otherwise separated from them during the conflict.

⁹ Other regions provide a number of examples where refugees have become stateless and had to wait for decades to acquire a nationality. At the time of India's independence in 1947, an Urdu-speaking population was forcibly displaced from the State of Bihar to Bangladesh. When Bangladesh became independent in 1971, however, this population became stateless as neither the predecessor nor the successor State considered them to be its nationals. The group remained in this predicament for nearly 40 years. Their situation was finally resolved by a 2008 Supreme Court decision recognizing them as Bangladeshi nationals. See, UNHCR, *How a Bangladesh court ruling changed the lives of more than 300,000 stateless people*, Press Release, 23 February 2015, <http://www.unhcr.org/54ec22869.html>. Similarly, refugees from Tajikistan displaced to Kyrgyzstan in the early 1990s became stateless after the dissolution of the Soviet Union, a situation which was resolved some two decades later, when Kyrgyzstan facilitated the naturalisation of 10,000 refugees between 2004 and 2007. UNHCR, *Good Practices Paper - Action 1: Resolving Existing Major Situations of Statelessness*, 2015.

States in the region,¹⁰ this chapter will focus on the dynamics of the problem in relation to the Syria crisis, which now represents the world's largest refugee population under the United Nations High Commissioner for Refugees (UNHCR)'s mandate. The chapter will examine the two core factors contributing to the risk of statelessness in this context: gender discrimination in Syria's nationality and personal status law, and obstacles to birth registration. This analysis will focus on the new solutions, interventions and partnerships emerging in the countries which host the majority of Syrian refugees, which demonstrate that despite being in the midst of an ongoing humanitarian crisis, solutions are entirely possible. The chapter will conclude by reinforcing the need for continued and expanded efforts in these areas, along with greater attention to remaining gaps and risk factors.

Finally, this chapter will show how a prevention focus is relevant to "solving" or ending statelessness. It is therefore critical to continue to devote attention to and to learn as many lessons as possible from situations where significant risks of statelessness emerge, such as where forced displacement is combined with discriminatory nationality laws, impeded access to civil registration and other challenges.

1. Preventing and reducing statelessness in MENA: Ensuring effective implementation of international standards

Statelessness affects over 10 million worldwide,¹¹ and significant stateless populations are present in all regions. Statelessness imposes

¹⁰ The region also hosts over 221,000 Iraqi refugees, and an additional 3.3 million persons have become internally placed within Iraq since January 2014. As of January 2016, approximately 435,000 people were internally displaced in Libya, and approximately 300,000 were internally displaced in Yemen, where an estimated 82 per cent of the population, 25 million people, is in need of humanitarian assistance.

¹¹ Today, UNHCR has reliable data for the size of the stateless population in 77 countries. However, while significant progress has been made, considerable challenges remain in fully mapping and quantifying the world's stateless population. See UNHCR, 2005 Global Refugee Trends: Statistical Overview of Populations of Refugees, Asylum-Seekers, Internally Displaced Persons, Stateless Persons, and Other Persons of Concern to UNHCR, 2006, para. 43; UNHCR, UNHCR Global Trends 2014: World at War, 2015. Improving qualitative and quantitative data is therefore a key action area of UNHCR's Global Action Plan to End Statelessness. UNHCR, Global Action Plan to End Statelessness: 2014-2024, 2014.

particular hardships on children, who are often denied basic rights such as health, education and social services, and remain at heightened risks of violence, abuse and exploitation throughout their lives. Statelessness is a distinct legal status, defined under international law as pertaining to a person “who is not considered as a national by any State under the operation of its law”.¹² The majority of the world’s stateless population are not refugees and have never left their own countries. However, there are 1.5 million stateless persons around the world who are also refugees¹³ — individuals who are both stateless and have fled across an international border due to a well-founded fear of persecution. Stateless persons can also be internally displaced persons (IDPs).

There are several protracted situations of statelessness in MENA, including the *bidoon* population, which is found primarily in the Gulf sub-region, the Faili Kurds of Iraq and certain Kurdish populations in Syria.¹⁴ Prior to 2012, the region witnessed significant reductions in statelessness. In 2010 and 2011, the two largest reported reductions in statelessness globally were both in MENA, with over 110,000 stateless persons acquiring nationality in Iraq and 69,000 acquiring nationality in Syria.¹⁵ With the rise of armed conflict and political instability in

¹² Convention relating to the Status of Stateless Persons, 28 September 1954, entry into force 6 June 1960, 360 UNTS 117.

¹³ Institute on Statelessness and Inclusion, *The Worlds’ Stateless: 2014*, Wolf Legal Publishers 2014.

¹⁴ This includes Palestinians, who are assisted by the UN Relief and Works Agency for Palestinian Refugees in the Near East (UNRWA) in Syria, Jordan, Lebanon, Gaza and the West Bank. For more information on stateless populations in MENA, see, UNHCR, *The situation of stateless persons in the Middle East and North Africa*, 2010. For more information on the history of statelessness in Syria, see, Tilburg University Statelessness Programme, *The Stateless Syrians*, 2013.

¹⁵ The reduction of statelessness in Iraq was achieved by the promulgation of a new Nationality Law in 2006 allowing for the re-acquisition of citizenship among the stateless Faili Kurd population by application. See, Iraqi Nationality Law 2006, Law 26 of 2006, Art. 17. In Syria, Decree 49 of 2011 allowed for the reacquisition of nationality by registered stateless Kurds, referred to as *ajanabi*. However, as the 2011 Decree does not cover the population of unregistered Syrian Kurds, known as the *maktoumeen*, they have no current prospect of acquiring a nationality, along with few rights in Syria — including no right to register births or marriages. See, UNHCR, *Public Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights Compilation Report*, Universal Periodic Review; Syria, 2011.

2012, however, attention has shifted to contending with these crises and less progress has been made in relation to resolving existing situations of statelessness.

The MENA region includes few States Parties to the UN Statelessness Conventions.¹⁶ Furthermore, countries in the MENA region have nationality laws that generally do not meet all international standards relevant to preventing statelessness — either in terms of ensuring the right of children to acquire a nationality, or in ensuring that the loss, deprivation, or renunciation of nationality does not result in statelessness. A particular challenge in the MENA region is the prevalence of nationality laws that deny women the right to confer nationality on their children on an equal basis with men. Laws of this nature can render children stateless in cases where the father himself is stateless, or is unable or unwilling to support the child in acquiring his nationality.¹⁷ While most States in MENA with such laws in principle allow women to confer nationality on their children under certain limited circumstances, these provisions are often difficult to use in practice.¹⁸ Furthermore, the absence of *jus soli* provisions in

¹⁶ Algeria and Israel are parties to the 1954 Convention, while Libya and Tunisia have acceded to both the 1954 and 1961 Conventions. For all of these States, however, domestic legislation and procedures are lacking to ensure implementation of the Conventions' provisions. None of the States Parties to the 1954 Convention have incorporated a definition of a "stateless person" into domestic law, and none have provisions to ensure that stateless people can be identified and protected in accordance with this Convention's provisions.

¹⁷ For more information see, 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, 2012, HCR/GS/12/04 (outlining applicable international standards to safeguard the right of the child to acquire a nationality); UNHCR, Interpreting the 1961 Statelessness Convention and Avoiding Statelessness resulting from Loss and Deprivation of Nationality ("Tunis Conclusions"), 2014 (reviewing international standards related to the prevention of statelessness through the withdrawal or loss of nationality); UNHCR, The situation of stateless persons in the Middle East and North Africa, *supra* n14 (analysing the extent to which nationality laws in the MENA align with these standards).

¹⁸ Most States in MENA whose nationality laws emphasize paternal *jus sanguinis* have legal exceptions permitting women to confer nationality on their children where the father is unknown or stateless. Often, the nationality law specifies that children in these circumstances acquire nationality automatically at birth, such as in Bahrain, Jordan, Libya, Saudi Arabia, Syria, the United Arab Emirates and, for children born outside the territory, Iraq, whereas other States permit such children to apply for a discretionary grant of nationality, such as in Kuwait.

the region means that children who are unable to acquire nationality on the basis of paternal descent do not enjoy the safeguard of obtaining nationality by virtue of their birth in the territory of the State.

These challenges notwithstanding, States in MENA have also acceded to a range of relevant international instruments. All States in the MENA region have ratified the Convention on the Rights of the Child (CRC). Article 7 of the CRC recognises the right of all children to be registered immediately at birth, to enjoy the right to a name from birth, to acquire a nationality and to know and be cared for by their parents. MENA also features universal accession to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 9(2) of the CEDAW recognises the right of women to confer nationality on their children on an equal basis with men, whereas Article 9(1) recognises the right of women to acquire, retain and change their own nationality on an equal basis as men.¹⁹ There have also been many successful cases of countries in the region amending their nationality law to make them more gender neutral.²⁰ While accession to the 1961 Convention on the Reduction of Statelessness (1961 Convention) remains limited, all States in the region have incorporated into domestic law safeguards against statelessness for “foundlings” — children found in the territory of a State of unknown parentage — a key protection that mirrors Article 2 of the 1961 Convention.²¹

In practice, these provisions are difficult to use due to the protection risks associated with public acknowledgment of births out of wedlock, including the threat of so-called “honour” related violence, and certain conflicts with other areas of the law. For instance, most Personal Status Laws in the region establish that, without a valid marriage certificate, a mother cannot obtain a birth certificate for her child — without which it will be extremely difficult to document the child as a national. Women who approach the authorities to report births out of wedlock may also face possible repercussions under adultery laws. See, generally, B.L. Fisher, “Why Non-Marital Children in the MENA Region Face a Risk of Statelessness”, *Harvard Human Rights Journal Online* 2015; UNHCR, *Background Note on Gender Equality, Nationality Laws and Statelessness* 2015, 2015.

¹⁹ However Bahrain, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria and the United Arab Emirates have entered reservations to Article 9 of CEDAW.

²⁰ See for example UNHCR, *Good Practices in Promoting and Adopting Gender Equality in Nationality Laws*, 2014 and Z. Albarazi and L. van Waas, *Transformations of Nationality Legislations in North Africa*, Routledge Handbook Of Global Citizen Studies 2014.

²¹ In practice, challenges remain with respect to consistent implementation of the foundlings principle, and several States in the region have yet to incorporate

There are also a number of key regional legal instruments that reinforce these universal standards and principles. In line with Article 7 of CRC, the Covenant on the Rights of the Child in Islam establishes that “States Parties to this Convention shall safeguard the elements of a child’s identity, including his/her name, nationality and family relations [...] and shall make every effort to resolve the issue of statelessness”.²² Similarly, Article 6 of the African Charter on the Rights and Welfare of the Child recognises the right of all children to acquire a nationality and to be registered at birth, and also calls on States Parties to grant nationality to a child born in their territories if the child would otherwise be stateless.²³ In line with Article 15 of the Universal Declaration of Human Rights, the Arab Charter on Human Rights reaffirms that everyone has the right to a nationality and that no one shall be arbitrarily deprived of their nationality.²⁴ The Arab Charter on Human Rights also calls on States to ensure equality between men and women in relation to all rights outlined in the Charter.

2. The importance of birth registration and civil status documentation

Zeina gave birth to her son Khalid just three weeks after fleeing to Lebanon. She admits that neither before nor after the birth had she considered ensuring that Khalid obtained a birth certificate. “It isn’t that I don’t know it’s important to be registered,” she explains, “it’s just I never had time to think of that. Even if I had thought about it my brother was too busy trying to find a job to do it for me, and I have

into domestic law the full range of safeguards against statelessness at birth found in the 1961 Convention on the Reduction of Statelessness. See, UNHCR, Guidelines on Statelessness No. 4, *supra* n17.

²² The Covenant on the Rights of the Child in Islam was adopted by the 32nd Islamic Conference of Foreign Ministers in Sana’a, Republic of Yemen, in June 2005. See, Organization of the Islamic Conference, Covenant on the Rights of the Child in Islam, June 2005, OIC/9-IGGE/HRI/2004/Rep.Final.

²³ Algeria, Egypt, Libya and Mauritania are parties to the African Charter on the Rights and Welfare of the Child. Tunisia has signed but not ratified the Charter.

²⁴ Thirteen States are parties to the Arab Charter on Human Rights, namely Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and Yemen; four States have signed the Charter but not yet ratified it: Egypt, Tunisia, Sudan and Morocco. The protection against arbitrary deprivation of nationality is also enshrined in Articles 5-9 of the 1961 Convention on the Reduction of Statelessness.

no idea how to do it.” Now, as Khalid is more than one year old, the deadline for registration has passed, so even if Zeina knew how and could afford it, the process of registering her son would have to go through the courts, which is a far more complex process.

2.1 A human right and a foundation for protection

To be registered at birth is a right of all children under international law.²⁵ Birth registration is a fundamental tool for the prevention of statelessness, as it provides evidence of a child’s parentage and place of birth — the facts used by States to grant nationality at birth under the principles of *jus sanguinis* (meaning the “right of blood” and referring to citizenship by descent) and *jus soli* (meaning “right of the soil” and referring to citizenship by birth in the State) respectively.

Birth registration also provides a critical foundation for the enjoyment of key rights throughout life. During infancy and early childhood, unregistered refugee children in the region have been found to face additional hardships in enjoying key rights, such as healthcare and education.²⁶ Unregistered children are also at greater risk of prolonged family separation, illegal adoption and trafficking, since the tracing and reunification of separated children is more difficult in the absence of records verifying a child’s actual parentage.

Birth registration is of particular importance as children enter adolescence, as it helps to establish their age, legal status as children, and entitlement to specific rights on this basis — including protection from child labour, child marriage, prosecution or detention as adults, and recruitment into armed groups. In addition to raising risks of statelessness, gaps in refugee birth registration are therefore of immediate relevance to a range of serious child rights violations, many of which are already on the rise among Syrian refugee children.²⁷

²⁵ See, Convention the Rights of the Child (CRC), Art. 7; International Covenant on Civil and Political Rights (ICCPR), Art. 24(3).

²⁶ See, e.g., UNHCR, *The Future of Syria: Refugee Children in Crisis*, 2013, pp. 55-57.

²⁷ Rising rates of child marriage are of particular concern. In Lebanon, 18 per cent of surveyed female youth aged 15 to 18 years were married and in Jordan the proportion of registered marriages involving Syrian children rose from 18 to 25 per cent between 2012 and 2013. Of these, 48 per cent involved marriages between Syrian girls and husbands who were 10 or more years older

Where the failure to register a child's birth results in statelessness the consequences can be lifelong and passed on to successive generations.

In the MENA region, the official registration of marriages also acts as a key foundation for the protection of the rights of women and children.²⁸ A marriage certificate not only facilitates birth registration, it acts as a key source of protection for vulnerable women, including those who are widowed, divorced or otherwise separated from their husbands, by helping to realise their rights to inherit property, legally remarry, retain child custody and register the births of children born through subsequent relationships.

The role of civil status documentation as a protection tool is not limited to the refugee context. Within Syria, the lack of civil status documentation is reportedly compromising access to services and employment, therefore limiting the capacity of families to cope with the consequences of the conflict. The lack of documentation is reportedly also curtailing freedom of movement inside Syria — hindering civilians from moving to safer locations within the country or obtaining or renewing a passport, which can also affect their ability to seek asylum abroad.²⁹

than them. In Turkey, some 4.5 per cent of refugee children are married. See UNHCR, *Protection of Refugee Children in the Middle East and North Africa*, 2014. Similarly, in 2015, the United Nations Children's Fund (UNICEF) reported that "[i]n Jordan, close to half of all Syrian refugee children are now the joint or sole family breadwinners in surveyed households, while in some parts of Lebanon, children as young as six years old are reportedly working". UNICEF, *Urgent action needed to tackle child labour caused by Syrian Crisis: Save the Children and UNICEF*, Press Release, 2 July 2015, http://www.unicef.org/media/media_82462.html.

²⁸ Marriage certificates also provide official recognition of a woman's marital status. In MENA, the registration of marriages in line with international standards therefore helps to protect the right of women to freely to choose a spouse and to enter into marriage only with their free and full consent, as recognised by Article 16 of CEDAW, as well as women's rights to family life and family unity, as recognised, *inter alia*, by Article 12 of the Universal Declaration of Human Rights (UDHR) and Article 17 of the ICCPR.

²⁹ See, UN Office of the High Commissioner for Human Rights (OHCHR), *Statement by the United Nations Special Rapporteur on the Human Rights of Internally Displaced Persons, Mr. Chaloka Beyani, upon Conclusion of his Official Visit to the Syrian Arab Republic – 16 to 19 May, 2015*, 19 May 2015, <https://shar.es/1uszOm>.

2.2 Challenges in registering and documenting new births

At the outset of the crisis, many refugees were unaware of the steps required to register births in their new countries of residence. Interviews conducted by UNHCR with Syrian refugees in Iraqi Kurdistan in 2012, for instance, revealed widespread confusion regarding the process, with most refugees incorrectly believing that the vaccination booklets they received at the hospital also served as birth certificates. Those that are aware of the procedures are often overwhelmed by their complexity. In Lebanon and Iraq, for instance, it is necessary to go to three different locations in order to register a birth, and documents proving the identity of the parents and relating to their marriage are required.³⁰ Similarly, Syrian refugees in Lebanon, Turkey and Jordan report a range of challenges in registering births. In addition to needing proof of their marital status, refugees may also lack basic identity documents, such as a Syrian passport or national ID card, which are required to complete the process. For some, after several years of displacement in countries of exile, their Syrian identity documents have expired and replacing them has become difficult or impossible. Limited freedom of movement, a lack of information on procedures and requirements, and the reluctance of some underage mothers to attempt to register their children further complicate matters. For some families, the costs associated with registering marriages and births, especially if fines are incurred for late registration, can be prohibitive. These challenges are examined further in the following section, which details the specific risks of statelessness arising from the crisis in Syria.

3. New risks of statelessness in the Syria crisis

Zeina got married in 2009, just after she finished high school. Her husband was a teacher in their hometown of Homs. Their first child, a baby girl called Hala, was born in 2011 and her husband was easily able to obtain a birth certificate for her, a document Zeina has carefully held on to. Zeina talks of how during the beginning of the conflict she tried to ignore the disaster spiralling around her and tried to focus on

³⁰ In Iraq, a birth certificate must first be issued in a hospital, and then taken to the Birth and Deaths Directorate, as well as the Ministry of Health, for certification. In Lebanon, a birth notification must first be obtained from a hospital or certified midwife, after which the parents are required to obtain a birth certificate from their local *mukhtar* (mayor), which must then be certified with the Personal Status Department.

looking after her daughter. However, at the end of 2012 tragedy struck, her husband went to spend the weekend with his cousins. She does not know what happened to him, whether he decided to go to fight, was taken, or died, but he never returned. She waited for 5 months in vain for his return. In 2013, when she was in the late stages of pregnancy with her second child, she decided to flee to Lebanon with the help of her brother. She did not bring along her marriage certificate, as she did not know where her husband kept it, and she therefore has no proof that the father of her second child, Khalid, is a Syrian national. She thinks that the fact that the birth certificate of her first child, Hala, mentions the father's name may help to establish that he is also the father of her child born in Lebanon, Khalid, but she is unsure whether this is the case.

Zeina is not alone in contending with this uncertainty. While some media articles have conflated the status of statelessness and with that of undocumented Syrians, a clear distinction must be made to ensure that the status of statelessness is not improperly assigned to children who are in fact Syrian nationals.

Under Syrian nationality law, a child born inside or outside the country is automatically Syrian at birth providing the child has a Syrian father *ipso facto*, meaning "by this fact alone".³¹ Refugee or conflict-affected children who are born to Syrian fathers are thus Syrian nationals at birth. However, there is a genuine risk that certain Syrian children could become stateless if it ultimately becomes impossible for them to prove their Syrian nationality.³² The degree to which a child is at risk of statelessness varies considerably in line with a range of factors — including forced displacement, family separation and sexual and gender-based violence.

3.1 Syrian children born in exile

For children who begin life as refugees, their birth in exile already introduces a certain level of risk in this regard, as they cannot benefit from protections against statelessness that are reserved for children born in the country. Syrian nationality law, in principle, provides an

³¹ See, Nationality Law (Syrian Arab Republic), *supra* n7.

³² Whether a person is stateless or not is a mixed question of law and fact. If a person who attempts to confirm their nationality with the competent authorities is ultimately unable to do so, this means they are stateless.

exception to the strict transmission of nationality from the father whereby children born to Syrian women can obtain nationality through their mothers if the child's paternity is not legally established. Notably, however, this protection only applies to children who are born inside Syria.³³ Similarly, Syrian nationality law includes a safeguard against statelessness for any child born in the country who does not acquire another nationality at birth.³⁴ While implementation of these provisions reportedly remains limited in practice, their presence in the law provides an important basis for advocating for the resolution of situations where children born in Syria are either at risk of statelessness or stateless at birth. Conversely, no provisions exist within Syrian law to grant nationality to a child born outside the country to a Syrian mother and an unknown father, or to a Syrian mother and a father who is incapable of conferring nationality on the child (e.g. a father who is himself stateless).

Family separation and gaps in birth registration are other key factors contributing to the risk of statelessness among Syrian refugee children. Not all children contend with an equal level of risk in this respect, and attention is urgently needed to identify and assist those who are the most vulnerable. In cases where Syrian refugee children become separated from their fathers *after* receiving an official birth certificate, the risk of statelessness is lower as such children are already in possession of a legal document offering evidence of their paternity, and thus their right to Syrian nationality.³⁵ Where refugee children lack such documentation (because it was lost, destroyed or simply never obtained), but remain together with their Syrian fathers, the risk of statelessness is also assessed as relatively low as the father can personally attest to the child's status as a national on the basis of descent. Moreover, where both parents are present, they can generally

³³ *Ibid.* For additional commentary, please see, Legal Agenda, Syrian Women's Right Pass on Citizenship to Children: An Appraisal, 2006. See also, In Search of Solutions, *supra* n1.

³⁴ *Ibid.* As written, this provision in Syrian nationality law functionally mirrors the safeguard against statelessness found in Article 1 of the 1961 Convention on the Reduction of Statelessness.

³⁵ A degree of uncertainty may still exist, however, as in many cases, it will be impossible to follow the procedure which existed prior to the conflict for Syrians who are born abroad. This procedure consisted of first obtaining an official birth certificate from the national authorities of the country in which the Syrian child was born, and subsequently providing notice of the birth to the Syrian embassy or consulate.

obtain or replace their marriage certificate, and on this basis complete a late birth registration procedure for their child.

Conversely, where refugee children are *both* unregistered and forcibly separated from their Syrian fathers, the risk of statelessness is considerable. While such children are technically Syrian under the law, their status as nationals may ultimately be impossible to prove in the absence of evidence to establish Syrian paternity. In view of these concerns, host governments, together with UN agencies and civil society, have launched an array of efforts to ensure that every Syrian refugee child is registered and documented at birth — efforts which are detailed further in the following section of this chapter.

In practical terms, however, the ability to register the birth of a Syrian refugee child often hinges on complex issues related to family composition and marital status. In most countries in the region hosting Syrian refugees, it is not possible to register a birth without an official marriage certificate, and without a certificate of divorce or death showing legal termination of a first marriage it may not be possible for a woman to legally register a second marriage. Reports indicate that large numbers of Syrian refugees are not legally registering new marriages due to a lack of knowledge of registration procedures in the country of asylum, coupled with the belief that they will soon return to Syria and to a more familiar legal system.³⁶ With regard to refugees whose marriages were legally registered in Syria, many are no longer in possession of their original marriage certificates or Family Booklets - a document that records all members of the nuclear family in one document. as these and other documents were lost or destroyed in the process of fleeing the country.³⁷

³⁶ Instead, many simply obtain Islamic customary marriage contracts, generally referred to as “*urfi*” marriages, which are not officially recognised. See, UNICEF, *A study on early marriage in Jordan*, 2014.

³⁷ Within Syria, “huge numbers of people have lost their personal status documents such as birth certificates and identification cards with more and more children born in areas where they are not registered due to lack of services, access, financial means or insecurity”. See, UNHCR, *Protecting and Supporting the Displaced in Syria - UNHCR Syria End of Year Report 2015, 2016*. Indeed, Syrians in 76 per cent of the country’s sub-districts have identified the lack of access to documentation as a major protection concern. See OCHA, *2016 Humanitarian Needs Overview: Syria*, 2015. Additionally, focus groups with Syrians displaced to neighbouring countries as refugees confirm that the devastation to Syria’s physical infrastructure from the conflict has also led to

For refugee families that remain intact, with both parents in the household, the absence of documents proving marital status can often be resolved.³⁸ However, in situations where the father is absent — and with his identity thus remaining in question — it can prove impossible to obtain or replace legal documentation of the marriage. In line with these challenges, children born to female-headed households where the mother lacks legal proof of marital status (either because it was lost or never obtained) are believed to be at a considerable risk of statelessness due to the practical challenges of having their births registered.

The situation is particularly worrisome in relation to children born out of wedlock, including as a result of sexual violence or exploitation. For such children, it is both exceedingly difficult under Personal Status Laws in the region, and also in practical terms, to either obtain a birth certificate (given the absence of a marriage certificate) or to legally establish the child's paternity. Although certain host countries have adopted dedicated safeguards to ensure that children born out of wedlock are also issued birth certificates,³⁹ these documents indicate that the father's identity is unknown — leaving the child without evidence of paternity, and thus without a basis to acquire Syrian nationality under the law. Moreover, while host countries in the region have adopted legal protections granting nationality to children of unknown paternity, these provisions only apply to the children of women who are nationals of the State in question — and thus would not be applicable to the child of an unknown father and a Syrian mother.⁴⁰

the loss and destruction of their identity documents. See, e.g., UNHCR, *The Future of Syria: Refugee Children in Crisis*, 2013.

³⁸ In such cases, the parents of the child can generally petition for judicial "ratification" (legal recognition) of a customary religious marriage or for late registration of the marriage — a process which also makes it possible to register the births of any children born to the couple.

³⁹ In Jordan, for instance, the adoption of Civil Status Law No. 9 of 2001 established several important provisions to remove barriers to birth registration. This includes authorising the mother of the child to register the birth and obtain a birth certificate, whereas previous legislation only permitted the father of the child to do so. Law No. 9 of 2001 also establishes clear procedures to ensure that children born out of wedlock, as well as foundlings, can be registered and issued with birth certificates.

⁴⁰ The nationality laws of Jordan and Lebanon, two significant host countries in the region for Syrian refugees, both establish that a child born in their territories to a woman who is a national and an unknown father will acquire nationality

The situation is compounded by the fact that the host countries in the region do not grant citizenship on the basis of birth in their territories, including with respect to children who would otherwise be stateless.

3.2 Challenges that start in Syria

In many respects, the fact that so many refugees arrive in countries of asylum without the documentation needed to register new births and marriages can be traced to Syria itself, where difficulties in obtaining, renewing and replacing civil status documentation were recently identified as a major protection concern for conflict-affected and internally displaced families. A multi-sector assessment completed in August 2015 to provide a Humanitarian Needs Overview (HNO) in Syria identified the lack of civil status documentation as a leading concern, with 91 per cent of the 262 sub-districts surveyed identifying it as a central issue affecting protection, rights and daily lives.⁴¹

In addition to devastating homes, economies, infrastructure and security, five years of armed conflict in Syria have also taken a massive toll on the country's civil documentation system. Official civil registration services no longer function in areas outside government control, and physical registries in these areas have sometimes been destroyed.⁴² In the areas under the control of various non-State actors, at least five parallel and incompatible systems have been established for issuing civil status documentation.⁴³ With half of Syria's hospitals damaged or destroyed, an estimated 1,480 Syrian women give birth in

at birth. See Law No. 6 of 1954 on Nationality (last amended 1987) (Jordan), Art. 3(4); Decree No15 on Lebanese Nationality including Amendments 1925 (Lebanon), Art. 2.

⁴¹ Whole of Syria Protection Sector, 2015 Protection Needs Overview, 2015.

⁴² International Rescue Committee and UNHCR, Civil Status Documentation in Non-government Areas of Northern Syria, 2016.

⁴³ Among these non-State actors, several have established irregularly-constituted *Shari'a* courts to preside over an array of legal affairs, including family law, criminal law, personal status law and the issuing of civil status documentation. In other areas, minority groups have adopted their own *ad hoc* "statutes" to regulate the issuing of certificates of marriage, birth, death and divorce, whereas other actors have attempted to reconstitute pre-existing civil registration offices. While the latter adhere, in principle, to Syria's Personal Status Laws and established procedures, they appear to be issuing civil status documentation without official authority to do so.

dire conditions each day⁴⁴ — often without receiving a medical birth notification for their newborn children, a document which is both a prerequisite for obtaining an official birth certificate, and which is itself a vital source of information about a child's identity, bio-data and family composition. The 2015 HNO further noted that the lack of security in Syria has made it impossible for many families to reach provincial capitals where civil registration or maternal health services remain intact.

In light of these challenges, there are concerns that significant numbers of children born in Syria are now going completely undocumented at birth⁴⁵ — having neither a birth certificate nor a medical birth notification. Furthermore, evidence indicates that a significant number of undocumented children born in Syria have been forcibly displaced to neighbouring States as refugees. In Jordan, for instance, in UNHCR registration data over 44,000 Syrian refugee children were identified as having been born in Syria, but never having received any form of documentation there.⁴⁶ This situation raises new challenges under the framework of international law, which obliges the State in which a child is born (in this case, Syria), rather than the country to which it is displaced, to furnish the child with a birth certificate.⁴⁷ Within Syria itself, the lack of civil status documentation is reportedly limiting people's coping mechanisms, impeding access to humanitarian assistance, curtailing freedom of movement, contributing to a loss of access to basic services like health care and education, and increasing vulnerability to harassment, extortion and exploitation.⁴⁸

⁴⁴ See, United Nations Population Fund, An Estimated 200,000 Pregnant Women in Syria in Need of Urgent Care, Warns UNFPA, Press Release, 19 March 2014, <http://www.unfpa.org/press/estimated-200000-pregnant-women-syria-need-urgent-care-warns-unfpa#sthash.Gy0I68ms.dpuf>.

⁴⁵ Recent reports indicate that "huge numbers of people [inside Syria] have lost their personal status documents such as birth certificates [...] with more and more children born in areas where they are not registered due to the lack of services, access, financial means or security". See, UNHCR, 2015 End of Year Report, *supra* n37, p. 17.

⁴⁶ See, In Search of Solutions, *supra* n1.

⁴⁷ See, CRC, Art. 7; ICCPR, Art. 24 (obliging States Parties to register the child "immediately" after its birth).

⁴⁸ See, UNHCR, 2015 End of Year Report, *supra* n37.

While the conflict has exacerbated the dimensions of the problem, it should also be noted that pre-existing gaps in Syria's national legal framework also act an impediment to the registration of marriages and births. As noted by the Committee on the Rights of the Child in 2011, structural gaps in the Personal Status Law place children at risk of being unregistered in cases where they are born out of wedlock or born to women in certain inter-faith marriages not recognised under the law.⁴⁹

4. Finding solutions: Safeguarding the rights and future of Syrian children

At the beginning of the conflict, the humanitarian response to the refugee crisis focused on meeting the immediate needs of those fleeing Syria — food, shelter, health care and physical security. Closer analysis of the needs of Syrians has since revealed that improving access to documentation is a cross cutting intervention that can yield protection dividends across a wide range of protection issues.

Bearing these needs in mind, an array of innovative solutions have been established in the MENA region, led by host governments in close collaboration with UN agencies, local civil society organisations, international non-governmental organisations (INGOs) and refugees themselves. UNHCR, partner organisations and other INGOs are also working to assess the specific challenges communities encounter in completing birth registration procedures in countries of asylum, with a view to developing more targeted interventions and solutions.⁵⁰

⁴⁹ In 2011, the Committee noted with concern that Syria's Personal Status Law No. 376 of 1957 does not recognise the marriage of a Muslim woman with a non-Muslim man, impeding the registration of any children they may have; that children born out of wedlock cannot be affiliated to their father, a situation which often leads to their abandonment; and that children born from rape, incest or out of wedlock cannot be registered unless the mother first files a police report to verify the circumstances in which the child was conceived. UN Committee on the Rights of the Child, Concluding observations: Syrian Arab Republic, 9 February 2012, CRC/C/SYR/CO/3-4.

⁵⁰ In Lebanon, for instance, organisations such as Oxfam supported refugee-led initiatives to identify what the communities felt were some of the most difficult challenges they faced in their host countries. This identified access to documents as a major issue. UNHCR Lebanon has also conducted geographic and demographic surveys to monitor access to birth registration at the municipal level. Advocacy and capacity building activities then targeted

These efforts have placed the need for birth registration and civil status documentation at the centre of the humanitarian response, galvanising greater awareness and engagement across an array of sectors. Over 300,000 informational brochures have been shared with refugees in Turkey, Lebanon, Jordan, Iraq and Egypt to familiarise them with the procedures to register births in their new countries of residence.⁵¹ Instructional videos and other multi-media materials have also been developed and shared across the region to raise awareness among refugees, service providers and relevant government counterparts.⁵² The response has also sought to better harness the capacity of refugees themselves, with Refugee Outreach Volunteers explaining procedures and accompanying new mothers to hospitals and civil registration offices. Partnerships with religious courts have further strengthened community counselling and support for refugees in obtaining marriage and birth certificates, with religious leaders also seeking to deter child marriages — a protection issue which can impede the registration of any births resulting from these marriages.⁵³

In partnership with local and international NGOs, legal aid and representation services have been established for refugees in all host

localities where challenges were the most notable. In addition, over an eight month period, UNHCR conducted follow-up interviews with Syrian families for 1,000 births each month to assess their awareness of the procedures, determine which stage of the birth registration process they were able to complete, assess which prerequisite documentation they possessed, and identify the key obstacles they faced in the process. Additional information on access to birth registration was collected through 100,000 interviews conducted through household visits in April and June of 2016.

⁵¹ These materials were developed and distributed by UNHCR in close cooperation with UNICEF, NGO partners and host governments. See, e.g., Protect Your Child: Register its Birth, <https://data.unhcr.org/syrianrefugees/download.php?id=5013> (brochure on birth registration procedures in Jordan); Register Your Child's Birth: Assure it's Rights, <http://data.unhcr.org/syrianrefugees/download.php?id=5936> (brochure on birth registration procedures in Iraq). In Search of Solutions, *supra* n1.

⁵² Informational brochures were jointly developed by a broad range of partners, including UNHCR, UNICEF, host governments and other partners, in Jordan, Lebanon, Turkey, Iraq and Egypt. The videos promoting refugee birth registration in Lebanon and Iraq are publically available: Lebanon video, 13 February 2015, <https://www.youtube.com/watch?v=fsmHvjeBODs&feature=youtu.be>; and Birth Registration for Syrian Refugees in Iraq, 15 January 2014, <https://www.youtube.com/watch?v=ZvtSIAMXx9U>.

⁵³ In Search of Solutions, *supra* n1.

countries in the region to assist them in registering new marriages and births. For example, the Norwegian Refugee Council, through its Information, Counselling and Legal Assistance (ICLA) programme, has provided legal aid in completing birth registration procedures in Lebanon and Jordan. They have also conducted national outreach programmes and public awareness campaigns, as well as published materials detailing the process of registration in the country, which target both the affected population and organisations needing to understand the procedure. By February 2015, over 145,000 Syrian refugees had received ICLA services aiding them through the registration process.⁵⁴ Many national NGOs are playing a leading role in providing legal counselling and representation to facilitate access to civil registration in complex cases. Across the Kurdistan Region of Iraq, for example, various organisations working with refugees are offering them information and aid completing civil registration procedures, such as Harikar, Qandil and the Civil Development Organisation. In Jordan these initiatives are led by national organisations such as the Arab Renaissance for Democracy and Development (ARDD) and the Jordan Bar Association.

Concerted advocacy efforts have also led to the simplification of procedures and the adoption of new solutions by governments in the region. In Jordan, religious courts and civil registration services have been established within the largest refugee camps, allowing refugees to register new marriages and births immediately and without difficulty, and to resolve potential problems related to the lack of documentation proving marital status.⁵⁵ The government of Jordan has also waived fines and deadlines for birth registration, thereby facilitating late birth registration for a significant number of children, including those who would previously have been required to petition a court to complete the procedure as a consequence of not obtaining a birth certificate within one year of the child's birth. Recognising the protection concerns associated with the lack of valid marriage certificates among many Syrian refugees, Jordan also instituted two waiver periods, one in 2014 and another in 2015, during which all refugees were eligible to complete late marriage registration procedures without incurring the

⁵⁴ See, Norwegian Refugee Council, Birth Registration Update, 2015.

⁵⁵ For more information on the efforts of the Jordanian government, see, UNHCR, 'I Am Here, I Belong': The Urgent Need to End Childhood Statelessness, 2015; ARDD-LEGAL AID, Birth Registration in Jordan in the context of the Refugee Crisis, 2015.

penalty formally prescribed under the law — with over 3,000 refugee families benefitting from this policy.⁵⁶

In Lebanon, the authorities have also instituted a range of measures to make procedures simpler and more accessible. In 2013, Lebanon's Personal Status Directorate issued a circular establishing that the Syrian Family Booklet would be accepted as evidence of both parental identity and marital status for families seeking to register new births.⁵⁷ This significantly increased access to birth registration by reducing the number of prerequisite documents needed to obtain a birth certificate. The central authorities in Lebanon also issued directives to local authorities reaffirming that Syrians in the country are entitled to birth certificates, and clarifying the documents needed to complete a birth registration under the simplified procedures. Similarly, in the Kurdistan Region of Iraq, the authorities have eased birth registration procedures by accepting UNHCR certificates as evidence of parental identity and marital status if families no longer possess valid documents from Syria.⁵⁸

In line with key international standards, Turkey's national legal framework recognises the right of all children born in the country to be registered at birth, irrespective of the circumstances of their births or their parents' marital status. In 2015 the government issued a circular to reduce the requirements and steps involved in registering a child born out of wedlock. The government has also made marriage registration far more accessible. When refugees no longer possess Syrian identity documents, they can register new marriages on the basis of the identity documents issued by Turkey's asylum authorities.⁵⁹ UNHCR promotes effective implementation of this positive legal and

⁵⁶ Under Jordanian law, the penalty associated with late marriage registration, applicable to nationals and foreigners alike, is approximately USD 1,500 per family. The waiver periods adopted in 2014 and 2015 which exempted refugees from this penalty thus removed the most significant barrier refugees faced in obtaining legal evidence of their marital status.

⁵⁷ This significantly increased access to birth registration, as previous requirements stipulated a range of documents which many refugees no longer possess, or which are now impossible to acquire, including a valid Syrian passport, an official marriage certificate, and a civil status extract stamped by the Lebanese Ministry of Foreign Affairs in Lebanon and the Syrian Embassy within the last three to six months.

⁵⁸ In Search of Solutions, *supra* n1.

⁵⁹ *Ibid.*

policy framework, including the new solutions reached to make civil registration procedures more accessible. The authorities have also established transportation assistance to ensure pregnant women living in refugee camps can reach hospitals to deliver in safety and receive birth notifications for their newborns. UNHCR and its partners have reached one million Syrian refugees in Turkey as part of a campaign to improve awareness of civil registration procedures and requirements.

With the benefit of these interventions, tremendous progress has been made in addressing gaps in birth registration and documentation. At the outset of the crisis, regional data indicated that 35 per cent of Syrian refugees born in exile in MENA went completely undocumented, receiving neither a birth certificate nor a medical birth notification.⁶⁰ In 2015 this was reduced to seven per cent of new refugee births regionally. Certain countries have witnessed particularly dramatic improvements. In Jordan, the establishment of mobile and camp-based registration services and courts resulted in 12 times as many births being successfully registered in camps in 2015, in comparison to 2013 (before these services were in place). In Iraq, less than a third of Syrian refugee births were registered in 2012, but by 2015 the birth registration rate had increased to 73 per cent. In Egypt, intensive legal aid and counselling for Syrian refugees has contributed to a 93 per cent birth registration rate.⁶¹

While many challenges remain, including in relation to completing all stages of the birth registration procedure, significant progress has been made towards ensuring that all children receive, at a minimum, some form of documentation which can be used to verify their identity, bio-data and parentage. This helps to address immediate protection needs, such as the promotion of family unity and reunification, while also helping to provide a basis to establish the child's nationality. In this regard, it is notable that while 68 per cent of Syrian refugee children born in Lebanon do not complete all stages of the birth registration

⁶⁰ This data relates to Syrian refugees registered with UNHCR in Lebanon, Jordan, Iraq and Egypt. See *Ibid.*, at p. 15.

⁶¹ All statistics from UNHCR registration data. Note that tracking birth registration rates is a UNHCR Global Strategic Priority. Birth registration rates are thus a key indicator that these operations monitor and record. See, UNHCR, *Global Strategic Priorities: 2016-2017*. For more information on birth registration rates for Syrian refugees in specific countries, see *In Search of Solutions, supra* n1.

procedure, 98 per cent now receive a birth notification and 79 per cent are able to obtain an initial birth certificate from the local municipal authority known as the “*Mukhtar*”. In comparison, in 2012 32 per cent of Syrian refugees born in Lebanon received no identity documentation whatsoever; in 2015 the figure was five per cent.⁶² The fact that virtually all refugee children now receive a medical birth notification is important in two respects; this document both facilitates official birth registration at a later date and, in the interim, can serve as a source of vital information about the child.

A number of initiatives within Syria itself are also worth noting. UNHCR, together with the Danish Refugee Council, Syrian Arab Red Crescent, the Syria Trust, and the Al Taalouf Charity Foundation, is expanding legal aid and counselling to help conflict-affected and internally displaced families obtain new documents and register new births. The Directorate of Civil Affairs has undertaken a range of measures to ease the process of replacing identity documents lost or destroyed during the conflict, particularly national ID cards and Family Booklets.⁶³ Persons from besieged areas are now given temporary ID cards, and are able to apply for replacement documents based on a central, digitalised database. IDPs can now also apply for replacement ID cards in their current place of residence, rather than having to return to their governorate of habitual residence,⁶⁴ thus removing the need to return to locale from which they were forcibly displaced and which in many instances remains unsafe. In addition, a new civil registration department has been established in Damascus to assist IDPs with obtaining and renewing identity documentation. These important efforts notwithstanding, the situation may call for additional efforts and solutions, as reports anticipate the number of persons within Syria who need to replace their documentation will increase exponentially in the near future.⁶⁵

5. Conclusion

This chapter has focused on a dimension of the crisis in Syria which is less visible than the devastation to infrastructure and security, but which is of vital importance to its children and future. Being stateless

⁶² *Ibid.*

⁶³ See, UNHCR, 2015 End of Year Report, *supra* n37.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, p. 17.

generally brings with it devastating humanitarian impacts.⁶⁶ In many countries, nationality acts as the gateway to protection and the enjoyment of fundamental rights. In the context of Syria, with such a volatile and protracted crisis, the situation is particularly precarious. The failure to document Syrian refugee children today could impede their ability to return to Syria in the future, or to be acknowledged and protected as Syrian citizens. In an important milestone, addressing the need of Syrians for civil status documentation — both within Syria and in the refugee context — has now been recognised as an issue vital to the stability and future of the country, including in relation to the humanitarian planning and peace-building efforts underway.

Although this book is entitled ‘Solving Statelessness’, this chapter has focused mostly on the prevention of statelessness — prevention that requires a concerted effort, but that is achievable, as States and other actors in the region are jointly demonstrating. The dramatic increase in birth registration in the region attests to the commitment of host countries to protecting refugee children, and to realising their rights to a legal identity and nationality. New approaches for providing alternative forms of official identity documentation to Syrian refugee children who were born in Syria, but who never received a birth certificate or medical birth notification there are also being explored.

While significant progress has been made, more needs to be done. A key priority is finalising the process of reforming Syria’s nationality and personal status laws to remove gender-discriminatory provisions and other structural gaps. Prior to the onset of the conflict, efforts were underway to draft and adopt legislation that would allow Syrian women to confer nationality on their children on an equal basis with men. In light of the needs identified in this chapter, revisiting and finalising that process of legislative reform would be particularly timely. Adopting legislation of this kind would further contribute to the growing community of States in the region which have enacted reforms to grant women equal rights with men in conferring nationality on their children, and thereby ensuring the right of the child to acquire a nationality.⁶⁷

⁶⁶ For more information on some of these impacts see, European Union: European Parliament, *Addressing the Human Rights Impact of Statelessness in the EU’s External Action*, 2014; and Women’s Refugee Commission, *Our Motherland, Our Country: Gender Discrimination and Statelessness in the Middle East and North Africa*, 2013.

⁶⁷ A number of States in the region have reformed their laws to enhance the

The risk of statelessness can be further reduced by implementing the recommendations from the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women to undertake a comprehensive reform of the Personal Status Act to ensure the “registration of all births, deaths, marriages and divorces”.⁶⁸ In addition to strengthening protection for Syrians displaced as refugees, addressing these gaps in the legal framework would help IDPs and conflict-affected families who urgently need to obtain or replace civil status documentation to ensure greater enjoyment of key rights and protections, and to navigate the everyday challenges of life in an increasingly insecure environment. Efforts are also needed to support more effective implementation of the safeguards against statelessness which exist in Syria’s current nationality law.

Syrians everywhere are living a life of uncertainty. With the conflict entering its sixth year, there are no concrete prospects for an end to hostilities, and it is unclear how long the situation will last and what any potential resolution will look like (the future shape of the country’s territory, governance and leadership, for example, all remain unclear). However, registering every Syrian refugee child will help to close a critical, if unseen, gap in protecting these children and laying the foundation for a safe return one day. These efforts, coupled with renewed attention to promoting women’s nationality rights, can help ensure that a generation of vulnerable children is protected from the prospect of statelessness.

ability of women to confer nationality on their children. Reforms of this nature have been adopted in Egypt (2004), Algeria (2005), Iraq (2006), Morocco (2007), Tunisia (2010), and Yemen (2010). In line with these legislative amendments, these States have also withdrawn their reservations to Article 9(2) of CEDAW. Other States in the region are also taking important steps. The United Arab Emirates and the Kingdom of Saudi Arabia introduced measures to allow children to apply for nationality on the basis of maternal descent on a discretionary basis, in 2011 and 2014 respectively, with other States in the region expressing interest in pursuing similar reforms.

⁶⁸ UN Committee on the Elimination of Discrimination against Women (CEDAW), UN Committee on the Elimination of Discrimination against Women: Concluding Comments, Syrian Arab Republic, 11 June 2007, CEDAW/C/SYR/CO/1, paras. 33-34; CRC, Concluding observations: Syrian Arab Republic, *supra* n49. In particular these Committees noted concerns in relation to the ability of children born out of wedlock to be registered at birth, and the inability of women in certain inter-faith marriages to have their marriages legally recognised and registered — an issue which also impedes birth registration for their children.

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Juan Ignacio Mondelli is the Regional Protection Officer (Statelessness) at UNHCR Regional Legal Unit for the Americas. Between 2003 and 2013, he performed as Associate Legal Officer in UNHCR Regional Office

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Amit Sen is UNHCR's Regional Protection Officer on Statelessness for the Middle East and North Africa, where he focuses on promoting the rights and protection of children displaced by the conflicts in Syria, Iraq, Yemen and Libya. Amit previously covered the Asia-Pacific region as a UNHCR Regional Protection Officer based in Bangkok, Thailand. He has also adjudicated asylum claims for UNHCR in Turkey, and served as UNHCR's Protection Officer in Nepal. Prior to joining UNHCR, Amit served as a Senior Associate at the US Department of Justice. He has worked at the International Criminal Tribunal for the Former Yugoslavia on the war crimes trial of Slobodan Milošević, clerked at the DC Court of Appeals and provided *pro bono* representation to asylum seekers and their families. He earned his law degree from Georgetown University and has served as a Practitioner in Residence at Duke University.

Prof. Julia Sloth-Nielsen is a professor in the department of Public Law and Jurisprudence at the University of the Western Cape and Professor of Children's Rights in the Developing World at Leiden University. She has published extensively on children's rights, and served a term on the African Committee of Experts on the Rights and Welfare of the Child from 2011-2016. She led the working group that drafted General Comment no 2 of the Committee on the right to a name, nationality to birth registration and combating statelessness.

Katja Swider is a doctoral researcher at the Law Faculty of the University of Amsterdam, finalising her thesis on statelessness. She has previously published a working paper on protection of stateless persons in the European Union, and co-authored a study on prevention of statelessness, the latter commissioned by the EU Parliament. Her other publications focus on statelessness in the Netherlands, as well as on interactions between the concepts of statelessness, nationality and human rights. Katja is also an Advisory Committee Member of the European Network on Statelessness.

Dr. Jason Tucker is a post-doctoral researcher working with stateless refugees in Sweden at the Malmö Institute for Studies of Migration, Diversity and Welfare. Formerly he was a regional statelessness officer at UNHCR Central Asia.

Prof. Maarten Peter Vink is Professor of Political Science and Political Sociology at Maastricht University where he is Co-Director of the Maastricht Center for Citizenship, Migration and Development (MACIMIDE) and leads the 5-year research project “Migrant Life Course and Legal Status Transition” funded by a Consolidator Grant of the European Research Council. Vink is also Part-Time Professor at the Robert Schuman Centre for Advanced Studies, European University Institute, where he is Co-Director of the European Union Democracy Observatory on Citizenship (EUDO CITIZENSHIP).

Dr. Olivier Willem Vonk holds a PhD from the European University Institute (Italy) and is currently a Marie Curie COFUND Fellow at the University of Liège (Belgium). Previously, he was a Marie Curie Outgoing Fellow at Maastricht University and a visiting researcher at Georgetown University (US). His publications include ‘Dual Nationality in the European Union’ and ‘Nationality Law in the Western Hemisphere’ (Martinus Nijhoff Publishers 2012 and 2014) and, with René de Groot, ‘International Standards on Nationality Law: Texts, Cases and Materials’ (Wolf Legal Publishers 2016).

Dr. Laura van Waas is Assistant Professor at Tilburg Law School in the Netherlands, as well as a founder and Co-Director of the Institute on Statelessness and Inclusion. Her PhD manuscript, ‘Nationality Matters’ (Intersentia, 2008), is widely used as a reference for understanding international statelessness law by researchers and practitioners all over the world, as is ‘Nationality and Statelessness under International

Law’ which she edited together with Alice Edwards (Cambridge University Press, 2014). In more than a decade of working on the issue of statelessness, she has carried out a wide array of research and teaching projects, both within academia and for other actors.

Joanna Whiteman is Co-Director of the Equal Rights Trust, an international NGO which seeks to advance equality and combat discrimination. Joanna leads the Trust’s litigation and resource development programmes and is one of the Trust’s expert equality trainers. She is a qualified lawyer with a particular expertise on the intersection between the right to non-discrimination and other human rights. She has trained lawyers and NGOs on the international law relating to statelessness and has written on discrimination against stateless persons and refugees for a number of publications. Joanna holds an LLM from the University of Cambridge and an LLB from the University of Nottingham. Together with Amal de Chickera and others, Joanna serves on the steering committee of the Global Campaign for Equal Nationality Rights.

Chapter abstracts

1. Making effective use of UN human rights mechanisms to solve statelessness

Melanie J. Khanna and Peggy Brett

United Nations human rights mechanisms can play an important role in solving statelessness by raising awareness, spreading good practice and making specific recommendations to States on the changes needed to resolve or prevent cases of statelessness. This chapter presents information on how the UN's human rights mechanisms addressed the right to nationality and certain related issues between 2012 and 2015. It covers the work of the Human Rights Council (including the Universal Periodic Review and the Special Procedures) and three of the human rights treaty bodies: the Committee on the Elimination of All Forms of Racial Discrimination; the Committee on the Elimination of All Forms of Discrimination against Women; and the Committee on the Rights of the Child. It identifies important opportunities that exist for making enhanced use of these bodies and argues that, taken together, the human rights mechanisms of the UN offer one of the most vibrant and promising avenues for addressing statelessness.

2. The Sustainable Development Goals and solutions to statelessness

Radha Govil

This chapter explores the extent to which the Sustainable Development Goals (SDGs) provide a useful avenue for resolving and preventing statelessness. It examines the problem of statelessness as a development issue. The chapter analyses which of the SDGs are of greatest relevance to addressing the issue of statelessness and links these to the United Nations High Commissioner for Refugees' statelessness mandate and the #IBelong Campaign to End Statelessness in 10 Years. The author examines how the relevant SDGs might be practically implemented and what limitations can be foreseen in this respect, particularly with respect to the Global Indicators established to monitor progress towards achievement of the SDGs. In light of the foregoing analysis, the conclusion evaluates the extent to which the SDGs can be useful in the quest to find durable solutions to statelessness.

3. Ensuring that today's refugees are not tomorrow's stateless persons: Solutions in a refugee context

Lucy Hovil

This chapter explores the nexus between displacement and statelessness. It argues that today's refugees, particularly those in protracted situations of displacement, are in danger of becoming tomorrow's stateless persons unless deliberate action is taken to resolve their plight; that those whose citizenship is questioned, whether directly in terms of their legal status or more broadly in terms of their belonging, are more vulnerable to displacement; and that displacement can be one of the mechanisms through which what was once a tenuous link with the State is severed. Focusing specifically on the Great Lakes region of Africa, it places the legal phenomenon of statelessness within its broader socio-political context, pointing to the reality that legal principles are often in tension with social reality. It argues that broader socio-political realities should be considered and social and political tensions addressed in tandem with legal reform and strengthening of the implementation of legal frameworks. Furthermore, the issues discussed have broader application to other refugee crises on the continent and globally. In particular, the United Nations High Commissioner for Refugees Campaign to End Statelessness by 2024 provides a lens through which to view the refugee crisis in the region and beyond. A focus on statelessness helps both in emphasising the extent to which failures to belong within a polity are a root *cause* of displacement and in exposing the fact that failures to *resolve* exile can lead to statelessness.

4. Addressing statelessness through the rights to equality and non-discrimination

Amal de Chickera and Joanna Whiteman

This chapter explores the interconnections between statelessness, equality and discrimination in order to offer insight into the multiple vulnerabilities associated with statelessness and propose a framework through which they can be addressed. There is a relationship between statelessness, equality and discrimination. Statelessness often occurs as a result of direct discrimination, on grounds such as race, ethnicity and gender. Furthermore, stateless people are systematically treated unequally, and are vulnerable both to direct and indirect discrimination.

As a result, stateless people's ability to participate in all aspects of life on an equal basis with others and to fully enjoy their human rights is severely impeded. The effective application of the equality framework is an important 'solution' to statelessness and its effects. Grounded in international human rights obligations, its relevance is clear. The framework not only requires States not to discriminate against individuals in ways which may lead to statelessness, but also imposes certain positive duties on them to identify and tackle discrimination by individuals against stateless persons. This chapter outlines how the existing equality framework can be used to address statelessness in both national and international settings.

5. Litigating against statelessness

Laura Bingham and Liliana Gamboa

In this chapter we explore the promise, past achievements and limitations of litigation as a tool to eliminate statelessness, to press for equal and fair treatment in respect of access to nationality, and to ensure that stateless persons and other categories of non-citizens enjoy robust human rights protection. We draw from a survey of important cases in national and international jurisdictions, exploring as much as possible the context in which litigation emerged, in order to derive lessons for how it can be used successfully to advocate for positive changes in this field in the future. Litigation naturally frames social issues within a specific human narrative with the potential to recast victims of human rights abuses as independent subjects of the law. Litigation can also encourage activism, including engagement and empowerment of affected individuals and communities. We argue that these promising aspects of litigation have yet to be fully exploited and that the growth of organised transnational campaigns and regional networks in recent years presents a new opportunity to engage in strategic litigation.

6. "Benchmarking" legal protection against statelessness

Olivier Willem Vonk, Costica Dumbrava, Maarten Peter Vink and Gerard-René de Groot

This chapter analyses legal provisions on the acquisition and loss of nationality in order to assess the levels of formal protection against

statelessness in Europe and the Americas in light of the international legal standards on the prevention and reduction of statelessness. For this purpose it has developed a set of benchmarks to measure legal protection against statelessness, the methodology of which is explained at length in the chapter. The set of international legal standards used are those identified in the EUDO CITIZENSHIP Global Database on Protection against Statelessness as providing protection against each of the seventeen “modes” of statelessness used in the database. The analysis shows that Europe and the Americas are regions where there are not large numbers of stateless persons and where countries generally have a good record in complying with the international standards on the prevention and reduction of statelessness. The current expansion of EUDO CITIZENSHIP to other continents will bring further understanding of the formal protection afforded against statelessness by nationality laws worldwide, while applying the benchmarks to more problematic regions will allow the development of a truly global comparative benchmark analysis in the context of statelessness.

7. Securing every child’s right to a nationality in a changing world: The nationality implications of international surrogacy

Claire Achmad

The growth in use of twenty-first century assisted reproductive technology which has occurred over the last decade has seen children being conceived and born abroad, with implications for their right to a nationality. The challenge of securing children’s right to a nationality has manifested acutely in the context of international commercial surrogacy (ICS). ICS involves a person or persons residing in one State paying money in order to conceive a child and have that child carried to term by a surrogate mother located in another State. Through the application of domestic nationality laws to children born through ICS, conflict of laws situations are arising and leaving children stateless and stranded in their birth State. Drawing on theory and practice (utilising real case examples), this chapter examines the challenge of nationality acquisition and the prevention of statelessness in ICS cases, placing it within the wider context of challenges to the concept of ‘family’ and family formation in the twenty-first century. The scenarios through which statelessness occurs in the ICS context are examined, highlighting the areas where further work on the prevention of statelessness is

needed. The wider child rights implications of statelessness in ICS are exposed, pointing to the reality that the child's right to nationality is a 'key' unlocking many of the child's other rights under the United Nations Convention on the Rights of the Child. Core international law norms and standards regarding nationality and statelessness are analysed and recent jurisprudence in the area of ICS and nationality is highlighted, along with pioneering State responses to the issue. The chapter takes a solutions-based approach to the problem of child statelessness in ICS, proposing practical steps founded on pre-existing international law norms and standards. Such approaches should be implemented now, before the problem of child statelessness stemming from ICS deepens and becomes a more significant cause of global statelessness.

8. A fresh examination of facilitated naturalisation as a solution for stateless persons

Tamás Molnár

"Durable solutions" for non-refugee stateless persons (covered by the 1954 Convention relating to the Status of Stateless Persons) are different from those available for refugees, but there are common elements. Such solutions should be long-lasting and genuine and address existing stateless populations both *in situ* and in a migratory context. Besides confirming nationality for those people who are stateless in the country of their birth and ancestry, or granting nationality to them *ex lege*, the other appropriate durable solution for stateless persons found in a migratory situation is facilitated naturalisation. This chapter focuses on provisions relating to the facilitated naturalisation of stateless persons under international law (both on the universal and regional planes) and the domestic law and policy of States in this respect. Its aim is to show the potential of this "durable solution" offered by international law, but also to demonstrate that the problems of naturalisation for stateless persons are more complicated in practice than they first appear or than the international legal instruments suggest. In addition to mapping and evaluating the current state of international law and general trends in State practice (including highlighting existing shortcomings and gaps), the chapter assesses whether there is an emerging human rights norm, namely the "right to be considered for naturalisation", on the basis of a genuine connection with the State (*jus connectionis*).

9. The right to a nationality in Africa: New norms and new commitments

Bronwen Manby with Ayalew Getachew and Julia Sloth-Nielsen

This chapter presents two ground-breaking initiatives on the right to a nationality and the prevention of statelessness in Africa undertaken by the African Committee of Experts on the Rights and Welfare of the Child and the African Commission on Human and Peoples' Rights. The chapter outlines the current trends in nationality laws in the continent and identifies the populations left at risk of statelessness by those laws. It summarises existing provisions and jurisprudence on the right to a nationality in the African human rights system and the extent to which issues relating to statelessness have been considered by the other institutions of the African Union. Finally, it sets out the process leading to and the content of the General Comment adopted by the African Committee of Experts on the Rights and Welfare of the Child in 2014 on the right to a name, birth registration, and a nationality; as well as steps taken by the African Commission on Human and Peoples' Rights towards the elaboration of a draft protocol to the African Charter on Human and Peoples' Rights on the eradication of statelessness and the right to a nationality in Africa.

10. Eradicating statelessness in the Americas: The Brazil Declaration and Plan of Action

Juan Ignacio Mondelli

This chapter explains how Latin-American and Caribbean countries seek to end statelessness in the Americas by 2024, through the implementation of a programme with this end which has been included in the Brazil Plan of Action (2014). The chapter refers to the content of this programme, and the steps that States have given to achieve this goal through accession to the UN Statelessness Conventions, promoting the harmonisation of nationality laws with relevant international standards; facilitating universal birth registration and issuing nationality documentation; establishing statelessness determination procedures and legal frameworks for the protection of stateless persons that provide for facilitated naturalisation, etc. The chapter starts by explaining, from a regional perspective, what it means to "eradicate statelessness", and offers three complementary perspectives: 1) human rights approach; 2) programmatic approach;

and an 3) idealistic approach. Relying heavily on the jurisprudence of the Inter-American Court of Human Rights, the chapter analyses the right not to be stateless, as the flip side of the right to a nationality, and highlights the importance of the principle of equality and non-discrimination as the cornerstone for preventing and resolving statelessness. It also briefly reviews how the Inter-American Court has considered the individual's identity when responding to a breach of the right to a nationality.

11. Statelessness in Central Asia: From State succession to solutions

Jason Tucker

Many of the protracted situations of statelessness that we face today have arisen due to State succession. In addition, State succession continues to pose a risk with regard to the creation of further large scale cases of statelessness. Therefore, there is a need to better understand how to prevent and resolve statelessness in situations of State succession. This chapter argues that if we are to effectively do so, historic, economic, political and socio-psychological factors must be considered in policy and practice to ensure that legal safeguards to prevent and reduce statelessness are not out of sync with the context within which the law is being applied. To contextualise this discussion, the chapter explores the various underexplored factors which led to the creation of large stateless populations in Central Asian States following their succession from the Union of Soviet Socialist Republics. The successful efforts of Kyrgyzstan to overcome some of the past disjuncture between the citizenship law, its implementation and the context within which it is being applied are used as an example to support the argument that effective efforts to prevent and reduce statelessness following State succession, and pre-empt problems in the future, require States to adopt responsive and flexible policies that are sensitive to the various historic, economic, political and socio-psychological factors influencing the population. Such an approach is situated within international law standards on the avoidance of statelessness in cases of State succession, notably the requirement that States take *all appropriate measure* to avoid statelessness.

12. AsiaThe search for solutions to statelessness in Southeast Asia: State practice and recent developments

Nicholas Oakeshott

This chapter examines five selected successful national approaches to addressing statelessness in Southeast Asia alongside a number of regional developments. It discusses what can be learnt from these approaches about how statelessness can be “solved” in the region and beyond, stressing the importance of understanding the regional and national context. It describes the measures taken as well as the policy considerations that appear to have motivated States to devise and implement solutions to statelessness. The opportunities for future progress are canvassed alongside a number of potential areas for future research.

13. The evolving role of the European Union in addressing statelessness

Katja Swider, Giulia Bittoni and Laura van Waas

The European Union is a powerful supra-national regional organisation, which possesses some features of statehood, yet the EU’s ability to deal with the problem of statelessness is distinct from that of an individual State. On the one hand, the EU can contribute more to the resolution of statelessness than each of its Member States individually. On the other hand, the EU’s powers are sometimes more limited than those of States, which continue to monopolise nationality policy. In this chapter we explore what the EU’s potential powers and limitations are when it comes to resolving the problem of statelessness within and outside its own borders. The first part of this chapter explains why greater EU action in the field of statelessness is important. The chapter then explores more closely what the EU can do to solve and mitigate statelessness within its own borders through migration policies and through the regulation of the status of EU citizenship. The final section of the chapter looks at what role the EU can play in efforts to address statelessness beyond its borders and discusses how this role could be strengthened. It considers the extent to which a statelessness-specific agenda has now emerged and how that agenda is being shaped, including which frameworks and actors are implicated in EU external engagement on statelessness.

14. Efforts to prevent statelessness amongst children displaced by conflict in the Middle East and North Africa

Amit Sen and Zahra Albarazi

This chapter examines the risks of statelessness arising from the crisis in Syria, which has left 2.5 million displaced in the immediate region as refugees and over 6 million children inside Syria who are in urgent need of humanitarian assistance. Over 300,000 Syrian children have been born in exile as refugees, and some 709,000 Syrian refugee children under the age of four have been born since the conflict began. While Syrian refugee children acquire nationality exclusively from their fathers, one-fourth of Syrian refugee households are led by women alone — with no fathers present to attest to the nationality of the children. These children are at considerable risk of statelessness if left without documentation of their births, identities, parentage and links to their country of nationality. It is of particular concern, therefore, that registering new births can often prove a challenge for families displaced by conflict. The inability to obtain a birth certificate also exacerbates serious protection risks such as family separation, smuggling and trafficking, child recruitment, child marriage and child labour. In response, States in the region are working in partnership with civil society, domestic and international NGOs, communities, UNHCR and other UN agencies to ensure all children are registered and documented at birth. Statelessness prevention activities have been integrated into child protection frameworks, maternal health programming, and initiatives to prevent and respond to sexual and gender-based violence. Collectively, these efforts have vastly increased the number and percentage of Syrian refugee children registered and documented at birth. Despite this progress, the crisis in Syria continues unabated, compromising access to documentation within the country and generating ongoing displacement and uncertainty — leaving much work to be done to prevent statelessness among the children affected by this crisis.

Suggested reading

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SOLVING STATELESSNESS

Interest in statelessness has been steadily increasing since the late 1990s – within academia, among governments, at the UN and among civil society organisations. Research projects, mapping studies and doctrinal discussions have helped to clarify the challenges faced and our understanding of what is at stake. This has led to a fresh sense of purpose in addressing the issue and there is now a growing international movement engaged in finding solutions, spurred on by the UNHCR-led #Belong Campaign to End Statelessness by 2024. Making meaningful progress towards this goal demands a new and more ambitious approach, one that moves beyond stocktaking to inspire solutions. As Volker Türk outlines in his introduction to this ground-breaking publication: *“The global debates have moved beyond the need to explain the problem and its causes and consequences. The time has come to accelerate the momentum to implement durable solutions effectively.”*

The essays which have been collected in this edited volume all approach statelessness from a solutions perspective, looking at what is being done, and what more can be done, to address the issue. The first part of the book has a thematic focus, exploring perspectives, tools and techniques for solving statelessness which are relevant across different countries and regions. Chapters in the second part each have a regional focus, exploring region-specific challenges, developments and innovations set against the backdrop of the broader context of a global campaign to solve statelessness. With contributions from both scholars and practitioners, the book is likely to be of interest to anyone engaged in studying or implementing solutions for statelessness, including researchers, government policy-makers, staff of international or regional inter-governmental bodies and UN agencies, grass-roots and international civil society organisations, legal practitioners and advanced-level students.



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