

# *Statelessness and the Problem of Resolving Nationality Status*

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## Introduction: The Right to a Nationality: Theory *and* Practice?

'Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.' Such is the text of article 15 of the 1948 Universal Declaration of Human Rights. This has not always been the case. The right to a nationality and the notion of 'effective nationality', of nationality as a basis for the exercise of other rights, have been developed through the course of this century. Notable landmarks include the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, the 1961 Convention on the Reduction of Statelessness, and the 1997 European Convention on Nationality. The principles contained in these conventions have been elaborated upon and reinforced by other treaties, jurisprudence, and State practice. The right to a nationality is a human right, in turn, out to serve as a basis upon which to settle issues pertaining to the acquisition, loss, or denial of nationality.

If everyone has the right to a nationality, how is this right to be realized, how is nationality to be ascribed? International law stipulates that it is for each State to determine, through the operation of national law, who are its citizens. This determination will be recognized at the international level so far as it accords with general principles of international law. The State, therefore, should not apply measures which conflict with international principles relating to the acquisition, loss, or denial of citizenship. This principle is enunciated in the 1930 Hague Convention, the 1997 European Convention, and the case law of both the Permanent Court of International Justice and International Court of Justice.

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In the practice of States, nationality is not granted indiscriminately but generally reflects factors which in turn indicate an established link between the individual and the State. Evidence of this 'link' is found specifically, for example, in place of birth, descent, or strong ties established through residence, among others. Now a term of art in the field of nationality, the genuine and effective link, as evidenced in these factors, is a valuable tool in ascertaining which nationality is the most logical one to ascribe to an individual.<sup>1</sup> Many States tend to emphasize descent, while in the Americas place of birth is important in determining nationality. While the choice of emphasis varies from region to region, one or more of the elements of the genuine and effective link, often in conjunction with one another, are utilized to some degree by all States in their nationality legislation and practice.

International law, therefore, establishes some parameters which provide guidance on nationality legislation and practice. However, despite developments and clarification in international law and practice relating to nationality, the international community currently faces numerous situations of statelessness and inability to establish a nationality. The problem has arisen most notably in connection with State succession and the adoption of nationality legislation by new or restored States, but is also seen in areas of the world which have had no recent change in legislation and have undergone no transfer of territory. Those affected include life-long residents of a State, ethnic minorities, and significant numbers of women and children who are unable to exercise their own links but must, rather, follow those of husband or father.

The emergence of inter-ethnic conflicts, numerous sudden cases of State succession, and increased displacement have brought the nationality issue to the foreground. Statelessness and the inability to acquire an effective nationality have, in recent years, received greater attention from the international community as their potential as a source of regional tension and of involuntary displacement have come to be more widely

<sup>1</sup> This article uses the concept of genuine and effective link more broadly than did the International Court of Justice in the *Nottebohm Case*. The premise is that nationality based upon birth, descent, and residence is presumed by States in their practice to be evidence of a link between the individual and the State and may be used as a minimum reference point for determining substantial connections. The genuine and effective link is a subtle and fluid concept which can be evidenced in many factors including social attachments, centre of interests, extended family ties, and so on; it is not limited to place of birth, descent, or residence. The latter, however, are matters of fact, which makes them far easier to identify and apply in an objective and non-discriminatory manner than some of the more subtle signs of attachment which can be used as supplementary means of determining ties. Moreover, *jus soli*, *jus sanguinis*, and long-term residence are each well-established and globally practised principles upon which nationality is granted *ex lege* or through naturalization. Problems arise because they are not applied in the same way by all States, and many not be applied equally to individuals within a State. Thus, while all the factors of the genuine and effective link are important, a good starting point for developing some uniformity in the laws and their application would be by reference to birth, descent, and residence as *primary* elements of the genuine and effective link between an individual and a State or States.

recognized. The United Nations General Assembly and the UNHCR Executive Committee have adopted resolutions and conclusions stressing the importance of the principles embodied in international instruments, and the need for States to adopt measures to avoid statelessness. The International Law Commission, at the request of the General Assembly, has undertaken work on nationality following a succession of States.<sup>2</sup> Efforts have also been undertaken at the regional level by the Organization of American States, the Organization for Security and Cooperation in Europe, and the Council of Europe, the latter having opened the European Convention on Nationality for signature in November 1997.<sup>3</sup>

The 1930 Hague Convention, the 1954 Convention relating to the Status of Stateless Persons, and 1961 Convention on the Reduction of Statelessness, are the primary international instruments which serve as reference points for the principles relating to the right to a nationality and the problem of statelessness. The principles underlying these instruments are supported, in turn, by provisions in, for example, the 1957 Convention on the Nationality of Married Women, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, and the 1989 Convention on the Rights of the Child. In the view of the author, who participated in the drafting, the text of the 1997 European Convention on Nationality reflects a largely successful effort to incorporate and build upon the principles contained in the 1961 Convention on the Reduction of Statelessness.

An essential step in strengthening efforts to reduce statelessness and the inability to establish nationality, is promotion of the principles contained in these instruments which seek to ensure, at a minimum: that persons will be granted a nationality under certain circumstances in which they might otherwise be stateless; that deprivation of nationality will not result in statelessness and in no case will be arbitrary; that adequate protection will be available to those who, nonetheless, remain or become stateless; and that State practice will reflect contemporary developments in international law and practice.

International instruments, of course, cannot actually grant the nationality to which a given individual may have a claim, or make nationality effective. As noted, it is the State which bestows nationality by operation of internal law. It is, further, the State which ultimately determines the content of its nationality. The State's determination of

<sup>2</sup> See Mikulka, Václav, 'Third Report on Nationality in Relation to the Succession of States': UN doc. A/CN.4/480, 27 Feb. 1997 and 'Report of the International Law Commission on the work of its Forty-ninth session', 12 May–18 Jul. 1997: UN doc. A/52/10, (1997).

<sup>3</sup> The European Convention on Nationality, adopted by the Committee of Ministers of the Council of Europe in May 1997, was opened for signature by member States of the Council of Europe and non-member States which participated in its elaboration on 6 Nov. 1997. Fifteen States signed the Convention at its opening, and several others are currently taking steps toward ratification. Three ratifications only are necessary for the Convention to come into force.

nationality ought to reflect principles of international law, but does international law provide appropriate guidance for the issues pertaining to statelessness today? Which stateless persons are more likely to benefit from the right to a nationality? Are active steps taken by States to effectively resolve long-standing cases of unresolved nationality?

Statelessness is not merely a legal problem, it is a human problem. Failure to acquire status under the law can have a negative impact on many important elements of life, including the right to vote, to own property, to have health care, to send one's children to school, to work, and to travel to and from one's country of residence. Many complications arise for those who have no nationality or whose nationality status is unclear, including indefinite detention in a foreign State when that State cannot determine the individual's citizenship for purposes of expulsion and release on the territory is not authorized.<sup>4</sup> These human issues and realities are the background to this article, which begins with a review of the right to a nationality and presumption against statelessness. It then discusses those who are considered stateless and in need of a nationality, as well as those who cannot establish their nationality status. In conclusion, the effective application of existing legislation and possible directions for further development of the law are considered.

## 1. International Law: The Right to a Nationality and Statelessness

Citizenship, or nationality,<sup>5</sup> has been described as the individual's basic right — the right, in fact, to have rights.<sup>6</sup> When cast in this light, two aspects of nationality become apparent, the first being that having a nationality is a right, and the second that the realization of this right is a necessary precursor to the exercise of other rights. Nationality provides the legal connection between an individual and a State which serves as a basis for certain rights, including the State's right to grant diplomatic

<sup>4</sup> There are currently an unknown, but high, number of 'forgotten persons', including rejected asylum seekers, illegal migrants, convicted persons, overstayers, and others whose documentation has been lost or stolen. Many also are in detention, and may remain there for months or years, because their country of residence or nationality will not acknowledge them or accept them back and the country of detention will not release.

<sup>5</sup> The terms citizenship and nationality are used as synonyms in this paper. According to art. 2(a), 1997 European Convention on Nationality, nationality means 'the legal bond between a person and a State and does not indicate the person's ethnic origin' ('European Convention on Nationality and Explanatory Report', ETS No. 166, Council of Europe, Strasbourg, 1997). Some States use the word citizenship to connote this legal bond, nationality being used to refer to ethnic origin (eastern European concept). Other States use the word nationality to connote the legal bond, citizenship being a particular aspect of nationality which provides for rights, such as voting, once the bond is established (for example, in the Americas). At the international level, nationality is generally used to describe the recognition of an individual as legally attached to a particular State.

<sup>6</sup> Chief Justice Earl Warren, *Trop v. Dulles*, 1958, quoted in Independent Commission on International Humanitarian Issues, *Winning the Human Race?* (1988), 107.

protection and representation of the individual on the international level.

The sources of international law<sup>7</sup> have, as regards nationality, developed over time as new conventions, custom, case law and principles have emerged. The General Assembly has called upon States to adopt nationality legislation with a view to reducing statelessness, consistent with the fundamental principles of international law pertaining to nationality.<sup>8</sup> Nationality of a State is a primary link between the individual and international law. It is, further, representative of a type of identity, supportable by diplomatic protection, for the individual and for States in responding to individuals. Thus, while the extension of rights generally associated with citizenship, such as voting, employment, or ownership of property, may be one means of normalizing the status of non-citizens on a State's territory, under international law there is no replacement for citizenship itself.

As early as 1923, the Permanent Court of International Justice (PCIJ) stated in its *Advisory Opinion on the Tunis and Morocco Nationality Decrees* that, 'The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; it depends on the development of international relations.'<sup>9</sup> Nationality, in principle a matter within domestic jurisdiction, was thus governed by rules of international law, so far as State discretion might be limited by obligations undertaken towards other States.

This theme was woven into the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws. Held under the auspices of the Assembly of the League of Nations and the first international attempt to ensure that all persons have a nationality, the Hague Convention picked up this theme and went further. Article 1 provided that,

It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.<sup>10</sup>

This reference to the three primary sources of international law, restated in article 3 of the 1997 European Convention on Nationality, indicates that the State's exercise of its right to determine its citizens should accord with the relevant provisions of international law. The concept of the genuine and effective link was formally enunciated in the *Nottebohm Case* as a means of defining the nature of nationality, the particular facts of the case relating to opposability vis-à-vis another State. In the words of the International Court of Justice (ICJ):

<sup>7</sup> See art. 38, Statute of the International Court of Justice.

<sup>8</sup> UNGA res. 50/152, 9 Feb. 1996.

<sup>9</sup> Permanent Court of International Justice, *Advisory Opinion on the Tunis and Morocco Nationality Decrees*, Ser. B, No. 4, 1923, 23.

<sup>10</sup> 179 LNTS 89, 99.

According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.<sup>11</sup>

The genuine and effective link, as extrapolated from the *Nottebohm Case*, has since been moulded and developed into a broader concept in the area of nationality legislation and practice based upon principles embodied in State practice, treaties, case law and general principles of law.<sup>12</sup> According to State practice, birth, descent, or residence can each be presumed to support a genuine and effective link or substantial connection between the individual and the State. Most States, however, do not apply these elements on an equal basis but, rather, indicate a preference for either birth or descent by basing national legislation and practice on either *jus soli* (nationality based upon place of birth) or *jus sanguinis* (nationality based upon descent).<sup>13</sup> Naturalization procedures are generally available for immigrants who remain in the country for a fixed period prior to application and who meet certain criteria. Thus, birth, descent, and long-term residence serve as evidence of either an automatically established link, or of a link acquired over time, between the individual and the State.

The 1961 Convention bases the right to a nationality on ties implicitly held with the State in which one is born, or in the State in which a parent held citizenship at the time of one's birth. This right is contingent, however, on the fact that one would otherwise be stateless. According to their terms of reference, the drafters of the 1961 Convention were to focus on how best to avoid statelessness, not on development in general of the right to a nationality. Nonetheless, in focusing on birth and descent, the drafters indicated that these factors are sufficient to establish a link between the individual and the State, a foundation upon which it is legally sound to grant nationality, in particular, to a person who has received none. The 1961 Convention does not require a contracting State unconditionally to grant nationality to any stateless person but seeks, rather, to balance factors of birth and descent in an effort to avoid the

<sup>11</sup> ICJ Reports, 1955, 23.

<sup>12</sup> Examples include the 1997 European Convention on Nationality and the 'Principles on Citizenship Legislation Concerning the Parties to the Peace Agreement on Bosnia and Herzegovina', adopted by the Expert Meeting on Citizenship Legislation held in co-operation with the United Nations High Commissioner for Refugees (UNHCR), the Council of Europe, Office of the High Representative, OSCE, and State party delegates from the five States on the territory of the former Yugoslavia (attached in Annex to Batchelor, Leclerc, Schack, 'Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia', *UNHCR European Series*, Vol.3, No.1, June 1997). Both instruments refer explicitly to the genuine and effective link and request States to apply this doctrine in specific circumstances.

<sup>13</sup> For example, European States tend to grant nationality on the basis of descent, place of birth being used as a 'stop-gap' in many States to avoid statelessness for foundlings or stateless children born on the State's territory.

creation of statelessness by reflecting an individual's genuine and effective *existing* connection with the State.

This approach is developing as a principle in international law outside the context of the 1961 Convention on the Reduction of Statelessness, as may be seen, for example, in the provisions of the 1997 European Convention on Nationality.<sup>14</sup> Article 6 of the European Convention provides for automatic acquisition of a Contracting State's nationality for children, 'one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party'.<sup>15</sup> Foundlings and children born on the State's territory who do not acquire at birth another nationality are also to be granted the nationality of the State Party.<sup>16</sup> Thus, the principles of nationality based on descent, or *jus sanguinis*, and nationality based on place of birth, or *jus soli*, are reflected in the 1997 European Convention.<sup>17</sup>

Moreover, article 6(3) of the European Convention takes a significant step forward in nationality legislation and practice:

Each State Party shall provide in its internal law for the possibility of naturalisation of persons lawfully and habitually resident on its territory. In establishing the

<sup>14</sup> An important reference tool for contemporary law and practice relating to nationality, this Convention is relevant not only within the Council of Europe member and observer States participating in its formulation, but also for analysis of problems relating to nationality for individuals appearing elsewhere who originate from these States. The International Law Commission's (ILC) Special Rapporteur utilizes the concept of the genuine and effective link as the basis for the ILC's work on nationality in the context of State succession, (see Mikulka, Václav, Special Rapporteur, International Law Commission, 'First Report on State Succession and its Impact on the Nationality of Natural and Legal Persons': UN doc. A/CN.4/467, 17 Apr 1995; 'Second Report on State Succession and Its Impact on the Nationality of Natural and Legal Persons': UN doc. A/CN.4/474, 17 Apr. 1996, and 'Third Report on Nationality in Relation to the Succession of States': UN doc. A/CN.4/480, 27 Feb. 1997). The genuine and effective link, dropped by the ILC during its 1997 session in favour of an 'appropriate connection' between an individual and a State, is, in fact, one of the pivotal reference points underlying the 'Draft Articles on Nationality of Natural Persons in Relation to the Succession of States'. See 'Report of the International Law Commission on the work of its forty-ninth session', 12 May–18 July 1997: UN doc. A/52/10, (1997), 14, hereinafter, ILC 'Draft Articles'. The revised 'Draft Articles' were adopted by the ILC in July 1997 and discussed in the UNGA Sixth Committee in October 1997. States have been requested to submit comments on the draft for further discussion. A final version in the form of a Declaration on the Nationality of Natural Persons in relation to the Succession of States is currently anticipated for 1999.

<sup>15</sup> While children born abroad may be subject to variations on this acquisition (art. 6(1)(a)), any initial differences in treatment (failure to acquire the nationality *ex lege*, for example) could later be done away with through facilitated acquisition of nationality by descent (art. 6(4)(b)): above, note 5. Guidelines currently being drafted on the implementation of the 1997 Convention emphasize that statelessness should not occur for children of nationals born abroad, with some indication of the means of avoiding this also elaborated upon.

<sup>16</sup> See arts. 6(1)(b) and 6(2), above note 5.

<sup>17</sup> See also art. 12, ILC 'Draft Articles', which provides that a child born after the date of succession, who has not acquired any nationality, 'has the right to acquire the nationality of the State concerned on whose territory that child was born', resolving cases in which nationality by descent has not been acquired. Prior habitual residence, tempered by principles of, for example, family unity, will resolve the nationality of children born prior to the date of succession: above, note 13.



conditions for naturalisation, it shall not provide for a period of residence exceeding ten years before the lodging of an application.<sup>18</sup>

Thus, habitual residence, another of the elements of the genuine and effective link, is now formally recognized as a sound basis for the grant of nationality. Moreover, the individual will have the *right* to apply for citizenship after a maximum period of 10 years of residence following which, while the fulfilment of certain other criteria may still be required, the habitual residence in itself constitutes a sufficient basis upon which to ensure the individual is allowed to *try* to naturalize. This period of time will logically be less for stateless persons and refugees, as article 6(4)(g) goes on to recommend that the access of such individuals to naturalization procedures should be facilitated.

Notably, in Chapter VI of the 1997 European Convention, with provisions concerning State succession, habitual residence and the genuine and effective link are primary factors which the State should take into consideration in determining the attribution of nationality. The *will* of the person concerned should also be taken into account by the State, giving the individual the opportunity to indicate expressly *which* nationality is desired. States are encouraged, in article 19, to promote the conclusion of treaties which 'shall respect the principles and rules' contained and referred to in the chapter, including therefore, non-discriminatory consideration of the genuine and effective link, habitual residence, and the will of the persons concerned, in particular, so as to avoid statelessness.<sup>19</sup> These elements are more broadly approached in article 10 of the 1961 Convention concerning transfer of territory, which stipulates that a Contracting State, in the absence of a treaty ensuring that statelessness does not occur, *shall* confer its nationality on persons under that State's jurisdiction who would otherwise be made stateless by the transfer of territory.<sup>20</sup>

<sup>18</sup> Art. 6(3), above note 5.

<sup>19</sup> Also to be taken into account is the territorial origin of the person concerned. 'Territorial origin' does not refer to either ethnic or social origin but, rather, to where the person was born, where the parents or grandparents were born or, perhaps, to an internal nationality designation. It is therefore intended to be similar in application to the principles of *jus soli* and *jus sanguinis* in determining nationality. Each element which the State must take into account under art. 18 is to be weighed in the balance in a non-discriminatory manner, in particular, so as to avoid statelessness.

<sup>20</sup> Art. 7, ILC 'Draft Articles', provides that, subject to consideration of the will of persons concerned as stipulated in art. 10, 'a successor State does not have the obligation to attribute its nationality to persons concerned *if* they have their habitual residence in another State and *also* have the nationality of that or any other State' (emphasis added). Art. 4 indicates a presumption of nationality for persons who have their habitual residence in the territory affected by the succession, the presumption being that they acquire the nationality of the successor State. Part II of the ILC 'Draft Articles' contains further provisions stipulating the grant of nationality to habitual residents: see art. 19 and following. Art. 10(2) requires States concluding treaties to provide for a right of option 'to persons concerned who have appropriate connection with that State if those persons would otherwise become stateless as a result of the succession of States'. Art. 10(1) requires States, in general, to 'give consideration to the will of persons concerned whenever those persons are qualified to acquire the nationality of two or more States concerned'. Presumably what qualifies



The drafters of the European Convention on Nationality drew inspiration from the provisions of the 1961 Convention, incorporating some elements almost verbatim and elaborating upon others to reflect the many years of legal developments in the interim. An underlying tenet of the European Convention is clearly the avoidance of statelessness, and article 4 sets out this principle as one to which reservation may not be made.<sup>21</sup> Thus, through guiding principles and rules of law, coupled with the priority to avoid statelessness, the 1997 European Convention on Nationality has further developed the right to a *given* nationality, a nationality based upon the principles of the genuine and effective link.

These principles are also reflected in the articles concerning the loss of nationality in both the 1961 and the 1997 Conventions. Article 7(3) of the European Convention allows the State to withdraw its nationality resulting in statelessness *only* where nationality has been acquired on the basis of fraudulent conduct, false information or concealment of relevant facts directly attributable to the applicant. Article 8 of the 1961 Convention stipulates that a Contracting State should not withdraw nationality if statelessness will result. While the article then introduces certain exceptions to this rule, the criteria for the State acting upon these exceptions are so narrow (see article 8(3) and (4) and Parts II and III attached in Resolution to the Convention) that it would only rarely be acceptable under the Convention for the State to withdraw nationality and thereby creating statelessness.<sup>22</sup> Renunciation of nationality is permitted in article 7 of the

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someone to acquire nationality is the 'appropriate connection' with a State. According to the ILC commentary, the concept of an appropriate connection 'should be interpreted in a broader sense than the notion of "genuine link"'. In debate in the ILC, some members expressed the view that the genuine and effective link was limited, in that its legal context derived from the questions of diplomatic protection at issue in the *Nottebohm Case*. However, this does not take into account the many later applications of the notion, or the fact that the components of the genuine and effective link derived from State practice and were not enunciated by the Court as new concepts. Cf. 1997 European Convention on Nationality as a good example of the application of genuine and effective link quite outside the context of diplomatic protection. From a practical perspective, it would be helpful in resolving nationality conflicts if legal terminology was harmonised.

<sup>21</sup> Arts. 4(b), 6(2), 7(3), 8, and 18, 1997 European Convention on Nationality indicate the importance placed on avoidance of statelessness. Art. 3, ILC 'Draft Articles', provides that States concerned should take all appropriate measures to prevent persons who had the nationality of the predecessor State on the date of succession, from becoming stateless as a result of the succession. However, those stateless before the succession will not acquire a right to a nationality by virtue of the succession, and the avoidance of statelessness here is more a question of the 'transfer' of rights and identity parallel to the transfer of territory, than recognition of a new right, even though the stateless person may in fact have had an appropriate connection with the former State but never have been granted its nationality.

<sup>22</sup> Art. 13 of the 1961 Convention does stipulate that the provisions of the instrument shall not be construed as affecting any provisions more conducive to the reduction of statelessness as developed in later legislation. Given the years which have passed since the drafting of the 1961 Convention, the developments in human rights law and the presumption against the creation of statelessness, it may be argued that the removal of nationality resulting in statelessness must now be limited strictly to cases of fraudulent conduct, directly attributable to the applicant, which if known would have disqualified the person concerned from the grant of nationality.

1961 Convention and article 8 of the 1997 Convention, but in both cases it is premised upon the previous acquisition, or guarantee of acquisition, of an alternative nationality and may not result in statelessness. Finally, full procedural guarantees are in place for the individual in Chapter IV of the European Convention and in article 8 of the 1961 Convention.

Article 11 of the 1961 Convention provides for 'a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority' — a function which has been entrusted to the United Nations High Commissioner for Refugees.<sup>23</sup> Review of the implementation of the 1997 European Convention on Nationality, however, is left to the legal system of the State Party, no review being possible through the European Court of Human Rights or any other independent body.<sup>24</sup>

Human rights law, in conjunction with the genuine and effective link between the individual and the State, acts as an additional basis, under international law, for defining principles relating to nationality. Article 15 of the 1948 Universal Declaration of Human Rights declares that 'Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.'<sup>25</sup> Most of the relevant human rights principles in this area are the result of developments following the drafting of instruments concerning nationality. Article 5 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, for example, seeks,

[T]o 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.<sup>26</sup>

Other international legal instruments dealing with the right to a nationality

<sup>23</sup> Art. 16, ILC Draft Articles provides for full procedural guarantees, indicating that relevant decisions 'shall be issued in writing and shall be open to effective administrative or judicial review'. Art. 17 obliges upon States to consult and negotiate in order to identify problems regarding nationality arising from the succession and to seek solutions.

<sup>24</sup> Art. 23, 1997 European Convention on Nationality, calls upon States Parties to 'co-operate amongst themselves and with other member States' but there is little opportunity for the individual to participate, for actual cases to be brought to a forum designed for resolving them, or for any means of guaranteeing the 'progressive development of legal principles and practice concerning nationality and related matters' as called for in art. 23. A review body, particularly in the case of a treaty which is intended to address differences between national systems, would have been helpful not only for the individual, but also for the State, and might well have contributed to consistency, clarity, and close cooperation, while facilitating the resolution of conflicts in the attribution of nationality. However, many member States did not wish to submit their nationality laws and practices to external review. The Working Group on Nationality which drafted the Convention has received a provisionally extended mandate for purposes of drawing up guidelines on implementation; the first set, focusing on statelessness, is expected to be concluded in June 1998.

<sup>25</sup> UNGA res. 217 A(III), 10 Dec. 1948; text in *Human Rights: A Compilation*, 1.

<sup>26</sup> UNGA res. 2106 A(XX), 21 Dec. 1965; text in *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons*, vol. I, 205.

include the 1957 Convention on the Nationality of Married Women,<sup>27</sup> the 1966 International Covenant on Civil and Political Rights,<sup>28</sup> the 1979 Convention on the Elimination of All Forms of Discrimination Against Women,<sup>29</sup> and the 1989 Convention on the Rights of the Child.<sup>30</sup> The 1957 and 1979 Conventions seek to grant women equal rights with men to acquire, change, or retain their nationality. The husband's nationality status should not automatically change the nationality of the wife, render her stateless, nor mandate acquisition by her of his nationality.

Women should also have equal rights with men with respect to the nationality of their children avoiding both discrimination against women and the inheritance, where applicable, of the father's statelessness. The 1989 Convention on the Rights of the Child and the 1966 International Covenant on Civil and Political Rights stipulate that children should be registered immediately after birth. Registration of birth is a critical factor in establishing the right to a nationality in all legal systems, for the birth certificate will indicate where the child is born, making acquisition of nationality by *jus soli* possible, and to whom the child is born, making acquisition of nationality by *jus sanguinis* possible. The 1989 Convention and the 1966 Covenant further state that children have the right, from birth, to acquire a nationality.

Regional instruments, such as the 1969 American Convention on Human Rights, also provide for the right to a nationality. In the words of article 20:

<sup>27</sup> The Preamble to the 1957 Convention on the Nationality of Married Women recalls art. 15, UDHR48, stipulating the right to a nationality and the right not to be arbitrarily deprived of nationality, and seeks to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to sex'. Arts. 1–3 of the Convention contain specific provisions on how the wife's nationality is to be addressed.

<sup>28</sup> Art. 24, ICCPR66 provides: '1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society, and State. 2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.'

<sup>29</sup> Art. 9, CEDW79 provides: '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.'

<sup>30</sup> The following articles of CRC89 are also relevant: art. 2: '1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.' Art. 7: '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.'

Every person has the right to a nationality. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality. No one shall be arbitrarily deprived of his nationality or of the right to change it.<sup>31</sup>

These principles have been supported by the jurisprudence of the Inter-American Court. While it has confirmed that the conditions under which nationality will be conferred remain within the domestic jurisdiction of the State, the Court stated in an Advisory Opinion:

It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and recognition of nationality are matters for each State to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the State in that area and that the manner in which States regulate matters bearing on nationality cannot today be deemed to be within their sole jurisdiction; those powers of the State are also circumscribed by their obligations to ensure the full protection of human rights. The classical 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.<sup>32</sup>

Article 4 of the 1997 European Convention on Nationality incorporates as basic principles the right to a nationality for all, the avoidance of statelessness, the prohibition against arbitrary deprivation of nationality, and preservation of nationality in marriage or the dissolution of marriage, thereby consolidating the provisions of earlier agreements.<sup>33</sup> The non-discrimination clause was the subject of lengthy discussions, a balance being sought in distinguishing between 'positive' discrimination for those persons with stronger links to the State in question who might have access to facilitated naturalization procedures, and 'negative' discrimination based on grounds of sex, religion, race, colour or national or ethnic origin in the grant of nationality. The language used in article 5 allows for distinctions, provided they do not amount to discrimination on any of the enumerated grounds. The non-discrimination clause of the European

<sup>31</sup> Art. 20, ACHR69; text in *Collection of International Instruments and Other Legal Texts*, Vol.II, 140. See also art. 6, 1990 African Charter on the Rights and Welfare of the Child, not yet in force, which requires States Parties to extend nationality to children born on the State's territory who receive no other nationality at birth.

<sup>32</sup> Inter-American Court on Human Rights, Advisory Opinion, 'Amendments to the Naturalisation Provision of the Constitution of Costa Rica', paras. 32–5; text in 5 *HRLJ* 1984. These human rights issues included, in the opinion of the Court, limitations incumbent upon the State through the principle of non-discrimination, as balanced by reasonableness, objectivity, and proportionality. Such balancing factors apply to both the law on its face and to the effects of the implementation of the law pertaining to nationality.

<sup>33</sup> See, for example, the 1957 Convention on the Nationality of Married Women, CRS61, and UDHR48.

Convention builds upon article 9 of the 1961 Convention, which in turn stipulates against deprivation of nationality on racial, ethnic, religious or political grounds reflecting, as is appropriate, developments in international law between the post-war drafting of the 1961 Convention and the recent drafting of the 1997 Convention.<sup>34</sup>

From this brief review of international law pertaining to nationality, it is clear that the developments of recent decades have fundamentally altered the reference points for nationality legislation and practice. The reasons for these developments are also clear. Everyone has the right to a nationality. Everyone needs a nationality because nationality serves as the basis for legal recognition and for exercise of other rights. Nationality should, therefore, be effective in ensuring the exercise of these rights. Statelessness should be avoided as it defeats these goals and may, further, lead to displacement and instability in international relations. One of the best means of avoiding statelessness is to ensure recognition of an individual's genuine and effective link with a State, based on identifiable factors including place of birth, descent, and residency.<sup>35</sup>

As everyone has these links to some degree, often having all of them in a single State, the avoidance of statelessness should not be difficult to achieve in theory. Yet, statelessness persists. One difficulty is, naturally, the time lag between the development of international law and its implementation in State nationality legislation and practice. Furthermore, States may need encouragement and assistance in altering their nationality legislation and practice which, for some, would represent significant change.

Another problem surfaces in the application of the law, when trying to incorporate international legal principles to avoid statelessness in practice. While human rights law states clearly in several international instruments that everyone has the right to a nationality, little direction is given in these instruments as to *which* nationality. Naturally, when States become party to treaties, they take on obligations for their own internal structure and in relation to persons subject to their jurisdiction. Thus, for example, in relation to article 7 of the Convention on the Rights of the Child, States parties have made the commitment to ensure that

<sup>34</sup> Art. 14 of the ILC Draft Articles provides: 'States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground'. Art. 15 prohibits arbitrary deprivation of the nationality of the predecessor State or arbitrary deprivation of the right to *acquire* the nationality of the successor State, which is a step forward in promoting the positive right to a nationality for the individual as against the less specific obligation upon States to avoid statelessness. Art. 15 also stipulates against arbitrary deprivation of the right of option.

<sup>35</sup> Many States provide in their legislation for the automatic acquisition of the State's nationality for foundlings discovered on their territory, the presumption being that unless there is evidence to the contrary, the genuine and effective link is with the State in which the child is found. Thus, nationality can be resolved even when place of birth and descent are not clear, and residency is not relevant.

children under *their* jurisdiction are registered immediately after birth and have the right to acquire a nationality. It could be argued that the right to acquire a nationality has no meaning unless all States, even those with legislation based upon the principle of *jus sanguinis*, grant their nationality to children born on their territory who would otherwise be stateless. Nonetheless, as described above, the two systems for granting nationality based upon *jus soli* and *jus sanguinis* are both fully developed and equally legitimate, though there are numerous variations in their implementation. If an individual is stateless, the question arises, which State should assume responsibility. In the case of article 7 CRC89, the State which has ratified this instrument has taken on responsibilities for persons under its jurisdiction who have a right to acquire a nationality. This right is denied if the law is applied in a strictly formal way without taking into account the necessity to achieve a balance between law and practice in each of the relevant States. Further problems may arise in the case of a 'shift' of obligations from a *jus sanguinis* State, in which the parents hold nationality but which refuses to grant nationality to the child because it is born abroad, to another State which is left to deal with the problem of a stateless child 'created' on its territory. While individual rights should not be lost because of an inability of States to resolve differences in their legislation and practice, it is understandable that a State with which the individual may have a very minor connection through 'chance' birth on its territory becomes frustrated with the refusal on the part of the parents' State of nationality to acknowledge as a national a child who has a significant connection with that State.

In summary, it can safely be said that States have an obligation under international law to avoid the creation of statelessness. If a State has legislation or practice which creates statelessness, it is that State which should resolve the problem. Yet, the real issue here is one of who created the statelessness, of which State should grant nationality. This remains a problem even with reference to provisions such as article 7 CRC89 because the underlying presumptions about the rights and obligations differ from State to State. How much more difficult is it, then, to resolve cases which do not entail children, where individuals have gone through life without a nationality or have inadvertently lost it through marriage, dissolution of marriage, departure from the State, State succession, shifting of ties, and so on. The underlying philosophy for nationality determination requires some modification, therefore, in order for the right to a nationality to become, in practice, actual acquisition or retention of nationality.

Some positive obligations on States are developing which would help to resolve the question of which nationality an individual may have a right to acquire. The 1997 European Convention on Nationality provides for the right to apply for nationality after 10 years of lawful and habitual residence. It also provides for other absolute rights based on birth

and descent. The Draft Articles of the International Law Commission concerning nationality attribution following a succession of States do likewise, in indicating that persons cannot be arbitrarily deprived of the right to *acquire* the nationality of the successor State, nor can they be arbitrarily deprived of a right of option.<sup>36</sup> Previously, international law merely provided that a person could not be arbitrarily deprived of a nationality *already held*. Thus, there is some progress in turning a negative obligation on States to avoid cases of statelessness into a positive obligation to grant nationality in certain circumstances. The 1969 American Convention on Human Rights is quite specific in this regard, article 20 requiring States to grant nationality to persons born on their territory who do not have the right to another nationality. While this is a clear and positive provision, it is a reflection of the legislation of States in the Americas and does not, in practice, represent a consistently applied philosophy concerning an inherent right. Moreover, problems can be created through conflict with the legislation and practice of *jus sanguinis*-based countries. This arises, for example, when the latter refuse to grant nationality to the children of their nationals born overseas to whom the State of birth does not wish to grant nationality either because of a lack of any real tie, other than the fact of birth under their jurisdiction to parents who have no status in the country of birth, but who do have very strong ties to their State of nationality. Even with a provision as clear as article 20, which represents the *jus soli* tradition and is, in many ways, the simplest means of ensuring the avoidance of statelessness, there can still be difficulties. Given the various categories of stateless persons, not all of whom are stateless by reference to law, the problem of identifying who is really stateless and, as such, in need of a nationality arises. The latter category is in need of review if a real reduction of statelessness is to be achieved.

## 2. The 'Categories' of Statelessness

### 2.1 *Who is stateless?*

Owing to the frequent similarity in circumstance between those who lack national protection while possessing a nationality, and those who have no nationality either in name or in practice, a great deal of confusion has arisen around the definition of a stateless person. The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness have defined, by terminology in the former and by reference in the latter, both *de jure* and *de facto* stateless persons. The definitions and use of terms contained in these instruments have, as

<sup>36</sup> See above, note 33 with reference to notes 19 and 20.



originated in and promulgated by the United Nations International Law Commission, been accepted in both private and public international legal parlance pertaining to nationality and serve as the basis of discussions relating to statelessness.<sup>37</sup>

### 2.1.1 *De jure stateless*

The 'condition' of statelessness was described in article 1 of the 1954 Convention relating to the Status of Stateless Persons:

For the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law.

To be considered as a national by operation of law means that, under the terms outlined in the State's enacted legal instruments pertaining to nationality, the individual concerned is *ex lege*, or *automatically*, considered a national. As a minimum, there must be a State, the constitution or laws of which make some provision for nationality. Those who are granted citizenship automatically by the operation of these legal provisions are definitively nationals of that State. Those who have to apply for citizenship and those the law outlines as being eligible to apply, but whose application could be rejected, are not citizens of that State by operation of that State's law. Wherever an administrative procedure allows for discretionary granting of citizenship, such applicants cannot be considered citizens until the application has been approved and completed and the citizenship of that State bestowed in accordance with the law.

Most people are considered nationals by operation of one State's law only, often the law of the State in which they were born or the law of the State in which their parents or a parent held nationality at the time of the birth. Everyone is born in a geographical location, has parents who originate from a State, States, or a particular region, and most people establish ties with a particular country through residence in that country. Nonetheless, not everyone receives a nationality 'by operation of law'. Those who have not received nationality automatically under the operation of any State's law are stateless persons or, more specifically, *de jure* stateless persons.<sup>38</sup>

<sup>37</sup> The fact that there may be regional variations concerning nationality or citizenship does not alter the meaning ascribed to nationality or the definition of statelessness incorporated into international instruments, nor does it alter their meaning under international law in general. Thus, a State adopting alternative definitions will run the risk of criticism and lack of recognition for national law at the international level, and of conflicts and problems with other States concerning the nationality status of persons at issue.

<sup>38</sup> Residents who are treated as though they were citizens and who enjoy many of the rights generally associated with citizenship are sometimes described as having '*de facto* citizenship'. The phrase has no legal status, however, and is potentially misleading, for example, so far as it may imply security within a State where the persons concerned are, in reality, *de jure* stateless, often despite having genuine, strong, and effective links.

### 2.1.2 *De facto stateless*

Those who cannot establish their nationality<sup>39</sup> and those without an effective nationality, referred to as *de facto* stateless persons, are not included in the legal definition of a *de jure* stateless person outlined above. The drafters separated these groups to avoid confusion in an individual's status, to avoid encouraging individual efforts to secure an alternative nationality, to avoid a situation in which some States decide to treat a person as stateless, while other States consider that person to still hold nationality, and to avoid confusing overlap between the 1954 Convention relating to the Status of Stateless Persons and the 1951 Convention relating to the Status of Refugees. The drafters presumed that *de facto* stateless persons were those who still had a nationality in name, but for whom that nationality was not effective. They presumed that all those without an effective nationality, that all *de facto* stateless persons, were, and would be, refugees.

However, neither *de jure* nor *de facto* statelessness necessarily signifies the existence of a well-founded fear of persecution under the terms of the 1951 Convention. The definition of a *de jure* stateless person was chosen in order to exclude the question of whether the person has faced persecution, as there are conflicts of laws issues which might result in statelessness without any wilful act of neglect, discrimination, or violation on the part of the State.<sup>40</sup> *De facto* statelessness, on the other hand, was presumed to be the result of an act on the part of the individual, such as fleeing the country of nationality because of persecution by the State. The drafters of the 1954 and 1961 Conventions felt that all those who faced persecution, and who did not have an effective nationality, would be considered refugees and would receive assistance from the international community under the terms of the 1951 Convention relating to the Status of Refugees. Quite intentionally, then, the drafters of the 1954 Convention relating to the Status of Stateless Persons adopted a strictly legal definition of stateless persons which, like legal definitions relating to death, marriage, or to the establishment of a business, is not one of content or quality but simply one of fact. *De jure* statelessness could be ascertained by reference to national law, and *de facto* statelessness covered persons who were unable

<sup>39</sup> Generally, States presume that an individual has a nationality unless there is some evidence to the contrary, although there may be no agreement on which nationality it is.

<sup>40</sup> The law of some countries allows an individual to renounce nationality without first acquiring or being assured of another nationality, thereby leading to statelessness. Although States should avoid such legislation in principle, the practice is not uniform. Formally 'correct' systems may also clash by reason of the underlying philosophy for granting nationality. For example, State A, in which the individual is born, grants nationality by descent only (*jus sanguinis*) and State B, in which the parents hold nationality, grants nationality by place of birth only (*jus soli*). There are many variations in law and practice which create gaps leading to statelessness, and one perennial problem is the inability under the laws of many countries for a mother to pass nationality to her child even if the father is stateless.

to 'act' on their nationality because its effectiveness was denied to them.

As it was assumed that *de facto* stateless persons had 'voluntarily' disassociated themselves from their nationality and were, in any event, refugees, they were made the subject of a recommendation in the Final Act of the 1954 Convention relating to the Status of Stateless Persons. The non-binding recommendation is intended to encourage host States to assist *de facto* stateless persons. The Conference,

Recommends that each Contracting State, when it recognizes as valid the reasons for which a person has renounced the protection of the State of which he is a national, consider sympathetically the possibility of according to that person the treatment which the Convention accords to stateless persons.

The Final Act of the 1961 Convention on the Reduction of Statelessness contains a similar provision, recommending 'that persons who are stateless *de facto* should as far as possible be treated as stateless *de jure* to enable them to acquire an effective nationality'.

Given the developments in practice relating to asylum seekers over the years, and the number of persons who do not receive citizenship in their country of habitual residence but continue to live there, it has become clear that not all *de facto* stateless persons are refugees. This is complicated by the various positions adopted by States on nationality status, the State of residence, for example, insisting that the persons concerned have nationality in the State where a previous generation held citizenship, while the latter State refuses to grant nationality insisting that the persons concerned should have nationality where they were born or reside. The 'grey zone' of *de facto* statelessness has grown substantially, and today may include, persons who are confirmed *de jure* stateless in their country of long-term habitual residence but treated as if they held another State's nationality, for example, because they might have the technical possibility of applying for naturalization, notwithstanding the absence of any effective link or ancestral connection; persons who have the nationality of a country but who are not allowed to enter or reside in that country; persons who, following a succession of States or transfer of territory, do not receive nationality in the State where they were born, where they reside, work, own property and have all their links but, rather, receive nationality in the successor State with which they have no genuine or effective connection (the result being they are no longer able to work, own property, have health care, education, and so on in the only place of residence they have known); persons who have the theoretical right to the nationality of a State but who are unable to receive it owing to administrative and procedural hurdles, excessive registration or naturalization fees, or other criteria which block access to the nationality. The majority of *de jure* and *de facto* stateless persons requiring assistance on questions relating to their nationality status are not, today, refugees. Moreover, persons defined as

*de jure* stateless under the 1954 Convention, stateless, by reference to national law, today fall into the grey area of *de facto* statelessness, because of the lack of agreement between States on their *de jure* stateless status. Nonetheless, if stateless persons are really to benefit from the provisions of international or regional instruments developed to resolve cases of statelessness, they must be able to show *de jure* statelessness.

## 2.2 'Status' determination

As noted above, it is national legislation and practice to which reference is made to determine *de jure* statelessness. If the law on its face does not indicate *ex lege* acquisition of nationality, the individuals concerned may be *de jure* stateless.<sup>41</sup>

Article 11 of the 1961 Convention on the Reduction of Statelessness provides for an agency to help individuals and States clarify nationality status, and to advise on how to avoid the creation of statelessness; this role was extended to the United Nations High Commissioner for Refugees (UNHCR) when the Convention came into force. An advisory body was also discussed during the drafting of the 1997 European Convention on Nationality, but none was provided for.<sup>42</sup> The International Law Commission's work on nationality attribution following a succession of States is expected to result in a Declaration, which will be useful because, unlike a treaty, it will not require lengthy debate and negotiation to ensure ratification by States, but equally it will not be able to provide for a supervisory agency or mechanism to which the State and the individuals concerned might turn for guidance.

While UNHCR does have the responsibility of assisting States and individuals and has been requested by the General Assembly to assist States in avoiding statelessness, neither UNHCR, other international or regional organizations, nor third States can pronounce authoritatively on nationality in one or other State. The State concerned must indicate whether the individuals in question do or do not have its nationality, for it is that State which has both the privilege and the obligation to determine who are its citizens, in accordance with international law. While organizations and other States may promote the recognition of a genuine and effective link and encourage recognition of these links wherever they exist, only the State concerned can indicate whether it acknowledges these links.

<sup>41</sup> Nationality Acts lay down categories of persons entitled to nationality, and the State must confirm that a given person has acquired its nationality. Its interpretation may, of course, reflect a practice not apparent from the law itself, while the law also may not necessarily indicate all categories of persons who receive nationality.

<sup>42</sup> It is to be expected, however, that the principles of the 1997 European Convention on Nationality will influence cases relating, for example, to family unity or minorities, which are subject to the Court or Commission.

Thus, definitions relating to *de jure* and *de facto* statelessness are important for they show who, the *de jure* stateless, are obviously without a nationality and therefore to be treated in accordance with the rules and principles of international law pertaining to statelessness. If so inclined, States may assist the *de facto* stateless, as indicated in the Final Acts, reference being made to the principles contained in the 1954 and 1961 Conventions and in international law generally. Nonetheless, given the strictly legal definitions of a stateless person, this category is unlikely to receive the same recognition as those who are *de jure* stateless.

International law has developed provisions concerning the right to a nationality and, moreover, to a *particular* nationality; these are included in conventions, and have been developed in jurisprudence and defined to some degree by State practice itself. With these developments, and given the clear preference in international law against the creation of statelessness, it might appear that the sole remaining question is whether States incorporate these principles into their domestic legislation and practice. The technical distinctions between *de jure* and *de facto* stateless persons should not be significant if the principles and intent of international law are fully recognized. In fact, however, a review of nationality acts, decrees, and State constitutions globally, while revealing some gaps in legislation, would not reveal some of the more significant problems concerning nationality practice today.

### 3. Statelessness Today

In analysing the right to a nationality as a human right, Chan points out that 'The last sixty years have clearly witnessed the formation of a global consensus on the undesirability of statelessness. Statelessness arises as a result of a deliberate act of deprivation of nationality by the State concerned, as a result of territorial change, or, more frequently, as a result of a conflict of nationality law.'<sup>43</sup>

These are indeed the most apparent causes of statelessness. An examination of domestic legislation and comparative studies can reveal conflicts between national laws. Also, in cases of transfer of territory, the change of sovereign is clear and, eventually, successor States adopt new nationality legislation. In like manner, deliberate and, in particular, mass deprivation of nationality is generally well-known, as the nationality is revoked for the specific purpose of ensuring that neither the individuals affected nor other States consider that particular group to continue to enjoy citizenship in the State revoking citizenship.

While in no way seeking to underestimate these categories which constitute much of the work now undertaken at the international and

<sup>43</sup> Chan, J., 'The Right to a Nationality as a Human Right', 12 *HRLJ* 13 (1991).

regional levels to ensure that statelessness is avoided, two aspects are significant: the first is the categories just mentioned are apparent and often receive the attention of organizations dealing with statelessness; the second is that there are legal reference points available, subject to the will of the State or States involved, for resolving instances in which statelessness is, or can be, created.

In the case of deprivation of nationality, the Universal Declaration prohibits arbitrary deprivation of nationality, while general and regional international law incorporates the positive rights outlined above. Articles 8 and 9 of the 1961 Convention prohibit discriminatory deprivation and deprivation resulting in statelessness, as does article 4(6) of the European Convention.<sup>44</sup> United Nations General Assembly resolution 50/152 of 9 February 1996 further '*Calls upon States to adopt nationality legislation with a view to reducing statelessness, consistent with fundamental principles of international law, in particular by preventing arbitrary deprivation of nationality.*'<sup>45</sup> (Emphasis added.)

In the case of territorial change and the right to a nationality, article 10 of the 1961 Convention stipulates that transfer of territory should in no case result in statelessness, while Chapter VI of the 1997 European Convention is devoted to nationality attribution following State succession, and advocates resolution of the issue through treaty, and by way of analysis of the genuine and effective link, habitual residence, right of option, and territorial origin. Finally, resolution of conflict of laws issues was the driving force behind the 1930 Hague Conference and has since been developed at both regional and international levels in the instruments referred to above, as well as through positive developments in the drafting and amendment of nationality laws. While differences in laws still exist and require attention, the problem for many countries is not so much one of technically correct laws which appear to avoid statelessness and do not conflict with the laws of neighbour States, it is, rather, a problem of depth, of looking beyond the terms of the law itself, to the outcome of its application in practice.

This is not to say that the areas of deprivation, territorial change, and conflicts have been effectively or positively addressed in each instance, or that the numbers of cases of statelessness resulting from a failure to address these issues are not significant. The points to be illustrated are, however, that one has to have *had* a nationality in order to show proof of arbitrary deprivation of that nationality; that in the case of territorial change it is not usually the transfer *per se* which creates statelessness, the vast majority of nationals of the predecessor State normally having their nationality resolved through treaty or through the adoption and

<sup>44</sup> See also arts. 5–8, 1997 European Convention on Nationality.

<sup>45</sup> A/RES/50/152, 9 Feb. 1996.

implementation of the successor State's nationality legislation; and that in a conflict of laws situation there exist means of resolving conflicting legislation which inadvertently creates statelessness.

What, however, of the case of those who have resided all their lives in a specific country, who have perhaps been in that country as a distinct group for generations, who never had or who no longer have effective links with another country, who are not the subjects of a transfer of territory but who have, nonetheless, failed to acquire the nationality of the State in which they reside? What of those who have never *had* the nationality of the country in which they have all ties?

A similar question may be put for those who, in the context of State succession, fail to acquire nationality in the place where they have permanently resided because they are deemed to have links elsewhere. Though they may avoid *de jure* statelessness, these persons may be left *de facto* stateless, without the right to work, to health care, to own property, or to education in their lifelong place of residence. The transfer of territory itself may not create statelessness by operation of law, but the means chosen to resolve nationality issues can result in *de facto* statelessness. What mechanism exists for ascertaining *where* an individual has the strongest links which could, accordingly, be reflected in the grant of nationality?

In his 1952 report for the International Law Commission in preparation for the drafting of the international conventions on statelessness, the Special Rapporteur, Manley Hudson, stated that the greatest number of cases of statelessness had been created by collective denationalization on political, racial or religious grounds.<sup>46</sup> He further stated that,

Purely formal solutions . . . might reduce the number of stateless persons but not the number of unprotected persons. They might lead to a shifting from statelessness '*de jure*' to statelessness '*de facto*'.<sup>47</sup>

This analysis of future developments has proved largely true not, primarily, because of continued denationalization on a large scale but, rather, because of a failure ever to acquire the nationality of the State with which the individual is most closely connected in daily life. While massive denationalization still takes place and is currently a problem in different regions of the world, it is a visible problem which tends now to receive attention from the international community as a whole. The legal categories of statelessness were drafted under the presumption that agreement between States on their application would develop and progress.

Equally difficult, but far less visible than denationalization, are the problems for the group of stateless persons who fail to acquire nationality

<sup>46</sup> Hudson, Manley O., 'Report on Nationality, Including Statelessness', International Law Commission, 4th session: UN doc. A/CN.4/50, 21 Feb. 1952, 49.

<sup>47</sup> Ibid.



in the State in which they reside, often because that State considers them still, perhaps after generations, to have stronger links elsewhere. No collective denationalization on political, racial or religious grounds is said to have taken place because nationality was never extended to the group in question. The reasons for this may be numerous and may include discrimination, but the manner in which the discrimination takes place is less apparent.

Thus, there are currently thousands of those who are in a *de facto* stateless situation, as predicted by Hudson. They are not declared *de jure* stateless because the country in which they live believes they hold nationality, or should hold nationality, in the country, for example, from which their ancestors came. The country from which their ancestors came, on the other hand, believes they ought to have acquired nationality where they were born or where they live. The national laws of both States may provide favourably for the grant of citizenship for *de jure* stateless persons while, in practice, no administration actually considers these persons to *be* stateless. They may languish this way for decades, unable to exercise any of the rights of citizenship, fearful to leave the country in which they reside because they will not be readmitted, unable to enter the 'country of their ancestors' and, in any event, no longer with significant ties elsewhere.

In many such cases, the cause of the dispute over nationality arose originally out of a transfer of territory, sometimes accompanied by mass displacement, making resolution of nationality in the context of State succession extremely important. It is not necessarily the State succession or transfer of territory *per se* which creates the problem, for the nationality can be resolved by treaty, through State practice, negotiation, and by way of legislation which seeks to ensure a right to a nationality. *De jure* statelessness is, in the context of transfer of territory, often less of a problem than *de facto* statelessness which is generally created in two ways: lack of clarity concerning which nationality an individual has, each State assuming the other to be the responsible State; or imposition of nationality which, by virtue of the situation, cannot be an effective nationality. In both cases, the ineffective resolution of the nationality question is unlikely to disappear but, rather, to become exacerbated as time passes.<sup>48</sup>

Permission to remain as a permanent resident in the State where one has always lived may be helpful, but those who are given favourable status as permanent residents in one political climate may find themselves without such privileges in the grey zone of *de facto* statelessness, when the

<sup>48</sup> See Batchelor, C.A., 'Citizenship and Voting Issues in Bosnia-Herzegovina Following the Dayton Peace Agreement', *International Foundation for Election Systems (IFES)*, Electoral Code Working Group (ECWG), OSCE/Office of Democratic Institutions and Human Rights/IFES, Legal and Technical Analysis Compendium, Jan.-Mar. 1996, for analysis of issues relating to citizenship in the context of State succession.

climate changes. There is no replacement for citizenship itself, in particular as international law is better equipped to deal with the deprivation of a nationality previously held than it is to deal with a failure to acquire a given nationality for lack of determining the most effective link.

Whether *de facto* statelessness is created 'overnight', as may be in the case of State succession or transfer of territory, or is an outstanding issue of unresolved nationality generated by the events of years gone by, the grey zone of unresolved cases of nationality is little addressed in practice. Nonetheless, if reference is made to the genuine and effective link, in most cases it is not difficult to identify one or two States which would be the most logical candidates to ensure that the right to a nationality is an effective right. This was, in essence, what Hudson proposed when, studying the question as Special Rapporteur for the International Law Commission, he observed that any attempt to eliminate statelessness would only be fruitful if it resulted in,

[N]ot only...the attribution of a nationality to individuals, but also an improvement of their status. As a rule, such an improvement will be achieved only if the nationality of the individual is the nationality of that State with which he is, in fact, most closely connected, his 'effective nationality', if it ensures for the national the enjoyment of those rights which are attributed to nationality under international law, and the enjoyment of that status which results from nationality under municipal law.<sup>49</sup>

Hudson went on to say that, in his view, the principle he coined as '*jus connectionis*', or right of attachment, was in this regard superior to those of *jus soli* or *jus sanguinis*, for it advocates the nationality of the State to which the individual is proved to be most closely attached in his or her conditions in life.<sup>50</sup>

This is, in fact, an argument for a more balanced application of the genuine and effective link going beyond the purely formal application of either *jus soli* or *jus sanguinis*. Strict application of the *jus sanguinis* principle, for example, can result in the inheritance of statelessness. If, on the other hand, the principle of *jus connectionis* or place of attachment is used, in particular when *jus sanguinis* would result in *de jure* or *de facto* statelessness, an effective nationality is more likely to be secured. This concept, although not stated in these words, is reflected in the 1997 European Convention on Nationality. The 1997 Convention has not only *jus sanguinis* and *jus soli* provisions, but also provides for a maximum period of ten years of residence after which the State of residence must allow applications for naturalization. While such applications may still be subject to certain criteria, ten years' residence is now presumed to be a sufficient legal ground for the grant of nationality to persons neither born in the State

<sup>49</sup> Ibid., 49.

<sup>50</sup> Ibid.

nor descended from nationals of the State. Place of habitual residence, moreover, has taken a prominent position in Chapter VI of the European Convention concerning nationality attribution following State succession, as it does also in article 10 of the 1961 Convention stipulating that the State grant nationality to persons under its jurisdiction who would otherwise be made stateless by a transfer of territory.<sup>51</sup>

An overall reduction in *de jure* statelessness was the goal agreed by the international community when drafting the 1961 Convention on the Reduction of Statelessness. Having a nationality in name is important, but if it does not address the underlying problems resulting from statelessness which the international community found to be undesirable, the intentions of the drafters and the underlying intent of the developments in international law cannot be said to have been met. It is to the advantage of the international community as a whole, and of the individuals concerned, that nationality is not given in name only, but is also effective. Both *de jure* and *de facto* statelessness must be addressed.

International law has generated certain principles which serve as a good reference point for ensuring not only a nationality by operation of law, but also an effective nationality. Thus, in resolving nationality in the context of State succession, conflicts of laws, marriage or the dissolution of marriage, birth, administrative practice, denationalization, renunciation, and any of the other numerous ways in which nationality and statelessness issues arise,<sup>52</sup> reference may be made to the principles of *jus soli*, *jus sanguinis*, and the right of attachment established through, for example, residence (or, to use Hudson's words, *jus connectionis*), in essence, an objective means of arriving at the genuine and effective link. Residence is not the only element of the genuine and effective link which needs to play a greater role, however. The concept of *jus connectionis* might also include, for example, recognition of the tie a child has with its mother and with the mother's nationality which, in some cases, might take precedence over other ties such as those based upon place of birth. Positive consideration and uniform recognition of the tie a child has to the mother's nationality would provide an automatic means of avoiding statelessness at birth when a child is born to a stateless father. Similar considerations of strong and relevant ties could be made in the context

<sup>51</sup> This may also be said of the ILC's Draft Articles which seek to base the grant of nationality on habitual residence and the appropriate connection, a broadened concept of the genuine and effective link, and stipulate that States should ensure statelessness is not created for persons under their jurisdiction as a result of the succession. Moreover, the arbitrary deprivation of the right of option and of the right to acquire the nationality of the successor State for persons with an entitlement in relation to the succession are also prohibited. This goes beyond the obligation to avoid statelessness and creates, in conjunction with the other draft articles concerning habitual residence, family unity, and appropriate connections, an obligation for the State toward persons with the specified links.

<sup>52</sup> See Batchelor, C.A., 'UNHCR and Issues Related To Nationality', 14 RSQ 91 (1995), for an overview of the underlying causes of statelessness.

of marriage, dissolution of marriage, and adoption, to name but a few instances. Moreover, proactive application by States of the genuine and effective link would serve, largely, to side-step the existing legal vacuum in addressing cases of *de facto* statelessness. Rather than placing the burden on the individual to establish a negative, to prove that he or she is *de jure* stateless, emphasis would be placed on the positive right to a nationality by establishing *which* nationality the individual has a right to, based upon the well-founded principles of the genuine and effective link. By reflecting an individual's existing links in this way, *de jure* and *de facto* statelessness will be cut back and the category of *de facto* stateless persons reduced to that intended by the drafters of the 1954 and 1961 Conventions (that is to say, refugees).

Any successful effort in this regard will require a forum for discussions and negotiations between States, with the opportunity for individuals, non-governmental organizations, and concerned international agencies to provide information on actual problems and cases. Without such dialogue and openness, States may continue to make laudable efforts individually and at the regional level, but which fail to address the core philosophical differences in the approach to the law. The risk will be the development of technically correct laws which miss the object and purpose of international legal principles, which stipulate the right to a nationality while recognizing the sovereign concerns of States. The approach needs necessarily to be flexible, incorporating not only the acknowledged legal systems of *jus soli* and *jus sanguinis*, but also additional relevant factors which can resolve problems created between States through narrow adherence to place of birth or descent. The tools for this proactive application of the law exist already in nationality law itself, in legal constructs such as the genuine and effective link. They should be applied with reference to principles now well established in human rights law, such as the right to a nationality and non-discrimination.

The right to a nationality is a positive right. It is more than the unilateral obligation on a State to avoid the creation of statelessness under its own legislation without regard to the international consequences of the application of this legislation. The right to a nationality is, or should be, based on a recognition of the link, or bond, established between an individual and a State.

## Conclusion

Stateless persons have been described as a kind of flotsam, as anomalies, 'nationality still being the principal link between the individual and the Law of Nations'.<sup>53</sup> The problem of statelessness is not only a legal problem

<sup>53</sup> Weis, P., 'The United Nations Convention on the Reduction of Statelessness, 1961', 11 *ICLQ* 1073 (1962).

resulting in the inability to exercise rights. It is a problem of identity under the law. Article 15 of the Universal Declaration of Human Rights proclaims that everyone has the right to a nationality. One difficulty in ensuring that everyone does indeed have such a right has been that of resolving *which* nationality there may be a right to. International law, particularly as it has developed since the Universal Declaration of Human Rights, offers means of resolving this problem, not least of which is the 'doctrine' of the genuine and effective link.

The categories of stateless persons have not only been further illuminated, but have also shifted since the drafting and adoption of the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These Conventions referred to categories of *de facto* stateless persons only in the Final Acts. Presently, there are significant numbers of persons who are not considered to be either *de jure* stateless or refugees, but who fail to acquire the nationality of the State in which they have lived their lives or with which they are most closely connected. The 1961 Convention promotes acknowledgement of the links an individual has with a State through factors such as birth and descent where the person concerned would otherwise be stateless. International law, too, has developed, with recent instruments such as the 1997 European Convention on Nationality making explicit reference to residence and to the genuine and effective link as a basis for resolution of nationality status. Recognition of this link in a balanced application of the principles of *jus sanguinis*, *jus soli*, and '*jus connectionis*' can ensure reduction of *de jure* and *de facto* statelessness, and the undesirable effects of statelessness the international community has sought to avoid.

Efforts have been made to resolve significant conflicts between the nationality laws of many States. Attempts to resolve these conflicts will bear little real fruit so long as the fundamental philosophical positions concerning State responsibility in determining nationality continue to vary. The point of departure is where opposing laws meet, either colliding as technically correct but artificial constructs which allow the individual no way through, or more productively, as positive means of meshing systems in an effort to address the practical outcome of their application. Progress can be made toward the latter, through the development of proactive means of granting nationality without reliance solely on pre-existing legal structures but, rather, with a view beyond to broader, more universal means of applying national legislation so as to achieve the object and purpose of international principles.

Statelessness is not only a legal problem, it is a human problem. Failure to acquire status under the law, particularly in cases where the individual was born and has lived the better part of his or her life in a single State, creates significant human problems. These problems can negatively impact upon many important elements of life, including the right to vote, to own

property, to have health care, to send one's children to school, to work, and to travel to and from one's country of residence. International law provides tools for ensuring the right to a nationality exists, and is further developing the mechanisms to ensure that nationality is effective. International law has, further, recognized the State's right to determine nationality with reference to certain standards. Positive steps by all States can ensure the integration and implementation of these principles and standards in State legislation and practice, reducing and, eventually, eliminating the problem of statelessness.