



**UNHCR**

**United Nations High Commissioner for Refugees**

Haut Commissariat des Nations Unies pour les réfugiés

**LEGAL AND PROTECTION POLICY  
RESEARCH SERIES**

**UNHCR and *De Facto* Statelessness**

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Senior Legal Adviser, UNHCR Geneva

**DIVISION OF INTERNATIONAL PROTECTION**

**LPPR/2010/01**

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## INTRODUCTION

UNHCR has had a mandate for stateless persons ever since the Office was established in 1950. Originally, that mandate only extended to stateless persons who are refugees. As discussed in Part I below, refugees who do not have a nationality at all are “*de jure* stateless”, whereas refugees who do have a nationality are “*de facto* stateless”. However, whereas all refugees are stateless, many stateless persons are not refugees.<sup>1</sup>

UNHCR’s mandate began to be extended to stateless persons more generally in 1974. Further to the entry into force of the 1961 Convention on the Reduction of Statelessness, UN General Assembly Resolution 3274 (XXIX) of 1974 designated the Office as the body to which, in accordance with Article 11 of the Convention, “a person claiming the benefit of the Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.”<sup>2</sup> Broadly speaking, the 1961 Convention establishes a set of rules according to which a person is entitled to acquire the nationality of a Contracting State, or not to be deprived of or to lose the nationality of a Contracting State, if he or she would otherwise be stateless. The Convention itself does not define the term “stateless”. However, Resolution No. I of the Final Act of the Conference that drew up the Convention recommends 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.

This implies that *de facto* stateless persons are to be understood as persons lacking an effective nationality. As will be seen in section 3 below, it also implies that the 1961 Convention is legally binding with respect to *de jure* statelessness only. The definition of *de jure* statelessness is itself to be found in the 1954 Convention relating to the Status of Stateless Persons, according to which a stateless person is “a person not considered as a national by any State under the operation of its law”.<sup>3</sup>

Apart from the role given to UNHCR under the 1961 Convention, the Office’s broader mandate for non-refugee stateless persons arguably originated only with Conclusion No. 50 of the Office’s Executive Committee (ExCom), paragraph (l) of which

noted the close connection between the problems of refugees and of stateless persons and invited States actively to explore and promote measures favourable to stateless persons, including accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, as well as the adoption of legislation to protect the basic rights of stateless persons and to eliminate sources of statelessness.

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<sup>1</sup> See section 1 below.

<sup>2</sup> In 1976, the General Assembly confirmed its decision in the light of experience of one year’s implementation of the 1961 Convention and requested UNHCR “to continue to perform these functions”: see UN General Assembly resolution 31/36 of 1976 on “Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply”.

<sup>3</sup> See the discussion of the 1954 Convention in section 2 below. Note also that the International Law Commission states in the commentary its draft Articles on Diplomatic Protection that the definition of a stateless person in the 1954 Convention “can no doubt be considered as having acquired a customary nature” (International Law Commission, “Report of the International Law Commission on the work of its fifty-eighth session”, A/65/10, 2006, p. 49).

UNHCR's mandate has since been progressively developed to the point where it currently stands in ExCom Conclusion No. 106 of 2006 on "Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons", as endorsed by the UN General Assembly in resolution 61/137 of 2006. Conclusion No. 106 lists a number of measures to be taken by UNHCR, States and other actors with respect to:

- The identification of "stateless persons and individuals with undetermined nationality";
- The protection of "stateless persons"; and
- The prevention and reduction of "statelessness".

Like other ExCom Conclusions, Conclusion No. 106 does not explicitly distinguish between *de jure* statelessness and *de facto* statelessness.<sup>4</sup> UNHCR has therefore tended to assume that it has a mandate for *de facto* stateless persons who are not refugees just as much as it has a mandate for *de jure* stateless persons who are not refugees.

UNHCR has accordingly required its Country Operations to address problems of *de facto* statelessness and to report annual statistics on *de facto* stateless persons. However, the Office has never clearly defined what *de facto* statelessness is, nor what the legal and operational responses to *de facto* statelessness should be. In this respect, it should be noted that whereas an international treaty regime has been developed for addressing problems of *de jure* statelessness – including most notably the 1954 and 1961 Statelessness Conventions – there is no such legally binding regime at the global level for *de facto* stateless persons who are not refugees.<sup>5</sup> Whereas the absence of such a regime does not mean in and of itself that UNHCR cannot address problems of *de facto* statelessness, it does mean that if UNHCR does indeed have a mandate to address such problems, the range of protection tools on which the Office can rely will necessarily be more limited than when addressing problems of *de jure* statelessness.

The present paper seeks to answer the question what *de facto* statelessness is. The meaning of the term "*de facto* stateless" can only be properly understood by comparing it with the meaning of the term "*de jure* stateless", and thus Part I explores the origins of the international statelessness regime and shows how efforts to create such a regime for *de facto* stateless persons were, with the notable exception of refugees, rather less successful than they were for *de jure* stateless persons. Part I also shows how the term "*de facto* stateless" was traditionally reserved for persons who are outside the State of their nationality and lacking in that State's protection, the protection in question being diplomatic and consular protection and assistance (as opposed to protection on the territory of the State of nationality itself).

Part II discusses how in the 1990s – with the dissolution of the Soviet Union, Czechoslovakia and the former Socialist Federal Republic of Yugoslavia – UNHCR and others began to

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<sup>4</sup> Note, however, the possible exception of ExCom Conclusion No. 90 on International Protection (2001), which expresses concern that "many victims of trafficking are rendered *effectively stateless* [emphasis added] due to an inability to establish their identity and nationality status" and calls upon States "to cooperate in the establishment of identity and nationality status of victims of trafficking so as to facilitate appropriate resolutions of their situations, respecting the internationally recognized human rights of the victims". However, this refers not to action to be taken by UNHCR, but to action to be taken by States. See further the discussion in section 5 below about ExCom Conclusions and UNHCR's position on *de facto* statelessness.

<sup>5</sup> The situation is slightly different at the regional level. See section 11.3 below.



expand the concept of *de facto* statelessness into new areas, not all of which can be fully reconciled with the traditional view referred to above. For example, the expanded concept tends to suggest that *de facto* stateless persons may include certain persons who are inside the State of their nationality, not just those who are outside it. Part II analyzes in detail the main categories of persons who have been claimed to fit this new paradigm of *de facto* statelessness, notably:

- Persons who do not enjoy the rights attached to their nationality;
- Persons who are unable to establish their nationality, or who are of undetermined nationality;
- Persons who, in the context of State succession, are attributed the nationality of a State other than the State of their habitual residence.

Part II concludes that the new paradigm of *de facto* statelessness is doctrinally questionable and serves no useful purpose, since in some cases the persons concerned are actually *de jure* stateless, in other cases they fit the traditional conception of *de facto* statelessness, and in yet other cases they should not be considered *de facto* stateless at all.

Part III concludes that the traditional definition of *de facto* statelessness is still valid in the present day, and proposes an interpretation of that definition. It also provides a few brief conclusions regarding the scope *ratione materiae* and *ratione personae* of UNHCR's mandate for addressing *de facto* statelessness.

## **PART I: HISTORICAL SURVEY OF INTERNATIONAL ACTION ON *DE FACTO* STATELESSNESS**

### **1. INTERNATIONAL ACTION ON STATELESSNESS PRIOR TO THE ADOPTION OF THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS**

In 1930, the Hague Conference for the Codification of International Law convened by the League of Nations adopted the Convention on Certain Questions relating to the Conflict of Nationality Laws. The Convention included a number of provisions aimed at reducing some of the causes of statelessness.<sup>6</sup> These provisions were supplemented by the 1930 Protocol relating to a Certain Case of Statelessness, also adopted by the Hague Conference, Article 1 of which provided:

In a State whose nationality is not conferred by the mere fact of birth in its territory, a person born in its territory of a mother possessing the nationality of that State and of a father without nationality or of unknown nationality shall have the nationality of the said State.

With a view to determining certain relations of stateless persons to the State whose nationality they last possessed,<sup>7</sup> the Hague Conference also adopted a Special Protocol concerning Statelessness, which provided in Article 1 that:

If a person, after entering a foreign country, loses his nationality without acquiring another nationality, the State whose nationality he last possessed is bound to admit him, at the request of the State in whose territory he is:

- (i) if he is permanently indigent either as a result of an incurable disease or for any other reason; or
- (ii) if he has been sentenced, in the State where he is, to not less than one month's imprisonment and has either served his sentence or obtained total or partial remission thereof.

In the first case the State whose nationality such person last possessed may refuse to receive him, if it undertakes to meet the cost of relief in the country where he is as from the thirtieth day from the date on which the request was made. In the second case the cost of sending him back shall be borne by the country making the request.

This latter Protocol never entered into force because it did not receive the required minimum ten ratifications.

It was not until after the Second World War that international action was taken to establish a protection regime specifically for stateless persons. Until then, action had been taken only to address the protection needs of certain categories of refugees. Thus, the League of Nations had set up:

- A High Commissioner's Office for Russian and Armenian Refugees (1921 - 1930);
- The Nansen International Office (1930 – 1938);
- The Office of the High Commissioner for Refugees coming from Germany (1933), subsequently incorporated in the League of Nations (1936 to 31 December 1946);

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<sup>6</sup> See Article 7 on expatriation permits, Articles 8 and 9 on the nationality of married women, Articles 13 to 16 on the nationality of children, and Article 17 on adoption.

<sup>7</sup> See preamble to the 1930 Special Protocol concerning Statelessness.

- A High Commissioner's Office for "Nansen" refugees and refugees coming from Germany (1938 to 31 December 1946).<sup>8</sup>

Additionally, an independent International Conference, held at Evian in 1938, established the Intergovernmental Committee on Refugees (1938 to 1 July 1947). The Committee's terms of reference were initially to give international protection to German refugees, but were subsequently extended in 1943 to "all persons whoever they may be, who, as a result of events in Europe, have had to leave, or may have to leave, their countries of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs".<sup>9</sup>

Each of the categories of refugees emerging before the Second World War was defined *inter alia* as a person lacking protection. For example, the Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees of 12 May 1926 defined a "Russian refugee" as

Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality

and an "Armenian refugee" as

Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality.

As will be seen below, "lack of protection" is also a key defining characteristic of a stateless person, be the person stateless *de jure* or stateless *de facto*.

## 1.1 Memorandum on Statelessness by the Intergovernmental Committee on Refugees

In March 1946, the Intergovernmental Committee on Refugees reprinted for distribution to senior Army officers and staff of the recently established United Nations Relief and Rehabilitation Administration (UNRRA) a Memorandum entitled "*Statelessness and Some of its Causes: An Outline*".<sup>10</sup> The Memorandum had originally been prepared for use by Committee Representatives, who were called upon on a daily basis "to formulate an opinion as regards numerous cases of indetermined nationality, or of persons claiming to be stateless."<sup>11</sup> Chapter II of the Memorandum describes *de jure* and *de facto* statelessness as follows:

1. The term "stateless" defines an individual whom no country recognizes as possessing its nationality.

It is through the medium of their nationality that individuals can normally enjoy benefits from the existence of the Law of Nations (international public law). Modern society is composed of sovereign States. Normally, human beings are members (possess nationality) of such sovereign collectivities. They owe allegiance to the State. The concomitant is that the State affords them protection, not merely when they reside in the territory of their country of nationality, but also when they are abroad.

<sup>8</sup> United Nations Department of Social Affairs, "A Study of Statelessness", August 1949 (reedited by UNHCR, 1995), p. 34.

<sup>9</sup> "A Study of Statelessness", *op. cit.*, pp. 38 – 41.

<sup>10</sup> UNRRA was established in 1944 to provide emergency relief to the displaced. At the end of the Second World War, it also organized the voluntary repatriation of millions of refugees.

<sup>11</sup> Intergovernmental Committee on Refugees, "Statelessness and its Causes: An Outline", March 1946, p. 2.

The “protection” afforded to nationals while abroad is based upon international law, and the principle of reciprocity. In many cases there exist bilateral treaties between two States regulating the legal status of their nationals residing in the territory of the other. But even where no such specific treaties exist, a national residing abroad enjoys, according to general principles of international law, the protection of the consular and diplomatic representatives of the country of his nationality.

Stateless persons are deprived of this “protection”, although their sojourn may come under the general provisions made by a sovereign State in respect of aliens residing on its territory. He is generally under a so-called “régime de tolérance”. He can be expelled by administrative measure or by Court decree, in some countries even if he is not in possession of a valid entry permit into another country. He is unable to get a national passport as a valid travel document enabling him to move from one country to the other. Frequently he is unable to move freely from one part of the country to the other (résidence assignée, internment, etc.). Very often he is refused access to the labour market, and thus deprived of the possibility of earning a livelihood. Even civil acts like marriage and divorce, conclusion of contracts, and acquisition and possession of real estate may be impossible for stateless persons, or cause them great inconvenience and expense.

2. Besides *de jure* stateless persons there are also at present an increasing number of *de facto* stateless persons. These, too, are “unprotected persons”, as they do not enjoy in fact the ‘protection’ of any Government, although they have not been formally denationalised by the State of their nationality.

Thus, up to the time of entry into force of the denationalisation decree of the Nazi Régime, dated November 25<sup>th</sup> 1941, the bulk of the refugees of German and Austrian origin were still so-called ‘German nationals’ (Staatsangehörige).

A distinction must also be made between temporary lack of “protection” and *de facto* statelessness. The former relates to nationals of a given country deprived of diplomatic and consular protection because the State concerned is unable, for the time being, to maintain diplomatic and consular representatives in the territory where the person resides at present (military occupation by a foreign power, absence of diplomatic recognition or of resumption of diplomatic relations etc.). Thus, at the time of writing this outline, a Polish citizen in the Iberian Peninsula or a Soviet citizen in Switzerland does not temporarily enjoy “protection”. On the other hand, *de facto* statelessness is based upon the refusal of the State of nationality to afford protection to some of its nationals. This was the case with German refugees prior to the en masse denationalisation of November 25<sup>th</sup> 1941 referred to above.<sup>12</sup>

Chapter VI of the Memorandum elaborates further on the situation of the German Jews, in particular regarding the precise point in time at which they became *de jure* stateless:

The racial (Nuremberg) laws of 15<sup>th</sup> September, 1935, did not provide, as is often assumed, for the en masse denationalisation of German Jews.

The law introduced a new conception, namely the division of all German nationals into (a) citizens of the Reich (Reichsbuerger) and (b) other German nationals (Staatsangehoerige). Those having Aryan nordic blood were citizens with all civic rights, while Jews became mere nationals with no civic rights nor the obligation of military service.

Subsequently the notion of “Staatsangehoerige” applied to the Jews was gradually emptied of any positive content whatsoever by various persecution measures and acts of dispossession and spoliation.

Mere German nationals or “Staatsangehoerige” of Jewish origin were able to leave the country with valid German passports stamped with a big “J”. Up to the war and even, in some cases, up to 1941, Jews abroad were able to obtain renewal of the validity of their passport from German Consulates. However, such holders of “J” passports were otherwise denied the right to ask for German consular and diplomatic protection, so that both the League High Commission and the Intergovernmental Committee on Refugees, as well as most Governments, rightly considered them as persons who, in fact, did not enjoy the protection of their Government.

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<sup>12</sup> *Ibid.*, pp. 3 - 4.

By October 1941, the German authorities stopped getting rid of Jews by facilitating their taking refuge in other countries and refused henceforth issue of passports or grant of exit permits.

In pursuance of the above mentioned German Law of the 15<sup>th</sup> of September 1935, the German Government issued on the 25<sup>th</sup> of November 1941 a decree (the 11<sup>th</sup> Ordinance under the Reich Citizenship Law (Reichsbürgergesetz) of 15<sup>th</sup> September 1935), which laid down:

- (1) That a Jew who has his ordinary place of residence abroad cannot be a German national;
- (2) That the Jew loses his German nationality either on the date of the issue of the decree, or from the date he has taken up his ordinary residence abroad, or at a later date, when he transfers his ordinary residence abroad.

A considerable number of Jews lost their nationality as a result of that Decree. It also provided for the confiscation of the property of Jews who became stateless as a result thereof.

Thus all Jewish refugees (whether confessional Jews or Christian non-Aryans) living as refugees outside the territory of the Reich, and not having acquired another nationality (e.g. by immigration into Palestine or the USA) became stateless.<sup>13</sup>

The Memorandum thus describes *de facto* stateless persons as persons who:

- Have a nationality;
- Are outside the State of their nationality; and
- Are refused diplomatic and consular protection by that State.

Conversely, persons inside the State of their nationality are not described as *de facto* stateless, even if, like the German Jews in the 1930's, they are denied civic rights to such an extent that their nationality is deprived of any positive content whatsoever under that State's municipal law.<sup>14</sup>

The Memorandum does not consider that *any* person deprived of diplomatic protection and consular assistance is necessarily *de facto* stateless. The deprivation must be as a result of a refusal by the person's State of nationality to provide such protection; if, on the other hand, the State is unable to provide protection – for example, because of military occupation by a foreign power, or absence of diplomatic recognition – the person concerned is not *de facto* stateless.<sup>15</sup>

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<sup>13</sup> *Ibid.*, pp. 14 - 15.

<sup>14</sup> One may question whether, if being the national of a country has no positive content at all, one can really be considered a national of the country concerned.

<sup>15</sup> The same position was also taken by the International Union of Child Welfare (ICWU), a federation of national and international voluntary and semi-voluntary organizations for child welfare. See ICWU, "Stateless Children: A Comparative Study of National Legislations and Suggested Solutions to the Problem of Statelessness of Children", 1947, p. 6: "Besides persons who are stateless on legal grounds there are nowadays an increasing number of individuals who are stateless *de facto*. They are unprotected persons because in reality they enjoy the protection of no government, although they have not been formally denationalised. A further distinction must be made between *de facto* statelessness and a temporary lack of protection. The latter position arises when persons are deprived of protection because the State to which they belong is not in a position for the time being to have diplomatic or consular representatives on the territory in which those persons are residing (military occupation, absence of diplomatic relationships, and other similar cases)."

## 1.2 1949 Study of Statelessness by the UN Secretary-General

In 1947 the UN Commission on Human Rights adopted a Resolution on Stateless persons in which it expressed the wish

- (a) that the United Nations make recommendations to member States with a view to concluding conventions on nationality;
- (b) that early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of nationality as regards their legal and social protection and their documentation.

and recommended that

such work be undertaken in consultation with those specialized agencies at present assuming the protection of some categories of persons not enjoying the protection of any government ...

In pursuance of this resolution, the UN Economic and Social Council (ECOSOC) adopted resolution 116 (VI) D on Stateless Persons dated March 1948, according to which:

*The Economic and Social Council,*

*Taking note* of the resolution of the Commission on Human Rights adopted at its second session regarding stateless persons,

*Recognizing* that this problem demands in the first instance the adoption of interim measures to afford protection to stateless persons, and secondly the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an effective right to a nationality,

*Requests* the Secretary-General, in consultation with interested commissions and specialized agencies:

- (a) To undertake a study of the existing situation in regard to the protection of stateless persons by the issuance of necessary documents and other measures, and to make recommendations to an early session of the Council on the interim measures which might be taken by the United Nations to further this object;
- (b) To undertake a study of national legislation and international agreements and conventions relevant to statelessness, and to submit recommendations to the Council as to the desirability of concluding a further convention on this subject.

The Secretary-General accordingly produced his 1949 *Study of Statelessness*, in which he considered that there are two categories of stateless persons: *de jure* and *de facto*.<sup>16</sup> The *Study* provided a slightly broader definition of *de facto* stateless persons than the description given by the Intergovernmental Committee on Refugees:

*Stateless persons de facto* are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals. The Constitution of the IRO [International Refugee Organization]<sup>17</sup> in its Annex (First part – Section A.2) uses this formula: “a person ... who is unable or unwilling to avail himself of the protection of the Government of his country of nationality or former nationality.”<sup>18</sup>

<sup>16</sup> “A Study of Statelessness”, *op. cit.*, p. 8.

<sup>17</sup> The work of the Intergovernmental Committee on Refugees and that of UNRRA was wound up on 30 June 1947, following which the International Refugee Organization (IRO) assumed responsibility for providing international protection to refugees up until the establishment of UNHCR as of January 1951.

<sup>18</sup> “A Study of Statelessness”, *op. cit.*, p. 9. This definition of *de facto* stateless persons is slightly self-contradictory, since it refers at one and the same time to persons who have left the country of which they *were* nationals, and to those persons amongst them who renounce the protection of the country of which they *are* nationals. However, it is clear from the context that all *de facto* stateless persons are by definition

This definition is broader than that of the Intergovernmental Committee of Refugees because it includes not only persons who are refused protection by the country of their nationality, but also persons who renounce such protection. However, once again it is clear that the reference to “protection” concerns only the protection of nationals who are abroad. As the *Study* explains, such protection includes not only “protection proper” – that is, the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals – but diplomatic and consular protection and assistance generally:

The protection enjoyed by the foreigner possessing a nationality has a much wider connotation than is suggested by the term “protection”. It is a matter far more of assistance to the national and of collaboration with the authorities in the foreign country than of protection proper. Only in rare cases does protection take the form of representations to a foreign Government. In normal times, “protection” is assistance and it is in this sense that the term is used in the present report.

Protection takes various forms:

- A. Governments seek to secure for their nationals abroad a status exceeding the minimum required by international law. To this end they negotiate treaties on the basis of reciprocity (settlement and immigration conventions, Consular conventions, commercial treaties, etc.);
- B. They see to it that such conventions and treaties are carried out, and where necessary, take action to ensure that the rights granted to their nationals are respected;
- C. The Consular authorities recommend their nationals to the authorities of the country and carry out certain technical functions designed to facilitate the application of the agreements and treaties;
- D. Governments issue to their nationals the passports which enable them to travel abroad;
- E. The authorities in the country of origin and the national Consuls draw up various certificates and documents (identity documents, civil registration documents, customary certificates concerning personal status, certificates testifying that the documents drawn up in the country of origin are in conformity with the laws of the country etc.) so as to enable their nationals to carry out the normal formalities of civilian life;
- F. The State bears the whole or part of the cost of relief (assistance to sick, infirm, indigent persons etc.) furnished to its nationals, or arranges for their repatriation.<sup>19</sup>

The *Study* identified two causes of *de facto* statelessness, both of them refugee-related: taking refuge abroad as a result of racial, religious or political persecution; or mass emigration caused by changes in a country’s political or social system.<sup>20</sup>

The *Study* defined *de jure* stateless persons as

persons who are not nationals of any State, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one.<sup>21</sup>

Although ECOSOC had only mentioned stateless persons in its resolution, without explicitly referring to refugees, the *Study* nevertheless included the latter persons within its terms of reference since:

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outside the country of which they *are* nationals, whereas “persons who are not nationals of any State, either because at birth or subsequently they were not given any nationality, *or because during their lifetime they lost their own nationality and did not acquire a new one*” [emphasis added] are defined by the Study as *de jure* stateless.

<sup>19</sup> “A Study of Statelessness”, *op. cit.*, p. 32.

<sup>20</sup> *Ibid.*, p. 131 and pp. 141 - 142.

<sup>21</sup> *Ibid.*, p. 8.

Clearly, the fact that refugees are not mentioned [by ECOSOC] does not mean that they must be excluded from the scope of the present study. In fact, a considerable majority of stateless persons are at present refugees. These refugees are *de jure* stateless persons if they have been deprived of their nationality by their country of origin. They are *de facto* stateless persons if without having been deprived of their nationality they no longer enjoy the protection and assistance of their national authorities<sup>22</sup>

However, the *Study* added that not all persons who were considered at the time to be refugees were also considered to be stateless. Thus, certain existing categories of refugees were excluded from the scope of the *Study*, including most notably for present purposes:

individuals ... who found refuge abroad but who continue to benefit by the protection and assistance of their government, itself in exile abroad, which has been recognized by other States. Such was, for example, the case of Norwegian, Belgian and Dutch refugees during the second world war.<sup>23</sup>

In his conclusions to the *Study*, the Secretary-General submitted various recommendations to ECOSOC, including the following which applied equally to *de jure* and *de facto* stateless persons:

*Considering*

That the possession of a nationality and the protection of a country of which they are nationals are the foundations of the status of foreigners;

That the fact of not having a nationality or not enjoying in practice the protection of a State places stateless persons, *de jure* or *de facto*, in a position of inferiority incompatible with the respect of human rights;

[...]

That it is necessary to abolish statelessness and, until such time as this has been achieved, to improve the status of stateless persons;

That the political conditions which at present are the main cause of statelessness will not disappear until more stable conditions are restored throughout the world;

That in any event statelessness can be abolished only by measures which cannot produce their full effect until a certain length of time has elapsed; which measures will be recommended by the Secretary-General for adoption (see Part Two [of this Study]);

That it is important, meanwhile, to take action forthwith to improve the status of stateless persons;

That stateless persons should be:

- (a) Granted an international legal status guaranteeing them the enjoyment of fundamental human rights, and
- (b) Assured of the protection of an international organ of an intergovernmental character;

*Considering*

That at present only certain categories of stateless persons, and these only in certain countries, have the benefit as refugees of a legal status and of international protection provided by the International Refugee Organization, a non-permanent organization;

That without prejudice to the advantages accorded to the said categories of stateless persons by the agreements concluded in their favour, which would remain in force, it is necessary to establish a legal regime for all stateless persons, the said regime to comprise legal status and international protection;

*In conclusion*, the Secretary-General

*Recommends* the Economic and Social Council to take the following decisions:

1. To address an invitation to all Member States not yet parties to the Convention Relating to the International Status of Refugees of 28 October 1933, the Convention concerning the Status of Refugees

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<sup>22</sup> *Ibid.*, p. 9.

<sup>23</sup> *Ibid.*, p. 9, footnote 13.



coming from Germany of 10 February 1938 and the Additional Protocol to that Convention of 14 September 1939, to take the necessary steps as soon as possible to become parties thereto;

2. To urge States Members to refrain from taking any discriminatory measures affecting *de jure* or *de facto* stateless persons in territories under their jurisdiction, and to improve the conditions of such persons by providing them, through appropriate legislative or administrative action, with a legal status inspired by the principles underlying the agreements enumerated in item 1 above;

3. To request the IRO, in accordance with those provisions in its Constitution relating to the political and legal protection of refugees, to continue to use its good offices and to take whatever administrative measures are required to secure the implementation of items 1 and 2 above.

The Secretary-General further recommends the Economic and Social Council:

4. A. To recognize the necessity of a convention, based on the agreements now in force, determining the legal status of stateless persons as such, but excluding war criminals and such other categories of persons as are specified in the convention.

B. To this end, to instruct either the Secretary-General in consultation with the Director-General of the IRO and the administrative heads of the other specialized agencies concerned, or an *ad hoc* Committee appointed by the Council, to prepare a draft convention including provisions concerning:

(a) The following subjects:

1. Personal status;
2. Rights formerly acquired;
3. Property rights;
4. The exercise of trades and professions;
5. Education;
6. Relief;
7. Social security;
8. The right to appear before the courts as plaintiff or defendant;
9. Exemption from reciprocity;
10. Taxation;
11. Military service;

(b) A travel document taking the place of a passport;

(c) The procurement of documents enabling stateless persons to perform various acts of civil and administrative life;

5. To recognize the necessity of providing at an appropriate time permanent international machinery for ensuring the protection of stateless persons.

### **1.3 Ad Hoc Committee on Statelessness and Related Problems**

After considering the *Study*, ECOSOC adopted resolution 248 (IX) B of August 1949 providing for the appointment of an *ad hoc* Committee consisting of representatives of thirteen Governments. The Committee's task was to:

(a) Consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention;

(b) 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;

(c) Make any other suggestions they deem suitable for the solution of these problems, taking into consideration the recommendations of the Secretary-General [in the *Study of Statelessness*.]

The UN Secretary-General duly submitted a preliminary draft convention to the *ad hoc* Committee for discussion. Article 2 of the draft provided that in addition to applying to refugees, who may be *de jure* or *de facto* stateless, the convention should apply to *de jure* stateless persons who are not refugees.<sup>24</sup>

However, in its initial report to ECOSOC, the Committee recommended instead a draft convention relating only to the status of refugees, with a separate protocol thereto relating to the status of stateless persons. According to the draft statelessness Protocol, most of the provisions of the draft refugee Convention were to be applied to stateless persons *mutatis mutandis*. The Committee also recommended to ECOSOC a draft resolution on the elimination of statelessness, which *inter alia* requested the International Law Commission to prepare a draft international agreement or agreements for the elimination of statelessness.<sup>25</sup> Neither the draft Protocol nor the draft ECOSOC resolution defined “statelessness”, but the context in which they were prepared implies that they were referring to *de jure* statelessness only.<sup>26</sup>

After ECOSOC had discussed the Committee’s initial report, the Committee reconvened to take into account the comments received from ECOSOC and governments, following which it then submitted its final report, containing revised texts of the draft Convention relating to the Status of Refugees and the draft Protocol relating to Stateless Persons.<sup>27</sup> The report was submitted to the UN General Assembly, which in December 1950 adopted resolution 429 (V) convening a Conference of Plenipotentiaries to complete the drafting of and to sign both the Refugee Convention and the Statelessness Protocol, taking into consideration the draft texts prepared by ECOSOC and a definition of the term “refugee” proposed by the Assembly itself.<sup>28</sup> The term “stateless person” remained undefined.

#### **1.4 The 1951 Convention and 1967 Protocol relating to the Status of Refugees**

The Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons met in Geneva from 2 to 25 July 1951, but adopted only a Convention relating to the Status of Refugees. The Protocol relating to the Status of Stateless Persons was referred back to the appropriate organs of the United Nations for further study.<sup>29</sup>

Article 1A(2) of the 1951 Refugee Convention provides that, for purposes of the Convention, the term “refugee” shall apply to any person who:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country

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<sup>24</sup> Ad Hoc Committee on Statelessness and Related Problems, “Status of Refugees and Stateless Persons – Memorandum by the Secretary-General”, E/AC.32/2, 3 January 1950.

<sup>25</sup> Report of the Ad Hoc Committee on Statelessness and Related Problems, E/1618, 17 February 1950.

<sup>26</sup> Note also that all the causes of statelessness referred to in the Committee’s Report are of *de jure* statelessness only: see E/1618, para. 23, p. 8.

<sup>27</sup> “Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, 14 August to 25 August 1950”, E/1850, 25 August 1950.

<sup>28</sup> The General Assembly’s proposed definition was itself a variation of a definition that had been proposed by ECOSOC in resolution 319 (XI) B (II) of 11 August 1950.

<sup>29</sup> See the resolution in para. III of the Final Act of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The 1951 dateline was subsequently removed in the case of States Parties to the 1967 Protocol relating to the Status of Refugees, Article I(2) of which provides:

For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” “and the words”... “a result of such events”, in article 1 A (2) were omitted.

The 1951 dateline never applied to UNHCR, since according to the Office’s 1950 Statute the competence of the High Commissioner extends not only to

Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it <sup>30</sup>

but also to

Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.<sup>31</sup>

According to paragraph 8(a) of UNHCR’s Statute, one of the functions of the High Commissioner is to supervise the application of international conventions for the protection of refugees. Accordingly, Article 35(1) of the 1951 Convention and Article II(2) of the 1967 Protocol both provide that Contracting States shall cooperate with UNHCR, and in particular facilitate its duty in supervising the application of their provisions.

While the 1951 Convention, 1967 Protocol and UNHCR’s Statute are not instruments for the protection of stateless persons *per se*, UNHCR has observed that all refugees are *de jure* or *de facto* stateless. For example, according to UNHCR’s 1962 *Eligibility Guide*:

Whether unable or unwilling to avail himself of the protection of his government, a refugee [with a nationality] is always a person who does not enjoy that protection. His nationality is rendered ineffective by such lack of national protection which is either denied to him or rejected by him. The result is that he is always *de facto* stateless.<sup>32</sup>

As the *Eligibility Guide* goes on to say, the protection in question “may be diplomatic or consular in character”.<sup>33</sup>

UNHCR’s position that all refugees who have a nationality are *de facto* stateless would seem to imply a broader understanding of *de facto* statelessness than that of the Intergovernmental

<sup>30</sup> Statute of the Office of the United Nations High Commissioner for Refugees, para. 6A(ii).

<sup>31</sup> *Ibid.*, para. 6B.

<sup>32</sup> UNHCR, “Eligibility: A Guide for the Staff of the Office of the United Nations High Commissioner for Refugees”, March 1962, p. 81, para. 78.

<sup>33</sup> *Ibid.*, para. 80.

Committee on Refugees or the *Study of Statelessness*. This is because inability to avail oneself of protection includes not only a situation of being refused protection by one's country of nationality but also a situation whereby one's country of nationality is itself unable to provide protection, for example because of a state of war and/or absence of diplomatic relations.<sup>34</sup>

Nevertheless, the refugee definition does not encompass *all* persons who *de jure* or *de facto* lack national protection – i.e. who are *de jure* or *de facto* stateless – since to be a refugee the person concerned must also have a well-founded fear of being persecuted for one of the reasons enumerated in the definition. However, as noted in UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status* (hereinafter "*RSD Handbook*"), lack of protection may sometimes itself contribute to the fear of persecution:

denial of protection [by the country of nationality] may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.<sup>35</sup>

Note nevertheless that UNHCR considers that there may be situations where denial of protection does not constitute persecution. As the *RSD Handbook* says regarding applicants for refugee status who have dual nationality:

There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals ... As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of reply within reasonable time may be considered a refusal.<sup>36</sup>

## **1.5 Work of the International Law Commission on the topic of nationality, including statelessness**

In 1949, the International Law Commission (ILC) placed "nationality, including statelessness" on a list of topics tentatively selected for codification. One year later, ECOSOC adopted Resolution 319 B III (XI) requesting that the Commission "prepare at the earliest possible date the necessary draft international convention or conventions for the

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<sup>34</sup> See UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status", para. 98: "Being *unable* to avail himself of such protection implies circumstances that are beyond the will of the person concerned. There may, for example, be a state of war, civil war or other grave disturbance, which prevents the country of nationality from extending protection or makes such protection ineffective. Protection by the country of nationality may also have been denied to the applicant ... " See also Grahl-Madsen, "The Status of Refugees in International Law", Vol. I, A.W. Sijthoff-Leyden, 1966, p. 256: "If there is no diplomatic or consular relations between the country of origin and the country of refuge, a person will, as a rule, be unable to avail himself of the protection of the former country. This is particularly true in the case of war between the two countries, or when the country of refuge has not recognized the country of origin or its government." See further Grahl-Madsen's observations on governments in exile and on divided countries where the government of either part pretends to represent the whole country (*op. cit.*, pp. 258 – 260). See further the discussion in section 10 below.

<sup>35</sup> Handbook on Procedures and Criteria for Determining Refugee Status, *op. cit.*, para. 98. See also Discussion note on stateless persons submitted by UNHCR to the Working Group on Solutions and Protection, Doc. No. WSGP/12, 10 April 1991 (annexed to EC/1992/SCP/CRP.4, 1 April 1992), para. 7: "De facto as well as de jure statelessness can be the intended result of a policy of discrimination. The ethnic origin or religious persuasion of groups of persons has been the reason for actual, though not specific legislative, denial of assistance and protection by States to certain of its nationals. Passports have not been extended, for example, or embassies of that State in other countries have refused any association with the individuals or groups being discriminated against."

<sup>36</sup> Handbook on Procedures and Criteria for Determining Refugee Status, *op. cit.*, para. 107.

elimination of statelessness". In 1951, the Commission duly initiated work on the topic, for which it appointed one of its members, Manley O. Hudson, as special rapporteur.

Hudson immediately contacted UNHCR, which had offered to assist the ILC in its work, and was provided with the services of Dr. Paul Weis who subsequently devoted seven weeks to working with the special rapporteur. Hudson's resultant report made the following observation on the distinction between *de jure* and *de facto* statelessness in the *Study of Statelessness*:

Such a distinction may have been useful for the purpose for which the study was made; it has, however, no place in the present paper. *Stateless persons in the legal sense of the term are persons who are not considered as nationals by any State according to its law.* The so-called stateless persons are *de facto* nationals of a State who are outside of its territory and devoid of its protection; they are, therefore, not stateless: it might be better to speak of "*unprotected persons*" and to call this group "*de facto unprotected persons*", in distinction to "*de jure unprotected persons*", i.e., stateless persons. Refugees may be stateless or not; in the first case they are *de jure* unprotected persons; in the latter *de facto* unprotected.<sup>37</sup>

Although considering that the ILC's terms of reference extended only to *de jure* statelessness, Hudson remarked that a purely technical solution to *de jure* statelessness which does not take account of the need for a genuine improvement in the status of the person concerned could lead to a shift from *de jure* statelessness to, despite the observation quoted above, what he nevertheless called *de facto* statelessness:

Any attempt to eliminate statelessness can only be considered as fruitful if it results not only in the attribution of a nationality to individuals, but also in 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. Purely formal solutions which do not take account of this desideratum 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* which, in the view of the Rapporteur, would not be desirable. (Cf. the proceedings of the International Law Association at its 39th Conference in Paris in 1936, where it was suggested that neither *jus soli* nor *jus sanguinis* should be decisive but the *jus connectionis* or right of attachment, i.e., a person should have the nationality of the State to which he has proved to be most closely attached in his conditions of life as may be concluded from spiritual and material circumstances).<sup>38</sup>

Hudson resigned after having submitted his report but was succeeded in his role as special rapporteur by Roberto Cordova. Unlike Hudson, Cordova made a special plea that the ILC address the situation of *de facto* stateless persons, emphasizing that everyone should have an *effective* right to a nationality:

35. [...] Some members might think that the problem of *de facto* statelessness does not fall within the Commission's terms of reference and that, therefore, the Special Rapporteur oversteps his instructions in dealing with this most cruel and inhuman situation. They might think that *de facto* statelessness is not a juridical problem since the persons concerned have not been deprived of their nationality and therefore are not, *stricto sensu* and juridically speaking, stateless. To a certain extent, of course, this contention is valid; but, on the other hand, a right which cannot be exercised is not a positive one, and the Special Rapporteur submits that what human beings are entitled to possess is a positive, an effective, right of nationality.

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<sup>37</sup> International Law Commission, "Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur", A/CN.4/50, 1952, p. 17.

<sup>38</sup> "Report on Nationality, Including Statelessness by Mr. Manley O. Hudson, Special Rapporteur", *op. cit.*, p. 20.

36. As construed by the Economic and Social Council, this must be the correct meaning of article 15 of the Universal Declaration of Human Rights which states that: "Everyone has the right to a nationality". Indeed in its resolution 116 D (VI) of 1 and 2 March 1948, the Council, referring to stateless persons, not only to juridically stateless persons, but, in general, including all those who cannot enjoy the rights flowing from nationality, very definitely says that such a problem demands "the taking of joint and separate action by Member nations in co-operation with the United Nations to ensure that everyone shall have an *effective* right to a nationality". It is obvious that *de facto* stateless persons do not have such an effective right to a nationality. Their nationality is utterly ineffective. Therefore, very modestly, but with profound conviction, the Special Rapporteur thinks that the terms of reference of this Commission also include the establishment of juridical means permitting to grant to *de facto* stateless persons an "effective" right to a nationality.

37. *De facto* statelessness is, of course, a *de facto* situation, but the Commission is bound and is also entitled to propose juridical solutions for a *de facto* situation especially as the Universal Declaration of Human Rights, according to the correct interpretation given by the Economic and Social Council, aims at ensuring that every human being has the effective enjoyment of the rights of nationality. It is true that the *de facto* stateless person has a potential nationality but it is not less true that this juridical nationality is an ineffective nationality. It seems to the Special Rapporteur that the most important aspect of this problem of statelessness is not the technical question of nationality only, but the real situation. The juridical solution consists in bestowing upon each individual an effective nationality and the Special Rapporteur has accordingly framed article 4 of the Alternative Convention on Elimination of Present Statelessness. Needless to say that the Commission is not only obliged to deal with juridical statelessness, but is also under the solemn obligation to provide juridical solutions for the situation of thousands of human beings who are in a much worse position than those who only are *de jure* stateless. The Commission should face the fact and propose a legal remedy for acts of States which plunge so many persons in a desperate plight demanding an energetic legal solution such as the one proposed in article 4. The members of the Commission should bear in mind that *de facto* statelessness is much worse than *de jure* statelessness not only quantitatively but also qualitatively, because not only is it true that *de facto* stateless persons constitute by far the largest number of stateless individuals but it is also a fact that their condition is worse than that of the *de jure* stateless. They are not only deprived of the rights which derive from nationality but the mere fact that they are not technically deprived of nationality itself renders them incapable of obtaining a legal remedy under the proposed statute for stateless persons unless the Commission has the courage to face the problem and provides the said legal remedy. The present situation is that *de facto* stateless persons, having a nominal and ineffective nationality, are liable to be and are in fact persecuted and punished by their governments, for political or racial motives only.<sup>39</sup>

Cordova prepared for the consideration of the ILC drafts of various different Conventions and Protocols on the Elimination of Future Statelessness, the Reduction of Future Statelessness, the Elimination of Present Statelessness and the Reduction of Present Statelessness. Some of the drafts on present statelessness were particularly far-reaching, providing for a legal status of "protected persons" to stateless persons in their State of residence, with the same rights as nationals except for political rights, and with the right of naturalization under national law (albeit subject to the same conditions as required of other aliens). Children of such protected persons were to have the right to citizenship upon reaching the age of majority. Additionally, the drafts provided that

*de facto* stateless persons actually living in the territory of one of the Parties shall have the same rights as those granted to *de jure* stateless persons ... provided that they renounce the ineffective nationality which they possess.<sup>40</sup>

<sup>39</sup> International Law Commission, "Nationality, Including Statelessness – Third Report on the Elimination or Reduction of Stateless by Mr. Roberto Cordova, Special Rapporteur", A/CN.4/81, 1954, p. 30.

<sup>40</sup> See Article 4 of the draft Alternative Convention on the Elimination of Present Statelessness and Article 4 of the draft Alternative Convention on the Reduction of Present Statelessness, Cordova's Third Report, *op. cit.* Other drafts proposed by Cordova also referred to *de facto* stateless persons. See Article 5 of the draft "Protocol to the 'Convention on the Elimination of Future Statelessness', for the Elimination of Present Statelessness" and Article 5 of the draft "Protocol to the 'Convention on the Reduction of Future Statelessness', for the Reduction of Present Statelessness".

In support of this latter provision, Cordova argued:

(1) The special importance and the unique and vast scope of this article, as well as the main ideas on which it is based, have already been partly explained in [para.'s 35 – 37 quoted above].

(2) There are hundreds of thousands of individuals who, on political, economic or racial grounds, had to leave their country of origin of which they were nationals and which in turn, quite frequently, is unwilling to accept them again or to accord them the minimum protection to which they are entitled as human beings. These *de facto* stateless persons have sought refuge in foreign countries and have established there a residence which they perhaps intended to be temporary, or to which the local authorities may have refused a permanent character, but which may have become, in fact, permanent or, at best, indefinite. The recipient countries accepted them for humanitarian reasons and, faced with the dilemma of an inhuman *refoulement* or expulsion to another country (which is not always possible), have resigned themselves to allowing them to stay, postponing *sine die* the final settlement of the problem but always maintaining the threat of some drastic action concerning them.

(3) If the legislation of the recipient countries happens to be based on the *jus soli* principle, the problem will ultimately be solved by the mere passage of time. The stateless persons will eventually die and their children will acquire the nationality of such countries by operation of the law. The situation is quite different in the case where the recipient country follows the *jus sanguinis* principle. In this case, the stateless person and his descendants may forever remain in this condition.

(4) In both these cases resumed action should be taken because, in the first instance, at least one complete generation would have to pass before the problem is solved and, in the second one, it might never be solved unless the Convention on the Elimination of Future Statelessness is adopted by the States concerned.

(5) The most practical and just solution would be the one suggested in this article, namely, to extend to *de facto* stateless persons the juridical remedies which have been proposed for *de jure* stateless persons, e.g. the granting of the restricted nationality envisaged in articles 1 and 2 of this Convention.

The Commission voted against including *de facto* stateless persons after objections were expressed by one of its members, Mr. Lauterpacht, that the term “*de facto* statelessness” had never been clearly defined, that it would be very difficult in practice to make a clear distinction between *de jure* and *de facto* statelessness, that including *de facto* stateless persons “would impose upon States the duty and give them the right to decide that a person who was a national of State X was not really a national of that State”, and that States would accordingly be obliged to treat *de facto* stateless persons as assimilated in most respects to their own nationals.<sup>41</sup>

However, the Commission did retain many of Cordova’s proposals on present statelessness with respect to *de jure* stateless persons, including all of those mentioned above, i.e. that such persons should have the same rights as nationals of their State of residence except for political rights, that they should have the same rights to naturalization as aliens, and that their children should have the right to citizenship upon reaching the age of majority. But instead of assembling the proposals into a draft Convention or Protocol, the Commission stated that “though formulated in the form of articles, [the proposals] should merely be regarded as suggestions which Governments may wish to take into account when attempting a solution of this urgent problem.”<sup>42</sup>

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<sup>41</sup> Summary record of the 246<sup>th</sup> meeting of the International Law Commission, A/CN.4/SR.246, 1954, para. 18; Summary record of the 249<sup>th</sup> meeting of the International Law Commission, A/CN.4/SR.249, 1954, para.'s 15 – 17.

<sup>42</sup> Report of the International Law Commission to the General Assembly covering the work of its sixth session, A/2693, 1954, p. 147, para. 36.

The Commission did produce two draft Conventions on Future Statelessness, one on the Reduction of Future Statelessness and the other on the Elimination of Future Statelessness.<sup>43</sup> These drafts were later to provide a starting point for discussion at the UN Conference that drew up the 1961 Convention on the Reduction of Statelessness (see section 3 below) – but again, neither of the drafts referred to *de facto* statelessness.

With respect to the question of the granting of international protection by an international agency to stateless persons, the Commission’s final report noted:

In considering the problem of present statelessness, the Commission was aware of the fact that stateless persons who are refugees as defined in the Statute of the Office of the United Nations High Commissioner for Refugees receive international protection by the United Nations through the High Commissioner. The suggestions contained in the present report are without prejudice to the question of granting international protection by an international agency, as distinguished from diplomatic protection by States, to stateless persons pending their acquisition of a nationality.<sup>44</sup>

## **2. THE 1954 CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS**

On 26 April 1954 ECOSOC decided by resolution 526 A (XVII) that a second conference of plenipotentiaries should be convened to revise the draft Protocol relating to the Status of Stateless Persons in light of the observations made on it by Governments and in light of the provisions of the 1951 Refugee Convention. A Conference of Plenipotentiaries on the Status of Stateless Persons was duly convened in September 1954, leading to the adoption of the Convention – rather than a Protocol – relating to the Status of Stateless Persons.

The 1954 Statelessness Convention sets out the definition of a stateless person and specifies the treatment to be accorded to stateless persons by Contracting States.<sup>45</sup> The standard of treatment required was much lower than had been proposed by the International Law Commission with regard to “present statelessness” and is essentially the same as that required for refugees under the 1951 Refugee Convention.<sup>46</sup> The Refugee Convention is however more favourable than the Statelessness Convention in certain respects, most notably because of its prohibition against *refoulement* and its requirement of non-penalization for illegal entry or presence of refugees coming directly from a territory where their life or freedom is threatened.<sup>47</sup> A stateless person who is a refugee should be treated as such.

Unlike the 1951 Refugee Convention, the 1954 Statelessness Convention does not provide that Contracting States shall facilitate supervision by UNHCR of the application of its provisions. Carol Batchelor has written that “there is every indication this was an

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<sup>43</sup> *Ibid.*, pp. 143 - 147.

<sup>44</sup> *Ibid.*, p. 147, para. 34.

<sup>45</sup> For an article-by-article analysis of the 1954 Convention, see “Convention relating to the Status of Stateless Persons: Its History and Interpretation: A Commentary by Nehemiah Robinson”, Institute of Jewish Affairs, 1955, republished by UNHCR in 1997. For a more succinct overview, see Paul Weis, “Convention relating to the Status of Stateless Persons”, *International and Comparative Law Quarterly*, Vol. 10, 1961, pp. 255-264.

<sup>46</sup> The UN Secretary-General drew the attention of the Conference to the suggestions of the International Law Commission on present statelessness, but the Conference did not pursue them. See United Nations Conference of Plenipotentiaries on the Status of Stateless Persons, “Work of the International Law Commission on the Problem of Present Statelessness: Note by the Secretary-General”, E/CONF.17/4, 26 August 1954.

<sup>47</sup> See 1951 Convention, articles 33 and 31 respectively. There are also certain other respects in which the 1951 Convention is more favourable than the 1954 Convention: see, for example, articles 15 and 17 of both Conventions regarding the right of association and wage-earning employment.



oversight”.<sup>48</sup> However, this is not really correct. Although in 1949 the UN Secretary-General had recommended that ECOSOC “recognize the necessity of providing at an appropriate time permanent international machinery for ensuring the protection of stateless persons” (see section 1.2 above), neither ECOSOC nor the UN General Assembly ever adopted a resolution to this effect. When the UN General Assembly adopted UNHCR’s Statute in 1950, it extended the High Commissioner’s competence only to refugees, not to stateless persons who are not refugees.<sup>49</sup> Hence, the true obstacles to providing in the 1954 Convention for a duty of cooperation by Contracting States with a supervisory body were not procedural or time constraints, but rather were due to the fact that the UN General Assembly had not created a body for the protection of stateless persons in the first place. It therefore made perfect sense that, as noted by the UN Secretary-General prior to the start of the Conference of Plenipotentiaries on the Status of Stateless Persons, the draft Protocol relating to the Status of Stateless Persons excluded application of the provisions on supervisory responsibility in Article 35 of the 1951 Convention *mutatis mutandis* to stateless persons, and that no Government had proposed otherwise when asked to review the text of the draft Protocol and of the 1951 Convention before the Conference.<sup>50</sup> The origins of UNHCR’s current mandate for the protection of non-refugee stateless persons are relatively recent, dating back only to the late 1980’s.<sup>51</sup>

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<sup>48</sup> Carol A. Batchelor, “UNHCR and Issues Related to Nationality”, *Refugee Survey Quarterly*, Vol. 14, No. 3, 1995, at p. 92. Batchelor argues the point in greater detail by reference to the *travaux préparatoires* of the 1954 Convention in “Stateless Persons: Some Gaps in International Protection”, *International Journal of Refugee Law*, Vol. 7, 1995 at pp. 245 – 247. According to Batchelor in the latter article: “Governments were not asked to comment upon a possible article 35 [per the 1951 Convention] and there was, therefore, nothing upon which the Conference of Plenipotentiaries could base a discussion.” This is incorrect, since UN General Assembly resolution 629 (VII) of 1952 had requested the UN Secretary-General “to communicate the provisions of the draft protocol [relating to the status of stateless persons] to all the governments invited to the United Nations Conference on the Status of Refugees and Stateless Persons held at Geneva in July 1951, with a request for their comments, in particular on those provisions of the Convention relating to the Status of Refugees which they would be prepared to apply to the various categories of stateless persons”. Batchelor additionally states: “as the *Ad hoc* Committee had not made provisions for a supervisory body in its *mutatis mutandis* version [of the draft Protocol relating to the Status of Stateless Persons], no discussion took place [at the Conference of Plenipotentiaries on the Status of Stateless Persons] on a possible ‘article 35 body’ for inclusion *mutatis mutandis* in the 1954 Convention.” This implies that the Conference only discussed provisions that were included in the draft Protocol, which is again incorrect since the Conference actually discussed and included in the 1954 Convention certain provisions from the 1951 Convention that the *Ad hoc* Committee had not included in the draft Protocol, e.g. Articles 8 and 9 of the 1954 Convention.

<sup>49</sup> UN General Assembly resolution 428 (V) of 14 December 1950 on “Statute of the Office of the United Nations High Commissioner for Refugees”. See also UN General Assembly resolution 319 (V) of 3 December 1949 on “Refugees and Stateless Persons”. The latter resolution took into account the UN Secretary-General’s 1949 *Study of Statelessness*, but requested the Secretary-General and ECOSOC only to prepare draft provisions for the functioning of the High Commissioner’s Office for Refugees, not for the functioning of a High Commissioner’s Office for Refugees and Stateless Persons.

<sup>50</sup> ECOSOC, United Nations Conference of Plenipotentiaries on the Status of Stateless Persons, “The Draft Protocol relating to the Status of Stateless Persons: Memorandum by the Secretary-General”, para. 64 (which must be read in the light of para. 30 of the Memorandum). Para. 64 states: “the draft protocol does not provide for [the application of Article 35 of the 1951 Refugee Convention], *mutatis mutandis*, to stateless persons.” Para. 30 explains that the observations of Governments are only noted in the Memorandum when: (i) a Government was not in favour of applying, or had a reservation, one of the provisions in the draft Protocol; or (ii) a Government had proposed including a provision from the 1951 Convention that had not been included in the draft Protocol. Note that the UK proposal referred to in footnote 48 above was not made directly in response to the Memorandum, but was made during the Conference itself.

<sup>51</sup> See Introduction above.

The Conference of Plenipotentiaries on the Status of Stateless Persons spent a considerable amount of time discussing who should be considered stateless for purposes of the Statelessness Convention. Issues included:

- Whether the Convention should only apply to persons becoming stateless as a result of events occurring before 1 January 1951;<sup>52</sup>
- Whether the Convention should exclude persons already covered by the 1951 Convention relating to the Status of Refugees;<sup>53</sup>
- Whether the Convention's definition of stateless persons should explicitly include persons whose nationality status is indeterminate (for example because the country with which such persons have links declines to reply to inquiries whether they are its nationals);<sup>54</sup>
- Whether the Convention should apply to *de facto* stateless persons as well as to *de jure* stateless persons, and if so, how broadly *de facto* stateless persons should be defined for purposes of the Convention.

Ultimately all four questions were answered in the negative, and the final definition of stateless persons for purposes of the Convention encompassed only “persons not considered as a national by any State under the operation of its law”,<sup>55</sup> whom the Conference referred to as *de jure* stateless. However, reference to *de facto* stateless persons was not dropped altogether since the Conference recommended in its Final Act 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; and [...] further that, in cases where the State in whose territory the person resides has decided to accord the treatment referred to above, other Contracting States also accord him the treatment provided for by the Convention.

UNHCR has made a number of statements about this recommendation that are not entirely accurate. For example, according to *Nationality and Statelessness: A Handbook for Parliamentarians*:

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<sup>52</sup> See United Kingdom proposal in E/CONF.17/L.1 and Australian proposal in E/CONF.17/L.2. The proposals are discussed E/CONF.17/SR.2, E/CONF.17/SR.3 and E/CONF.17/SR.4.

<sup>53</sup> See United Kingdom proposal, E/CONF.17/L.1: “Article 1: For the purpose of this Protocol the term ‘stateless persons’ means persons who are not considered as nationals by any State according to its law. Article 2: 1. This Protocol shall apply to stateless persons who are not refugees within the meaning of Article 1 of the Convention [relating to the Status of Refugees]. This Protocol shall not apply to stateless persons coming within the terms of Sections D, E or F of Article 1 of the Convention.” See also the later proposals of the United Kingdom at E/CONF.17/L.21 and E/CONF.17/L.21/Rev.1, by which time it had provisionally been agreed by the Conference to include *de facto* stateless persons as well as *de jure* stateless persons in the Convention's definition of a stateless person. As the United Kingdom representative explained at E/CONF.17/SR.13, pp. 13 - 14, under these latter proposals the exclusion of refugees from the Statelessness Convention would only apply to 1951 Convention refugees who are *de facto* stateless, not to 1951 refugees who are *de jure* stateless. Thus, the Convention would cover all *de jure* stateless persons, and also *de facto* stateless persons who are not 1951 Convention refugees. Note, however, that this does not necessarily mean that the United Kingdom representative considered that some *de facto* stateless persons are not refugees, since the 1951 Convention only covers persons who are refugees as a result of events occurring before 1951. It was not until the entry into force of the 1967 Protocol relating to the Status of Refugees that this limitation in time in the definition of a refugee was eliminated.

<sup>54</sup> See also discussion in section 7 below.

<sup>55</sup> Article 1(1), 1954 Convention relating to the Status of Stateless Persons.

Although the [1954] Convention's drafters felt it was necessary to make the distinction between *de jure* stateless persons (those who have not received nationality automatically or through an individual decision under the operation of any State's laws) and *de facto* stateless persons (those who cannot establish their nationality), they did recognize the similarity of their positions. The Final Act of the Convention addresses the issue of *de facto* stateless persons ...<sup>56</sup>

Not only is it incorrect to equate "persons who cannot establish their nationality" with the reference in the recommendation to "persons renouncing the protection of the State of which they are nationals", the Conference actually discussed the problem of persons of indeterminate nationality not as one of *de facto* statelessness but as a separate issue.<sup>57</sup>

Also problematic is that a number of pronouncements made by UNHCR suggest that the recommendation in the Conference's Final Act applies to *de facto* stateless persons generally. For example, in a second passage in the *Handbook for Parliamentarians*, UNHCR says "[t]his recommendation was included on behalf of *de facto* stateless persons who, technically, still hold a nationality but do not receive any of the benefits generally associated with nationality, notably national protection."<sup>58</sup> Similarly, according to UNHCR's *Guidelines on Field Office Activities Concerning Statelessness*, "[t]he Final Acts of both the 1954 and 1961 Conventions recommend to Contracting States that persons who are stateless *de facto* (who have a nationality in name which is not effective) should as far as possible be treated as stateless *de jure*".<sup>59</sup>

However, it is clear that the recommendation in the Conference's Final Act does not cover *all* persons lacking the protection of their State of nationality, but only those persons who have renounced that protection and whose reasons for doing so are considered valid by the foreign State concerned.<sup>60</sup> At a point when the Conference was still considering including *de facto* stateless persons within the Convention's definition of a stateless person, the United Kingdom had in fact sought to broaden the scope of the definition that had provisionally been agreed upon so as to include not only persons who are *de facto* stateless because they have renounced the protection of their State of nationality, but also persons who are *de facto* stateless because they have been "refused" or "deprived" of such protection.<sup>61</sup> The Conference did not agree with the proposal, and when *de facto* stateless persons were moved out of the provisional definition of a stateless person into the recommendation contained in the Conference's Final Act, the Conference agreed to a proposal from Denmark that the

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<sup>56</sup> UNHCR and Inter-Parliamentary Union, "Nationality and Statelessness: A Handbook for Parliamentarians", 2005, p. 11.

<sup>57</sup> See discussion in section 7 below.

<sup>58</sup> UNHCR and Inter-Parliamentary Union, "Nationality and Statelessness: A Handbook for Parliamentarians", *op. cit.*, p. 25.

<sup>59</sup> UNHCR, "Guidelines: Field Office Activities Concerning Statelessness", IOM/66/98 – FOM/70/98, 28 September 1998, p. 4, para. 9.

<sup>60</sup> See Paul Weis, "The Convention relating to the Status of Stateless Persons", *op. cit.* at p. 262: "In order to include *de facto* stateless persons, this recommendation seems incomplete, as it refers only to persons who have renounced the protection of the State of their nationality, and does not mention persons who have been refused protection by the State of their nationality."

<sup>61</sup> See the United Kingdom proposal in E/CONF.17/L.21 and the ensuing discussion in E/CONF.17/SR.13 at pp. 5 - 16, and also the revised United Kingdom proposal in E/CONF.17/L.21/Rev.1 and the discussion in E/CONF.17/SR.14 at pp. 1 - 10 which led to the final rejection of the proposal that *de facto* stateless persons be included within the Convention definition of a stateless person.

recommendation should refer only to persons who renounce the protection of their State of nationality.<sup>62</sup>

For renunciation of the protection of the State of nationality to bring a person within the scope of the recommendation, the renunciation has to be for reasons that are recognized as valid by the Contracting State concerned. This introduces an element of subjectivity into the assessment, since what is considered as a valid reason by one State may not be considered as valid by another.<sup>63</sup> Reasons put to the Conference as not being valid are those of personal convenience, or whereby the individual concerned seeks to avoid all obligations to his or her State of nationality.<sup>64</sup> In fact the Conference identified only one reason that it did consider valid – that is, if the individual concerned is a refugee, i.e. is outside his or her State of nationality and is unwilling to avail himself or herself of the protection of that State owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.<sup>65</sup>

Given that the Refugee Convention had already been adopted three years earlier, this begs the question as to why there was even any discussion at the Conference about whether to include persons who renounce the protection of their State of nationality in the recommendation in its Final Act, let alone on whether to include them in the definition of a stateless person in the Statelessness Convention itself. The answer is that discussions on this point were largely driven by the concern and insistence of the Belgian delegate that only refugees who were *de jure* stateless would otherwise be covered by the Statelessness Convention. He thought that some States might become a party to the Statelessness Convention without also becoming a party to the Refugee Convention, and therefore that the Statelessness Convention should additionally provide for the protection of *de facto* stateless refugees in order to avoid a

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<sup>62</sup> See Danish proposal in E/CONF.17/L.25. Norway had proposed that the recommendation in the Final Act also include persons deprived of the protection of their State of nationality (E/CONF.17/SR.14 at p.4), but this proposal was not adopted.

<sup>63</sup> This element of subjectivity was one of the reasons why the Conference did not agree to the inclusion of *de facto* stateless persons within the Convention's definition of a stateless person. See, for example, the remarks of the delegate of Yugoslavia, E/CONF.17/SR.10 at p. 11: "The idea of recognizing as a stateless person a person who invoked reasons recognized as a valid by the State in which he was a resident could not be accepted. The criteria for validity would vary greatly from State to State, and the State of origin would have no say in the matter. The idea might be incorporated in the final act as a *voeu*; if embodied in the instrument it would open the way to widespread abuse."

<sup>64</sup> Note in particular the following comments of the delegates of Yugoslavia and Belgium: "... *de facto* stateless persons who refused to claim the nationality of a State and sought to enjoy the status of stateless persons in their State of residence as a means of avoiding all obligations towards that State should be excluded" (Yugoslavia, E/CONF.17/SR.3, p. 13); "If persons became [*de facto*] stateless for political reasons, they should be treated as refugees; if they renounced their nationality for personal convenience, they were not entitled to special protection" (E/CONF.17/SR.10, p. 11); "Care should be taken ... to exclude *non bona fide* [*de facto*] stateless persons, those who renounced their nationality for personal reasons, sometimes somewhat shady ones" (Belgium, E/CONF.17/SR.4, p. 3). The Belgian delegate later added the clarification that "the main point was not renunciation of nationality but protection" (E/CONF.17/SR.10, p. 13).

<sup>65</sup> Note that according to the definition given in Article 1A(2) of the 1951 Convention refugees include not only persons with a well-founded fear of being persecuted who are *unwilling* to avail themselves of the protection of the country of their nationality, but also persons with a well-founded fear of being persecuted who are *unable* to avail themselves of such protection. The latter category of refugees would appear not to be covered by the recommendation in the Final Act of the 1954 Convention, since renunciation of protection arguably stems from an unwillingness to accept protection, not from an inability to obtain protection.

protection gap.<sup>66</sup> He therefore proposed that persons renouncing the protection of their State of nationality for reasons considered to be valid be included in the Convention definition of statelessness on an equal footing with *de jure* stateless persons.<sup>67</sup> However, this proposal was not accepted and instead the Conference provisionally agreed that Contracting States should be permitted to treat such persons as stateless under the Convention if they so wished, without actually being required to do so.<sup>68</sup> But even this created problems for many delegates – because, for example, of uncertainty about whether a decision by one Contracting State to treat such a person as stateless would be binding upon other Contracting States<sup>69</sup> – and so the recommendation in the Final Act ended up being adopted as a highly diluted compromise, with no legally binding effect.<sup>70</sup>

Fortunately, this compromise would seem to be of little or no concern today. Leaving aside the fact that the purpose of the Conference was not to create a new instrument for the protection of refugees, the Belgian delegate's fears have proven to be unfounded and the problem is actually the other way around: States have been far more reticent about acceding to the 1954 Convention than to the 1951 Convention and its 1967 Protocol. As of March 2010 there were only 65 States Parties to the 1954 Convention, compared to 147 States Parties to the 1951 Convention and/or the 1967 Protocol.<sup>71</sup> Only two States were party to the 1954 Convention without also being party to the 1951 Convention or 1967 Protocol.<sup>72</sup>

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<sup>66</sup> See the argument of the Belgian delegate that the inclusion of *de facto* stateless persons “would ensure that *bona fide* refugees in countries which had not signed the 1951 Convention would not receive less protection than stateless persons in countries which signed the instrument under discussion” (E/CONF.17/SR.10, p. 11). See also the Belgian delegate's comments in E/CONF.17/SR.14 at p. 6: “If it were made impossible to extend the provisions of the [Statelessness] Convention to *de facto* stateless persons, he wondered what would be the position of a *bona fide* refugee in a country which had not ratified the Convention relating to the Status of Refugees but ratified the Convention on stateless persons. Such a person would obviously benefit by neither convention, and would be in a more unfavourable position than a mere stateless person, whose statelessness might in some cases be voluntary. He did not think that the Conference could justifiably refuse all protection to such refugees and make veritable pariahs out of them.” However, certain other delegates strongly opposed this proposal, believing that it would result in fewer States becoming party to the Convention, or in reservations being made to the definition of a stateless person.

<sup>67</sup> See Belgian proposal in E/CONF.17/L.3: “For the purposes of the present Protocol, the term ‘Stateless Persons’ shall designate persons who are not considered as its nationals by any State according to its law or who invoke reasons recognized as valid by the State in which they are resident for renouncing the protection of the country of which they are nationals.”

<sup>68</sup> The following definition of a stateless person was adopted by the Conference at first reading, E/CONF.17/L.11/Add.2: “1. For the purpose of this Protocol (Convention) the term ‘stateless person’ means a person who is not considered as a national by any State under the operation of its law. 2. Nothing in this Protocol (Convention) shall be construed to mean that its provisions cannot be made applicable to any person living outside his own country who, for reasons recognized as valid by the State in which he is a resident, has renounced the protection of the State of which he is, or was, a national ...” The Style Committee subsequently proposed changing the text of the second paragraph of the definition to: “2. Nothing in this Convention shall prevent any State from applying the provisions thereof to any person residing in its territory who, for reasons recognized as valid by that State, has renounced the protection of the State of which he is a national” (E/CONF.17/L.11/Add.2).

<sup>69</sup> See, for example, the President's summary of the issues in E/CONF.17/SR.13, pp. 9 - 12 and E/CONF.17/SR.14, pp. 2 - 3.

<sup>70</sup> This was much to the exasperation of the Belgian delegate, who said “everyone knew that, while contracting States tried to carry out the actual provisions of an instrument, they did not pay much attention to the recommendations in the final act. In that matter the example of the Convention relating to the Status of Refugees was conclusive” (E/CONF.17/SR.14, p. 6).

<sup>71</sup> Had the Belgian delegate's initial proposal been adopted it would in some ways not have gone as far as the 1951 Convention, since, unlike the refugee definition in the 1951 Convention, it would have excluded persons who are willing but unable to avail themselves of the protection of their State of nationality (see footnote 65 above). On the other hand, in other ways it would have gone further, since it did not contain a

Moreover, the problems that the recommendation in the Statelessness Conference's Final Act were seeking to address are more comprehensively dealt with under the 1951 Convention and 1967 Protocol than under the 1954 Convention, given that the former two instruments provide a greater degree of protection to refugees than the latter instrument does to stateless persons.<sup>73</sup> It follows that the recommendation is of no practical relevance today unless it can be argued that there is a category of persons other than refugees who could be considered to have valid reasons for renouncing the protection of the State of their nationality which would justify them being treated as stateless by other States. Certainly, individuals who are not refugees may have many different reasons for renouncing protection: for example, some may wish to avoid military or civil service, others may repudiate the country of their nationality owing to a profound disagreement with the political *status quo* in that country without a concomitant risk of persecution, still others may be trying to avoid criminal prosecution, and yet others may wish to sever relations with the country of their nationality in order to try to establish a new life under more favourable conditions in another country.<sup>74</sup> However, assuming that the persons concerned genuinely do not have a well-founded fear of persecution, these are hardly the sorts of reasons that States in today's world would be likely to regard as valid for purposes of implementing the recommendation in the Final Act.

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limitation in time whereby only persons renouncing the protection of the State of their nationality as a result of events occurring before 1951 would be included. However, the former point is now academic because of the large number of accessions to the 1951 Convention, and the second point is also academic because the 1967 Protocol removes the date limitation in the 1951 Convention.

<sup>72</sup> Kiribati and Libyan Arab Jamahiriya (UN Treaty Collection: <http://treaties.un.org/>).

<sup>73</sup> Note that the Statelessness Conference also unanimously adopted the following resolution in its Final Act, again with an eye to the protection of refugees:

“The Conference,

*Being of the opinion* that Article 33 of the Convention relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion,

*Has not found it necessary* to include in the Convention Relating to the Status of Stateless Persons an equivalent to Article 33 of the of the Convention relating to the Status of Refugees of 1951.”

<sup>74</sup> Note that the Recommendation in the Final Act of the Statelessness Conference contains echoes of the Constitution of the International Refugee Organization (IRO), Section C of Part I of Annex I of which provided that “persons will become the concern of the Organization ... if they have ... expressed valid objections to returning to [their countries of nationality or former habitual residence.]” Annex I to the IRO's Constitution went on to provide that the following were considered valid objections: “(i) Persecution, or fear, based on reasonable grounds of persecution because of race, religion, nationality or political opinions ... (ii) Objections of a political nature judged by the Organization to be ‘valid’ as contemplated in paragraph 8(a) of the Report of the Third Committee of the General Assembly as adopted by the Assembly on 12 February 1946. (iii) ... compelling family reasons arising out of previous persecution or compelling reasons of infirmity or illness.” According to the IRO's Manual for Eligibility Officers, p. 22, para. 11: “It is valid objections which enable a distinction to be drawn between refugees proper and simple migrants. The judgment of the validity of expressed objections is at once the most crucial and the most difficult point in determining whether an individual is in the Mandate or not.” After cautioning about that expressed objections should not always necessarily be taken at face value, because the underlying reality may be more complex, the IRO Manual went on to say at pp. 23 to 24 that “[t]here is a colossal list of objections that are expressed but are not valid”, including, for example: “bad conditions at home”, “bright hopes in the western world”, “lack of housing”, “uncertainty of work in somewhat specialised occupations”, “family feuds and quarrels”, “the desire to join a relation abroad or not to rejoin one's family at home”, “fear of punishment [that is not related to persecution]”, etc.

Whether there might be any other reasons that States could or should consider as valid is a question that is returned to in Part II <sup>75</sup> and Part III <sup>76</sup> below.

Contrary to what UNHCR has said, the Conference did not necessarily consider that all *de facto* stateless persons are refugees.<sup>77</sup> In particular, as stated by the President of the Conference:

It had been said that the provisions of the Convention relating to the status of stateless persons should not be applicable to *de facto* stateless persons, because most of them were refugees. That analogy should not be carried too far, for there were cases in which a person who could not in any way be regarded as a refugee might for various reasons be deprived of the protection of the state of which he was legally a national. It was easy to imagine, for example, the case of a person who, while abroad, was refused an extension of his passport by the consular authorities of the country of which he was a national and was instructed to return to that country. If that person, for reasons other than the fear of persecution or the like, did not return to his country he was henceforth deprived of the protection of the diplomatic and consular authorities of his country and thus became a *de facto* stateless person, although that did not make it possible to regard him as a refugee. Such cases were not rare, hence it was natural that States should be given the possibility of extending the Convention's provisions to *de facto* stateless persons ...  
<sup>78</sup>

Even if the persons to whom the President was referring should indeed be considered to be *de facto* stateless – which although they are unprotected in their host State would seem debatable if they are able to return to their State of nationality<sup>79</sup> – they are not covered by the recommendation in the Final Act since they have not renounced the protection of their State of nationality but have been refused it. The same would also be true of any other categories of persons who are refused or otherwise unable to obtain the protection of the State of their nationality.

### 3. THE 1961 CONVENTION ON THE REDUCTION OF STATELESSNESS

In December 1954, the UN General Assembly adopted resolution 896 (IX) on the Elimination or Reduction of Future Statelessness. The resolution noted the work of the International Law Commission in producing draft Conventions on the Elimination and Reduction of Future Statelessness and expressed the General Assembly's desire that an international conference of plenipotentiaries be convened to conclude a convention for the reduction or elimination of future statelessness as soon as at least twenty States had communicated to the Secretary-General their willingness to cooperate in such a conference. It took until March 1959 for the Conference on the Elimination or Reduction of Future Statelessness to be convened in Geneva, but the Conference did not manage to complete its work in time owing to the complexity of the issues under discussion, in particular the differences of approach towards nationality problems by different States. The Conference therefore had to be reconvened to

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<sup>75</sup> See section 7 below at p. 59.

<sup>76</sup> See section 1011.3 below.

<sup>77</sup> See, for example: (i) UNHCR and the Inter-Parliamentary Union, "Nationality and Statelessness: A Handbook for Parliamentarians", *op. cit.*, p.12: "The drafters of the 1954 Convention presumed that all persons without an effective nationality – that is, all *de facto* stateless persons, were refugees"; (ii) UNHCR, "Training Package: Statelessness and Related Nationality Issues", 1996 (revised 1998), p. 7, para. 14: "The drafters [of the 1954 Convention] 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 refugees."

<sup>78</sup> E/CONF.17/SR.13, p. 10.

<sup>79</sup> See further section 10 below.

complete its work in New York in August 1961, the result of which was the 1961 Convention on the Reduction of Statelessness.<sup>80</sup>

Broadly speaking, the 1961 Convention establishes a set of rules according to which a person is entitled to acquire the nationality of a Contracting State, or not to be deprived of the nationality of a Contracting State, if he or she would otherwise be stateless. The rules with regard to the acquisition of nationality strike a balance between the obligations to be undertaken by *jus soli* and *jus sanguinis* countries: persons who would otherwise be stateless should acquire nationality through the subsidiary application of *jus soli* in *jus sanguinis* countries and, where this would not lead to acquisition of nationality, by the application of *jus sanguinis* by *jus soli* countries.<sup>81</sup> Thus, acquisition of the nationality of a Contracting State by a person who would otherwise be stateless requires a link by birth or descent with the State concerned.

The 1961 Convention itself does not define the term “stateless”. However, Resolution No. I of the Final Act of the Conference that drew up the Convention recommends 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.

This implies that the Convention is legally binding with respect to *de jure* statelessness only. The Resolution was introduced as a humanitarian measure by Belgium, with the strong support of UNHCR, both of whom were primarily concerned with ensuring that the children of refugees should be able to acquire the nationality of the country of refuge. As Dr. Paul Weis said at the Conference on behalf of UNHCR:

The scope of the provisions of the Convention [...] was not clearly defined, since their application depended on the fact that the persons concerned would otherwise be stateless. Very often it was difficult to determine a person’s nationality or lack of nationality. Similarly, the distinction between persons who were stateless *de jure* and those who were stateless *de facto* was hard to determine. The international instruments relating to refugees, be it the Statute of the Office of the United Nations High Commissioner for Refugees or the Convention relating to the Statute of Refugees, did not distinguish between those who were considered *de jure* or *de facto* stateless.

To enable the refugees within the competence of the United Nations High Commissioner and, particularly, those refugees’ children, to benefit from the provisions of the Convention, it was desirable that the term “statelessness” should be interpreted as broadly as possible and, consequently, that persons who were stateless *de facto* should be regarded as stateless *de jure*.

That was why the Office of the United Nations High Commissioner, prompted by the desire that the application of the Convention should enable as many persons as possible to acquire an effective nationality, was very anxious to see the Conference support the draft resolution which had been submitted to it.<sup>82</sup>

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<sup>80</sup> For a summary of the drafting history of the 1961 Convention, see Paul Weis, “The United Nations Convention on the Reduction of Statelessness, 1961”, *International and Comparative Law Quarterly*, Vol. 11 October 1962, pp. 1073 – 1096.

<sup>81</sup> Paul Weis, “The United Nations Convention on the Reduction of Statelessness, 1961”, *International and Comparative Law Quarterly*, Vol. 11 October 1962, p. 1082.

<sup>82</sup> Summary Record of the Conference’s Twenty-Third Plenary Meeting on 25 August 1961, A/CONF.9/SR.23, pp. 13 - 4. See also A/CONF.9/11, “Observations transmitted by the United Nations High Commissioner for Refugees”, 30 June 1961, para. 7: “The United Nations High Commissioner hopes that persons who are refugees within his mandate and who are *de jure* or *de facto* stateless, as well as persons who derive their nationality from such persons, will be enabled to benefit equally from the provisions of the Convention on the Reduction of Future Statelessness.”



The Conference did not define the term “*de facto* stateless”, although it can be inferred from the language of the Resolution in the Final Act that *de facto* stateless persons have a nationality that is “ineffective”. It should be noted also that the Executive Secretary of the Conference referred to the definition of *de facto* statelessness given in the *Study of Statelessness*,<sup>83</sup> and the Chairman of the Conference simply said that *de facto* statelessness arose “in most cases from a decision by the person concerned that he no longer wished to seek the assistance of the country whose nationality he possessed”.<sup>84</sup> The delegate of Belgium said in introducing the draft Resolution that it was “intended to draw ... attention ... to the case of persons who were not *de jure* stateless, but who no longer enjoyed the protection of the country whose nationality they nominally possessed.”<sup>85</sup> Paul Weis also wrote in his private capacity in 1962 that a *de facto* stateless person

is normally regarded as a person who does possess a nationality, but does not possess the protection of his State of nationality and who resides outside the territory of that State, i.e. a person whose nationality is ineffective.<sup>86</sup>

The Conference records suggest that the delegates were principally concerned about the situation of *de facto* stateless persons who are refugees.<sup>87</sup> However, the Belgian delegate also gave the example of a Belgian woman who married a *de facto* stateless refugee, saying that:

In such cases, the husband was regarded as stateless *de jure*, in order to allow the wife to retain her Belgian nationality.<sup>88</sup>

and

Belgian legislation took account of the status of a person who was stateless *de facto*. Thus, a Belgian woman who would normally have acquired her husband’s nationality, retained Belgian nationality on marrying a person regarded as a refugee, because the view of the authorities was that otherwise she would have no effective nationality.<sup>89</sup>

One delegate, that of the United Kingdom, may also have had a broader category of persons in mind when he said:

cases of de facto statelessness were both numerous and diverse and difficult to establish. The Convention dealt with the rights, strictly speaking, of easily identifiable persons. However much one might wish to ensure that as many persons as possible should acquire effective nationality, he doubted whether the detailed provisions of the Convention, even when given a generous interpretation, could be applied in the case of persons who were stateless de facto. No one could say at a person’s birth whether or not he would enjoy the protection of his government in later years. It was also conceivable that a person having dual nationality lost one nationality without it being known whether he would be refused

<sup>83</sup> As noted in section 1.2 above, the *Study of Statelessness* defines *de facto* stateless persons as: “persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.”

<sup>84</sup> A/CONF.9/C.1/SR.19, p. 9.

<sup>85</sup> *Ibid.*, p. 8.

<sup>86</sup> Paul Weis, “The United Nations Convention on the Reduction of Statelessness, 1961”, *op. cit.*, p. 1086.

<sup>87</sup> For the full discussion on *de facto* statelessness by the Conference see: A/CONF.9/L.48, “Belgium: Draft Resolution”, 13 April 1959; A/CONF.9/11, “Observations transmitted by the United Nations High Commissioner for Refugees”, 30 June 1961, para.’s 5-7; A/CONF.9/C.1/SR.19, 24 April 1961, pp. 8-10; A/CONF.9/SR.23, pp. 12-14.

<sup>88</sup> A/CONF.9/C.1/SR.19, p. 8.

<sup>89</sup> A/CONF.9/SR.23, p. 13.

the benefits of the other; in such a case it was a moot point whether article 7 or article 8 was to be applied. Another hypothetical case was that of a child who was protected at birth by the State whose national he was but who could find himself deprived of that protection at the age of ten and regain it at the age of eighteen. How could the provisions of articles 1 and 4 be applied to him? In view of that multiplicity of difficulties, he feared that, although the circumstances of persons who were stateless de facto were a matter of greatest concern, the terms of the proposed resolution were inappropriate in relation to the Convention.<sup>90</sup>

Following the abovementioned intervention by Paul Weis on behalf of UNHCR, the United Kingdom delegate nevertheless said at the Conference's next meeting:

recalling the doubts he had expressed at the preceding meeting concerning the appropriateness of the terms of the draft resolution, [he] nevertheless emphasized the United Kingdom's sympathy for those unfortunate persons who were without an effective nationality. His delegation would vote in favour of the draft resolution, on the understanding that it constituted a general exhortation to States to do what they could to assist de facto stateless persons.<sup>91</sup>

As far as the acquisition of an effective nationality is concerned, applying the Resolution of the Final Act would broadly speaking require that:

- A Contracting State should grant nationality at birth, or subsequently by application within a specified period of time, to a child born in its territory who by *jus sanguinis* has acquired the ineffective nationality of another State;<sup>92</sup>
- A Contracting State should grant nationality at birth, or subsequently by application within a specified period of time, to a child not born in the territory of a Contracting State, who has acquired by *jus sanguinis* or *jus soli* the ineffective nationality of another State, assuming that one of the parents of the child is a national of the Contracting State.<sup>93</sup>

Even though the Resolution was adopted by a large majority (17 votes to 1, with 8 abstentions), many of the Conference delegates who voted in favour of it did so merely as a humanitarian gesture, while remaining sceptical about its practical utility. For example, the Federal Republic of Germany considered that it was "in substance, a repetition of [Article 34 of the 1951 Convention], and it would be unwise for the Committee to adopt it".<sup>94</sup> Article 34 of the 1951 Refugee Convention provides:

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. 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.<sup>95</sup>

When confronted with this objection, Belgium replied exactly as it had done when defending the Recommendation in the Final Act of the 1954 Statelessness Convention: it pointed out that not all States participating in the Conference for the 1961 Convention were signatories of the Refugee Convention, thereby implying that there was a risk of refugees falling into a

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<sup>90</sup> A/CONF.9/SR.23, pp. 12 – 13.

<sup>91</sup> A/CONF.9/SR.24, p. 1.

<sup>92</sup> Article 1 of the 1961 Statelessness Convention, as applied to *de facto* stateless persons.

<sup>93</sup> Article 4 of the 1961 Statelessness Convention, as applied to *de facto* stateless persons.

<sup>94</sup> See comment of the Federal Republic of Germany: "The ... draft resolution was, in substance, a repetition of that article, and it would be unwise for the Committee to adopt it" (A/CONF.9/C.1/SR.19, p. 8).

<sup>95</sup> A similar provision is contained in Article 32 of the 1954 Statelessness Convention.

protection gap with respect to the acquisition of an effective nationality.<sup>96</sup> Nevertheless, just as with the 1954 Convention, subsequent events have proven Belgium's concerns unfounded: whereas as of March 2010 there were only 37 States Parties to the 1961 Convention, there were 147 States Parties to the 1951 Refugee Convention and/or its 1967 Protocol. Only two States were party to the 1961 Convention without also being party to the 1951 Convention or 1967 Protocol.<sup>97</sup>

Lastly, it should be noted that in 1974, in readiness for the entry into force of the 1961 Convention in 1975, the UN General Assembly provisionally designated UNHCR as the body to which, in accordance with Article 11 of the Convention, "a person claiming the benefit of the Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority."<sup>98</sup> In 1976, the General Assembly confirmed that decision in the light of experience of one year's implementation of the 1961 Convention and requested UNHCR "to continue to perform these functions."<sup>99</sup> Given the Resolution in the Conference's Final Act, UNHCR arguably therefore has the mandate to assist *de facto* stateless persons as well as *de jure* stateless persons in presenting their claims to the appropriate authority – although this does not mean of course that the authority concerned would therefore be bound to apply the Convention to persons who are, or would otherwise be, *de facto* stateless.

#### 4. CONCLUSIONS OF PART I

According to the "traditional" view of *de facto* statelessness described above, *de facto* stateless persons are by definition outside the State of their nationality and lacking in that State's protection. The protection in question is diplomatic and consular protection and assistance, i.e. "external protection" vis-à-vis the host State, not "internal protection" within the territory of the State of nationality.<sup>100</sup> In other words, *de facto* stateless persons have a nationality in name, but their nationality is ineffective because they are unprotected by the State of their nationality.<sup>101</sup>

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<sup>96</sup> Although Article 34 stops short of providing a right to naturalization, it is legally binding, is of benefit to all refugees instead of only to the children of refugees, and does not necessarily require a link by birth or descent to the country of refuge for purposes of acquisition of nationality.

<sup>97</sup> Kiribati and Libyan Arab Jamahiriya (UN Treaty Collection: <http://treaties.un.org>).

<sup>98</sup> UN General Assembly resolution 3274 (XXIX) of 1974 on "Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply".

<sup>99</sup> UN General Assembly resolution 31/36 of 1976 on "Question of the establishment, in accordance with the Convention on the Reduction of Statelessness, of a body to which persons claiming the benefit of the Convention may apply".

<sup>100</sup> For a fuller discussion of the distinction between "external protection" and "internal protection", see Antonio Fortin, "The Meaning of 'Protection' in the Refugee Definition", *International Journal of Refugee Law*, Vol. 12, No. 4, 2000, pp. 548 – 576.

<sup>101</sup> See also, for example, UNHCR, UNHCR, "Training Package: Statelessness and Related Nationality Issues", *op. cit.*, p. 9: "*De facto* statelessness refers to those who have a nationality in name but who do not have national protection"; UNHCR, "Guidelines: Field Office Activities Concerning Statelessness", *op. cit.*, p. 4, para. 9: "people who are stateless *de facto* (who have a nationality in name which is not effective)".

## PART II: SHIFTING PARADIGM OF *DE FACTO* STATELESSNESS

### 5. EXPANDING THE BOUNDARIES OF “*DE FACTO* STATELESSNESS”

With the dissolution in the 1990s of the Soviet Union, Czechoslovakia and the former Socialist Federal Republic of Yugoslavia, UNHCR and others began to expand the concept of *de facto* statelessness into new areas, not all of which can be fully reconciled with the traditional view described above.

#### *Academic literature*

For example, in 1995 Carol Batchelor wrote:

Those who cannot establish their nationality and those without an effective nationality, referred to as *de facto* stateless persons, are not included in the definition of a *de jure* stateless person [in Article 1 of the 1954 Convention] ... 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 healthcare, 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 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 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.<sup>102</sup>

Some of these scenarios beg a number of questions. For example, it would seem self-contradictory to say that “persons who are confirmed *de jure* stateless” may at the same time be *de facto* stateless, or that “persons defined as *de jure* stateless ... fall into the grey area of *de facto* statelessness”. Additionally, it is not clear why “persons who have the theoretical

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<sup>102</sup> Carol Batchelor, “Statelessness and the Problem of Resolving Nationality Status”, *International Journal of Refugee Law*, Volume 10, 1998, p. 173 - 174. This passage has been picked up by a number of commentators. See, for example, Human Rights Council, “Complementary International Standards: Report on the study by five experts on the content and scope of substantive gaps in the existing international instruments to combat racism, racial discrimination, xenophobia, and related intolerance”, A/HRC/4/WG.3/6, 27 August 2007, para. 64: “Most experts in the field agree that today *de jure* statelessness is overshadowed by the even greater crisis caused by *de facto* statelessness resulting from irregular migration, which contributes to the evolution of a ‘grey zone of *de facto* statelessness.’ The experts are of the opinion that this problem should be examined by the human rights treaty bodies, both in their general comments and concluding observations.”

right to the nationality of a State but who are unable to receive it” should be considered *de facto* rather than *de jure* stateless. Nor is it clear why “persons who cannot establish their nationality” are distinguished from “persons without an effective nationality”, thus implying that *de facto* stateless persons comprise not only persons whose nationality is ineffective, but a second category of persons as well. Moreover, as discussed below, it may be arguable in at least some situations that “persons unable to establish their nationality” are not considered as nationals by their State of putative nationality nor any other State under the operation of its law – meaning that such persons would be *de jure*, not *de facto*, stateless.

David Weissbrodt and Clay Collins rely heavily upon Batchelor but inject some human rights elements into their own description of *de facto* statelessness in 2006:

Persons who are *de facto* stateless often have a nationality according to the law, but this nationality is not effective or they cannot prove or verify their nationality. *De facto* statelessness can occur when governments withhold the usual benefits of citizenship, such as protection, and assistance, or when persons relinquish the services, benefits, and protection of their country. Put another way, persons who are *de facto* stateless might have legal claim to the benefits of nationality but are not, for a variety of reasons, able to enjoy these benefits. They are, effectively, without a nationality.<sup>103</sup>

Weissbrodt and Collins later go on to say that:

Although the category of *de facto* stateless persons is sufficiently broad to include all persons who have a citizenship yet do not receive the concomitant benefits and protection that typically accompany citizenship, the term *de facto* stateless is, more often than not, applied to those persons who do not enjoy the rights of citizenship enjoyed by other noncriminal citizens of the same state. Consequently, most persons considered *de facto* stateless are the victims of state repression. Whereas *de jure* statelessness can simply result from the oversight of lawmakers who leave gaps in the law through which persons can fall, *de facto* statelessness typically results from state discrimination.<sup>104</sup>

A footnote to the first sentence of this latter passage adds:

Hence, someone is usually not said to be *de facto* stateless if he or she has been convicted of a crime and denied the right, for example, to vote.

This tends to suggest that, according to Weissbrodt and Collins, a person may be *de facto* stateless even inside the country of his or her (ineffective) nationality. Some of the other scenarios that they and/or Batchelor mention similarly entail that in theory a person could be *de facto* stateless inside, as well as outside, the country of his or her nationality. For example, a person who is unable to establish his or her nationality could in principle be either inside or outside the country of his or her nationality.<sup>105</sup>

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<sup>103</sup> David Weissbrodt, Clay Collins, “The Human Rights of Stateless Persons”, *Human Rights Quarterly* 28 (2006), pp. 251 - 252.

<sup>104</sup> *Ibid.*, p. 263.

<sup>105</sup> See James A. Goldston, “Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens” in “Ethics and International Affairs”, Vol. 20, No. 3, 2006 at p. 339 - 340: “Article 1 of the 1954 Convention relating to the Status of Stateless Persons defines statelessness as the condition of ‘a person who is not considered as a national by any State under the operation of its law.’ Such a definition does not encompass the myriad situations of *de facto* statelessness—where persons who in principle satisfy the respective criteria of national citizenship law (for example, they are born on the territory of a state that has *jus soli* citizenship rules) nonetheless have no effective proof to document their citizenship. This reflects the fact that, when the 1951 Refugee Convention and the 1954 Statelessness Convention were adopted, the operating assumption was that all *de facto* stateless persons would be outside their countries of habitual residence, and hence refugees. It was also assumed that an individual would have had to act—by, for example, fleeing her country of birth—to render herself *de facto* stateless. And yet, the United Nations

## *Council of Europe*

On 9 December 2009 the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2009)13 on the Nationality of Children, which recommends that Member States of the Council of Europe should:

7. treat children who are factually (*de facto*) stateless, as far as possible, as legally stateless (*de jure*) with respect to the acquisition of nationality;
8. register children as being of unknown or undetermined nationality, or classify children's nationality as being 'under investigation' only for as short a period as possible

The Explanatory Memorandum to the Recommendation articulates the rationale behind these two principles:

### Principle 7

#### *De facto statelessness*

19. The application of any rules avoiding statelessness depends on the definition of statelessness itself. As already mentioned above a person is regarded to be legally (*de jure*) stateless, 'who is not considered as a national by any State under the operation of its law.' In addition to cases of *de jure* statelessness, states also may be confronted with cases where persons do possess a certain nationality, but where either the state involved refuses to give the rights related to it, or the persons involved cannot be reasonably asked to make use of that nationality. In both cases the persons involved do not benefit of an effective nationality and are in fact stateless.

20. According to Resolution I ... of the Final Act of the 1961 Statelessness Convention, 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. This is repeated in this principle.

21. Factual or '*de facto*' statelessness implies that a person theoretically possesses a certain nationality, but no relevant tie exists (anymore) between the person and the state concerned and consequently the person involved will not enjoy the protection of this state. *De facto* statelessness is closely related to the definition of statelessness and to proof of statelessness. E.g., a person could be considered as *de facto* stateless if he or she possesses solely the nationality of the state, which he or she has left as a refugee, while he or she is recognised by his or her country of habitual residence as a *de jure* refugee. The state of habitual residence should apply its rules on avoiding statelessness on the children born to such persons, in particular principles 1 and 2 [of the Recommendation]. That could also happen if a state continues to hesitate about whether a child is *de jure* or *de facto* stateless. However, it has to be underlined, that it is up to the states to determine what *de facto* statelessness is and thus which persons are to be covered by this principle.

### Principle 8

#### *Unknown or undetermined nationality*

22. A case on the borderline of *de jure* and *de facto* statelessness exists if authorities register a person as being of unknown or undetermined nationality or classify the nationality of a person as being 'under investigation'. Such classification is only reasonable as a transitory measure during a brief period of time. This is in line with the spirit, for example, of Article 8 of the Convention on the avoidance of statelessness in relation to state succession, requesting states to lower the burden of proof. It urges states

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High Commission for Refugees has 'identified many instances throughout the world in which individuals may be physically present in a country, even for generations, but cannot normalize their stay nor establish lawful residence. This, in turn, means they can never aspire to full integration through naturalization.'" Note, however, that the reference to UNHCR is misleading, since UNHCR is here talking about *de jure* statelessness, not *de facto* statelessness, as is clear from the reference to "naturalization".

to implement their obligations under international law by not indefinitely leaving the nationality status of an individual as undetermined.

The Recommendation was prepared by the Council of Europe's Group of Specialists on Nationality, in which UNHCR participated as an observer. The description of *de facto* statelessness as provided in the draft Explanatory Memorandum is flexible and rights-oriented on the one hand, yet cautious on the other hand: *de facto* stateless persons are described as "persons [who] do possess a certain nationality, but where either the state involved refuses to give the rights related to it, or the persons involved cannot be reasonably asked to make use of that nationality", yet "it has to be underlined, that it is up to the states to determine what *de facto* statelessness is and thus which persons are to be covered by [principle 7]."

After the Recommendation was adopted in draft by the Group of Specialists, it passed through the Bureau of the Council of Europe's European Legal Committee on Cooperation (CDCJ), which commented as follows:

*De facto* statelessness is a sensitive issue but it should nevertheless not be ignored by the Recommendation, which furthermore leaves considerable discretion to the member states which should "as far as possible" treat factually stateless children as legally stateless ones [...] The Bureau of the CDCJ believes that the formulation of this principle is flexible enough to allow States to appreciate to which extent they will apply the equal treatment principle ...<sup>106</sup>

### *Inter-American Court of Human Rights*

The Inter-American Court of Human Rights held in 2005 that:

States have the obligation not to adopt practices or laws concerning the granting of nationality, the application of which fosters an increase in the number of stateless persons. This condition arises from the lack of a nationality, when an individual does not qualify to receive this under the State's laws, owing to arbitrary deprivation or the granting of a nationality that, in actual fact, is not effective.<sup>107</sup>

Thus, according to the Court – whose comments on the point should be considered *obiter* – statelessness comprises not only the lack of a nationality, but also the granting of a nationality which is ineffective.<sup>108</sup>

### *UNHCR*

UNHCR has not been entirely consistent in its own approach towards *de facto* statelessness.

In 1995 the Office referred to *de facto* stateless persons in a Note to the Sub-Committee of the Whole on International Protection as "those with an ineffective nationality or those who cannot prove they are legally stateless" and as "individuals whose nationality status is unclear".<sup>109</sup> That same year, ExCom Conclusion No. 78 on Prevention and Reduction of

<sup>106</sup> Council of Europe, "Position Paper of the Bureau of the European Committee on Legal Cooperation on the Draft Recommendation on the Nationality of Children", CDCJ-BU (2009) 8, 4 June 2009, p. 4.

<sup>107</sup> Inter-American Court of Human Rights, *Case of the Yean and Bosico Children v. The Dominican Republic*, Judgment of 8 September 2005, para. 142.

<sup>108</sup> See also International Law Reports, *Perez v. International Olympic Committee*, Court of Arbitration for Sport, CAS Arbitration No SYD 5, 19 September 2000, para.'s 33 to 46. The Court found that Mr. Perez was at least *de facto* stateless because Cuba apparently withheld from him "the benefits of fundamental civil rights, such as those of freedom of movement and respect for property."

<sup>109</sup> UNHCR, "Note on UNHCR and stateless persons", footnote 48 above, para.'s 6 and 11. On the issue of unclear nationality status, see also UNHCR, "Information and Accession Package: The 1954 Convention

Stateless and Protection of Stateless Persons expressed concern that “statelessness, including the inability to establish one’s nationality, may result in displacement”.<sup>110</sup> ExCom Conclusion No. 90 on International Protection subsequently expressed concern in 2001 that many victims of trafficking “are rendered effectively stateless due to an inability to establish their identity and nationality status”.<sup>111</sup>

In March 2006, UNHCR revised its annual statistical reporting instructions, as a result of which UNHCR country operations were required to report statistics on “stateless persons”, defined as

persons or categories of persons (a) who are not considered nationals by any country under the operation of their laws (*de jure* stateless persons) as per Article 1 of the 1954 *Convention Relating to the Status of Stateless Persons*, (b) *de facto* stateless persons as well as (c) persons who are unable to establish their nationality.

The statistical reporting instructions thus refer to three distinct categories of statelessness: *de jure* statelessness, *de facto* statelessness and the inability to establish one’s nationality. However, a different approach was subsequently taken in October 2006 in ExCom Conclusion No. 106 of 2006 on the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons, which refers to “stateless persons and persons with undetermined nationality” – thereby implying that persons with undetermined nationality are not stateless at all.

Finally, like Batchelor, UNHCR has also used the term “*de facto* statelessness” to refer to a situation where, following a succession of states, a person receives the nationality of a State other than that of the State of their habitual residence.<sup>112</sup>

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relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness”, June 1996 (revised January 1999), p. 10, para. 36: “When the 1954 and 1961 Conventions were drafted, it was assumed that all *de facto* stateless persons were refugees and would, therefore, benefit from the 1951 Convention. It is now apparent that there are those who do not qualify as refugees but whose nationality status is unclear. The situation of such a person in terms of a lack of national protection may be identical to that of a *de jure* stateless person. Since lack of protection may result in involuntary displacement, UNHCR is also concerned with promotional and preventive measures on behalf of such individuals. UNHCR continues to explore promotional and preventive activities in this area to which the Office can contribute in collaboration with concerned States.”

<sup>110</sup> UN General Assembly Resolution 50/152 of December 1995 similarly expresses concern that “statelessness, including the inability to establish one’s nationality, may result in displacement”. Note also, for example, that in 2005 UNHCR’s *Handbook for Parliamentarians* also referred to *de facto* stateless persons as “those who cannot establish their nationality”.

<sup>111</sup> See also UNHCR, “Handbook for the Protection of Women and Girls”, 1 January 2008, p. 220: “Trafficked women and girls may be unaware of their rights, may lack access to information and advice, and may face obstacles to gaining access to mechanisms that protect those rights. They may find themselves without personal identity documents and be unable to establish their nationality status, leaving them *de facto* stateless.” Cf. UNHCR, “Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating the Status of Refugees to victims of trafficking and persons at risk of being trafficked”, April 2006, para. 43: “Everyone has the right to return to their own country. States should extend diplomatic protection to their nationals abroad. This includes facilitating their re-entry into the country, including in the case of victims of trafficking who find themselves abroad. If, however, the State withholds such assistance and fails to supply documentation to enable the individual to return, one practical consequence may be to render the individual effectively stateless. Even if the individuals were not previously considered stateless by their State of nationality, they may find themselves effectively treated as such if they attempt to avail themselves of that State’s protection.”

<sup>112</sup> See, for example, UNHCR, “Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia”, Regional Bureau for Europe, European Series, Volume 3, No. 1,



## Conclusions

The above represents only a snapshot of how the traditional view of *de facto* statelessness has been expanded upon by UNHCR and others in recent years. The remainder of Part II of this paper discusses the key elements of these new approaches in more detail, in particular whether the following categories of persons should be considered “*de facto* stateless”:

- Persons who do not enjoy the rights attached to their nationality;
- Persons who are unable to establish their nationality, or who are of undetermined nationality;
- Persons who, in the context of State succession, are attributed the nationality of a State other than that of the State of their habitual residence.

Given that UNHCR has tended to recommend that all *de facto* stateless persons should be treated as *de jure* stateless,<sup>113</sup> it is also discussed in relation to the categories above whether it really should be recommended that the persons concerned be treated as *de jure* stateless for purposes of: (i) protection, including under the 1954 Statelessness Convention; and/or (ii) reduction of statelessness, including under the 1961 Statelessness Convention. The issue of persons inside the country of their nationality is also discussed, as is the extent to which, if at all, each of the above categories can be reconciled with the traditional view of *de facto* statelessness outlined in Part I above.

## 6. PERSONS WHO DO NOT ENJOY THE RIGHTS ATTACHED TO THEIR NATIONALITY

### *Nationality in international law*

Nationality is a concept of both municipal and international law. As a concept of international law it denotes “the allocation of individuals, termed nationals, to a specific State – the State of nationality – as members of that State, a relationship which confers upon that State under customary international law [certain] rights and duties in relation to other States”, *viz.* the right to protect its nationals in relation to other States, and the duty to admit its nationals if expelled from another State.<sup>114</sup> Additional rights and duties in relation to other States may also exist under international treaty law, spanning from bilateral to regional to international treaties.

Individuals themselves also have certain rights and obligations under international law, sometimes in their own right as subjects of international law, at other times indirectly as objects of international law. Again, these rights and obligations may exist under customary international law or be based on treaty law. Certain rights and obligations apply only to nationals, *i.e.* are attached to a person’s nationality, and may be in relation to the State of nationality or to another State or States – *e.g.* the State of residence, a belligerent State or a group of States such as the European Union. Other rights are independent of nationality and

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June 1997, Parts 1 and 3; UNHCR, “The State of the World’s Refugees: A Humanitarian Agenda”, 1997, chapter 6.

<sup>113</sup> See Part I above regarding UNHCR’s position on the recommendations made in the Final Acts of the 1954 and 1961 Statelessness Conventions.

<sup>114</sup> P. Weis, “Nationality and Statelessness in International Law”, Sijthoff and Noordhoff, 2<sup>nd</sup> edition, 1979, p. 59.

stem from the fact that the individual is a human being, as is the case generally speaking with human rights.

One key human right of every human being is the right to a nationality, as provided for in Article 15(1) of the Universal Declaration of Human Rights (UDHR), Article 23(3) of the International Covenant on Civil and Political Rights (ICCPR), Article 7 of the Convention on the Rights of the Child (CRC) and in various other international human rights instruments. The following are some important examples of rights which, under international human rights law, are reserved for nationals.<sup>115</sup>

Article 15(2) of the UDHR provides: “No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”

Article 25 of the ICCPR provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Additionally, Article 12 of the ICCPR provides:

[...]

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.<sup>116</sup>

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<sup>115</sup> On the general limits to permissible distinctions between nationals and non-nationals with respect to the enjoyment of human rights, see Commission on Human Rights, “Prevention of Discrimination: The Rights of Non-Citizens”, E/CN.4/Sub.2/2003/23, 26 May 2003.

<sup>116</sup> See Human Rights Committee, “General Comment No. 27: Freedom of Movement”, CCPR/C/21/Rev.1/Add.9, 2 November 1999, para. 9: “In order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality. Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere. It is no justification for the State to claim that its national would be able to return to its territory without a passport.” Para. 20 of General Comment No. 27 explains that the scope of the term “his own country” is broader than the term “country of nationality”: “The wording of article 12, paragraph 4, does not distinguish between nationals and aliens (‘no one’). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase ‘his own country’. The scope of ‘his own country’ is broader than the concept ‘country of his nationality’. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by

Article 2(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 23 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also distinguishes between nationals and non-nationals:<sup>117</sup>

Migrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired. In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right.<sup>118</sup>

Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women stipulates:<sup>119</sup>

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.

Article 1(2) of the Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides:

This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

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conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence. Since other factors may in certain circumstances result in the establishment of close and enduring connections between a person and a country, States parties should include in their reports information on the rights of permanent residents to return to their country of residence.”

<sup>117</sup> Note that, as stipulated in Article 3 of the Convention: “The present Convention shall not apply to: ... (d) Refugees and stateless persons, unless such application is provided for in the relevant national legislation of, or international instruments in force for, the State Party concerned ...” On the subject of an individual’s right to diplomatic and consular protection and assistance, see also *La Grand* case (*Germany v. United States of America*) *I.C.J. Reports* 2001, p. 466 at para.’s 76 - 77; *Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America)* *I.C.J. Reports* 2004, p. 12 at para. 40; Inter-American Court of Human Rights, “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law”, Advisory Opinion OC-16/99, 1 October 1999.

<sup>118</sup> Note that Article 6 of the Convention provides that: “For the purposes of the present Convention: (a) The term ‘State of origin’ means the State of which the person concerned is a national”.

<sup>119</sup> See also the 1957 Convention on the Nationality of Married Women.

While CERD thus provides for the possibility of differentiating between nationals and non-nationals, as the Committee on the Elimination of All Forms of Racial Discrimination has noted in its 30<sup>th</sup> General Recommendation, “[Article 1(2)] must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights”.<sup>120</sup> The Committee then went on to say:

3. Article 5 of [CERD] incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law;

4. Under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim ...<sup>121</sup>

### *Nationality in municipal law*

As well as being a concept of international law, nationality is also a concept of municipal law. Indeed, as the International Court of Justice observed in the *Nottebohm* case:

nationality has its most immediate, its most far-reaching and, for most people, its only effects within the legal system of the State conferring it. Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.<sup>122</sup>

Thus, the scope of the rights and obligations attached to a person’s nationality is determined by the municipal law of the State of which he or she is a national.

Municipal law may grant nationals rights which go beyond those which the State is required to provide under international human rights law. All nationals may, for example, be entitled to free university education.

Municipal law may also grant to non-nationals certain rights which under international law only have to be granted to nationals, e.g. some countries allow non-nationals who are permanent residents to vote in local elections. However, in all, or virtually all States, certain rights and obligations nevertheless remain reserved for persons who possess the nationality of the State concerned.<sup>123</sup> Any provisions to this effect under municipal law must be consistent

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<sup>120</sup> Committee on the Elimination of All Forms of Racial Discrimination, “General Recommendation No. 30: Discrimination against Non Citizens”, 1 October 2004.

<sup>121</sup> Ibid.

<sup>122</sup> *Nottebohm Case (Liechtenstein v. Guatemala)* I.C.J. Reports 1955, p. 20. See also Inter-American Court of Human Rights, Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OV-4/84 of 19 January 1984, para. 34.

<sup>123</sup> In exceptional cases non-nationals may be assimilated to nationals, as envisaged by Article 1(2)(ii) of the 1954 Statelessness Convention according to which “[This Convention shall not apply to] persons who are recognized by the competent authorities of the country in which they have taken residence as having the

with international law for a State to be in compliance with its international obligations, notably in relation to legitimate grounds for affording different treatment to nationals and non-nationals.

Municipal law may also legitimately distinguish between different categories of nationals by conferring certain rights and obligations upon some nationals but not others. Obvious examples concern the right to vote and the obligation of military service, which are usually reserved for nationals who are adults. In some countries, such a distinction may be drawn by providing that certain nationals are “citizens” whereas other nationals are not.<sup>124</sup> When used in this sense, the term “citizen” has a different meaning than the term “national”, and thus it is important to note that whether the terms “national” and “citizen” are synonymous or not depends upon the context in which they are being used.<sup>125</sup>

### *De facto statelessness*

The question raised at the end of section 5 above is whether persons who do not enjoy the rights attached to their nationality may be considered *de facto* stateless.<sup>126</sup>

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rights and obligations which are attached to the possession of the nationality of that country”. Consider in particular the case of the *Volksdeutsche*, as provided for in Article 116(1) of the 1949 Basic Law of the Federal Republic of Germany: “Unless otherwise provided by a law, a German within the meaning of this Basic Law is a person who possesses German citizenship or who has been admitted to the territory of the German Reich within the boundaries of December 31, 1937 as a refugee or expellee of German ethnic origin or as the spouse or descendant of such person.”

<sup>124</sup> See, for example, Article 36 of the Constitution of Honduras: “Son ciudadanos todos los hondureños mayores de dieciocho años.” See, more generally, the discussion in Weis, “Nationality and Statelessness in International Law”, *op. cit.*, at pp. 3 - 7; Jennings and Watts (eds), “Oppenheim’s International Law”, 9<sup>th</sup> edition, 1992, Volume 1, Parts 2 to 4, p. 856: “In general, it matters not, as far as international law is concerned, that a state’s internal laws may distinguish between different kinds of nationals – for instance, those who enjoy full political rights, and are on that account named citizens, and those who are less favoured, and are on that account not named citizens”; Cordova, footnote 39 above, para. 32: “The Special Rapporteur thinks that nationality does not, by itself, include the status of citizenship. A citizen is a national who enjoys political rights; but there are many nationals who are not citizens in the sense that they do not enjoy political rights. That is the case with minors in all countries and, in some of them, with women, the mentally incapacitated and convicted criminals.” Cordova’s example of women is of course incompatible with international human rights law, which has developed significantly since when he was writing in 1954.

<sup>125</sup> The meaning of the terms “citizen” and “national” may differ in other contexts as well, such as the concepts of “EU citizen” and “British Overseas Citizen”. However, a full discussion of such distinctions is outside the scope of the present paper.

<sup>126</sup> A typical scenario under which nationals may in practice be denied a broad range of rights is if they are unable to obtain national identity documents. Possession of such a document may be the *sine qua non* for the exercise of a wide range of civil, political, economic, social and cultural rights. For example, the European Court of Human Rights found in 2003 that the denial of the issuance of an internal passport by the Russian Federation constituted an interference with the right to respect for private life, noting *inter alia* that: “in their everyday life Russian citizens have to prove their identity unusually often, even when performing such mundane tasks as exchanging currency or buying train tickets. The internal passport is also required for more crucial needs, for example, finding employment or receiving medical care” (European Court of Human Rights, *Case of Smirnova v. Russia*, Application No.’s 46133/99 and 48183/99, Judgement of 24 October 2003 (final), para. 97). Note in general that there can be many reasons why a person may be unable to obtain an identity document. For example, in Egypt, Baha’is and certain other nationals have been unable to obtain birth certificates, identity cards, marriage certificates, death certificates and other vital records because the government requires all such documents to list religious affiliation and restricts the choice of religion to the three officially recognized religions: Islam, Christianity and Judaism. Many persons have been unable to obtain identification papers because they refuse to lie about their religious affiliation and have been denied the possibility on leaving the entry about religious affiliation blank. They have accordingly been denied enjoyment of a wide range of rights, such as access to employment,

This requires consideration of the following:

- a) Are the rights in question only those explicitly provided for under international human rights law, or do they also include additional rights provided for under municipal law? Just as nationality is a concept of both municipal and international law, the question whether an individual's nationality is effective or not is a question of municipal as well as international law.
- b) Are the rights in question only those specifically reserved for nationals, or do they also include rights that should be enjoyed by all persons within the jurisdiction of the State concerned, whether nationals or not?
- c) To what extent does a national have to be denied the rights in question for him or her to be *de facto* stateless?
- d) Why call such denial of rights "statelessness"?

Even if the rights in question include only those reserved for nationals under international human rights law, considering non-enjoyment of such rights to amount to *de facto* statelessness would lead to some odd consequences, particularly should a partial denial rather than a complete denial of rights be sufficient for a national to qualify as *de facto* stateless. For example, the Human Rights Committee has held that the right to leave any country, including one's own, as provided for in Article 12 of the ICCPR, implies the right to be issued a passport by one's State of nationality.<sup>127</sup> However, should a person be unlawfully denied a passport to travel abroad, but nevertheless be able to vote in national elections, it would seem strange to say that he or she is *de facto* stateless. Similarly, until 1971 women were denied the right to vote in federal elections in Switzerland, but neither they nor anybody else considered that they were therefore *de facto* stateless. Even in a dictatorship where, say, all nationals except for one ethnic group are denied the right to a passport, the right to vote, the right to take part in public affairs and the right of access to public service,<sup>128</sup> it is still not clear why such second-class nationals should be considered *de facto* "stateless".

The argument that persons who do not enjoy the rights attached to their nationality are *de facto* stateless appears to be based on the following premises:

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education, pensions, voting, passports and medical and financial services. See further Human Rights Watch, "Egypt: Prohibited Identities: State Interference with Religious Freedom", November 2007.

<sup>127</sup> See Human Rights Committee, "General Comment No. 27: Freedom of Movement", footnote 116 above, para. 9: "In order to enable the individual to enjoy the rights guaranteed by article 12, paragraph 2, obligations are imposed both on the State of residence and on the State of nationality. Since international travel usually requires appropriate documents, in particular a passport, the right to leave a country must include the right to obtain the necessary travel documents. The issuing of passports is normally incumbent on the State of nationality of the individual. The refusal by a State to issue a passport or prolong its validity for a national residing abroad may deprive this person of the right to leave the country of residence and to travel elsewhere. It is no justification for the State to claim that its national would be able to return to its territory without a passport."

<sup>128</sup> See references to the ICCPR above. See also, for example, Commission on Human Security, "Human Security Now", New York, 2003, p. 31: "Citizenship can ... be ineffective. Many countries have degrees of citizenship, giving more or fewer rights to ethnic or religious minority communities, creating inequalities that lead to grievances and possibly conflict. The objective of these discriminatory policies is to exclude communities from political, social and economic power."

**Premise 1:** Persons who do not enjoy the rights attached to their nationality have a nationality that is ineffective.

**Premise 2:** Persons who have a nationality that is ineffective are *de facto* stateless.<sup>129</sup>

**Conclusion:** Persons who do not enjoy the rights attached to their nationality are *de facto* stateless.

It should be noted that under human rights law, the right to a nationality is distinct from the rights attached to nationality (i.e. the rights that must be granted to persons who are nationals), and the violation of one does not necessarily entail a violation of the other. Thus, a State could in theory violate a person's right to nationality but nevertheless grant to all persons within its jurisdiction, irrespective of nationality, the rights that must be granted to its nationals. Conversely, a State could in principle violate the rights that it must grant to its nationals without actually violating the right to nationality. Hence, a State may secure effective enjoyment of the right to a nationality even if it does not secure effective enjoyment of the rights attached to its nationality.<sup>130</sup>

If Premise 1 above is correct, it follows that even if a person enjoys an effective right to a nationality, his or her nationality will nevertheless be ineffective if he or she does not enjoy the rights attached to that nationality.<sup>131</sup> Such a conclusion is unremarkable in and of itself, but combining it with Premise 2 above results in a second conclusion that is by no means self-evident: a person who enjoys an effective right to a nationality may nevertheless be "stateless".

In a limited sense, the latter conclusion is already implied by the traditional conception of statelessness discussed in Part I above, whereby persons are *de facto* stateless if they are outside the State of their nationality and *de facto* unprotected by that State in relation to other States. However, as mentioned above,<sup>132</sup> Hudson commented already in the early 1950's that:

The so-called stateless persons are *de facto* nationals of a State who are outside of its territory and devoid of its protection; they are, therefore, not stateless: it might be better to speak of "*unprotected persons*" and to call this group "*de facto unprotected persons*"

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<sup>129</sup> Assuming that the persons concerned do not have a second nationality that *is* effective.

<sup>130</sup> Cf. para. 36 of the passage by Cordova quoted on pp. 13 to 14 above, according to which persons who do not enjoy the rights flowing from their nationality do not enjoy an effective right to a nationality. But note that Cordova was writing at a time when the international human rights regime was in its infancy.

<sup>131</sup> Cf. the statement by UNHCR in 1997 in "State of the World's Refugees", *op. cit.*, footnote 112 above, chapter 6: "Under international law, a stateless person is one 'who is not considered as a national by any state under the operation of its law.' This definition is helpfully concise and to the point. But it is also a very limited and somewhat legalistic definition, referring to a specific group of people known as *de jure* stateless persons. It does not encompass the many people, usually described as *de facto* stateless persons, who are unable to establish their nationality or whose citizenship is disputed by one or more countries. This chapter uses the notion of statelessness in its broader sense, to denote all those people who lack what has become known as an 'effective nationality', and who are consequently unable to enjoy the rights that are associated with citizenship" [emphasis added]. Cf. also the statement by UNHCR in 1991 that *de facto* statelessness may be understood "as the absence of an effective nationality for protection of basic rights" (para. 1 of the discussion note on stateless persons submitted by UNHCR to the Working Group on Solutions and Protection, Doc. No. WSGP/12, 10 April 1991 as annexed to EC/1992/SCP/CRP.4, 1 April 1992). The phrasing of these two statements by UNHCR is different from Premise 1 in the text above since it implies that the absence of enjoyment of the rights associated with nationality does not make nationality ineffective, but rather may be the consequence of an ineffective nationality.

<sup>132</sup> See text above footnote 37 above.

Weis has similarly observed that “*de facto* statelessness” was a misnomer, and that it would have been more appropriate to speak of “*de facto* unprotected persons”.<sup>133</sup> Hence, if it was already stretching the meaning of the term “stateless” to apply it to nationals who are devoid of external protection, it would be stretching the meaning of the term even further to apply it to nationals whose rights are violated by State or non-State actors on the territory of the State of their nationality.

The broader the range of rights that are considered to attach to nationality in answer to questions (a) and (b) above, the ever more problematic it would be to conclude that persons who do not enjoy the rights attached to their nationality are *de facto* stateless. For example, to argue that persons who are deprived of the enjoyment of such rights are *de facto* stateless, and that all *de facto* stateless persons should be treated as *de jure* stateless, would be doing a grave disservice to persons who should be treated as the nationals that they are, rather than as stateless persons.

Furthermore, assuming that UNHCR has a mandate for addressing *de facto* statelessness, then, given that the rights attached to nationality may be violated inside the country of nationality as well as outside it, UNHCR would have a mandate also for persons who remain *inside* the country of their nationality. The scope of such a mandate would go beyond the Office’s permitted engagement with internally displaced persons (IDPs) – which must be at the request of the Secretary-General or the competent principal organs of the United Nations, with the consent of the State concerned, and must not undermine the institution of asylum – to persons more generally, whether displaced or not.<sup>134</sup> Aside from the questions such a mandate would raise about possible perceived interference with national sovereignty, there is also the question as to the extent to which the rights attaching to nationality would have to be violated before the persons concerned would qualify as “*de facto* stateless”:<sup>135</sup> the lower the threshold required, the broader the scope of UNHCR’s mandate *ratione personae* would become.<sup>136</sup>

A UNHCR mandate to address such problems would far exceed the authority currently granted to the Office by the UN General Assembly and by ExCom, and would encroach into the domain of the international protection of human rights generally. As van Waas has argued, there is no need for a special statelessness regime to address the problem of denial of rights attached to nationality as such problems are already covered by the international human rights regime.<sup>137</sup>

Hence, it is submitted that:

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<sup>133</sup> Weis, “Nationality and Statelessness in International Law”, p. 164.

<sup>134</sup> See, for example, para. 16 of UN General Assembly Resolution 53/125 of 9 December 1998; UNHCR, “The Protection of Internally Displaced Persons and the Role of UNHCR”, 27 February 2007, Section II.

<sup>135</sup> Cf. Indira Goris, Julia Harrington and Sebastien Köhn, “Statelessness: What it is and why it matters” in “Forced Migration Review”, Issue 32, April 2009, p. 4: “Although individuals who have legal citizenship and its accompanying rights may take both for granted, what they enjoy is one extreme of a continuum between full, effective citizenship and *de jure* statelessness, in which individuals have neither legal citizenship nor any attendant rights. In between these extremes are millions of *de facto* stateless persons denied effective protection.”

<sup>136</sup> For example, one might ask whether the violation of rights would have to amount to persecution, or whether the threshold might be lower than that.

<sup>137</sup> Van Waas, “Nationality Matters: Statelessness under International Law”, footnote 82 above, p. 25.



1. As a general rule, non-enjoyment of rights attached to nationality does not constitute *de facto* statelessness.<sup>138</sup>

2. The only exception to the above rule is the non-enjoyment of diplomatic protection and consular assistance of the State of nationality in relation to other States (see Part I above).

## 7. PERSONS UNABLE TO ESTABLISH THEIR NATIONALITY OR OF UNDETERMINED NATIONALITY<sup>139</sup>

There is a link between persons unable to establish their nationality and persons not enjoying the rights attached to their nationality, since not being able to establish his or her nationality may be the reason why the person concerned does not enjoy the rights attached to his or her nationality. Additionally, as observed by van Panhuys:

Though admitting that the main test for identifying nationals of a State, is how the individuals concerned are *regarded* by it, and not how they are *treated*, such treatment is not entirely irrelevant. In the first place their treatment, particularly in connection with political matters, may be *indicative* of whether the State looks upon the individuals as its own (e.g. if clear nationality legislation is lacking). In the second place, it is open to doubt whether a State, though treating an individual who nominally possesses its nationality as a foreigner, is still entitled to have him recognized as one of its nationals ...<sup>140</sup>

There may thus be a fine line between being recognized as a national but not being treated as such, and not being recognized as a national at all.<sup>141</sup> The two problems are nevertheless conceptually distinct: the former problem is connected with the rights attached to nationality,<sup>142</sup> whereas the latter problem is connected with the right to nationality itself.

The present section of this paper discusses the problem of persons who are unable to establish their nationality, or who are of undetermined nationality, and who therefore encounter obstacles in trying to exercise their right to a nationality. The section begins by listing and describing examples of different categories of persons who have a nationality but who encounter difficulties proving it. The section then examines the issue of nationality determination from the perspective of the State whose nationality is at issue, followed by a discussion of nationality determination from the perspective of other States. It is shown that in practice the declaration by a State that a particular individual is, or is not, its national may not always coincide with the findings of other States about that individual's nationality.

<sup>138</sup> If this rule is not accepted and alternatively it were to be argued that non-enjoyment of rights attached to nationality does constitute *de facto* statelessness, then the following would need to be clarified: (1) the rights attaching to nationality that are relevant to the determination of *de facto* statelessness; (2) the criteria establishing to what extent such rights have to be violated before the person concerned qualifies as *de facto* stateless; (3) whether domestic remedies have to be exhausted before such a person qualifies as *de facto* stateless.

<sup>139</sup> It is beyond the scope of this paper to enter into a detailed discussion on the term "nationality" or of the rules of evidence for establishing a person's nationality or lack thereof.

<sup>140</sup> H.F. van Panhuys, "The Role of Nationality in International Law", 1959, A.W. Sijthoff's Uitgeversmaatschappij N.V., pp. 24 - 25. See further *op. cit.* at p. 78: "Let us take, e.g. the case of an individual possessing the nationality of State A. In addition he is a national of State B, but only nominally, for in fact he is treated by the authorities of that State as if he were a foreigner. *Quaeritur*: is State B in order to oppose a claim of State A on behalf of that person, free to plead the defence of double nationality?"

<sup>141</sup> Consider, for example, a person who is unable to exercise his or her rights as a national because he or she is unable to obtain a national identity card because his or her birth was never registered.

<sup>142</sup> See section 6 above.

Next, it is argued that – contrary to what has sometimes been asserted – UNHCR itself can make determinations of nationality status, and therefore that the aforementioned discussion concerning the determination of nationality status by States applies equally to the determination of nationality status by UNHCR. Finally, the issue of *de facto* statelessness is itself discussed.

## 7.1 Persons who may have difficulties proving their nationality

The vast majority of persons who have a nationality go through life without ever having their nationality questioned. However, some people who have a nationality may face difficulties proving it when required, be they inside or outside the State whose nationality is at issue. For example:

- a) Some people may never have been registered in the civil registration system of the country of their nationality.<sup>143</sup> For example, a person may have been born in a country which grants nationality *jure soli* and therefore have acquired that country's nationality at birth. However, if the birth of the person was never registered, the person may subsequently have difficulties proving he or she was born in the country and that he or she is its national.<sup>144</sup> Similarly, a person may be born to parents who are nationals of a country which grants nationality *jure sanguinis*. If the birth of the person is not registered, the person may again have difficulties proving that he or she is a national. Even DNA-testing may not be conclusive (supposing that such testing is even affordable and accessible in the country concerned) since the parents may no longer be alive – or the births of the parents may never have been registered, thus bringing into

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<sup>143</sup> The United Nations defines civil registration as follows: "Civil registration is defined as the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of vital events pertaining to the population as provided through decree or regulation in accordance with the legal requirements of a country. Civil registration is carried out primarily for the purpose of establishing the legal documents provided by the law. These records are also the best source of vital statistics. [The occurrences considered as vital events are live birth, death, foetal death, marriage, divorce, annulment of marriage, judicial separation of marriage, adoption, legitimization and recognition ...]" (United Nations Statistics Division, ST/ESA/STAT/SER.F/84, "Handbook on Training in Civil Registration and Vital Statistics Systems", 2002, p. 5, para. 22).

<sup>144</sup> There are many different reasons why births may not be registered. For example, procedures may be complex, costly and/or inaccessible, or parents may not even be aware that they should register their children. Late birth registration (i.e. registering a birth outside of the ordinary time limits) may sometimes pose virtually insurmountable obstacles, e.g. requiring the parents to produce a whole series of different documents that they may not necessarily possess or which are themselves difficult to acquire (see, for example, UNHCR and Praxis, "Analysis of the Situation of Internally Displaced Persons from Kosovo in Serbia: Law and Practice", March 2007, p. 24; Inter-American Court of Human Rights, *Case of the Yean and Bosico Children v. The Dominican Republic*, footnote 107 above, para.'s 109(18) to 109(28)). Sometimes the law itself may completely block registration, e.g. registration may require legal residence, or that the child be born in wedlock. Some parents may be unwilling or even afraid to register their children: for example, in some societies a common view is that girls will not go to school and women will not work beyond the confines of the family and it is therefore not worth using time and money to register a girl's birth or obtain an identity document for an adult woman; in other cases, the birth of a boy may not be registered, or registered only several years after birth, in order to avoid or delay future conscription for military service; in yet other cases, the parents may be irregular migrants who are afraid to approach the authorities. The authorities themselves may sometimes lack the capacity to register, e.g. during an international or internal armed conflict or during a process of state dissolution. The authorities may also suffer from a lack of resources or be corrupt. They may also sometimes be unwilling to register, e.g. so as to prevent the children of refugees, asylum-seekers and migrant workers being able to exercise an automatic right to citizenship *jure soli*. For some concrete examples, see further UNHCR, "State of the World's Refugees: A Humanitarian Agenda", *op. cit.*, footnote 112 above, chapter 6, box 6.4.

question the nationality of the parents as well.<sup>145</sup> Other problems relating to birth registration may also occur. For example, data entered in birth registries may be vague or incomplete, such as an entry stating that the nationality of the parents is undetermined. Alternatively, a person may be born in a border area, for example to nomads or to parents who belong to an indigenous people whose ancestral lands straddle the border, and it may not be clear exactly in which country that person was born. Either one or both of the countries may grant nationality *jure soli*, but unless the person can prove in which country he or she was born it may become impossible for him or her to establish his or her nationality.<sup>146</sup> A similar type of problem may occur in the context of State succession, in a situation where, for example, a Federal Republic dissolves into two States, and a person is unable to produce evidence showing which successor State nationality he or she should be deemed to possess.<sup>147</sup>

- b) Civil registries may have been destroyed or have gone missing. For example, a birth registry may have been damaged or have been completely destroyed during a civil war. Persons whose births were recorded in the registry may then experience the same difficulties proving their nationality as the persons at (a) above, unless they are able to re-register using as evidence of their birth personal documents that they had been previously issued, or unless rules of evidence are relaxed, e.g. by allowing testimony of witnesses.<sup>148</sup>
- c) Some people may have difficulties proving their identity.<sup>149</sup> For example, it may be clear from a country's citizenship records that Ms. X is a national of that country. However, Ms. X may have difficulties proving that she really is Ms. X, e.g. she may have been smuggled or trafficked to another country and then abandoned without any personal documents. If she is subsequently unable to prove her identity, she will also

<sup>145</sup> Where nationality is transmitted *jure sanguinis*, lack of birth registration not only creates problems for persons born inside the country of their nationality, but may also create additional problems for persons born outside the country of their nationality, particularly if their parents are irregular migrants and as a result they themselves become irregular migrants. See Laura van Waas, "The Children of Irregular Migrants: A Stateless Generation?", *Netherlands Quarterly of Human Rights*, Vol. 25/3, 2007, pp. 437 - 458.

<sup>146</sup> In some countries in Latin America this type of problem has been solved by ensuring that indigenous peoples acquire the nationality of both countries. See, for example, Article 7 of the 2008 Constitution of Ecuador: "Son ecuatorianas y ecuatorianos por nacimiento: 1. Las personas nacidas en el Ecuador. 2. Las personas nacidas en el extranjero de madre o padre nacidos en el Ecuador; y sus descendientes hasta el tercer grado de consanguinidad. 3. Las personas pertenecientes a comunidades, pueblos o nacionalidades reconocidos por el Ecuador con presencia en las zonas de frontera" [emphasis added].

<sup>147</sup> See, for example, UNHCR, "Citizenship in the Context of the Dissolution of Czechoslovakia", *European Series*, Vol. 2, No. 4, September 1996, p. 17, footnote 44: "... Some NGOs and IGOs have expressed concern regarding persons having difficulty in determining their former internal nationality and, consequently, their previous citizenship. These persons cannot establish their present citizenship and are another category of *de facto* stateless persons which are of concern."

<sup>148</sup> See, for example, UNHCR and Praxis, "Analysis of the Situation of Internally Displaced Persons from Kosovo in Serbia: Law and Practice", *op. cit.*, pp. 22 - 26.

<sup>149</sup> Problems of proving one's identity can in principle arise both inside and outside one's country of nationality. For a fuller discussion about persons who are outside the country of their nationality and unable to prove their identity, see: Ryszard Piotrowicz, "Victims of Trafficking and *De Facto* Statelessness", *Refugee Survey Quarterly*, Vol. 21, Special Issue, 2002, pp. 50 - 59; Stefanie Grant, "The Legal Protection of Stranded Migrants" in R. Cholewinski, R. Perruchoud and E. MacDonald, eds., "International Migration Law", T.M.C. Asser Press, 2007, pp. 29 - 47; Rebecca Dowd, "Trapped in Transit: The Plight and Human Rights of Stranded Migrants", Research Paper No. 156, *New Issues in Refugee Research*, UNHCR, June 2008.

be unable to prove her nationality.<sup>150</sup> A similar problem may also be faced by, for example, unaccompanied children, and become particularly acute if the unaccompanied child is so young as to be unable to provide any information at all about his or her origins, e.g. if the child is a foundling. Other people may have travelled abroad using false documents, or have deliberately destroyed their documents upon embarkation or arrival.<sup>151</sup> In other cases, the authenticity of even genuine documents may be questioned.<sup>152</sup> Yet other people may remain inside the country of their nationality but still have difficulty identifying themselves because, for example, their documents have been destroyed or are inaccessible due to an armed conflict, or they may never have been issued documents in the first place.<sup>153</sup>

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<sup>150</sup> See UNHCR, “UNHCR’s Activities in the Field of Statelessness: Progress Report”, EC/51/SC/CRP.13, 30 May 2001, para. 18: “The trafficking of women has also given rise to problems related to the establishment of their identity and national status. Trafficked women may have their documents stolen or destroyed either on arrival in a third country or prior to transfer, often making it impossible to prove their status when they try to re-enter their country. They may be placed in detention in the country to which they have been transported illegally, and may linger there for years because of the refusal by the country of citizenship to readmit them in the absence of evidence of their nationality, and refusal by the country of detention to release them without proper documentation. UNHCR has assisted in the resolution of a number of such cases recently, but the vast majority of such problems go undetected. Enhanced cooperation among states, based on the establishment of proper procedures and criteria, as well as greater flexibility with respect to documentation requirements, could help to promote appropriate and early solutions so that women who have already been victimized do not suffer further isolation.”

<sup>151</sup> For further information, see the references in footnote 149 above.

<sup>152</sup> See, for example, CBC News, “Suad Hagi Mohammed’s detention in Kenya: Canadian government under fire for handling of case”, 21 August 2009, <http://www.cbc.ca/world/story/2009/08/12/f-haji-mohamud-timeline.html> (accessed on 1 April 2010).

<sup>153</sup> See, for example, Brookings Institution – University of Bern: Project on Internal Displacement, “Protecting Internally Displaced Persons: A Manual for Law and Policymakers”, October 2008, Chapter 11, pp. 157 – 168; “Action Sheet 2: Civil Status and the Prevention of Statelessness” in Global Cluster Protection Working Group, “Handbook for the Protection of Internally Displaced Persons”, provisional release, December 2007, pp. 171 – 179. See also Article 8(1) of the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession: “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.” The Explanatory Report to the aforementioned Convention states in relation to Article 8(1) of that Convention:

“32. The provision takes account of the situation where, due to the particular circumstances which might occur in the situation of State succession, it is impossible or very difficult for a person to fulfil the standard requirements of proof to meet the conditions for the acquisition of nationality.

33. It might in some cases be impossible for a person to provide full documentary proof of his or her descent if, for instance, the civil registry archives have been destroyed, or it might be impossible to provide documentary proof of the place of residence in cases where this was not registered. The provision includes the situation where it might objectively be feasible for a person to provide proof but where it would be unreasonable to demand for instance an action by a person which might put his or her life or health in danger.

34. The circumstances which lead to the difficulty in providing proof in order to meet the requirement are not necessarily always linked directly to the event of the State succession. It might be the consequence of an event that occurred before or after the time of the State succession, for instance where under the regime of the predecessor State a registry was destroyed or essential documents were not issued to a certain group of the population.

35. In the cases mentioned above it shall be sufficient to have a high probability of proof or independent testimony that the conditions for the acquisition of the nationality of a successor State are fulfilled.”

- d) Countries may be unable or unwilling to cooperate in identifying persons who are their nationals.<sup>154</sup> For example, Country A may not respond to a request from Country B to confirm whether Mr. Y is its national, e.g. because it lacks the institutional capacity to carry out the necessary investigations, or simply because it is unwilling to cooperate.<sup>155</sup> Mr. Y may even be detained by Country B and himself have received no response from Country A to a request for consular assistance.

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<sup>154</sup> See ExCom Conclusion No. 96 of 2003 on “The Return of Persons Found Not to be in Need of International Protection” which:

“(a) *Reaffirms* the right of everyone to leave any country, including his or her own, and to return to his or her own country as well as the obligation of States to receive back their own nationals, including the facilitation thereof, and remains seriously concerned, as regards the return of persons found not to be in need of international protection, that some countries continue to restrict the return of their own nationals, either outright or through laws and practices which effectively block expeditious return;

[...]

e) *Calls on* States to cooperate regarding the efficient and expeditious return of persons found not to be in need of international protection, to their countries of origin, other countries of nationality or countries with an obligation to receive them back, notably by;

- cooperating actively, including through their diplomatic and consular offices, in establishing the identity of persons presumed to have a right to return, as well as determining their nationality, where there is no evidence of nationality in the form of genuine travel or other relevant identity documents for the person concerned;
- finding practical solutions for the issuance of appropriate documentation to persons who are not or no longer in possession of a genuine travel document;

[...]

(g) *Recalls* further that Annex 9 to the 1944 Convention on International Civil Aviation requires that States, when requested to provide travel documents to facilitate the return of one of its nationals, respond within a reasonable period of time, and not more than 30 days after such a request is made, either by issuing a travel document or by satisfying the requesting State that the person concerned is not one of its nationals”

See also ExCom Conclusion No. 106 of 2006 on “Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons” which:

“(l) *Encourages* States to seek appropriate solutions for persons who have no genuine travel or other identity documents, including migrants and those who have been smuggled or trafficked, and where necessary and as appropriate, for the relevant States to cooperate with each other in verifying their nationality status, while fully respecting the international human rights of these individuals as well as relevant national laws;

(m) *Calls upon* States Parties to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Sea and Air, both supplementing the United Nations Convention against Transnational Organized Crime, to respect their obligation to assist in verifying the nationality of the persons referred to them who have been smuggled or trafficked with a view to issuing travel and identity documents and facilitating the return of such persons; and, *encourages* other States to provide similar assistance”

See also paragraph “s” of ExCom Conclusion No. 90 of 1996 and the references in footnote 149 above.

<sup>155</sup> On how States may seek to avoid their responsibilities to readmit their nationals, see Gregor Noll, “Return of Persons to States of Origin and Third States” in T. Alexander Aleinikoff and Vincent Chetail, eds., “Migration and International Legal Norms”, T.M.C. Asser Press, 2003, pp. 61 – 74.

- e) Nationality legislation may be unclear or be misinterpreted or misapplied by the Executive. This type of problem frequently may impact upon a particular group in society, for example in the context of post-colonialism or of State succession. Its resolution may require a ruling by the Courts, confirming that persons belonging to the group are indeed nationals.<sup>156</sup> Up until such time as the ruling is made, which may take several years or even several decades, the group may not be considered as nationals by the Executive, or may not even consider themselves to be nationals, even though they in fact fulfil the requirements for nationality. In other cases, ambiguity may be resolved only by a change in government policy or by the adoption of new nationality legislation with retroactive effect.<sup>157</sup>
- f) A State may consider that a person has the nationality of another State, and therefore that the person has not acquired its own nationality. For example, State A may be a party to the 1961 Convention on the Reduction of Statelessness and provide in its nationality legislation that a person born on its territory acquires its nationality at birth by operation of law if that person would otherwise be stateless. State A may determine that a person born on its territory acquired at the birth the nationality of State B, and therefore did not acquire its own nationality at birth. However, the person may in fact not have acquired the nationality of State B, and thus actually be a national of State A even though not yet recognized as such.<sup>158</sup>

<sup>156</sup> See, for example, Eric Paulsen, "The Citizenship Status of the Urdu-Speakers/Biharis in Bangladesh" in "Refugee Survey Quarterly", Vol. 25, No. 3, 2006, pp. 54 - 69; *Case of the Yean and Bosico Children v. The Dominican Republic*, footnote 144 above.

<sup>157</sup> See Paul White, "Reducing *de facto* statelessness in Nepal" in "Forced Migration Review", Issue 32, April 2009, pp. 28 - 29. See also Nini Gurung and Eric Paulsen, "Nepal Moves Mountains" in UNHCR, "Refugees", No. 147, Issue 3, 2007, p. 16:

"Birash is one of a reported 2.6 million Nepalese people who received citizenship certificates during a massive government campaign to regularize their situation in the first few months of 2007. Hundreds of mobile teams criss-crossed Nepal's 75 districts, visiting even the remotest of mountain villages, to ensure that citizenship certificates were issued to as many stateless people as possible.

This extraordinary logistical feat stemmed from the Nepal Citizenship Act of November 2006, which tackled the country's longstanding 'citizenship problem' – the estimated 3.4 million people who did not have citizenship certificates, and as a result suffered from a heavily truncated set of civil, social and economic rights. One of the main aims of the Act was to ensure that all eligible Nepalese can vote in forthcoming elections."

<sup>158</sup> Scenarios such as this were one of the reasons for the inclusion of Article 11 in the Convention. By providing for the establishment of an agency that can examine claims under the Convention and assist the individuals concerned in presenting them to the appropriate authorities, Article 11 gives individuals a degree of standing under the Convention, which is important because disputes in the application of the Convention are frequently more likely to arise between individuals and States than between States themselves. Note that Article 11 of the 1961 Convention went through various evolutions before it ended up in its final form. For the initial discussions and rationale in the International Law Commission, see: A/CN.4/SR.218, A/CN.4/SR.219, A/CN.4/SR.220, A/CN.4/SR.223, A/CN.4/SR.224, A/CN.4/SR.231 and A/CN.4/SR.232. UNHCR itself submitted written observations to the Conference on the Elimination or Reduction of Future Statelessness: see A/CONF.9/11, "Observations transmitted by the United Nations High Commissioner for Refugees", 30 June 1961:

"1. The draft Convention on the Reduction of Future Statelessness, as adopted by the Conference held in Geneva in March/April 1959 [prior to the reconvening of the Conference in New York in 1961], makes the grant of nationality according to Articles 1 and 4 dependent, *inter alia*, on the fact that the person concerned 'would otherwise be stateless'. The application of these provisions would, therefore, make it necessary for Contracting States to ascertain whether the person concerned possesses or does not possess

## 7.2 Determination of nationality

The fact that the persons listed above may face difficulties establishing their nationality does not necessarily mean that they will never be able to do so. However, the process may be challenging and take months, years, or even decades before a successful outcome is achieved. Difficulties of proof may be caused by complex, inaccessible and costly procedures, or by indifference or hostility from the authorities, making the process too onerous for an individual to pursue on his or her own without support from an international body, an NGO and/or his or her community. Sometimes laws or government policies may need to be changed, or at least relaxed, to make proof possible. Alternatively, in some cases the persons concerned may themselves try to prevent their nationality being established, for example if they are trying to benefit from the grant of nationality of another country on the grounds that they would otherwise be stateless, or if they are rejected asylum-seekers trying to conceal their true identity in order to avoid being returned to their country of origin. In other cases, the persons concerned may not even realize or consider themselves to be nationals.

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the nationality of one or several other States. According to a general principle of law, it is for each State to determine who are its nationals. The finding of the Contracting State concerned on the nationality of the person would not necessarily be identical with the finding of the State or States whose nationality is at issue. It could occur that Contracting State A holds that the person possesses the nationality of State B, while the authorities of State B hold that he has not the nationality of that country. In this case the person would not be granted the nationality of State A and, not being considered as national by State B, would remain stateless.

[...]

3. Article 11 of the draft Convention adopted by the Conference at Geneva provides that Contracting States shall promote the establishment within the framework of the United Nations of the United Nations of a body to which a person claiming the benefit of the Convention could apply for the examination of his claim and for assistance in presenting it to the appropriate authority. No provision is made, on the other hand, for a special tribunal as envisaged in the draft of the International Law Commission. The draft contains a new article providing for the settlement of disputes between Contracting States concerning the interpretation or application of the Convention which cannot be settled by other means, by the International Court of Justice at the request of any one of the parties to the dispute. Both Article 11 and the new Article on settlement of disputes were adopted at Geneva subject to a right of reservation.

4. The United Nations High Commissioner for Refugees wishes to draw the attention of the Conference to this problem, as the absence of provisions for the settlement of such conflicts as to the nationality of a person may, in his view, reduce the effect of the Convention in reducing statelessness.”

See further UNHCR, “Training Package: Statelessness and Related Nationality Issues”, *op. cit.*, para. 18: “it is not infrequent that all of the States with which an individual might have a claim to nationality cannot agree as to which State is the State which has granted nationality, leaving the individual unable to show *de jure* statelessness and, at the same time, without an effective nationality.” See also “Nationality and Statelessness: A Handbook for Parliamentarians”, *op. cit.*, p. 11: “It is presumed that an individual has a nationality unless there is some evidence to the contrary. However, sometimes the States with which an individual might have a genuine link cannot agree as to which of them is the State that has granted citizenship to that person. The individual is thus unable to demonstrate that he/she is *de jure* stateless, yet he/she has no effective nationality and does not enjoy national protection. He/She is considered to be *de facto* stateless.”

### *Determination of nationality by the State whose nationality is at issue*

Articles 1 and 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws reflect the well-established principles of international law that:<sup>159</sup>

Article 1: It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2: Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State.

Most people acquire a nationality automatically at birth, i.e. by operation of law without any formal act of the Executive being required.<sup>160</sup> Other people acquire a nationality only subsequent to birth, either automatically by operation of law or by an act of the Executive, the most common such act being naturalization.<sup>161</sup>

It should be noted that just because a person has not been registered by a State as its national does not necessarily mean that he or she is not considered as a national under the operation of that State's law. For example, each year approximately 48 million births remain unregistered by the time the children concerned have reached the age of five,<sup>162</sup> but this does not necessarily mean that none of those children have a nationality. What it does mean, however, is that the children are at the very least *at risk* of not being able to prove a claim that a claim that they have acquired nationality *jure sanguinis* or *jure soli* should their nationality status ever be questioned.<sup>163</sup> Such questioning could be triggered either by the State whose nationality is at issue, or by another State (if, for example, the child concerned was born or later travelled abroad).

Where a process of nationality determination is triggered, the persons listed in categories (a) to (f) above may find themselves unable to prove to the State whose nationality is at issue that they do in fact have its nationality, in which case that State will not consider them to be nationals under the operation of its law. If that State also considers them not to have the nationality of any other State, it will be bound to consider them *de jure* stateless.

### *Determination of nationality by other States*

Other States may make a nationality determination with or without consulting the State whose nationality is at issue. If the persons concerned are refugees or asylum-seekers, the State whose nationality is at issue *must not* be consulted; or, if there is already sufficient evidence regarding nationality status, the State whose nationality is at issue *need not* be consulted. However, sometimes it may be necessary to consult the State whose nationality is at issue before a determination can be made.

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<sup>159</sup> See also, for example, the Advisory Opinion of the Permanent Court of International Justice in *Nationality Decree Issued in Tunis and Morocco (French Zone)*, 1923.

<sup>160</sup> Note that the term "by operation of law" is not to be confused with the term "under the operation of its law". The latter term is broader, including, for example, decisions of the Executive that are based on law.

<sup>161</sup> For example, as a result of marriage.

<sup>162</sup> UNICEF, "The 'Rights' Start to Life: A Statistical Analysis of Birth Registration", 2005, p. 3.

<sup>163</sup> Note that sometimes a country may for a particular purpose be willing to lower its standard of evidence for proving nationality, e.g. in the context of a readmission agreement with another country. See, for example, the "List of Documents for Indirect Evidence of Nationality" in Annex 3 to the 2006 Agreement between the European Community and the Russian Federation on Readmission.



Ideally States would always agree on questions of nationality determination. However, in practice the finding of a State whose nationality is at issue may not always coincide with the findings of other States. For example, if State A declares that a person does not have its nationality this should normally be accepted by other States, in accordance with the principle that each State is competent to determine who are its nationals. However, where other States consider there are substantial reasons to doubt or challenge such a declaration, they need not necessarily take it at face value and could instead determine that the person concerned does in fact have the nationality of State A.<sup>164</sup>

For example, State B may find it credible that a particular individual was born in a State A that grants nationality *jure soli*, even though this is yet to be demonstrated to the standard required by the laws of evidence of State A. State B may accordingly make a finding that the person concerned is a national of State A, even though State A has not made such a finding itself.<sup>165</sup> State B's finding will not normally be binding on State A or on other States, but may well have legal consequences in State B, for example regarding whether or not State B should treat the person concerned as stateless. Hence, it is submitted that:

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<sup>164</sup> See UNHCR references in footnote 158 above. See also Weis, *op. cit.*, footnote 80 above, pp. 1085 – 1086: “The operation of most of the provisions of the [1961] Convention depends on the condition that the person concerned ‘would otherwise be stateless’ or be rendered stateless. The interpretation of these provisions will be a matter for the Contracting States. It will, therefore, be necessary for them to ascertain whether the person does or does not possess the nationality of one or more other States. Each State is, however, competent to determine who are its own nationals, and the findings of the Contracting State concerned on the nationality of the person will not necessarily coincide with the findings of the State or States whose nationality is at issue. In the absence of authoritative determination by that State or States, it is, as practical experience has shown, often very difficult to establish, beyond doubt, a person’s nationality or, for that matter, his lack of nationality, his statelessness.”

<sup>165</sup> The converse might also exceptionally occur, where State A claims that an individual has its nationality but State B refutes this. See Jennings and Watts (eds), “Oppenheim’s International Law”, 9<sup>th</sup> edition, 1992, Volume 1, Parts 2 to 4, pp. 854 - 855:

“[N]otwithstanding the general principle that it is for each state to determine who are its nationals, a state’s assertion that in accordance with its laws a person possesses its nationality is not conclusive evidence of that fact for international purposes. An international tribunal called upon to apply rules of international law based upon the concept of nationality has the power to investigate the state’s claim that a person has its nationality. However, this power of investigation is one which is only to be exercised if the doubts cast on the alleged nationality are not only not manifestly groundless but are also of such gravity as to cause serious doubts with regard to the truth and reality of that nationality.

Furthermore, it is not only international tribunals which may question the grant of nationality by a state to an individual. Even the national courts of other states may, although usually reluctant to do so, in certain circumstances feel it right to inquire into the justification and lawfulness of a state’s grant of its nationality. This is likely particularly to be the case where the grant of nationality is to be questioned because of alleged non-conformity with international law.

Despite such limitations on the international effects of nationality granted by a state to an individual, a state’s own determination that an individual possesses its nationality is not lightly to be questioned. It creates a very strong presumption both that the individual possesses that state’s nationality as a matter of its internal law and that that nationality is to be acknowledged for international purposes ...”

Where there have been grounds for State A to challenge the declaration of State B that a particular individual is not its national, then, if all reasonably available remedies have been exhausted by State A with State B, and State B maintains that it does not consider the individual concerned to be a national under the operation of its law, State A should similarly find that the individual is not a national of State B. If the individual does not have any other nationality, the individual would therefore be *de jure* stateless.

In many cases, the State whose nationality is at issue may not provide a definitive answer to other States as to whether a particular individual is its national or not. This may be because the State whose nationality is at issue requires further evidence before giving an answer, because it lacks the capacity to carry out any necessary investigations, because there is a dispute between it and another State as to which of the two State's nationalities the individual actually has, or simply because it is being uncooperative.<sup>166</sup>

If there is no reply at all from the State whose nationality is at issue, the most that can be inferred absent any other evidence is that if the individual concerned is indeed a national of that State, then he or she has been refused its external protection.<sup>167</sup> Whether it would be reasonable to additionally infer that the individual really is, or is not, a national of that State would depend upon what other evidence is available in the case, including the individual's own testimony. Frequently, however, the host State inquiring into the individual's nationality status may stop short of making a definitive nationality determination and conclude merely that the individual is of "undetermined nationality".<sup>168</sup>

The question arises, therefore, as to how a host State should treat a person if it concludes that he or she is of "undetermined nationality", i.e. that there is insufficient evidence to find that he or she is a national of the State(s) whose nationality is at issue, but also that there is insufficient evidence to find that he or she is not a national of the State(s) concerned. According to the legislation of certain States, including the majority of Member States of the Commonwealth of Independent States (CIS), persons not found to be nationals of any State

<sup>166</sup> Sometimes a country may invoke reasons of protection of personal data for not answering inquiries about whether a given individual is its national. This can be legitimate if the individual concerned has not provided his or her consent to disclosure of relevant personal data held by that country (although note that the right to privacy is not absolute and there may be certain situations where consent is not required). However, where the individual concerned does not have valid reasons for withholding consent, it may be questioned whether he or she is cooperating with the process of establishing his or her nationality, and thus possibly lead to adverse inferences in his or her case.

<sup>167</sup> Cf. UNHCR, "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees", 1979 (re-edited 1992), para. 107, quoted in the text footnoted by footnote 36 above.

<sup>168</sup> Just as a State may not confirm that a person is indeed its national, a State may also decline to confirm that a person is not its national. See Nehemiah Robinson, "Convention relating to the Status of Stateless Persons: Its History and Interpretation", Institute of Jewish Affairs (1955), republished by UNHCR (1997), pp. 16 - 17: "[The Conference of Plenipotentiaries on Status of Stateless Persons] did not deal with proofs. Nor does the [1954 Statelessness] Convention establish how statelessness is to be proven. Thus it is left to the government of the state of residence to decide whether the person in question has proven the lack of nationality. Although the definition on its face may appear to have such a meaning, it certainly was not the intention of the conference to require a formal proof from states with which the person had no intimate relationship. This would reduce the proofs to the country of origin and/or former permanent residence. Once these countries have certified that the person is not a national of theirs, he would come within the definition of Article 1 [of the 1954 Convention]. If, however, no such certification could be obtained because the relevant authorities refuse to issue it or do not reply to inquiries, the state of residence is expected to accept other proofs, either documentary ... or reliable witnesses."

qualify as stateless persons. Thus, for example, Article 3 of Federal Law No. 62-FZ of 31 May 2002 on Citizenship of the Russian Federation defines a stateless person as “a non-citizen of the Russian Federation who has no proof of possessing the nationality of a foreign State” (unofficial translation). Similarly, Article 1(f) of the 2006 Agreement between the European Community and the Russian Federation on Readmission provides that a stateless person “shall mean any person who does not hold the nationality of the Russian Federation or one of the Member States, and who has no evidence of holding the nationality of any other State”. Within the European Union (EU) itself, the citizenship legislation of at least one Member State, Austria, provides that subject to certain exceptions – e.g. foundlings – a person whose nationality cannot be determined is to be treated as a stateless person.<sup>169</sup> Norway in fact proposed at the Conference of Plenipotentiaries on the Status of Stateless Persons that Article 1 of the 1954 Statelessness Convention might be amended “to the effect that the term ‘stateless persons’ should be interpreted as meaning persons not found to be nationals of any State.”<sup>170</sup> Similarly, the representative of Germany to the Conference noted that “it was sometimes difficult to determine whether a person was or was not a national of a particular State” and proposed that “[t]hat disadvantage might be avoided by the addition of the words: ‘or whose nationality cannot immediately be established’”.<sup>171</sup> The German representative later added:

No country of residence could dispute the declaration of a country of origin that it had deprived a person of its nationality. The status of such a person was clear. The difficulty arose in cases where there was no definite resolution of the question of status owing to the unwillingness of the country of origin to reply to inquiries or for other reasons. It would be dangerous to define such persons as stateless. The best way to provide for the latter contingency would be the inclusion of a clause giving the contracting States the option of granting the benefits accorded to stateless persons to any person who renounced his nationality or who was not claimed by his country of origin, or the use of some other formula along similar lines.<sup>172</sup>

Neither the German nor the Norwegian proposals were substantively discussed by the Conference in plenary, and one can only speculate about what discussions may subsequently have taken place in the Drafting Committee which produced the core text of Article 1. As a matter of logic, persons *not found to be* nationals of any State are not the same as persons *found not to be* nationals of any State; nevertheless, in light of the above it is submitted that:

1. If, after having examined the nationality legislation and practice of States with which an individual enjoys a relevant factual link (in particular by birth on the territory, descent, marriage or residence) – and/or after having checked as appropriate with those States – the individual concerned is not found to have the nationality of any of those States, then he or she should be considered to satisfy the definition of a stateless person in Article 1 of the 1954 Statelessness Convention.
2. Foundlings are an exception. In the absence of proof to the contrary, foundlings should be presumed to have the nationality of the State in whose territory they are found (see below).

Point 1 above assumes that the individual concerned is cooperating in the process of establishing his or her nationality. It provides for an inclusive interpretation of Article 1 of

<sup>169</sup> Article 3 of the 1985 Austrian Citizenship Act. The exceptions are listed in Article 8 of the Act.

<sup>170</sup> E/CONF.17/SR.4, p. 7. Norway’s proposal was also supported by Yugoslavia.

<sup>171</sup> E/CONF.17/SR.3, p. 17.

<sup>172</sup> E/CONF.17/SR.4, p. 4.

the 1954 Convention, consistent with the Convention's humanitarian object and purpose. It prevents persons who are acting in good faith from being left indefinitely in limbo with "undetermined nationality", since in practice such persons are in exactly the same position protection-wise as persons found not to have a nationality.<sup>173</sup>

Point 2 above provides for an important exception to the general rule in point 1. As early as 1930, Article 14 of the Hague Convention on Certain Questions relating to the Conflict of Nationality Laws stipulated:

A child whose parents are both unknown shall have the nationality of the country of birth. If the child's parentage is established, its nationality shall be determined by the rules applicable in cases where the parentage is known.

A foundling is, until the contrary is proved, presumed to have been born on the territory of the State in which it was found.

Similarly, Article 2 of the 1961 Convention on the Reduction of Statelessness provides:

A foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State.

In other words, in the absence of proof to the contrary, foundlings should be presumed to have the nationality of the State in whose territory they are found.<sup>174</sup> This is the position taken in the nationality legislation of many States, including those which have never been party to the abovementioned instruments.

### *Determination of nationality by UNHCR*

It has sometimes been suggested that UNHCR does not have the authority to make determinations of statelessness, since States alone determine who are their citizens.<sup>175</sup>

While it is, of course, true to say that States alone determine who are their citizens – in the sense that each State has the sovereign right, subject to certain limitations imposed by international law, to decide upon whom it shall confer, or from whom it shall withdraw, its nationality – it does not follow that UNHCR does not have the authority to determine whether an individual has a particular nationality or is stateless. On the contrary, as part of the process of conducting refugee status determination (RSD) under the Office's mandate,

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<sup>173</sup> Although not exactly the same point, note also the Handbook on Procedures and Criteria for Determining Refugee Status, *op. cit.*, para. 89: "Where his nationality cannot be clearly established, [the applicant's] refugee status should be determined in a similar manner to that of a stateless person, i.e. instead of the country of his nationality, the country of his former habitual residence will have to be taken into account."

<sup>174</sup> See also Article 6(1) of the European Convention on Nationality: "Each State Party shall provide in its internal law for its nationality to be acquired *ex lege* by the following persons: (a) ... (b) foundlings found in its territory who would otherwise be stateless."

<sup>175</sup> See, for example, UNHCR, "Guidelines: Field Office Activities Concerning Statelessness", *op. cit.*, para. 21: "UNHCR does not have either the authority or the expertise to make declarations on nationality status or independently to issue documentation attesting to nationality status. States alone determine who are their citizens." See also UNHCR, "Progress Report on UNHCR Activities in the Field of Statelessness", E/49/SC/CRP.15, 4 June 1999, para. 13: "UNHCR, as the body responsible for providing technical and advisory services on nationality principles in international law, can assist efforts to determine nationality status. However, the determination as to whether an individual does or does not have the nationality of a given State ultimately rests with the State, as is stipulated by international law. If States do not or cannot make this determination, an individual's status will remain unclear."

UNHCR Field Offices are on a daily basis actually *required* to make findings about the nationality, or lack thereof, of applicants for refugee status and to issue the persons concerned with a refugee or asylum seeker certificate declaring their nationality status. Similarly, there is no reason in principle why UNHCR cannot conduct statelessness determination outside the context of RSD. Such statelessness determination of course has to be based on evidence as to the status of the persons concerned under the municipal law of the State(s) whose nationality is at issue, and as the case may be might only be made after directly consulting that State(s), but the fact remains that it is UNHCR that makes the determination. The Office has recently made this clear in a Strategy Note on statelessness issued in March 2010:

In some circumstances it may be necessary that UNHCR assesses whether or not a person is stateless. As in refugee status determination, UNHCR can assess, whether to the Office's knowledge, a person is stateless or possesses a specific nationality.<sup>176</sup>

Hence, the above considerations concerning the determination of nationality status by States apply equally to the determination of nationality status by UNHCR.

### 7.3 Questions of statelessness

As noted above, persons with respect to whom a particular State's nationality is at issue may either be outside or inside that State.

#### a) Persons outside the State whose nationality is at issue:

- i) If the persons are found to be nationals of the State concerned, they will fall within the traditional conception of *de facto* statelessness discussed in Part I above if they are found to be refugees or are otherwise unable or, for valid reasons,<sup>177</sup> unwilling to avail themselves of the protection of that State.
- ii) If the persons are found not to be nationals of the State concerned, they will be *de jure* stateless if they do not have the nationality of another State.<sup>178</sup>
- iii) If nationality inquiries are ongoing with the State concerned, the question whether the persons are *de jure* or *de facto* stateless cannot yet be answered. However, inquiries should not be allowed to drag on indefinitely, with no answer in sight. For example, as recommended by the Council of Europe in 2009 in its Recommendation on the Nationality of Children, States should "register children as being of unknown or undetermined nationality, or classify children's nationality as being 'under investigation' only for as short a period as possible".<sup>179</sup>

It is therefore concluded that the case of persons outside the State whose nationality is at issue does not raise any questions of *de facto* statelessness that go beyond the traditional conception of *de facto* statelessness.

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<sup>176</sup> UNHCR, "UNHCR Action to Address Statelessness: A Strategy Note", Division of International Protection, March 2010, para. 54.

<sup>177</sup> See further the discussion on "valid reasons" in section 11.3 below.

<sup>178</sup> Note also point 1 of the submission on p. 50 above.

<sup>179</sup> Principle 8 of Recommendation CM/Rec(2009)13 of the Committee of Ministers of the Council of Europe, 9 December 2009.

b) Persons inside the State whose nationality is at issue:

- i) If the State concerned finds that the persons are its nationals, they are neither *de jure* nor *de facto* stateless.
- ii) The persons may not possess any documentation which proves they are nationals of the State concerned and their treatment by that State may suggest that it does not regard them as its nationals, or that State may even have made an initial determination that they are not its nationals. Nevertheless, UNHCR or another State may, depending on the evidence available, consider that such persons have, or may have, the nationality of that State. Any such finding or hypothesis would normally have no legal consequences for that State, which will either consider the persons to be its nationals or not. However, there may be consequences in particular for UNHCR.

If the Office considers that the persons have, or may have, the nationality of that State, then it may need to take action based on its mandate for the prevention of *de jure* statelessness because of the risk of the State never recognizing them as its nationals. If in fact the persons do turn out to be *de jure* stateless, the Office's mandate for the protection of stateless persons and reduction of statelessness would be engaged.

Given that the persons concerned remain inside the State of their alleged nationality, grounding the Office's approach in its mandate for addressing *de jure* statelessness would be much less questionable doctrinally, and no less effective in practice, than creating a new paradigm of *de facto* statelessness whereby persons can be *de facto* stateless inside the State of their nationality as well as outside it. The scope of what the Office could actually set out to achieve in any given country situation would, however, depend on how any concerns about possible perceived interference with national sovereignty are resolved.

In conclusion, it is submitted for the reasons set out in (a) and (b) above that:

Persons who are unable to establish their nationality, or who are of undetermined nationality, may turn out to be *de jure* or *de facto* stateless. Those who are *de facto* stateless fall within the traditional conception of *de facto* statelessness described in Part I above.

**8. PERSONS WHO, IN THE CONTEXT OF STATE SUCCESSION, ARE ATTRIBUTED THE NATIONALITY OF A STATE OTHER THAN THE STATE OF THEIR HABITUAL RESIDENCE**

As mentioned above,<sup>180</sup> UNHCR and others have used the term “*de facto* statelessness” to refer to a situation where, following a succession of states, a person is attributed the nationality of a state other than the State of his or her habitual residence. The most comprehensive statement of the Office's position in this respect is to be found in its 1997

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<sup>180</sup> See section 5 above.

publication concerning citizenship and statelessness in the context of the disintegration of the former Socialist Federal Republic of Yugoslavia (SFRY):<sup>181</sup>

The Socialist Federal Republic of Yugoslavia was characterized by a double level of citizenship, all former SFRY citizens were citizens of the Federal Republic and were also registered with a republican citizenship of one of the six SFRY Republics (Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia, and Slovenia).

[...]

Each of these republics had its own record of nationality and everyone who was a national of the Socialist Federal Republic of Yugoslavia was also to be registered in the nationality books of *one* of the republics. This registration had no legal impact for the persons concerned in the sense that it did not necessarily reflect the republic in which one lived, voted, worked, went to school nor, in fact, where one was born. It was of so little significance to people that they moved freely back and forth between republics and rarely made an effort to change their republican nationality, although this could be easily done. Many did not even know in which register they were recorded.

Thus, when the successor States chose to grant nationality based upon the list of names in the previous republican nationality register, the result had both positive and negative elements. The positive element to this approach is that in principle, no cases of *de jure* statelessness could occur as all persons were presumed to be registered in one of the republican nationality registers. The negative element to this approach, with serious repercussions for thousands of people, was that those who were not registered in the successor State in which they *lived* were made foreigners in *that* State overnight. This was true in cases of persons who were born on the territory of that State and had lived there all their lives. While in some cases procedures were introduced to mitigate these severe effects, for example through a right of option or through acceptance into citizenship for certain ethnic groups, these procedures were either limited in time or of assistance to particular ethnic groups only.

[...]

The procedure used in determining the more “effective nationality” in cases of dual nationality can usefully be extrapolated for determination of the genuine and effective link in granting nationality following State dissolution. There are connecting factors which may indicate an individual has a closer connection to one particular State than to any other State. Inability to acquire nationality in *that* State will constitute significant hardship for that individual and for his or her family. Further, basing the grant of nationality upon the registration system of a dissolved State, which was of no consequence even within that State, does not seem sufficient ground for choosing the nationality register over the genuine and real ties an individual has established. Human rights principles may also be contravened if the *de facto* statelessness thereby created, is created in relation to minorities only on the State’s territory. Thus, while avoidance of *de jure* statelessness may comply with international legal principles in the narrow sense of the law, the creation of *de facto* statelessness does not address the underlying intent or purpose of the law that all persons should have an effective nationality, one which carries with it the usual attributes of nationality and is reflective of real, genuine, and effective links in daily life.

In UNHCR’s view, therefore, permanent residents on a successor State’s territory at the point of the dissolution of the former SFRY might more understandably have been included in the initial body of citizens of that successor State. If, however, the successor States were unable to agree on this approach and were concerned that the use of different approaches might result in *de jure* statelessness, a right of option might have been employed to extend to those who had been granted nationality in a State in which they did not live the right to choose, rather, to have nationality in the State in which they did live. In this way, both *de jure* and *de facto* statelessness would have been avoided.<sup>182</sup>

In short, according to this approach, persons may become *de facto* stateless if, in the context of State succession, they are not granted the right to the nationality of the successor State

<sup>181</sup> See also, for example, UNHCR, “Citizenship in the Context of the Dissolution of Czechoslovakia”, *op. cit.*

<sup>182</sup> UNHCR, “Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia”, *op. cit.*, pp. 2 - 5.

with which they have a genuine and effective link through habitual residence, but instead against their will are granted the nationality of a different State. Since the persons concerned remain outside the State of their nationality, such a position would be consistent with the traditional conception of *de facto* statelessness discussed in Part I above if the persons concerned were unable or, for valid reasons, unwilling to avail themselves of the protection of said State. However, what UNHCR says is that such persons are *de facto* stateless simply because they are condemned to live as foreigners in the State of their habitual residence; the availability or otherwise of the protection of the State of nationality in relation to the State of habitual residence appears not to be relevant in UNHCR's view.

### *ILC draft Articles on Nationality of Natural Persons in Relation to the Succession of States*

UNHCR's position above needs to be assessed in the light of subsequent developments, in particular the completion by the ILC in 1999 of its draft Articles on Nationality of Natural Persons in Relation to the Succession of States,<sup>183</sup> draft Article 5 of which provides:

Subject to the provisions of the present articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor State on the date of such succession.

According to the ILC commentary to the above provision:

(1) The purpose of article 5 is to address the problem of the time-lag between the date of the succession of States and the adoption of legislation or, as the case may be, the conclusion of a treaty between States

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<sup>183</sup> In December 2000 the UN General Assembly adopted Resolution 55/153, which *inter alia* invited Governments to take the draft Articles into account as appropriate, considering that "they provide a useful guide for practice". The General Assembly subsequently adopted a second resolution in December 2004 (Resolution 59/34) which *inter alia*: "2. *Encourages* States to consider, as appropriate, at the regional or subregional levels, the elaboration of legal instruments regulating questions of nationality of natural persons in relation to the succession of States, with a view, in particular, to preventing the occurrence of statelessness as a result of a succession of States; 3. *Invites* Governments to submit comments concerning the advisability of elaborating a legal instrument on the question of nationality of natural persons in relation to the succession of States, including the avoidance of statelessness as a result of a succession of States". A third resolution was adopted by the General Assembly in December 2008 (Resolution 63/118), which repeats the aforementioned and: "*Decides* to include in the provisional agenda of its sixty-sixth session [in 2011] the item entitled "Nationality of natural persons in relation to the succession of States", with the aim of examining the subject, including the question of the form that might be given to the draft articles." In 2006, the Council of Europe adopted the Convention on the Avoidance of Statelessness in the Context of State Succession, which *inter alia* takes the draft Articles into consideration. Article 1(c) of the Convention provides: "'Statelessness' means the situation where a person is not considered as a national by any State under the operation of its internal law". However, para. 9 of the Explanatory Report to the Convention adds *inter alia*: "The definition in terms of binding legal obligation for the States concerned is thus limited to "*de iure* stateless persons", although the Final Act of the 1961 United Nations Convention on the Reduction of Statelessness recommends that persons who are "*de facto* stateless" should as far as possible be treated as "*de iure* stateless" to enable them to acquire an effective nationality." Article 3 of the Convention then provides: "The State concerned shall take all appropriate measures to prevent persons who, at the time of the State succession, had the nationality of the predecessor State, from becoming stateless as a result of the succession." Para. 16 of the Explanatory Report then notes in this respect: "States may if they so wish apply the provisions of the Convention also to *de facto* stateless persons. This is not a legal obligation but a possibility. State succession may well create situations of *de facto* statelessness where persons do have the nationality of one of the States concerned but are not able to benefit from the protection of that State." For purposes of applying the Convention to *de facto* stateless persons, *de facto* statelessness thus appears to be construed in the Explanatory Report in terms consistent with the traditional conception of *de facto* statelessness discussed in Part I above. It may even be more limited than the traditional conception, since no reference is made to persons who are unwilling to avail themselves of protection.



concerned on the question of the nationality of persons concerned following the succession. Since such persons run the risk of being treated as stateless during this period, the Commission feels it important to state, as a presumption, the principle that, on the date of the succession of States, the successor State attributes its nationality to persons concerned who are habitual residents of the territory affected by such succession. The presumption stated in article 5 also underlies basic solutions envisaged in Part II [of the draft articles] for different types of succession of States.

(2) This is, however, a rebuttable presumption [...]

[...]

(4) As regards the criterion on which this presumption relies, it derives from the application of the principle of effective nationality to the specific case of the succession of States. As Rezek has stressed,

*“the juridical relationship of nationality should not be based on formality or artifice, but on a real connection between the individual and the State”.*

Habitual residence is the test that has most often been used in practice for defining the basic body of nationals of the successor State, even if it was not the only one. This is explained by the fact that the population has a “territorial” or local status, and this is unaffected whether there is a universal or partial successor and whether there is a cession, i.e., a “transfer” of sovereignty, or a relinquishment by one State followed by a disposition by international authority. Also, in the view of experts of UNHCR, “there is substantial connection with the territory concerned through residence itself”.<sup>184</sup>

The different types of succession of States for which solutions are provided in the draft Articles are: (i) when part of the territory of a State is transferred by that State to another State; (ii) when two States unite; (iii) when a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States. Specifically, the draft Articles provide:

#### *Article 20*

##### *Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State*

When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted. The predecessor State shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

#### *Article 21*

##### *Attribution of the nationality of the successor State*

Subject to the provisions of article 8,<sup>185</sup> when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.

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<sup>184</sup> International Law Commission, “Report of the International Law Commission on the work of its fifty-first session”, A/54/10, 1999, pp. 28 - 29.

<sup>185</sup> Article 8 provides: “1. A successor State does not have the obligation to attribute its nationality to persons concerned who have their habitual residence in another State and also have the nationality of that or any other State. 2. A successor State shall not attribute its nationality to persons concerned who have their habitual residence in another State against the will of the persons concerned unless they would otherwise become stateless.”

*Article 22*  
*Attribution of the nationality of the successor States*

When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, unless otherwise indicated by the exercise of a right of option, attribute its nationality to:

(a) Persons concerned having their habitual residence in its territory; and

(b) Subject to the provisions of article 8:

- (i) Persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;
- (ii) Persons concerned not entitled to a nationality of any State concerned under subparagraphs (a) and (b) (i) having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

*Article 23*  
*Granting of the right of option by the successor States*

1. Successor States shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.

Thus, leaving aside the situation of two or more States uniting into one successor State, habitual residents should normally be granted the nationality of the successor State in which they reside, unless otherwise indicated by the exercise of a grant of option to the nationality of a predecessor State or of another successor State.

This is consistent with the position of UNHCR above that, in the context of the disintegration of the SFRY, the habitual residents of each successor State should have been granted the nationality of the State concerned, unless being granted a right of option to the nationality of the State where they had held their “republican citizenship”. However, it is another matter whether it also means that those habitual residents who against their will acquired the nationality of the State where they had held republican citizenship, instead of their State of residence, were thereby rendered *de facto* stateless.

*Critique of UNHCR’s position on de facto statelessness*

As already noted, UNHCR claims that the above-mentioned persons are *de facto* stateless not because they do not enjoy the protection of the State of their nationality *vis-à-vis* other States, including the State of their habitual residence, but because they are condemned to live as foreigners in the latter State. However, it is not all clear why persons who have a much closer link with the State of their habitual residence than with the State of their nationality should be termed “stateless”. Similarly-situated persons may also be found in contexts much more common than that of State succession, but have never been called “stateless” by UNHCR or by anybody else.

For example, States such as Switzerland that do not automatically grant nationality *jure soli* may also not grant nationality *jure soli* even to a second generation of persons born on their territory (i.e. to children born to foreign parents who themselves were born on the territory). Assuming that such children acquire at birth the nationality of another State (i.e. are not *de jure* stateless), their position is in all practical respects no different from that of persons who, in the context of State succession, acquire the nationality of a State other than their State of habitual residence. However, nobody has ever suggested that such children are *de facto* stateless, for the simple reason that even if their links with the State of their nationality are very tenuous, there is no obstacle in principle to their being able to rely on that State's diplomatic protection and consular assistance. As the ILC has stated in its commentary to its draft Articles on Diplomatic Protection, the effective link argument in the *Nottebohm* case should be distinguished on its very particular facts, and, for purposes of diplomatic protection:

it is necessary to be mindful of the fact that if the genuine link requirement proposed by *Nottebohm* was strictly applied it would exclude millions of persons from the benefit of diplomatic protection as in today's world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth of descent from States with which they have a tenuous connection.<sup>186</sup>

Even if the children discussed above were to renounce the protection of the State of their nationality on the grounds that they have a much closer connection with the State of their habitual residence, State practice already shows that renunciation would not be considered as valid for purposes of treating them as stateless under the 1954 Statelessness Convention per the Recommendation of that Convention's Final Act,<sup>187</sup> or for purposes of granting them nationality under the 1961 Convention.

Similarly, a tenuous link with the State of nationality would on its own be insufficient for considering as *de facto* stateless persons who, in the specific context of State succession, against their will do not acquire the nationality of the State of their habitual residence. Even if such persons have unlawfully been denied the nationality of the State of their habitual residence (e.g. by not being given an option to acquire that nationality), it would arguably be unlawful for States to accept as valid their reasons for rejecting the protection of the State of their nationality. Article 19(1) of the draft Articles on Nationality in the Context of State Succession stipulates:

Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.<sup>188</sup>

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<sup>186</sup> International Law Commission, "Report of the International Law Commission on the work of its fifty-eighth session", A/65/10, 2006, p. 33.

<sup>187</sup> In many countries it would not even be in the interests of such children to be treated as stateless under the 1954 Convention, since they normally would benefit from the acquired rights (e.g. to permanent residence) of their parents in the country of habitual residence.

<sup>188</sup> An earlier version of draft Article 19(1) actually used the term "*de facto* stateless" and was worded as follows: "Without prejudice to any treaty obligation, where persons having no genuine link with a State concerned have been granted that State's nationality following the succession of States, other States do not have the obligation to treat those persons as if they were nationals of the said State, unless this would result in treating those persons as if they were *de facto* stateless" (see International Law Commission, "Third Report on Nationality in Relation to the Succession of States", A/CN.4.480 and Add.1, 27 and 28 February 1987). However, ILC Member James Crawford objected to use of the term "*de facto* stateless", stating that: "He was a little concerned about the reference to ... *de facto* statelessness which seemed to raise a distinction between *de facto* and *de jure* status that might be problematic. He would prefer it, therefore, if

As stated by the ILC in its commentary to draft Article 19(1):

(1) *Paragraph 1* safeguards the right of States other than the State which has attributed its nationality not to give effect to a nationality attributed by a State concerned in disregard of the requirement of an effective link. International law cannot, on its own, invalidate or correct the effects of national legislation on the nationality of individuals, but it allows “some control of exorbitant attributions by States of their nationality, by depriving them of much of their international effect”, because “the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question”. In the final analysis, although nationality pertains essentially to the internal law of States, the general principles of the international law of nationality constitute limits to the discretionary power of States.

(2) The need to “draw a distinction between a nationality link that is *opposable* to other sovereign States and one that is not, notwithstanding its validity within the sphere of jurisdiction of the State [in question]” has led to the development of the theory of effective nationality. As regards the specific situation of a succession of States, it is also widely accepted that

*[t]here must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplomatically; provided, that is, there is some State competent to protest on behalf of the persons concerned.*

(3) A number of writers on the topic of the succession of States who hold the above view that the successor State may be limited in its discretion to extend its nationality to persons who lack an effective link with the territory concerned base their argument on the decision of ICJ in the *Nottebohm* case. In its judgment, the Court indicated some elements on which an effective nationality can be based. As the Court said,

*[d]ifferent factors are [to be] taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.*

It is to be noted, however, that the Italian-United States Conciliation Commission, in the *Flegenheimer* case, concluded that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in cases of fraud, negligence or serious error. Moreover, the judgment in the *Nottebohm* case only dealt with the admissibility of a claim for diplomatic protection and did not imply that a person could be generally treated as stateless.

(4) In practice, different tests for determining the competence of the successor State to attribute its nationality on certain persons have been considered or applied, such as habitual residence or birth. Thus, for example, the peace treaties after the First World War as well as other instruments used as a basic criterion that of habitual residence. But, as has been pointed out, “[a]lthough habitual residence is the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons, it cannot be stated with assurance to be the only test admitted in international law”. Some authors have favoured the test of birth in the territory affected by the succession as proof of an effective link with the successor State. In recent dissolutions of States in Eastern Europe, the main accent was often put on the “citizenship” of the component units of the federal State that disintegrated, which existed in parallel to federal nationality.

(5) The term “link” in paragraph 1 of article 19 is qualified by the adjective “effective”. The intention was to use the terminology of ICJ in the *Nottebohm* case. Although the question of non-opposability of

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the last part of the paragraph could be amended to read: ‘and this would result in treating them as stateless’, or words to that effect” (see International Law Commission, “Summary Record of the 2486<sup>th</sup> meeting”, A/CN.4/SR.2486, 30 May 1997, para. 70).

nationality not based on an effective link is a more general one, the scope of application of paragraph 1 is limited to the nonopposability of a nationality acquired or retained following a succession of States.<sup>189</sup>

Thus, even should there be a situation where, in the context of State succession, the State of nationality does not have a right under international law to extend its diplomatic protection to persons who against their will have become its nationals instead of becoming nationals of the State of their habitual residence, States may not lawfully treat such persons as stateless. There would therefore be nothing to be gained in UNHCR considering such persons as stateless either. This of course is without prejudice to such persons being treated as refugees by UNHCR and by States if they fall within the definition of the 1951 Refugee Convention. In conclusion, it is submitted that:

1. The term “*de facto* stateless” does not apply to persons who, in the context of State succession, against their will acquire the nationality of a State other than the State with which they have a genuine and effective link through habitual residence.
2. Persons who are refugees within the meaning of the 1951 Refugee Convention are an exception. However, such persons should be treated as refugees, not merely as stateless persons.

## 9. CONCLUSIONS OF PART II

Part II has analyzed three categories of persons who have been claimed in the literature to be *de facto* stateless:

- Persons who do not enjoy the rights attached to their nationality;
- Persons who are unable to establish their nationality, or who are of undetermined nationality;
- Persons who, in the context of State succession, are attributed the nationality of a State other than the State of their habitual residence.

The conclusion from the analysis above is that each of these categories is invalid, since in some cases the persons concerned are actually *de jure* stateless, in other cases they fit the traditional conception of *de facto* statelessness, and in yet other cases they should not be considered *de facto* stateless at all.

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<sup>189</sup> International Law Commission, “Report of the International Law Commission on the work of its fifty-first session”, *op. cit.*, pp. 39 - 40.

## **PART III: CONCLUSIONS**

### **10. THE DEFINITION OF *DE FACTO* STATELESSNESS**

Based on the analysis in Parts I and II above, it is submitted that *de facto* stateless persons should be defined as follows:

*De facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.

Persons who have more than one nationality are *de facto* stateless only if they are outside *all* the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of *any* of those countries.

### **11. INTERPRETATION OF THE DEFINITION OF *DE FACTO* STATELESSNESS**

It is submitted that the above definition of *de facto* statelessness should be interpreted as follows.

#### **11.1 Outside the country of nationality**

Persons who are *de facto* stateless cannot be inside the country of their nationality. By definition, they must be outside that country.

Sometimes it may be possible to establish that a person has a nationality, but not exactly which nationality he or she has, in which case it will not necessarily be possible to establish whether the person is inside or outside the country of his or her nationality.

For example, the legislation of Country A may provide that a person born on Country A's territory acquires Country A's nationality at birth if the person concerned would otherwise be *de jure* stateless. If it cannot be established whether or not the person had, or was entitled to acquire, the nationality of another country at birth, it will not be possible to establish whether or not that person acquired the nationality of Country A at birth. In such circumstances, while it can be concluded that the person must have a nationality – that is, either the nationality of Country A or of another country – it cannot be concluded exactly which nationality the person has. Under such circumstances, a person must be outside all of his or her putative countries of nationality before it can be established whether or not he or she is *de facto* stateless.

If it cannot be established whether or not a person has a nationality, then it cannot be established whether or not he or she is *de facto* stateless.<sup>190</sup>

#### **11.2 Protection of the country of nationality**

Persons who are *de facto* stateless must be unable or, for valid reasons, unwilling to avail themselves of the protection of their country of nationality. Such protection includes not

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<sup>190</sup> But see point (a)(iii) in section 7.3 above

only “protection proper” – that is, the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals – but diplomatic and consular protection and assistance generally, including return to the State of nationality.

### **11.3 Valid reasons for being unwilling to avail oneself of protection**

What is considered as a valid reason by one State may not be considered as valid by another. Absent a consensus amongst States on what constitutes a valid reason, any determination that a particular reason is valid would be binding only for the State making that determination. This would normally be the case even if the person claiming to be *de facto* stateless is objecting to any conduct of his or her State of nationality that may be illegal under international law.

The existing global and regional refugee protection instruments reflect the current consensus of States on what constitute “valid reasons” for refusing the protection of one’s country of nationality. Persons who refuse the protection of the country of their nationality when it is available and who do not fall under one or more of the aforementioned instruments are not *de facto* stateless.

#### *Global refugee protection instruments*

For purposes of the 1951 Convention/1967 Protocol relating to the Status of Refugees, a refugee is a person who

“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence ... is unable or, owing to such fear, is unwilling to return to it.”

Refugees are thus either *de jure* or *de facto* stateless.

“*De jure* stateless refugees” are persons not having a nationality who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their former habitual residence and are unable or, owing to such fear, are unwilling to return to it.

“*De facto* stateless refugees” are persons who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, are outside the country of their nationality and are unable or, owing to such fear, are unwilling to avail themselves of the protection of that country.

In the case of refugees who are *unwilling* to avail themselves of the protection of the country of their nationality, it is their well-founded fear of being persecuted which gives rise to their “valid reasons” for refusing such protection and hence to their *de facto* statelessness.

### *Regional refugee protection instruments*

Three regional refugee protection instruments reflect the current consensus of States at the regional level on what constitute valid reasons for refusing the protection of one's country of nationality:

- The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa;
- The 1984 Cartagena Declaration on Refugees; and
- Council Directive 2004/83/EC of the European Union on "minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted" (hereinafter "EU Qualification Directive").

#### *1969 Convention Governing the Specific Aspects of Refugee Problems in Problems in Africa*

The 1969 Convention protects persons falling within a similar refugee definition to that of the 1951 Convention/1967 Protocol<sup>191</sup> and also

every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.<sup>192</sup>

Although the 1969 Convention does not explicitly require that the latter persons who are nationals be unable or unwilling to avail themselves of the protection of the country of their nationality, such a requirement may be inferred from the 1969 Convention's cessation clauses which *inter alia* stipulate that the Convention shall cease to apply to any person who "has voluntarily re-availed himself of the protection of the country of his nationality."<sup>193</sup>

The 1969 Convention thus protects persons who are *de jure* or *de facto* stateless. In the case of persons who are *de facto* stateless, "valid reasons" for refusing protection are having a well-founded fear of being persecuted on one of the five grounds enumerated in the 1969 Convention, or being compelled to leave one's place of habitual residence in the country of nationality to seek refuge abroad owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of said country.

#### *1984 Cartagena Declaration on Refugees*

The 1984 Cartagena Declaration recommends the use of a refugee definition in Latin American countries which

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<sup>191</sup> See Article 1(1) of the 1969 Convention: "For the purposes of this Convention, the term 'refugee' shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it."

<sup>192</sup> Article 1(2) of the 1969 Convention.

<sup>193</sup> Article 1(4)(a) of the 1969 Convention.



in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.<sup>194</sup>

The reference to the 1951 Convention and 1967 Protocol implies that persons who have a nationality must be unable or unwilling to avail themselves of the protection of the country of their nationality.

The Cartagena Declaration thus protects persons who are *de jure* or *de facto* stateless. In the case of persons who are *de facto* stateless, “valid reasons” for refusing protection are having a well-founded fear of being persecuted on one of the five grounds enumerated in the 1951 Convention/1967 Protocol, or fleeing the country of nationality because one’s life, safety or freedom has been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.

#### *2004 EU Qualification Directive*

The EU Qualification Directive protects persons falling within a similar refugee definition to that of the 1951 Convention/1967 Protocol<sup>195</sup> and also

a third country national or a [*de jure*] stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a [*de jure*] stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm ... and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country<sup>196</sup>

Such a person is termed a “person eligible for subsidiary protection.”

The Qualification Directive thus protects persons who are *de jure* or *de facto* stateless. In the case of persons who are *de facto* stateless, “valid reasons” for refusing protection are having a well-founded fear of being persecuted on one of the five grounds enumerated in the Directive, or otherwise being at real risk of suffering serious harm in the country of nationality.

### **11.4 Inability to avail oneself of protection**

Being *unable* to avail oneself of protection implies circumstances that are beyond the will of the person concerned. Such inability may be caused either by the country of nationality refusing its protection, or by the country of nationality being unable to provide its protection

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<sup>194</sup> Paragraph 3 of the Cartagena Declaration. The enduring relevance of the Cartagena Declaration was recognized in the 2004 Mexico Declaration and Plan of Action.

<sup>195</sup> See Article 2(c) of the Qualification Directive, which defines a refugee as “a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it ...”

<sup>196</sup> Article 2(e) of the Qualification Directive.

because, for example, it is in a state of war and/or does not have diplomatic or consular relations with the country of refuge.<sup>197</sup>

Some persons who are unable to avail themselves of the protection of the country of their nationality may qualify for protection under the 1951 Convention/1967 Protocol or under one of the three regional refugee protection instruments. For example, as stated in UNHCR's *Handbook on Procedures and Criteria for Determining Refugee Status*, lack of protection may sometimes itself contribute to fear of persecution:

“denial of protection [by the country of nationality] may confirm or strengthen the applicant's fear of persecution, and may indeed be an element of persecution.”<sup>198</sup>

However, there may also be situations where denial of protection does not constitute persecution. For example, as the *Handbook on Procedures and Criteria for Determining Refugee Status* states regarding applicants for refugee status who have dual nationality:

“There will be cases where the applicant has the nationality of a country in regard to which he alleges no fear, but such nationality may be deemed to be ineffective as it does not entail the protection normally granted to nationals ... As a rule, there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. If there is no explicit refusal of protection, absence of reply within reasonable time may be considered a refusal.”<sup>199</sup>

Whether a person unable to avail himself or herself of protection is a refugee or not, such a person is always *de facto* stateless if he or she is outside the country of his or her nationality.

Inability to avail oneself of protection may be total or partial. Total inability to avail oneself of protection will always result in *de facto* statelessness. Persons who are unable to return to the country of their nationality will also always be *de facto* stateless even if otherwise able in part or in full to avail themselves of protection in their host country. On the other hand, persons who are able to return to the country of their nationality are not *de facto* stateless, even if otherwise unable to avail themselves of any form of protection in the host country.<sup>200</sup>

## 11.5 Undocumented migrants

Irregular migrants who are undocumented may, or may not, be unable or unwilling to avail themselves of the protection of the country of their nationality. As noted in section 11.4 above, as a rule there should have been a request for, and a refusal of, protection before it can be established that a given nationality is ineffective. For example, Country A may make a finding that a particular individual is a national of Country B, and may seek to return that individual to Country B. Whether or not the individual is *de facto* stateless may depend on whether or not Country B is willing to cooperate in the process of identifying the individual's nationality and/or to permit his or her return.

## 12. UNHCR'S MANDATE FOR *DE FACTO* STATELESSNESS

UNHCR's competence to provide international protection to refugees covers not only those persons meeting the eligibility criteria for refugee status set out in the 1951 Convention/1967

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<sup>197</sup> See footnote 34 above.

<sup>198</sup> See footnote 35 above.

<sup>199</sup> “Handbook on Procedures and Criteria for Determining Refugee Status”, *op. cit.*, para. 107.

<sup>200</sup> *Quaeritur*: Would this last point also apply to nationals of “failed States”?

Protocol, but also persons who come within the extended refugee definition under the Office's mandate because:

they are outside their country of origin or habitual residence and unable or unwilling to return there owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order.<sup>201</sup>

Thus, UNHCR's refugee mandate covers *de facto* stateless persons who fall within the 1951 Convention/1967 Protocol refugee protection regime, as well as the vast majority of *de facto* stateless persons who are covered by regional complementary protection regimes. Certain persons, however, who qualify for subsidiary protection in the EU may not fall under UNHCR's refugee mandate, i.e. persons who are not Convention refugees and who face a real risk of serious harm not resulting from generalized violence or events seriously disturbing public order. It is submitted, therefore, that:

If UNHCR does indeed have a general mandate for addressing *de facto* statelessness, then the only persons falling within that mandate who do not already come within the Office's refugee mandate are:

1. Persons outside the State of their nationality
  - who do not qualify for refugee status; and
  - who in the State of their nationality face a real risk of serious harm not resulting from generalized violence or events seriously disturbing public order; and
  - who are unable, or, owing to such risk, unwilling to avail themselves of the protection of that State.
2. Persons outside the State of their nationality
  - who do not qualify for refugee status; and
  - who are unable avail themselves of protection owing to, at a minimum, being unable to return to the State of their nationality.

UNHCR should therefore reconsider its requirement that Country Operations should provide statistics on *de facto* stateless persons generally, so as to be more precise about the categories of *de facto* stateless persons on whom statistics are actually required. More broadly, the Office needs to clarify the scope and content of its mandate for the identification, prevention and/or reduction of *de facto* statelessness, and/or for the protection of *de facto* stateless persons.

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<sup>201</sup> UNHCR, "Refugee Status Determination: Identifying Who is a Refugee", Self-study module 2, 1 September 2005, pp. 8 - 9. The extended refugee mandate is pursuant to various ECOSOC and UN General Assembly Resolutions adopted during the period 1975 – 1995.