Stateless Persons: Some Gaps in International Protection

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1. Introduction

The prominence of statelessness as an area of international concern rises as a correlative of the number of people who either have no nationality or have no effective nationality. As defined in article 1 of the 1954 Convention relating to the Status of Stateless Persons, statelessness means a 'person who is not considered as a national by any State under the operation of its law'.[1] This is concise and to the point. It defines a specific group of people, the *de jure* stateless, because it delineates a specific, quantifiable fact: either one is, or one is not a national by operation of a State's law.[2] This clear definition is stated in the 1954 Convention and presumed in the 1961 Convention on the Reduction of Statelessness.[3]

A problem arises, however, in that the definition itself precludes full realization of an effective nationality because it is a technical, legal definition which can address only technical, legal problems. Quality and attributes of citizenship are not included, even implicitly, in the definition. Human rights principles relating to citizenship are not delineated, despite the inspiration of the Conventions themselves by article 15 of the Universal Declaration of Human Rights. The definition is not one of quality, simply one of fact.

In the case of stateless persons, history has shown that the question of nationality is not merely a legal one, not merely one of whether or not a nationality has been ascribed. In certain cases, *having* a nationality may push individuals to seek a different status, may itself lead to statelessness. This was, in effect, the case for *de facto* stateless German Jews who were,

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[1] 360 *UNTS* 117; text in UNHCR, *Collection of International Instruments relating to Refugees*, (1979), 59.

[2] While there may be complex legal issues involved in determining whether or not an event has occurred by operation of law, national courts have means of resolving such questions.

[3] 989 *UNTS* 175; text in UNHCR, *Collection of International Instruments relating to Refugees*, (1979), 82.

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under the Reich laws, classed as nationals *and* non-citizens. Although legally still holding a nationality, the lack of the usual attributes of nationality, including effective protection, was evident. It is from this epoch that the term *de facto* stateless traces its origins. At that time, however, the terminology was more encompassing for the criterion was not lack of citizenship but, rather, lack of effective protection.[4]

In other cases, there is no clear evidence as to nationality. One may suppose a genuine effective link,[5] but States must be willing to recognize this and grant protection accordingly. Take, for example, one sector of the large number of 'boat people' in transit through Hong Kong.[6] Ethnic Chinese born and resident in the Socialist Republic of Vietnam (SRV), many have never set foot in either the Republic of China (ROC) or mainland China (PROC). They have been ascribed ROC 'overseas nationality' based on expired documents of their own or of their ancestors. Overseas nationals, with few exceptions, have no right of entry or abode in Taiwan. Further, the authenticity of the papers would have to be verified which in many cases, is not possible. Hence, the only country willing to acknowledge this particular group as its nationals, if possessing authentic documents, is not willing to extend to them any of the attributes of nationality. Further, based on their birth and residency in the SRV, one might ask under what criterion they should be ascribed Taiwanese nationality.

The crucial question is that of an effective nationality. The attributes of nationality, the rights and responsibilities which generally flow from an effective nationality, are stabilizing factors. Clearly there is a gap between the technical question of being ascribed a nationality and the question of effective national protection. The gap is all the more significant because not all those who lack effective protection qualify as refugees, even if they are outside their place of habitual residence. The protection of the stateless thus reveals a gap in definition between those who are stateless refugees, and as such protected as refugees, and those who are legally or *de jure* stateless and, therefore, covered by the statelessness conventions. As Manley Hudson, Special Rapporteur for the International

[4] See art. 1, Provisional Arrangement of 4th July 1936 concerning the Status of Refugees coming from Germany: '[T]he term *refugee coming from Germany* shall be deemed to apply to any person who was settled in that country, who does not possess any nationality other than German nationality, and in respect of whom it is established that in law or in fact he or she does not enjoy the protection of the Government of the Reich.'

[5] The doctrine of effective link was enunciated in the *Nottebohm Case* in which the International Court of Justice stated that, 'According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.' ICJ *Reports*, 1955, p. 23.

[6] See Tang Lay Lee, Stateless Persons and the 1989 Comprehensive Plan of Action Part 1: Chinese Nationals and the Republic of China (Taiwan), above, pp. 201–31.

Law Commission on the subjects of nationality and statelessness, commented,[7]

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

There is a need to address the issue as a question of protection rather than one simply of recognition under the law as either a national or a non-national. Efforts may then be made to prevent unnecessary dislocation and hardship.

The United Nations High Commissioner for Refugees (UNHCR) has a mandate to assist refugees. The High Commissioner's Office has also been charged with responsibilities under article 11 of the 1961 Convention on the Reduction of Statelessness. Issues which relate to actual or potential movement of persons are necessarily of concern to the High Commissioner's Office and in this sense, the appointment is logical. UNHCR is concerned with facilitating the realization of an effective nationality, not only as a means of prevention of displacement, but also as a means of reintegration or local integration once movement has occurred.[8] There remain, however, a large number of people who are without effective national protection, but for whom neither the refugee nor the statelessness conventions apply.

Stateless persons and refugees once numbered amongst the same group and, as such, received the same assistance. After a brief account of international law regarding nationality, this paper will provide an overview of international instruments adopted and the provisions made for international protection of stateless persons. In reviewing international protection, the divergence of the paths of stateless persons and refugees will be highlighted. The divergence resulted in certain gaps in protection which must be defined in order for more comprehensive protection to be considered.

2. Nationality and International Law

Nationality, or citizenship, is indicative of a special relationship between the individual and the State.[9] Membership of the State, evidenced generally through the possession or grant of citizenship, carries with it the freedom

[7] Hudson, Manley O., *Report on Nationality, Including Statelessness*, International Law Commission 4th session: UN doc. A/CN.4/50, 21 Feb. 1952, 49.

[8] The UNHCR Statute includes promoting the assimilation of refugees, especially by facilitating their naturalization (para. 2(e)). Regaining nationality or acquiring a new nationality are indicators, under the Statute, that an individual is no longer in need of international protection. See para. 6A (ii)(b), (c).

[9] The terms citizenship and nationality are used synonymously throughout this paper unless otherwise indicated.

to exercise certain rights and the expectation of allegiance to certain ideals. It is the primary means by which an individual may endeavour to become a participant, rather than remain an impotent observer, in the larger apparatus of the State. This relationship brings with it duties as well as obligations for both the individual and the State. Further, it is through this relationship that the individual takes on an identity under the law. Thus, Weis made the following observation:[10]

> From the point of view of international law, the stateless person is an anomaly, nationality still being the principal link between the individual and the Law of Nations.

He goes on to describe the stateless person as a kind of flotsam, *res nullius*, a thing which in the eyes of international law is without legal existence.[11] If without legal existence, one is stripped of even the right to have rights, there being no foundation from which other rights might reliably flow. Earl Warren summed up this catch 22 situation as follows: 'Citizenship is man's basic right for it is nothing less than the right to have rights'.[12] The stateless person is denied the vehicle for access to fundamental rights, access to protection and access to expression as a person under the law.

To what extent is the State free to grant, deny or revoke citizenship? Different views are expressed concerning citizenship and State sovereignty.[13] Article 1 of the 1930 Hague Convention, for example, declares,[14]

> 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*.

This definition echoes article 38 of the Statute of the International Court of Justice which also delineates international conventions, customary

[10] Weis, P., 'The United Nations Convention on the Reduction of Statelessness, 1961', 11 *ICLQ* 1073 (1962).

[11] Ibid. See also Oppenheim, *International Law* (8th ed., Lauterpacht, H., ed.), 668, in which the analogy is made between a stateless person and a flagless ship sailing on the high seas.

[12] Earl Warren, 1958, quoted in Independent Commission on International Humanitarian Issues, *Winning the Human Race?* (1988), 107.

[13] For a discussion of legal positions see Crawford, J., 'Territorial Change and the Status of Inhabitants', in *Korean Residents in Japan and Korea-Japan Relations*, International Cultural Society of Korea, (1985), 53–84.

[14] 179 *LNTS* 89, 99 (emphasis added). Held under the auspices of the Assembly of the League of Nations and a culmination of work commissioned by the Council of the League, the goal was to ascertain what problems resulted from conflicts of law regarding nationality and how they might be resolved through conventions without significant political obstacles. The Conference adopted the Convention on Certain Questions relating to the Conflict of Nationality Laws, a Protocol relating to a Certain Case of Statelessness, and a Special Protocol concerning Statelessness. See (1937–38) 179 *LNTS* 89 (No. 4137), 115 (No. 4138) and LN doc. C.227.M.114. 1930.V, respectively. See also the Harvard Research Draft, 23 *AJIL* (1929), Special Supplement, (working document for the 1930 Conference).

international law, and general principles of law as the primary sources of international law. In essence, therefore, article I of the Hague Convention is stating that domestic nationality legislation will be recognised in so far as it is consistent with international law.

Under this definition, citizenship is a matter of domestic concern provided a State's action does not conflict with international law. The Permanent Court of International Justice, in an Advisory Opinion, stated:[15]

> The question whether a certain matter is or is not solely within the domestic jurisdiction of a State is an essentially relative question; *it depends on the development of international relations*. Thus, in the *present state* of international law, questions of nationality are, in the opinion of this Court, in principle within this reserved domain... [T]he right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law.

Today, it is now more than a question of contractual obligations between States, international law having, indeed, developed. Roberto Córdova, Special Rapporteur for the International Law Commission, argued in 1953 that the State was not a private club which could selectively expel certain members. Rather, in order to protect international order, not only the rights but also the duties of States must be recognized in municipal law, including that of refraining from exercising rights in a way which would be detrimental to the international community as a whole.[16] The creation or promulgation of statelessness is an act which has a detrimental effect on an international scale.

When a conflict arises,[17] domestic legislation may be scrutinized by arbitral tribunals or by the International Court.[18] In the pivotal *Nottebohm Case*,[19] the International Court of Justice indicated that it is a prerogative of the State to determine who will be citizens, with the caveat that the

[15] *Advisory Opinion on the Tunis and Morocco Nationality Decrees*, PCIJ, Ser. B, No. 4, p. 23 (emphasis added). See also *Acquisition of Polish Nationality* case, PCIJ, Ser. B, No. 7 in which domestic jurisdiction over nationality matters is found to be subject to contractual obligations a State has undertaken.

[16] Córdova, R., *Report on the Elimination or Reduction of Statelessness*: UN doc. A/CN.4/64, (1953).

[17] *Wildermann v. Stinnes*, 4 *Recueil T.A.M.* (1925), 842; 6 *Recueil T.A.M.* (1927), 485. See also Advisory Opinion on *The Exchange of Greek and Turkish Populations*, PCIJ, Ser. B, No. 10.

[18] See, for example, the *Georges Pinson* case, in which the Franco-Mexican Claims Commission cited the Court's opinion in the Morocco and Tunisia case: '[Q]ue cette souveraineté peut être limitée par des règles du droit des gens, règles qui peuvent s'enraciner non seulement dans des traités formels, mais encore dans une *communis opinio juris* sanctionnée par le droit coutumier... tout tribunal international, de par sa nature, est obligé et autorisé à... examiner [les lois nationales] à la lumière du droit des gens, thèse, d'ailleurs, qui a été maintes fois soutenue et appliquée par différentes jurisdictions internationales'. Commission Franco-Mexicaine. p. 1; *UN Reports*, vol. V, 393, quoted in Weis, P., *Nationality and Statelessness in International Law*, (2nd ed., 1979), 77. Clearly it was considered not merely possible, but an obligation to scrutinize domestic legislation which might prove incompatible with international law, including human rights law.

[19] ICJ *Reports*, 1955, p. 4.

act does not necessarily have international effect. In the view of the Court,[20]

> [A] State cannot claim that the rules it has thus laid down are entitled to recognition by another State unless it has acted in conformity with the general aim of making the legal bond of nationality accord with the individual's genuine connection with the State.

In this context, Brownlie argues that international law requires the presence of certain social links in order for a State to exercise not only its right of protection, but also any right of conferment, renunciation or deprivation of nationality. The purported exercise of State authority is entitled to recognition only in the presence of such links.[21]

Further, the division or categorization of nationals may also be subject to international scrutiny. According to Hudson,[22]

> Nationality is usually defined in terms of municipal law... Distinctions made by municipal law between various classes of nationals are, as a rule, immaterial from the point of view of international law... They become, however, relevant if a State creates a class of nationals in regard to whom it does not assume the rights and obligations inherent in the... concept of nationality for the purpose of international law.

Such discrimination may not be acceptable under human rights principles. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination seeks, with respect to the right to nationality, among others,[23]

> ... to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law...

Article 15 of the Universal Declaration of Human Rights lays the foundation by declaring 'Everyone has the right to a nationality'.[24] While many commentators consider that the Declaration or parts of it have acquired the status of customary international law, notably absent in this and other instruments is the matter of upon whom the obligation falls to

[20] Ibid., 23.

[21] Brownlie, I., *Principles of Public International Law*, (4th ed., 1990), 560–1.

[22] Hudson, above note 7, at 11 (note omitted).

[23] Art. 5, 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

[24] In the case of children, this is followed up in art. 24 of the Covenant on Civil and Political Rights: 'Every child has the right to acquire a nationality'. See also the Convention on the Rights of the Child which indicates that children have the right to acquire a nationality and that they shall acquire that of the State of birth if they will otherwise be stateless (arts. 2, 7), and Principle 3 of the United Nations Declaration of the Rights of the Child, which provides that 'the child shall be entitled from his birth to a name and a nationality': UNGA res. 1386 (XIV) 20 Nov. 1959. The 1961 Convention on the Reduction of Statelessness requires the State to extend citizenship to those born on its territory who would otherwise be stateless.

grant nationality.[25] Article 15, however, goes on to provide that, 'No one shall be arbitrarily deprived of his nationality'. Thus, while there may not necessarily be a positive duty on States to confer nationality there is, arguably, 'a negative duty not to create statelessness',[26] so that any deprivation must be accompanied by strict rules of procedure and should not result in statelessness.[27] Although it would be difficult to argue there is an absolute right to a nationality, human rights law is closing the gaps.

Córdova summed up his analysis of the current state of international law in the following:[28]

> Whereas formerly it was held that sovereignty was absolute, at present it is recognized that there are limitations to which the States must submit by reason of their being members of the international community and in order to make possible an orderly and peaceful society of nations.

It is within the sole purview of the State to determine who are its nationals provided this determination does not conflict with international legal principles.

Nonetheless, nationality matters remain within the domestic realm until they conflict with international law. In other words, international law is the exception. The individual is not, therefore, in a favourable position for self-representation in arguing that he or she has been denied an effective nationality. States tend to view the matter in either simple legal terms[29] or with highly charged sentiments of membership based on exclusive notions of race, descent or other qualifying factors. In a weak position, the individual is in need of assistance to engage the State in an effort to negotiate improvement in his or her status.

[25] The question of 'whose obligation?' is not futile, for principles of international and national law both depend upon a genuine effective link as evidenced through various combinations of birth, residency and blood ties. For an effective resolution, see art. 20, 1969 American Convention on Human Rights, placing the obligation on the State in whose territory the person was born should no other nationality be forthcoming. This reflects the preference for the principle of *jus soli*, predominant in the Americas.

[26] Chan, J.M.M., 'Nationality as a Human Right', 12 *HRLJ* 11 (1991). Women, when marrying, often lost their original nationality on the assumption they would acquire that of their husband. Aside from the fact that this was not always the case, it put women in a weak position in terms of their rights. While gender was not included in the non-discrimination clauses of the 1954 and 1961 Conventions, the position of women was more carefully considered in the 1957 Convention on the Nationality of Married Women.

[27] Chan argues that deprivation must be prescribed by law and accompanied by full legal proceedings. Review or appeal should be available, and no deprivation should result in statelessness: ibid., 8.

[28] Córdova, above note 16, at 6.

[29] That is to say, States can rely on their own bestowal of nationality 'by operation of law' without a qualitative analysis of the content of nationality or the gaps in legislation which may lead to statelessness.

3. Refugees and Stateless Persons: No Distinction

Stateless persons have not always comprised a distinct group. Previously, refugees and stateless persons,[30]

> [W]alked hand in hand, and after the First World War, their numbers and condition were almost coterminous. Later, their paths diverged, with refugees being identified principally by reference to the reasons for their flight, and their statelessness, if it existed, being seen as incidental to the primary cause.

Despite historical developments, however, the fact remains that refugees and stateless persons are similarly situated, for they both suffer from a lack of national protection. While initially no distinction was made between refugees and stateless persons, later the stateless were included in the group receiving international protection only if they could fit into the narrower definition of refugee; statelessness alone was not decisive. However, before the First World War, certain assumptions were made in relation to nationality which largely precluded the matter of statelessness from arising. In essence, the inhabitants of a territory were deemed to be part of the land and were thought to be disposed of together with the territory.[31] Later, when treaties were used to regulate the transfer of territory, the principle of domicile was assumed to establish an effective link between the individual and the territory. Following the First World War, the presumption of effective link was no longer so evident in the treaties concluded, in that certain groups were excluded from acquisition of the new nationality regardless of residence.[32] Ethnicity, race and language became relevant factors, although domicile was still employed as a safety-net in instances where statelessness might otherwise result.[33]

The concept of attachment to the land through residency or domicile is also implicit in early responses to the large-scale movement of people. Under the auspices of the League of Nations, several multilateral treaties were concluded to address the situations of Russian, Armenian and later other specific groups of refugees.[34] The definition encompassed stateless persons by reference to those 'who [do] not enjoy or who no longer

[30] Goodwin-Gill, G.S., 'The Rights of Refugees and Stateless Persons: Problems of Stateless Persons and the Need for International Measures of Protection', paper presented to the World Congress on Human Rights, New Delhi, India, 10–15 Dec. 1990, in Saksena, K.P., ed., *Human Rights Perspective and Challenges (in 1990 and Beyond)*, World Congress on Human Rights, New Delhi. Lancer Books. 1994. 378, 389–90.

[31] Onuma, Y., 'Nationality and Territorial Change: In Search of the State of the Law', 8 *Yale Journal of World Public Order*, (1981).

[32] Treaty of Versailles, art. 91, 2 *Major Peace Treaties of Modern History 1648–1967*, at 1332; Treaty of St. Germain, art. 76, ibid., vol. 3, 1564; Treaty of Trianon, art. 62, ibid., 1888; Treaty of Neuilly, art. 39, ibid., 1739. See also Intergovernmental Committee on Refugees, *Statelessness and Some Of Its Causes: An Outline*, (Mar. 1946), 6 in which the faulty administration of tests for establishing the right to nationality is described as resulting in statelessness which the treaty drafters had sought to avoid.

[33] See Onuma, above note 31, at 8–10.

[34] See Mutharika, P., *The Regulation of Statelessness Under International and National Law*, (1989).

[enjoy] the protection of the Government... and who [have] not acquired another nationality'.[35] Underlying this was the assumption that the individual was outside his or her habitual country of residence, and was therefore without the traditional domiciliary link and without the protection which that link generally afforded. This definition was later elaborated in reference to stateless Germans as applying to,[36]

> Stateless persons not covered by previous Conventions or Agreements who have left German territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the German Government.

Refugees were defined by the fact that they were without national protection, one criterion of which was their physical location.[37] No particular distinction was made between the stateless and refugees, both being defined as outside their place of residence and lacking protection. Of course, this definition was not universal, but applied only to specific groups of interest. One cannot say that there was a purposeful approach to the stateless per se. What is of interest is that the question of protection and location was definitive, it not being deemed necessary to distinguish the legal position of refugees and stateless persons on any other level.

Stateless persons outside their country of habitual residence and without national protection, qualified as refugees and, as such, for the assistance of whichever international organization was responsible for refugees at the time, from the League of Nations High Commissioners for Refugees, to the Intergovernmental Committee for Refugees, and finally to the International Refugee Organization. Stateless individuals were dealt with in turn by each of these entities but under the rubric of their position as refugees. A progressive narrowing in the definition of 'refugee' can be followed during this time. The Intergovernmental Committee on Refugees took the following position in relation to stateless persons:[38]

> [The] mandate of the Intergovernmental Committee does not mention statelessness at all, while policy decisions in respect of groups recognised as coming under the 'current and authorised operations' of the Committee, regard de jure and de facto statelessness merely as one of the criteria of eligibility in conjunction with others, e.g. flight into another State as a result of racial, political or religious persecution.

It was no longer sufficient to be outside of one's country of habitual

[35] 89 *LNTS* No. 2004, (1926) quoted in Mutharika, above note 34, at 7.

[36] 192 *LNTS* 59 (No. 4461), art. 1(b).

[37] This does not necessarily presume the opposite, that if they were within their habitual place of residence they would have protection. It simply indicates that lack of effective protection was implied by the fact that they had fled and were clearly without the physical tie. Lack of any effective diplomatic protection extended to them was observable, whereas the fact of sovereignty effectively precluded inquiry into the availability of 'internal' protection, let alone the provision of international protection to citizens within their own State.

[38] Intergovernmental Committee on Refugees, above note 32, at 2.

residence and without effective protection. The reasons for flight became paramount and statelessness, in turn, marginalized as merely one of many symptoms to be analysed in considering a refugee claim. *De jure* and *de facto* stateless were, nonetheless, still factored into the equation by the organizations appointed to assist refugees.[39]

4. Refugees and Stateless Persons: Two Separate Conventions

4.1 The 1951 Conference

In 1947, the Commission on Human Rights requested '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'.[40] The work was to be undertaken in consultation with specialized agencies currently assuming the protection of persons without the protection of any government. In response, ECOSOC requested the Secretary-General to make a study of the subject to be followed with recommendations.[41] This resulted in *A Study on Statelessness*,[42] made in consultation with the International Refugee Organization, which focused on the position of refugees who were *de jure* or, as the study described, '*de facto*' stateless. Once again, therefore, stateless persons were included with the group of refugees.

The Secretariat's *A Study on Statelessness* expended little energy on non-refugee stateless, focusing rather on *de jure* and *de facto* definitions in relation to refugees.[43] The study divided the legal analysis into issues of status and issues of elimination of statelessness in relation to refugees. This division was implicit in the ECOSOC resolution which initiated the study,[44] and was later locked into the form of the 1954 Convention

[39] See also Annex I, Constitution of the International Refugee Organization, in which reasons for flight were the deciding factors, regardless of retention of nationality, in defining both refugees and displaced persons: UN doc. A/C.3/527, (1949).

[40] UN doc. E/600, (1947), para. 46.

[41] ECOSOC res. 116 D (VI), 1 and 2 March 1948. The study was to be made with the assistance of interested commissions and specialized agencies which had experience in the matter.

[42] *A Study on Statelessness*, E/1112 and Add.1 (1949).

[43] Virtually all reports touching on statelessness outside the strictly legal context of codification, dealt with those who were both stateless, *de jure* or *de facto*, and refugees.

[44] ECOSOC res. 116 D (VI), 1 and 2 Mar. 1948, '*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*...; (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.' Part (a) deals with status and part (b) with elimination and reduction. The latter was taken up for codification by the International Law Commission.

relating to Status and the 1961 Convention concerning reduction of statelessness. An additional result of the division was several studies pertaining to elimination and very little analysis of the status of the stateless.[45] The problem in this approach was that the study dealt with persons who were stateless refugees, while the 1954 and 1961 Conventions focus on stateless persons in the legal sense of the term only. Although the entire issue of statelessness was intended for study in conjunction with the issue of refugees, the manner in which the 'studies' were commissioned and conducted separated their paths. The result was a technical, legal definition of stateless persons, very limited in scope, which did not address questions of effective protection. The individual who has a nationality 'by operation of law' and who does not qualify under today's definition of refugee, is not covered by any of these conventions, whether or not the nationality ascribed to him or her carries with it the usual attributes of an effective nationality. Here is a gap in protection.

In response to the Secretariat's study, ECOSOC appointed an *Ad hoc* Committee on Refugees and Stateless Persons.[46] The terms of reference were to prepare a convention relating to the international status of refugees and stateless persons as well as to consider means of eliminating statelessness. The latter included requesting the ILC to prepare a study and make recommendations. The *Ad hoc* Committee, consisting of representatives of thirteen Governments, held two sessions during which it prepared and submitted to ECOSOC a draft convention on the status of refugees and a draft protocol relating to the status of stateless persons.[47] The Council then submitted the *Ad hoc* Committee's report to the General Assembly[48] which followed with the decision 'to convene in Geneva a conference of plenipotentiaries to complete the drafting of and to sign both the Convention relating to the Status of Refugees and the Protocol relating to the Status of Stateless Persons'.[49]

The ECOSOC *Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons)*, given to the *Ad hoc* Committee as a basis for its discussion, included under article 2, 'Stateless persons who are not refugees'.[50] Articles 6 and 15 of the recently adopted Universal Declaration of Human Rights were quoted, and taken up again in ECOSOC res. 116 (VI)D of 1 and 2 March 1948, calling for the,[51]

[45] As will be seen below, this was because the ILC took up the question of elimination and made thorough studies on the matter. The question of status of stateless persons, initially intended as a protocol to the Refugee Convention, did not receive detailed consideration.

[46] ECOSOC res. 248 B (IX), 8 Aug. 1949.

[47] See UN docs. E/1618 and Corr. 1, (17 Feb. 1950), and E/1850, (14–25 Aug. 1950).

[48] Submitted by ECOSOC res. 319 B (XI), 16 Aug. 1950.

[49] UNGA res. 429(V), 14 Dec. 1950.

[50] *Ad hoc* Committee on Statelessness and Related Problems, *Status of refugees and stateless persons, Memorandum by the Secretary-General*: UN doc. E/AC.32/2, (3 Jan. 1950).

[51] ECOSOC res. 116(VI)D, 1 and 2 Mar. 1948.

> [A]doption 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.

The position of stateless persons was said to be the same as that of refugees as both were lacking 'the protection and assistance of the State'.[52] However, it was left for the *Ad hoc* Committee to consider what decision should be made with respect to stateless persons who were not refugees. Under the *Ad hoc* Committee's draft Protocol, provisions of the draft Convention were to be made applicable to stateless persons who were not covered by the Convention itself.[53]

It is often stated that a thorough analysis of the problem of the stateless was put aside for lack of time. The lack of time was, in fact, the consequence of the impending liquidation of the IRO and the urgency felt to establish an organization to deal specifically with the problem of refugees. Thus, when the *Ad hoc* Committee met it noted that,[54]

> In view of the urgency of the refugee problem and the responsibility of the United Nations in this field, the Committee decided to address itself first to the problem of refugees, *whether stateless or not* (emphasis added), and to leave to later stages of its deliberations the problems of stateless persons who are not refugees.

Refugees were the priority, while the status of the stateless was seen as a separate issue which did not attract the same urgency. The question of reduction or elimination of statelessness was also under consideration but no consensus could be reached on this matter. The conclusions of the *Ad hoc* Committee were based upon two considerations:[55]

> (a) The Committee, by the time it reached this item on the agenda, had already completed a draft convention relating to the status of refugees, and a protocol relating to the status of stateless persons. These labours had largely exhausted the time at the disposal of the Committee.
>
> (b) The Committee felt, moreover, that it was at this stage difficult, if not impossible, to approach in the necessary detail a matter of such complexity.

The result was that the Committee recommended a draft resolution to ECOSOC suggesting that governments make provisions in their nationality laws and assurances in transfers of territory on behalf of stateless persons. Further, it was suggested that the ILC prepare the necessary draft documents of an agreement requiring joint international

[52] UN doc. E/AC.32/2, above note 50, at 13.

[53] Hudson, above note 7, at 39. See also ECOSOC res. 526 A (XVII) and *Report of The International Law Commission*, Sixth Sess., 3 June–28 July 1954: UNGAOR, Ninth Sess., Suppl. No. 9 (A/2693) 1954.

[54] *Report of the Ad hoc Committee on Statelessness and Related Problems*: UN doc. E/1618 and Corr. 1, 17 Feb. 1950, 120 (emphasis added).

[55] Ibid., 121.

action as soon as possible. A final cause of hesitation over a detailed discussion on statelessness was concern regarding possible overlap or conflict with other studies, none of which had yet achieved a clear legal stance in relation to stateless persons. Detailed studies were to follow from the ILC and the *Ad hoc* Committee was inclined to defer substantive discussion until these had been concluded.[56]

As a result of the priority given to the immediate needs of refugees, statelessness was not analyzed. A draft Protocol was adopted instead which sought to apply *mutatis mutandis* certain of the provisions of the Convention relating to the Status of Refugees 'to stateless persons to whom that Convention does not apply'.[57] During this process, an article equivalent to article 35 in the 1951 Convention, providing for a supervisory body to assist stateless persons, was not considered; hence, no such article could be included *mutatis mutandis* in the Protocol.[58] The question of elimination of statelessness was referred back to ECOSOC with the request that the ILC prepare draft documents.[59] Thus, when the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened in Geneva from 2 to 25 July 1951, it had before it the two draft instruments prepared by the *Ad hoc* Committee on Refugees and Stateless Persons, the draft of a preamble prepared by the Economic and Social Council (resolution 319 B II (XI)), and the draft of article 1 of the Convention (definition of the term 'refugee') recommended by the General Assembly (resolution 429(V), Annex).[60] The draft Convention relating to the Status of Refugees was adopted while the intended Protocol was deferred under the following resolution:[61]

The Conference,

Having considered the draft Protocol relating to the Status of Stateless Persons,

Considering that the subject still requires more detailed study,

[56] See *Report on Nationality, Including Statelessness*, by Manley O. Hudson, former Special Rapporteur of the Commission: UN doc. A/CN.4/50, (1952); *Report on the Elimination or Reduction of Statelessness*, by Roberto Córdova, Special Rapporteur of the Commission, UN doc. A/CN.4/64, (1953); *National Legislation Concerning Grounds for Deprivation of Nationality*, memorandum prepared by Ivan S. Kerno, Expert of the Commission; UN doc. A/CN.4/66.

[57] *Report of the Ad hoc Committee*, above note 54, at 134.

[58] The Memorandum by the Secretary-General simply states in relation to article 35 of the 1951 Convention that, 'An article on this subject appeared in the draft convention as Article 30, but the draft protocol does not provide for its application, *mutatis mutandis*, to stateless persons': UN doc. E/CONF.17/3, at 30.

[59] See UNGA res. 319(IV), 11 and 16 Aug. 1950, in which the General Assembly noted that the ILC intended to begin work on the subject of nationality and invited the Secretary-General to transmit the request to the ILC to prepare draft international conventions for the elimination of statelessness.

[60] *The Draft Protocol Relating to the Status of Stateless Persons: Memorandum of the Secretary-General*: UN doc. E/CONF.17/3, 6 Aug. 1954.

[61] UN doc. A/1913, (15 Oct. 1951), 1; see also UN doc. A/CONF.2/108, Section III.

Decides not to take a decision on the subject at the present Conference and refers the draft Protocol back to the appropriate organs of the United Nations for further study.

Like the *Ad hoc* Committee, the 1951 Conference of Plenipotentiaries was inclined to defer substantive discussion pending the recommended studies. Article 1 of the 1951 Refugee Convention incorporates all those who were found to be refugees under various international instruments up to and including the IRO. It then adopts a new definition of the term 'refugee' which incorporates stateless persons in limited part, by including those who are outside their habitual country of residence and have a well-founded fear of persecution for one of the enumerated reasons. Stateless persons as such are put to the side for later consideration, a delay which ultimately resulted in the 1954 Convention relating to the Status of Stateless Persons.

4.2 The 1954 Conference

Both the *Ad hoc* Committee and the Conference of Plenipotentiaries referred the matter of statelessness for further study, leaving the Protocol in its *mutatis mutandis* form. This was, essentially, what appeared before the second conference of plenipotentiaries, convened by ECOSOC Res. 526 A (XVII), in 1954. Although some cursory discussion ensued regarding the exact meaning of *mutatis mutandis*, it was generally assumed that the Conference was not authorized to make additions and 'that it would be wise not to try to amend the articles of the Geneva Convention, but to restrict itself to deciding whether or not to insert them in the instrument on the status of stateless persons.'[62] An indication of this hesitation regarding legal powers was that although the representatives convened agreed that a separate instrument would be preferable, there was careful analysis of whether or not they were authorized to create a Convention in lieu of the intended Protocol.[63] Hence, the delegates would certainly have questioned their authority for introducing a supervisory mechanism, had the issue been raised. However, as the *Ad hoc* Committee had not made provisions for a supervisory body in its *mutatis mutandis* version, no discussion took place on a possible 'article 35 body' for inclusion *mutatis mutandis* in the 1954 Convention. In addition, it was thought that amendments would compel the members of the Conference to consult their Governments and might give rise to endless debate'.[64] Time pressures were felt, as were concerns regarding the extent of power the representatives were authorized to use.

[62] *Conference of Plenipotentiaries on the Status of Stateless Persons*: UN doc. E/CONF.17/SR.5, p. 3.

[63] The matter was submitted to the Credentials Committee: see UN doc. E/CONF.17/SR.10, p. 2.

[64] UN doc. E/CONF.17/SR.5, p. 5.

There was, however, an added complicating factor. The Secretary-General's Memorandum indicated, in reference to the lack of commentary from governments, that,[65]

> It would probably not be necessary to include detailed executory or transitory provisions in the Protocol if the Protocol enumerates Articles 35 37 of the Convention, or certain of these articles, as being applicable, *mutatis mutandis*, to the Protocol.

This statement and its surrounding text[66] belie a possible oversight. The implication is that, given the fact that the intended instrument was to be Protocol, there would be a kind of understanding by association with the Refugee Convention. Unfortunately, any intended association would be lost when the instrument became a Convention in its own right, something which may have been overlooked in the transition. There may have been another oversight. In a memorandum submitted by the Secretary-General to the 1954 Conference of Plenipotentiaries, it was stated that,[67]

> 13. [A] decision will have to be made as to whether certain provisions of the Convention which the *Ad hoc* Committee did not mention in the draft Protocol... should nevertheless be enumerated in the Protocol.
>
> 14. [T]he observations of the Governments concerned... are also to be taken into consideration.

However, in the same document we find that 'No observations on the application of Articles 35 to 37 of the Convention to the Protocol have been received from Governments, *as no question relating to them was put by the General Assembly in Resolution 629 (VII)*'.[68]

In short, nobody raised the issue. There were two additional ways for provisions, other than the original *mutatis mutandis* provisions, to be considered for inclusion in the Protocol. The first was through reference back to the Refugee Convention, the second via the questions and responses of the Governments concerned.[69] As already seen, new agenda items would pose serious problems as is evidenced by the endless debate on inclusion of an article 1 definition of a stateless person. Article 35, as worded in 1951, could not apply to stateless persons. Its language referred to refugees, and for this reason it was necessarily left out for *mutatis mutandis* inclusion by the *Ad hoc* Committee. However, no reference back to the Refugee Convention was made. In addition, Governments were

[65] Memorandum of the Secretary-General, above note 60, item 55, at 48.

[66] The surrounding text considers various ways by which to modify an instrument through preparing clauses 'of a more simple and less detailed nature and calling for fewer ratifications or accessions': Memorandum of the Secretary-General, above note 60, item 58, p. 48. The idea was to get signatures and have the instrument adopted with as little effort as possible.

[67] Memorandum submitted by the Secretary-General, above note 60, items 13 and 14, p. 8.

[68] Ibid., item 55, pp. 47, 48 (emphasis added).

[69] Cf. E/Res. (XVII)/12, 27 Apr. 1954, p. 2.

not asked to comment upon a possible article 35 and there was, therefore, nothing upon which the Conference of Plenipotentiaries could base a discussion.

Thus, for procedural reasons, namely, time, lack of authority, creation of an independent instrument and failure to raise the issue either with governments or through reference back to the Refugee Convention, the matter of a supervisory body was never discussed.

Substantively, it was clearly intended to separate those to be assisted under this document from those covered under the 1951 Convention. The ILC, in its preparatory work for the convention on elimination, observing that refugees benefited from the international protection provided by the High Commissioner, made clear that the suggestions contained in their report should be read without prejudice as to whether or not to grant international protection from an international agency to stateless persons.[70] In fact, the ILC, in a list of proposals to governments on solutions for present statelessness, suggested in article VII that,[71]

> There shall apply to any convention concluded on this subject the provisions of the conventions on the elimination and reduction of future statelessness concerning the interpretation and application of their terms, *including the provisions for the creation of an agency to act on behalf of persons claiming to have been wrongfully denied nationality.*

As the Convention relating to the Status of Stateless Persons is on 'this subject' and the ILC adopted these proposals as a means of reducing current statelessness, it is arguable that the ILC was in favour of a supervisory body for the 1954 Convention. The ILC rejected the suggestion of the Special Rapporteur that *de facto* stateless persons be assimilated to *de jure* stateless so as to receive the status of 'protected person' and the right to naturalization should they agree to renounce their ineffective nationality.[72] The ILC also wished to keep a clear distinction, therefore, between refugees and stateless persons. One may infer, however, that the ILC would have supported the limited definition of stateless persons adopted in article 1 of the 1954 Convention, but would have gone further and made provision for a supervisory body as well.[73]

One stated aim of the delegates at the 1954 Conference 'was to obtain the greatest possible number of signatures'.[74] A definition which did not

[70] *Report of the International Law Commission*, sixth sess., A/CN.4/88, item 34, 1954.

[71] Ibid., p. 8 (emphasis added).

[72] Ibid., p. 7. Hudson commented, 'The so-called stateless persons *de facto* are 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': Hudson, above note 7, at 40 1.

[73] The art. 1 definition, 'a person who is not considered as a national by any State under the operation of its law', derives from that given by Hudson; above note 7, at 41.

[74] UN doc. E/CONF.17/SR.10, p. 10.

overlap with that of *de facto* stateless in the 1951 Convention was more likely to achieve this, for the assumption was that *de facto* stateless persons *were* refugees and a State might not wish to accept obligations to both *de jure* and *de facto* stateless persons. If a *de facto* definition was included, not only might the number of signatories decrease, but reservations might be made which would lead to a variety of legal positions vis-à-vis the instrument. Further, it was argued if 'persons became 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'.[75] There was concern that an individual might convince one State party to the instrument to consider his former nationality void, obliging other State parties to follow in kind or create a dual status by continuing to recognize the former nationality. Finally, overlap would result in a situation less favourable to the stateless since the 1954 Convention did not impose any limitation in time or location, the single factor being one of statelessness by operation of law.[76]

Thus, despite extensive discussion and several proposals to incorporate *de facto* stateless persons who were without protection, the definition was limited to the *de jure* in an attempt to avoid abuse, overlap and potential conflicts between States.[77] A recommendation was inserted into the Final Act that:[78]

> [E]ach 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.

Of interest is the fact that, at one point in the discussion, a delegate tabled the suggestion that in order to make as clear a distinction as possible between refugees and stateless persons, those receiving assistance from UNHCR should be excluded from protection or assistance under the 1954 Convention. This suggestion received no response from other delegates.[79] Although such exclusion was applied in relation to all other UN agencies, no effort was made to exclude or limit UNHCR. In fact, the exclusion specifically *exempts* UNHCR.[80] Therefore, it cannot be inferred that the overlap between the conditions of refugees and stateless persons was no longer appreciated. The concern was, very simply, to

[75] Ibid., 11.
[76] UN doc. E/CONF.17/SR.2, p. 7.
[77] See UN docs. E/CONF.17/L.2, L.3, L.4, L.6, L.21/Rev. 1 and L. 22.
[78] *Final Act of the United Nations Conference on the Status of Stateless Persons*, item 3.
[79] UN doc. E/CONF.17/SR.13, p.7.
[80] Art. 1(2)(I) of the 1954 Convention provides that, 'This Convention shall not apply: (I) To persons who are at present receiving from organs or agencies of the United Nations *other than the United Nations High Commissioner for Refugees* protection or assistance so long as they are receiving such protection or assistance' (emphasis added).

distinguish between the legal status of those who were stateless and the legal status of those who were refugees. The lack of a supervisory body for the 1954 Convention was not considered, either procedurally or substantively.[81]

5. The 1961 Convention on the Reduction of Statelessness

One most significant achievement of the 1930 Hague Codification Conference, the first international attempt to provide everyone with a nationality, was the acknowledgement that nationality was not a subject solely within the prerogative of State sovereignty. Rather, common standards should be sought at the international level. While the Hague Conference did lead in some cases to 'legislative changes with regard to matters which had been considered as constituting characteristic and permanent features of national jurisprudence', nonetheless, 'no agreement proved possible on important questions of substance'.[82] So elementary were the remaining problems that the Secretary-General's recommendation in 1948 was for the International Law Commission to focus on development, rather than codification, aimed at 'introducing a departure from existing practice'.[83] Existing State practice was itself difficult to ascertain since it reflected the use of different means of ascribing nationality.[84]

ECOSOC resolution 248B (IX) of 8 August 1949 led to the appointment of an *Ad hoc* Committee described above, whose terms of reference were to consider a convention on the status of refugees and stateless persons, as well as the means of eliminating statelessness. The *Ad hoc* Committee made *mutatis mutandis* provisions regarding status of non-refugee stateless in the Protocol originally attached to the draft 1951 Refugee Convention, but the issue of elimination of statelessness was not taken up for reasons of time, complexity and, of more significance, in deference to the work of the ILC.

In 1949, the ILC included nationality, including statelessness, on its list of subjects to be codified.[85] An ECOSOC resolution followed,

[81] See Robinson, N., *Convention Relating to the Status of Stateless Persons, Commentary on Its History and Interpretation*, Institute of Jewish Affairs, World Jewish Congress, 1955, 21, observing that the Convention did not provide for a supranational body to pass upon the eligibility of a person as a 'stateless person'. Thus, 'the determination must ordinarily be made by the authorities of the country where the person resides'.
[82] *Survey of International Law in Relation to the Work of Codification of the International Law Commission, Memorandum Submitted by the Secretary-General*: UN doc. A/CN.4/1, (5 Nov. 1948), 44.
[83] Ibid., 45.
[84] Namely, *jus soli*, nationality based upon place of birth, *jus sanguinis*, nationality based on descent, and a variety of combinations thereof.
[85] See also ECOSOC res. 304 D(XI), 17 Jul. 1950, and *Report of the International Law Commission*, Second Session: UN doc. A/1316.

requesting that the Commission, 'prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness'.[86] Further to these initiatives Manley Hudson, a member of the Commission, was appointed Special Rapporteur, and he at once took up UNHCR's offer of assistance.[87] Under resolution 896 (IX) of 4 December 1954, the General Assembly, noting that the International Law Commission had submitted revised drafts for Conventions on Elimination and Reduction of Future Statelessness, expressed its desire for an international conference to conclude a convention on the subject.[88] The Secretary-General was asked to communicate the revised draft conventions to Member States and to fix the time and place for the Conference, which was duly convened in Geneva in 1959.[89]

Unlike the case of the Refugee Convention, the work of the Commission was not geared toward a particular group of people who were in urgent need of assistance. Rather, refugees and strictly *de jure* stateless persons were seen to be two separate categories of persons. It was assumed that *de facto* stateless persons would also be refugees and would accordingly receive the assistance of the High Commissioner for Refugees.[90] This is patently clear from the statements of several delegates at the 1959 Conference, one of whom indicated he 'did not understand what stateless persons *de facto* were, if they were not refugees'.[91]

The Executive Secretary of the Conference agreed, this while quoting the definition of *de facto* stateless persons in *A Study on Statelessness* which describes them as,[92]

> [P]ersons 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.

Statelessness in and of itself was not thought to be specifically connected with flight. If flight occurred, the refugee definition was thought broad enough to encompass all those concerned. However, this was no longer the case, for the reasons for flight had become paramount and statelessness alone was no longer sufficient. Nonetheless, Hudson, for example, declared that the distinction between *de jure* and *de facto* stateless persons in the *Study on Statelessness*[93] was of no relevance to the work of the Commission, and that his study dealt exclusively with statelessness in the strict, legal sense of the term.[94] The Chairman of the 1959 Conference remarked that,[95]

> [T]he Conference was concerned with what might be described as negative conflicts of national law resulting in cases of statelessness. Statelessness *de facto* did not arise from any conflict of national laws, but 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.

From the legal point of view, he could not understand how persons in the *de facto* group could be treated as though they belonged to the *de jure* group.[96]

Two years later, at the 1961 Conference,[97] the United Nations High Commissioner for Refugees made one final effort to have the Conference reconsider the question of *de facto* stateless persons:[98]

> There are many persons who, without being *de jure* stateless, do not possess an effective nationality. They are usually called *de facto* stateless persons... 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.

Weis submitted his own statement. He indicated that the definition which required a State to grant its nationality if the person concerned would

[86] ECOSOC res. 319 B III (AI), 11 Aug. 1950.

[87] This resulted in two uninterrupted months of assistance from Dr. Paul Weis of UNHCR; see Hudson, above note 7, at 5.

[88] The Conference was to be convened as soon as twenty States had communicated to the Secretary-General their willingness to co-operate: UNGAOR, Ninth Session, Suppl. No. 9 (A/2693), ch. II and Suppl. No. 21 (A/2890), 49-50; UN doc. A/CONF.9/3, (13 Feb. 1959), 3.

[89] The delegates at the 1959 Conference decided unanimously to take the draft Convention on the reduction of Future Statelessness as the basis for their work; see UN doc. A/CONF.9/L.40/Add.6, at 3. The draft Convention on the Elimination of Future Statelessness was considered too radical a step.

[90] Although the 1961 Convention on the Reduction of Statelessness does not define stateless persons, it is generally assumed that the definition is the same as that in the 1954 Convention. Further, the fact that *de facto* stateless persons are relegated to a recommendation in the Final Act indicates that they are not, indeed, included in the Convention itself.

[91] UN doc. A/CONF.9/C.1/SR.19, p. 10.

[92] Ibid., at 10.

[93] *A Study on Statelessness*, E/1112 and Add.1 (1949), 8–9.

[94] Hudson, above note 7, at 41.

[95] This, of course, is no more correct than it is to say refugees are persons who no longer wish to live in their own country. While there will always be a variety of motivations behind movement and a desire to release oneself of one's nationality may be one of them, there are many cases in which individuals have been denationalized or denied access to nationality against their will. It would be more accurate to indicate where assistance is denied and, therefore, no longer sought. The element of choice is significant.

[96] UN doc. A/CONF.9/C.1/SR.19, p. 10. These discussions were inspired by a proposal that the recommendation concerning *de facto* stateless persons be included in the Final Act as a humanitarian gesture to assist refugees who no longer enjoyed national protection and who did not know what their status was in their country of origin.

[97] UN doc. A/CONF.9/3, (13 Feb. 1959). The first Conference on the Elimination or Reduction of Future Statelessness was convened in 1959. Rather than settle on an 'unsatisfactory document' due to the inability to complete its work in the prescribed time, the Conference was reconvened in 1961; see UN doc. A/CONF.9/SR.14, (18 Apr. 1959), 9.

[98] UN doc. A/CONF.9/11, (30 Jun. 1961), p. 4.

otherwise be stateless was not satisfactory, for it required proof of a negative on the part of the individual concerned.[99]

> In practice, circumstances vary a great deal from case to case. There are many cases where a person's nationality status cannot be established, where it is doubtful, undetermined or unknown. . . The borderline between what is commonly called *de jure* statelessness and *de facto* statelessness is sometimes difficult to draw, but the latter term is in common use and has acquired a meaning.

He went on to say, that in order for the Convention to achieve its aim and for as many persons as possible to be enabled to acquire an effective nationality without passing from generation to generation the uncertainty of their status, the term statelessness should be interpreted in its widest and most liberal sense. The crucial question was one of protection.[100]

Nonetheless, *de facto* stateless persons remained outside the definition in the Convention. The work of the Commission was seen as somewhat technical legal work, a continuation of the efforts initiated in the 1930 Hague Conference for the Codification of International Law in the field of nationality. The goal was to adopt a convention which could harmonize the nationality legislation of countries which used different means of determining who were citizens. By filling in the gaps created in domestic legislation and by harmonizing the legislation of different legal systems, the desired result of elimination, or at very least reduction, of statelessness would be achieved. The ILC, as is its function, had approached the matter as one for development and codification. The delegates at the 1959 and 1961 Conferences proceeded in like fashion.

5.1 Article 11 of the 1961 Convention

Article 11 of the 1961 Convention was the focus of a great deal of debate. In its original form, the article provided for the establishment of an agency to act on behalf of stateless persons, and also for a tribunal which would be competent to decide any disputes between parties as well as to hear complaints presented by the agency on behalf of stateless individuals.[101] The final version of the article adopted by the Commission

[99] Statement by Dr. P. Weis on Friday, 25 Aug. 1961 to the United Nations Conference on the Elimination or Reduction of Future Statelessness.

[100] For the final discussion and vote, see UN doc. A/CONF.9/SR.23, (11 Oct. 1961).

[101] Some discussion also took place on whether or not parties to the Convention could establish responsibilities for third States. Specifically, could the General Assembly legally be required to take action on the creation of an agency or tribunal in the event the contracting parties themselves had failed to take such action on their own. In the words of Hersch Lauterpacht of the ILC, 'the General Assembly would be entirely justified in establishing a body in which only a few members were interested, because it would be acting pursuant to a convention which it had discussed, approved and laid open for signature, and for which it would thus have accepted general responsibility': UN doc. A/CN.4 SER.A/1953, 327. Córdova cited art. 8 of the Convention on the Declaration of Death of Missing Persons which established an International Bureau for Declaration of Death within the framework of the United Nations. Art. 15 required the approval of the General Assembly in order for the Bureau to be set up. Hence, there was a precedent. He continued, 'It must be assumed that the General Assembly was interested in solving the problem of statelessness, for not only had the Economic and Social Council asked the ILC to take up the matter, but the Commission on Human Rights was also interested in its solution. Further, as budgetary provision would have to be made for the agency or tribunal, it might be expected that the General Assembly would be interested on that ground, too': UN doc. A/CN.4/64, 328. Following this discussion, it was agreed to include the referral to the General Assembly should the parties have failed, within a prescribed period of time after entry into force of the Convention, to have established an agency. No question regarding validity of this act arose in the discussions by representatives at the conferences, although concerns were expressed later when the time came to appoint an art. 11 agency (see below). Discussions at the 1959 and 1961 Conferences indicated that participating States agreed with this analysis and anticipated the involvement of the General Assembly in the creation of the agency. See also UN doc. A/CONF.9/C.1/SR.17.

provided for the creation of an agency and a tribunal. If they had not been created within two years of the entry into force of the Convention, any of the contracting States[102] could bring the matter before the General Assembly which would, in turn, ensure the establishment of the appropriate bodies.

The International Law Commission considered that the proposed agency should have the authority to determine when to exercise its powers of intervention and which cases were appropriate to refer to the proposed tribunal. The agency was important for several reasons. A stateless person would have neither the financial resources nor the necessary expertise to engage the authority of the State on his or her right to the nationality of that State. No other State could plausibly take up the cause. Hence, the independence and authority of an international entity would be critical. There was also the question of whether or not an individual should or could be granted standing. An international agency, it was suggested, could represent an individual and this would avoid the question of whether or not an individual could be a subject of international law. An agency would develop expertise in the matter and could effectively advise the individual concerned as well as determine whether or not there was any colourable claim. Finally, the International Law Commission had been directed by the General Assembly and the Economic and Social Council to propose means for the effective reduction of statelessness and for individuals to acquire an effective nationality. For this to be accomplished, recommendations regarding implementation and enforcement were required.[103]

When the article went before the plenipotentiaries at the 1959 Conference clarification was sought. It was suggested that the General Assembly could entrust to the Secretary-General the responsibility of defining the specific functions the agency was to perform. Further, several delegations proposed that the United Nations High Commissioner for Refugees was well-situated and the most obvious agency to grant assistance,

[102] The Secretary-General was added later.

[103] It was suggested that, in order to facilitate access to the agency, local representatives should be available 'wherever there are large numbers of stateless persons': UN doc. A/CN.4/Ser.A/1953, 326. Some observed that the agency might also be of benefit to governments themselves: see UN doc. A/CONF.9/5, (24 Feb. 1959), 22.

the additional benefit of which would be the lack of a necessity to create a new agency whose functions would obviously overlap with those already performed by the High Commissioner.[104] These comments were lost, however, in the ensuing discussion regarding the proposed tribunal.

Objections to the creation of an independent tribunal were so significant that a vote resulted in rejection of the proposal by 21 to 2 with 3 abstentions.[105] A vote on whether to include within the body of the Convention the proposal for creation of an agency was split, 10 for and 10 against with 8 abstentions, with the result that the provision for an agency remained.[106]

In later discussions, the right of reservation to article 11, now providing exclusively for the creation of an agency, was approved. Finally, the question of provisions for the creation of the agency in an attached protocol rather than in the Convention itself was deflected by the President who recommended that the matter be decided by the General Assembly or some other appropriate body.[107] At the 1961 Conference, article 11 was adopted and consequently reference to the proposed agency included in the Convention itself, by 10 votes to 9, with 12 abstentions.[108]

5.2 Appointment of the Article 11 Agency

Upon deposit of the sixth instrument of ratification, the Secretary-General of the United Nations, acting under paragraph 2 of article 20, brought to the attention of the General Assembly the question of establishment, in accordance with article 11, of an agency to assist stateless persons.[109] The six Contracting States, in conjunction with the Secretary-General, made a concerted presentation to the General Assembly, and consultations took place between the Contracting States and the Office of the United Nations High Commissioner for Refugees. As a result, the Secretary-General came to the conclusion that the body to which persons claiming the benefit of the Convention may apply should be established within the framework of UNHCR.[110] He cited several supporting factors, including the fact that many refugees, already the concern of the High Commissioner, were also stateless persons. Further, the High Commissioner's Office had been suggested by delegates at the Conference

[104] UN doc. A/CONF.9/C.1/SR.9, 5-9 (comments by Belgium, United Kingdom, Japan, Austria, Italy and the Executive Secretary). See also UN doc. A/CONF.9/5, (24 Feb. 1959), for similar statements by governments on the proposed draft conventions.

[105] A vote taken later on as to whether a new article on submission of disputes to the International Court of Justice should be included in the convention, reservations permissible, was accepted by 21 votes to 1, with 9 abstentions.

[106] UN doc. A/CONF.9/C.1/SR.17.

[107] UN doc. A/CONF.9/SR.10, pp. 11-13.

[108] See UN doc. A/CONF.9/C.1/SR.17, p. 9.

[109] The Convention was to enter into force on 13 Dec. 1975.

[110] *Note by the Secretary-General*: UN doc. A/9691, (16 Jul. 1974), p. 2.

of Plenipotentiaries which adopted the Convention as the appropriate body to assume the functions under article 11.[111]

The General Assembly allocated this agenda item to the Third Committee, which considered the issue on 27 November 1974. Its draft resolution[112] met with some division of opinion, which should be interpreted in light of the historical setting. States opposed to the adoption of UNHCR as the agency under article 11 and to any consideration of the issue at all were overwhelmingly members of the Soviet Bloc.[113] The representative of the Union of Soviet Socialist Republics (USSR), for example, argued that stateless persons were not necessarily refugees and were therefore not necessarily of interest to UNHCR. Further, it was not their nationality which was the concern if they were of interest to the High Commissioner. In his opinion, the Convention had not been adopted by the General Assembly and was therefore not the concern of the Secretary-General, and finally, as it was not yet in force, there was no need to take action. As the problem was of concern to States other than those signatory to the Convention, he proposed further review and deferral to the following session of the General Assembly.[114]

In response, other delegates suggested that there was nothing further to examine, for the procedure and the steps to be taken had been outlined in the Convention. The sovereignty of the States who had created the Convention should be respected and the process embodied in the Convention could not now be reviewed by States who were not signatory. It was simply a matter of agreement or disagreement on the agency itself. The governments of thirty-five States had been represented at the Conference and had adopted the Convention in accord with resolution 896 (IX) of the General Assembly which specifically called for the adoption and final conclusion of a Convention on the Elimination or Reduction of

[111] The Secretary-General also tabled a proposal on funding the work to be undertaken; see UN doc. A/9691/Add.1, 19 Nov. 1974, which was later modified. As the workload relating to the application of art. 11 would only become clear after entry into force, fiscal considerations should be made at that time. Hence, UNHCR was to assume the functions of art. 11 from within its available resources which, if they proved insufficient, would be reviewed by the Secretary-General who would, in turn, submit a report to the General Assembly; see *Note by the Secretary-General*, 22 Nov. 1974: UN doc. A/C.3/L.2137.

[112] UN doc. A/C.3/L.2140.

[113] Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Saudi Arabia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics.

[114] See UN docs. A/C.3/SR.2101, and A/C.3/SR.2102, (3 Dec. 1974; Third Committee, 29th sess.). Poland's proposal to refer the matter to the General Assembly failed at the vote.

Statelessness. The primary work of the Convention had been completed.[115]

A large number of refugees were also stateless persons. As the idea was to have a central body with whom stateless persons might communicate, which would be responsible for negotiations with governments, and which understood and dealt with the problems faced due to a lack of protection, the most obvious candidate was UNHCR. The special knowledge of the High Commissioner's Office could be used for the benefit of the stateless. The Convention, and the agency embodied therein, would not be of benefit to signatories only. Rather, the view was one of assisting all stateless persons and all States facing the problem of statelessness.

In an effort to bring the dialogue to a close, the Iraqi delegate proposed that UNHCR be charged with the responsibilities of the article 11 agency on a provisional basis, and reviewed at a later date. The sponsors of the resolution, essentially the six signatories, agreed and the proposal was adopted, several States which were not signatory voicing their support of the principles embodied in the Convention and the need of a body to whom stateless persons might appeal. UNHCR was seen to be the most appropriate body. On 10 December 1974, this proposal was adopted by the General Assembly as resolution 3274 (XXIX). In November 1976, the General Assembly reviewed the provisionally allocated duties, and UNHCR was requested to continue to perform these functions.[116]

6. Conclusion: Remaining Gaps

In his report for the International Law Commission, Manley Hudson stated that the greatest number of cases of statelessness had been created by collective denationalization on political, racial or religious grounds.[117] This, clearly, is not merely a conflict of laws problem and the State, upon which the individual is most dependent for help, is unlikely to give assistance. There are nevertheless aspects of nationality law which are subject to scrutiny under international law. While these are the exception, they may have an impact on people in a variety of situations, and the

[115] The UNHCR Protection Division provided a background note which, although it does not appear to have been presented as an official note to the Third Committee, was undoubtedly discussed with representatives. The note covered some constitutive aspects, indicating that art. 22 of the UN Charter ("The General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions"), read in conjunction with arts. 11 and 20 of the 1961 Convention, provided the legal authority for the General Assembly to entrust an entity with the art. 11 functions. As the functions of the art. 11 body would include promotion and strengthening of human rights, they fell within the functions of the General Assembly described in art. 13 and Ch. IX of the Charter.

[116] See UNGA res. 31/36, 30 Nov. 1976. The General Assembly noted that there were no financial implications involved.

[117] Above note 7, at 49.

person lacking an effective nationality in law or in fact is not well-positioned to represent him- or herself before the State.

The 1954 Convention relating to the Status of Stateless Persons, originally intended as a *mutatis mutandis* Protocol to the 1951 Refugee Convention, failed to provide for a supervisory body. There is every indication that this was not intentional but the result of oversights and procedural complications. A clear distinction between stateless persons and refugees was desired; however, it was assumed that *de facto* stateless persons, or as Hudson more accurately phrased it, *de facto* unprotected persons, were refugees. Thus, *de facto* stateless persons were relegated to a non-binding recommendation in the Final Act. The International Law Commission indicated that a supervisory body should be incorporated into any Convention dealing with stateless persons. Hence, the separation in paths between stateless persons and refugees was never intended to exclude international assistance to stateless persons regarding their status. Further, the provisions of the 1954 Convention could easily be extended to those who, due to a change in political circumstances, cannot provide evidence of their nationality or are clearly lacking national protection. In particular, special consideration should be given in situations where the status of large ethnic groups is prejudiced and may result in displacement. The High Commissioner for Refugees has an interest in the protection of persons who are without national protection, as well as in prevention of unnecessary dislocation and hardship.

The 1961 Convention on the Reduction of Statelessness was drafted with the objective of filling gaps created by conflicts of law. Originally intended as a convention on *elimination* of statelessness whose articles had further reaching implications, this was felt too radical a step and the Conference chose to use the draft Convention on Reduction of Future Statelessness instead. The focus on *reduction* is evident in the articles, which aim at avoiding statelessness at birth but do not prohibit the possibility of revocation of nationality under certain circumstances. The article 11 provision for a supervisory body was marginally accepted, States expressing concern regarding the specific functions of the agency, which were not delineated, as well as over the process of appointment. The ILC and State delegates were, nonetheless, of the opinion that international assistance was necessary. Clearly, the agency has the authority to initiate a dialogue with signatories to the Convention to ensure that domestic legislation complies with the provisions of the Convention. The agency may also assist those who believe they have been wrongfully denied a nationality. The Final Act recommends that this assistance be extended to those with no effective nationality. Included in this group should be those who cannot ascertain their nationality, for an individual cannot verify citizenship status without the final declaration of the State. Further, while a State may claim an individual has the option to obtain nationality, administrative

procedures may be adopted which foreclose attainment of citizenship for certain sectors of the population. Hence, these individuals should not be left to languish under the burden of proving a negative.

Refugees and stateless persons were once treated in like manner. The divergence of their paths, as outlined above, cannot be interpreted as an intention to deny international protection to those who lack national protection. Further, the division of *de jure* and *de facto* stateless persons was a result of two things. The first was the desire to *extend* protection to those who legally had a nationality but had none of the attributes of a nationality. The second was a misconception regarding who would qualify, at the time and over the years, as a refugee. The assumption was that *de facto* stateless persons *were* refugees. As such, they were already granted international protection. The recommendations in the Final Acts of the 1954 and 1961 Conventions were made as humanitarian gestures. Sympathetic States may then extend provisions to *de facto* stateless when so inclined.

At the 1961 Conference, the High Commissioner's Office stated it had 'always been the endeavour of the Office of UNHCR to assist refugees in acquiring a nationality, as one of the means of ceasing to be a refugee'.[118] In this regard, the expertise of UNHCR was thought to be invaluable, not only for purposes of assisting those without national protection, but also due to the experience the High Commissioner's Office had in negotiating with governments. This was anticipated by the Co-ordinating Board of Jewish Organizations who, at the 1959 Conference, stated,[119]

When in an individual case doubt exists as to whether a person comes within the terms of one of the Articles of the Convention, or when two States are in disagreement as to which nationality the person concerned should possess under the Convention, it is essential that the United Nations Agency be empowered to negotiate with the States concerned and give legal protection to the individual in question until the matter of his nationality has been settled.

The difficulty is one of the grey zone, the gap left between a simple conflicts of law issue and an unprotected person who does not fit categorically into any of the definitions. Hudson observed that any attempt to eliminate statelessness would only be fruitful if it resulted in,[120]

[N]ot only... the attribution of a nationality to individuals, but also in an improvement of their status. As a rule, such an improvement will be achieved

[118] UN doc. A/AC.96/INF.5, (26 Oct. 1961), p. 2.

[119] *Memorandum submitted by the Co-ordinating Board of Jewish Organizations*: UN doc. A/CONF.9/NGO.1, (Mar.1959) 5.

[120] Hudson, above note 7, at 49, went on to state that the principle of *jus connectionis*, or right of attachment, was in this sense superior to *jus soli* or *jus sanguinis*, for it advocates the nationality of the State to which the individual is proved to be most closely attached in his conditions in life. This is, in essence, the genuine effective link.

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.

International law and national law must meet on this complex issue, involving diverse matters of State succession, transfer of territory, conflicts of law, nationality legislation and its administration and the right of a State to choose its nationals. Instances of statelessness in relation to each of these categories may be seen around the world. There was, initially, international intention to ensure an effective nationality on a broad scale as a means of protection. Certain gaps have yet to be addressed if this goal is to be realized.