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The Ships of State and the shipwrecked.

The (il)legality for states to create statelessness under
international law

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Abstract

This thesis carried out a study into the (il)legality of creating statelessness under international (human rights) law. The UNHCR most recently launched a global campaign to eradicate statelessness, given the widespread recognition of the harmful impact it has on the full realisation and enjoyment of human rights. However, while subscribing to this view, many states are simultaneously undermining the campaign by seeking the removal of nationality in response to terrorism. This risks creating statelessness at best, and in some cases directly creates it at worst. The study shows that the sovereign title states still hold over nationality matters, despite the rise of human rights, means that they in principle can indeed strip people's nationality even if this creates statelessness. However, human rights have been successful in securing a more circumspect control via modifying principles for state action as non-discrimination and proportionality. Depriving nationality for convicts or suspects of terrorism sacrifices a significant deal of human rights at the altar of (perceived) security, which probably could be dealt with via ordinary criminal proceedings. It will therefore not likely meet the standards of proportionality.

Keywords: statelessness, deprivation of nationality, international human rights law

*Thou, too, sail on, O Ship of State!
Sail on, O Union, strong and great!
Humanity with all its fears,
With all the hopes of future years,
Is hanging breathless on thy fate!*

(Henry Wadsworth Longfellow,
The Building of the Ship 1849)

Table of Acronyms

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
ECHR	European Convention for the protection of Human Rights and Fundamental Freedoms
ECN	European Convention on Nationality
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council
EU	European Union
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
PCIJ	Permanent Court of International Justice
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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Table of Contents

ABSTRACT	II
INTRODUCTION	1
RESEARCH QUESTIONS	3
IS IT A QUESTION OF LAW?	3
IS IT A QUESTION OF INTERNATIONAL LAW?	4
DELIMITATION, RESEARCH METHODOLOGY AND SOURCES	7
OUTLINE	9
1. SETTING THE FRAMEWORK ON STATELESSNESS	11
1.1. THE HUMAN RIGHTS COSTS OF STATELESSNESS	11
1.2. THE DEFINITION OF A STATELESS PERSON	11
1.3. THE SIZE OF THE PROBLEM	16
1.4. WHAT ARE THE PRINCIPAL CAUSES OF STATELESSNESS?	17
1.5. STATELESSNESS AS A CONSEQUENCE OF FORMALITY	20
2. SETTING THE FRAMEWORK ON NATIONALITY	25
2.1. AN OVERVIEW OF THE RIGHT TO NATIONALITY	25
2.1.1. TREATY RULES	25
2.1.2. CUSTOMARY RULES	29
2.2. THE <i>DOMAINE RÉSERVÉ</i> OF STATES WITH REGARD TO NATIONALITY	32
2.3. WHAT IS THE NATURE OF THE RIGHT TO A NATIONALITY AND THE DUTY TO PREVENT STATELESSNESS?	35
3. DOES NATIONALITY STILL MATTER?	40
4. SETTING THE EXAMPLES: HOW CAN STATES CREATE STATELESSNESS?	48
4.1. REMOVING NATIONALITY ON THE INTERNATIONAL PLANE BY OPPOSING CONFERRALS UNDER INTERNATIONAL LAW	48
4.1.1. EXAMPLES	49
4.2. REMOVING NATIONALITY BY REMOVING THE STATE	54
4.3. REMOVING NATIONALITY BY DEPRIVATION	56

5. LEGAL APPRAISAL OF THE CREATION OF STATELESSNESS	58
5.1. CONVENTIONAL AND CUSTOMARY OBLIGATIONS	58
5.2. GENERAL PRINCIPLES	60
5.2.1. NON-ARBITRARINESS	60
5.2.2. PROPORTIONALITY	62
CONCLUSIONS	69
<i>BIBLIOGRAPHY</i>	73

Introduction

It is the worst possible thing to happen to a human being. It means you are a non-entity, you don't exist, you're not provided for, you count for nothing.¹

Statelessness harms millions of people across all corners of the world. The United Nations High Commissioner for Refugees (hereinafter UNHCR) estimates that worldwide over ten million people suffer from being stateless,² and their numbers should be significantly greater. In simple terms, being stateless means that no country accepts you as one of its own, and, in principle, you do not belong anywhere. Behind this simplicity lies a plethora of human rights problems, ranging from the lack of identity papers, denied right to property and housing, barred access to education, the labour market, and health care, to prolonged or indefinite detention and so on. When it happens to vulnerable people as children it leaves them even more fragile. A stateless person is a non-person who spends her life in waiting,³ condemned to a suspended life in the margins of societies. Since stateless persons are relegated to the fringes of societies and commonly lack the legal and administrative avenues and political clout to have their voices heard, the phenomenon of statelessness itself shares in their anonymity.

Stateless persons are gradually emerging from a life in the shadows, however, with their plight being more and more exposed by human rights activists and civil society organisations, parliaments, courts and tribunals, inter-governmental bodies, and international organisations.⁴ Statelessness is gaining recognition and prominence with scholars and policy makers on individual, regional, and global level. The number of state parties to the conventions on statelessness jumped exponentially.⁵ On 4 November 2014, the UNHCR, mandated by the international community to identify, prevent and

¹ Statement by a Nubian elder of Kibera, Kenya, reproduced in Plan and UNHCR, 'Under the Radar and Under Protected: The Urgent Need to Address Stateless Children's Rights' (September 2012), 10.

² For the most recent statistics, see UNHCR, *Mid-Year Trends 2014*, 7 January 2015, 10. See further UNHCR, *Global Appeal 2015 Update*, November 2014, 58-65; *Global Report 2014*, 80-87.

³ Martijn Jurgen Keeman, 'Life is Waiting...' (*Statelessness Programme*, 13 May 2014) <statelessprog.blogspot.nl/2014/05/life-is-waiting.html> accessed 14 July 2015.

⁴ From EU to OAS, Interparliamentary Union and UN, see table of instruments above.

⁵ The UN Secretary-General highlighted them in a treaty event, see UN, 2013 Treaty Event: Towards Universal Participation and Implementation, 2.

reduce statelessness and protect stateless persons,⁶ launched an aspirational campaign to pick up the ball where the same community had dropped it,⁷ and eradicate statelessness by the year of 2024. To this end it drafted a programme with ten action points to be primarily undertaken by states as principal actors.⁸

Notwithstanding above trend to rally against statelessness and its pledge to respect international principles and action on it,⁹ the United Kingdom has moved against suspects of terrorism by removing their nationality even if it renders them stateless,¹⁰ which Australia intends to follow.¹¹ Similar sentiments are spoken out in other states.¹² Secondly, some states such as the Dominican Republic have pressed on with denationalising large groups of people on their territories,¹³ allegedly due to a perception of being foreign to their homogenised culture and identity.¹⁴ These measures are directly at odds with the UNHCR campaign's stated aim of preventing new cases of statelessness from emerging, and thwarts the achievement of the campaign's ultimate goal of fully eradicating statelessness.

Beyond the question of whether such state action is incompatible with policies of the international community lies the pertinent question whether and under what conditions it is allowed from a legal point of view.

⁶ UNGA Res 64/127 (27 January 2010), para 4; Res 61/137 (25 January 2007), para 4; Res 50/152 (9 February 1996), para 14-15; Res 3274 (XXIX) (10 December 1974); Res 31/36 (30 November 1976). See further UNHCR, Executive Committee Conclusion No 78 (XLVI) on the prevention and reduction of statelessness and the protection of stateless persons, 20 October 1995, UN Doc A/50/12/Add.1, para 20; Executive Committee Conclusion No 106 (LVII), 6 October 2006, UN Doc A/61/12/Add.1, para 18.

⁷ See the fate of the Draft Convention on the Elimination of Future Statelessness in ILC Yb 1954/II.

⁸ UNHCR, Global Action Plan to End Statelessness: 2014-2024, November 2014.

⁹ UNHCR, Pledges 2011: Ministerial Intergovernmental Event on Refugees and Stateless Persons, October 2012, 36 and 124.

¹⁰ Nicholas Watt, 'Theresa May plan capable of making foreign-born terror suspects stateless' *The Guardian* (London, 29 January 2014) <theguardian.com/politics/2014/jan/29/theresa-may-terror-suspects-citizenship-clegg-approval> accessed 14 July 2015.

¹¹ Australian Government Department of Immigration and Border Protection, 'Australian Citizenship: Your Right, Your Responsibility' (2014), 6.

¹² See Editorial, 'VVD: terroristen mogen stateeloos worden' *de Volkskrant* (Amsterdam, 26 February 2015) <vk.nl/politiek/vvd-terroristen-mogen-stateeloos-worden~a3874143/> last visited 14 July 2015.

¹³ Sibylla Brodzinsky, 'Man lynched in Dominican Republic as tensions run high' *The Guardian* (London, 12 February 2015); Marselha Goncalves Margerin, Monika Kalra Varma and Salvador Sarmiento, 'Building a Dangerous Precedent in the Americas: Revoking Fundamental Rights of Dominicans' (2014) 21 Human Rights Brief 9; Inter-American Commission on Human Rights, IACHR Wraps Up Visit to the Dominican Republic (2013) <oas.org/en/iachr/media_center/PReleases/2013/097.asp> last visited 14 July 2015.

¹⁴ Institute on Statelessness and Inclusion, *The World's Stateless* (December 2014), 25.

Research questions

The main research question is therefore as follows: **can states remove the nationality from natural persons and render them stateless under public international law?**

This can be subdivided into several other questions. First of all, which situations of denationalisation can be identified that lead to statelessness, and what rules and principles of international law can be found that control those situations? Secondly, what is the scope and content of discovered rules and principles that are to be applied to those situations? For instance, how does a proportionality test look like? Together these must answer the overall research question.

Is it a question of law?

States regularly insist in (inter)national legal proceedings that certain questions belong to the executive's prerogative and are not truly legal questions;¹⁵ defences which courts regularly defer to.¹⁶ It could be argued that the central focus on a state's competence to denationalise is more of a political than legal nature. As long as a population is required for statehood,¹⁷ and as long as the personal dimension of a state determines its rights and obligations towards other states, questions about its composition such as who is in or out directly affect sovereignty and thus remain, in an extreme sense, of existential concern to any state. It is also clear that measures to combat terrorism and to protect vital interests as public order and the security of its population and institutions are likely candidates for judicial deference.¹⁸ Nevertheless, a thesis has the luxury to safely ignore considerations of judicial restraint and propriety. Moreover, because the research

¹⁵ Known as the political questions and *acte de gouvernement* doctrines in common and civil law systems respectively, see Paul PT Bovend'Eert, Pien M van den Eijnden and Constantijn AJM Kortmann, *Grenzen aan de rechtspraak? Political question, acte de gouvernement en rechterlijk interventionisme* (Kluwer 2004). For a recent discussion on national courts in the application of international law, Daniele Amoroso, 'Judicial Abdication in Foreign Affairs and the Effectiveness of International Law' (2015) 14 Chinese J Intl Law 99. According to Shaw these doctrines inevitably surface in the international legal sphere, see Malcolm Nathan Shaw, *International Law* (OUP 2014), 134. It has most recently been invoked in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Rep 403, para 26.

¹⁶ From the Dutch administrative court's '*marginale toetsing*' to the ECtHR's '*margin of appreciation*'.

¹⁷ Cf Convention on the Rights and Duties of States (Inter-American) (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19; James R Crawford, *Creation of States in International Law* (2nd edn, OUP 2006), 52 (states are aggregates of individuals).

¹⁸ Cf *Thomas v Mowbray* [2007] HCA 33, para 107.

questions are formulated in legal terms it can rely on the logic of the International Court of Justice (ICJ) in its long-standing and consistent line of jurisprudence on justiciability, wherein it held that ‘the fact that a question has political aspects does not suffice to deprive it of its character as a legal question’.¹⁹

Is it a question of international law?

It has recently been asserted that the topic of statelessness might not belong to the realm of public international law. According to Hanley, who is sympathetic to the inclusion of statelessness by taking the perspective of ‘victims of international law’, bringing millions of individuals interacting with an international law that fails them into view,²⁰ scholars of international law do not seem to share the view of those who study statelessness that it is, or ought to be, part of international law.²¹ At the outset, this claim ought to be tested on its merits if this thesis is to succeed in asking and answering the above research questions from the internal perspective of international law. First, a procedural question mark can be placed regarding his use of sources.²² Second and more substantively, the main reason put forward that ‘in the legal literature statelessness is typically cast as a problem to be solved by nationality law’ cannot furnish proof that

¹⁹ ICJ, *Kosovo Opinion* (n 15), para 26-27; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 41; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 13; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Jurisdiction and Admissibility) [1984] ICJ Rep 392, para 95-96; *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3, para 37; *Aegean Sea Continental Shelf (Greece v Turkey)* (Judgment) [1978] ICJ Rep 3, para 31; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 18, para 15; *Application for Review of Judgement No 158 of the United Nations Administrative Tribunal* (Advisory Opinion) [1973] ICJ Rep 172, para 14; *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, 155; *Competence of Assembly regarding admission to the United Nations* (Advisory Opinion) [1950] ICJ Rep 4, 6-7; *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)* (Advisory Opinion) [1948] ICJ Rep 57, 61.

²⁰ W Hanley, ‘Statelessness: An Invisible Theme in the History of International Law’ (2014) 25 EJIL 321, at 322-323 and 326. Hanley supports such an inclusion because it opens up the two perspectives of international law beyond the state, and practice beyond concepts. *Ibid*, at 323-327.

²¹ *Ibid*, at 322.

²² It is questionable to dismiss ‘those who study statelessness’ as scholars of international law without offering any explanation as to what criteria is justified in order to make those distinctions. As a result, the legal literature cited to support the claim cannot be reviewed on having been selected for appropriate reasons. In that respect, it is even more dubious to cite commentators who clearly cover statelessness from the international law perspective in support of reasons why scholars of international law do not seem to think that statelessness is part of international law.

statelessness thus falls squarely and exclusively within the domestic legal sphere, along with nationality laws, to which it is intimately bound; it is *non sequitur*. The Permanent Court of International Justice held, while admitting that nationality is indeed a matter in principle not regulated by international law, that the question whether nationality remained so,²³ ‘is an essentially relative question; it depends upon the development of international relations’.²⁴ By the same token, albeit restrictions upon the sovereignty of a state vis-à-vis nationality affairs cannot be presumed, this cannot predetermine the non-existence of restrictions either; a state can eg partly relinquish jurisdiction.²⁵ In short, the subject-matter of nationality and statelessness can at best indicate the absence of germane rules of international law, but the latter ultimately depends on what legal grounds (*titres*) and arguments are advanced. It is submitted that international relations have developed in such ways that nationality itself was brought into the fold of international law,²⁶ and statelessness can share the same fate in a derivative way. Third and finally, statelessness is not a mere by-product of nationality, incidental and epiphenomenal, but a topic *sui generis*. The causes and consequences of statelessness require international cooperation.²⁷ Six multilateral treaties are wholly dedicated to statelessness,²⁸ with multiple provisions explicitly allocated to it in other treaties,²⁹ and

²³ I.e. solely within the domestic jurisdiction of a state conform art 15(8) Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 195, the predecessor to art 1(7) UN Charter.

²⁴ *Nationality Decrees Issued in Tunis and Morocco (French Zone) (Great Britain v France)* (Advisory Opinion) [1923] PCIJ Series B No 4, 7th February 1923, at 24.

²⁵ See *The Case of the S.S. "Lotus" (France v Turkey)* (Judgment) [1927] PCIJ Series A No 10, 7th September 1927, at 18-19, a case that can be traced back to the abrogation of capitulatory rights, and where the PCIJ echoed the fundamental characteristic of international law as governing relations between independent states.

²⁶ See Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge 2013); Ian Brownlie, ‘The Relations of Nationality in Public International Law’ (1963) *British Yb Intl L* 39, 284.

²⁷ Mark Manly and Laura van Waas, ‘Human Security and Statelessness’, in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (CUP 2010), 72-75.

²⁸ Protocol relating to a Certain Case of Statelessness (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 115; Special Protocol concerning Statelessness (adopted 12 April 1930, entered into force 15 March 2004) (1974) 13 ILM 1; Convention relating to the Status of Stateless Persons (adopted 28 September 1954, entered into force 6 June 1960) 360 UNTS 117; Convention on the Reduction of Statelessness (adopted 30 August 1961, entered into force 13 December 1975) 989 UNTS 175; Convention tendant à réduire le nombre des cas d'apatridie (adopted 13 September 1973, entered into force 31 July 1977); Convention on the Avoidance of Statelessness in relation to State Succession (adopted 19 May 2006, entered into force 1 May 2009) CETS No 200 (Avoidance Convention).

other international instruments.³⁰ In addition, prevention or alleviation of statelessness is the underlying rationale for many other provisions. It clearly concerns the international community as an idiosyncratic product and cause of human rights violations. Moreover, these violations can occur on such a large scale to involve the gross or systematic state failure to protect individuals within its jurisdiction, that systematic exclusion and persecution not only becomes a concern for individual human security,³¹ but, carrying within the seed to become the root cause for conflict, a concern for the in- and external security of states as well.³² When ethnic minority groups are kept stateless and subsequently denied of other fundamental rights it strains the relationships between kin and host states.³³ Furthermore, statelessness does not only occur *in situ*, but is frequently a transboundary phenomenon with forced migration and refugee flows as result. The dire situation in Asia triggered an intervention from the United Nations to call repeatedly upon Myanmar to grant citizenship to the Rohingya.³⁴

²⁹ Art 10 Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (adopted 15 November 1965, entered into force 23 October 1978. Ceased to have effect on 23 October 2008) 1107 UNTS 33; art 9(1) Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; art 6(3) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; art 7(2) Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; art 4, 6-8, 18 and 23 European Convention on Nationality (adopted 6 November 1997, entered into force 1 March 2000) CETS No 166; art 10(3) International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3; art 7(2) Covenant on the Rights of the Child in Islam (adopted June 2005, status unknown) OIC/9-IGGE/HRI/2004/Rep.Final.

³⁰ Art 4, 7-9, 11 and 19 Draft Articles on Nationality of Natural Persons in relation to the Succession of States, ILC Yb 1999/II(2), 20; art 8(1) Draft Articles on Diplomatic Protection, ILC Yb 2006/II(2).

³¹ Amal de Chickera and Joanna Whiteman, 'Discrimination and the human security of stateless people' [2014] (46) Forced Migration Review 56.

³² UN Committee on the Elimination of Discrimination against Women, 'General recommendation No 30 on women in conflict prevention, conflict and post-conflict situations' (18 October 2013) UN Doc CEDAW/C/GC/30, para 58; Kelly Staples, *Re-theorising Statelessness: A Background Theory of Membership in World Politics* (Edinburgh University Press: 2012), 121; Mark Manly and Laura van Waas (n 23), 70-71; Commission on Human Security, *Human Security Now* (New York, 2003), 32.

³³ See Thomas Fuller and Joe Cochrane, 'Turned Away From Land and Abandoned at Sea' *NY Times* (New York, 15 May 2015), A1. It is the reason why the OSCE is involved with this, see Stéphanie Marsal and Jennifer Croft, 'The Activities of the OSCE High Commissioner on National Minorities January 2011 to December 2011' (2011) 10 *European Yb Minority Issues* 487, 499-501.

³⁴ UNGA Res 69/248 (21 January 2015), para 8 and 9; Res 68/242 (24 February 2014), para 10; Res 67/233 (8 April 2013), para 14; Res 65/241 (21 March 2011), para 14; Res 64/238 (26 March 2010), para 14. Human Rights Council, Res 29/21 (3 July 2015), para 9; UN Doc A/HRC/28/L.21/Rev.1, 25 March 2015, para 11; Res 25/26 (15 April 2014), para 10; Res 22/14 (10 April 2013), para 8; Res 19/21 (26 April 2012), para 9; Res 16/24 (12 April 2011), para 16; Res 13/25 (15 April 2010), para 12; Res 10/27

In conclusion, a claim that matters of statelessness cannot be addressed by international law is untenable.

Delimitation, research methodology and sources

The thesis restricts itself to a legal, normative appraisal of the creation of statelessness by states, and approaches it from an international law perspective. A qualitative research will use legal sources to locate legal and doctrinal rules and principles that are relevant for the above research questions, determine their scope and apply them to. National law, also known as municipal or domestic law, will also be used in an auxiliary fashion in order to clarify or flesh out the scope and content of international law where appropriate. The utilisation of domestic laws has to be justified when two essential characteristics of international law disfavour their normal or full application on its own level, namely an immanent dualistic predilection and reserved supremacy.

With regard to the first characteristic, international law traditionally keeps a divide between it and the domestic legal regime so that the two are not automatically valid within each other's sphere. Validity here concerns whether international law forms part and parcel of national law, or, in Anglo-Saxon terms, forms part of the 'law of the land', and vice versa. Domestic legal orders can remove this barrier via monism, the constitutional set-up whereby international law is declared valid in the internal domestic system without the need for separate legislative acts of incorporation, transformation or adoption. However, after removing the sluice gate norms can only flow downstream, in the sense that the domestic system receives and is imbued with rules of international law but not the other way around; national rules will not without more become valid on the international plane. In other words, on the international level, domestic laws are applicable 'not in itself (as if there were a sort of continuum juris, a legal relay between such law and international law), but only as one factual element among others [...]',³⁵ and monist states cannot change that. Instead, domestic laws remain 'merely facts which express the will and constitute the activities of States, in the same manner as do

(27 March 2009), para 10. See also Statement by the President, UN Doc A/HRC/PRST/23/1, 27 June 2013, para (h).

³⁵ *Frontier Dispute (Benin v Niger)* (Judgment) [2005] ICJ Rep 90, para 28; *Frontier Dispute (Burkina Faso v Republic of Mali)* (Judgment) [1986] ICJ Rep 554, para 30.

legal decisions or administrative measures'.³⁶ International law allows for unification but is rather indifferent to it,³⁷ it does not care how states fulfil their obligations as long as they do,³⁸ and when in union the marriage remains a rather disinterested, one-way affair.

With regard to the second characteristic, international law assumes supremacy as well, meaning that it prevails over conflicting domestic norms.³⁹ Its supremacy claim is somewhat of a misnomer in the light of its dualistic trait,⁴⁰ but manifestations of this 'supremacy', or rather the blind application of its own norms, is that a state cannot invoke its national law to justify the non-observance of conventional or customary international obligations,⁴¹ and accordingly cannot escape international liability when violating those obligations because of domestic law.⁴²

However, international law is not as detached from domestic laws as it first appeared. Because domestic laws are generally more detailed and densely regulated,

³⁶ *Case concerning certain German interests in Polish Upper Silesia (Germany v Poland)* (Judgment) [1926] PCIJ Series A No 7, 19.

³⁷ International law cannot dictate monism and subsequently cannot impose its presence within the domestic legal order, see André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011), 68-73 and 299-300.

³⁸ Eileen Denza, 'The Relationship between International and National Law', in Malcom David Evans (ed), *International Law* (4th edn, OUP 2014), 416-417.

³⁹ *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (Advisory Opinion) [1988] ICJ Rep 12, para 57; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* (Advisory Opinion) [1932] PCIJ Series A/B No 44, 24; *Greco-Bulgarian Communities* (Advisory Opinion) [1930] PCIJ Series B No 17, 32. See also André Nollkaemper, 'Inside or Out', in Jann Klabbers and Touko Piiparinen (eds), *Normative Pluralism and International Law. Exploring Global Governance* (CUP 2013), 108-109.

⁴⁰ If domestic laws are not valid on the international level and only international law exists there to be applied, then formally there are no competing norms hence no conflict that needs to be resolved by a hierarchical (re)ordering. Prevalence as concept is more relevant for the domestic legal order. See also Gerald Fitzmaurice, 'The General Principles of International Law Considered from the Standpoint of the Rule of Law' (1957) 92 *Recueil des Cours* 5, 79-80.

⁴¹ Art 27 and 46 VCLT. See also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, para 113; *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v United States)* (Judgment) [2009] ICJ Rep 3, para 47; *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, Advisory Opinion OC-14, Inter-American Court of Human Rights Series A No 14 (9 December 1994), para 35; *Reparations for injuries suffered in the service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 180; *Case of the S.S. "Wimbledon"* (*United Kingdom, France, Italy and Japan v Germany*) (Judgment) [1923] PCIJ Series A No 1, 29-30; *Alabama Claims Arbitration* (1872) 1 Moore Intl Arbitrations 495, 656. See further art 13 Draft Declaration on the Rights and Duties of States, ILC Yb 1949/I, 288.

⁴² Cf art 3 and 32 Articles on Responsibility of States for Internationally Wrongful Acts.

international law sometimes needs to use domestic concepts in order to supplement and develop international law. In order to prevent a *non liquet*, international law can deduce general principles of law recognized by civilised nations, a primary source of international law according to Article 38(1)(c) ICJ.⁴³ Additionally, domestic law can be integrated by way of reference, even implicitly.⁴⁴ Article 1(1) Convention on the Status of Stateless Persons (Status Convention) contains an explicit *renvoi* to domestic nationality laws. Moreover, there other ways that domestic law becomes relevant for or in international law.⁴⁵ A comparative study between national laws will be conducted where the clarification of customary norms necessitates it in order to establish state practice and *opinio juris*,⁴⁶ or where it could distil general principles of law.

Lastly, the legal sources relied on are in accordance with Article 38 ICJ Statute. The facts relied on are facts insofar as they are authoritatively established under responsibility of the United Nations, in particular UNHCR, and where appropriate on supplementary reports of other organisations such as non-governmental organisations.

Outline

The thesis is organised into five chapters. Chapter One introduces the theory around statelessness, why it is a problem and how it is caused. It will investigate formalism as root cause of exclusions in nationality and other fields. Next, Chapter Two introduces the theory around nationality and its two-sided nature of an individual's human right on the one hand and the state's collective (sovereign) privilege on the other. The latter, also known as the state's *domaine réservé*, means a significant relativisation for the aspirations of the human right to nationality. Chapter Three questions the relevance of nationality as membership card to get on board, or whether individuals might have

⁴³ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, para 38 and 50 (referring to 'rules generally accepted by municipal legal systems which recognize the limited [liability] company').

⁴⁴ *Exchange of Greek and Turkish Populations* (Advisory Opinion) [1925] PCIJ Series B No 10, 19. See also *Elettronica Sicula SpA (ELSI) (United States of America v Italy)* (Judgment) [1989] ICJ Rep 15, para 61 (on whether local remedies were exhausted).

⁴⁵ Alain Pellet, 'Article 38', in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm, Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, OUP 2012), para 117-139.

⁴⁶ See *Serbian and Brazilian Loans Case* (Judgment) [1929] PCIJ Series A No 20/21, 18-20; *Nottebohm Case (second phase)* (Judgment) [1955] ICJ Rep 4, 20-21.

alternative options. It makes the case that nationality still matters. Chapter Four gives three examples how states can create statelessness. Next to circumstantial ways it describes the UK model for deprivation of nationality as the most direct cause of statelessness. Together these four chapters set the theoretical framework. Finally, Chapter Five reviews the UK model's compliance to current international (human rights) law standards and obligations, while keeping in mind the special character of human rights on the one hand and the state's sovereign *domaine réservé* in relation to nationality on the other. The thesis will zoom into the personal stories of stateless people from time to time, to show how statelessness affects people's lives.

The thesis concludes that in present-day international law the rise of human rights has so far not yet precluded states from depriving persons of nationality, but that it did attribute to changing the content of modifying principles as non-discrimination and proportionality. These principles make it likely illegal for states to create castaways and sail on.

1. Setting the framework on Statelessness

1.1. The human rights costs of statelessness

The costs in terms of obstacles to the full realisation of human rights that statelessness brings for people will be covered in greater detail below, in Chapter Five, where the proportionality of deprivation measures is fleshed out. It would be appropriate however to start off with an overview. The precise costs of a single person obviously depends on the combination of all facts in her specific case, such as the state's jurisdiction she is in, whether she belongs to a minority group and so on. In general, however, it is possible to identify human costs that all and any stateless person has to endure, in addition to those that most are very likely to bear.

The first human rights cost of statelessness is already statelessness in itself as the manifestation of an unfilled right to nationality. This right to nationality is described by the Human Rights Council as an inalienable and fundamental human right.⁴⁷ This should not surprise since it will be shown that nationality is still the key to unlock access to many other human rights, despite the special character of most human rights obligations as being owed to all persons with no regard for civil status.

1.2. The definition of a stateless person

Article 1(1) Status Convention hands down an authoritative definition of a stateless person, which is 'a person who is not considered as a national by any State under the operation of its law'. The treaty expressly prohibits parties to exclude or modify this definition in order to protect its integrity and uniform application,⁴⁸ which is said to have acquired meaning beyond the purpose of the treaty. The International Law Commission had no qualms about recognising its customary status without much further ado,⁴⁹ prompting the UNHCR to refer to it as 'the universal definition',⁵⁰ and others to

⁴⁷ HRC, Res 26/14 (11 July 2014) UN Doc A/HRC/RES/26/14, para 1; Res 20/5 (16 July 2012) UN Doc A/HRC/RES/20/5, para 1; Res 13/2 (14 April 2010) A/HRC/RES/13/2, para 1; Res 10/13 (26 March 2009) UN Doc A/HRC/RES/10/13, para 1; Res 7/10 (27 March 2008) UN Doc A/HRC/RES/7/10, para 1. CHR, Res 2005/45 (19 April 2005) UN Doc E/CN.4/RES/2005/45, para 1; Res 1999/28 (26 April 1999) UN Doc E/CN.4/RES/1999/28, para 1; Res 1998/48 (17 April 1998) UN Doc E/CN.4/RES/1998/48, para 1; Res 1997/36 (11 April 1997) UN Doc E/CN.4/RES/1997/36, para 1.

⁴⁸ Art 38(1) Convention relating to the Status of Stateless Persons.

⁴⁹ Commentary to Article 8 Draft Articles on Diplomatic Protection (n 29), para 3.

unreservedly rely on it.⁵¹ Statelessness is therefore officially the absence of nationality or citizenship of any state by law,⁵² and is also known as *de jure* statelessness.

This official definition with its constitutive elements of ‘state’ and ‘law’ presents two critical challenges to its interpretation and application. As for the element of ‘state’, a first complication arises with regard to the quantity of states that need to be considered. Although it is sometimes feared that the terms ‘any State’ charges an alleged stateless person with the daunting task to prove that she does not have the nationality of literally any state in existence, the interpretative principles of effectiveness and good faith should sufficiently suggest that a host state has to limit its enquiry to states with which she has a *prima facie* connection, such as the state where she was born or where she has or had habitual residence. In addition, the *travaux préparatoires* would corroborate this view.⁵³ This can be more difficult than it sounds. Identifying the states with which she has or had intimate ties necessitates that a host state is able to backtrack her point of origin and migratory route, to find out if she got married or had habitual residence between departure and arrival. A second difficulty is that it cannot be ruled out that a state with which she has no meaningful ties at all has nevertheless accorded her its nationality. Although such a move can be opposed by other states, as will be seen below, opposing it has limited effects and arguably cannot quash the validity of her nationality in the charitable state’s domestic sphere. Since even in the most restricted reading it is the domestic law which is referred to by ‘under the operation of its law’, it follows that she is not stateless from a strictly legal(istic) point of view. In the absence of a shared nationality database, even with the centralising function of the UNHCR as platform for cooperation, host states cannot always rule out with certitude that a person who claims statelessness status is truly not considered a

⁵⁰ UNHCR, *Handbook on Protection of Stateless Persons* (Geneva 2014), para 7.

⁵¹ Eg Committee on the Elimination of Discrimination against Women, ‘General recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’ (14 November 2014) UN Doc CEDAW/C/GC/32, footnote 51.

⁵² The terms nationality or citizenship will be used interchangeably since there is no substantial difference to be found under international law. This might be different in the internal law of states, cf the United Kingdom’s distinctions between different classes of citizens, nationals and subjects in Part I-III British Nationality Act 1981; Australian Citizenship Act 2007, ss 21(8).

⁵³ Nehemiah Robinson, *Convention relating to the Status of Stateless Persons: its history and interpretation, a commentary* (Institute of Jewish Affairs, World Jewish Congress 1955), para 4. See also UNHCR (n48), para 18.

national by any state. Instead of accepting a margin of error below the threshold of absolute certainty, states often load the burden of proof on the individual despite being frequently in a better position to enquire with other states. A second complication also has to do with the range of states that need to be considered, but then on the basis of quality. Since there is no shared list that exclusively enumerates the entities that qualify for consideration as a state, it is in principle up to the host state to accept or reject a person's nationality for deriving from a state or not. In theory, the smaller the range of states becomes the bigger the risk that a person ends up stateless. For that reason it will be separately looked into as a cause of statelessness in Chapter Three.

As for the second element of 'law', a problem popped up when states apply their own reading of each other's nationality laws. This is not uncommon in private international law where forum states frequently have to interpret and apply foreign law, but it can obviously lead to statelessness when a host state rejects that nationality has been validly conferred upon an individual. Strangely this problem only seems to exist on paper with no known cases so far, while another empirical problem came to the fore that requires more imagination. This happened in the case of Mr Pham, a terrorist suspect whose nationality was removed by the United Kingdom on the basis that he was bipatriate on the date of removal, so that the removal would not render him stateless. When Vietnam as the alleged remaining state of nationality informed the United Kingdom that it did not recognise Pham as its national, however, the United Kingdom took the position that Vietnam erred and was simply a state that dodged its responsibilities. As a result, the decision to deprive Pham of his British nationality had made him *de facto* and not *de jure* stateless.⁵⁴ For the same reason as above it will be further looked into as a cause of statelessness in Chapter two.

The formal sense of statelessness can be distinguished from two other kinds. The second type is the just mentioned *de facto* statelessness which refers to a situation where an existing nationality is ineffective. Lacking in legal definition, it is generally considered to signify 'persons outside the country of their nationality who are unable or,

⁵⁴ See *B2 v Secretary of State for the Home Department* [2013] EWCA Civ 616, para 22 and 81.

for valid reasons, are unwilling to avail themselves of the protection of that country'.⁵⁵ Inability usually means that a state of nationality turns a deaf ear to calls from a national, while unwillingness is typically found amongst refugees. *De facto* statelessness has been doctrinally resisted due to the dangers of dilution or rights inflation – the more human rights there are the easier it becomes to end up stateless – , and secondly, of rewarding the state that shuns its national by treating her as a stateless person rather than the national that she is. Thirdly, if applied consistently the opposite should hold true which would mean the bizarre conclusion that a stateless person can be a *de facto* national.⁵⁶ The normal human rights regimes should apply to a situation of ineffective nationality instead.⁵⁷ As for the third critique, this is actually already a reality because the *de facto* citizen is excluded from the benefits of the Status Convention.⁵⁸ But without needing to enter that discussion here, it will become clear that there is a real problem when a state does not ignore its nationals for simply any reason but for the specific reason of lacking its nationality. That state can stay silent when probed about a person alleged to have its nationality or decidedly repudiate her. The dilemma that unfolds is that on the one hand, it does not help someone much when her alleged state of nationality obstinately refuses to accept her as its national, while other states challenge this ducking for cover by insisting on their own confirmative interpretation of said state's nationality law. On the other hand, states are also understandably reluctant to reward the behaviour of a state that dodges its own responsibilities, and end up with having to absorb foreigners that for some reason fell out of grace. There seems to be a discrepancy with refugee law on this point, where it is accepted that only an effective as opposed to a purely formal nationality will decide whether a person is barred from refugee status, for having a safe state of nationality available, whereby the recognition of nationality by that state is an essential component

⁵⁵ Cf Hugh Massey, 'UNHCR and De Facto Statelessness' (April 2010), 61; Paul Weis, 'The Convention relating to the Status of Stateless Persons' (1962) 10 Intl and Comparative L Q 255; UN Secretary-General, A Study of Statelessness (1 August 1949) UN Doc E/1112, 8-9.

⁵⁶ Jason Tucker, 'Questioning *de facto* Statelessness: *by looking at de facto Citizenship*' (2014) 19 Tilburg L Rev 276.

⁵⁷ It has been argued that for those reasons it is better to use existing human rights regimes to address the situation of *de facto* unprotected persons, see Massey, *ibid*, 36-40; Paul Weis, *Nationality and Statelessness in International Law* (2nd edn, Brill 1979), 164; Manley Ottmer Hudson, 'Report on Nationality, Including Statelessness' ILC Yb 1952/2, 3, 17.

⁵⁸ Art 1(2)(ii) Status Convention. It was modeled after art 1E Refugee Convention.

of the test of effectiveness.⁵⁹ Given UNHCR's experience with the problem that the legal assessment of the nationality of refugees is not so straightforward, it is not surprising that it viewed de facto statelessness as an important yet underestimated problem.⁶⁰

Finally, the third type refers to the situation where statelessness as a consequence of formality is taken to its purest form, and a person is registered as being of unknown or undetermined nationality. This usually occurs when a state has no statelessness determination procedure, as a result of which her nationality or statelessness status hangs suspended in the air. Another possibility is that a state does have a status determination procedure in place, but that a person under review receives the intermediary status of 'unknown nationality' pending outcome. Civil servants often prefer to play it safe and register her with the open-ended status that her nationality cannot be established, rather than drawing the definite conclusion that she has none at all.⁶¹ Unlike the closed system deployed in international humanitarian law,⁶² there is no benefit of doubt granted to her to permit treatment as if she was a national or, in the least, as if she was stateless, thereby making her the beneficiary of rights accorded under its respective regime until her final status has been authoritatively established. Instead, she spends her life in waiting in a legal limbo that runs deeper than that of a recognised stateless person. Also contrary to the system of protection offered by international humanitarian law, doubt is neither qualified.⁶³ In short, where the officially

⁵⁹ *Tji* (Australian FC, 1998), 696. See also James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014), 56-57.

⁶⁰ UNHCR, 'Observations by the United Nations High Commissioner for Refugees' (30 June 1961) UN Doc A/CONF.9/H, para 6-7.

⁶¹ Adviescommissie voor Vreemdelingenzaken, 'Geen land te bekennen: een advies over de verdragsrechtelijke bescherming van staatlozen in Nederland' (4 December 2013), 71-72. (Advisory Committee for Alien Affairs, 'No Country of one's own')

⁶² Whereby a person in case of doubt is classified according to the category which provides the highest protection. She thus starts out as a civilian in case of doubt between civilian or combatant status in accordance with art 50(1) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I). If she participates in hostilities and then gets caught, she is assumed to be a prisoner of war in case of doubt between the privileged and unprivileged or unlawful combatant in accordance with art 5 Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III); art 45 AP I. See also art 52(3) AP I.

⁶³

recognized stateless person is at least entitled to the minimal protection regime established for that category, her *de facto* stateless fellows and her confusing fellows are usually less well off when not simultaneously qualifying as refugee.⁶⁴

1.3. The size of the problem

As recalled, the UNHCR currently estimates more than ten million people are stateless.⁶⁵ This is likely to concern a considerable greater number. For one thing, the defining feature of a stateless person is her administrative, legal, and factual invisibility. Because she has no legal or social identity, the UNHCR compares measuring statelessness with counting legal ghosts.⁶⁶ She often lacks the civil registration of birth certificates with state authorities, as common (indirect) cause of statelessness. Also, without nationality she will usually not be entitled to official state benefits and protection, such as public relief and social security like housing and financial assistance. As a consequence her formal contact with all layers of government will be limited, and she will have, similar to irregular migrants, mainly informal interaction with local governments as city council. Furthermore, because many states have no statelessness determination procedure in place, their administrative practice is frequently to follow the path of least resistance, by withholding a conclusive decision on someone's alleged statelessness in abeyance, and label her 'of unknown nationality' instead. Such practice obscures her even further. It prevents the stateless community from being given a face, and thus their number and thereby the significance of the problem remains the guess work of statisticians. As a result of this potentially indefinite pause in official

⁶⁴ Non-refugees must still qualify as stateless persons in order to benefit from the subsidiary protection offered by art 2(f) Council Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), [2011] OJ L 337/9. Furthermore, although Resolution I of the Final Act of the Statelessness Reduction Convention (29 August 1961) UN Doc A/CONF.9/14 calls upon states parties to treat *de facto* stateless persons as far as possible equal to *de jure* stateless persons so as to enable them to acquire an effective nationality, this resolution should be considered non-binding. The same applies to the implied reference to *de facto* stateless persons in the recommendations in the Final Act of the United Nations Conference on the Status of Stateless Persons (25 July 1951) UN Doc E/CONF.17/5/Rev.1, para 3.

⁶⁵ UNHCR, *supra* note 1.

⁶⁶ UNHCR, 'Media Backgrounder: Millions Are Stateless, Living in Legal Limbo' (2011); Gábor Gyulai, 'The Determination of Statelessness', in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (CUP 2014), 125.

recognition of statelessness status, she will even fail to benefit from that smallest space of visibility reserved in the Status Convention by way of identity papers.⁶⁷

1.4. What are the principal causes of statelessness?

Statelessness as the absence of nationality is obviously not a natural but man-made creation, of both deliberate design and as the by-product of a complex and fragmented world. There are many causes, but for reasons of economy this thesis cannot give an exhaustive account and will limit itself to giving an impression of key factors. These factors can be categorised into procedural and substantial causes of statelessness, and in its temporal dimensions between statelessness at birth (original or absolute statelessness) and subsequent to birth (subsequent or relative statelessness). A further distinction can be made between voluntary and involuntary statelessness, given that some states permit voluntary renunciation or the fact that some stateless persons have the opportunity to resolve their own situation but choose not to.

As for procedural causes, the most common ones are evidentiary problems such as lacking a birth certificate to prove place of birth in order to meet *jus solis* requirements, or lineage in case of *jus sanguinis*. DNA sampling helps bring down the last obstacle, but the technique or (one of) the parents are not always available. A potential catastrophe of a new source of statelessness is looming over the many refugees, such as those from Syria. A recent survey conducted by the Norwegian Refugee Council revealed that a staggering 92 percent of a large Syrian refugees respondent group was unable to register their children in Lebanon.⁶⁸

As for substantial causes, there is often a combination at work of tough, discriminatory or otherwise flawed nationality laws, a mismatch between nationality laws, state succession, discrimination in implementation, and subsequent loss due to voluntary renunciation, *de lege* loss or removal of nationality. Nationality laws can impose exacting preconditions on a candidate in order to meet the requirements for *de*

⁶⁷ Art 27 Status Convention; art 38(1) expressly allows contracting states to make a reservation to it.

⁶⁸ Norwegian Refugee Council, 'Birth Registration Update: The Challenges of Birth Registration in Lebanon for Refugees from Syria' (January 2015), 6 and 20. See also Diana Al Rifai, 'UN: 36,000 newborn Syrians stateless in Lebanon' (*Al Jazeera*, 11 May 2015).

lege acquisition or in order to become eligible for a decision on naturalisation. Examples are typically a prolonged minimum of stay, that the stay has been lawful all the way through, and being in possession of a good and loyal character. Nationality laws can also have a distinct element of discrimination. There are currently twenty-seven states that lack gender parity in their nationality laws, by which it is (nearly) impossible for a mother to transfer her nationality to her child.⁶⁹ Discrimination can also occur on the ground of disability,⁷⁰ racial or ethnic origin,⁷¹ or any other unjustifiable ground. Next, there can be gaps in nationality laws that require legislation or judicial development such as with the unforeseen phenomenon of (commercial) surrogacy.⁷² Furthermore, a mismatch often occurs when the nationality laws of several states are involved. In theory, a child can derive many nationalities from the interplay between *jus sanguinis* and *jus soli* principles that involved states adhere to, or none at all. For instance, a child born in the Netherlands to a Qatari mother and unknown father becomes stateless for minimally three years, depending on whether she was given a permit for lawful stay.⁷³ When sovereignty changes hands the problem can arise that the nationality of (parts of) a population changes hands with it against their will, and perhaps this while they only have an accidental connection to the successor state. A greater problem is when no agreements are made between preceding and succeeding states, which can cause statelessness.⁷⁴ The problem came particularly to light following the dissolutions in Eastern Europe, which pressed the ILC to take up the gauntlet again.⁷⁵

⁶⁹ UNHCR, 'Background Note on Gender Equality, Nationality Laws and Statelessness 2015' (6 March 2015); Committee on the Elimination of Discrimination against Women (n 49), para 54 and 61; UNHCR, 'Preventing and Reducing Statelessness: Good Practices in Promoting and Adopting Gender Equality in Nationality Laws' (7 March 2014).

⁷⁰ Example Iraq!

⁷¹ Example Dominican Republic v Haitians.

⁷² Cf La Commission Internationale de l'État Civil, 'La maternité de substitution et l'état civil de l'enfant dans les Etats membres de la CIEC' (February 2014).

⁷³ Dutch nationality law provides her the right of option after three years of lawful stay, in art 6(1)(b) Rijkswet der Nederlanderschap.

⁷⁴ Ineta Ziemele, 'State succession and issues of nationality and statelessness' in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (OUP 2014).

⁷⁵ Václav Mikulka, 'First report on State succession and its impact on nationality of natural and legal persons', ILC Yb 1995/II(1), 157, para 13.

The couple Igor Skrijevski and Galina Skrijevskaja got caught out in the midst of this turmoil. Born in Donetsk Oblast when it was still part of the Soviet Union, the couple fled from KGB persecution to the United States in 1990. Six years later their asylum request was denied, after which they entered into a special immigration procedure for people from the Soviet Union, which had meanwhile disappeared. They were presumed to be nationals of its successor state, however, and upon confirmation by the Ukrainian Ministry of Foreign Affairs deported in 2007. The Ukrainian authorities were told by an administrative court to have erred, since the Skrijevskis never automatically acquired Ukrainian nationality for not being around during the birth of the nation on 24 August 1991. As if they somehow needed to share in its labour pains. The Supreme Administrative Court of Ukraine upheld the ruling on 3 November 2011. Interestingly, the Supreme Court gravely erred itself by also relying on Article 18(2)(c) ECN,⁷⁶ in order to accommodate the Skrijevski's stated desire to be Americans, and in this way continued the Skrijevski's statelessness in breach of Ukraine's obligations.⁷⁷ It will be demonstrated below how the interplay between court and executive decisions regarding deprivation create statelessness, but this example of how courts continue statelessness will not be further discussed. The Skrijevski were sent back to the US as a parcel returned to sender, but soon turned out to be undeliverable and got half-way stuck in the Netherlands since 2008, in illegality, address unknown.⁷⁸

Finally, there seems to be a growing trend that states are resorting to deprivation of nationality as a measure against terrorism. The United Kingdom has gone farthest in this, with an explicit endorsement of the creation of statelessness. Australia is likely to follow, while other states as Austria, Canada, Denmark, the Netherlands, and the United States are, at least for now, limiting the measure to the removal of citizenship in the

⁷⁶ Ukraine is a contracting state to the ECN since 21 December 2006, and became party on 1 April 2007. It has signed but not ratified the Avoidance Convention.

⁷⁷ Under art 18(2)(c) ECN, parties shall take into account the will of the person concerned (US). To this can be added the genuine and effective link of the person concerned (US), and the habitual residence of the person concerned at the time of State succession (US), while only the territorial origin of the person concerned point to Ukraine. In effect, three out of four 'connectors' point to the US. However, the US is no state party. Furthermore, even if it were, it is not a 'concerned' party, meaning a state involved in the succession. Instead, Ukraine is obliged to respect the principles of art 4(b), that statelessness shall be avoided, and heed the modifier in art 18(1) to avoid statelessness.

⁷⁸ For a journalistic account, Karel Smouter, 'Staatloos, ongewenst en gestrand in Apeldoorn' (*De Correspondent*, 10 February 2014).

case of dual nationals.⁷⁹ It is submitted that even this jeopardises the protection a person has against becoming stateless, for the simple reason that the remaining nationality is not carved in stone either. Given the relativity that surrounds nationality, for these people losing one nationality simply brings them one step closer towards statelessness. It is state action in various forms that lead or can lead to statelessness, including but not limited to deliberate deprivation of nationality, with which this thesis is concerned. This warrants a separate and central analysis in Chapter Three below.

1.5.Statelessness as a consequence of formality

Apart from the technical reasons mentioned above, statelessness is on a higher level a direct result of the formality in law. That is to a certain extent unavoidable when formalising sources in order to determine the law,⁸⁰ as opposed to less formal methods of discovery as sociology and anthropology, but here the problem lies mainly with formalism in rule-making and subsequent interpretation and application. To unduly rely on formalism invites laws to become too rigid, ossified and blind or indifferent to demands for leeway, exceptions or change. There is a condition attached to law in general, and an idiosyncrasy attached to nationality law in specific, that tend to favour formalism occasionally up to an excessive measure of reliance on it.

In general, there are restraints imposed by the condition of positivism and rule of law ideals, where legal certainty, predictability and stability need definitions that are as well-defined as possible. The desire to reach a higher precision with rules can lead to more details or factors cascading down to the exclusion of others that deserve to be included as well. Such a rule would become under-inclusive, which is when ‘the factual predicate occasionally fail[s] to indicate the justification in cases in which it is present’.⁸¹ An example of an under-inclusive nationality rule, currently the practice in

⁷⁹ Audrey Macklin, ‘Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien’ (2014) 40 *Queens L J* 1.

⁸⁰ As defended by Jean d’Aspremont, *Formalism and the Sources of International law: A Theory of the Ascertainment of Legal Rules* (OUP 2011).

⁸¹ Frederick F Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and Life* (OUP 1991), 32.

twenty-seven states,⁸² is the rule that nationality by descent can only be passed on via the lineage of the father. In this case, the introduction of the factual predicate of male gender fails to indicate the underlying justification for the conferment of nationality rules on the basis of parentage. It rather reveals gender-biased patriarchal stereotyping. The rule excludes women without proper justification in the implementation of *jus sanguinis*, which is tied to parental bloodline and not gender, and even if the rule aims at preventing dual nationality or preserving family unity, other solutions than a total ban are feasible. Instead the rule became a probable cause of statelessness.⁸³ Next to above gender-based discrimination, the introduction of ethnic factors would fail to justify the implementation of *jus soli*, which is tied to territory and not ethnicity. This rule too would become a probable cause of statelessness.

Shachar diagnoses birthright citizenship, her term for original nationality, as both over- and under-inclusive. In the application of *jus sanguinis*, children born abroad are automatically included while they may have never visited their country of citizenship, while citizenship may be automatically refused to (permanent) residents.⁸⁴ She proposes to add *jus nexi* or rootedness based on a genuine and active link, as it would mitigate over- and under-inclusiveness as the purest justification to base factual predicates on.⁸⁵ Obviously, states do assume that a newborn who has parents with their nationality or who has been born on their territory already possesses the best genuine link that one can have with a state right at the start. This legal fiction is inescapable since rootedness obviously comes over the years. For the years beyond the start a *jus nexi* is a good addition. Although states have it in place as a basis for naturalisation, for instance as a requirement of minimum years of residence or a language test, but there is likely more

⁸² UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness 2014 (7 March 2014). See also the continuing reservations to art 9(2) CEDAW of the Bahamas, Bahrain, Brunei Darussalam, Democratic People's Republic of Korea, Jordan, Kuwait, Lebanon, Malaysia, Monaco, Oman, Qatar, Saudi Arabia, Syrian Arab Republic and United Arab Emirates. Other states withdrew similar reservations, and many states objected against the reservations for being contrary to the object and purpose of the CEDAW. Monaco amended its nationality law in 2011 to pull its gender status on par, but has not matched it so far by a withdrawal of its reservation to the entire art 9 CEDAW.

⁸³ Betsy Fisher, 'Why Non-Marital Children in the MENA Region Face a Risk of Statelessness' in (2015) 25 Harvard Human R J (forthcoming).

⁸⁴ Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Harvard University Press 2009).

⁸⁵ *Ibid*, 166-170.

ground to gain. The genuine and active link allows for a less formal approach to nationality rights.

Formal constraints such as nationality or territory have unjustifiably excluded many persons from protection in the field of human rights, similar to the field of international humanitarian law, such as persons who are stateless or in the power of a state just across the border.⁸⁶ Amending nationality laws to become more inclusive is a partial solution, but removing the formal approach seems the most elegant: the core of human rights are given to all individuals under a state's jurisdiction or control, regardless of nationality and sometimes regardless of territory. It goes beyond the topic of this thesis however to theorise perspectives on deformalisation;⁸⁷ for now it suffices to compare it with developments in other fields. Nationality has been used before to exclusionary effect in other branches of international law but was made more negligible due to progressive development. For instance, a jurisprudential test was developed in refugee law, the older brother of statelessness law, on whether the nationality of a state of reference is pragmatically effective rather than purely formal, whereby 'one essential element in the concept of an 'effective nationality' is the recognition of the existence of nationality by the State of nationality'.⁸⁸ In other words, although there is a requirement of nationality in order to qualify as refugee,⁸⁹ it is interpreted from an effective perspective as opposed to merely formal, in order to advance instead of frustrate its humanitarian object.⁹⁰ Under international humanitarian law, the older brother of both, nationality had initially been used for exclusionary purpose as well, with certain nationals kept out of the category of protected persons.⁹¹ It has similarly taken judicial activism here to replace the formal test of nationality with a substantial test of

⁸⁶ Keeman, Martijn Jurgen, 'Is Formalism a Friend or Foe? Saving the Principle of Distinction by Applying Function over Form' (2013) 4 J Intl Humanitarian Legal Studies 354.

⁸⁷ Nico Kirsch, 'Pluralism in International Law and Beyond' in Jean d'Aspremont and Sahib Singh (eds), *Fundamental Concepts for International Law: The Construction of a Discipline* (Edward Elgar 2015) (forthcoming).

⁸⁸ *Tji* (Australian FC, 1998), 696. See Hathaway (n 59), 56-57.

⁸⁹ Art 1A(2) Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 150; art 1(2) Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

⁹⁰ *Jong Kim Koe* (Australian FFC, 1997), 520-21; Hathaway (n 59), 56-57.

⁹¹ Art 4 Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV).

allegiance.⁹² Depending on one's perspective, the judges have either committed the interpretive sin of *eisegesis* with liberal lawmaking as result, or they correctly applied the teleological or dynamic, evolutive interpretation that became commonplace in human rights instruments, that couples the principle of effectiveness or *effet utile* with the special character of human rights and humanitarian conventions. As Meron advocated,

[i]n interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals.⁹³

However, the dilemma that is felt in the area of statelessness is not as forcefully present in the other branches of refugee, humanitarian and human rights law. It is one thing to try to circumvent the formality of nationality laws, but quite another to do so with the stateless treaties. As recalled, the purest form of formalism is the person who falls between *de jure* and *de facto* statelessness, namely the person of unknown nationality. To qualify as stateless a person will have to pay the costly premium of nationality loss, whereas the latter fields offer protection without any real sacrifice in return for coverage. In the other fields, persons only stand to gain when the protective goals are enabled for the greatest number of persons possible. With regards to the risks of being too casual in statelessness determination, the UNHCR cautioned that

as a general rule, possession of a nationality is preferable to recognition and protection as a stateless person. Therefore, in seeking to ensure that all those who fall within the 1954 Convention's reach benefit from its provisions, it is important

⁹² *Prosecutor v Delalić et al* (Judgment) IT-96-21-T (16 November 1998), para 263-66. Confirmed in appeals judgments of *Prosecutor v Tadić* IT-94-1-A (15 July 1999), para 164-66; *Prosecutor v Aleksovski* IT-95-14/1-A (24 March 2000), para 151 ff; *Prosecutor v Delalić et al* IT-96-21-A (20 February 2001), para 83; *Prosecutor v Blaškić* IT-95-14-A (29 July 2004), para 176-182. *Contra* however *A and B v Israel*, Supreme Court of Israel, Court of Criminal Appeals, CrimA 6659/06 (11 June 2008), para 11.

⁹³ Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout' (1998) 92 *American J Intl L* 236, 239.

to take care that individuals with a nationality are so recognised and not mistakenly identified as stateless.⁹⁴

In the case of a person whose alleged nationality is disputed or quietly ignored by the state in question, the difficulty lies in not unnecessarily downgrading her status so as to become entitled to the limited benefits of the Status Convention as a stateless person, while at the same time not denying her the prospects of the Reduction Convention to acquire a meaningful, tangible and effective nationality. The provisions for *ex lege* or facilitated naturalisation of the latter convention sets a flag on the horizon and offers her a viable and expedient outlook on improvement.⁹⁵

The point is driven home by the experiences of Denny and Thai-Ha Vu in the Netherlands. Thai-Ha Vu is a twenty-two year old woman who was born in Germany from Vietnamese parents, and living since the age of four in the Netherlands with a residency permit since 2007. In order to acquire Dutch nationality via naturalisation, Thai-Ha is required to show a passport as evidence of her previous nationality. Such proof is evidently not required of a recognised stateless person, but the Dutch authorities suspect her of possessing a Vietnamese nationality on their reading of Vietnamese nationality law.⁹⁶ The Vietnamese authorities have informed Thai-Ha, however, that they do not consider her to be a Vietnamese national, and yet the Netherlands cannot come to terms with Vietnam's rejection any further than resorting to the practical compromise of registering her with unknown nationality. As a result she cannot naturalise but is stuck in a vicious circle; either she proves her Vietnamese nationality by showing a passport or she proves that she is stateless, while the fact that she cannot produce a Vietnamese passport is not considered as conclusive evidence that

⁹⁴ UNHCR (n 48), para 14.

⁹⁵ Art 1-4 Convention on the Reduction of Statelessness.

⁹⁶ See art 13(1) Law on Vietnamese Nationality, No 24/2008/QH12, 13 November 2008, in conjunction with art 14 Law on Vietnamese Nationality, No 07/1998/QH10, 20 May 1998, in conjunction with art 6 Law on Vietnamese Nationality, VNM-1988-L-38289, 28 June 1988.

she is in fact stateless.⁹⁷ However, in this instance her best prospect is to be indeed recognised as stateless in order to access facilitated naturalisation.

2. Setting the Framework on Nationality

2.1. An overview of the right to nationality

This chapter starts with an overview of individual nationality rights to see which common characteristics show, and places it next to the sovereign rights of states in matters of nationality in the second part. The third part equates the two to reveal the nature of the right to nationality and a duty to prevent statelessness. It is not concerned yet with assessing a specific deprivation of nationality case, where the composition of an involved state's legal obligations requires a precise look at a number of factors, such as which treaties it is party to that are relevant qua subject-matter and scope, taking into account reservations and rules on successive treaties, etc. The sole ambition here is to analyse the nature of the rights and duties in terms of human rights and general international law parlance.

2.1.1. Treaty rules

After the general right of everyone to a nationality was proclaimed in the non-binding Article 15(1) UDHR, it did not appear in any of the core human rights treaties. It does appear in three regional human rights treaties, namely Articles 20(1) ACHR, 29(1) ArCHR and 24(1) of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States,⁹⁸ and is so far missing in the ECHR, the EU Fundamental Charter and the ACHPR. The African Commission on Human and Peoples' Rights is currently in the process of drafting a Protocol on the

⁹⁷ Laura van Waas, 'The Story of Thai Ha' (*YouTube*, 18 February 2014) <[youtube.com/watch?v=o9EhPr3ETXw](https://www.youtube.com/watch?v=o9EhPr3ETXw)> last accessed 14 July 2015. See also Keeman (n 107), 551-552.

⁹⁸ Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (adopted 26 May 1995, entered into force 11 August 1998) (CIS).

Right to Nationality to the ACHPR.⁹⁹ It is also included but labelled as a principle in the semi-regional treaty of Article 4 lit a ECN.¹⁰⁰ Articles 24(3) ICCPR and 6(3) of the African Charter on the Rights and Welfare of the Child restate the general right to nationality as a children's right,¹⁰¹ while Articles 7(1) CRC, 18(2) and Article 7(1) of the Covenant on the Rights of the Child in Islam add that this right is in force from birth. Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families specifies the right even further to children of regular and irregular migrant workers.¹⁰²

Then there are rights to a specific nationality. Article 20(2) ACHR introduces a *jus soli* failsafe for anyone in case there is no right to any other nationality. Article 1 of the Convention tendant à réduire le nombre des cas d'apatridie gives a child the right to acquire her mother's nationality if she would otherwise end up stateless, with the option to confine this right to children born within a party's territory.¹⁰³ Article 1 of the Protocol relating to a Certain Case of Statelessness hands out the same right to acquire the mother's nationality if otherwise stateless. Article 10 Avoidance Convention repeats the *jus soli* failsafe for children born to parents of predecessor states, while Articles 6(2) ECN and 6(4) ACRWC implement it for children with known parents, and Article 15 Convention of Nationality Laws goes furthest by according it to children of both *de jure* and *de facto* stateless parents. Article 14 Convention of Nationality Laws gives a birth right to children with unknown parents. Article 13 of the Convention on Certain Questions relating to the Conflict of Nationality Laws states that minors shall follow in

⁹⁹ Most recently reported on in African Commission on Human and Peoples' Rights, 'Final Communiqué of the 56th Ordinary Session' (7 May 2015), para 32. See also ECOWAS, 'Abidjan declaration of Ministers of ECOWAS Member states on eradication of statelessness' (25 February 2015), para 5.

¹⁰⁰ This convention is as usual open to all member states of the Council of Europe, but also to non-member states which have participated in its elaboration, while the Committee of Ministers may invite any non-participating non-member State to accede. See art 27(1) and 28(1) ECN.

¹⁰¹ African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (ACRWC).

¹⁰² International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 (Migrant Workers Convention).

¹⁰³ A combination of *jus soli* and *jus sanguinis*, in art 4(a) Convention tendant à réduire le nombre des cas d'apatridie.

the naturalisation of their parents,¹⁰⁴ although it leaves it entirely up to the involved state what conditions it may specify. Article 6 lit g of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa gives women the right to acquire the nationality of her spouse.¹⁰⁵ Article 3 of the Convention on the Nationality of Married Women provides them privileged naturalisation,¹⁰⁶ which Article 9 Avoidance Convention does for persons in case of state succession. Article 2 Avoidance Convention secures the right for persons that have or would become stateless as a result of state succession, in accordance with Articles 5 and 6.

A variant of specific nationality rights are the rights that provide persons with a choice between nationalities. Articles 10 and 11 Convention of Nationality Laws do not allow for an automatic change or reinstatement of nationality upon marriage that does not originate from the woman's consent. Articles 18 ECN and 7 Avoidance Convention allow for the expressed will of the person involved to be taken into account during state succession.

Additionally, there are treaty provisions that facilitate or protect nationality in general, mostly by widening access via the removal of discriminatory obstacles, or by making its loss more difficult. Articles 5(d)(iii) CERD, 5(1) ECN and 4 Avoidance Convention stipulate that everyone shall enjoy the right to nationality on the basis of equality and non-discrimination before the law.¹⁰⁷ Article 18(1)(a) CRPD prescribes that persons with disabilities have equal right to nationality. Article 9(1) CEDAW provides women equal rights with men in regard to acquisition of nationality, while Articles 9(2), 29(2) ArCHR and 6 lit h Protocol enable women to pass their nationality on to their children in equality to men.¹⁰⁸ Articles 24(2) ICCPR, 7(1) CRC, 18(2) CRPD

¹⁰⁴ Convention on Certain Questions relating to the Conflict of Nationality Laws (adopted 12 April 1930, entered into force 1 July 1937) 179 LNTS 89 (Convention of Nationality Laws).

¹⁰⁵ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September 2000, entered into force 25 November 2005) (ACHPR-P). Reprinted in Martin Semalulu Nsibirwa, 'A Brief Analysis of the Draft Protocol to the African Charter on Human and People's Rights in Africa' (2001) 1 African Human R L J 40.

¹⁰⁶ Convention on the Nationality of Married Women (adopted 20 February 1957, entered into force 11 August 1958) 309 UNTS 65.

¹⁰⁷ Committee on the Elimination of Racial Discrimination, 'General recommendation XX on article 5 of the Convention' (14 March 1996) UN Doc A/51/18.

¹⁰⁸ Although art 6 Protocol reserves an exception for the case that the mother is of enemy nationality.

and 6(2) ACRWC order immediate birth registration. Article 7(2) of the Covenant on the Rights of the Child in Islam requires states to safeguard the nationality of children, and make every effort to resolve their statelessness. Article 9 ECN requires the facilitation of the recovery of nationality. Articles 8(2) CRC and 25(4) CED instruct the restoration of children's nationality in case of unlawful loss. Article 7 ECN reduces the number of permissible causes for automatic loss or deprivation, while paragraph 3 restricts it even further if loss or deprivation would result in statelessness. 8(1) ECN allows states to permit renunciation of nationality only if persons do not thereby become stateless. Article 16 Convention of Nationality Laws makes loss of nationality of an extramarital child after a change in her civil status conditional on the successful acquisition of another nationality, which Article 17 repeats for adopted children. Articles 8 and 9 of the Convention on Certain Questions relating to the Conflict of Nationality Laws do the same for married women with regard to her husband's nationality, while Articles 9(1) CEDAW and 6 lit g ACHPR-P go further and prevent the loss of her original nationality period. Articles 20(3) ACHR, 24(2) CIS, 4 lit c ECN, 29(1) ArCHR and 18(1)(a) CRPD condemn arbitrary deprivation of nationality, while the latter adds on the basis of a disability.¹⁰⁹ Articles 4 lit b ECN and 3 Avoidance Convention encourage states to prevent statelessness. Last but not least, Article 18(1)(b) CRPD facilitates that persons with disabilities have access to documentation of their nationality.

Final mention should be made about the 'hardness' of above provisions. Most are not written in stone as laws of the Medes and Persians, and therefore open to reservations in conformity with the standard law of treaty rules on reservation, in particular on compatibility with the treaty's object and purpose, unless the treaty itself provides *lex specialis* rules on permissibility.¹¹⁰ The one exception is Article 4 ECN by virtue of Article 29(1), but this article speaks of principles and not hard and fast applicable rules. In addition, the human rights treaties that regulate suspension do not

¹⁰⁹ Disability is mentioned as a separate prohibition even though it makes more sense as a concrete manifestation of arbitrariness; any form of unjustified discrimination equals arbitrariness.

¹¹⁰ Eg art 20(2) CERD provides a procedure whereby the objection of a qualified majority of two thirds of the parties will objectively establish a reservation as incompatible.

make nationality rights non-derogable, except for the package deal contained in Article 20 ACHR owing to Article 27(2). Where rights are inderogable, reservations may be possible but requiring more justification.¹¹¹

2.1.2. Customary rules

Most of the UDHR is considered binding as customary law,¹¹² and art 15 UDHR on the right to nationality and prohibition of arbitrary deprivation is almost certainly no exception. The Human Rights Council seems to at least think so, having reaffirmed in a long line of resolutions that the right to a nationality as enshrined in, inter alia, the UDHR, is a fundamental and inalienable human right.¹¹³ In addition, the UNHCR believes that the two main statelessness treaties embody principles drawn from the legislation and administrative practice of many states, in particular on the general right to nationality, not to be arbitrarily deprived and a general duty not to create situations resulting in statelessness, which therefore serve as reference points for determining customary law.¹¹⁴ This should count even more for the similar provisions in the core human rights treaties given their broad participation, while (other) supportive nationality rights such as the principles of non-discrimination and equality should not cause much controversy if labelled as customary law.¹¹⁵ However, notwithstanding the dense regulation to provide stateless children with a specific nationality, no customary right to a specific nationality exists.¹¹⁶ Here is not the place to meticulously search for evidence of state practice and *opinio juris*, but there is space for going into a few

¹¹¹ Cf HRC, ‘General comment No 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant’ (11 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para 10.

¹¹² Olivier De Schutter, *International Human Rights Law* (CUP 2014), 63; UNHCR, ‘NGO manual on international and regional instruments concerning refugees and human rights’ (July 1998), 41 and 210.

¹¹³ HRC (n 46).

¹¹⁴ *Ibid*, 211.

¹¹⁵ HRC, ‘General Comment No 18: Non-discrimination’ (10 November 1989) UN Doc HRI/GEN/1/Rev.1 at 26; Monique Chemillier-Gendreau, ‘Principe d’égalité et libertés fondamentales en droit international’ in Emile KM Yakpo and Tahar Boumedra (eds), *Liber amicorum judge Mohammed Bedjaoui* (Kluwer 1999), 661. It was even declared to have peremptory status in *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003), para 110.

¹¹⁶ Serena Forlati, ‘Nationality as a human right’, in Forlati (n 26), 21-22.

observations on the formation and evidence of customary law with regard to nationality and statelessness.

From the external perspective acts of all branches are attributable to a state, so that administrative, legislative and judicial acts all count as state practice.¹¹⁷ As will be detailed in Chapter Three below, the UK government amended legislation to ensure the Secretary of State's competence to strip a person of British nationality even if this renders her stateless, after a Supreme Court's ruling in *Al-Jedda* had earlier foiled such plans. This example shows that state practice is a continuing internal dialogue, and one should be cautious not to interrupt it by using decisions of domestic courts or legislation too hastily, as whatever act comes latest could be seen as the final deed. In this case, the amendment may indicate that the UK does not view it as contrary to its obligations under both conventional and customary law to render someone stateless within the parameters set. Of course, it is neither ruled out that the UK consciously defies its obligations under international law, but there is no indication for this from the lead-up to the amendment. Also, if one is not to conflate the two elements of state practice and *opinio juris*, the example of a judicial decision of a state held undesirable by its executive highlights a schizophrenic issue with regard to the second element. From an outside perspective, the state would seem to speak as a Jekyll and Hyde after which the spectator is no closer to understanding the true position of that state. The Special Rapporteur Wood proposes that when state organs do not speak with one voice, state practice is ambivalent and thus ought to be given less weight.¹¹⁸ However, Nollkaemper questions whether the rule of law principle that governments are subjected to the control

¹¹⁷ *Jurisdictional Immunities of the State* (n 127), para 55; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, (Judgment) [2002] ICJ Rep 3, para 58. See also Shaw (n 15), 58; Andrea Gattini, 'Le rôle du juge international et du juge national et la coutume internationale', in Denis Alland, Vincent Chetail, Olivier de Frouville and Jorge E Viñuales (eds), *Unité et diversité du droit international: écrits en l'honneur du professeur Pierre-Marie Dupuy* (Martinus Nijhoff 2014), 253-273; Pellet (n 44), 815; Hersch Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law', (1929) 10 *British Yb Intl L* 65.

¹¹⁸ Michael Wood, 'Second report on identification of customary international law' (22 May 2014) UN Doc A/CN.4/672, para 50-51. Secondly, when a court discovers an international customary rule, factoring in treaties or not, it obviously applies that rule *ex post facto* and the ruling cannot be seen as state practice which still contributes to its formation. Any other view would put the cart before the horse; it is extremely circular for an international norm to come into existence by giving weight to national courts that claim to have discovered that same international norm.

of independent courts would not dictate courts have the final say.¹¹⁹ Lastly, if one is not to conflate the separately existing treaty and customary law, this particular judicial decision should not count since the court relies exclusively on treaty obligations, without venturing into how those could have influenced customary law.¹²⁰ With the above caveats in mind, it will be interesting how domestic courts will respond to an increasing number of deprivation cases. Assuming that this also increases the pressure on alleged states of nationality, it will also be interesting to monitor the responses of these states and how they will frame their protest, for instance in terms of customary law. In that case, the deprivation acts of states like the United Kingdom will meet resistance of other states and not be capable of revising the customary rule. On the other hand, ‘abstention from protest by states may amount to agreement’.¹²¹

The many treaty provisions on nationality and statelessness are indicative of customary law and thus of normative value,¹²² and likewise the many UN resolutions on this subject-matter adopted by states.¹²³ As the ICJ has held, ‘multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them’,¹²⁴ and with fundamentally norm-creating provisions ‘a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected’.¹²⁵ It is hard to pinpoint the criteria by which a state would be specially affected in nationality matters, other than perhaps sheer population size which would give China and India more weight in these matters than the Republic of Nauru. Some of the core human rights treaties have near-universal participation, while the two main statelessness treaties gained considerable momentum. As for the UN resolutions, there seems to be sufficient support for a general right to nationality, the prohibition of non-arbitrary deprivation and the caution that states must take to avoid creating statelessness. A peculiar matter is the steady stream of resolutions from the UNGA and

¹¹⁹ André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011), 271.

¹²⁰ See *North Sea Continental Shelf (Germany v the Netherlands)* (Judgment) [1969] ICJ Rep 3, para 76.

¹²¹ Shaw (n 15), 57.

¹²² Wood (n 88), para 31-44.

¹²³ *Legality of Nuclear Weapons* (n 19), para 70; Wood (n 88), para 45-54.

¹²⁴ *Continental Shelf (Libyan Arab Jamahiriya v Malta)* (Judgment) [1985] ICJ Rep 13, para 27.

¹²⁵ *North Sea Continental Shelf* (n 90), para 73. See also *Continental Shelf*, para 27 (‘overwhelming’).

HRC that call for the specific Myanmar nationality for the Rohingya.¹²⁶ This has probably more to do with the large-scale discrimination of an *in situ* minority with massive refugee flows as result that might move too close to a system of apartheid, rather than the international community placing the seeds for specific nationality rights. After all, if there exists no customary rule to grant even the most vulnerable class of stateless minority girls a specific nationality, such as the state they were born in, there exists *a fortiori* no right to a specific nationality for the minority group. On the other hand, it does seem a novel event in the field of nationality and statelessness which might turn out to have been the first building blocks of a new human rights monument. Time will tell whether the right to a specific nationality will emerge as a customary rule, but until then it should be considered *de lege ferenda*.

2.2. The *domaine réservé* of states with regard to nationality

The starting point of a legal appraisal of states' freedom under international law to denationalise and create statelessness must be that states are in principle free to decide on questions of nationality themselves. As an aspect of sovereign jurisdiction, states enjoy discretion in deciding to whom they confer nationality, and by that same token from whom they withhold or remove it.¹²⁷ This privilege for states is considered by Amerasinghe as a customary rule.¹²⁸ The space it occupies is also referred to as the *domaine réservé*,¹²⁹ and its size contracts or expands in accordance with international law.

The way that a state uses this discretion with regard to who gets access to nationality and who gets to keep it cannot be seen separately from its immigration policies, in particular irregular migration. Firstly, in contrast to the traditional immigrant

¹²⁶ *Infra* n 33.

¹²⁷ Art 1 and 2 Convention of Nationality Laws ('It is for each State to determine under its own law who are its nationals').

¹²⁸ Chittharanjan Felix Amerasinghe, *Diplomatic Protection* (OUP 2008), 92. A view that can only be based on seeing international law as objectively permissive in nature, instead of prohibitive.

¹²⁹ Emer de Vattel, *Le Droit des Gens; ou, Principes de la Loi Naturelle appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758) Vol I, book II, para 79-97, 116-130 and 131-139. Reprinted and translated in James Brown Scott (ed), *The Classics of International Law* (Carnegie Institution of Washington 1916).

states of the Americas, most European states have resisted the *jus soli* principle for fear of an influx of migrants. The words of Switzerland are in this respect most enlightening:

To oblige those [European] States, many of which are over-populated, to absorb indiscriminately into their population thousands of people whose only link with that territory is the accident of their birth on it would be to strike at the structure and very existence of those States.¹³⁰

Switzerland and many others do not salute to America's banner of '*E pluribus unum*'. It is clear that those at the helm often perceive the ship of state as a sort of Hardin's lifeboat, where not too many shipwrecked people can be taken aboard or the boat might scuttle.¹³¹ They are not ready to be assimilated into its culture, or it is feared that many others will follow in its wake, the pull factor, because others might derive a residence permit under Article 8 ECHR's right to family life and/or via Union citizenship rights as clarified in the *Zambrano* case.¹³²

Secondly, statelessness itself is often not seen as a ground for a residence permit.¹³³ In fact, the Netherlands even maintains this with regard to stateless children born on its territory,¹³⁴ in contravention of its obligations under art 1 Reduction Convention and its own domestic case-law.¹³⁵ The EU has spun an intricate web of readmission agreements for the deportation of stateless persons, like the one under which the Skrijevski is attempted to be deported.¹³⁶ This practice has been sanctioned

¹³⁰ UNGA, 'Comments by Governments on the revised Draft Convention on the Elimination of Future Statelessness and the revised Draft Convention on the Reduction of Future Statelessness, Prepared by the International Law Commission at its sixth session' (24 February 1959) UN Doc A/CONF.9/5, 16-17.

¹³¹ Critical of this, Peter Singer and Renata Singer, 'The Ethics of Refugee Policy', in James S Fishkin and Robert E Goodin (eds), *Population and Political Theory* (Wiley-Blackwell 2010), 285-305.

¹³² *Kamerstukken II* 2014-15, 19637, 1917, 2. Case C-34/09 *Zambrano v Office national de l'emploi* ECLI:EU:C:2011:124.

¹³³ *Kamerstukken II* 2013-14, 19637, 1889, 3.

¹³⁴ *Kamerstukken* (n 113), 1-2.

¹³⁵ Martijn Jurgen Keeman, 'Verslag Seminar Zonder Land Geen Identiteit en Recht? Staatloze Mensen in Nederland' (2014) 39 *Dutch J of Human Rights* 550; *A & B v the Mayor of Zwolle*, District Court Zwolle-Lelystad, 9 September 2010, ECLI:NL:RBZLY:2010:BN6394, para 2. This will be partially corrected by the new plans for expanded option rights, see *Kamerstukken* (n 113), 2-3.

¹³⁶ Council Decision (EC) 2007/839 of 29 November 2007 concerning the conclusion of the Agreement between the European Community and Ukraine on readmission of persons [2007] OJ L 332/46.

on member state level by the highest administrative court, after it found no immediately clear obligation against deportation under the Status Convention.¹³⁷

Thirdly, human rights treaties often include caveats to leave room for state discretion. The ambit of certain treaties on nationality has been narrowed,¹³⁸ or its scope,¹³⁹ or provisions speak of no more than ‘facilitation’,¹⁴⁰ or ‘principles’.¹⁴¹ When it comes to the general right to nationality for the extremely vulnerable group of children, treaty bodies have widely acknowledged the state’s margin of discretion. The Human Rights Committee has expressed its view that the purpose of Article 24(3) ICCPR is ‘to prevent a child from being afforded less protection by society and the State because he or she is stateless’ but that this ‘does not necessarily make it an obligation for States to give their nationality to every child born in their territory’.¹⁴² It neither affords an entitlement to a nationality of one’s own choice, such as one in denial of the right to self-determination.¹⁴³ Finally, the Committee and the ECtHR looked over the borders of their own mandate. The Committee noted that ‘neither the Covenant nor international law in general spells out specific criteria for the granting of citizenship through naturalization’,¹⁴⁴ while the Court observed ‘neither the Convention nor international law in general provides for the right to acquire a specific nationality’.¹⁴⁵

¹³⁷ *Aliens v the Minister of Immigration, Integration and Asylum*, Council of State, 26 March 2013, ECLI:NL:RVS:2013:BZ8704, para 7.2.

¹³⁸ Eg art 1(3) CERD reiterates that nationality regulation cannot on itself be viewed as discriminatory in contravention of the treaty.

¹³⁹ Eg Art 3 lit d Migrant Convention excludes statelessness from its scope. Strangely enough the undocumented or irregular migrant is included and therefore recipient of more protection than a stateless person, particularly in economic rights. It will be interesting whether states, that often use the lack of documents to refuse the positive determination of statelessness, will now turn the assumption about statelessness around in case of an undocumented person, and are less hesitant about it in order to exclude her from the treaty’s personal scope. An overview on the map reveals that the currently 48 states parties come from either traditional emigration states (North Africa) and traditional immigration states (Latin and Central America).

¹⁴⁰ Eg art 6(4) and 9 ECN

¹⁴¹ Eg art 4 ECN.

¹⁴² Human Rights Committee, ‘General comment No 17: Article 24’ (29 September 1989) UN Doc HRI/GEN/1/Rev.6 (2003), para 8. It confirmed its view in

¹⁴³ Human Rights Committee, Communication No 1134/2002 (10 May 2005) UN Doc CCPR/C/83/D/1134/2002, para 4.10 (*Gorji-Dinka v Cameroon*).

¹⁴⁴ Human Rights Committee, Communication No 1423/2005 (4 August 2008) UN Doc CCPR/C/93/D/1423/2005, para 7.4 (*Šipin v Estonia*); Communication No 1136/2002 (25 August 2004) UN Doc CCPR/C/81/D/1136/2002, para 7.4 (*Borzov v Estonia*).

¹⁴⁵ *Petropavlovskis v Latvia* (app no 44230/06) [2015] ECHR 169, para 83.

Given the great strides that human rights law has made in the past decades, with the great number of provisions on the right to nationality and for the prevention and solution of statelessness, it is remarkable to notice that states have kept their veto in nationality matters so close to their heart. Human rights have risen both in number and stature, but when it comes to something as elemental as nationality states managed to conserve a *domaine réservé*.

2.3. What is the nature of the right to a nationality and the duty to prevent statelessness?

The right to a nationality is directly protected by many regional and core human rights treaty provisions and thus itself clearly a human right. This section therefore starts by constructing the above catalogue of individual rights and corresponding duties of states with discursive human rights tools. It ends with the broader perspective from general international law.

The right to nationality is categorised by Article 5(d)(iii) ICERD as a civil right, and to become member of a community certainly implies civil status and political rights. As recalled, some civil and political rights such as on active and passive voting are excluded from stateless people.¹⁴⁶ Nationality is part of a person's social identity and ability to form relations with others, falling under the right to privacy, and as such capable of being protected under the ECHR.¹⁴⁷ However, going beyond scraping the surface the right to nationality demonstrates the inadequacy and limited use of this categorisation. As gateway to many other human rights, such as access to education and the labour market, it is inextricably tied to economic, social and cultural rights.

After a few landmark cases by the European Committee of Social Rights, it looked as if the trend to decouple human rights from nationality and place, and guarantee them to each person within a state's jurisdiction instead, found an inroad into

¹⁴⁶ Art 25 ICCPR.

¹⁴⁷ *Genovese v Malta* (app no 53124/09) [2011] ECHR 1590, para 34; *Karashev v Finland* (app no 31414/96) ECHR 1999-II.

the fields of economic, social and cultural rights. In *DCI v the Netherlands*,¹⁴⁸ the Committee held that the Revised European Social Charter¹⁴⁹ obliged the Netherlands to disapply its ‘linkage principle’, which entitles only those with lawful stay to social benefits, with regard to children unlawfully present on its territory. In order to do that, the Committee had to set aside the reciprocity requirement of paragraph 1 of the Appendix, that narrows the personal scope down to the nationals of other parties lawfully present. It did so on the basis that minding the exclusion is an ossified and outdated take on the Charter in light of developments elsewhere in international law, primarily under the CRC, and in light of the need to interpret the Charter so as to give life and meaning to fundamental social rights.¹⁵⁰ This reasoning was extended from children to adults in *CEC v Netherlands*.¹⁵¹ This progressive jurisprudence arguably brings the Charter’s social rights into reach for stateless persons. Although they receive separate treatment in paragraph 3 of the Appendix, keeping their exclusion in place while it has been removed for aliens is hardly tenable in light of the core principle of Article 7 Status Convention, which prohibits treating stateless persons worse than foreigners who do possess a nationality. However, the Netherlands is not amused with the Committee’s progressive interpretation and not likely to implement it, with which they would seem to get away since the Council of Europe’s Committee of Ministers is neither convinced.¹⁵²

Finally, some states allow for voluntary loss of nationality even if it causes statelessness. From the perspective of the individual, is the right to nationality a discretionary right that would be breached if states force its nationality upon her? After all, the right to health does not imply states have to force-feed fruit to people who rather like to live unhealthy. The sensible perspective on the right to nationality should follow

¹⁴⁸ *DCI v Netherlands* (Decision on merits) (Complaint No 47/2008) European Committee of Social Rights, 20 October 2009.

¹⁴⁹ European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999) CETS No 163.

¹⁵⁰ *DCI v Netherlands* (n 147), para 34-38.

¹⁵¹ *CEC v Netherlands* (Decision on merits) (Complaint No 90/2013), European Committee of Social Rights, not yet published.

¹⁵² *Kamerstukken II* 2014-15, 19637, 2012, 1-2; *Kamerstukken II* 2014-15, 19637, 1994, 1.

the ECtHR's interpretation of the right to life in *Pretty v UK*,¹⁵³ interpreting it as an obligation incumbent on the state to respect it, rather than defer to the individual's wish to reject it.

It was seen that a peculiar trait specific to nationality law is that it embodies elements of individual human rights and collective public order. The two faces are seen in various aspects. The right to return to a state of nationality can be understood as a manifestation of human rights, such as the right to freedom of movement, family life and property, that is owed to the individual abroad. It is simultaneously an ordering of international relations, whereby the state of nationality guarantees to the host state that it will take its national back. A passport is in that respect a promissory document of free travel to both the individual as well as to foreign states. It would be inaccurate to stress one element over the other. Having perused both the individual's right to nationality and the state's *domain (p)réservé*, one might be left to wonder what the net worth is of the Human Right Council's recognition that the right to nationality is inalienable and fundamental. How much currency does it actually have? Looked at closer, the right to nationality involves the usual suspects with the individual as right holder and the state as norm addressee or duty bearer, but there is commonly no desk where the individual can go to cash in on her claim; the norm addressees are usually *all* states and therefore none in particular. This is fundamentally different from the situation where an individual does have a specific claim with a specific state but also no government desk to go to: this would be a clear violation of her right and the obligation of the state to amend its internal legal order to facilitate her right.¹⁵⁴ In terms of Hohfeldian incidents there is a 'privilege' that individuals may invoke,¹⁵⁵ but no accompanying claim. Decaux described the situation where individuals cannot claim specific

¹⁵³ *Pretty v UK* (app no 2346/02) [2002] ECHR 423, para 54-56.

¹⁵⁴ This is the situation in the Netherlands, where the identity papers of art 27 Status Convention cannot be picked up because no state organ has been charged with issuing them. See *Claimant v the Mayor of The Hague*, District Court The Hague, 19 February 2014, ECLI:NL:RBDHA:2014:2255, para 2 and 18-20.

¹⁵⁵ Individuals frequently have a choice to take their own steps for acquiring nationality and resolve their statelessness, such as by registration with an embassy etc.

nationality rights as the absence of a debtor,¹⁵⁶ but it is more accurate to call it the absence of any creditors. The right also seems to lack a sufficiently arguable object. The characteristics of the individual right to nationality provokes a comparison to the collective right to self-determination, a right considered so important as to impose obligations on states against all others,¹⁵⁷ but equally elusive when push comes to shove. The composite right of self-determination is claimed to be not inherent in the human person, but dependent for its realisation on the political policies of a national and international order.¹⁵⁸ While the right to nationality has been described as inherent in the individual, it is also very absorbed by the rights of political communities.

An unarguable right stretches the tolerance of positivists, whom like to see law as ‘hard’ law or no law at all, for resembling the ‘soft’ law of a moral duty so strongly, rather than a legal one. There are three reasons for this resemblance. First, as touched upon above, the right’s object and scope are difficult to determine because no state is in principle under a definite, positive obligation to accord its nationality.¹⁵⁹ In other words, individuals are not vested with standing to assert their right to a specific nationality in front of a domestic or international court. Second, states can infringe upon the right to nationality by removing it. This begs the question whether it is truly an inalienable right of any human person, or a forfeitable right the way convicted persons can forfeit their political rights such as voting, albeit temporarily.

There is a bottom limit of ‘softness’ of law, in terms of producing legal effects such as state responsibility and the obligation to make reparation, below which human rights should not sink if they are not to be dismissed like *jus cogens* norms frequently are, namely as irrelevant, empty, symbolical, a rhetorical exclamation mark, a hopeless chimera, or even a Cheshire cat with ‘the disconcerting habit of vanishing and then

¹⁵⁶ Emmanuel Decaux, ‘Le droit à une nationalité, en tant que droit de l’homme’ (2011) 86 *Revue trimestrielle des droits de l’homme* 237, 242.

¹⁵⁷ *Wall in the OPT* (n 18), para 155; *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, para 29.

¹⁵⁸ Theo van Boven, ‘Categories of Rights’, in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (OUP 2010), 178.

¹⁵⁹ Unless it has agreed to include specific rights, such as via the *jus soli* failsafe in art 1 Reduction, or the *jus sanguinis* failsafe in art 4 Reduction.

reappearing to deliver further words of wisdom'.¹⁶⁰ Human rights that produce no effects are more like delusive layers of fancy veneer. Such rights lie closer to the realm of *sollen* than *sein*, as misty signposts quietly directing at what the law ought to be; at best overlooked and at worst ignored. Human rights presume positive and/or negative obligations, while obligations presume responsibilities as the necessary companion of a right.¹⁶¹ The less consequences are attached to a rule the more it lacks in relevance and the more it becomes questionable in terms of its own legal nature. According to some writers, state responsibility is the best and even only proof of the existence of law.¹⁶²

The question which aspects of the right to nationality and the duty to prevent stateless triggers state responsibility is pressing. The future will tell whether the twin norms become accepted as *erga omnes* obligations, like the right to self-determination, so that states will forward claims if they feel specific states ought to do more for stateless persons on their territory. The recent concern for the Rohingya and the mounting pressure for Myanmar to accord them its nationality might become a signpost in hindsight. The general right to nationality and the prevention of statelessness seem therefore better described as due diligence obligations, urging the community of states to tackle it together in a joint effort. Other aspects of it that produce clearer legal effects are circumstantial or supportive rights, such as the right to equality and non-discrimination. If states do create more specified nationality rights, they are forbidden from denying them to qualified persons arbitrarily.¹⁶³ A good way to show how the

¹⁶⁰ Ian Brownlie, 'Comments', in Antonio Cassese and Joseph Halevi Horowitz Weiler (eds), *Change and Stability in International Law-Making* (Walter de Gruyter 1988), 110; Arthur Mark Weisburd, 'The Emptiness of the Concept of Jus Cogens as Illustrated by the War in Bosnia-Herzegovina' (1995) 17 Michigan J Intl L 1; Hilary Charlesworth and Christine Chinkin, 'The Gender of Jus Cogens' (1993) 15 Hum Rights Q 63, 66; Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2008) 18 EJIL 853, 871; Anthony D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens!' (1990) 6 Connecticut J Intl L 1, 6; Gordon A Christenson, 'Jus Cogens: Guarding Interests Fundamental to International Society' (1988) 28 Virginia J Intl L 585, 589; Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984), 224.

¹⁶¹ *British Claims in the Spanish Zone of Morocco Case (Spain v United Kingdom)* (Arbitral Award) (1925) 2 RIAA 615, 641 (Max Huber).

¹⁶² Alain Pellet, 'The Definition of Responsibility in International Law', in James Crawford, Alain Pellet and Simon Olleson, *The Law of International Responsibility* (OUP 2010), 3-4 ('No responsibility, no law'). See also Dionisio Anzilotti, *Cours de droit international* (Sirey 1929), 467.

¹⁶³ HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General' (14 December 2009) UN Doc A/HRC/13/34, para 23.

general right to nationality can work via circumstantial or supportive elements is the case-law of the ECtHR. The Court reiterated that a general right to nationality similar to that in Article 15 UDHR, let alone a right to acquire or retain a particular nationality, is not guaranteed by the ECHR nor its Protocols. But it went on to say that arbitrary or discriminatory denials of nationality by member states may risk raising an issue under the ECHR, in particular Article 8 (depending on the impact) or 14 ECHR.¹⁶⁴ It has recently also examined under Articles 10 and 11 ECHR.¹⁶⁵ The same considerations have been applied by the African Committee of Experts on the Rights and Welfare of the Child,¹⁶⁶ and the Inter-American Court of Human Rights.¹⁶⁷

The due diligence obligations of

3. Does nationality still matter?

The progressive theology has been preached that the formalist state-centred model is in decline for a number of reasons, such as globalisation, increased interdependency and revolutions in information and communication technologies, and that this finally gives the stage to non-state actors. It can have consequences for the meaning and worth of having a nationality if it is true that the state is in the process of being replaced by alternatives. If the practical significance of a state fades, its nationality might fade along. For that reason those suggestions will now be examined in more detail.

It is unquestionable that non-state actors such as individuals, non-governmental organisations, multi- or transnational corporations, and international organisations have at least partially dislodged the state to claim competences of their own. There are several reasons why the situation where both domestically and internationally the state is no longer monopolist was brought about. On the one hand, greater awareness of shared problems as environmental pollution, transboundary crimes and unstable regions

¹⁶⁴ *Genovese v Malta* (n 146); *Karashev v Finland* (n 146); *Slivenko v Latvia* (app no 48321/99) ECHR 2002-II, para 77. Lastly confirmed in *Petropavlovskis v Latvia* (n 144), para 73-74.

¹⁶⁵ *Petropavlovskis v Latvia* (n 144), para 75-87.

¹⁶⁶ *Nubian Minors v Kenya* (Communication No Com/002/2009A), 22 March 2011.

¹⁶⁷ *Case of Expelled Dominicans and Haitians v. Dominican Republic* (Judgment) 28 August 2014 Series C No 282, para 253; *Case of the Girls Yean and Bosico v Dominican Republic* (Judgment) 8 September 2005 Series C No 130, para 137; *Proposed amendments to the naturalization provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84 19 January 1984 Series A No 4.

begged the question on the utility of state boundaries, that turned out to be rather porous by events that need not even occur close to state borders.¹⁶⁸ On the other hand, the persistency of problems and the perception that the ambitions of states can do much harm,¹⁶⁹ begged the question on the utility of state institutions. Should there be more of it via a consolidation and strengthening of the state, or should there be a turn towards a diversification of options? In addition to external forces pulling states from the centre of gravity, states placed trust in the promises of liberal markets and denationalisation and voluntarily retreated themselves, labelling less functions as exclusively within the public domain. At most they started to view functions as mixed, which ushered in a new shared power arrangement of the public-private cooperation.¹⁷⁰ States started to treat each other less formalist too.¹⁷¹ Above developments created more operating space for non-state actors; with states not as ubiquitous and pervasive in all aspects of life, attention shifted away from the Westphalian model to higher levels of cooperation and different actors to cooperate with. Salvation is sought higher up and down below. This is exemplified by the human rights project that connects the particular of the individual with the universal claims and values of an international community, crowning in the grand theory of *jus gentium*,¹⁷² that the human being is the international community's real constituent atom. As a result, individuals directly receive human rights and other

¹⁶⁸ One can think of global warming, the threat of piracy for trade or the motivation of Western states for military intervention in the Middle East and North Africa region.

¹⁶⁹ See James C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1999).

¹⁷⁰ Even in the area of defence, known as civil-military cooperation. See also the private contractors and private military and security companies, in Peter Warren Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press 2003); Emanuela-Chiara Gillard, 'Business goes to war: private military/security companies and IHL', (2006) 88 IRRC 836, 525-572; Willem van Genugten, Marie-José van der Heijden and Nicola Jägers, 'Protecting the Victims of the Privatization of War', in Rianne Letschert and Jan van Dijk (eds), *The New Faces of Victimhood* 253 (Springer 2011).

¹⁷¹ Spurred by the insight that not everything a government does automatically differs from what private actors do, states restricted sovereign immunity from each other's domestic proceedings for *acta jure gestionis*, or non-sovereign acts. See Hazel Fox and Philippa Webb, *The Law of State Immunity* (OUP 2013); *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* (Judgment) [2012] ICJ Rep 99, para 59-60, 64. See further art 4-11 European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 1495 UNTS 182; art 10-17 Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004, not entered into force) UN Doc A/59/508.

¹⁷² For one of its fiercest advocates, Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Brill 2010). See also Theodor Meron, *The Humanization of International Law* (Martinus Nijhoff 2006).

rights such as consular rights,¹⁷³ as well as have obligations directly imposed upon them, as a result of which they may be individually liable under international criminal law. According to Janne Nijman, individuals are

both the source and the final destination of the law of nations. ILP [international legal personality] forms the *cords* between the individual human being and the universal human society, and because of it, the international community and international law must guarantee the right to have rights, the right to political participation, i.e., the right to speak out and raise one's *voice*. This could be the new function of ILP.¹⁷⁴

These developments were accompanied by doctrinal debates on the effects of the (partial) replacement of the nation-state and spawned theories of globalism,¹⁷⁵ post- and transnationalism, and stateless laws,¹⁷⁶ all with obvious implications for nationality. If the individual needs the state less for her self-realisation because there are other clubs vying for membership,¹⁷⁷ her nationality as a stamp on the wrist as proof of admittance decreases in value. Some writers argue that the national is in the process of being replaced by regional citizens,¹⁷⁸ or even global or post-national citizens in true

¹⁷³ The ICJ left open the question whether the individual right of consular notification of art 36 Vienna Convention on Consular Relations (adopted 24 April 1963, entered into force 19 March 1967) 596 UNTS 261 is also a human rights or not, see *Avena and Other Mexican Nationals (Mexico v United States of America)* (Judgment) [2004] ICJ Rep 12, para 124; *LaGrand (Germany v United States of America)* (Judgment) [2001] ICJ Rep 466, para 126. The consequences that should be attached to this typology is one of relativisation between normal individual rights and the special character of human rights.

¹⁷⁴ Janne Elizabeth Nijman, *The Concept of International Legal Personality, An Inquiry into the History and Theory of International Law* (TMC Asser Press 2004), 473.

¹⁷⁵ From global governance and administrative law to constitutionalism. See Eyal Benvenisti, *The Law of Global Governance* (Brill 2014); Anne Peters, 'Global Constitutionalism', in Michael T Gibbons (ed), *The Encyclopedia of Political Thought* (Wiley-Blackwell 2015).

¹⁷⁶ Helge Dedek and Shauna Van Praagh (eds), *Stateless Law: Evolving Boundaries of a Discipline* (Ashgate 2015).

¹⁷⁷ See Thomas M Franck, *The Empowered Self: Law and Society in the Age of the Individual* (OUP 1999).

¹⁷⁸ Diego Acosta Arcarazo, 'Toward a South American Citizenship? The Development of a New Post-National Form of Membership in the Region' (2015) 68 J of Intl Affairs 213; Bruno Nascimbene, 'Le droit de la nationalité et le droit des organisations d'intégration régionales. Vers de nouveaux statuts de résidents?' (2013) 367 Recueil de Cours 253.

cosmopolitan spirit.¹⁷⁹ For instance, a European Union citizen is entitled to receive consular protection abroad from other Member States than its own.¹⁸⁰

However, there are practical and moral reasons to dampen expectations for nationality to become obsolete. As for practical obstacles, the citizen of regional organisations still needs to possess the nationality of a particular state.¹⁸¹ Post-nationalists are often second-class citizens.¹⁸² Meanwhile, the United Nations, as the closest thing to a world organisation, dwelled in the shape of Special Rapporteur Córdova on Scelles' proposal for conferring 'international nationality' to stateless persons in order to create a citizen of the world,¹⁸³ and it simply did not know what to do with her. The Special Rapporteur not only feared that she would find herself in every country in an inferior position compared to a national, but also struggled with the quintessence of nationality, that legal expression of a bond that presupposes both rights and *duties* towards each other, as requiring the United Nations to draft her as a universal soldier in an army of stateless.¹⁸⁴ In that case, 'statelessness would become a profession rather than a juridical status' in an extreme *quid pro quo*.¹⁸⁵ Finally, despite Nijman's

¹⁷⁹ Eg Saskia Sassen, 'Towards Post-National and Denationalized Citizenship', in Engin F Isin and Bryan S Turner (eds), *Handbook of Citizenship Studies* (Sage 2002).

¹⁸⁰ Art 20(2)(c) and 23 Consolidated version of the Treaty on the Functioning of the European Union (adopted 25 March 1957, entered into force 1 January 1958) [2012] OJ C326/47 (TFEU); art 46 Charter of Fundamental Rights of the European Union (adopted 12 December 2007, entered into force 1 December 2009) [2012] OJ C326/391; Council Directive 2015/637 on the coordination and cooperation measures to facilitate consular protection for unrepresented citizens of the Union in third countries and repealing Decision 95/553/EC [2015] OJ L106/1.

¹⁸¹ As for the Union citizen, art 20(1) TFEU. For the Mercosur citizen, art 1 Agreement on Residence for State Party nationals (*Acuerdo 14/02 sobre Residencia para Nacionales de los Estados Partes del MERCOSUR, Bolivia y Chile*) (adopted 6 December 2002, entered into force 4 December 2009). For the Gulf citizen, art 3 Economic Agreement between the Cooperation Council for the Arab States of the Gulf States (adopted 31 December 2001, entered into force 1 January 2003). For the ECOWAS citizen, art 1 Protocol A/P.3/5/82 relating to the Definition of Community Citizen (adopted 29 May 1982, entered into force 10 July 1984) 1690 UNTS 77, in conjunction with art 1 Revised Treaty of the Economic Community of West African States (adopted 24 July 1993, entered into force 23 August 1995) 2373 UNTS 233. See also art 27(1) (old) Treaty of the Economic Community of West African States (adopted 28 May 1975, entered into force 20 June 1975) 1010 UNTS 17.

¹⁸² Kiran Banerjee, 'Toward Post-National Membership? Tensions and Transformation in German and EU Citizenship' (2014) 10 *J of Intl L and Intl Relations* 4, 22-30. The theory is further challenged by Randall Hansen, 'The Poverty of Postnationalism' (2009) 38 *Theory and Society* 1.

¹⁸³ Georges Scelles, 'Le problème de l'apatridie devant la Commission du Droit international de l'ONU' (1954) 52 *Die Friedens-Warte* 142-153.

¹⁸⁴ Roberto Córdova, 'Third report on the elimination or reduction of statelessness', ILC Yb 1954/2, 26, para 21-28.

¹⁸⁵ *Ibid*, para 26.

conclusion that the doctrinal heart of international legal personality should compel the international community to guarantee individuals the right to have rights, the modicum of personality that is granted to a stateless person remains that infinitesimally small that she has a hard time to speak up, instead of being looked upon as a theme. When concepts as *jus cogens* norms that ought to ensure the protection of human rights, because of the backing of the international community, are vehicles that hardly leave the garage, ‘the state is still the primary vehicle by which the individual accesses the rights and protections available under international law’.¹⁸⁶ Arendt was very critical of founding human rights in man for the practical reason that it mattered little in exercising them when not absorbed into a (well-defined) group. Man cannot completely emancipate himself severed from a body. One could counter that an individual (wo)man can always be seen as part of mankind, the most abstract group on the highest level, but in Arendt’s view such a community is rather meaningless. The ‘world citizen’ has no real rights unless a ‘world polity’ is sufficiently real, which it is arguably not. According to Arendt even the stateless are aware of that, who

[...] were as convinced as the minorities that loss of national rights was identical with loss of human rights, that the former inevitably entailed the latter. The more they were excluded from right in any form, the more they tended to look for a reintegration into a national, into their own national community. The Russian refugees were only the first to insist on their nationality and to defend themselves furiously against attempts to lump them together with other stateless persons. Since them, not a single group of refugees or Displaced Persons has failed to develop a fierce, violent group consciousness and to clamor for rights as – and only as – Poles or Jews or Germans, etc.¹⁸⁷

Although Arendt referred to the experience of stateless groups that were *en masse* denationalised after the Second World War, even now the need for a nationality in order to be able to come in from the cold should be felt by all cases of stateless persons.

¹⁸⁶ Jeffrey L Blackman, ‘State Successions and Statelessness: The Emerging Right to an Effective Nationality under International Law’ (1998) 19 Michigan J Intl L 1141, 1150.

¹⁸⁷ Hannah Arendt, *The Origins of Totalitarianism* (Schocken Books 1951), 292 and 300.

As for moral reservations, when casting the limelight at non-state actors on a human rights stage their performance is not always up to standard. The democratic legitimacy of NGO's and transnational corporations, that represent a very singular field in terms of topics, interests and peoples, can be doubtful in comparison with a government, that has a public and general mandate and a process that brings as many opposing interests together. A limited representation narrows the field of view and creates blind spots insofar as human rights do not overlap with the mandate. This mandate kerbs the appetite for self-regulatory practices and *zelfreinigend vermogen*, so that an intervening state as prompter via the top-down implementation and enforcement of human rights standards continues to be required.¹⁸⁸ The norm addressees of human rights treaties are only states, since natural and legal persons have limited international legal personality; as subjects they are only entitled to rights as far as human rights law goes. International organisations are neither necessarily

the harbingers of international happiness, embodying a fortuitous combination of our dreams of 'legislative reason' and the idea that everything international is wonderful precisely because it is international.¹⁸⁹

That the grass is not always greener on the other side of the constitutional fence is a growing insight with monist states, that use their setting to keep international law and the decisions of international organisations at bay insofar it is deemed as conflicting with fundamental constitutional principles.¹⁹⁰ In fact, the accountability gap can be equally great, if not greater, with international organisations, corporations and individuals. As for the first, international organisations have their own legal personality

¹⁸⁸ See Cedric Ryngaert, 'Transnational private regulation and human rights: The limitations of stateless law and the re-entry of the state' in Jernej Letnar Černič and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (Wolf Legal Publishers 2015), 106-130.

¹⁸⁹ Jan Klabbers, 'The Life and Times of the Law of International organizations' (2001) 70 *Nordic J Intl L* 287, 288.

¹⁹⁰ Cf the ruling of the Italian Constitutional Court, which shielded Italy's domestic legal order from international law by declaring the customary rule of sovereign jurisdictional immunities in violation with its constitutional values of fair trial and access to court. Italian Constitutional Court, no 238 of 22 October 2014. See further the *Solange-I* and *Solange-II* cases of the BVerfGE 37, 271 and BVerfGE 73, 339 respectively.

distinct from their member states,¹⁹¹ yet none can appear before the ICJ in the way that states can be held to account.¹⁹² Secondly, none are currently party to human rights treaties and are therefore not subjected to the jurisdiction of other international courts as the European Court of Human Rights (ECtHR),¹⁹³ or to the minimal examination of treaty bodies. Regardless of whether they would make such a decision, accession to human rights treaties is even impossible for them, with the exception of the ECHR vis-à-vis the European Union,¹⁹⁴ and would require the difficult procedure of amendments. Thirdly, international organisations can often neither be coerced to appear in domestic proceedings unless consenting through a waiver of immunity, which would otherwise ‘thwart the proper functioning of international organisations and run counter to the current trend towards extending and strengthening international cooperation’,¹⁹⁵ insofar as the organisation enjoys functional immunity,¹⁹⁶ which in the case of the United Nations is virtually unchecked.¹⁹⁷ This functional immunity also covers staff insofar as

¹⁹¹ As for the EU, art 47 Consolidated Version of the Treaty on European Union (adopted 7 February 1992, entered into force 1 November 1993) [2012] OJ C326/13 (TEU). As for the UN, art 104 UN Charter; art I Convention on the Privileges and Immunities of the United Nations (adopted 13 February 1946, entered into force 17 September 1946) 1 UNTS 15 (General Convention); art II of the Convention on the Privileges and Immunities of the Specialized Agencies (adopted 21 November 1947, entered into force 2 December 1948) 33 UNTS 261 (Special Convention). See also *Reparation for injuries (n 41)*, 178-179, 185.

¹⁹² Art 34(1) ICJ Statute. The only exception is art VIII, s 30 General Convention, which upgraded an advisory opinion into a binding procedure.

¹⁹³ Cf *Matthews v the United Kingdom* (app no 24833/94) 28 ECHR 361, para 32. Although the EU intends to accede to the ECHR the process is lengthy and difficult, see Adam Lazowski and Ramses A Wessel, ‘When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR’ (2015) 16 German L J 179; Sionaidh Douglas-Scott, ‘Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice’ (*UK Const L Blog*, 24 December 2014) <ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/> last accessed 14 July 2015. See further Opinion 2/13 of the Court of Justice of the European Union, 18 December 2014, ECLI:EU:C:2014:2454.

¹⁹⁴ Art 59(2) ECHR in conjunction with art 6(2) TEU.

¹⁹⁵ *Klausecker v Germany* (app no 415/07) [2015] ECHR 212, para 72; *Mothers of Srebrenica v the Netherlands* (app no 65542/12) [2013] ECHR 739, para 139; *Waite and Kennedy v Germany* (app no 26083/94) [1999] ECHR 13, para 72.

¹⁹⁶ Art 105(1) UN Charter; art II and III General Convention; art III and IV Special Convention; art III Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations (adopted 26 June 1947, entered into force 21 November 1947) 11 UNTS 11 (UN Headquarters Agreement). See further in general August Reinisch (ed), *The Privileges and Immunities of International Organizations in Domestic Courts* (OUP 2013).

¹⁹⁷ The ECtHR described the UN as in possession of ‘universal jurisdiction’ when fulfilling its imperative collective security objective, in *Behrami/Saramati v France*, app no 78166/01, 2 May 2007, para 151. It also held that the ECHR could not be construed in a manner that would repudiate the UN’s immunity, given the importance of Chapter VII UN Charter resolutions to its mission of securing international peace and security, in *Mothers of Srebrenica v the Netherlands* (n 80), para 154.

they do not exceed the scope of their functions,¹⁹⁸ even against states of which they are nationals.¹⁹⁹ The fact that international organisations and their staff enjoy functional immunity even in their ‘home’ state, the state where they have their seat, means that they enjoy a broader immunity than states that in principle cannot invoke sovereign immunity before their own courts. As a result, the fail-safe criterion of equivalent protection has been introduced to engage the responsibility of a state while international organisations are taking the decisions, or when member states are merely implementing those decisions even in the case of UN decisions that ‘shall prevail in the event of a conflict with obligations under any other international agreement’,²⁰⁰ in order to ensure that human rights are not theoretical or illusory, but effective and real.²⁰¹

In conclusion, nationality still matters for people. It is safe to say that, as it stands today, most people would rather be on a ship of state when it sails by than floating around aimlessly, while hanging on to a copy of the UN Charter. The next Chapter shall now discuss three possible ways in which states deliberately or not end up creating statelessness.

¹⁹⁸ Art 105(2) UN Charter; art V and VI General Convention; art VI Special Convention; art IV and V UN Headquarters Agreement. The opinion of the Secretary-General as chief administrative officer can only be set aside by the most compelling reasons, see *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, para 61.

¹⁹⁹ *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations* (Advisory Opinion) [1989] ICJ Rep 177, para 50-61.

²⁰⁰ Art 103 in conjunction with art 41, 48(2) and 25 UN Charter.

²⁰¹ If the organisation offers equivalent protection, the ECtHR will presume that a state was justified in its interference. However, this can be rebutted if in the particular instance protection was manifestly deficient. For UN decisions, see *Al-Dulimi v Switzerland* (app no 5809/08) [2013] ECHR 153, §116-122. For NATO decisions, see *Gasparini v Italy and Belgium* (app no 10750/03) ECHR 12 May 2009. For EU decisions, see *MSS v Belgium and Greece* (app no 30696/09) [2011] ECHR 108, para 338; *Bosphorus v Ireland* (app no 45036/98) [2005] ECHR 440, para 156; *M & Co v Germany* (app no 13258/87) [1990] DR 64, 138. For European Patent Office and International Labour Organisation, see *Klausecker v Germany* (n 80), para 100-107. For European Space Agency, see *Beer and Regan v Germany* (app no 28934/95) [1999] ECHR 6, para 57 and 58.

4. Setting the examples: how can states create statelessness?

4.1 Removing nationality on the international plane by opposing conferrals under international law

It is recalled that the conferral of nationality is an internal affair of states, with the important caveat that their right to decide who are their nationals is not absolute; it has to be exercised within the limits imposed by international law. Because of these limits, while other states cannot pull rank and overrule the internal validity of such a unilateral act of conferral under the principle of sovereign equality, nor international courts or tribunals for that matter, states do not have to completely abide by it either. On the international plane states can, and in some cases must, oppose the validity of such acts and deny its legal consequences.²⁰²

This basic premise of being entitled to deny recognition of nationality on the international plane raises a number of questions with regard to the creation of statelessness. It is recalled that a stateless person is not considered as a national by any state under the operation of its law. If a state does consider a person as a national under the operation of its law, can other states negate it for considering that law inconsistent with international law? In other words, where statelessness is first and foremost created because states refuse to confer nationality to someone, can states also create it by refusing to recognise that any of them has done so validly? This raises further questions on the exact nature of statelessness. Does a stateless person exist objectively the moment one state denies recognition of her nationality, thus holding a Damoclean sword over her head and a veto over states, or is statelessness a relative concept that depends on the eyes of the beholder? Very strictly spoken, a person is not stateless when considered its national by any state no matter if all other states deny this on the international level. A final question concerns the consequences of states to continue in denial, and when that is indeed the creation of statelessness, whether the duty to prevent

²⁰² Art 3(2) ECN; art 1 Convention of Nationality Laws. ('This law [of each state to determine who are its nationals] shall be recognized by other States insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality'). See also Oliver Dörr, 'Nationality' in Max Planck Encyclopedia of Public International Law (OUP), para 17; Alfred Michael Boll, *Multiple Nationality And International Law* (Brill 2007), 207-113.

that should influence their decision in any way. The best clarification of the issue at hand can be given by the example of Guatemala and one known limitation to a state's conferral of nationality. Guatemala expressly denied a valid conferral of Liechtenstein's nationality to Mr Nottebohm had taken place, for the simple fact that he had not changed his habitual residency from Guatemala to Liechtenstein.²⁰³ After the ICJ accepted Guatemala's argument about the need for a real and effective link to a state that confers nationality, Vermeer-Künzli claimed that applying this notorious *Nottebohm* rule leaves people stateless.²⁰⁴ As much as her reproach is directed towards the ICJ, it is of equal concern to states. This chapter will therefore explore whether opposing nationality conferrals conflicts with the right to nationality and the due diligence obligation to prevent statelessness. It will start with four examples of known limitations.

4.1.1.Examples

The first example of a known limitation is the general law principle of non-discrimination.²⁰⁵ Dörr lists in this respect race, sex, language, religion, or sexual or political preference as criteria not recognised as legitimate for the purpose of conferring nationality, in addition to being contrary to certain human rights treaties.²⁰⁶ Racial discrimination has been given a wide definition that includes nationality or national origin.²⁰⁷ Dörr chose the remarkable words 'would attempt' when speaking of a state that intends to confer nationality on the basis of these illegitimate criteria,²⁰⁸ but the usage of such uncertain language must be limited to the international plane since

²⁰³ ICJ, *Nottebohm case* (n x), 19.

²⁰⁴ In this case Mr Nottebohm of course, see Annemarieke Vermeer-Künzli, 'Nationality and Diplomatic Protection: A Reappraisal', in Forlati (n 26), 77-78.

²⁰⁵ Eg art 1(3) and 5(d)(iii) ICERD. See also Committee on the Elimination of Racial Discrimination, 'General recommendation No 30 on discrimination against non-citizens' (10 January 2004) UN Doc CERD/C/64/Misc.11/rev. 3.

²⁰⁶ Oliver Dörr, 'Nationality', in Max Planck, para 17.

²⁰⁷ Art 1(1) ICERD; European Commission against Racism and Intolerance (ECRI), 'General Policy Recommendation No 7 on National Legislation to Combat Racism and Racial Discrimination' (17 February 2003) CRI (2003) 8, at 5 and 12; ECRI, 'General Policy Recommendation No 14 on Combating Racism and Racial Discrimination in Employment' (25 September 2012) CRI (2012) 48.

²⁰⁸ Dörr (n 64), para 17.

domestically the state can succeed.²⁰⁹ Translated into concrete examples, it would thus be problematic when Russia takes its love for heterosexuals further and implements the condition of its desired sexual preference as a basis for naturalisation, or when Turkey had taken its need to protect a fundamental feature of the European public order further and made a democratic political preference a requirement for eligibility for naturalisation.²¹⁰ Already established practice is the automatic right to citizenship of every immigrated person with a Jewish mother or who has converted to Judaism and is not a member of another religion.²¹¹ Similarly, member states of the European Union have a preferential naturalisation trajectory for Union citizens, which seems an indirect discrimination on the basis of nationality. Finally, many states such as the Netherlands have a language proficiency test for naturalisation, that according to the CEDAW Committee discriminates against women in practice.²¹² Nevertheless, in practice it is difficult to imagine why states would oppose the conferral of nationality on the grounds of discrimination, rather than protest about the exclusion of others.

The second example is the specific treaty limitation that prohibits automatic bestowal to a woman upon her marriage of the nationality of her husband,²¹³ which is notably the only example that the ILC has to offer.²¹⁴ A limitation on automatic acquisition of nationality might seem strange from a statelessness perspective,²¹⁵ but can actually be understood from the experience that many states are ill-disposed towards dual or multiple nationality, so that the acquisition of another nationality comes at the

²⁰⁹ The consequence of the great divide between international and domestic law. This is also why the ICJ did not take away the nationality of Mr Nottebohm in Liechtenstein proper when it limited the international effects of that conferral, see x; Mikulka (n 64), para 63; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn, Longman 1992), 856. ('[...] where the effects in international law of a state's grant of nationality are limited, the individual will still be a national of that state for purposes of its own laws')

²¹⁰ For an accepted exclusion of an anti-democratic movement from the political process, cf *Case of Refah Partisi (the Welfare Party) v Turkey* (App no 41340/98) (2003) ECHR 87.

²¹¹ Nationality Law, 5712-1952, s 2 in connection with Law of Return, 5710-1950, s 4b. See Christina O Alfrev, 'Volatile Citizenship or Statelessness? Citizen Children of Palestinian Descent and the Loss of Nationality in Israel' in Jacqueline Bhabha (ed), *Children Without a State: A Global Human Rights Challenge* (MIT Press 2011), 69.

²¹² Committee on the Elimination of Discrimination against Women (n 48), para 55.

²¹³ Art 9(1) CEDAW. Similarly, art 4(d) ECN; art 1 Convention on the Nationality of Married Women.

²¹⁴ Commentary to Article 4 Draft Articles on Diplomatic Protection (n 29), para 6 and 8.

²¹⁵ Turkey's interpretative declaration to art 9(1) CEDAW was based on this sentiment.

penalty of (automatic) loss of theirs.²¹⁶ Furthermore, an involuntary conferral is problematic from the human rights value of personal autonomy.²¹⁷ The application of the conventional or customary rule that states can ignore this conferral for being inconsistent with an international convention seems the only title available to states, as there is no such consequence provided for under the primary rules of the treaty itself or the residuary rules regarding non-observance,²¹⁸ nor under the secondary rules of state responsibility.²¹⁹ Moreover, invocation of the title becomes complicated with regard to reserving states,²²⁰ hard questions need to be settled such as the validity of reservations,²²¹ and in case of their invalidity, whether the doctrine of severability applies to create the so-called ‘super-maximum effect’ of contracting the reserving state while tossing out its reservation.²²² Given these complications, unless the prohibition

²¹⁶ See also Savitri WE Goonesekere, ‘Article 9’ in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (OUP 2012), 241. To lose one’s own nationality is an unreasonable price to pay for a foreign wedding candidate and would frustrate the right to marriage, but more importantly, it dramatically increases the risk of statelessness for the reasons outlined in the section on causes above.

²¹⁷ Cf art 18(2)(c) ECN; art 7 Avoidance Convention (the principle of the will of the person concerned which entails avoiding the imposition of nationality). The automatically acquired nationality can come with duties which a person might not want.

²¹⁸ The humanitarian character prevents recourse to termination of this treaty or the suspension of its operation in whole or in part on the basis of a material breach, conform art 60(5) VCLT.

²¹⁹ It would be hard to argue that an automatic, involuntary conferral of nationality amounts to a gross or systematic failure that can count as a serious breach by the responsible state to fulfil an obligation arising under a peremptory norm of general international law, in order to trigger the obligation for states to not recognise as lawful a situation created by that breach, in line with art 41(2) in conjunction with art 40 ARSIWA. On the one hand, while the *ex lege* operation of nationality laws could count as systematic failure, and while the right to nationality and the duty to prevent statelessness are in present writer’s opinion sensible candidates for peremptory status, see *infra* below, the responsible state is actually conferring nationality and not necessarily causing statelessness; it can just as well be argued that the state that causes statelessness is the one that penalises the acquisition of another nationality by removing theirs.

²²⁰ Monaco and the UAE have excluded art 9 CEDAW in its entirety. Fiji, Iraq and the Republic of Korea withdrew a similar reservation. Turkey withdrew an interpretive declaration on the spirit of art 9(1) CEDAW that counts as reservation, because its nationality laws remained technically in breach.

²²¹ The reservations invited objection, or rather protest because of the invoked legal invalidity as opposed to a political discretion, of seven states for being incompatible with object and purpose of the treaty, except for France who offered no reason. If true, the reservation has not been validly established in accordance with art 21(1) in conjunction with art 19(c) VCLT, and somewhat redundantly art 28(2) CEDAW, thus null and void. None protested against Monaco and Turkey, which is inconsistent yet inconsequential when the reservation is impermissible in itself, objectively and independent of any declaration comparable to the declaratory v constitutive theories re state recognition. See ILC, Guide to Practice on Reservations to Treaties, Commentary to Guideline 4.5.2, ILC Yb 2011/II(2), para 1-9.

²²² Jan Klabbbers, ‘Accepting the Unacceptable? A new Nordic Approach to Reservations to Multilateral Treaties’ (2000) 69 Nordic J Intl L 179, 183-186. State practice is clearly there with art 9 CEDAW, with all objector states categorically stating that their objections do not preclude the establishment of treaty relations between them and reserving states ‘in its entirety, without [reserving state] benefitting from its

can be simultaneously based on a customary rule, it is rather difficult to see a straightforward application by treaty partners with regard to reserving states. This holds all the more true for third states with regard to any state. It does not appear that the treaty parties intended to offer the right of non-recognition to third states,²²³ while the CEDAW is unlikely to have created some form of objective regime,²²⁴ so that third states can respond that way as a matter of course, without needing title. In short, this second example of ways to create statelessness seems only possible when based on the customary rule that women may not automatically be given their husband's nationality. It might be possible to rely on the wide-spread ratifications of Article 9 CEDAW, with the remaining reserving states persistent objectors, but finding evidence of such a rule lies outside of this thesis. The aim was merely to point out ways how states can create statelessness.

The third example was set in the field of diplomatic protection, where the ICJ held in the *Nottebohm case* that Liechtenstein could not seize the Court of a claim against Guatemala relating to Mr Friedrich Nottebohm, who had solicited Liechtenstein's nationality in order to avoid treatment as a German enemy national, when Liechtenstein's nationality did not correspond with a factual situation of a real and effective link, 'as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter'.²²⁵ Since states are not obliged to hand over financial reparation to injured individuals, states could in theory use them as cash cows to generate income.²²⁶ When individuals are enlisted as assets on a state's balance sheets, other states are understandably keen on limiting the number of eligible claimant states via the predictable ploy of a stricter interpretation of the nationality of claims requirement. Mr. Nottebohm's ad-hoc naturalisation was financially attractive

reservation'. The ILC is more moderate, however, in order to guard the voluntary principle of express consent to be bound. They proposed the pragmatic solution that unless the author of an invalid reservation clause has expressed a contrary intention, which he moreover may express at any time, states can operate on the rebuttable presumption that it is bound by the treaty without benefit of the reservation, see ILC, Guide to Practice on Reservations to Treaties, Commentary to Guideline 3.3.1, para 6; Commentary to Guideline 4.5.3, para 1-55.

²²³ In accordance with art 36 VCLT.

²²⁴ David J Bederman, 'Third Party Rights and Obligations in Treaties', in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012), 344.

²²⁵ ICJ, *Nottebohm case* (n x), 24.

²²⁶ Liechtenstein sought almost 8 million Swiss francs for damages, excluding profits.

for Liechtenstein, and others have followed more systematically in the commodification of citizenship.²²⁷ The indirect majority schemes seem not contradictory with the *Nottebohm* rule,²²⁸ whereas Malta's direct scheme of 'cash-for-passports' seems strikingly at odds. More examples are cited by Boll that all have to do with an insufficient connection between the individual and a state to warrant diplomatic protection.²²⁹ Because the conferral of nationality is the principal remedy to statelessness, widening the opportunity to naturalise should be positive.

A fourth and final example has to do with the circumstance that international law denies certain legal effects of acts in contravention of it, with the corollary duty for states to do the same. This overall principle translates into a number of derived rules. Given the sacrosanctity of the boundaries of states, or the idea that borders are protected facts instead of suggestions, opinions, or a nice idea, this is the text-book candidate for duties. Therefore, in regard to state formation or other changes to the status of territory inconsistent with international law, states are obliged to cooperate to bring the breach to an end, not to recognise as lawful the situation created by the breach, either explicitly or implicitly, and not to render aid or assistance in maintaining the illegal status quo. Not heeding such duties might incur different forms of liability.²³⁰ Because the Netherlands condemns the Autonomous Republic of Crimea as having been illegally annexed by Russia, for instance, in violation of fundamental principles as the obligation to refrain from the threat or use of force against the territorial integrity, political independence, and sovereign equality of Ukraine,²³¹ it may not recognise Russia's conferral of nationality based on the *jus soli* principle. In a similar instance, the Supreme Court of the United States recently rescinded a bill that allowed United States citizens born in

²²⁷ Jelena Dzankic, 'The pros and cons of *ius pecuniae*: investor citizenship in comparative perspective' EUI Working Paper RSCAS 2012/14, March 2012. See also Kim Gittleson, 'Where is the cheapest place to buy citizenship?' *BBC News* (London, 4 June 2014) <bbc.com/news/business-27674135> last accessed 14 July 2015.

²²⁸ Most immigrant investor or citizenship-by-investment programmes, where foreign investors receive visas that lead towards naturalisation, involve significant investments into businesses coupled with the usual requirements of lengthy residency, that count toward a genuine and effective link.

²²⁹ Boll (n 60), 109. (citing Randelzhofer, *Nationality*, 419)

²³⁰ Either directly for co-perpetration of a primary rule of international law, or separately for the non-performance of obligations that arise under the secondary rules of state responsibility. See art 16 and 41 Articles on Responsibility of States for Internationally Wrongful Acts respectively.

²³¹ Cf UNGA Res 68/262 (1 April 2014).

Jerusalem to list Israel as their place of birth on their passports.²³² Although the Court's decision mainly revolved around constitutional distribution of responsibility for foreign policy, and whether the president could defy an act of Congress on the basis of an exclusive power to grant formal recognition to foreign sovereigns,²³³ from an international law perspective the ruling is correct.²³⁴

4.2 Removing nationality by removing the state

Some elements in the definition of a stateless person are problematic, which is often overlooked or misunderstood in the literature. The phrase 'any State' seems similar to the so-called 'Moscow formula', which is a concept that has currency in the law of treaties, and stands for a treaty regime that leaves it undetermined, by formulations as 'all states' or 'any state', which entities qualify as states for the purpose of that treaty. Such determination is critical for the operation of treaties because, besides within the functionally limited competence of international organisations,²³⁵ it is states that possess general capacity to conclude treaties, and only international agreements concluded between states that fall within the material scope of the law of treaties, which is hence the *sedes materiae*.²³⁶ If determination is indeed left to states a divergence will be inevitable.

²³² S 214(d) Foreign Relations Authorization Act of 2003, P L No 107-228, 116 Stat 1350 (2003).

²³³ *Zivotofsky v Kerry*, 8 June 2015, 576 US _ (2015).

²³⁴ It is widely held, including by the United States, that (East) Jerusalem belongs to occupied territories with Israel having the status of an occupying power. Cf ICJ, *Wall in the OPT* Opinion (n 18), para 70-78; Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (24 October 1970). Occupation does not transfer sovereignty over to the occupier. As a result of several violations of the right to self-determination, human rights, and of international humanitarian law, the ICJ mentioned the three consequences arising for third states, in para 159: 'Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end.'

²³⁵ Cf art 1, 2 and 6 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986, not entered into force) 25 ILM 543 (1986).

²³⁶ Cf art 1, 2 and 6 VCLT.

Because Iraq recognises Palestine as a fully-fledged state, for instance, while the Netherlands, the UK and others hold it at most *in statu nascendi*,²³⁷ a person from the Occupied Palestinian Territories who has no other nationality, such as Israeli, Lebanese or Jordanian, is stateless in the eyes of the Netherlands but Palestinian as far as Iraq is concerned, provided the Palestinian Authorities promulgate nationality legislation.²³⁸ Although most Palestinians receive protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East which excludes them from the Status Convention,²³⁹ identifying stateless persons continues to be important outside of this treaty. In addition to the problem of states having to independently decide on the objective existence of statehood in line with the declaratory theory, certain states such as the UK expressly adhere to the constitutive theory,²⁴⁰ whereby states are the ones recognised as such by its government.²⁴¹ However, Article 35(2) and (4) Status Convention clearly incorporates a ‘Vienna formula’.²⁴² Such formulas are generally understood to help determine which entity is a state for the purposes of the underlying treaty.²⁴³ Under the current UK instructions, the state invited to it by the UNGA might go unrecognised, and its nationals along with it.

A most peculiar and inadvertent way to create statelessness is when states deprive a person from her second nationality, while dismissing any protests from the allegedly remaining state of nationality. Few drafters of the statelessness conventions would have premeditated that statelessness could be caused by states ascribing another nationality, before removing theirs. Yet this is exactly what happened to Pham, who was ascribed

²³⁷ Cf UK, ‘Applications for leave to remain as a stateless person’ (1 May 2013), para 3.4.

²³⁸ See also art 6(2) Iraqi Nationality Law, Official Gazette, Issue 4019, No 26 of 7 March 2006 (excluding Palestinians from the possibility to naturalise in order to guarantee their right to return to their homeland conform the Arab League’s Resolution 1547 (9 March 1959).

²³⁹ Art 1(2)(i) Status Convention. It was modelled after art 1D Refugee Convention.

²⁴⁰ On the two theories, Crawford (n 17), 19-28.

²⁴¹ UK (n 233).

²⁴² For more examples see art 81 and 83 VCLT; art V and VII Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted 26 November 1968, entered into force 11 November 1970) 754 UNTS 73.

²⁴³ On the ‘Vienna’ and ‘Moscow’ formulas, see Kirsten Schmalenbach, ‘Article 1’ in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012), para 8-12; Nicolas Burniat, ‘Article 81’ in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Vol 1) (OUP 2011); UNSG, Summary of practice of the Secretary-General as depositary of multilateral agreements (June 1999) UN Doc ST/LEG/7/rev 1, para 79-81.

Vietnamese nationality by the UK despite Vietnam's own position, on the basis that Vietnam got it wrong. The rule of law would dictate that Vietnam rendered Pham *de facto* and not *de jure* stateless, so that nothing precluded the UK from removing British nationality. It would be ironic if Vietnam refused to accept the UK's removal for being contrary to the rule of law, now that the UK had previously instructed its civil servants to follow the UNHCR's interpretive guidance and make the position of the national authorities determinative, rather than the letter of the law, in concluding that a state does not consider such an individual as a national.²⁴⁴

4.3 Removing nationality by deprivation

Finally, the most conspicuous way to create statelessness is by the deliberate removal of a person's nationality. The previous two examples have in common that they exist very much in the twilight between *de jure* and *de facto* statelessness, but removal of a person's nationality leaves less doubt. The only exception to this is when other states deny the legality of the removal and feel free to remove their own, in case of dual nationals; this would bring it back to the *Pham* scenario as described above. States such as the Netherlands limit themselves to deprivation in the case of dual nationality,²⁴⁵ including Australia for now,²⁴⁶ which however has been outspokenly supportive on government level of the UK model.²⁴⁷ Removing then nationality of dual nationals increases the risk to statelessness. Only the UK example will be analysed below, however, because it is the most direct, obvious and expressly condoned cause of statelessness.

According to the UK Secretary of State 'citizenship is a privilege, not a right'.²⁴⁸ This has been echoed by Canadian members of cabinet,²⁴⁹ the United States,²⁵⁰ and

²⁴⁴ UK (n 233), 11, para 3.4.

²⁴⁵ The Netherlands even intends to widen the deprivation measure to persons suspected of instead of convicted for participation in terrorism, see *Kamerstukken II* 4016-(R2036), 3.

²⁴⁶ Paul Farrell, 'Whistleblowers could have citizenship revoked under proposed laws' *The Guardian* (London, 25 June 2015).

²⁴⁷ Australian Government Department of Immigration and Border Protection, 'Australian Citizenship: Your Right, Your Responsibility' (2014), 6.

²⁴⁸ Theresa May strips citizenship from 20 Britons fighting in Syria' *The Guardian* (London, 23 December 2013) <<http://www.theguardian.com/politics/2013/dec/23/theresa-may-strips-citizenship-britons-syria>> last accessed 14 June 2015.

Australia. After the UK Supreme Court's ruling flew in the face of the government,²⁵¹ it amended legislation to push through that a national could be stripped of nationality and rendered stateless, to which the caveat was added that the Secretary of State, who makes the decision, must be convinced that the individual has a realistic chance to acquire nationality elsewhere. In line with Article 8(2)(b) Reduction Convention, the Secretary of State's power to make a person stateless was originally limited to cases of fraud, false representation, or concealment of a material fact.²⁵² However, the power to make a person stateless has been expanded by the insertion of a new clause to include the situation where the Secretary of State is satisfied that deprivation is conducive to the public good, because a naturalised person has conducted herself in a manner which is seriously prejudicial to the vital interests of the UK, including the Islands and overseas territories.²⁵³ The only limitation that was inserted under pressure is that there must be a realistic chance for the person to acquire another nationality.²⁵⁴ This will be for the Secretary of State to decide. Additionally, the UK intends to make provision on new counter-terrorism measures that keep its citizens out of its borders through the imposition of temporary exclusion orders, but the fundamental difference in treatment with stateless persons is that the exclusion of citizens requires regulation.²⁵⁵

²⁴⁹ Speaking notes for Chris Alexander, Canada's Citizenship and Immigration Minister at a News Conference to Announce the Tabling of Bill C-24: The Strengthening Canadian Citizenship Act, Toronto, 6 February 2014.

²⁵⁰ US Government Publishing Office, Vol 160, no 134, Congressional Record, 18 September 2014, S5727. See also Charlie Savage and Carl Hulse, 'Bill Targets Citizenship of Terrorists' Allies' *NY Times* (New York, 7 May 2010), A12.

²⁵¹ *Secretary of State for the Home Department v Al-Jedda* [2013] UKSC 62.

²⁵² British Nationality Act 1981, s 40(4) in connection with (3).

²⁵³ Amendment by the Immigration Act 2014, s 66(1). The amendment acquired the force of law on 28th July 2014, by virtue of art 3(t) Immigration Act 2014 (Commencement No 1, Transitory and Saving Provisions) Order 2014.

²⁵⁴ The new British Nationality Act 1981, s 4A reads as follows:

But that does not prevent the Secretary of State from making an order under subsection (2) to deprive a person of a citizenship status if—

- (a) the citizenship status results from the person's naturalisation,
- (b) the Secretary of State is satisfied that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom, any of the Islands, or any British overseas territory, and
- (c) the Secretary of State has reasonable grounds for believing that the person is able, under the law of a country or territory outside the United Kingdom, to become a national of such a country or territory.

²⁵⁵ The exclusion orders are, in principle, for the duration of two years, subjected to judicial review and with the possibility of permits to return. Cf Counter-Terrorism and Security Act 2015, Pt 1, Ch 2.

Deprivation of nationality should always be a cause for vigilance. Arendt warned that denationalisation has historically been used as a powerful tool of totalitarianism,²⁵⁶ and that

to be stripped of citizenship is to be stripped of worldliness; it is like returning to a wilderness as cavemen or savages. A man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow man [...] they could live and die without leaving any trace, without having contributed anything to the common world.²⁵⁷

The Institute of International law resolved that it should not be possible to denationalise anyone as punitive measure,²⁵⁸ while the International Law Association went even further to contemplate denationalisation as not possible at all, aside from the case of an effective acquisition of another nationality.²⁵⁹ Reflecting on this, Paul Weis nonetheless considered the creation of statelessness through denationalisation undesirable but, with the possible exception of discriminatory denationalisation, not inadmissible under international law as it stood in the year of 1979.²⁶⁰ The next chapter will now examine whether this still holds true in light of present day international law, or whether international law standards have developed further against it.

5. Legal appraisal of the creation of statelessness

5.1. Conventional and customary obligations

The most far-reaching treaty provision is that of Article 7(3) ECN, which prohibits deprivation of nationality out-and-out if it creates statelessness, save the one exception of responding to an acquisition of nationality by means of fraudulent conduct, false information or concealment of any relevant fact attributable to the applicant. However,

²⁵⁶ Arendt (n 186), 269.

²⁵⁷ Arendt (n 186), 269.

²⁵⁸ Institut de Droit International, Resolution II: Principes relatifs aux conflits de lois en matière de nationalité (naturalisation et expatriation), art 6, reprinted in [1895] 14 *Annuaire de l'Institut de droit international* 194, Session de Cambridge, 14 August 1895.

²⁵⁹ International Law Association, Report of the Nationality and Naturalisation Committee, at p. 32. Reprinted in [1924] 33 *Inl L Association Conference Rep.*

²⁶⁰ Weis (n 50), 125.

the UK decided likely for this reason not to join it. It is party to the Reduction Convention, and its Article 8 equally condemns deprivation outright in case it creates statelessness, but grants more exceptions in paragraphs 2 and 3. Its negative formulation emphasises that the exhaustive list of tolerated exceptions must be interpreted restrictively. A crucial precondition for opening up the exhaustive list of Article 8(3) is that those grounds must already have existed in a party's national law prior to making an explicit declaration of its intent to keep them in place. The exception in Article 8(3)(a)(ii) needs to be invoked for deprivation of nationality in the war on terrorism, and reads

that, inconsistently with his duty of loyalty to the Contracting State, the person has conducted himself in a manner seriously prejudicial to the vital interests of the State.

A number of parties have made the declarations on retention,²⁶¹ with the UK amongst them and thus not proscribed from deprivation on this ground.²⁶² Since the Netherlands is not, its avenue for deprivation of nationality is accordingly only in the case of dual nationals.

The argument has then to be made whether the conduct of terrorism that the UK contemplates is indeed seriously prejudicial to its vital interests. Its security is an obvious vital interest. It is feared that people who radicalise and take up arms abroad, with the experience, training and network that brings, import the sectarian violence on their return in a number of ways, via recruitment and propaganda or even direct attacks on UK soil. All sorts of arguments can be thrown against it, such as whether deprivation would actually be effective in protecting the UK, but effectiveness is mainly a policy

²⁶¹ Declarations were made by Austria, Belgium, Brazil, France, Georgia, Ireland, Jamaica, Lithuania, New Zealand, Tunisia and the UK.

²⁶² The declaration in full reads: The Government of the United Kingdom declares that, in accordance with paragraph 3 (a) of Article 8 of the Convention, notwithstanding the provisions of paragraph 1 of Article 8, the United Kingdom retains the right to deprive a naturalised person of his nationality on the following grounds, being grounds existing in United Kingdom law at the present time: that, inconsistently with his duty of loyalty to Her Britannic Majesty, the person (i) Has, in disregard of an express prohibition of Her Britannic Majesty, rendered or continued to render services to, or received or continued to receive emoluments from, another State, or (ii) Has conducted himself in a manner seriously prejudicial to the vital interests of Her Britannic Majesty.

argument and not a legal requirement encapsulated in Article 8(3)(a)(ii). It will be argued that a minimum measure of effectiveness is legally required by way of a general principle, subsumed in proportionality. The point here is that it is not a direct requirement flowing from said treaty provision. The only additional requirement that the treaty makes in paragraph 4 is, again formulated in the negative, that states shall not exercise their retained right to deprivation unless ‘in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body’. In conclusion, the UK’s legislation to create statelessness by removing nationality in case of terrorism does not appear illegal from the point of view of its treaty obligations.

Finally, Articles 20(3) ACHR, 4 lit c ECN, 29(1) ArCHR and 18(1)(a) CRPD condemn the arbitrary deprivation of nationality. As it happened to be, none of these instruments are applicable to the UK except for Article 18(1)(a) CRPD with regard to persons with disabilities. Arbitrariness is covered under the general principle of non-arbitrariness below.

As for customary obligations, as recalled, the customary obligation of Article 15(2) UDHR is not interpreted as outright prohibiting deprivation, other than arbitrary.

5.2. General principles

5.2.1. Non-Arbitrariness

The principle of non-arbitrariness is widely accepted and has an autonomous meaning in international law. Acts are therefore not necessarily arbitrary despite domestic courts having judged the same act as unjustified, unreasonable or arbitrary, although it ‘may be a valuable indication’.²⁶³ In other words, not being in accordance with law makes it by necessity unlawful but not immediately arbitrary. Rather than being the same as unlawful, arbitrariness is ‘a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety’.²⁶⁴ It is not about being in breach of

²⁶³ *Elsi* (n 43), para 124.

²⁶⁴ *Ibid*, para 128.

a rule of law but *the* rule of law.²⁶⁵ Another way of putting that is the rule *of* law instead of the rule *by* law. The rule of law is a contested concept which does not make it much easier, but at the minimum are procedural guarantees of justice. The Human Rights Council therefore called upon states to observe minimum procedural standards.²⁶⁶ The minimum standards include issuing decisions relating to nationality in writing and making the decisions open to effective administrative or judicial review.²⁶⁷ The decisions must be based on law that has the quality for legal certainty, meaning it is accessible and foreseeable by being sufficiently precise as to enable a person, sometimes after seeking legal advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The decisions must also be reasoned and taken in good faith.

In its report on arbitrary deprivation of nationality, the UN Secretary-General logically coupled the meaning of arbitrariness with its interpretation under the treaty provision on arbitrary deprivation of liberty.²⁶⁸ According to the Working Group on Arbitrary Detention, the notion of arbitrary *stricto sensu* includes both the requirement that a measure is taken in accordance with the applicable law and procedure and that it is proportional to the aim sought, reasonable and necessary.²⁶⁹ The proportionality, reasonableness and necessity are separated and analysed under the principle of proportionality below.

Discrimination is another clear manifestation of arbitrariness, so that any deprivation of nationality on unjustifiable grounds is illegal. The Human Rights Council named race, colour, sex, language, religion, political or other opinion, national or social

²⁶⁵ Ibid. see also *Colombian-Peruvian asylum case (Columbia v Peru)* (Judgment) [1950] ICJ Rep 266, 284.

²⁶⁶ HRC (n 46), para 12.

²⁶⁷ A/HRC/13/34, para 43.

²⁶⁸ In footnote no 6 of HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General' (19 December 2013) UN Doc A/HRC/25/28.

²⁶⁹ HRC, 'Report of the Working Group on Arbitrary Detention' (24 December 2012) UN Doc A/HRC/22/44, para 61. See also Human Rights Committee, Communication No 1128/2002 (29 March 2005) UN Doc x, para 6.1 (*de Morais v. Angola*); Communication No 305/1988 (23 July 1990), para 5.8 (*Van Alphen v The Netherlands*); Communication No 458/1991 (21 July 1994), para 9.8 (*Mukong v Cameroon*); Communication No 560/1993 (3 April 1997), para 9.2 (*A v Australia*); *Panday v Suriname*, Judgment, Inter-American Court of Human Rights Series C No 16 (1994), para 47.

origin, property, birth or other status as unjust grounds,²⁷⁰ but these should be viewed as non-exhaustive examples. The UN High Commissioner for Human Rights has noted that terrorism measures taken under the scope of Security Council resolution 2178 (2014) may have a negative impact on the right to be protected from arbitrary deprivation of nationality.²⁷¹ In that respect it should be taken into account that states can have dubious motives based on discriminatory stereotypes and double-standards when it comes to designating terrorists in the practice of ‘blacklisting’.²⁷² This should increase the onus on the state to explain and justify that its deprivation acts are not taken on the basis of these stereotypes or ethnic profiling.

The UK will install independent review of the deprivation decision to give it a measure of oversight. Whether the deprivation decisions will nevertheless clash with the principle of non-arbitrariness will be decided on a case-by-case basis. It might be argued that terrorism is an ill-defined and thereby unforeseeable crime, given the difficulties in defining it on the international level. This has not stopped it from being implemented in probably all domestic criminal codes, and the way it will be implemented in practice has to be waited for.

5.2.2. Proportionality

Complying with the standards demanded by the principle of proportionality is the hardest task for the UK, and a tall order. Borrowing the language of the ECtHR, if an interference with the right to nationality is to be proportional, it has to be necessary in a democratic society, meaning justified by a pressing social need and proportionate to the legitimate aim pursued. A balance must be struck between divergent public and private interests. When it comes to measures that deal with security and public order, a state has usually a wide margin of appreciation, with the role of courts limited to a marginal review that usually consists of checking on a manifest abuse of discretion. However, in

²⁷⁰ HRC (n 46), para 4.

²⁷¹ HRC, ‘Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism’ (19 December 2014) UN Doc A/HRC/28/28, para 49.

²⁷² Hans J Giessmann, ‘Fundamentalism, Extremism, Terrorism: Commonalities, Differences and Policy Implications of "Blacklisting"’, in Bruce A Arrigo and Heather Y Bersot (eds), *The Routledge handbook of international crime and justice studies* (Routledge 2014).

matters of deprivation of nationality a full review of proportionality is possible, as has happened in the *Rottmann* case.²⁷³ There the European Court of Justice held that when Union citizenship rights are affected by deprivation orders, the principle of proportionality under EU law was applicable.

The UN Secretary-General has conducted a study into the detrimental impact of deprivation of nationality on the full realisation and enjoyment of human rights, and concluded it would place people in an extremely vulnerable position. It is not only his word, the destructive impact on human rights have been extensively documented.²⁷⁴ Given the authoritative and comprehensive study of the Secretary-General, a selection shall be itemised below.

One of the immediate rights that are stripped off along with nationality are the rights that entitles a person to participate in the political process. According to the Secretary-General

Current State practice reflects the continuing importance of nationality to the exercise of political rights. The predominant view is that the exercise of political rights is an entitlement of citizens only.²⁷⁵

Seeing that a stateless person is by necessity an alien and thus subject to migration laws, after being stripped of nationality she is limited in her freedom of movement even within the very state in which she was born and has lived for many years. Some states have criminalised unlawful stay, the Netherlands being almost one of them, which could result in indefinite detention. Remaining in the country she faces expulsion, but when out of the country she faces not being allowed back in. This obviously frustrates rights as the right to enjoy property or family life. The Human Rights Committee commented on the right to enter one's own country as provided for in Article 12(4) ICCPR as not limited to a formal sense, but covering those with which the person has special ties or

²⁷³ Case C-135/08 *Janko Rottmann v Freistaat Bayern* ECLI:EU:C:2010:104.

²⁷⁴ Eg Laura van Waas, 'Addressing the Human Rights Impact of Statelessness in the EU's External Action' (12 November 2014), 14-19.

²⁷⁵ HRC, 'Human rights and arbitrary deprivation of nationality: Report of the Secretary-General' (19 December 2011) UN Doc A/HRC/19/43, para 6.

claims. This would be the case of nationals of a country who have been arbitrarily deprived of their nationality.²⁷⁶ However, despite the special weight that ought to be given to interpretations of treaty bodies, there is no evidence that states follow up on this specific interpretation. Furthermore, Article 13 ICCPR raises no bar to the expulsion cases under contemplation here.

Another immediate loss are various rights that ought to be guaranteed under the human rights treaties to everyone, regardless of civil status. However, in practice it appears that stateless often are hindered in effectively enjoying those rights, such as the right to work, social security as bed, bath and bread, right to health, and adequate housing.²⁷⁷

Another protection that a stateless person usually misses out on is diplomatic protection. Diplomatic protection is vital to securing the human rights of a person outside of her own state, and it could offer a more effective remedy than a treaty body can, whose views and conclusions are not binding on states, or even more, could offer the only remedy because of the large absence of individual standing in national and international courts.²⁷⁸ According to Special Rapporteur Dugard:

diplomatic protection remains an important weapon in the arsenal of human rights protection. As long as the State remains the dominant actor in international relations, the espousal of claims by States for the violation of the rights of their nationals remains the most effective remedy for the promotion of human rights.²⁷⁹

According to the definition of the International Law Commission, which the ICJ confirmed as reflective of customary international law,²⁸⁰ diplomatic protection consists of:

²⁷⁶ Human Rights Committee, 'General Comment No 27 on freedom of movement' (1 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 5.

²⁷⁷ HRC (n 275), para 23-35.

²⁷⁸ John R Dugard, 'First Report on Diplomatic Protection', ILC Yb 2000/II(1), 205, para 17-32.

²⁷⁹ Ibid, para 32.

²⁸⁰ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (Judgment) [2007] ICJ Rep 582, para 39.

[...] the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.²⁸¹

It comprises various courses of action available to a state such as protest, arbitral and judicial dispute settlement proceedings, to have the injuring state acknowledge its responsibility for an international wrongful act, cease and desist its conduct in the case of a continuing violation and offer appropriate assurances and guarantees of non-repetition, and make full reparations. It has old roots that trace back to the assurance of the customary minimum standard of treatment of aliens,²⁸² but as this minimum standard expanded by the evolution in human rights law, the titles to the right to exercise diplomatic protection broadened with an equal step to include human rights violations.²⁸³

The main legal obstacle for a stateless person to benefit from the protection of a state is the nationality of claims requirement. In the case of stateless people, any state

[...] does not commit an international delinquency in inflicting an injury upon an individual lacking nationality, and consequently, no State is empowered to intervene or complain on his behalf either before or after the injury.²⁸⁴

This is because the legal fictional basis for the institution of diplomatic protection is that it is the state on behalf of himself, as a sort of *parens patriae*, espouses the grievance of one of its children as an ill-treatment of itself.²⁸⁵ As a result, a state lacks standing to raise violations that it does not suffer on behalf of one of its nationals. The ILC described above dictum as reflecting an inaccurate position of contemporary

²⁸¹ Art 1 Draft Articles on Diplomatic Protection (n 29).

²⁸² De Vattel (n 70), para 71.

²⁸³ Ibid.

²⁸⁴ *Dickson Car Wheel Company (United States of America v United Mexican States)*, Mexico-US General Claims Commission, (1931) 4 UNRIAA 669, 678.

²⁸⁵ *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* (Judgment) [1939] PCIJ Series A/B No 76, 28th February 1939, 16.

international law, which is concerned for all categories of persons including the stateless.²⁸⁶ However, human rights have so far not punched a dent into the ancient fiction large enough for the ILC to feel confident in completely severing the required bond between state and injured individual. It viewed it as progressive development of the law, riding on the human rights wave, to include the stateless person only insofar he is lawfully and habitually resident in claimant state.²⁸⁷ It might have been true that the ILC had to carefully manoeuvre when introducing *de lege ferenda*, but saying that the high threshold leads to a lack of protection for *some* individuals is a gross understatement.²⁸⁸ If they have consulted the UNCHR they would have heard that a significant number cannot cross this threshold.

It is admitted that the lack of diplomatic protection can to a certain extent also be of dubious benefit to the individual. Because a state is ‘in reality asserting its own rights – its rights to ensure, in the person of its subjects, respect for the rules of international law’,²⁸⁹ it may freely choose whether to make use of this right or not. The state’s espousal of individual grievances of its nationals by bringing its own claim to bear will generally be exercised only if, insofar and in the manner it sees fit as serving its own interests. There is currently no international obligation for states to intervene under the laws of diplomatic protection, nor under international human rights law.²⁹⁰ This is no different under regional human rights law as the ECHR.²⁹¹ In the course of the discussions, states even rejected the Special Rapporteur’s attempts to introduce a duty to exercise diplomatic protection against *jus cogens* violations. However, even if individuals have no justiciable right in front of national courts, the state’s discretion to

²⁸⁶ Commentary to Article 8, Draft Articles on Diplomatic Protection, para 1.

²⁸⁷ Art 8(1) Draft Articles on Diplomatic Protection.

²⁸⁸ Commentary to Article 8, Draft Articles on Diplomatic Protection, para 4.

²⁸⁹ *Mavrommatis Palestine Concessions (Greece v the United Kingdom)* (Judgment) [1924] PCIJ Series A No 2, 12.

²⁹⁰ Enrico Milano, ‘Diplomatic protection and human rights before the International Court of Justice: re-fashioning tradition?’ (2004) 35 *Netherlands Yb Intl L* 85, 94-97; Pieter Hendrik Kooijmans, ‘Is the right to diplomatic protection a human right?’, in Gaetano Arangio-Ruiz (ed), *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004), 1975-1984.

²⁹¹ *Case of M v Italy and Bulgaria* (App no 40020/03) ECHR 31 July 2012, para 127; *Boumediene v Bosnia and Herzegovina* (app no 38703/06) (2009) 48 EHHR 10, para 62; *Bertrand Russell Peace Foundation v the United Kingdom* (app no 7597/76) (1978) 14 DR 117; *Kapas v the United Kingdom* (app no 12822/87) (1987) 54 DR; *L v Sweden*, (app no 12920/87), Commission decision of 13 December 1988; *Dobberstein v Germany*, (app no 25045/94), Commission decision of 12 April 1996.

exercise their right or ‘duty’ became limited by constitutional and administrative judicial review principles such as the obligation to give due and rational consideration, and honour legitimately raised expectations.²⁹² Moreover, states are at liberty to go further themselves and elevate their right into a duty in domestic (constitutional) law. Finally, the possibility to be protected by a state remains. It has a modicum of preventive protection value by attaching a risk to a state bent on mistreating an alien, and some correctional and reparatory value when exercised afterward.

Lastly, a stateless person is neither entitled to consular assistance whenever she gets into trouble. The Vienna Convention on Consular Relations for instance creates the important individual rights to receive and communicate with consular officers.²⁹³ These consular officers can arrange for her legal representation, while their visits have a preventive monitoring effect against abuse. Although it is uncertain whether this concerns a human right,²⁹⁴ it is clear that the lack of consular protection is an additional personal loss.

Against these losses in human rights protection stands the proportionality demand that it must be the least intrusive measure possible, also known as the principle of subsidiarity, and that the measure must be effective in realising the stated aim. If for a sense of justice and strong non-tolerance message, it can first of all be questioned whether the normal criminal proceedings are not sufficient for dealing with terrorist suspects, or even those convicted. If for security, it can also be questioned whether the state manages to put her across the border and leave her with another state; which state would be willing to act as a Guantanamo Bay? Besides, the sole purpose of expulsion, even if successful, is itself problematic.²⁹⁵

²⁹² *Van Zyl v Government of RSA*, Case No 170/06, [2007] SCA 109 (RSA), para 6; *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, para 106; *Kaunda et al v President of the RSA*, Case No CCT 23/04 [2004] ZACC 5, para 78-80. See further Colin Warbrick, ‘Protection of nationals abroad’ (1988) 37 *Intl & Comparative L Quarterly* 1002, 1009.

²⁹³ Art 36 Vienna Convention on Consular Relations (n 65). See *Avena* (n 65), para 40; *LaGrand* (n 65), para 77.

²⁹⁴ *LaGrand*, *ibid*, para 78.

²⁹⁵ Cf art 8 Draft Articles on the Expulsion of Aliens, ILC Yb 2014/II(2).

The onus on the government to justify such an enormous impact on a person's human rights is that heavy, that it is likely not to meet standards of non-discrimination and proportionality.

Conclusions

The study was set out to analyse the phenomenon of the creation of statelessness by states. This topic became appropriate now that several states are, in response to terrorism, at an advanced stage to remove the nationality of people convicted for or suspected of terrorist activities. The United Kingdom is introducing legislation to strip people's nationality even when this results in statelessness. Although others as the Netherlands limit themselves to people with dual nationalities, it still increases the risk to create statelessness. Finally, some states as Australia also limit themselves for now, but have expressed enthusiasm for the UK model. They might wait for the model to be tested in a field trial first, especially on how it will hold up in court, and copy it in the future. This development is strikingly at odds with another development, the increasing recognition that statelessness is detrimental to the full realisation and enjoyment of human rights. Statelessness brings people into an extremely vulnerable position where they have to swim for themselves. This is why the United Nations High Commissioner for Refugees launched a campaign to root out the scourge of statelessness by 2024, but the plans of states are diametrically opposed.

Against this conflict in the background, the thesis sought to answer what international law, particularly human rights law, has to say about states creating statelessness. After Chapters One and Two described the nature of statelessness and nationality, Chapter Three argued that nationality still matters and by that token the loss of it. In Chapter four, the thesis explored three different ways in which states can create statelessness, ranging from the denial of nationality conferrals, via the denial of unrelated legal matters that indirectly and unintentionally affect nationality, to the deprivation of nationality as most direct way to create statelessness. There are no watershed divisions and the creation of statelessness is often a combination. The first way is when states oppose the international validity of a nationality conferral because it did not abide by international norms. In such a case, when one of them confers its nationality the others 'reset' it by denying it legal consequences. In fact, while states are not under a specific obligation to confer their own nationality, they could be obliged to deny conferrals given by others in violation of serious norms, such as norms of

occupation law and self-determination. Denials like these can reset a person back to being stateless, but whether she becomes *de jure* or *de facto* stateless is hard to assess. It depends on whether one views the definition as a complete and autonomous *renvoi* to domestic nationality laws, or that the *renvoi* is itself subjected to laws that are in harmony with international law. The latter interpretation is more consistent, but both bring hardship for the concerned individual abroad: a *de facto* stateless person receives no consular assistance and diplomatic protection because the legal state of nationality does not care for her, while a *de jure* stateless person receives these things because the host state does not accept the claimant state really belongs with her. The second way creates statelessness as a by-product of states either denying or ‘removing’ the existence of other states, or ‘removing’ decisions those other states took with regard to their own nationals. An example of the first scenario is the denial of Palestine by the UK and the Netherlands, while the second scenario is the situation in which Mr. Pham found himself at the receiving end. It was shown that there are many challenges to a straightforward operation of the legal framework on nationality and statelessness, such as with the definition of ‘any state’ and ‘operation of its laws’ in Article 1 Status Convention. This leads to divergence in interpretation and application, which in turn threatens the project to prevent and resolve statelessness. Seen from that perspective, it helps if a state party would be a bit more proactive and seek clarification via a test case, banging the drum of Kenya’s ‘don’t be vague, let’s go to The Hague’, while hopefully remaining a bit more upbeat about the whole process.²⁹⁶ Many treaties enable it to via a compromissory clause,²⁹⁷ which in the case of the definition questions is even conveniently excluded from opt-outs.²⁹⁸

The third and final way to create statelessness is the most palpable way, when states remove the nationality of their own nationals. It was seen that plenty of states have that liberty, either belonging to the significant group of non-parties to the Reduction Convention, or to the select few parties who have reserved that right such as

²⁹⁶ On Kenya’s rallying cry, see Lionel Nichols, *The International Criminal Court and the End of Impunity in Kenya* (Springer International Publishing 2015), 133 *et seq*; Horand Knaup, ‘Mögliche Anklage in Den Haag: Kenia wartet auf seine Stunde Null’ (*Der Spiegel*, 14 January 2012).

²⁹⁷ Eg art 34 Status; art 14 Reduction.

²⁹⁸ Eg art 38(1) Status.

the UK. Luckily, human rights standards are not completely banished from the *domaine (p)réservé*, and managed to make inroads via modifying principles as non-discrimination and proportionality. Both are likely to militate against the creation of statelessness by removing nationality from remaining legal. There should certainly be a heavy onus on the state that is willing to put one of its nationals aboard and sail on. Secondly, there is an important task for the domestic courts to be the first line of defence, and claim their space to submit deprivation orders to a full review that includes proportionality. Thirdly, there is also a shared task for the general public. Many stateless like the Skrijevskis and Thai Ha face adversities on a daily basis anonymously, hidden from view. There should be a debate in society about the limits to exclusion that is currently sorely missing. There is still great progress to make on informing society about the problem, so that the stateless appear and personalise with names and faces.

It is good to conclude with the words of one experienced stateless person who managed to make a name for herself and be heard loud and clearly. Hannah Arendt persuasively articulated what dangers exclusion ultimately brings to states that claim denationalisation is only necessary to protect themselves. When she spoke of the decline of the nation-state she referred to minorities and stateless people, that

bears the germ of a deadly sickness. For the nation-state cannot exist once its principle of equality before the law has broken down. Without this legal equality, which originally was destined to replace the older laws and orders of the feudal society, the nation dissolves into an anarchic mass of over- and underprivileged individuals. Laws that are not equal for all revert to rights and privileges, something contradictory to the very nature of nation-states.²⁹⁹

Creating no-class citizens who have to live somewhere and often cannot but remain in a state causes an imbalance in societies. Despite all the progress in human rights and international regimes that extend to a stateless person as well, many human rights will remain unattainable in order for her to have a meaningful life, the courageous *vita activa* made viable through civil rights. Arendt laid bare the civic pains that undo

²⁹⁹ Arendt (n 186), 290.

freedom: what is freedom of movement worth if she cannot find a home, and what does freedom of opinion matter when no one listens? It is the freedom of a fool.³⁰⁰ In other words, the right to have rights means to count and that it matters what one says or does.³⁰¹ History has also aptly shown that humans are at their most vulnerable when excluded from the political process and societal relationships, and are thought of in terms of a problem that needs to be solved. Arendt warned that human rights break down when objectification occurs. In the moving words, ‘[t]he world found nothing sacred in the abstract nakedness of being human’.³⁰²

In this light one ought to contemplate the recital of another Jewish philosopher, the son of Portuguese migrants Baruch Spinoza, on his statue between the Amsterdam city council hall and a hub of intersecting canals: the purpose of a state is freedom.³⁰³ As the water in canals hangs on to the quays, the stateless person has to be able to connect to a state in order to realise her freedoms, for there is nothing free and romantic about a person detached from anything, like water adrift.

³⁰⁰ Ibid, 296 and 302.

³⁰¹ Arendt explains it as ‘to live in a framework where one is judged by one’s actions and opinions’, *ibid.*

³⁰² Arendt, 299.

³⁰³ An interpretation of *Tractatus theologico-politicus* (1670), 20.20 (‘In fact, the true aim of government is liberty’).

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