



**Overview of Statelessness:  
International and Japanese Context**

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## Preface

We often take for granted the fact that each one of us is a citizen or a national of a country. Many of us even have two or three nationalities and passports. There are millions of people, however, who are not recognized as citizens or nationals of any country. These people are often called *stateless people* and their situation is a significant problem in many parts of the world. The Office of the United Nations High Commissioner for Refugees (UNHCR) estimates that approximately 12 million people are stateless in the world today. The fate of stateless people has attracted little attention and they are often called the ‘forgotten people’.

Having no citizenship and nationality, normal life may become very difficult for stateless people. Daily lives may become very complex and full of legal and administrative hurdles. Without a nationality, individuals may find it difficult to secure legal status and to register with local authorities to obtain an identification document which is essential to gain access to social services, to receive an education and to find a means of employment. Another obvious consequence is the difficulty in obtaining any kind of national passport or international travel document and visa. Furthermore, travelling to other countries becomes very complex.

People are often stateless for reasons beyond their control such as the break-up of a country and the redrawing of borders after a conflict. In other instances, conflicting laws within and amongst countries means that people may unwittingly lose their nationality or fail to obtain one. Such cases often involve children born out of marriages involving different nationalities. Sometimes, people may be deprived of their nationality arbitrarily or on purpose. Under certain circumstances, stateless people may be refugees and in need of international protection.

UNHCR has a mandate, given by the UN General Assembly, to act on behalf of stateless people and to prevent and to seek to address their plight. At present, there are two international legal instruments relating to statelessness, namely: the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. To date, some 65 countries have acceded to both or one of these Statelessness Conventions.

Little information is currently available about the issue of statelessness in Japan. It is

within this context that the Office of UNHCR in Japan commissioned the independent study “Overview of Statelessness: International and Japanese Context” by *Kohki Abe, Professor of International Law Kanagawa University Law School Professor.*

The study starts by outlining the existing issues with respect to statelessness in the international legal context, before analyzing and identifying statelessness issues in Japan. Apparent from the study is the absence of detailed information about who stateless people are. Among the key recommendations suggested in this study is that Japan accedes to one or both Conventions relating to Statelessness so as to meet international standards. Linked to this is the setting up of a proper statelessness determination procedure.

This study is an important contribution toward a greater understanding and awareness among policy makers and the public at large about statelessness and the difficulties that stateless people face in Japan. Nevertheless, it is only the beginning: the issues have been identified, but they also need to be resolved if we want to address the plight of stateless people in Japan.

Johan Cels  
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*I found out I was stateless when I was 11 years old. It was such a shock. I frequently fought with my mother over the matter, at times blaming her for all my misfortunes. Everyone else had a nationality, why didn't I? It seemed only natural for a child to have the nationality of her mother. At times, people laughed at me for being stateless<sup>1</sup>.*

*These spectral humans, deprived of ontological weight and failing the tests of social intelligibility required for minimal recognition include those whose age, gender, race, nationality, and labor status not only disqualify them for citizenship but actively “qualify” them for statelessness... [T]he stateless are not just stripped of status but accorded a status and prepared for their dispossession and displacement: they become stateless precisely through complying with certain normative categories... In different ways, they are, significantly contained within the polis as its interiorized outside.<sup>2</sup>*

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<sup>1</sup> Witness Naomi Takioka described the anguish of stateless children/adults by introducing the motivation in an application for naturalization at the 101st National Diet Session House of Representatives Justice Committee (1984). Quoted in Mizue Tsukida, *Nihonno mukosekiji to kodomonon fukushi* (Stateless Children in Japan and Child Welfare) (2008), pp.108-109.

<sup>2</sup> Judith Butler and Gayatri Spivak, *Who Sings the Nation-state? Language, Politics Belonging* (2007), pp.15-16.

## Introduction

Nationality is generally defined as “the individual’s status as a member of a particular state” and indicates “a legal bond of affiliation with that state”<sup>3</sup>. Stateless persons lack this nationality.

The present international system in which the sovereign state serves as the basic unit has been designed on the presumption that individuals are affiliated with a certain state. Citizens benefit from various services offered by the state, which in turn stabilizes its foundation by providing them with necessary protection. The emergence of persons without protection from any state undermines the efficacy and legitimacy of this system, and has been dealt with as a “problem” needing to be “solved.” Stateless persons and refugees exemplify this problem<sup>4</sup>.

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<sup>3</sup> Tadamasu Kuroki and Kiyoshi Hosokawa, *Gaijiko, kokusekiho, Gyosei (Alien Law and Nationality Act)* (1988), p.237; Hidehumi Egawa, Ryouichi Yamada and Yoshiro Hayakawa, *Kokusekiho (Nationality Act)* (1997), p.3; Shoichi Kidana, *Kokusekiho (Nationality Act)* (2003), p.6. The International Court of Justice defines nationality as a legal bond in the *Nottebohm Case* (1995). *ICJ Reports* 4, p.23. However, Yasuhiro Okuda argues that the description of nationality as “a status of a membership of a particular state” has a more universal validity. Okuda, *Kosekiho to kokusai oyakoho (Nationality Act and International Law on Parents and Children)* (2004), p.33. The terms “nationality” and “citizenship” are often used synonymously. Batchelor, C., “Statelessness and the Problem of Resolving Nationality Status,” *International Journal of Refugee Law*, Vol.10 (1998) p.159, n.5. The United States has a category of “noncitizen national” which describes a new status of people who live without full range of citizenship. See Kerber, L., “The Stateless as the Citizen’s Other: A View from the United States,” *The American Historical Review*, Vol.112 (2007) p.47. The subject of this paper will be limited to the nationality of natural persons, and will not refer to that of legal persons or corporate entities.

<sup>4</sup> A trailblazing research published by the U.N. in 1949 describes stateless persons as “an anomaly”, which creates a state of affairs “incompatible with a healthy conception of the law”. (*A Study of Statelessness*, E/1112; E/1112/Add.1 August 1949, paras 1.3. See also Weis, P., “The United Nations Convention on the Reduction of Statelessness,” *International and Comparative Law Quarterly*, Vol.11, (1963) p.1073). UNHCR has recently described stateless persons as “outcasts from the global political system of States” or “non-persons /legal ghosts.” (UNHCR, *The problem of statelessness has become a live issue again*, 1 March 1996; *The World’s Stateless People: Questions and Answers* (2006), p.5.). In theory, statelessness would not exist without states, as is the case for refugees, so one may say that stateless persons are a structural product of the present international system (Kenjiro Yamaoka, Kokuminto nanminno deautokoro (Where Nationals and Refugees Meet) *Hitotsubashi shakaikagaku (Hitotsubashi Journal of Social Science)* No.3 (2007, pp.231-55. See also, Haddad, E., *The Refugee in International Society* (2008), pp. 46-69. Furthermore, the stateless “serve the state by embodying its absence, by providing frightening models of the vulnerability of those who lack sufficient awe of the state” (Kerber, *supra* note 3, p.74). Chen Tien-shi’s remarks also relate to how stateless persons expose the system of states and nationality: “When thinking about stateless persons, they lead an existence deprived of what any citizen would regard as a given. They sigh and seem apathetic about their plight. Many years later, I found even if they try to scoff the inconsistencies of the state as meaningless entities, they are most affected by the lack of protection a state can provide. They are at the mercy of the authorities and live in constant fear. Many stateless persons hold a strong sense of nationalism and have a special attachment to a certain country. Chen, *Mukokuseki*” (*Statelessness*) (2005), p.143.

The problem of statelessness became an agenda of international concern after events mainly in Europe in the first half of the 20<sup>th</sup> century. At first, a clear distinction between stateless persons and refugees did not exist. While the refugee problem attracted public attention after the Second World War, statelessness continued to receive very little attention. As will be described below, the United Nations High Commissioner for Refugees (UNHCR) has been entrusted with responsibilities in relation to stateless people since the mid-1970s. However, the Independent Commission on International Humanitarian Issues (ICHI) observed that “[t]he UNHCR was more or less indifferent to the fate of stateless persons... the term “stateless person” hardly ever appears in UNHCR publications.”<sup>5</sup>

Vast changes occurred in the post Cold War period.<sup>6</sup> Within Europe, with the dissolution of the Soviet Union and Yugoslavia, state succession gave rise to statelessness. Afterwards, the problem became a global humanitarian concern that posed a security risk. Outside Europe, the existence of stateless persons was reconfirmed in the Middle East and South East Asia. UNHCR expanded its role in working for the stateless.<sup>7</sup> At the end of 2008, UNHCR published statistics on 6.6 million stateless persons in 58 countries. It also estimated the number of stateless persons in the world to be about 12 million.<sup>8</sup> Japan is not immune to this problem as will be discussed later in this paper.

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<sup>5</sup> Independent Commission on International Humanitarian Issues, *Winning the Human Race* (1988), p.112, quoted in UNHCR, *The State of the World's Refugees 1997-98: A Humanitarian Agenda*, p.227.

<sup>6</sup> *Current UNHCR activities on behalf of stateless persons*, EC/1995/SCP/CRP.6, 21 Sep.1995, para.1.

<sup>7</sup> *The State of the World's Refugees: A Humanitarian Agenda*, *supra* note 5, p.17. See also, *The World's Stateless People: Questions and Answers*, *supra* note 4, p.5; *Prevention and Protection of Statelessness and the protection of Stateless persons*, 20 October 1995, No. 78 (XLVI)-1995. This UNHCR Executive Committee conclusion 78 invited UNHCR to provide information on activities undertaken on behalf of stateless persons biennially, beginning at the forty-seventh session of the Executive Committee held in 1997.

<sup>8</sup> UNHCR, *2008 Global Trends: Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons* (June 2009), available at <http://www.unhcr.org/4a375c426.html>.



## 1 Exploring Statelessness

### (1) Boundaries between *de jure* and *de facto*

Article 1(1) of the 1954 United Nations Convention Relating to the Status of Stateless Persons defines a stateless person as one “who is not considered as a national by any State under the operation of its law.”<sup>9</sup> This commonly accepted definition in international law has also been transposed into the 1961 Convention on the Reduction of Statelessness.<sup>10</sup>

In principle, a person is considered a national at birth through application of legal instruments (such as a constitution, nationality law, or executive orders) of the state of birth or of their parents’ state of citizenship. However, not everyone acquires nationality at birth by application of law. Some are left without a nationality after a loss of citizenship. They are generally called *de jure* stateless persons and are the principal subject of concern in the Convention Relating to the Status of Stateless Persons.

Another category of stateless persons is comprised of a group who, without having been deprived of their nationality, are for some reason unable to enjoy the protection and assistance of their national authorities when abroad. This group lacks an effective form of nationality and is categorized as *de facto* stateless persons.<sup>11</sup> Similar problems may arise where persons have the nationality of a country but are not allowed to enter or reside in that country.<sup>12</sup>

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<sup>9</sup> This follows International Law Commission (ILC) Special Rapporteur Manley O. Hudson’s definition of stateless persons. See *Report on Nationality, Including Statelessness by Manley O. Hudson, Special Rapporteur*, A/CN.4/50, Extract from the Yearbook of the International Law Commission, 1952, vol. II p.17; Robinson, N., *Convention Relating to the State of Stateless Persons- Its history and Interpretation: A Commentary* (1995), reprinted by the Division of International Protection of the United Nations High Commissioner for Refugees 1997, Article 1, para. 3.

<sup>10</sup> Bachelor, *supra* note 3, p.170.

<sup>11</sup> The 1949 UN report, *A Study of Statelessness* (*supra* note 4, Introduction III 1,2), had already differentiated *de jure* and *de facto* stateless persons based on Intergovernmental Committee on Refugees, *Statelessness and Some of its Causes: An Outline* (1946). ILC *Special Rapporteur* Hudson suggests “so-called stateless persons are *de facto* nationals of a State who are outside of its territory and devoid of its protection; they are, therefore, not stateless: it might be better to speak of “unprotected persons” and to call this group “*de facto* unprotected persons,” in distinction to “*de jure* unprotected persons,” *i.e.* stateless persons. (Hudson, *supra* note 9, p.17).

<sup>12</sup> Bachelor, *supra* note 2, p.173. Tang Lay Lee analyzes regulations and its application in the Republic of China, which requires its own nationals residing overseas to acquire a visa before they enter or reside in Taiwan. Lee, T., “Stateless Persons and the 1989 Comprehensive Plan of Action Part 1:-Chinese Nationality and the Republic of China (Taiwan),” *International Journal of Refugee Law*, Vol.7 (1995), p.217.

Under the present international system, it is presumed that an individual has a nationality unless there is some evidence to the contrary.<sup>13</sup> Strictly stated, an individual is not to be treated as *de jure* stateless unless proven to lack a nationality of any state. When related States have differing opinions, an individual's nationality may be left uncertain and he or she would be at risk of statelessness (it is generally understood that when a person has been ascertained to be devoid of any nationality, s/he will be regarded as a *de jure* stateless person).

Other examples of risks of statelessness include those who did not have their births registered and therefore have difficulties to confirm the nationality they have acquired at birth.<sup>14</sup> Similarly, identification documents can be confiscated during human-trafficking transactions, making it impossible for victims/survivors to prove their nationality and return to their country of origin. They also fall in this category.<sup>15</sup>

The line between *de jure* and *de facto* statelessness is at times rather vague. As Weis notes, “[i]n practice, circumstances vary a great deal from case to case. There are many cases where a person's nationality status cannot be established, where it is doubtful, undetermined or unknown... The borderline between what is commonly called *de jure* stateless and *de facto* stateless is sometimes difficult to draw.” However he goes on to state that “... the latter term is in common use and has acquired a meaning.”<sup>16</sup>

Although *de jure* and *de facto* statelessness have been conceptually differentiated in legal terms, they both essentially refer to persons lacking protection from a state. From this perspective, they should be entitled to equal protection under international law. However, both the Convention Relating to the Status of Stateless Persons and the Convention Regarding the Reduction of Stateless Persons do not extend legally binding protection to *de facto* stateless persons. Therefore, it must be noted that in principle, these two Conventions extend protection to only *de jure* stateless persons (reasons for which will be discussed later).

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<sup>13</sup> *Nationality and Statelessness: A Handbook for Parliamentarians* (2005), p.11; Bachelor *supra* note 3, 172, n.39.

<sup>14</sup> See generally, Waas, “The Children of Irregular Migrants: A Stateless Generation?” *Netherlands Quarterly of Human Rights*, Vol.25 (2007), pp.437-58.

<sup>15</sup> Brouwer, A., *Statelessness in the Canadian Context: A Discussion Paper* (2003), p.4.

<sup>16</sup> Quoted in Batchelor, C., “Stateless Persons: Some Gaps in International Protection,” *International Journal of Refugee Law*, Vol.7 (1995), p.252.

## (2) Mechanisms of Statelessness

What causes statelessness, especially *de jure* statelessness? UNHCR lists ten causes that engender statelessness: conflict of laws; transfer of territory; laws relating to marriage; administrative practices; discrimination; laws relating to registration of births; *jus sanguinis*; denationalization; renunciation; and automatic loss by operation of law.<sup>17</sup> As has been discussed earlier, a person can become stateless at birth or later in life. In this paper, causes of statelessness will be examined at the time of a person's birth and subsequent stages in life.<sup>18</sup>

Firstly, in considering statelessness at birth, it should be recalled that two commonly known principles, *jus soli* and *jus sanguinis*, dictate criteria for citizenship. The former grants citizenship based on place of birth, and the latter on family heritage or descent. The criteria by which states grant citizenship falls within their sovereign authority. However, these two different approaches sometimes work against the universal right to nationality, rendering a newborn stateless. An example of this is a child born in a country which adopts *jus sanguinis* to parents who are citizens of a country granting nationality based on *jus soli*. S/he is in danger of becoming stateless. When the parents are stateless, the new born child succeeds this statelessness. Some *jus sanguinis* countries only grant citizenship to children of fathers who are nationals, and exclude matrilineal citizenship. In this case, children born to a citizen mother and a non-citizen father can become stateless.<sup>19</sup>

*Jus sanguinis* nationality laws can engender statelessness in newly born children if they

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<sup>17</sup> Office of the United Nations High Commissioner for Refugees, *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness* (rev. January 1999), para.10.

<sup>18</sup> See *A Study of Statelessness*, *supra* note 4, Part Two. Section I, Chapter 1; Hudson, *supra* note 9, pp.17-19; Geske, M., "State Building, Citizenship and Statelessness (1997)," available at [http://www2.soros.org/fmp2/html/build\\_intro.html](http://www2.soros.org/fmp2/html/build_intro.html); *Nationality and Statelessness*, *supra* note 12, pp.27-42; *Conclusion on Identification, Prevention and Reduction of Statelessness and protection of Stateless Persons*, 6 October 2006 Mo.106 (LVII)-206, para (j); Weissbrodt, D. & Collins C., "The Human Rights of Stateless Persons," *Human Rights Quarterly*, Vol.28 (2006), pp.253-64.

<sup>19</sup> Lee incisively criticizes the gendered dimension inherent in the commonly adopted procedure of passing on the father's nationality by acknowledging paternity for children born out of wedlock. Lee, T., *Statelessness, Human Rights and Gender: Irregular Migrant Workers from Burma in Thailand* (2005), p.122. Despite the *jus soli* principle adopted in the U.S., when a U.S. citizen has a child by a non-citizen woman, he must acknowledge legal paternity for the child to acquire U.S. citizenship. In 2001, a five-to-four U.S. Supreme Court majority denied the father's claim that he should have been able to transmit birthright citizenship to his child on the same terms that an American citizen woman can. His non-marital son, who faced deportation, had been born to a non-citizen mother, but the father's failure to acknowledge legal paternity had left the child stateless (*Tuan Ahn Nguyen vs. INS*, 533 U.S. 53(2001)).

are born to stateless parents. This perpetuates statelessness from one generation to the next. The advantages of the *jus soli* principle have been recognized as a means of eliminating statelessness,<sup>20</sup> but the *jus soli* principle also reproduces statelessness. This occurs to children of irregular migrants when a particular immigration status of the parent is an additional requirement (of granting citizenship) combined with the fact that the child was born in that state. These children are barred from citizenship and also inherit their parents' illegal immigration status. This irregular status will be transmitted continuously from one generation to the next, resulting in a chain of statelessness and illegal resident status.<sup>21</sup> In recent years, residence status has been regarded as an important factor in finding solutions for the problem of statelessness.

Secondly, statelessness after birth can result from a change in family status. In the past, many countries had nationality laws that made a married woman's nationality dependent on that of her husband. This was referred to as the principle of the unity of nationality of spouses. By marrying a foreign national, the wife lost her own nationality and acquired that of her husband. However, she was rendered stateless by divorce or the death of her husband.<sup>22</sup>

It has been a widely acknowledged right to renounce one's nationality. However, persons can become stateless under laws that allow renouncing citizenship before naturalization. In countries that denationalize citizens for certain reasons automatically, such as residency in a foreign country for a certain period of time or serving in a foreign military or government, a person in such a situation can become stateless unless s/he acquires another nationality. States can denaturalize their own nationals if naturalization was gained through misrepresentation, or if a national's actions critically threatens the state's interests.

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<sup>20</sup> For example, "Recognizing the advantages of the *jus soli* principle as a means of eliminating statelessness – an advantage which has been clearly demonstrated in the Americas region – the ICIHI has called for the introduction of a new international instrument, enshrining this principle as the sole criterion for the acquisition of nationality." *The State of the World's Refugees: A Humanitarian Agenda*, *supra* note 5, p.17.

<sup>21</sup> See Waas, *supra* note 13, p.446.

<sup>22</sup> Committee on Feminism and International Law, *Final Report on Women's Equality and Nationality in International Law*, in *Report of the Sixty-Ninth Conference, The International Law Association* (2000), pp.16-17. In April 2003, the UNHCR sent a questionnaire of 24 questions concerning statelessness to all UN member states (191 at the time). A total of 74 countries responded to the questionnaire by February 2004. To question 7(a), "Does either a marriage or the dissolution of a marriage lead to automatic changes in the nationality of a spouse?" 6.8% of participating states answered "yes." Of this 6.8%, 60% were from Middle East/Asia and 40% from Europe. UNHCR, *Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection*, March 2004, para.56. The final report does not identify specific countries for each response.

Statelessness can be produced *en masse* by denationalization of or refusal to grant citizenship to certain groups for reasons of race, ethnicity or otherwise. There are also cases of statelessness caused by insufficient administrative support for acquiring citizenship under restrictive regulations. Furthermore, transfer of territory resulting from state dissolution, succession, or independence produces stateless persons in residents of that territory. Succeeding states redefining citizenship requirements can produce a large number of stateless persons. Insufficient concern for the stateless before succession can invite this situation to linger unresolved.

As mentioned earlier, the distinction between *de jure* and *de facto* statelessness can at times become vague. Discriminatory attitudes of government officials in charge of registration procedures, lack of parents' identification documents, and lack of knowledge or understanding of the relevant nationality laws and regulations in both registration officials and parents can often hamper recognition of nationality at birth. Hospital staff may refuse to issue a birth certificate, while many irregular migrants hesitate to register their newborn for fear of drawing government attention to their immigration status. *Jus soli* countries sometimes require registration at embassies and consulates to acquire nationality. In this case, failure to do so deprives the subject of her/his legal nationality.<sup>23</sup>

### **(3) Consequences of Statelessness: An Interface of Nationality and Immigration Laws**

Hannah Arendt describes in *The Origins of Totalitarianism*, “the moment human beings lacked their own government and had to fall back on their minimum rights, no authority was left to protect them and no institution was willing to guarantee them. [What was] supposedly inalienable, proved to be unenforceable.”<sup>24</sup>

International human rights law bears an institutional memory of the plight of the Jews whose nationalities were confiscated as they vanished from sight during the holocaust. The condition of human rights around the globe has seen a change in the past 60 years, an outcome at least partly due to development in international human rights law. Arendt's understanding half a century ago therefore may not altogether apply today, but by and large her coherent observations still holds true in the contemporary world. A

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<sup>23</sup> Yasuhiro Okuda, *Suji de miru kodomo no kokuseki to zairyu shikaku (Nationality and Residence Status of the Child: Statistical Analysis)* (2002), pp.38-39.

<sup>24</sup> Arendt, H., *The Origins of Totalitarianism* (1951), pp.291-93.; *Eichmann in Jerusalem* (1963), p.240.

huge disparity exists in the rights of the citizen and the stateless who lack government protection.<sup>25</sup> The U.S. Supreme Court Chief Justice E. Warren described that to be stateless is to lack “the right to have rights.” This description remains pertinent to this day.<sup>26</sup>

In understanding the disadvantages of statelessness, we need to confirm the legal function of nationality in the real world. For the sake of convenience, to set forth the function in a simplified manner, initially it springs to mind that within interstate relations, a state is entitled to extend diplomatic protection to persons having its nationality while obligated to receive/readmit persons having its nationality.<sup>27</sup> In domestic matters, nationals are given priority in most circumstances such as immigration, residency, right to vote, assuming public posts, social security, and property rights. In private international law, nationality is the connecting factor for applicable family and inheritance laws. Stateless persons are likely to be deprived of these benefits.<sup>28</sup>

Inhumane treatment of stateless persons, reflected in their description as “non-persons,” becomes most evident in the deportation context.<sup>29</sup> International law allows the state to

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<sup>25</sup> Brouwer, *supra* note 15, p.2.

<sup>26</sup> *Trop v. Dulles*, 356 U.S. 86 (1958), p.102. In “Why Citizenship?” *Virginia Journal of International Law*, Vol.35 (1994-95), p.300, Stephen Legomsky, S., states “Every individual needs one sovereign state to play the role of guardian angel.” In *Trop v. Dulles*, the U.S. Supreme Court ruled in favor of a petitioner who had been denied application for a U.S. passport. A U.S. citizen serving as a private in the U.S. Army escaped from the Army stockade during World War II, and his application for a passport was denied based on the 1940 Nationality Act. Justice Earl Warren stated that “Citizenship is not a license that expires upon misbehavior. Denationalization as a punishment is barred by the Eighth Amendment.” Later, the Supreme Court ruled in *Afroyim v. Rusk* (387 U.S. 253, 1967) that “all U.S. citizens retain the constitutional right to remain a citizen ... unless he voluntarily relinquishes his citizenship”. See *Kerber, supra* note 3, for more details.

<sup>27</sup> In everyday life, we are more likely to be exposed to consular protection rather than diplomatic protection. The Vienna Convention on Consular Relations stipulates in Article 36(1) (a): “consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State.” Detailed provisions about communication and visiting rights of the consular officer follow. Consular protection is generally granted based on nationality. A recent ICJ ruling reconfirmed the importance of consular protection. It ruled that failure by the U.S. to give notification to two German nationals of their right to consular protection was a violation of international law, demanding the U.S. to review and reconsider the conviction and sentence. *LaGrand Case* [2001] *ICJ Rep.* 466.

<sup>28</sup> The discussion in this paper has simplified the function of nationality. In reality, mainly by virtue of the influence of international human rights law, the function of nationality in protection, immigration and social security has been significantly reduced. See Okuda, *supra* note 3, pp.35-39.

<sup>29</sup> See *supra* note 4 for “non-persons”. John Torpey describes “how states and the international state system stripped private entities of power to authorize and forbid movement and gathered that power unto themselves. This was not limited to international borders.” Torpey, J., *The Invention of the Passport*:

evict foreign nationals who pose a risk to national security. The other side of the coin to the state's right to control its national borders lies with the obligation to receive its nationals. Eviction of a foreign national is only possible because the country of the subject's nationality agrees to accept her/him. Refusing readmission of a national would be interpreted as an illegal act that prevents the host state from exercising its border control power.

Stateless persons do not fit in this reciprocal framework of rights and duties between nations. When stateless persons committing crimes that constitute a reason for deportation cannot be expelled because they do not have a country of origin, they can end up in indefinite detention. Kestusis Zadvydas (hereinafter referred to as Z) was a typical example, who took his case to court in the U.S. Z was born to Lithuanian parents in a displaced persons camp in Germany. He immigrated to the U.S. and lived there as a resident alien. Z was ordered deported to Germany for committing crimes that make aliens deportable, but Germany refused to accept him because he was not a German citizen. Z filed a petition for a writ of *habeus corpus* challenging his continued detention.

The court of first instance granted that writ but the appeals court reversed the decision ruling that Z's detention did not violate the Constitution because despite being in detention for five years, eventual deportation was not "impossible." The Federal Supreme Court ruled in 2001 that due process applies to all humans in the U.S, regardless of whether the subject's residency is legal/illegal or temporary/permanent. After the 6-month detention period, once an alien is able to reasonably show that there will be no significant likelihood of removal in the reasonably foreseeable future, the Government must furnish evidence sufficient to rebut such showing. Z was released until the country of his deportation was decided.<sup>30</sup> The judicial response eventually relieved Z from detention. As long as States refuse to accept non-citizens facing deportation, however, stateless persons face the risk of unlimited detention around the globe.<sup>31</sup>

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*Surveillance, Citizenship and the State* (2000) p.8.

<sup>30</sup> *Zadvydas v. Davis*, 533 U.S. 678 (2001). In another case, the Supreme Court held that inadmissible aliens who are subject to removal cannot be held in detention indefinitely. Illegal aliens convicted of felonies may not be detained for more than six months while awaiting deportation if there is no prospect that their native countries will take them back. Cuba had refused to accept the return of those committing crimes in the U.S. (*Clark v. Martinez*, 543 U.S. 371 (2005)). These persons can be described to be *de facto* stateless, as they were rejected from their native country.

<sup>31</sup> See UNHCR, *Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers* (1999), Guideline 9.

Even if they are not deported, in practice, stateless persons find themselves without the right to be readmitted to her/his country of residence despite their right to return to their “own” country as guaranteed under article 12(4) of the International Covenant on Civil and Political Rights. This makes it difficult for them to cross international borders unless their right of reentry has been secured. Stateless persons often lack identification documents which places them at a disadvantage in pursuing economic, social, and cultural rights such as in education, employment, and social services. They can be subject to unnecessary risks of detention- a grave problem in securing their political and social rights. They also face a high risk of discrimination, which has a negative effect on the establishment of their identity. By lacking support from a government, stateless persons are placed at a disadvantage for various rights, but their plight is aggravated if they do not have a stable resident status, which in most countries also entails enjoyment of many rights. Obtaining such a status will generally therefore address many concerns stateless persons face in their daily lives, although only acquisition of a nationality will fully resolve their situation.

Migration can also lead to statelessness. The progress of globalization has increased the flow of people across borders to countries which offer better opportunities, be they industrialized or developing nations. In these countries, aliens are treated in accordance with their residence status. While skilled experts and their families enjoy relatively free travel across borders regardless of nationality, unskilled workers and their families find traveling difficult. They are often left with no choice but to resort to irregular ways to enter or stay in a country which is not their own.

Furthermore, many migrants do not possess documentation; their documentation is lost, stolen, taken away during migration or they sometimes make use of false documents in order to enter another country. This causes trouble in proving identity and consequently their nationality. Even when they are deported, the country of origin may not accept them due to unidentifiable nationality. In this case, the subject needs to clarify the nationality of her/his country of origin. Thus, undocumented migrants may be at risk of statelessness, in particular where several generations have been living in the host country.



## 2 International Legal Development: Creation of Two “Orphan” Conventions

### (1) International regulation of nationality laws and statelessness

International law has traditionally reserved the right to grant nationality to each state. The Permanent International Court of Justice 1923 *Advisory Opinion on the Tunis and Morocco Nationality Decrees*<sup>32</sup> and the 1930 Convention on Certain Questions Relating to the Conflict of Nationality Laws<sup>33</sup> are often cited as evidence. The Convention on Certain Questions Relating to the Conflict of Nationality Laws was the first convention to deal with the problem of statelessness as well as dual nationality, and was the starting point in the effort to prevent statelessness in international law.<sup>34</sup>

The Convention stipulates prevention of statelessness from the loss of nationality when expatriate permits are issued (Article 7), for married women (Articles 8~11), for a child whose parents are both unknown or parents having no or unknown nationality, and for an illegitimate or adopted child (Articles 13~17). The Hague Conference for Codification of International Law, which adopted this Convention, also adopted detailed provisions for stateless persons and stateless children whose fathers' nationality is unknown in *A Protocol Relating to a Certain Case of Statelessness* and *A Special Protocol Concerning Statelessness*.

Article 1 of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws* stipulates that it is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international treaties, international customs, and the generally recognized principles of law with regard to nationality. In order for nationality laws to have opposability, its laws must be consistent with international law. The International Court of Justice provided the “genuine and effective link” criteria in the *Nottebohm* case. Unless the

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<sup>32</sup> *Advisory Opinion on the Tunis and Morocco Nationality Decrees* [1923] PCIJ, Series B, No.4, p.24. Okuda incisively analyses this advisory opinion: “the conception that nationality belongs to the domestic jurisdiction of the state only rephrases a given that assigning a particular nationality is through domestic law and not international law.” (Okuda, *supra* note 3, p.53).

<sup>33</sup> Japan signed on April 12, 1930, but has yet to ratify this Convention. This is also the case for the 1930 *A Protocol Relating to Certain Case of Statelessness*.

<sup>34</sup> Only about 20 countries have become signatories of the Hague Convention. This reflects the states' desire to reserve rights about stateless persons to their jurisdiction, but the principles expressed in the Convention have greatly influenced the development of domestic nationality laws in non-contracting States. See Weis, P., *Nationality and Statelessness in International Law* (rev.2<sup>nd</sup> ed., 1979) pp.27-28; Chan, J., “The Right to Nationality as a Human Right,” *Human Rights Law Journal*. Vol.12 (1991), p.2. As will be discussed later, Japan has also conformed to this trend in international law.

individual has a close relationship with the country based on residence, taxation, employment, family ties, participation in public life and personal ties to the state, nationality would not be internationally effective.<sup>35</sup>

Looking at how laws are applied in various countries, the three factors of birth, descent and residence provide a presumption of a genuine and effective link. Nationality granted at birth based on *jus soli* or *sanguinis* or later through naturalization has been widely adopted to correspond with these three factors.

As was the case of the *Convention on Certain Questions Relating to the Conflict of Nationality Laws*, the focus of attention in international law in the early 20<sup>th</sup> century concentrated on the legal technicalities of how to eliminate the conflict in nationality laws. Concern for improving the disadvantages the stateless suffer did not receive much attention. For this reason, the Convention has been criticized for lacking provisions dealing with arbitrary confiscation of nationality by States. However, this absence probably originates from the drafters' focus on conflict of domestic nationality laws.

The 20<sup>th</sup> century saw denationalization and eviction *en masse* in Europe. In the 1920s, two million people were politically exiled from Russia and denationalized. In the 1930s, many Jews in Germany, Hungary, and Italy lost their citizenship rights for racial reasons, and in the 1940s, Germans and Hungarians lost their nationalities in Czechoslovakia, Poland, and Yugoslavia. At the end of the Second World War, an astonishing 30 million refugees and stateless persons had emerged.<sup>36</sup>

The United Nations Commission on Human Rights adopted a resolution on statelessness at its second session in 1947. This resolution expressed the wish that “early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of

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<sup>35</sup> *Nottebohm Case*, supra note 3. See also Brownlie, I., *Principles of Public International Law* (4<sup>th</sup> ed., 1990), pp.560-1.

<sup>36</sup> Marrus, M., *The Uprooted: European Refugees in the Twentieth Century* (1985), pp. 297-98. Initially no distinction was made between refugees and stateless persons. Both had been displaced from their country (country of nationality/place of residence) and lacked national protection. As international organizations provided support to “refugees,” stateless persons outside their country of habitual residence and without national protection qualified as refugees and received treatment as such. However, as reasons for flight (racial, political, or religious persecution) became more important as criteria in screening a refugee claim, statelessness was conceptually differentiated from a refugee. See Batchelor, supra note 16, pp.239-41. The problem of statelessness received very little attention outside Europe. The U.N. International Law Commission Report by *Special Rapporteur* Manley Hudson only briefly mentions “Arab refugees from Palestine” and “stateless persons in the Far East.” Hudson, supra note 9, p.17.

nationality as regards their legal and social protection and their documentation.”<sup>37</sup> On the basis of this resolution, the Economic and Social Council adopted a resolution in March the following year requesting the Secretary-General to undertake a study of the existing situation with regard to the protection of stateless persons and national legislation, international agreements and conventions relevant to statelessness, and to submit recommendations to the Council on the desirability of concluding a further convention on this subject.<sup>38</sup> Pursuant to such resolution, the Department of Social Affairs of the United Nations Secretariat prepared the report, *A Study of Statelessness*.<sup>39</sup>

This report extended its provisions to *de jure* as well as *de facto* stateless persons; it outlines the situation for stateless persons traveling across international borders, their legal status in the host country of residence, activities of international organizations, international agreements and conventions relevant to the protection of refugees, causes of statelessness, and portrays the plight of illegal immigrants who enter the country of residence without valid passports/visas living under constant fear of deportation and avoiding contact with authorities. It also refers to stateless persons who are at risk for protracted detention as no country is bound to receive a stateless person for whom an expulsion order has been issued.

The report recommends countries to issue travel documents to stateless persons, refrain from expulsion to countries where they risk becoming illegal residents, secure the right to work and the opportunity for elementary education, and exempt them from reciprocity requirements in practicing their profession or in higher education.

After this report was compiled, the Economic and Social Council appointed an *Ad Hoc* Committee on Refugees and Related Problems, consisting of representatives from thirteen governments, to draft the text of a convention for refugees and stateless persons. The Council also requested the International Law Commission (ILC) to prepare a study and make recommendations for eliminating the problem of statelessness.<sup>40</sup>

The *Ad Hoc* Committee held two sessions before it presented the Council with a Draft Convention relating to the status of refugees and a Draft Protocol relating to the status of stateless persons. The Economic and Social Council reconvened the *Ad Hoc*

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<sup>37</sup> UN Doc.E/600(1947), para.46

<sup>38</sup> ECOSOC Res.116D(VI), 1 and 2 March 1948.

<sup>39</sup> *Supra* note 4.

<sup>40</sup> ECOSOC Res.248B(IX), 8 August 1949.

Committee to revise the drafts, based on comments from various states and discussions in the Council. At the same time, it recommended the General Assembly to approve the draft. The General Assembly decided to convene a conference of plenipotentiaries in Geneva to examine and adopt these draft instruments.<sup>41</sup>

Worthy of note was that the Economic and Social Council presented the *Ad Hoc* Committee with a single draft dealing with both refugees and stateless persons. This was because the position of stateless persons was considered similar to refugees as both lacked the protection and assistance of the State. However, the *Ad Hoc* Committee decided to separate the two, giving refugees the priority. This has been said to be a result of the urgency of the refugee problem.<sup>42</sup>

The Committee resolved to adopt the draft Refugee Convention, which had largely adopted recommendations in the 1949 U.N. Report, and a draft Protocol, which sought to apply the Refugee Convention *mutatis mutandis* to stateless persons who were not refugees. The drafters of the Protocol had thought of it as an appendix to the Refugee Convention rather than as an independent document. The elimination of statelessness was referred back to the Economic and Social Council and the ILC was asked to draw another document concerning this matter.<sup>43</sup>

The U.N. Conference on Plenipotentiaries on the Status of Refugees and Stateless Persons convened from July 2 to 25, 1951. The discussion focused on the above draft Convention and Protocol prepared by the *Ad Hoc* Committee, the preamble compiled by the Economic and Social Council, and a draft of Convention Article 1 defining refugees recommended by the General Assembly. Representatives from 26 countries, with two countries participating as observers, voted unanimously 24-0 to adopt the Refugee Convention. However, the Conference referred the Draft Protocol back to the appropriate organs of the U.N. for further study.<sup>44</sup>

With the entry into force of the Refugee Convention on April 22, 1954, the Economic and Social Council summoned the Second Conference of Plenipotentiaries between

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<sup>41</sup> GA Res.429(V), 14 Dec. 1950. See also Robinson, *supra* note 9, part one.

<sup>42</sup> See Batchelor, *supra* note 16, p.243. In the political framework of the Cold War, Hathaway states that refugees were given priority to stateless persons to advance “sinister political purposes” of Western states. Hathaway, J., “A Reconsideration of the Underlying Premise of Refugee Law,” *Harvard International Law Journal*, Vol.31 (1990), pp.145-48.

<sup>43</sup> See Batchelor, *supra* note 16, p.244.

<sup>44</sup> UN Doc.A/1913, 15 October 1951, p.1.

September 13 and 23, 1954, in New York. Twenty-seven countries sent representatives, and five countries including Japan attended as observers. The conference was called to revise the Draft Protocol, but as it had been compiled as an appendix to the Refugee Convention, the Draft Protocol was incomplete as an independent document. The conference of plenipotentiaries reviewed the Refugee Convention to redraft its provisions as a separate convention for stateless persons.<sup>45</sup> The protocol draft for stateless persons was adopted unanimously 19-0 (with 2 abstentions) on the final day of the conference, and opened for signature.<sup>46</sup>

## **(2) The 1954 Stateless Persons Convention: Who Determines Statelessness?**

Several important provisions in the 1951 Refugee Convention have not been included in the 1954 Stateless Persons Convention, although the latter was modeled after the former. These include for example, provisions regarding penalties for illegal entry and presence (Article 31 of the Refugee Convention), the principle of *non-refoulement* (Article 33 of the Convention), and a supervisory body (Article 35 of the Convention). The absence of provisions equivalent to Article 31 and 35 of the Refugee Treaty must not be overlooked when considering the *status quo* of stateless persons. Since the treaty lacks a supervisory mechanism, it is often described as an “orphan convention” along with the Convention on the Reduction of Statelessness. This issue will be discussed later.<sup>47</sup>

Three points need to be confirmed concerning Article 1, which provides the most common definition for statelessness in international law. The first is the problem of application when the same person is both a refugee and a stateless person. Article 1 A (2) of the Refugee Convention includes stateless persons in its application. This is confirmed in the third paragraph of the Preamble of the Stateless Persons Convention. The Stateless Persons Convention includes all stateless persons as its subject. Seemingly, this would cause a problem of conflict of application for signatory states to both Conventions.

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<sup>45</sup> See Robinson, *supra* note 9, Part one.

<sup>46</sup> See *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons*, Vol. I (1995), pp.95-98 for countries participating in the Conference of Plenipotentiaries and the Final Act and resolution adopted.

<sup>47</sup> *Information and Accession Package*, *supra* note 16, para 5. The problem of the supervisory body was not discussed during the conference, as representatives did not raise it as an issue. Time pressures also contributed to the failure to discuss the subject. Batchelor, *supra* note 16, 245-47. The Final Act mentions that the drafters did not regard it necessary to include the generally accepted principle of *non-refoulement*. *Collections of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons*, *supra* note 48, p.97.

Much discussion took place on this issue at the conference. However, as the Chairman of the conference of plenipotentiaries has confirmed and Robinson stresses, the state must apply the more favorable provisions of the Refugee Convention. Signatories of the two Conventions apply the Refugee Convention to all refugees, including stateless persons, and apply the Stateless Persons Convention to stateless persons who are not refugees. This is also justified by the circumstances where the Stateless Persons Convention was originally intended to cover such persons to whom the Refugee Convention is not applicable.<sup>48</sup>

The second refers to the reasons for limiting the definition of stateless persons to *de jure* stateless persons. Among several factors,<sup>49</sup> the most important lies in the drafters' intention to avoid an overlap between the two Conventions. It was thought that *de jure* statelessness occurred from a conflict of nationality laws, and *de facto* statelessness from intentional action such as escape from persecution of the country of nationality. In other words, *de facto* stateless persons and refugees were placed in the same category. The premise that *de facto* stateless persons are refugees and should be dealt with as such led to the thinking that the application of the Stateless Persons Convention should be limited to *de jure* stateless persons.<sup>50</sup>

Others reasons are that a clear definition was necessary to prevent discrepancy among contracting parties in determining statelessness. The drafters did not want the Convention to be the impetus for persons to attempt to secure a second nationality if they felt they were *de facto* stateless. In addition to these circumstances, the conference of plenipotentiaries hoped to secure as many signatory countries and ratifications as possible without reservations.<sup>51</sup>

The third problem lies in the administrative practices determining statelessness. The

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<sup>48</sup> Robinson, *supra* note 9, Article 1, para.1

<sup>49</sup> Batchelor, *supra* note 3, pp.172-73; Batchelor, *supra* note 16, pp.247-48

<sup>50</sup> The Final Act recommends contracting States to extend the rights accorded to *de jure* stateless persons under the Convention to *de facto* stateless persons, if it decides that the reasons for renunciation of nationality is valid. Worthy of note is that while determination as a *de jure* stateless person will have extraterritorial effects, voluntary treatment as a *de facto* stateless person may not always do so. Therefore, it may be said that States are not under an obligation (no violation of Article 28) to recognize the validity of travel documents issued by other states to *de facto* stateless persons. However, signatory states are expected to recognize the validity of this travel document based on the recommendation. Robinson, *supra* note 9, Article 1, para. 5.

<sup>51</sup> As of November 1, 2007, only 62 countries have become signatories to this Convention. Asian countries including Japan have not signed the Convention.  
[http://www.unhcr.ch/html/menue/b/o\\_c\\_sp.htm](http://www.unhcr.ch/html/menue/b/o_c_sp.htm).

Stateless Persons Convention does not elaborate a procedure for identifying who is stateless, or how that is to be proven. Since the Convention does not provide for a supranational body to pass upon the eligibility of a person as a “stateless person,” the determination must ordinarily be made by the authorities of the country where the person resides. In that event, without actual provisions in the Convention, each state should establish appropriate procedures for determining statelessness in accordance with the general obligations of the Convention.

Practical application of these procedures varies among states, with some adopting legislation that designates specific government agencies and procedures to examine and adjudicate claims of statelessness.<sup>52</sup> However, most countries, including those in Europe, have no specific procedure in place. Stateless persons may be obliged to channel their application through the asylum regime simply because there is no other procedure available to them. In reality, stateless persons are processed within a framework that includes humanitarian or subsidiary protection.<sup>53</sup>

To prove statelessness, the applicant would be asked to present documents that indicate her/his status, similar to the screening process for refugees.<sup>54</sup> Stateless persons are not considered a national by any State. Therefore, in theory, it may follow that a stateless person is obliged to prove that s/he has no legal bond with *any* country. However, to require proof that the individual lacks the nationality of states with which s/he has no close relationship goes beyond what can be reasonably expected from an individual. As a result, requirements of proof should be limited to the countries of (former) habitual residence, birth, nationality of the parents or another country with which the person has close ties. For this purpose, documentation from the embassy or consular office of her/his country of origin or habitual residence confirming that the individual is not a national generally provide conclusive evidence.<sup>55</sup> However, the relevant authorities of the country of origin or country of habitual residence may refuse to issue certified documents stating the person is not a national, or they may simply not reply to inquiries.

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<sup>52</sup> In France, the Office for the Protection of Refugees and Stateless Persons conducts the procedure for recognizing stateless status. In Spain, the Aliens Law provides that the Ministry of Interior recognize the status of statelessness, as is also the case in Italy. *Nationality and Statelessness: A Handbook for Parliamentarians*, *supra* note 12, p.19.

<sup>53</sup> *Id.*, pp.19, 20.

<sup>54</sup> See *Id.*, pp.17-18, 20; Robinson *supra* note 9, Article 1, para.4; Batchelor, *supra* note 3, pp.174-75.

<sup>55</sup> In Japan, the Director-General of the Civil Affairs Bureau of the Ministry of Justice issues a certificate of nationality, including a certificate that the person in question does not possess Japanese nationality. (Kidana, *supra* note 3, p.64). For the present, this is the official document that certifies a person residing in Japan does not have Japanese nationality.

In this case, states may accept other methods of proof, including credible declarations made by witnesses and other third parties.

A collaborative approach among relevant States is essential in the recognition of statelessness.<sup>56</sup> Countries adjudicating applications for statelessness need to share information among various government departments and ministries, while collecting information on relevant nationality laws and regulations in related countries. At present, a standard approach for identifying stateless persons among States does not exist. Since the criteria for establishing proof of statelessness may vary from State to State, an individual who might be recognized as stateless in one country might not be so recognized in others. If a State refuses to confirm that a person is its national, the refusal in itself is a form of evidence that the person lacks protection from that State.

Many provisions in the Stateless Persons Convention, as follows from its genesis, have been modeled after the Refugee Convention. Typical examples are non-discrimination (Article 3), freedom of religion (Article 4), juridical status (Chapter 2), gainful employment (Chapter 3), welfare (Chapter 4), freedom of movement (Article 26), identity papers and travel documents (Article 27 and 28), expulsion (Article 31), and expediting naturalization proceedings (Article 32). Nevertheless, most provisions limit application of this Convention to legal residents. The treaty assures minimum legal status to stateless person and does not oblige signatory states to eliminate statelessness.

### **(3) The 1961 Convention on the Reduction of Statelessness and the UNHCR as an International Agency for Stateless Persons**

The International Law Commission (ILC), responding to hopes for research on the elimination of statelessness, took up nationality, including statelessness, in its founding days for codification. It appointed Hudson and others as *Special Rapporteurs* for consideration. The Economic and Social Council demanded the compilation at the earliest opportunity of a draft treaty for the elimination of statelessness in August 1950 based on the discussion in the *Ad Hoc* Committee. The ILC drafted two draft treaties for the elimination and reduction of statelessness.<sup>57</sup> The General Assembly requested that

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<sup>56</sup> In no way is this to compromise the integrity of refugee determination processes. Privacy and the safety of asylum-seekers and their families is the fulcrum of refugee protection. An arrangement must be made with great care for inter-state collaboration in addressing stateless problems to avoid negative effects on the fair administration of refugee determination.

<sup>57</sup> *Nationality, including Statelessness Report on the Elimination or Reduction of Statelessness* by Robert



the Secretary General decide on the date and venue for the conclusion of this treaty.<sup>58</sup>

In 1959, 35 countries assembled in Geneva for the U.N. Conference of Plenipotentiaries on the Elimination of Reduction of Future Statelessness to discuss the ILC draft for the reduction of statelessness.<sup>59</sup> However, since an agreement could not be reached about the confiscation of nationality, it was reconvened in 1961. After more than ten years since the first draft was compiled, 30 countries, including Japan, signed the Convention on the Reduction of Statelessness.<sup>60</sup>

Fourteen years hence, the Convention entered into force on December 13, 1975. The work of the ILC was seen as technical legal work, a continuation of the efforts initiated in the 1930 Hague Conference for the Codification of International Law Codification Conference in the field of nationality. The goal was to adopt a convention that could harmonize the nationality legislation of countries that used varying means to determine a citizen. Delegates expressed the opinion that *de facto* and *de jure* stateless persons should be able to benefit equally from the Convention, but the final draft limited application to *de jure* stateless persons. The erroneous notion that equated *de facto* stateless persons with refugees prevailed again.<sup>61</sup>

The Convention reflects a commitment to reduce statelessness. Its most important feature lies in granting nationality at the time of birth when the person would otherwise be legally stateless. It also prevents statelessness by obligating states to not deprive a person of a nationality where it would render him legally stateless. Detailed provisions stipulate how nationality can be provided in accordance with *jus soli* and *sanguinis*, as well as residency in the signatory states (Articles 1 to 4). It also obligates State parties to avoid statelessness for its residents through loss and renunciation of nationality, denationalization and transfer of territory.

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Cordova, *Special Rapporteur*, A/Cn.4/64, Extract from the Yearbook of the International Law Commission, 1953, vol. II Part I and II.

<sup>58</sup> UN GA Res.896 (IX), 4 December 1954.

<sup>59</sup> The ambitious Convention on Elimination of Statelessness never went beyond the status of a draft. Batchelor, *supra* note 3, pp.250, n.89; Chan, *supra* note 36, p.4.

<sup>60</sup> See Weis, *supra* note 4, pp.1073-96; *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons*, *supra* note 48, pp.107-8.

<sup>61</sup> Batchelor, *supra* note 16, pp. 251-52. The Conference also recommended that *de facto* stateless persons should be treated as equally as possible with *de jure* stateless persons, and be enabled to acquire an effective nationality. *Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons*, *supra* note 48, p.110.

Article 11 provides for “a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority” within the U.N. The final version of the article adopted by the Commission provided for the creation of an agency to act on behalf of stateless persons and a tribunal competent to decide on any disputes between parties as well as to hear complaints presented by the agency on behalf of stateless individuals. The idea of a tribunal faced overwhelming opposition from the plenipotentiaries, so an article was inserted to take a conflicting case to the International Court of Justice instead. The agency acting on behalf of the stateless persons remained in Article 11, but a reservation clause was admitted for this Article.

The Article 11 agency was to be established after the sixth instrument of ratification was deposited. This was the condition for the Convention to come into force (Article 18 (1)). After receiving six ratifications to the Convention in 1974, the Secretary-General acted under Article 20(2) to call attention of the General Assembly for the establishment of an agency to assist stateless persons. In so doing, the Secretary-General suggested that this agency should be established within the framework of the UNHCR, citing supporting factors such as the organization’s experience with stateless persons and the discussion in the Conference of Plenipotentiaries. Members of the Soviet bloc opposed this idea, so a compromise was reached for the UNHCR to be charged with the responsibilities of the Article 11 agency on a provisional basis, which would be reviewed at a later date. The General Assembly reviewed the provisionally allocated duties two years later in 1976, and requested the UNHCR to continue to perform these functions as the Article 11 agency.<sup>62</sup> In 1996, the General Assembly, following an Executive Committee’s conclusion, requested the UNHCR to continue its activities on behalf of stateless persons, actively promote accession to the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, and also “provide relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation.”<sup>63</sup>

Despite action from the UNHCR, only 34 states have become signatories of the Convention on the Reduction of Statelessness as of November 1, 2007.<sup>64</sup> However, similar to the case of the 1930 Hague Convention on Certain Questions relating to the

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<sup>62</sup> UN GA Res. 3274 (XXIX), 10 December 1974; UN GA Res.31/36, 30 November 1976. For details of the circumstances between the two resolutions, see Bachelor, *supra* note 16, 252-56.

<sup>63</sup> UN GA Res.50/152, 9 February 1996

<sup>64</sup> <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b39620&page=search>.

Conflict of Nationality Laws, the general principles embodied in the Convention have been substantively incorporated into nationality legislation and practice in many States, including Japan.<sup>65</sup>

#### **(4) Statelessness in International Human Rights Discourse**

Since the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, the trend in international law has increasingly leaned towards the reduction of statelessness. In this context, the problem of nationality not only concerns interstate relations but also human rights. In 1984, the Inter-American Court of Human Rights clearly expressed this view in its advisory opinion on whether Amendments to the Naturalization Provisions of the Constitution of Costa Rica was compatible with the Inter-American Convention.<sup>66</sup>

Nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manner in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights. The classical doctrinal position, which viewed nationality as an attribute granted by the state to its subjects, has gradually evolved to the point that nationality is today perceived as involving the jurisdiction of the state as well as human rights issues.

The 1948 Universal Declaration of Human Rights served as the starting point for this development in international law. Article 15 declares, "Everyone has the right to a nationality." It also calls attention the plight of the Jews, adding, "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Most human rights agreements hereafter have provisions that refer to nationality as a right.

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<sup>65</sup> *Information and Accession Package*, *supra* note 17, para. 32.

<sup>66</sup> Inter-American Court of Human Rights, *Re Amendment to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion of 19 January 1984, OC-4/84, paras. 32-35.

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination prohibits and eliminates in Article 5 racial discrimination in all its forms concerning nationality. Article 24 of the 1966 International Covenant on Civil and Political Rights, provides: “Every child shall be registered immediately after birth and shall have a name. Every child has the right to acquire a nationality.” Nationality in children has been further protected in the 1989 Convention on the Rights of the Child: “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality... State Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.”

Concerning women’s nationality, the 1979 Convention on the Elimination on All Forms of Discrimination Against Women (CEDAW) builds on the 1957 Convention on the Nationality of Married Women. Article 9 of CEDAW stipulates that: “1 State Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband. 2 State Parties shall grant women equal rights with men with respect to the nationality of their children.”

The 2006 Convention on Rights of Persons with Disabilities also recognizes the fundamental nature of the right to acquire and change a nationality. It stresses in Article 18 that: “Children with disabilities shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality”. It also explicitly requires that States ensure that persons with disabilities “[h]ave the right to acquire and change a nationality and are not deprived of their nationality arbitrarily or on the basis of disability” and “[a]re not deprived, on the basis of disability, of their ability to obtain, possess and utilize documentation of their nationality or other documentation of identification, or to utilize relevant processes such as immigration proceedings, that may be needed to facilitate exercise of the right to liberty of movement”.

Regional human rights instruments also refer to nationality, such as the 1969 American Convention on Human Rights, which has been supported by the Inter-American Court. Article 20 reflects the *jus soli* principle prevalently adopted in Latin America: “1. Every person has the right to a nationality. 2. Every person has the right to the nationality of

the State in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.” The notable feature of this provision is that it refers to the obligation of the country of a person’s birth to grant nationality.

In Europe, the European Convention on Nationality was adopted in 1997 and the Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession was adopted in 2006.<sup>67</sup> The 1997 Convention incorporates the basic right of nationality for all and prohibits arbitrary deprivation of nationality and change of marital status automatically affecting the nationality of either spouse (Article 4). It provides that states shall grant foundlings discovered on their territory the nationality of the state if they would otherwise become stateless and children shall acquire the nationality of the state of birth if s/he would otherwise become stateless (Article 6). It also has a provision to prevent statelessness when one loses nationality (Article 7). The 2006 Convention deals with nationality in state succession. It provides for facilitation of nationality procedures for those rendered stateless as a result of state succession, and obligatory granting of nationality based on *jus soli* to prevent statelessness at birth.<sup>68</sup>

Nationality as a human right (acquisition and maintenance) is the basic principle for preventing statelessness.<sup>69</sup> On the other hand, improving the legal status of *de facto* stateless persons who often lack legal resident status is an urgent need. *De jure* stateless persons are in the same situation if they lack legal resident status. What is of importance here is the principle of non-discrimination, which constructs the main pillar of

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<sup>67</sup> Yasuhiro Okuda and Shoko Iida, “Yoroppa kokuseki joyaku (European Nationality Conventions) “in Okuda ed., *Kokusaishihou • Kokusekihoh • Kazokuhoh Shiryousyu-gaikoku no rippo to joyaku (International Private Law, Nationality Act and Family Law: Collected Materials on Foreign Legislations and Treaties)*(1997), pp.92-124; Mari Kawamura, Nanmin no Kokusaiteki Hogo (*International Protection of Refugees*) (2003) pp.177-201; Kozue Niwa and Iku Kobata trans.,”Kokkashoukei ni kanrennsuru mukokuseki no boushi ni kansuru yoroppahyougikaijyouyaku oyobi setsumeihoukokusho (Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession and its Explanatory Report)”, *Housei Ronshuu (Nagaya University Law Journal)*, No.218 (2007), pp.267-83.

<sup>68</sup> The ILC had attempted to codify the principles regarding the impact of state succession on nationality issues as a response to the spate of state successions in Eastern Europe. Based on recommendations from the ILC, the General Assembly adopted the 2000 Resolution on Nationality of Natural Persons in Relation to the Succession of States. UN Doc.A/Res/55/153, 30 January 2001. This declaration addresses the prevention of legal statelessness among nationals and habitual residents of predecessor states and children born after the succession.

<sup>69</sup> As ILC *Special Rapporteur* Hudson pointed out more than half a century ago, merely assigning a nationality will not solve problems. “Purely formal solutions.... might reduce the number of stateless persons but not the number of unprotected persons. They might lead to a shifting from statelessness *de jure* to statelessness *de facto*.” Hudson, *supra* note 9, p.20. Attribution of an effective nationality, which ensures protection by a state, is essential.

international human rights law. As the Committee on Civil and Political Rights clearly states in relation to the International Covenant on Civil and Political Rights: “In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness... Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”<sup>70</sup> This also applies to the International Covenant on Economic, Social and Cultural Rights.

However, international human rights law does not prohibit differentiation of treatment altogether. Differentiation will not constitute discrimination if the criteria are reasonable and objective and if the aim is to achieve a purpose that is legitimate under the Covenant.<sup>71</sup> Differentiation in treatment will occur between citizens and non-citizens or between different categories of non-citizens, but it must be legitimate under international human rights law. Although the state retains the sovereign right to make distinctions between different categories of non-citizens, this distinction shall not be at variance with the principle of non-discrimination.<sup>72</sup>

The state has the sovereign right to control its borders, and its immigration policy has traditionally been left to its discretion. However, all persons enjoy inalienable human rights from birth. International human rights instruments have been compiled in recognition of these underlying principles. Non-citizens must be treated within an immigration policy legitimate under international human rights laws. International human rights laws bind states in differentiating non-citizens by immigration status.

Today, in mainly industrialized countries, one should not only take account of the distinction between citizens and non-citizens, but also the different categories of non-citizens ranging from permanent residents, who enjoy rights similar to that of citizens, to undocumented aliens at the far end of the spectrum. The establishment of different categories for aliens in itself does not constitute discrimination, but if its

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<sup>70</sup> *General Comment No. 15: The Position of Aliens under the Covenant*: 11/04/86, paras.1, 2.

<sup>71</sup> *General Comment No.18: Non-discrimination*: 10/11/89, para. 13.

<sup>72</sup> The Human Rights Committee, pursuant to Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination on Against All Forms of Discrimination Against Women, states that the term *discrimination* as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. *Id.*, para. 7.

application causes unjustifiable disadvantages for a certain group, one can suspect discrimination in the legal sense.

Those without a legal status often cannot enjoy various social services, for lack of documents to prove their identity or fear of being found by the authorities. Some regard this as a rightful retribution for lack of legal status, but this situation cannot be overlooked from the perspective of international human rights law. In reality, *de facto* stateless persons often cannot acquire legal status due to their lower economic or social status. Several factors for discrimination such as ethnicity, national origin, or race may intertwine in working against them. Such being the case, one could reasonably suspect that the creation of different categories of non-citizens may have a discriminatory “effect” if not an intention to impair enjoyment of human rights against undocumented migrants based on ethnicity, national origin, race or other social status<sup>73</sup>.

It should be recalled that the Committee on the Elimination of Racial Discrimination indeed asserts that under the International Convention on the Elimination of All Forms of Racial Discrimination, “... differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.” It goes on to recommend State parties to “ensure that immigration policies do not have the effect of discriminating against persons on the basis of race, colour, descent or national or ethnic origin.”<sup>74</sup>

The Inter-American Court of Human Rights expressed upon discussing the concept of discrimination in detail in its advisory opinion on the rights of illegal immigrants: “Migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature.... The State may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these maybe, including those of a migratory character.”<sup>75</sup>

Similarly, the Committee on Economic, Social and Cultural Rights confirms in its

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<sup>73</sup> Lee, *supra* note 19, pp.100-101.

<sup>74</sup> *General Recommendation No.30: Discrimination Against Non Citizens*: 01/10/2—4 paras.4, 9.

<sup>75</sup> Inter-American Court of Human Rights, *Re Judicial Condition and Rights of Undocumented Migrants*, Advisory Opinion of 17 September 2003, OC-18/03. para.173.

General Comment on education that “the principle of non-discrimination extends to all persons of school age residing in the territory of a State party including non-nationals and irrespective of their legal status.”<sup>76</sup> It also states concerning rights to health: “States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including minorities, asylum-seekers and illegal immigrants.”<sup>77</sup> The 2008 General Comment on the Right to Social Security “prohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.” It also calls the States to pay special attention to individuals and groups who traditionally face difficulties in exercising this right, such as minority groups, refugees, asylum-seekers, internally displaced persons, returnees, and non-nationals.<sup>78</sup>

International human rights law assures equal rights for all humans.<sup>79</sup> Based on the above opinions of human rights bodies, one needs to be watchful of whether granting certain immigration status to a specific group has the “effect of nullifying or impairing the equal enjoyment or exercise of rights.” In observations of periodic reports submitted by State parties, the Committee on the Elimination of All Forms of Racial Discrimination and the Committee on Civil and Political Rights<sup>80</sup> sometimes encourages states to regularize the status of illegal immigrants to secure their human rights.<sup>81</sup> This has been a decisive step for improving the status of *de facto* stateless persons.

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<sup>76</sup> *General Comment No.13: The Rights of Education*, UN Doc.E/C/1999/10, para. 34.

<sup>77</sup> *General Comment No.14: The Rights to the Highest Attainable Standard of Health*, UN Doc.E/C.12/2000/4 para. 34.

<sup>78</sup> *General Comment No.19: The Right of Social Security*, E/C/12/GC/19, 4 February 2008, paras. 29-31.

<sup>79</sup> Articles 8 to 33 of the 1990 Migrant Workers Convention extends civil, political, economic, social and cultural rights protection to illegal migrant workers. The Convention in principle does not apply to “refugees or stateless persons” (Article 3 d), but the stateless persons here refers to *de jure* stateless persons, so one may assume that it can be applied to *de facto* stateless persons who are not refugees.

<sup>80</sup> *E.g., Concluding Observations Spain* 10 March 2004, *Report of the Committee on the Elimination of Racial Discrimination*, UN Doc. A/59/18 para.171; *Concluding Observations Italy*, UN Doc.E/C.12/1Add.103, 26 November 2004, para. 8.

<sup>81</sup> Precedents in the European Court of Human Rights indicate cases in limited circumstances when there is a right to regularization. European Court of Human Rights, *Sisojeva and Others v. Latvia*, Judgment of 16 June 2005, Application No.60654/00, para.104011. See Lu, H., “The Personal Application of the Right to Work in the Age of Migration,” *Netherlands Quarterly of Human Rights*, Vol.26 (2008), pp.63-70.



### 3 The Issue of Statelessness in Japan

Despite the General Assembly encouraging States to consider acceding to the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness,<sup>82</sup> Japan has signed neither. There has been discussion in the National Diet on this topic several times.<sup>83</sup> For example, Ministry of Foreign Affairs official Mr. Kuriyama summarized the content of the Convention on the Reduction of Statelessness on behalf of the government on April 17, 1981 during the Lower House Committee on Foreign Affairs: “The Convention grants a stateless person born within the territory of a state, the nationality of that state, and establishes certain rules for granting nationality to those in danger of becoming stateless.” In explaining why Japan had not become a signatory, he said, “Our Nationality Act adopts the principle of *jus sanguinis* based on patrilineal descent. This clashes with the *jus soli* of the Convention.”

However, on other occasions (April 27 and May 28 in 1979), Ministry of Foreign Affairs official Mr. Harunori Kaya spoke on behalf of the government in the same Committee: “the two Conventions merit accession or ratification when conditions allow us to do so... We will consider the issue so that the Diet may ratify these Conventions in due course.”<sup>84</sup>

The Convention on the Reduction of Statelessness aims to prevent statelessness, and the Convention Relating to the Status of Stateless Persons aims to improve the status of stateless persons. Although Japan has not signed either, they provide a useful framework in analyzing stateless issues in Japan. The following outlines the situation of statelessness in Japan from the perspective of prevention and how stateless persons have been treated.

#### (1) Prevention of Statelessness

The 1889 Constitution of the Empire of Japan stipulates in Article 18 that “the conditions necessary for being a Japanese subject shall be determined by law.” Pursuant to this constitutional requirement, the first Japan’s Nationality Act was promulgated and

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<sup>82</sup> E.g., A/Res.61.137, 25 January 2007, para. 4.

<sup>83</sup> Searched through the minutes database systems of the Diet Sessions (<http://kokkai.ndl.go.jp/cgi-bin/KENSAKU/>)

<sup>84</sup> However, an interview with the Ministry of Foreign Affairs on June 9, 2009, indicated that the Japanese Government is not considering the issue of accession to these Conventions at the moment.

enforced in 1899. The Constitution of Japan enacted in 1946 after World War II provides in Article 10: “The conditions necessary for being a Japanese national shall be determined by law.” The Nationality Act was enacted in 1950 in accordance with this provision in the Constitution (the former Nationality Act was repealed accordingly). The Nationality Act was greatly amended in 1984 largely due to the ratification of the Convention on the Elimination of All Forms of Discrimination Against Women.

Until the 1984 amendment, the *jus sanguinis* principle in the Japanese Nationality Act<sup>85</sup> passed on nationality through patrilineal descent. In Okinawa, children born to a father stationed in an American military bases and a Japanese mother often became stateless as a result of conflicting nationality laws between the two countries. Worse yet, when an American soldier deserted his Japanese family, his child, unable to prove the father’s American citizenship, often became *de facto* stateless.<sup>86</sup> When a Japanese woman trying unsuccessfully to divorce an American who had deserted her had a child with a Japanese man out of wedlock, this child could become stateless. Article 772 of the Japanese Civil Code presumes the father to be the American husband if the child was conceived during the marriage. While this presumptive father’s nationality cannot be confirmed if he is missing, the genuine father could not pass on his Japanese nationality to the child because of the operation of the Civil Code. Desertion-by-American-husband cases comprised 90% of stateless children in Okinawa.<sup>87</sup> The 1984 revision of the

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<sup>85</sup> Yasuhiro Okuda states “There is a tacit agreement on using *jus sanguinis* as a criteria for citizenship. If we are to veer away from this principle, we may need to reconsider the fundamentals of the State. Although minute changes may be made in the principle of *jus sanguinis*, substituting this principle for another would be inconceivable.”

Okuda, *Kazoku to kokuseki (Family and Nationality)*(rev.2003),p.14.Ministry of Justice Civil Affairs Bureau Director Mr. Kiyoshi Hosokawa commented at the time the Nationality Act was revised in 1984 that “Japan does not need to adopt the *jus soli* principle due to the scarce possibility that it would accept a large number of immigrants.” He also referred to reasons for continuing to abide by the *jus sanguinis* principle: “Japan as a country has always been a mono-ethnic State with a single language, culture and history. A deeply rooted tradition of *jus sanguinis* lies within society, and this has been related to the country’s identity. *Jus sanguinis* in our Nationality Act has been established on this tradition and consciousness, and at present, the Japanese would not be in a position to accept *jus soli*”. Ministry of Justice Civil Affairs Bureau Legal Affairs Study Group ed., *Kaisei kokusekiho, kosekiho no kaisetsu (Interpretation of the Revised Nationality Act, Family Registry Law)* (1985), p.8.

<sup>86</sup> Kiyoko Kaneshiro, “Kokusekiho ikensosho to kanikika seido(Supreme Court Ruling on Nationality Act and Naturalization”, *Jurist* No.745(1981),p.112. The number of stateless persons residing in Okinawa Prefecture due to reasons cited in the text who have registered as aliens was 73 as of the end of June 1980. According to Ministry of Justice Immigration Bureau records, among this 73, those under 20 were 49, (23 Americans, 22 Chinese and 4 others). (Government Response no.4 House of Councilors Interpellation no.93-4, November 25, 1980) The U.S.-Japan joint international welfare consultation group reported that as of November 18, 1980, 35 cases had been dealt with and 39 were pending. Yuko Taniguchi and Kennen Yoseda, “Okinawa ni okeru mukokusekiji no jittai to kaiketsusaku no genjo (Reality of Stateless Children in Okinawa and Prospects for Solutions)”, *Jiyu to seigi (Liberty and Justice)*, Vol.32, No.11 (1980), p.20.

<sup>87</sup> Tsukida, *supra* note 1 pp.99.

Nationality Act solved this problem substantially by adopting *jus sanguinis* of bilineal descent.<sup>88</sup>

The Japanese Nationality Act has several important provisions that prevent statelessness which substantively accommodate the principles stated in the Convention on the Reduction of Statelessness and the Convention Relating to the Status of Stateless Persons. Firstly, the child acquires Japanese nationality at birth, when both parents are unknown or have no nationality in a case where the child is born in Japan (Article 2(3)). This is an exception to the otherwise *jus sanguinis* principle adopted in the Act. In acquiring nationality after birth, restrictions on naturalization procedures have been relaxed. Article 8(4) of the Nationality Act provides for relaxation of the requirements for naturalization for a person born in Japan with no nationality since the time of birth and domiciled in Japan for three consecutive years or more since then (Article 8(4)).<sup>89</sup>

A Japanese national loses her/his nationality only when s/he acquires a foreign nationality by her/his own choice (Article 11). The Nationality Act prevents dual nationality in accordance with the principle of single nationality, but loss of Japanese nationality occurs only after the person acquires another nationality. The Act prevents statelessness by refraining to create it before the person has acquired another nationality. The provisions do not refer to the deprivation of foreign nationality.<sup>90</sup> However, experts suggest that if the deprivation is retroactive to the time the person acquired a foreign nationality, s/he would be considered not to have acquired a foreign nationality and would remain a Japanese national.<sup>91</sup>

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<sup>88</sup> The Supplementary Provision 5 of the 1984 revision (Law No.45, May 25, 1984), states that those born from January 1, 1965, to the day before the revised Nationality Act was enforced on January 1, 1985, can be granted Japanese nationality by notifying the Minister of Justice if their mother was a Japanese citizen when the child was born. In Okinawa, even before the revision of the Nationality Act, a concerted effort existed for the elimination of the problem of statelessness. (*Ibid.*, Chapter 3).

<sup>89</sup> This provision was added in the 1984 Revised Nationality Act. During the discussion for revision, the drafters considered whether a child born in Japan, who would otherwise be rendered stateless, should be granted Japanese nationality. However, as long as one of the parents possesses a foreign nationality, the child could succeed that nationality, so this provision was not included. Ministry of Justice Civil Affairs Bureau Legal Affairs Study Group, *supra* note 87, pp.13.

<sup>90</sup> The United Nations Convention on the Reduction of Statelessness lists in Article 8 exceptions to the otherwise prohibited deprivation of nationality: when nationality is obtained by misrepresentation or fraud; and the individual has committed acts inconsistent with a duty of loyalty either in violation of an express prohibition or by personal conduct seriously prejudicial to the vital interests of the state.

<sup>91</sup> Kidana *supra* note 3 pp.341-42. Article 11(2) provides for loss of Japanese nationality when a Japanese national who possesses another nationality chooses that nationality. However, this has been criticized as depriving Japanese nationality against the child's will. Okuda *supra* note 3, pp.17-18

Other cases which lead to the loss of Japanese nationality are when a Japanese national obtains foreign nationality by being born abroad, but fails to reserve his right to Japanese nationality in the designated period of time (presently three months) (Article 12); and when the Japanese national with foreign nationality renounces Japanese nationality by notifying the Minister of Justice (Article 13). Both provisions are intended to avoid dual nationality, but also prevent statelessness. The Nationality Act does not allow Japanese nationals to become stateless by renouncing Japanese nationality.<sup>92</sup>

On the other hand, actual application has invited cases that do not always prevent statelessness, as the following incidences illustrate. Some have been attempted to be rectified through lawsuits.

### **Children Born out of Wedlock**

Article 2(1) of the Nationality Act reflects the principle of bilineal *jus sanguinis* for the child's nationality at birth: "A child shall be a Japanese national when the father or the mother is a Japanese national at the time of its birth." This "father or mother" refers to the legal, not the biological parent. The child obtains Japanese nationality if the mother or the legal father has Japanese nationality regardless of the place of birth. However, the accepted view is that if the child is born out of wedlock between a Japanese father and a mother of foreign nationality, the father must acknowledge paternity during pregnancy for the child to obtain Japanese nationality at the time of birth.

Since the 1980s, babies born out of wedlock to non-Japanese mothers of irregular immigration status and Japanese nationals increased. In this case, the *jus soli* laws or priority to the father's bloodline in the mother's country often engendered statelessness

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<sup>92</sup> *Ibid.*, pp.382. A Tokyo District Court Ruling (March 30, 1981) has stated that "Prevention of statelessness is more important than the prevention of dual nationality. When the two are in conflict and one must be chosen, prevention of statelessness must be given priority". In fact, it is reported that there is a case in which the Japanese nationality of a three-year old girl was renounced when her name was expunged from the family registry of a Japanese man with whom her mother (non-Japanese) was once legally married. The erasure from the family registry was required by the Immigration authorities to legalize the residence status of her real father of Filipino nationality. Without having an opportunity to have her relationship with the Filipino father confirmed by a family court of the Philippines, however, she has been left effectively stateless. See Fusae Ohshita, "Kokuseki to Koseki to Zairyu Shikaku (Nationality, Family Registry and Residence Status)", *Jinken to Seikatsu (The Human Rights and Life)*, Vol.28 (2009), pp.35-36.

in her child, unless the father acknowledged paternity during pregnancy. In the following case, the issue was not statelessness itself, but the Supreme Court's 2002 dismissal of a discrimination claim: a child born out of wedlock could acquire Japanese nationality at birth if paternity was acknowledged during pregnancy but could not if acknowledged after birth.<sup>93</sup>

Article 2(1) of the Nationality Law grants Japanese nationality to children born with a legal child-parent relationship with a mother or father of Japanese citizenship, in view of their close ties to Japan. It is desirable that the child's innate nationality be settled at the time of birth. However, whether the child's paternity will be acknowledged after birth is not definite at the time the child is born. Therefore, it is with reason that Article 2(1) of the Law does not grant Japanese nationality at birth, when the child's father acknowledges paternity after birth: this acknowledgment does not provide legal parentage retroactively to the date of the child's birth.

The Committee on the Rights of the Child made the following observations to the second periodic report presented by Japan in 2004, which contrasts with the above. "The Committee is concerned that a child of a Japanese father and foreign mother cannot obtain Japanese citizenship unless the father has recognized that child before its birth, which has, in some cases, resulted in some children being stateless...The Committee recommends that the State party amend its Nationality Act and all other relevant legislation and regulations to ensure conformity with Article 7 of the Convention so that no child born in Japan should become stateless."<sup>94</sup>

The amended 1984 Nationality Act created a new provision in Article 3, which states: "One who has acquired the status of a legitimate child by marriage of one's father and mother and by recognition thereof and has not attained the age of twenty years (excluding one who was once a Japanese national) may, in cases where a father or mother who made recognition was a Japanese national at the time of the birth of his or her child, if such father or mother is a Japanese national at present or was a Japanese national at the time of his or her death, acquire Japanese nationality by making notification to the Minister of Justice." This provision has been interpreted to enable a child whose Japanese father and foreign mother are not married at the time of birth to

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<sup>93</sup> Judgment of the Supreme Court (Second Petty Bench November 22, 2002).

<sup>94</sup> *Concluding Observations from the Committee on the Rights of the Child; Japan*, UN Doc.CRC/C/15/Add.231,26 February 2004, paras. 31, 32.

acquire nationality when his/her paternity is acknowledged after birth and his parents subsequently become married. However, the child whose paternity is acknowledged after birth cannot by his own will bring about marriage between his biological parents. The Supreme Court ruled in 2008 that Article 3 of the Nationality Act 3 was unconstitutional for lack of reasonable relevance in making marriage as a condition for the child to acquire nationality. In considering the changes in social and economic circumstances in Japan, the Supreme Court noted that:<sup>95</sup>

Japanese nationality is the qualification for being a member of the State of Japan, and it is an important legal status that means a lot to people in order to enjoy [the] guarantee of fundamental human rights, obtain public positions or receive public benefits in Japan... Whether or not a child can acquire the status of a child born in wedlock as a result of the marriage of the parents is a matter that depends on an act relating to the personal status of the parents, which cannot be affected by the child's own intention or efforts... Differentiating treatment between children acknowledged before and after birth in acquiring nationality cannot be justified by the legislative purpose of measuring the closeness of the tie between the children and Japan and amounts to discrimination even if the discretionary power vested in the legislative body is taken in account.

As a consequence of this ruling, the Nationality Act was revised on December 12, 2008 (effective as of January 1, 2009). The amended provision stipulates that the child born out of wedlock can acquire Japanese nationality if his father acknowledges paternity after birth even if the parents are not legally married. Interim regulations allow those born after January 2, 1983 and acknowledged before age 20 to obtain Japanese nationality by notifying the Minister of Justice by December 31, 2011. These measures helped eliminate the discrepancy between children acknowledged after and during pregnancy. However, when paternal acknowledgment comes after birth, the child acquires Japanese nationality by notification, so s/he might lose the nationality s/he acquired at birth (granted by the laws of her/his mother's state) from the perspective of dual nationality prevention. However, this does not occur when paternal acknowledgement comes during pregnancy, as s/he acquires Japanese nationality at birth. This disparity remains.

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<sup>95</sup> Judgment of the Supreme Court (Grand Bench June 4, 2008)  
<http://www.courts.go.jp/english/judgements/text/2008.06.04>.

By April 3, 2009, notification of nationality acquisition was filed by 252 persons under the amended Nationality Act and the certificate of nationality acquisition was issued to 116 persons<sup>96</sup>.

### **Children Whose Parents are Unknown**

Article 2(3) serves as an important means to prevent statelessness. “A child shall ... be a Japanese national when both parents are unknown ... in a case where the child is born in Japan.”<sup>97</sup> The interpretation of this provision received attention in the “Baby Andrew” case. Andrew was born in 1991 at a hospital in Komoro City, Nagano Prefecture. The mother disappeared five days after his birth. He was initially issued an alien registration card as a Philippine national, but the Philippine Embassy rejected this nationality, and he therefore was re-registered as stateless. From the fact that he was born in Japan to unknown parents, the case was taken to court to confirm his Japanese nationality under Article 2 (3) of the Nationality Act.

The main issue at trial was whether the “parents are unknown” provision applied to his case, and the burden of proof. The District Court and the High Court produced contradicting conclusions, but the Supreme Court recognized Andrew’s Japanese nationality in 1995:<sup>98</sup>

The Act ... provides that a child who was born in Japan shall be a Japanese national when both father and mother are unknown or have no nationality (Article 2(iii)). If the principle that the nationality of a child shall depend on the parents’ nationality is to be maintained, a child whose father and mother are unknown will be stateless. Therefore, in order to prevent the occurrence of stateless persons, the ... Act recognizes the acquisition of Japanese nationality by a child in such a situation. Therefore, “when both father and mother are unknown” in Article 2(iii) means when both father and mother

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<sup>96</sup> [www.moj.go.jp/MINJI/minji174.html](http://www.moj.go.jp/MINJI/minji174.html).

<sup>97</sup> The dominant view in Japan is that in the application of the Nationality Act, being on Japanese territory includes onboard a Japanese ship sailing the high seas and aboard a Japanese airline flying over international waters. The United Nations Convention on the Reduction of Statelessness (Article 3) does not limit the place of birth to the high seas or open skies. However, if the child is born when flying over a territory or sailing in territorial waters of a certain state, s/he will have two countries of birth. “As a non-signatory of this convention, we cannot adopt this interpretation for the Japanese Nationality Act”. Kidana *supra* note 3, pp.201.

<sup>98</sup> Judgment of the Supreme Court (Second Petty Bench January 27, 1995).

are not identified. This requirement should be considered to be satisfied where a person quite possibly is the child's father or mother but cannot be definitely identified as such. For even if a person quite possibly is the child's father or mother, the nationality of the child cannot be determined on the basis of such a person's nationality, and it is not until that person is identified that the child's nationality can be determined on the basis of his or her nationality."

In this case, the Court acknowledged that Andrew's mother was "unknown" as she could not be identified. This burden of proof on the State has been regarded as a reflection of the Court's concern for the Act's intention to prevent statelessness. However, in a joint survey conducted by Professor Yasuhiro Okuda and the International Social Service, Japan, at child guidance centers from the end of 2000 to February the following year, 17 out of the 241 applicants in Andrew's situation were not granted Japanese nationality despite the Supreme Court liberal judgment on Article 2 (3).<sup>99</sup> Administrative practice may need to be improved.

There are no official statistics produced on the case of acquisition of Japanese nationality in regards to children of unknown parents.<sup>100</sup>

### **Children Whose Parents are Both Stateless: Including Children Born in Japan to Palestinian Parents**

Article 2(3) of the Nationality Act stipulates from the perspective of preventing statelessness that a child shall be granted Japanese nationality if "both parents ... have no nationality in a case where the child is born in Japan." Typical application of this provision has been for children born in Japan to Palestinian parents. However, the Ministry of Justice changed its policy in the Ministerial Notice dated October 3, 2007, and refused to grant Japanese nationality in such cases.<sup>101</sup> The reason has been

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<sup>99</sup> Okuda, *supra* note 23, pp.118. Cases of apparently "abandoned" babies are increasing. Thus, "once again in January 2006, a public facility caring for infants who cannot be cared for at home consulted our Child Nationality Study Group. A foreign woman had abandoned her newborn child and disappeared, and the father's whereabouts was unknown. Information about the mother's alien registration or whether she had registered the birth of the child was not available." Tsukida, *supra* note 1, pp.259.

<sup>100</sup> Interviews with the Civil Affairs Bureau of the Ministry of Justice conducted on April 30, 2009.

<sup>101</sup> According to Lower House Diet Member Nobuto Hosaka's *Questions Concerning the Nationality of Palestinian Children* submitted to the Cabinet on Nov.30, 2007, 14 children had acquired Japanese nationality by means of Article 2 (3) of the Nationality Act. Justice Ministry Civil Affairs Bureau Director-General Itsuro Terada attended the 166<sup>th</sup> National Diet Session Budget Committee Third Division as a government witness on February 28, 2007 and said, "At present, local governments have



explained thus<sup>102</sup>:

Palestinians were formerly treated as stateless persons in international law, but although Palestine has not been recognized as a state, considering recent developments in the area and the virtual State status of the Palestinian National Authority, it is no longer necessary to regard Palestinians as stateless. Thus, their children need not be granted Japanese nationality....

This change in policy follows the Ministry of Foreign Affairs' response to an inquiry from the Ministry of Justice on the matter:

- (1)Based on the 1993 Oslo Accords, which affirmed a Palestinian right of self-government within the West Bank and the Gaza Strip, the Israeli Government has been transferring jurisdiction over territories to a Palestinian Self-Government Authority in stages. It can be said that Palestinians have the right to reside in the transferred territories.
- (2)When Palestinians feel mistreated in Japan, they can ask their General Mission in Tokyo for necessary protection and support.
- (3)Oslo Agreement II Appendix III in Article 28- 2, 7, and 8 refers to the Palestinian Authority's right to issue passports to Palestinians and their validity in many countries. Japan recognizes this passport as valid based on the Cabinet Decision of October 10, 2002

Concerning Palestine, a proposition that "the entity 'Palestine' does not fully satisfy the international legal criteria for statehood still seems to be valid. Palestinians who have not acquired the nationality of a third state therefore continue to be stateless for the purpose of international law."<sup>103</sup> The U.N. has not recognized Palestine as a state. Japan

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reported 12 born in Japan to Palestinian parents registered in the Japanese family registry." (Deliberation in the Diet has been retrieved from the Website indicated above unless otherwise stated.) Kyodo News reported on a seven-year-old child of Japanese nationality born in 2002 to Palestinian parents in Japan living in Gaza on January 14, 2009. "Child of Japanese Nationality in Gaza." In relation to this issue, Ministry of Foreign Affairs Consular Affairs Bureau Director-General Yasuaki Tanizaki attended the 166<sup>th</sup> National Diet Session Budget Committee Third Division as a government witness on February 28, 2007, and stated, "The Japanese government extends its protection to those who were stateless but subsequently acquired Japanese nationality. Our embassies and consulates will provide information if they find that that person resides in a dangerous region, like it would to every Japanese national." This statement confirms the effectiveness of nationality.

<sup>102</sup> Government response No. 280, House of Representatives Interpellation 168 No.280 (December 11, 2007).

<sup>103</sup> Takkenberg, L., *The Status of Palestinian Refugees in International Law* (1998), p.181.

has withheld state recognition of Palestine from its failure to satisfy requirements of statehood, especially independence. Approving Palestinian nationality without recognizing the Palestinian state may be subject to debate from the perspective of effective nationality.<sup>104</sup>

## Naturalization

The Nationality Act expects naturalization by a stateless person (Article 5(5)) and has provisions that facilitate naturalization procedures for stateless persons in certain cases. As stated previously, naturalization restrictions have been eased for stateless persons born in Japan and residing in the country for more than three years since birth. However, naturalization has not been recognized as a right, as its approval is left to the discretion of the Minister of Justice. Therefore easing conditions for naturalization does not always facilitate naturalization procedures.

The Civil Affairs Bureau of the Ministry of Justice has produced statistics for the number of naturalization applications in the ten-year period from 1999 to 2008, which are shown in the table below.<sup>105</sup> The number of stateless applicants during that period was not published, but interviews with the Ministry of Justice's Civil Affairs Bureau have indicated that every year there are roughly around 10 to 20 stateless applicants, and that in 2008 there were 16.

In this context, applicants whose nationalities are unclear are lumped together with applicants who do not have a nationality and are given the same treatment. Passports, birth certificates, identification documents, parents' nationalities, and other such documents that can have relevance to nationality identification are taken into consideration in determining an applicant's nationality, or lack thereof.<sup>106</sup>

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<sup>104</sup> Professor Okuda quotes an international law scholar's view that when the reason for not recognizing a new state or government lies in its not having the essential conditions of a state or government, then the court cannot treat it as a state or government. In private law, it should not be possible to apply laws pertaining to an area that does not have the quality of a state. Japanese nationality cannot be deprived from a person acquiring the nationality of an area that does not have the requirements of a state. Okuda, *supra* note 3, pp.93-94. According to Ministry of Justice Immigration Bureau Director-General Toshio Inami, who participated in the 166<sup>th</sup> National Diet Session Budget Committee Third Division as a government witness on February 28, 2007, "Palestinians who entered Japan with travel documents issued by the Palestinian Authority have been classified as stateless, but Palestinians working at the General Mission of Palestine in Tokyo and their families have been granted residence status for "designated activities" (Palestinians working for the General Mission of Palestine in Tokyo and their families).

<sup>105</sup> [http://www.moj.go.jp/TOUKEI/t\\_minj03.html](http://www.moj.go.jp/TOUKEI/t_minj03.html).

<sup>106</sup> Interviews with the Civil Affairs Bureau of the Ministry of Justice conducted on 30 April 2009.

Year	Applications	Approved				Rejected
		Total	Koreans	Chinese	Others	
1999	17,067	16,120	10,059	5,335	726	202
2000	14,936	15,812	9,842	5,245	725	215
2001	13,442	15,291	10,295	4,377	619	130
2002	13,344	14,339	9,188	4,442	709	107
2003	15,666	17,633	11,788	4,722	1,133	150
2004	16,790	16,336	11,031	4,122	1,183	148
2005	14,666	15,251	9,689	4,427	1,135	166
2006	15,340	14,108	8,531	4,347	1,230	255
2007	16,107	14,680	8,546	4,740	1,394	260
2008	15,440	13,218	7,412	4,322	1,484	269

Indicates number for calendar year

### **Un/Determination of Statelessness and Un/Registration of Birth**

The Baby Andrew case cited above brought to light the serious problems in determining nationality or statelessness in Japan. When Komoro City referred the decision to the Legal Affairs Bureau, Andrew was issued an alien registration card as a Philippine national. However, this was based on ambiguous remarks from people who were involved, and the decision was later reversed.<sup>107</sup>

According to the Residence Status in Alien Registration According to Nationality, 1,525 persons were registered in Japan as stateless as of the end of 2008.<sup>108</sup> “Non-Japanese nationals are treated as stateless persons in the application of the Alien Registration Law when their nationalities cannot be confirmed with passports or other documents.”<sup>109</sup> However, “one can predict from the Baby Andrew case that Japanese officials in charge of registering aliens may have registered children as stateless temporarily because their parents could not be identified. Alternatively, they might have done so for convenience in cases when the nationality could not be confirmed. Thus the nationality stated in the

<sup>107</sup> Okuda, *supra* note 87, pp.41

<sup>108</sup> <http://www/e-stat.go.jp/SG1/estat/List.do?lid=000001031723>.

<sup>109</sup> Justice Ministry Civil Affairs Bureau Director-General Itsuro Terada’s statement (*supra* note 105). According to Ministry of Justice, the Ministry registers as stateless “those who cannot confirm their nationality with their passports or other equal identification documents”(interviews with the Immigration Bureau of the Ministry of Justice conducted on April 30, 2009).

alien registration may not always indicate actual nationality or statelessness.” This shows that acknowledgement of a nationality (or statelessness) by the local authorities and regional Legal Affairs Bureau does not always reflect actual nationality or lack of nationality.<sup>110</sup>

In the determination of nationality, the Bureau's foreign registration practice has given weight to passports, other relevant documents and the applicant's own statements. However, standard procedures that each administration can refer to in order to determine whether an applicant has a nationality, and in particular, whether an applicant is stateless, have not been established in the alien registration procedure.<sup>111</sup>

The most serious effect on nationality decisions results from birth registration. Registration of birth with the Japanese authorities in itself does not grant the child a nationality; it only confirms the nationality of the child. However, failing to carry it out leaves the child's nationality unrecognized. Thus birth registration, or rather the lack of it is now recognized as a source of statelessness.<sup>112</sup> Article 7(1) of the Convention on the Rights of the Child states: “The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality.” This indicates that nationality cannot materialize without birth registration.<sup>113</sup>

In the above-mentioned survey conducted by Professor Okuda, 81 persons, or a third of the surveyed subjects, born in Japan had not registered their birth. More than a hundred had not registered birth in the non-Japanese parent's country. Fourteen of irregular immigrant status had refrained from registering the birth of their child from fear of being reported to the immigration authorities. Two subjects had not registered birth because the hospital had not issued them a birth certificate.<sup>114</sup>

Professor Lee describes the situation in her August 2000 thesis; “The mother, an illegal resident, knows she will be deported if the authorities come to know of her status. The mother thus refrains from visits to public offices. She will not report her pregnancy, and

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<sup>110</sup> Okuda, *supra* note 23, pp.32-33, pp.149. In an interview with her on September 28, 2008, Professor Chen Tien-shi, who has conducted extensive research on stateless persons, stated “The word stateless used in the Japanese alien registration system is very ambiguous. Since statelessness requires some sort of treatment, the tendency has been to avoid using this term, assigning the name of a country or an area.”

<sup>111</sup> Interviews with the Immigration Bureau of the Ministry of Justice conducted on April 30, 2009.

<sup>112</sup> Waas, *supra* note 13, pp.447.

<sup>113</sup> *Concluding Observations: Philippines*, UN Doc.CRC/C/15/Add.258, 2005 paras.36-37 clearly states this view.

<sup>114</sup> Okuda, *supra* note 23, 126-38.

will not receive her maternity health-record book. She will work until delivery without regular checkups at the obstetrician's office. The newborn baby's certificate will not be presented and the child will be in a stateless-like situation."<sup>115</sup> In a study published in 2005, Professor Lee estimates approximately 20,000 children in Japan are in the state of statelessness (author's note; or be in a stateless-like situation).<sup>116</sup>

In light of this situation, the Committee on the Rights of the Child expressed concern: "undocumented migrants are unable to register the birth of their children and this has also resulted in cases of statelessness," recommending the Japanese government to revise the nationality and other related laws and regulations to conform with Article 7 of the Convention to avoid statelessness for children born in Japan.<sup>117</sup> The Japanese government's third periodic report presented to the Committee in April 2008 does not refer to any corrective measures in response to this recommendation.<sup>118</sup>

Regional Child Consultation Centers and child welfare facilities have been exposed to a large increase in stateless children or children in a stateless-like situation, but those that come to consult these organs probably represent only a fraction of the actual number.<sup>119</sup>

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<sup>115</sup> Setsuko Lee and Carolyn Stevens, "Kodomono inochini kokyo wa nai (No Borders for a Child's Life)", *Josonpu zasshi (Journal of Midwives)*, Vol.54, No.8 (2000), pp.51. Moreover, Prof. Lee *et al.* state that: "we often hear there are medical institutions which refuse to issue birth certificates for non-payment for childbirth expenses [which leaves children in the state of statelessness]." Setsuko Lee, Megumi Imaizumi and Takashi Sawada, "Guidelines to Assist Foreign Mothers-Children in Japan", *Josan Zasshi (Journal on Childbirth Assistance)*, Vol.57, No.8 (August, 2003), p.70.

<sup>116</sup> Lee *et al.*, "Mukokusekijotai ni aru kodomono fushugaku no jittai (Children in the State of Statelessness Deprived of Education Opportunities)" *Shakaiigaku kenkyu (Journal of Social Medical Studies)*, No.23 (2005), p.18.

<sup>117</sup> See *supra* note 96.

<sup>118</sup> In relation to the problem of birth registration, so called "non-family registry children" (mukosekiji) have been the topic of much debate in Japanese society. The Civil Code stipulates in Article 772 that any child born to a woman less than 300 days of her divorce is considered to be the child of the "previous husband." It is possible to establish paternal relations with the biological father by means of filing petitions to family courts to annul the father-child relationship or have the legal father deny his paternity. However, by registering the birth, the baby enters the family register of the mother's "previous husband" as his child. If the mother waits for the court to settle her family relations and refrains from registering the birth before the decision, the child is without a family register. Other cases indicate the mother's reluctance to register birth for fear that her abusive previous husband would find her whereabouts. Non-birth registry makes it hard for children to be registered as a resident, which likely disqualifies them from administrative and welfare services from the local government. As these cases become conspicuous, various measures have been devised for support. Note, however, that these are non-family registry children and not stateless *per se*. Sakamoto, Yoko, *Honi shirizokerareru kodomatachi (Children Denied Protection by the Law)* pp.5-24. See also, Mainichi Shimbun ed., *Rikongo 300nichi mondai (The Post-divorce 300-day Problem)* (2008).

<sup>119</sup> Tsukida, *supra* note 1 pp. 26. Professor Tsukida points out that "Apart from alien registration, the sole government statistics available under the status quo is that of stateless children entering governmental facilities. Other measures to identify the statistics have not been taken." The Professor draws our attention to *Stateless Children Staying at Child Care Facilities* statistics compiled by Equal Employment, Children and Families Bureau Family Welfare Division of the Ministry of Health, Labour and Welfare. Out of the 33,304 children in the care of these public facilities and living with foster parents (as of October 1, 1999),

There are limitations to dealing with the problem of statelessness through child welfare services. Grasping the problem of statelessness in itself is difficult, as fear of drawing attention to irregular status keeps irregular migrants away from government authorities.

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Other examples of emerging statelessness include the birth of a girl in July 2008 in India to an Indian woman, when a Japanese man asked her to give birth to his baby as the surrogate mother. The baby girl's nationality remained uncertain. After the Indian government issued a travel certificate following the Supreme Court's decision, the Japanese government issued a one-year visa on humanitarian grounds, and the baby girl was allowed entry into Japan. The Ministry of Justice has suggested that parental relationship be established by means of paternal acknowledgment or adoption before applying for Japanese nationality<sup>120</sup> Further discussion on statelessness may be necessary for similar cases in the future.

## **(2) Status of Stateless Persons and Related Groups of Concern**

In Japan, the treatment of (*de jure* and *de facto*) stateless persons, including the scope of their rights, largely depends on the legal status. For instance, stateless persons without legal status are at risk of indefinite detention.

In describing the treatment faced by stateless persons, some actual examples will be presented below. I will also mention groups that are not necessarily stateless, but might face similar disadvantages in relation to nationality issues.

### **Listening to Voices of Stateless Persons**

Dr. Eugene Aksenov, Director of the International Medical Clinic in Tokyo, became stateless when Manchukuo collapsed. He has been living in Japan without a nationality. "I do not wish for a nationality, since I can be free. What I desire most now is to do as much as I can for society in good health as a doctor. It is my utmost wish that the world

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44 were stateless among the 475 who did not have Japanese nationality. The professor predicts that there are more stateless children in the 40 who were in the process of applying for nationality and 220 whose nationality were unknown.

<sup>120</sup> "Dairi shussanji indo karano nyukoku (Baby born to a surrogate mother in India admitted entry to Japan)" Tokyo Shimbun, November 3, 2008.

will eliminate conflict and become one.”<sup>121</sup> His cosmopolitan thinking has liberated him from the restrictions a nationality imposes, with the paradoxical but unlimited potential in statelessness.

His permanent resident status appeared to have supported this positive attitude towards statelessness. A substantial number of stateless persons hold permanent resident status,<sup>122</sup> and they live a life similar to Japanese citizens. However, in the present national system, permanent residents face restrictions in the right to vote, traveling across borders and can still face deportation.

Mr. A runs a chiropractic clinic in the Tokyo Metropolitan area. He is also stateless but does not have a regular residence status. He held the nationality of the People’s Republic of China, but lost this nationality when he was naturalized as a Bolivian citizen in 1992. He acquired his new nationality for convenience in travel. When he came to Japan in February 1995, he tried to regain his Chinese nationality because Bolivian laws had been revised: he would have to return to Bolivia every time to renew his passport. Bolivian Embassy officials also recommended him to do so. “The Chinese Embassy official told me that to acquire Chinese nationality, I would have to renounce my Bolivian nationality, and bring a document to prove this fact. So I renounced my Bolivian nationality at the Bolivian Embassy on April 13, 1995, and obtained a document certifying this fact.”<sup>123</sup>

When the Chinese Embassy contacted A in June, his three-month visa had already expired. However, “the Chinese Embassy official told me that since I did not have a long-term visa in Japan, I could not regain my Chinese nationality. My request had been rejected.” Thus A became stateless, without Chinese or Bolivian nationality.<sup>124</sup> Without legal residence status, he faces difficulties such as not being eligible for health insurance. “Not being able to attend my mother’s funeral or say goodbye to her when she died in January last year was heart-breaking. I could not carry out my duties as the eldest son in

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<sup>121</sup> *The world as seen from a stateless perspective- Reconsidering Nationality in Modern Society Program and summaries* (Chen Tien-shi, ed., November 23, 2008), p.7.

<sup>122</sup> Among 1,573 registered stateless aliens in Japan in 2007, 399 had permanent resident status. Others were 93 spouses, *etc.* of Japanese, 7 spouses, *etc.* of permanent residents, 253 long-term residents, and 69 special permanent residents. Those who had not obtained residence status were 313. See *supra* note 110.

<sup>123</sup> Interview with Mr. A on November 10, 2008.

<sup>124</sup> Although it may be necessary to consider whether the Bolivian Nationality Law required renunciation prior to acquiring Bolivian nationality, from the perspective of measures for statelessness, we cannot overlook the fact that this problem under Japanese government jurisdiction had languished unresolved for a long period of time.

the family. What I need urgently now is legal resident status. That is the priority, and then I can start to think about nationality. ” For lack of legal status and the country of nationality he could well have been detained indefinitely, though in fact he has been released on provisional parole.

On the other hand, Ms. B was born in Japan in 1985 to Vietnamese parents who fled their country as “boat people” in 1980 and were admitted as an Indochinese refugee by the Japanese government in 1982. At present, she is a graduate student at a national university in Japan. Her parents have lost their Vietnamese nationality, but they are not Japanese nationals; they remain stateless along with their daughter.

“My parents recommend me to acquire Japanese nationality, but I have not fully decided to do so. I prefer to exist in a framework of people that cannot be confined in the definition of “state.”<sup>125</sup> Her cosmopolitan spirit resembles that of Dr. Aksenov. From a technically legal standpoint, given that her parents were both stateless at the time of her birth, she would have acquired Japanese nationality at birth according to Article 2 (3) of the Japanese Nationality Act. Even if her parents’ nationality could not be identified, “the provision should be applied *mutatis mutandis* on account of the Act’s objective to prevent statelessness. The child should be granted Japanese nationality at birth through *jus soli*.”<sup>126</sup> Her “statelessness” entails uncertainty, but her situation illustrates an institutional problem in granting nationality or determining statelessness.

### **Nowhere to Go: Stateless Persons in Orbit**

Two men detained at the East Japan Immigration Center filed for cancellation of removal with the Tokyo District Court on July 29, 2008.<sup>127</sup> The plaintiffs were born to Vietnamese refugees who had left their country in 1954 for Thailand via Laos amidst the First Indochina War. Though the plaintiffs were born in Thailand, they did not obtain Thai nationality at birth. To find a way out of the disadvantages and discrimination faced there, they left Thailand for Japan in 1991 with false passports obtained from smugglers. After working at construction sites and factories, they faced a forcible removal order to Vietnam as illegal immigrants in 2008. However, since they could not

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<sup>125</sup> *The World as Seen from the Stateless Perspective*, *supra* note 123, p.8.

<sup>126</sup> Kidana, *supra* note 3, pp.212-23. Kuroki and Hosokawa also state that from the perspective of stateless elimination, Article 2(3) should be applied *mutatis mutandis* (*supra* note 3, p.297).

<sup>127</sup> The overview of this case and information on other similar cases are provided **in the bill of complaint** submitted on 29 July, 2008, which Ms. Shie Azukizawa, the attorney representing the complainants, kindly allowed us to refer to.



be deported allegedly for lack of Vietnamese nationality, they were forced into long-term detention.

There seems to be a significant number of people who entered Japan using false passports around 1990 and have stayed in Japan for more than ten years only to be found as illegal immigrants.<sup>128</sup> When the authorities tried to execute removal orders, these irregular immigrants had nowhere to go as they are stateless without documents to prove their nationality. The consequence is long-term detention. The country they claim to be from has refused to accept them due to the lack of documents to prove their nationality.<sup>129</sup>

Article 53(1) of the Immigration Control and Refugee Recognition Act (Immigration Act) provides that "Any person subject to deportation shall be deported to a country of which he/she is a national or citizen". Article 53(2) then goes on to provide 6 possible outcomes where "... the person cannot be deported to such a country as set forth in the preceding paragraph, such a person shall be deported to any of the following countries pursuant to her/his wishes." It is possible that Article 53(2) can be applied to stateless applicants, but even when a person wishes to be deported to a certain country, that country may decline to accept the person, and it is generally understood that they are then placed in limbo because deportation cannot be implemented.

In one case, a person was provisionally released after a detention of two and a half years and was able to acquire a Special Permit for Residence three years hence.<sup>130</sup> However, others remain in unstable circumstances under provisional release.<sup>131</sup> Some cannot leave Japan and are unable to join their families awaiting them abroad. One such person, named Vi, who was detained for three years and has been provisionally released, expressed his feelings<sup>132</sup>:

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<sup>128</sup> Some typical cases are described in detail in the above mentioned Application filed with the Tokyo District Court.

<sup>129</sup> The Annual Statistics on Immigration, 2007 reveals that the deportation order was issued to 5 stateless persons and it was executed with regard to 4 stateless persons in that year. See <http://www.e-stat.go.jp/SG1/estat/List.do?lid=000001029662>. In cases dealt with in the above-mentioned application, plaintiffs were treated as Vietnamese nationals, not stateless persons. The problem was that this nationality determined by the Immigration Bureau was not recognized by the Vietnamese authorities. Nevertheless, the plaintiffs were to be deported to Vietnam, resulting in their long term detention.

<sup>130</sup> The above-mentioned Application, p.12.

<sup>131</sup> The Immigration Act provides in Article 52 (6) that "if it is found that [an] alien cannot be deported", the director of an immigration detention center or supervising immigration inspector may release him/her on conditions as may be deemed necessary. It has not been confirmed how many have indeed benefited from this special parole system.

<sup>132</sup> Chen, *supra* note 4, p.225.

I want to go back to Thailand and join my family. Thai Embassy officials called me many times for interviews. I asked them every time for a passport, but they cannot give me one because I have no nationality. Japanese immigration officials tell me that maybe I can go to Vietnam. But it's the same. Without a nationality, I can't get a passport.

These cases illustrate how statelessness and illegal immigrant status intersect in forcible removal. A petition filed with the Japan Federation of Bar Associations in 1999 by three female human-trafficking victims had already signaled the emergence of this type of case in Japan.<sup>133</sup> Clearly, the actual number of these cases is far greater than that brought to public notice, symbolically reflecting the nature of the problem of statelessness.

### **What Happens to Unregistered Children?**

The substantial number of unregistered births due to fear of being exposed as illegal immigrants suggests disadvantages on the part of the mother and child. The mother's state of health remains questionable without visits to the obstetrician's office for regular checkups during pregnancy. The newborn child "cannot be vaccinated, without adequate medical care when they need it. They cannot attend school when they reach school age. These children are not growing in a protected and wholesome environment."<sup>134</sup>

As Professor Lee *et al.* accurately relate, there are no nationality provisions in the Maternal and Child Health Law and Child Welfare Law, and these laws do not differentiate treatment according to residence status. As the Ministry of Health and Welfare made clear in October 1995, "Without the nationality limitations in the Maternal and Child Health and Child Welfare Laws, these laws do not differentiate treatment according to residence status."<sup>135</sup>

However, as is the case with the Japanese child whose family registry is not fixed for lack of birth registry,<sup>136</sup> children who are non-Japanese or whose Japanese nationality

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<sup>133</sup> Japan Federation of Bar Association, *Report on Petition for Remedies concerning Human-trafficking Victims from Thailand*, May 1999.

<sup>134</sup> Lee and Stevens, *supra* note 117, p.51.

<sup>135</sup> *Ibid*, p.55.

<sup>136</sup> Sakamoto, *supra* note 120.

has not been acknowledged find it more difficult to enjoy the social services they should be entitled to unless their existence is officially confirmed with birth registry. Lack of information on the part of the parents or administrative officials seem to keep a substantial number of unregistered children away from educational opportunities.<sup>137</sup>

### **Convention Refugees, Indo-Chinese Refugees, and Asylum-seekers**

Information about people who are recognized as Convention refugees or granted special resident permits for humanitarian reasons is published according to nationality, as is the case with applicants for refugee status. Nationality is determined by reference to passports, other identification documents and the individuals' own statements. Cases of stateless applicants for refugee status are not very visible; it is estimated that there have been less than 20 such cases.<sup>138</sup> Besides Convention refugees, Japan accepted 11,319 Indo-Chinese refugees during the period from 1978 to March 2006. The breakdown is as follows: 8,656 Vietnamese, 1,357 Cambodians and 1,306 Laotians.

For reasons that prompted their departure, many of the Indo-Chinese refugees are reportedly not treated as nationals by their countries of origin. Thus, when ordered to leave Japan, they are rejected re-admission to their countries of origin and forced to endure long-term detention. Once deportation orders are issued for having committed certain crimes, they lose the status of Long-Term Resident (which had been granted upon admission as Indochinese refugees) and are disqualified from a variety of social services. Inevitably, grave hardships are inflicted on them even if provisional release is granted.<sup>139</sup>

With the exception of those who are in Japan on the Orderly Departure Program, Indo-Chinese refugees may not obtain passports from their countries of origin. In

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<sup>137</sup> Lee, *supra* note 117.

<sup>138</sup> Interviews with the Immigration Bureau of the Ministry of Justice conducted on April 30, 2009. In addition, the first applicant who was determined to be a refugee at the appeal level in December 1995 was a stateless Palestinian. It might not have been recognized that this individual was defined as "stateless" as relevant to the foreign registration administrative procedure.

<sup>139</sup> Deportable Indo-Chinese refugees used to be granted special resident permit for reasons related to their flight. Around 2002, however, there was an apparent change in immigration policy whereby cases have come to occur where Indo-Chinese refugees without permanent resident status, who were sentenced to imprisonment for a period of not less than 1 year or convicted for violation of a provision of the Narcotics and Psychotropic Substances Control Act, etc. were subjected to a removal order, resulting in long-term detention. Thus, mainly paroled Vietnamese refugees organized a group called "Betonamu kazoku kai"(Association of Vietnamese Families) in June 2005, to seek stabilization of their resident status. <http://www.rafiq.jp/nanmin/Vietnam.html>.

moving across borders, therefore, they need to have a travel document issued by the Japanese government, which permits reentry.<sup>140</sup>

Thus lacking protection from their home countries, Indo-Chinese refugees (Vietnamese refugees in particular) are unable to enjoy protection that citizens would normally enjoy, and may be categorized as *de facto* stateless persons. If their nationalities have been withdrawn, they are *de jure* stateless, a case which is to be determined. It should be recalled that a child born in Japan to stateless parents shall be granted Japanese nationality at birth by virtue of Article 2 (3) of the Nationality Act. It is important to accurately assess whether s/he has nationality in the country of origin.

There is no official statistical information on the number of Convention refugees and Indo-Chinese refugees who have been naturalized.<sup>141</sup> While Indo-Chinese refugees are to receive equivalent treatment to Convention refugees, they may in fact not have certificates of refugee status, which makes it very difficult for them to continue with the naturalization procedure. Without the help of their home countries, they may not be able to produce the necessary documents required for naturalization. Instead, currently, the Refugees Assistance Headquarters of the Foundation for the Welfare and Education of the Asian People issues Certificates of Resettlement Record, to be submitted along with written reasons for failing to obtain evidential documents from the government of their country of origin, to facilitate naturalization and other procedures for Indo-Chinese refugees.

In Japan, there is a substantial number of Rohingyas (Muslim residents of Northern Rakhine State, Myanmar) among asylum-seekers, Convention refugees and a group of people granted special resident permits for humanitarian reasons. The Burmese Citizenship Act of 1982 classifies citizens into three categories: full citizens, associated citizens and naturalized citizens. Since the vast majority of Rohingyas fail to qualify for

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<sup>140</sup> Kim Sun Gil, "Indochinese Refugees in Japan", in *White Paper on Foreigners and Ethnic Minorities* (Liaison Network of Human Rights Law for Foreigners ed., 2007), pp.210-11. See also, Yue Fu, "Protection of Stateless Persons: Issues Related to the Right to Remain in the Country of Habitual Residence" *Housei Ronsou (The Japanese Journal of Law and Political Science)*, Vol.44.No.2 (2008), p.4.

<sup>141</sup> However, an IOM-commissioned research conducted during the period from September 30 to October 20, 2004, on Vietnamese refugee women in Japan, reveals that 60 (23.9 %) out of 279 who responded to questionnaires had been naturalized. IOM, *Survey on Vietnamese (female) refugees' adaptation to Japan* (2008), p.97. Another research conducted on 163 Vietnamese refugees living in the metropolitan area reports that 22 % of them were naturalized while 1 % obtained permanent resident status. Hiroshi Yamada et. al., *Nihon no Nanminukeire Kako, Genzai, Mirai (Reception of Refugees in Japan: Past, Present and Future)* (2007), p.143.

any of the three categories of citizenship,<sup>142</sup> many of those who have made it here are understood to be in the state of *de jure* statelessness.

### **War-separated Japanese Nationals Left in China and the Philippines**

The Ministry of Health, Labour and Welfare defines War-Separated Japanese Nationals Left in China as the following.<sup>143</sup> “In 1945, many Japanese lived in settlement groups in the north-eastern part of China (former Manchu district). When the Soviet Union declared war on Japan on August 9, many died in the battlefield or from sickness or hunger during evacuation. During this time, some were left as orphans there and adopted by Chinese parents. We refer to these people as War-Separated Japanese Nationals Left in China.”

According to Appendix 4 in the reference materials distributed at the Conference of the Advisory Committee on Support for War-Separated Japanese Left in China held on May 17, 2007,<sup>144</sup> the number of War-Separated Japanese Left in China who returned to live in Japan with support from the government after Japan normalized diplomatic relations with China was 6,343 (20,239 including family members). The Law for the Support of War-Separated Japanese Left in China, which entered into force on April 6, 1994, has been one of various measures providing support, but the greatest problem for these people has been none other than the confirmation and proof of their identity. Identification is indispensable when confirming their nationality under the former Nationality Act and when filing petitions with family courts for permission to create a family registry.<sup>145</sup> For these war-separated people in China, the most pressing problem

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<sup>142</sup> See, Amnesty International, *The Rohingya Minority: Fundamental Rights Denied*, AI Index: SA 16/005/2004.

<http://www.amnesty.org/en/library/asset/ASA16/005/2004/en/a565434b-d5d5-11dd-bb24-1fb85fe8fa05/asa160052004en.html>. Six UN experts including Special *Rapporteur* on the situation of human rights in Myanmar, Paulo Sergio, in calling on Myanmar to address discrimination against members of Muslim minority in North Rakhine State on 2 April 2007, also stated that: “[u]nder the 1982 Citizenship Law, the members of the Muslim minority in North Rakhine State, generally known as the Rohingyas, have been denied Myanmar citizenship, which has seriously curtailed the full exercise of their civil, political, economic, social and cultural rights and led to various discriminatory practices”. <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/F0ED9448671A73E6C12572B1>.

<sup>143</sup> <http://www.mhlw.go.jp/bunya/engo/seido02/index.html>.

<sup>144</sup> <http://www.mhlw.go.jp/shingi/2007/05/s0517-3d.html>.

<sup>145</sup> “Japanese nationality cannot be acquired by means of the permission to create a family registry from the family courts, but this permission cannot be granted to non-Japanese nationals, so permission to create a family registry focuses on determining whether the subject has a Japanese nationality. These are matters to be examined in the court's own authority, and should not be left to statements and evidence provided by the subject”. Kidana, *supra* note 3, pp.69-70. See also Prof. Okuda's meticulous studies on jurisprudence on nationality and family registry in relation to war-separated Japanese nationals. Okuda, *supra* note 86,

is confirmation of nationality or registration on a family register rather than the eradication of statelessness.

Similarly, second generation Japanese-Filipinos who were born between Japanese men who went to the Philippines before and during World War II and local women face problems confirming their nationality and establishing their family registries. A substantial number in this group languish in the state of statelessness, as Philippine laws at the time only recognized children born to Filipino fathers as citizens. In July 2008, 14 out of the 16 who came to Japan to file petitions with family courts for permission to create a family registry did not have Filipino nationality.<sup>146</sup> In reality, acquiring this permission (to create family registry) is no easy task. According to the Philippine Nikkei-jin Legal Support Center, which supports this effort, since 2004, 54 people have been granted such permission.<sup>147</sup>

### **Defectors from the DPRK**

The specifics with regard to the number and nationality of defectors from the DPRK (so-called *dappokusya*) have not been publicized.<sup>148</sup> The North Korean Human Rights Act approved in 2006 defines *dappokusha* as “defectors from the DPRK in need of protection and support from a humanitarian standpoint,” and demands that the Japanese government endeavor to take necessary steps for their support and protection. The government also endeavors to support domestic and international *dappokusha* assistance organizations by providing them, as necessary, with information, as well as financial and other aid (Article 7).

It is not rare for DPRK defectors to be registered as stateless on their alien registration

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pp.151-201.

<sup>146</sup> Yasumoto, M., “War-separated Aged Seek Nationality”, *Japan Times*, July 26, 2008. On April 28, 2008, Upper House Diet Member Hirohiko Nakamura stated at the House of Councilors Budget Committee, that there are approximately 3,000 second generation Japanese Filipinos. Among them, 800 are stateless and 300 have passed away or have no contact address.

<sup>147</sup> Philippine Nikkei-jin Legal Support Center, *Filipine zanryu nihonjin nisei shuseki kyokato kyakka ichiran* (The list of second generation Philippino -Japanese persons who were granted/denied permission to create family registry) (as of 17 February 2010), <http://www.pnlsc.com/syuseki-data3.html>.

<sup>148</sup> In response to questions from an MP: “How many North Korean defectors now live in Japan? Could you give us the number according to length of residence and age bracket? How many of these defectors receive welfare benefits from the Japanese government? How many of these have acquired Japanese nationality?”, the government replied “We do not have data concerning your question.” (Government response No.139, December 26, 2008).

cards,<sup>149</sup> but this does not automatically imply that they are legally stateless. I have already mentioned that officials sometimes use the word stateless to mean that nationality is unknown. If it is confirmed that non-Japanese defectors were born to a Japanese parent, they can go through simplified naturalization procedures. Examples have been reported in the media.<sup>150</sup>

### **Resident Koreans<sup>151</sup>**

After World War II, Koreans constitute the largest ethnic minority in Japan. Although their number is decreasing year by year, the alien registration number of North and South Koreans combined as of the end of 2007 is 598,219, or 28.7% of aliens. This tops Chinese at 26.9% and Brazilians at 15.0%.<sup>152</sup>

All Koreans, including those residing in Japan, lost their Japanese nationality and became aliens when the San Francisco Peace Treaty came into effect on April 28, 1952 (Justice Ministry Civil Affairs Bureau Notice CO438: Concerning the disposition of nationality and family register matters regarding Chosenese, Taiwanese, and others, associated with the effectuation of the Treaty of Peace). However, Law No. 126 (the Law concerning measures for various Ministry of Foreign Affairs related ordinances based on matters concerning ordinances issued in conjunction with the acceptance of the Potsdam Declaration) assured their right to reside in Japan until a determination was made with respect to their residence status and term.

In 1965, a new permanent residence status for Resident Koreans was established by the Agreement between Japan and the Republic of Korea concerning the legal status and treatment of nationals of the Republic of Korea residing in Japan (*zainichi kankokujin*). Moreover, Supplementary Provision 7 of the Immigration Control and Refugee Recognition Act enacted to implement the Refugee Convention provided for special cases for permanent residence permission. This measure improved the residence status

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<sup>149</sup> For example, in a press conference with the Justice Minister on June 12, 2007, mention was made of a report that there were 24 *dappokusya* living in Japan as stateless. A question was also raised about a substantial number of *dappokusya* registered under the Alien Registration Law as stateless persons.

<sup>150</sup> *Yomiuri Shimbun* July 27, 2007.

<sup>151</sup> See generally, Kim Dong-Hag, “Zainichichousenjin no houtekichii · shakaiteki shomonndai (Legal Status and Social Problems of Resident Koreans)” in *Zainichichousenjin no rekishi to bunnka (History and Culture of Resident Koreans)* (2006). Let me acknowledge with appreciation Mr. Kim’s generous response to my direct inquiries into the legal status of resident Koreans.

<sup>152</sup> Ministry of Justice Immigration Bureau ed., *Heisei 19 nendoban shutsunyukoku kanri (Yearbook of Immigration Control, 2007)*, p.21.

of resident Koreans who had not acquired permanent residence status.

“The special law concerning immigration control with respect to those whose Japanese nationality was renounced based on the Peace Treaty with Japan” effectuated on January 1, 1991 (Immigration Bureau Special Law) established Law 126, which combines Permanent Residence Status (of the 1965 Agreement) and Special Permanent Residence together to create a “Special Permanent Resident Status,” which was aimed to further improve their legal status in terms of deportation and reentry. The legal status of resident Koreans with special permanent resident status has become closer to that of Japanese citizens when compared to other foreign nationals. However, they remain foreigners in Japan,<sup>153</sup> with the exception of those who have been naturalized.<sup>154</sup>

The treatment of the nationality of Koreans residing in Japan has not always been clear. The 1963 Nationality Act of DPRK (North Korea) and the 1948 Nationality Act of RK (South Korea) both regard all Korean residents in Japan, excluding those who have been naturalized, as their respective citizens. In an effort to avoid a political tangle between the two Koreas, the Japanese government initially listed “Chosen (the area name covering the Korean Peninsula and its surrounding islands)” on the alien registration card for Koreans. When the individual so requested, this was later changed to “Kankoku (the abbreviated name for the Republic of Korea)”. After the 1965 Treaty on Basic Relations with the Republic of Korea, “Kankoku” was formally a nationality, but “Chosen” was a mere symbol. The Japanese government has not recognized the DPRK and its nationality law up to now, so it has applied the Republic of Korea’s nationality law for nationality problems of resident Koreans.

The General Association of Korean Residents issues passports under authorization by the North Korean Foreign Ministry, but these have not been approved as valid by the Japanese Government. When residents in Japan travel abroad with this passport, the Japanese government issues them a reentry permit. In administrative practice, a “foreign country” in the Nationality Law refers to countries that Japan has recognized, so a Japanese national cannot renounce Japanese nationality to acquire the nationality of the DPRK. However, since the DPRK clearly satisfies requirements of a State under

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<sup>153</sup> It should be noted that there are more than a few Koreans who, unable to meet the requirements of special permanent resident status for a variety of reasons, continue to reside as general permanent residents.

<sup>154</sup> The number of those acquiring Japanese nationality by naturalization has been increasing. See *supra* note107.



international law, these administrative practices of the Japanese government have been the target of strong criticism.<sup>155</sup>

In principle, passports of the Republic of Korea are issued to those who are officially registered as Nationals Abroad and are listed in the Family Registry. It is a substantial requirement for the issuance of a passport that the entry in the Japanese Alien Registration be changed to “Kankoku” at the time of registration as Nationals Abroad. Resident Koreans whose entry in the Alien Registration states “Chosen” may still enter the Republic of Korea with a travel document issued by the government of ROK. On the other hand, passports of the DPRK have been issued through the General Association of Korean Residents not only to Koreans whose entry in the Alien Registration is “Chosen” but also to a considerable number of those whose entry is “Kankoku”.

Resident Koreans are not considered stateless because they are covered simultaneously by nationality laws of ROK and DPRK and are to be protected as nationals abroad as necessary. While some Koreans residing in Japan may not have been naturalized to acquire Japanese nationality or approached any of the Korean authorities yet, it appears that they would be able to obtain protection from the authorities through necessary procedures and therefore are not in a situation of statelessness.

### **Resident Taiwanese**

On September 29, 1972, switching its diplomatic position, Japan recognized the government of the People’s Republic of China (PRC) instead of the government of Taiwan as the official Chinese government. As is the case for resident Koreans, the Japanese government has applied the nationality law of the PRC for nationality matters regarding all Chinese residents.

Passports issued by the government in Taiwan were not valid in Japan, but due to enhanced relations between the two, as of 1996, such passports have been regarded as a valid passport for immigration control and refugee recognition purposes.

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<sup>155</sup> Kidana, *supra* note 3, p.390. The Japan Federation of Bar Association has recommended the Minister of Justice to rectify the violation of the freedom to renounce nationality. Japan has not recognized the DPRK, so the Japanese government rejects applications to renounce Japanese nationality when the subject has naturalized to DPRK. [http://www.nichibenren.or.jp/ja/opinion/hr\\_case/2003.html](http://www.nichibenren.or.jp/ja/opinion/hr_case/2003.html)

Immigration Act of the ROC enacted in 2003<sup>156</sup> differentiates nationals between those who reside in the Taiwan Area and have their permanent residence registered at a household registry on one hand, and those who reside overseas and have the nationality of the ROC on the other. Nationals without registered permanent residence shall be denied or banned from entering Taiwan if they have been suspected to be involved in major crimes (Article 7 (4) of the Immigration Act). They also need permission to enter Taiwan.

Banned from entering Taiwan, deportable ROC nationals might fall into the state of *de facto* statelessness without a country to receive them. In an interview with a Taiwanese official, I was informed that very few Taiwanese in Japan are now nationals without registered permanent residence<sup>157</sup>.

While those from Taiwan who lost their Japanese nationality when the San Francisco Peace Treaty came into effect now hold special permanent resident status, many Taiwanese have general permanent resident status. Since the Japanese government has included people from the PRC and the ROC together as Chinese in the official statistics on alien registration, one may not identify the precise figure of Taiwanese residents who have special/general permanent status.

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<http://law.moj.gov.tw/Eng/Fnews/FnewsContent.asp?msgid=351&msgType=en&keyword=nationality+>

<sup>157</sup> An interview conducted with Mr. Kogen Rin of Yokohama Branch of Taipei Economic and Cultural Office in Japan on June 5, 2009. Prof. Chen introduces in her book (*supra* note 4) a real story in which she herself was rejected by her own country Taiwan for lack of registered permanent residence. A distinction thus drawn between nationals with and without registered permanent residence is “justified on the grounds that Taiwan has a limited land area which cannot accommodate all the Chinese nationals residing overseas who wish to make a permanent home in Taiwan”. According to Lee, “[t]his is a complete reversal of the policy prior to 1949, when the Republic of China welcomed and facilitated the entry of their nationals residing overseas, but at that time the Republic of China Government held territory on the mainland now governed by the People’s Republic of China”. Lee, *supra* note 14, p.217. For an international legal analysis of the restriction on the entry of some nationals to Taiwan, see *id.*, pp.217-220.

## 4 Concluding Remarks

A trend in international society is clearly emerging towards the prevention of statelessness and the decrease in numbers of stateless individuals. Solutions for the problem in recent years requires not only regulating State jurisdictions but also addressing concerns for human rights protection. I would like to conclude this study by summing up the problems with regard to statelessness observed in Japan and making some proposals.

Firstly, many countries including Japan have problems in the statelessness determination process. Lack of a common international procedural standard such as that for determining Convention refugee status has been a major obstacle in this regard.

In the alien registration procedure, recognition of statelessness is usually made based on documents, interviews, or testimonies. However, a systematic means to verify the nature of “statelessness” itself does not exist. The designation of nationality/statelessness is essentially self-reported. Non-accession to relevant international treaties plays a part in the absence of a clear consensus on the concept of statelessness *per se*. In a complicated case, accurate information about the individual can be difficult to obtain under the circumstances, resulting in incorrect entries on the alien registration and at worst a misapplication of the Nationality Act

Japanese administrative and judicial organs are authorized to determine the nationality of individuals using information from alien registration as evidence.<sup>158</sup> This being the case, the nationality on the original alien registration entry must be all the more genuine. In Japan, the determination of nationality is carried out only when processes such as alien registration or naturalization are applied for; these processes are not integrated within Japanese government bodies. Each competent government agency or bureau separately determines whether an applicant is stateless under the framework set by the laws that they work under, such as the Alien Registration Act or the Nationality Act.

Given the gravity of the consequences, determination of the nationality of an individual must be made with accuracy. Above all, the determination of statelessness should be made through well-refined integrated methods as opposed to the uncoordinated fragmented ones currently in operation. For that purpose, in line with international

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<sup>158</sup> Kidana, *supra* note 3, p.55.

standards/practices, *de jure* and *de facto* stateless persons should be properly defined. All officers concerned with stateless issues should be provided with appropriate guidance and training regarding the concept and determination of statelessness.

Nurturing inter-state cooperation is indispensable when determining statelessness. The UNHCR, mandated to prevent and reduce statelessness and to protect stateless persons can assist States in their cooperation to establish a person's nationality status. Relevant information is also made available through UNHCR's database Refworld. It should be stressed that Inter-state cooperation in no way threatens the privacy and safety of stateless persons who seek refugee status.

Secondly, information necessary to fully grasp the issue of statelessness in Japan has yet to be compiled. As reliable comprehensive data is lacking, it is not possible to precisely set forth the demographic profile of stateless persons in Japan.<sup>159</sup> A national survey should be conducted in full cooperation with local governments, relevant NGOs and the UNHCR, which would enable one to identify the magnitude of the problem of statelessness. The data to be collected should cover such matters as: reasons for and duration of statelessness, their demographic profile disaggregated by, among others, sex, age, national/social origin or other status as well as their legal and socio-economic situations.

Attempts have been made to look into the matter through public organizations such as child consultation centers. However, undocumented immigrants tend to distance themselves from authorities, which results in the full picture never being portrayed. With respect to children not registered at birth, their legal existence has not been verified and accordingly, a national survey should be conducted immediately and this issue should be solved by applying any means necessary

Parents fail to register births because of lack of information, fear of being discovered as an undocumented resident, and in some cases refusal of the hospital to issue a birth certificate. Immediate registration after birth is a right protected under the Convention on the Rights of the Child. Japan has voluntarily accepted this obligation as a signatory.

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<sup>159</sup> It is noted that the breakdown of foreigners by nationality in the most recent National Census (2005) categorized as many as 119,280 persons for the group of "stateless or not reported" while the number of stateless persons registered as aliens in 2006 was 1717. See *National Census of 2005*, available at <http://www.e-stat.go.jp/SG1/estat/List.do?lid=000001029028>; *Statistical Data on Registered Aliens, 2006*, available at <http://www.moj.go.jp/TOUKEI/ichiran/touroku.html>.

The government must provide clear measures to assure that a child's birth can be registered without the repercussions that undocumented immigrants fear when in contact with the authorities.

Thirdly, detention based on a deportation order should be suspended for those refused by a designated country. When released, they should eventually be given a stable legal status, rather than being left in limbo. These individuals are usually *de jure* stateless or *de facto* stateless and the UNHCR can come to their aid in mediating cooperation between Japan and the country of prior residence. Their situation can only be solved through confirmation or acquisition of an effective nationality.

The statistical data produced by the Ministry of Justice reveals that the Japanese government has removed stateless persons pursuant to a deportation order. However, no information is available regarding the countries to which these persons were deported. It is not clear whether the government takes into consideration situations they would face in the receiving countries. The removing country's concern with immediate enforcement of should not be unconditionally prioritized. The government should ensure that stateless persons are only removed to countries where they will have a secure legal status, including lawful residence. The official data regarding detention under the Immigration and Refugee Recognition Act of stateless persons including the number, age, gender and length of detention should be made public as well as the country to which stateless persons were removed.

Fourthly, effective administrative measures should be enacted so that those who seek to obtain or confirm Japanese nationality (such as Indo-Chinese refugees and war-separated Japanese nationals left in the Philippines), who are in a state of *de facto* or *de jure* statelessness, may smoothly follow the required procedures to obtain such status. Furthermore, an arrangement should be made to provide necessary legal advice to those who are faced with problems of statelessness. The uncertainty surrounding the nationality of recognized refugees and their offspring (such as the *Rohingyas*) should be adequately addressed to prevent them from falling into the quagmire of statelessness. The government should also ensure that directions are provided to relevant departments in order to prevent the creation of statelessness by inadvertent administrative operations.

The Nationality Act makes some explicit references to the conferral of citizenship on stateless persons. Article 8(4) of the Nationality Act provides for relaxation of the

requirements for naturalization for a person born in Japan, not having any nationality since the time of birth, and continuously having a domicile in Japan for three years or more since that time. Further, Article 2(iii) of the Nationality Act provides that a child can acquire Japanese nationality if born in Japan and both of the parents are unknown or are without nationality.

To further limit the possibility of the occurrence of statelessness, the Nationality Act should be revised so that a child born in Japan be granted Japanese nationality where one or more of the parents possess/es foreign nationality but is/are unable to pass on their own nationality under their nationality law, which renders the child stateless if Japanese nationality is not granted.

The official data should be made public, annually and in total, regarding the number and gender of stateless persons who have acquired Japanese nationality by application of the Nationality Act. The statistical data on refugee determination should include information on the number, gender and the country of former habitual residence of stateless applicants and refugees.

Fifthly, it should be stressed that Japan has the obligation to observe faithfully international human rights obligations in relation to its treatment of *de jure* and *de facto* stateless persons. These include human rights instruments such as the Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. All humans have the right to enjoy rights protected therein. Limitations of these rights based on nationality or migrant status must be carefully examined: it must not constitute discrimination under international human rights law. Granting/depriving nationality and immigration control, including granting of resident status, are no longer mere domestic matters left to the sole discretion of the State, but a matter clearly regulated by international human rights law. Under any circumstances, a minimum level of human rights set forth in the international documents must be guaranteed to anyone in the state of statelessness.

These human rights instruments except the Convention on the Rights of the Child, provide for international bodies that receive and consider complaints from individuals

claiming violation of rights set forth in relevant treaties. To assure thorough protection of stateless person's rights, it would be most desirable for Japan to recognize the competence of these bodies.

Sixthly, it is time for Japan to re-examine the significance of the 1954 Convention Relating to the Status of Stateless persons and the 1961 Convention on the Reduction of Statelessness. I have already mentioned that the UN General Assembly and the Executive Committee of the UNHCR, where Japan is an active member in both, have encouraged member States to accede to these Conventions.

Examination of the substance of the two Conventions would help to clarify the concept of statelessness and no doubt sensitize decision-makers to the need of establishing a well-refined method to determine statelessness. It would also help to recognize the need to extend protection to *de facto* stateless persons as discussed by the drafters of the two Conventions. In this context, it is recalled that the Committee on the Rights of the Child recommended that Japan should revise the nationality and other related laws and regulations to conform with Article 7 of the Children's Convention to avoid statelessness for children born in Japan.

As most East and Southeast Asian countries are not party to the two Conventions or the Refugee Convention, it may be necessary to start a discussion on the possibility of establishing a regional mechanism working on the problem of nationality and protection that occurs from the movement of people across borders. The problem of statelessness cannot be solved by a single nation. Cooperation with related international organizations such as the UNHCR is indispensable to encourage solutions with a paramount respect for human dignity.

## **Appendix I Convention relating to the Status of Stateless Persons**

### ***Preamble***

*The High Contracting Parties,*

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly of the United Nations have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for stateless persons and endeavoured to assure stateless persons the widest possible exercise of these fundamental rights and freedoms,

Considering that only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention,

Considering that it is desirable to regulate and improve the status of stateless persons by an international agreement, Have agreed as follows:

### ***CHAPTER I***

#### **GENERAL PROVISIONS**

##### ***Article 1.-Definition of the term "stateless person"***

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

2. This Convention shall not apply:

(i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance;

(ii) To persons who are recognized by the competent authorities of the country in which they have taken residence as having the rights and obligations which are attached to the possession of the nationality of that country;



(iii) To persons with respect to whom there are serious reasons for considering that:

(a) They have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

(b) They have committed a serious non-political crime outside the country of their residence prior to their admission to that country;

(c) They have been guilty of acts contrary to the purposes and principles of the United Nations.

***Article 2.-General obligations***

Every stateless person has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

***Article 3.-Non-discrimination***

The Contracting States shall apply the provisions of this Convention to stateless persons without discrimination as to race, religion or country of origin.

***Article 4. -Religion***

The Contracting States shall accord to stateless persons within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practise their religion and freedom as regards the religious education of their children.

***Article 5. - Rights granted apart from this Convention***

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to stateless persons apart from this Convention.

***Article 6. - The term "in the same circumstances"***

For the purpose of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a stateless person, must be fulfilled by him, with the exception of requirements which by their nature a stateless person is incapable of fulfilling.

***Article 7. - Exemption from reciprocity***

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to stateless persons the same treatment as is accorded to aliens generally.
2. After a period of three years' residence, all stateless persons shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.
3. Each Contracting State shall continue to accord to stateless persons the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.
4. The Contracting States shall consider favourably the possibility of according to stateless persons, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to stateless persons who do not fulfill the conditions provided for in paragraphs 2 and 3.
5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

***Article 8. - Exemption from exceptional measures***

With regard to exceptional measures which may be taken against the person, property or interests of nationals or former nationals of a foreign State, the Contracting States shall not apply such measures to a stateless person solely on account of his having previously possessed the nationality of the foreign State in question. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article shall, in appropriate cases, grant exemptions in favour of such stateless persons.

***Article 9. - Provisional measures***

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a stateless person and that the continuance of such measures is necessary in his case in the interests of national security.

***Article 10. - Continuity of residence***

1. Where a stateless person has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a stateless person has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

***Article 11. - Stateless seamen***

In the case of stateless persons regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

***CHAPTER II***

**JURIDICAL STATUS**

***Article 12. - Personal status***

1. The personal status of a stateless person shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a stateless person and dependent on personal status, more particularly rights attaching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become stateless.

***Article 13. - Movable and immovable property***

The Contracting States shall accord to a stateless person treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

***Article 14. - Artistic rights and industrial property***

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a stateless person shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

***Article 13. - Right of association***

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible, and in any event, not less favourable than that accorded to aliens generally in the same circumstances.

***Article 16. - Access to courts***

1. A stateless person shall have free access to the courts of law on the territory of all Contracting States.
2. A stateless person shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.
3. A stateless person shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

### ***CHAPTER III***

#### **GAINFUL EMPLOYMENT**

##### ***Article 17. - Wage-earning employment***

1. The Contracting States shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage in wage-earning employment.

2. The Contracting States shall give sympathetic consideration to assimilating the rights of all stateless persons with regard to wage-earning employment to those of nationals, and in particular of those stateless persons who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

##### ***Article 18. - Self-employment***

The Contracting States shall accord to a stateless person lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

##### ***Article 19. - Liberal professions***

Each Contracting State shall accord to stateless persons lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

## **CHAPTER IV**

### **WELFARE**

#### ***Article 20. - Rationing***

Where a rationing system exists, which applies to the population at large and regulates the general distribution of products in short supply, stateless persons shall be accorded the same treatment as nationals.

#### ***Article 21. - Housing***

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to stateless persons lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

#### ***Article 22. - Public education***

1. The Contracting States shall accord to stateless persons the same treatment as is accorded to nationals with respect to elementary education.
2. The Contracting States shall accord to stateless persons treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

#### ***Article 23. - Public relief***

The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

#### ***Article 24. - Labour legislation and social security***

1. The Contracting States shall accord to stateless persons lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

(a) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities; remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a stateless person resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to stateless persons the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to stateless persons so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

## **CHAPTER V**

### **ADMINISTRATIVE MEASURES**

#### ***Article 25. - Administrative assistance***

1. When the exercise of a right by a stateless person would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting State in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities.
2. The authority or authorities mentioned in paragraph I shall deliver or cause to be delivered under their supervision to stateless persons such documents or certifications as would normally be delivered to aliens by or through their national authorities.
3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities and shall be given credence in the absence of proof to the contrary.
4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.
5. The provisions of this article shall be without prejudice to articles 27 and 28.

#### ***Article 26. - Freedom of movement***

Each Contracting State shall accord to stateless persons lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

#### ***Article 27. - Identity papers***

The Contracting States shall issue identity papers to any stateless person in their territory who does not possess a valid travel document.

#### ***Article 28. - Travel documents***

The Contracting States shall issue to stateless persons lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national



security or public order otherwise require, and the provisions of the schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other stateless person in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to stateless persons in their territory who are unable to obtain a travel document from the country of their lawful residence.

***Article 29. - Fiscal charges***

1. The Contracting States shall not impose upon stateless persons duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations .

2. Nothing in the above paragraph shall prevent the application to stateless persons of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

***Article 30. - Transfer of assets***

1. A Contracting State shall, in conformity with its laws and regulations, permit stateless persons to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement. 2. A Contracting State shall give sympathetic consideration to the application of stateless persons for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted. Article 31. - Expulsion

1. The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a stateless person shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the stateless person shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a stateless person a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

***Article 32. - Naturalization***

The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

***CHAPTER VI***

**FINAL CLAUSES**

***Article 33. - Information on national legislation***

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

***Article 34. - Settlement of disputes***

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

***Article 35. - Signature, ratification and accession***

1. This Convention shall be open for signature at the Headquarters of the United Nations until 31 December 1955.

2. It shall be open for signature on behalf of:

(a) Any State Member of the United Nations;

(b) Any other State invited to attend the United Nations Conference on the Status of Stateless Persons; and

(c) Any State to which an invitation to sign or to accede may be addressed by the General Assembly of the United Nations.

3. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

4. It shall be open for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

***Article 36. - Territorial application clause***

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

***Article 37. - Federal clause***

In the case of a Federal or non-unitary State, the following provisions shall apply

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the

Convention showing the extent to which effect has been given to that provision by legislative or other action.

***Article 38. - Reservations***

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16 (1) and 33 to 42 inclusive.

2. Any State making a reservation in accordance with paragraph I of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

***Article 39. - Entry into force***

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

***Article 40. - Denunciation***

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 36 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

***Article 41. - Revision***

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

***Article 42. - Notifications by the Secretary-General of the United Nations***

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 35:

- (a) Of signatures, ratifications and accessions in accordance with article 35;
- (b) Of declarations and notifications in accordance with article 36;
- (c) Of reservations and withdrawals in accordance with article 38;
- (d) Of the date on which this Convention will come into force in accordance with article 39;
- (e) Of denunciations and notifications in accordance with article 40;
- (f) Of request for revision in accordance with article 41.

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

DONE at New York, this twenty-eighth day of September, one thousand nine hundred and fifty-four, in a single copy, of which the English, French and Spanish texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 35.

## **Appendix II Convention on the Reduction of Statelessness**

### ***The Contracting States,***

*Acting* in pursuance of resolution 896 (IX), adopted by the General Assembly of the United Nations on 4 December 1954,

*Considering* it desirable to reduce statelessness by international agreement,

*Have agreed* as follows:

### ***Article 1***

1. A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless. Such nationality shall be granted:

(a) At birth, by operation of law, or

(b) Upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this article, no such application may be rejected. A Contracting State which provides for the grant of its nationality in accordance with subparagraph (b) of this paragraph may also provide for the grant of its nationality by operation of law at such age and subject to such conditions as may be prescribed by the national law.

2. A Contracting State may make the grant of its nationality in accordance with subparagraph (b) -of paragraph I of this article subject to one or more of the following conditions:

(a) That the application is lodged during a period, fixed by the Contracting State, beginning not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years, so, however, that the person concerned shall be allowed at least one year during which he may himself make the application without having to obtain legal authorization to do so;

(b) That the person concerned has habitually resided in the territory of the Contracting State for such period as may be fixed by that State, not exceeding five years immediately preceding the lodging of the application nor ten years in all;

(c) That the person concerned has neither been convicted of an offence against national security nor has been sentenced to imprisonment for a term of five years or more on a criminal charge;

(d) That the person concerned has always been stateless.

3. Notwithstanding the provisions of paragraphs I (b) and 2 of this article, a child born in wedlock in the territory of a Contracting State, whose mother has the nationality of that State, shall acquire at birth that nationality if it otherwise would be stateless.

4. A Contracting State shall grant its nationality to a person who would otherwise be stateless and who is unable to acquire the nationality of the Contracting State in whose territory he was born because he has passed the age for lodging his application or has not fulfilled the required residence conditions, if the nationality of one of his parents at the time of the person's birth was that of the Contracting State first above-mentioned. If his parents did not possess the same nationality at the time of his birth, the question whether the nationality of the person concerned should follow that of the father or that of the mother shall be determined by the national law of such Contracting State. If application for such nationality is required, the application shall be made to the appropriate authority by or on behalf of the applicant in the manner prescribed by the national law. Subject to the provisions of paragraph 5 of this article, such application shall not be refused.

5. The Contracting State may make the grant of its nationality in accordance with the provisions of paragraph 4 of this article subject to one or more of the following conditions:

(a) That the application is lodged before the applicant reaches an age, being not less than twenty-three years, fixed by the Contracting State;

(b) That the person concerned has habitually resided in the territory of the Contracting State for such period immediately preceding the lodging of the application, not exceeding three years, as may be fixed by that State;

(c) That the person concerned has always been stateless.

## ***Article 2***

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

### *Article 3*

For the purpose of determining the obligations of Contracting States under this Convention, birth on a ship or in an aircraft shall be deemed to have taken place in the territory of the State whose flag the ship flies or in the territory of the State in which the aircraft is registered, as the case may be.

### *Article 4*

1. A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State. If his parents did not possess the same nationality at the time of his birth, the question whether the nationality of the person concerned should follow that of the father or that of the mother shall be determined by the national law of such Contracting State. Nationality granted in accordance with the provisions of this paragraph shall be granted:

(a) At birth, by operation of law, or

(b) Upon an application being lodged with the appropriate authority, by or on behalf of the person concerned, in the manner prescribed by the national law. Subject to the provisions of paragraph 2 of this article, no such application may be rejected.

2. A Contracting State may make the grant of its nationality in accordance with the provisions of paragraph 1 of this article subject to one or more of the following conditions:

(a) That the application is lodged before the applicant reaches an age, being not less than twenty-three years, fixed by the Contracting State;

(b) That the person concerned has habitually resided in the territory of the Contracting State for such period immediately preceding the lodging of the application, not exceeding three years, as may be fixed by that State;

(c) That the person concerned has not been convicted of an offence against national security;

(d) That the person concerned has always been stateless.



### ***Article 5***

1. If the law of a Contracting State entails loss of nationality as a consequence of any change in the personal status of a person such as marriage, termination of marriage, legitimation, recognition or adoption, such loss shall be conditional upon possession or acquisition of another nationality.

2. If, under the law of a Contracting State, a child born out of wedlock loses the nationality of that State in consequence of a recognition of affiliation, he shall be given an opportunity to recover that nationality by written application to the appropriate authority, and the conditions governing such application shall not be more rigorous than those laid down in paragraph 2 of article I of this Convention.

### ***Article 6***

If the law of a Contracting State provides for loss of its nationality by a person's spouse or children as a consequence of that person losing or being deprived of that nationality, such loss shall be conditional upon their possession or acquisition of another nationality.

### ***Article 7***

1. (a) If the law of a Contracting State entails loss or renunciation of nationality, such renunciation shall not result in loss of nationality unless the person concerned possesses or acquires another nationality;

(b) The provisions of subparagraph (a) of this paragraph shall not apply where their application would be inconsistent with the principles stated in articles 13 and 14 of the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly of the United Nations.

2. A national of a Contracting State who seeks naturalization in a foreign country shall not lose his nationality unless he acquires or has been accorded assurance of acquiring the nationality of that foreign country.

3. Subject to the provisions of paragraphs 4 and 5 of this article, a national of a Contracting State shall not lose his nationality, so as to become stateless, on the ground of departure, residence abroad, failure to register or on any similar ground.

4. A naturalized person may lose his nationality on account of residence abroad for a period, not less than seven consecutive years, specified by the law of the Contracting State concerned if he fails to declare to the appropriate authority his intention to retain his nationality.

5. In the case of a national of a Contracting State, born outside its territory, the law of that State may make the retention of its nationality after the expiry of one year from his attaining his majority conditional upon residence at that time in the territory of the State or registration with the appropriate authority.

6. Except in the circumstances mentioned in this article, a person shall not lose the nationality of a Contracting State, if such loss would render him stateless, notwithstanding that such loss is not expressly prohibited by any other provision of this Convention.

#### ***Article 8***

1. A Contracting State shall not deprive a person of his nationality if such deprivation would render him stateless.

2. Notwithstanding the provisions of paragraph 1 of this article, a person may be deprived of the nationality of a Contracting State:

(a) In the circumstances in which, under paragraphs 4 and 5 of article 7, it is permissible that a person should lose his nationality;

(b) Where the nationality has been obtained by misrepresentation or fraud.

3. Notwithstanding the provisions of paragraph I of this article, a Contracting State may retain the right to deprive a person of his nationality, if at the time of signature, ratification or accession it specifies its retention of such right on one or more of the following grounds, being grounds existing in its national law at that time:

(a) That, inconsistently with his duty of loyalty to the Contracting State, the person:

(i) Has, in disregard of an express prohibition by the Contracting State 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 the State;

(b) That the person has taken an oath, or made a formal declaration, of allegiance to another State, or given definite evidence of his determination to repudiate his allegiance to the Contracting State.

4. A Contracting State shall not exercise a power of deprivation permitted by paragraphs 2 or 3 of this article except in accordance with law, which shall provide for the person concerned the right to a fair hearing by a court or other independent body.

#### ***Article 9***

A Contracting State may not deprive any person or group of persons of their nationality on racial, ethnic, religious or political grounds.

#### ***Article 10***

1. Every treaty between Contracting States providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. A Contracting State shall use its best endeavours to secure that any such treaty made by it with a State which is not a Party to this Convention includes such provisions.

2. In the absence of such provisions a Contracting State to which territory is transferred or which otherwise acquires territory shall confer its nationality on such persons as would otherwise become stateless as a result of the transfer or acquisition.

#### ***Article 11***

The Contracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority.

#### ***Article 12***

1. In relation to a Contracting State which does not, in accordance with the provisions of paragraph I of article I or of article 4 of this Convention, grant its nationality at birth by operation of law, the provisions of paragraph I of article I or of article 4, as the case may be, shall apply to persons born before as well as to persons born after the entry into force of this Convention.

2. The provisions of paragraph 4 of article I of this Convention shall apply to persons born before as well as to persons born after its entry into force.

3. The provisions of article 2 of this Convention shall apply only to foundlings found in the territory of a Contracting State after the entry into force of the Convention for that State.

#### ***Article 13***

This Convention shall not be construed as affecting any provisions more conducive to the reduction of statelessness which may be contained in the law of any Contracting State now or hereafter in force, or may be contained in any other convention, treaty or agreement now or hereafter in force between two or more Contracting States..

#### ***Article 14***

Any dispute between Contracting States concerning the interpretation or application of this Convention which cannot be settled by other means shall be submitted to the International Court of Justice at the request of any one of the parties to the dispute.

#### ***Article 15***

1. This Convention shall apply to all non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any Contracting State is responsible; the Contracting State concerned shall, subject to the provisions of paragraph 2 of this article, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which the Convention shall apply ipso facto as a result of such signature, ratification or accession.

2. In any case in which, for the purpose of nationality, a non-metropolitan territory is not treated as one with the metropolitan territory, or in any case in which the previous consent of a non-metropolitan territory is required by the constitutional laws or practices of the Contracting State or of the non-metropolitan territory for the application of the Convention to that territory, that Contracting State shall endeavour to secure the needed consent of the non-metropolitan territory within the period of twelve months from the date of signature of the Convention by that Contracting State, and when such consent has been obtained the Contracting State shall notify the Secretary General of the United Nations. This Convention shall apply to the territory or territories named in such notification from the date of its receipt by the Secretary-General.

3. After the expiry of the twelve-month period mentioned in paragraph 2 of this article, the Contracting States concerned shall inform the Secretary-General of the results of the consultations with those non-metropolitan territories for whose international relations they are responsible and whose consent to the application of this Convention may have been withheld.

***Article 16***

1. This Convention shall be open for signature at the Headquarters of the United Nations from 30 August 1961 to 31 May 1962.
2. This Convention shall be open for signature on behalf of:
  - (a) Any State Member of the United Nations;
  - (b) Any other State invited to attend the United Nations Conference on the Elimination or Reduction of Future Statelessness;
  - (c) Any State to which an invitation to sign or to accede may be addressed by the General Assembly of the United Nations.
3. This Convention shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.
4. This Convention shall be open for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

***Article 17***

1. At the time of signature, ratification or accession any State may make a reservation in respect of articles 11, 14 or 15.
2. No other reservations to this Convention shall be admissible.

***Article 18***

1. This Convention shall enter into force two years after the date of the deposit of the sixth instrument of ratification or accession.
2. For each State ratifying or acceding to this Convention after the deposit of the sixth instrument of ratification or accession, it shall enter into force on the ninetieth day after the deposit by such State of its instrument of ratification or accession or on the date on which this Convention enters into force in accordance with the provisions of paragraph I of this article, whichever is the later.

### ***Article 19***

1. Any Contracting State may denounce this Convention at any time by a written notification addressed to the Secretary-General of the United Nations. Such denunciation shall take effect for the Contracting State concerned one year after the date of its receipt by the Secretary-General.

2. In cases where, in accordance with the provisions of article 15, this Convention has become applicable to a non-metropolitan territory of a Contracting State, that State may at any time thereafter, with the consent of the territory concerned, give notice to the Secretary-General of the United-Nations denouncing this Convention separately in respect to that territory. The denunciation shall take effect one year after the date of the receipt of such notice by the Secretary-General, who shall notify all other Contracting States of such notice and the date of receipt thereof.

### ***Article 20***

1. The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States referred to in article 16 of the following particulars:

(a) Signatures, ratifications and accessions under article 16;

(b) Reservations under article 17;

(c) The date upon which this Convention enters into force in pursuance of article 18;

(d) Denunciations under article 19.

2. The Secretary-General of the United Nations shall, after the deposit of the sixth instrument of ratification or accession at the latest, bring to the attention of the General Assembly the question of the establishment, in accordance with article 11, of such a body as therein mentioned.

### ***Article 21***

This Convention shall be registered by the Secretary-General of the United Nations on the date of its entry into force.

IN WITNESS WHEREOF the undersigned Plenipotentiaries have signed this Convention.

DONE at New York, this thirtieth day of August, one thousand nine hundred and sixty-one, in a single copy, of which the Chinese, English, French, Russian and Spanish texts are equally authentic

and which shall be deposited in the archives of the United Nations, and certified copies of which shall be delivered by the Secretary-General of the United Nations to all members of the United Nations and to the non-member States referred to in article 16 of this Convention.