

**GUIDELINES ON STATELESSNESS NO. 1:  
The definition of “Stateless Person” in Article 1(1) of the 1954  
Convention relating to the Status of Stateless Persons**

UNHCR issues these Guidelines pursuant to its mandate responsibilities to address statelessness. These responsibilities were initially limited to stateless persons who were refugees as set out in paragraph 6 (A) (II) of the UNHCR Statute and Article 1 (A) (2) of the 1951 Convention relating to the Status of Refugees. To undertake the functions foreseen by Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, UNHCR's mandate was expanded to cover persons falling under the terms of that Convention by General Assembly Resolutions 3274 (XXIX) of 1974 and 31/36 of 1976. The Office was entrusted with responsibilities for stateless persons generally under UNHCR Executive Committee Conclusion 78, which was endorsed by the General Assembly in Resolution 50/152 of 1995. Subsequently, in Resolution 61/137 of 2006, the General Assembly endorsed Executive Committee Conclusion 106 which sets out four broad areas of responsibility for UNHCR: the identification, prevention and reduction of statelessness and the protection of stateless persons.

These Guidelines result from a series of expert consultations conducted in the context of the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness and build in particular on the *Summary Conclusions of the Expert Meeting on the Concept of Stateless Persons under International Law*, held in Prato, Italy in May 2010. These Guidelines are to be read in conjunction with the forthcoming *Guidelines on Procedures for Determining whether an Individual is a Stateless Person* and *Guidelines on the Status of Stateless Persons at the National Level*. This set of Guidelines will be published in due course as a UNHCR Handbook on Statelessness.

These Guidelines are intended to provide interpretive legal guidance for governments, NGOs, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff and other UN agencies involved in addressing statelessness.

## I. INTRODUCTION

### a) Overview

1. The 1954 Convention relating to the Status of Stateless Persons (1954 Convention) is the only international treaty aimed specifically at regulating the standard of treatment for stateless persons.<sup>1</sup> As such, it is of critical importance in ensuring the protection of this vulnerable group.

2. Article 1(1) of the 1954 Convention sets out the definition of a stateless person as follows:

*“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.”*

The Convention does not permit reservations to Article 1(1) and thus this definition is binding on all States Parties to the treaty. In addition, the International Law Commission has concluded that the definition in Article 1(1) is part of customary international law.<sup>2</sup> These Guidelines do not address Article 1(2) of the 1954 Convention which sets out the circumstances in which persons who fall within the “stateless person” definition are nevertheless excluded from the protection of this treaty.

3. Procedures implemented by States to determine whether an individual qualifies as a stateless person for the purposes of Article 1(1) are considered in separate guidance, as these Guidelines focus on the substantive criteria of the definition, except where cross-reference to the guidelines on procedures is necessary.<sup>3</sup> Questions relating to the rights and obligations of stateless persons are also addressed in separate guidelines.<sup>4</sup>

4. These Guidelines are intended to assist States, UNHCR and other actors with interpreting Article 1(1) to facilitate the identification and proper treatment of beneficiaries of the 1954 Convention. In addition, these Guidelines will be relevant in a range of other circumstances, such as the interpretation of other international instruments that refer to stateless persons or to related terms also undefined in treaties. In this respect, it is noted that as the 1954 Convention has not been able to attract the same level of ratifications/accessions as the 1951 Convention relating to the Status of Refugees (1951 Convention) and other human rights treaties, there is limited State practice, including jurisprudence of national courts, on the interpretation of Article 1(1).

### b) Background to the 1954 Convention

5. The 1954 Convention shares the same origins as the 1951 Convention. It was originally conceived as a draft protocol to the refugee treaty. However, when the 1951 Convention was adopted, the protocol was left in draft form and referred to a separate negotiating conference where it was transformed into a self-standing treaty concerning stateless persons. Most importantly for the purposes of these Guidelines, the 1954 Convention establishes the universal definition of a “stateless person” in its Article 1(1).

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<sup>1</sup> The 1961 Convention on the Reduction of Statelessness is concerned with avoiding statelessness primarily through safeguards in nationality laws, thereby reducing the phenomenon over time. The 1930 Special Protocol on Statelessness, which came into force in 2004, does not address standards of treatment but is concerned with specific obligations of the previous State of nationality. This Protocol has very few States Parties.

<sup>2</sup> See page 49 of the International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, which states that the Article 1 definition can “no doubt be considered as having acquired a customary nature”. The Commentary is accessible at [http://untreaty.un.org/ilc/guide/9\\_8.htm](http://untreaty.un.org/ilc/guide/9_8.htm). The text of Article 1(1) of the 1954 Convention is used in the Articles on Diplomatic Protection to provide a definition of stateless person.

<sup>3</sup> Please see the *Guidelines on Procedures for Determining whether an Individual is a Stateless Person* (“*Procedures Guidelines*”).

<sup>4</sup> Please see the *Guidelines on the Status of Stateless Persons at the National Level* (“*Status Guidelines*”).

## II. INTERPRETING ARTICLE 1(1)

### a) General Considerations

6. Article 1(1) of the 1954 Convention is to be interpreted in line with the ordinary meaning of the text, read in context and bearing in mind the treaty's object and purpose.<sup>5</sup> As indicated in its preamble and in the *Travaux Préparatoires*, the object and purpose of the 1954 Convention is to ensure that stateless persons enjoy the widest possible exercise of their human rights.<sup>6</sup> The drafters intended to improve the position of stateless persons by regulating their status. As a general rule, possession of a nationality is preferable to recognition and protection as a stateless person. Therefore, in seeking to ensure that all those who fall within the 1954 Convention's reach benefit from its provisions, it is important to recognise and respect an individual's nationality status.

7. Article 1(1) applies in both migration and non-migration contexts. A stateless person may never have crossed an international border, having lived in the same country for his or her entire life. Some stateless persons, however, may also be refugees or persons eligible for complementary protection.<sup>7</sup> Those stateless persons who fall within the scope of the 1951 Convention will be entitled to protection under that instrument, a matter discussed further in the *Status Guidelines*.

8. Persons who fall within the scope of Article 1(1) of the 1954 Convention are sometimes referred to as "*de jure*" stateless persons even though the term is not used in the Convention itself. By contrast, reference is made in the Final Act of the 1961 Convention to "*de facto*" stateless persons. Unlike Article 1(1) stateless persons, the term *de facto* statelessness is not defined in any international instrument and there is no treaty regime specific to this category of persons (the reference in the Final Act of the 1961 Convention being limited and non-binding in nature).<sup>8</sup> Care must be taken that those who qualify as "stateless persons" under Article 1(1) of the 1954 Convention are recognised as such and not mistakenly referred to as *de facto* stateless persons as otherwise they may fail to receive the protection guaranteed under the 1954 Convention. These Guidelines address interpretive issues regarding the Article 1(1) definition of stateless persons, yet avoid qualifying them as *de jure* stateless persons as that term appears nowhere in the treaty itself.

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<sup>5</sup> Please see Article 31(1) of the 1969 Vienna Convention on the Law of Treaties which sets out this primary rule of interpretation. Article 31 goes on to set out other factors which are relevant in interpreting treaty provisions whilst supplementary methods of interpretation are listed in Article 32.

<sup>6</sup> Please see the second and fourth paragraphs of the Preamble:

"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 it is desirable to regulate and improve the status of stateless persons by an international agreement,..."

(The reference to "fundamental rights and freedoms" is a reference to the Universal Declaration of Human Rights which is mentioned in the first paragraph of the Preamble).

<sup>7</sup> For example, they may fall within the European Union's subsidiary protection regime set out in Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. See, more generally, UNHCR Executive Committee Conclusion No.103 (LVI) of 2005 on complementary forms of protection.

<sup>8</sup> On *de facto* statelessness see for example, Section II.A. of United Nations High Commissioner for Refugees, *Expert Meeting on the Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010 (hereinafter referred to as the "*Prato Conclusions*"):

"1. *De facto* statelessness has traditionally been linked to the notion of effective nationality and some participants were of the view that a person's nationality could be ineffective inside as well as outside of his or her country of nationality. Accordingly, a person could be *de facto* stateless even if inside his or her country of nationality. However, there was broad support from other participants for the approach set out in the discussion paper prepared for the meeting which defines a *de facto* stateless person on the basis of one of the principal functions of nationality in international law, the provision of protection by a State to its nationals abroad.

2. The definition is as follows: *de facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality".

The full text of the Conclusions is available at: <http://www.unhcr.org/refworld/pdfid/4ca1ae002.pdf>.

9. An individual is a stateless person from the moment that the conditions in Article 1(1) of the 1954 Convention are met. Thus, any finding by a State or UNHCR that an individual satisfies the test in Article 1(1) is declaratory, rather than constitutive, in nature.<sup>9</sup>

10. Article 1(1) can be analysed by breaking the definition down into two constituent elements: “not considered as a national...under the operation of its law” and “by any State”. When determining whether an individual is stateless under Article 1(1), it is often most practical to look first at the matter of “by any State,” as this will not only narrow the scope of inquiry to States with which an individual has ties, but might also exclude from consideration at the outset entities that do not fulfil the concept of “State” under international law. Indeed, in some instances consideration of this element alone will be decisive, such as where the only entity to which an individual has a relevant link is not a State.

## **b) Interpreting “by any State”**

### **Which States need to be examined?**

11. Although the definition in Article 1(1) is formulated in the negative (“not considered to be a national by any State”), an enquiry into whether someone is stateless is limited to the States with which a person enjoys a relevant link, in particular by birth on the territory, descent, marriage, or habitual residence. In some cases this may limit the scope of investigation to only one State (or indeed to an entity which is not a State).<sup>10</sup>

### **What is a “State”?**

12. The definition of “State” in Article 1(1) is informed by how the term has generally evolved in international law. The criteria in the 1933 Montevideo Convention on the Rights and Duties of States remain pertinent in this regard. According to that Convention, a State is constituted when an entity has a permanent population, defined territory, effective government and capacity to enter into relations with other States. Other factors of statehood that have subsequently emerged in international legal discourse include the effectiveness of the entity in question, the right of self-determination, the prohibition on the use of force and the consent of the State which previously exercised control over the territory in question.<sup>11</sup>

13. For an entity to be a “State” for the purposes of Article 1(1) it is not necessary for it to have received universal or large-scale recognition of its statehood by other States or to have become a Member State of the United Nations. Nevertheless, recognition or admission will be strong evidence of statehood.<sup>12</sup> Differences of opinion may arise within the international community on whether a particular entity has achieved statehood. In part, this reflects the complexity of some of the criteria involved and their application. Even where an entity objectively appears to satisfy the criteria mentioned in the paragraph above, there may be States that for political reasons choose to withhold recognition of, or actively not recognise, it as a State. In making an Article 1(1) determination, a decision-maker may be inclined to look toward his or her State’s official stance on a particular entity’s legal personality. Such an approach could, however, lead to decisions influenced more by the political position of the government of the State making the determination rather than the position of the entity in international law.

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<sup>9</sup> The implications of this, in terms of the suspensive effect of determination procedures and the treatment of individuals awaiting an outcome of a determination of their statelessness, are addressed in the *Procedures Guidelines* and the *Status Guidelines*.

<sup>10</sup> The issue of what constitutes a relevant link is dealt with further in the *Procedures Guidelines* in the context of the standard of proof required to establish statelessness.

<sup>11</sup> Where an entity claims to be a new State but the manner in which it emerged involved a breach of a *jus cogens* norm, this would raise questions about its eligibility for statehood. A *jus cogens* norm is a principle of customary international law considered to be peremptory in nature, that is it takes precedence over any other obligations (whether customary or treaty in nature), is binding on all States and can only be overridden by another peremptory norm. Examples of *jus cogens* norms include the prohibition on the use of force and the right to self-determination.

<sup>12</sup> Please note though, the longstanding debate on the constitutive versus declaratory nature of recognition of States. The former doctrine considers the act of recognition to be a prerequisite to statehood whilst the latter treats recognition as merely evidence of that status under international law. These different approaches also contribute to the complexity in some cases of determining the statehood of an entity.

14. Once a State is established, there is a strong presumption in international law as to its continuity irrespective of the effectiveness of its government. Therefore, a State which loses an effective central government because of internal conflict can nevertheless remain a “State” for the purposes of Article 1(1).

### **c) Interpreting “not considered as a national ... under the operation of its law”**

#### **Meaning of “law”**

15. The reference to “law” in Article 1(1) should be read broadly to encompass not just legislation, but also ministerial decrees, regulations, orders, judicial case law (in countries with a tradition of precedent) and, where appropriate, customary practice.<sup>13</sup>

#### **When is a person “not considered as a national” under a State’s law and practice?**

16. Establishing whether an individual is not considered as a national under the operation of its law requires a careful analysis of how a State applies its nationality laws in an individual’s case in practice and any review/appeal decisions that may have had an impact on the individual’s status.<sup>14</sup> This is a mixed question of fact and law.

17. Applying this approach of examining an individual’s position in practice may lead to a different conclusion than one derived from a purely objective analysis of the application of nationality laws of a country to an individual’s case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to “law” in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when it comes to its implementation in practice.

#### *Automatic and non-automatic modes of acquisition or withdrawal of nationality*

18. The majority of States have a mixture of automatic and non-automatic modes for effecting changes to nationality, including through acquisition, renunciation, loss or deprivation of nationality.<sup>15</sup> When determining whether someone is considered as a national of a State or is stateless, it is helpful to establish whether an individual’s nationality status has been influenced by automatic or non-automatic mechanisms or modes.

19. Automatic modes are those where a change in nationality status takes place by operation of law (*ex lege*).<sup>16</sup> According to automatic modes, nationality is acquired as soon as criteria set forth by law are met, such as birth on a territory or birth to nationals of a State. By contrast in non-automatic modes, an act of the individual or a State authority is required before the change in nationality status takes place.

#### *Identifying competent authorities*

20. To establish whether a State considers an individual to be its national, it is necessary to identify which institution(s) is/are the competent authority(ies) for nationality matters in a given country with which he or she has relevant links. Competence in this context relates to the authority responsible for conferring or withdrawing nationality from individuals, or for clarifying nationality status where nationality is acquired or withdrawn automatically. The competent

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<sup>13</sup> A similar approach is taken in Article 2(d) of the 1997 European Convention on Nationality.

<sup>14</sup> This approach reflects the general principle of law set out in Articles 1 and 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

<sup>15</sup> Please note that the terms loss and deprivation are used here in the same manner as in the 1961 Convention: “loss” refers to withdrawal of nationality by operation of law (*ex lege*) and “deprivation” refers to withdrawal of nationality initiated by the authorities of the State.

<sup>16</sup> Please note in this regard that the phrase “under the operation of its law” in Article 1(1) is not synonymous with “by operation of law”. The latter is a term of art (used, for example, in the 1961 Convention) which signifies a mechanism that is automatic in nature. The stateless person definition encompasses nationality that may have been acquired or withdrawn through non-automatic as well as automatic mechanisms.

authority or authorities will differ from State to State and in many cases there will be more than one competent authority involved.<sup>17</sup>

21. Some States have a single, centralized body that governs nationality issues that would constitute the competent authority for the purposes of an analysis of nationality status. Other States, however, have several authorities that can determine nationality, any one of which might be considered a competent authority depending on the circumstances. Thus, it is not necessary that a competent authority be a central State body. A local or regional administrative body can be a competent authority as can a consular official<sup>18</sup> and in many cases low-level local government officials will constitute the competent authority. The mere possibility that the decision of such an official can later be overridden by a senior official does not in itself exclude the former from being treated as a competent authority for the purposes of an Article 1(1) analysis.

22. Identifying the competent authority or authorities involves establishing which legal provision(s) relating to nationality may be relevant in an individual's case and which authority/authorities are mandated to apply them. Isolating the relevant legal provisions requires both an assessment of an individual's personal history as well as an understanding of the nationality laws of a State, including the interpretation and application, or non-application in some cases, of nationality laws in practice.

23. The identity and number of competent authorities in a particular case will depend in particular on the following factors:

- whether automatic or non-automatic modes for the acquisition, renunciation, or withdrawal of nationality need to be considered; and
- whether more than one nationality-related event needs to be examined.

*Evaluating evidence of competent authorities in non-automatic modes of nationality acquisition and withdrawal*

24. Identifying the competent authority where a non-automatic mode of changing nationality status is involved can be relatively straightforward. For mechanisms which are dependent on an act or decision of a State body, that body will be the competent authority.

25. For example, the government department that decides naturalisation applications will be the competent authority in respect of this mechanism. The position of this authority is generally decisive. Some non-automatic modes involving an act of the State do not involve any discretion on the part of the officials concerned; if an individual satisfies the requirements set out in law, the official will be required to carry out a specific act bestowing or withdrawing nationality.<sup>19</sup>

26. In non-automatic modes where an act of the State is required for acquisition of nationality, there will generally be a document recording that act, such as a citizenship certificate. Such documentation will be decisive in proving nationality. In the absence of such evidence it can be assumed that the necessary action was not taken and nationality not acquired.<sup>20</sup> This assumption of non-citizenship can be set aside by subsequent statements, actions, or evidence by the competent authority indicating that nationality was actually conferred.

*Evaluating evidence of competent authorities in automatic modes of citizenship acquisition or loss of nationality*

27. In cases where acquisition or loss of nationality occurs automatically, no State body is actively involved in the change of status and no active step is required of an individual. Such

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<sup>17</sup> It follows from the above that the views of a State body that is not competent to pronounce on nationality status are irrelevant.

<sup>18</sup> Please see below at paragraphs 32-33.

<sup>19</sup> Please note that it cannot be concluded that an individual is a national (or has been deprived of nationality) until such a procedure has been completed, see paragraph 43 below.

<sup>20</sup> Applications for naturalization or other documents submitted through a non-automatic nationality procedure do not qualify as sufficient evidence regarding a State's determination on that individual's nationality status.

change occurs by operation of law (*ex lege*) when prescribed criteria are met. In most countries, nationality is acquired automatically either through birth on the territory or descent. Nationality is also acquired automatically by most individuals affected by State succession.<sup>21</sup> Some laws provide for automatic loss of nationality, when certain conditions are met, such as prescribed periods of residency abroad, failure to register or make a declaration within a specific period.

28. Where nationality is acquired automatically, documents are typically not issued by the State as part of the mechanism. In such cases, it is generally birth registration that provides proof of place of birth and parentage and thereby provides evidence of acquisition of nationality, either by *jus soli* or *jus sanguinis*, rather than being the formal basis for the acquisition of nationality.

29. When automatic modes of nationality acquisition or loss are under consideration, the competent authority is any State institution that is empowered to make a determination of an individual's nationality status in the sense of clarifying that status, rather than deciding whether to confer or withdraw it. Examples of such bodies are passport authorities or, in a limited number of States, civil registration officials (where nationality is indicated in acts of civil registration, in particular birth registration). It is possible that in a particular case, more than one competent authority will emerge as a number of bodies may legitimately take positions regarding an individual's nationality in the course of their designated activities.

#### *Considerations where State practice contravenes automatic modes of acquisition of nationality*

30. Where the competent authorities treat an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country's laws, it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national. This scenario frequently arises where discrimination against a particular group is widespread in government departments or where, in practice, the law governing automatic acquisition at birth is systematically ignored and individuals are required instead to prove additional ties to a State.<sup>22</sup>

#### *Assessing nationality in the absence of evidence of the position of competent authorities*

31. There may be cases where an individual has never come into contact with a State's competent authorities, perhaps because acquisition was automatic at birth and a person has lived in a region without public services and has never applied for identity documents or a passport. In such cases, it is important to assess the State's general attitude in terms of nationality status of persons who are similarly situated. If the State has a good record in terms of recognising, in a non-discriminatory fashion, the nationality status of all those who appear to come within the scope of the relevant law, for example in the manner in which identity card applications are handled, this may indicate that the person concerned is considered as a national by the State. However, if the individual belongs to a group whose members are routinely denied identification documents issued only to nationals, this may indicate that he or she is not considered as a national by the State.

#### *Role of consular authorities*

32. The role of consular authorities merits particular consideration. A consulate may be the competent authority responsible for conducting the necessary step in a non-automatic mechanism. This occurs, for example, where a country's laws require children born to their

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<sup>21</sup> In some cases of State succession, however, citizenship of a successor State is not automatic and non-automatic modes of citizenship acquisition are employed instead. Please see the International Law Commission, *Articles on the Nationality of Natural Persons in Relation to Succession of States with Commentaries*, 1999, for an overview of State practice.

<sup>22</sup> Where a State's laws provides for automatic acquisition of nationality, but in practice a State places additional requirements on individuals to acquire nationality, this does not negate the automatic nature of the nationality law. Rather, it indicates that the State in practice does not consider those who do not satisfy their extra-legal requirements as nationals, potentially rendering them stateless under the Article 1(1) definition.

nationals overseas to register with a consulate as a prerequisite for acquiring the nationality of the parents. As such, the consulate in the country of such a child's birth will be the competent authority and its position on his or her nationality will be decisive, assuming no subsequent mechanism has also to be considered. If an individual is refused such registration or is prevented from applying for it, he or she is not considered as a national for the purposes of Article 1(1).

33. Consulates might be identified as competent authorities in other respects. Where individuals seek assistance from a consulate, for example to renew a passport or to obtain clarification of their nationality status, a consulate is legitimately required to take a position on that individual's nationality status within its powers of consular protection. In doing so, it acts as a competent authority. This is also the case when it responds to enquiries from other States regarding an individual's nationality status. Where a consulate is the only competent authority to take a position on an individual's nationality status, its position is typically decisive. Where other competent authorities have also taken positions on an individual's nationality status, their positions must be weighed up against any taken by consular authorities.<sup>23</sup>

#### *Enquiries with competent authorities*

34. In some cases an individual or a State may seek clarification of that individual's nationality status with competent authorities. This need typically arises where an automatic mode of acquisition or loss is involved or where an individual may have acquired or been deprived of nationality through a non-automatic mechanism, but lacks any documentary proof of this. Such enquiries may be met either with silence or a refusal to respond from the competent authority. Conclusions regarding a lack of response should only be drawn after a reasonable period of time. If a competent authority has a general policy of never replying to such requests, no inference can be drawn from this failure to respond based on the non-response alone. Conversely, when a State routinely responds to such queries, a lack of response will generally provide strong confirmation that the individual is not a national. Where a competent authority issues a pro forma response to an enquiry and it is clear that the authority has not examined the particular circumstances of an individual's position, such a response carries little weight. In any case, the position of the competent authority on a nationality status enquiry will need to be weighed up against the position taken by any other competent authority, or authorities, involved in an individual's case.<sup>24</sup>

#### *Inconsistent treatment by competent authorities*

35. The assessment of the positions of competent authorities becomes complex when an individual has been treated by various State actors inconsistently. For example, an individual may have been allowed to receive public benefits, which by law and in practice are reserved for nationals, but on reaching adulthood is denied a passport. Depending on the specific facts of the case, inconsistent treatment may be an instance of a national's rights being violated, the consequence of that person never having acquired nationality of that State, or the result of an individual having been deprived of or losing his or her nationality.

36. In cases where there is evidence that an individual has acquired nationality through a non-automatic mechanism dependent on an act of a State body, subsequent denial by other State bodies of rights generally accorded to nationals indicates that his or her rights are being breached. That being said, in certain circumstances the nature of the subsequent treatment may point to the State having changed its position on the nationality status of that individual, or that nationality has been lost or withdrawn.

37. Even where acquisition or withdrawal of nationality may have occurred automatically or through the formal act of an individual, State authorities nonetheless will often subsequently

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<sup>23</sup> Please see paragraph 37 on the relative weight to be given to bodies tasked with issuing identity documents which mention nationality status.

<sup>24</sup> Please note that in cases of a non-automatic change in nationality status that requires an act of a State, the existence (or lack of) documents normally issued as part of the State's action will be decisive in establishing nationality. Please see paragraph 26.



confirm that nationality has been acquired or withdrawn. This is generally undertaken through procedures for the issuance of identity documents. In relation to mechanisms for acquisition or loss of nationality either automatically or through the formal act of an individual, greater weight is warranted regarding the view of the competent authorities responsible for issuing identity documents that constitute proof of nationality, such as passports, certificates of nationality and, where they are only issued to nationals, identity cards.<sup>25</sup>

#### *Nationality acquired in error or bad faith*

38. Where the action of the competent authority in a non-automatic mechanism is undertaken in error (for example, because of a misunderstanding of the law to be applied) or in bad faith, this does not in itself invalidate the individual's nationality status so acquired. This flows from the ordinary meaning of the terms employed in Article 1(1) of the 1954 Convention. The same is true if the individual's nationality status changes as a result of a fraudulent application by the individual or one which inadvertently contained mistakes regarding material facts. For the purposes of the definition, conferrals of nationality under a non-automatic mechanism are to be considered valid even if there is no legal basis for such conferral.<sup>26</sup> However, in some cases the State, on discovering the error or bad faith involved in the nationality procedure in question, will subsequently have taken action to deprive the individual of nationality and this will need to be taken into account in determining the State's position of the individual's current status.

39. The impact of fraud or mistake in the acquisition of nationality is to be distinguished from the fraudulent acquisition of documents which may be presented as evidence of nationality. These documents will not necessarily support a finding of nationality as in many cases they will be unconnected to any nationality mechanism, automatic or non-automatic, which actually was applied in respect of the individual.

#### *Impact of appeal/review proceedings*

40. In instances where an individual's nationality status has been the subject of review or appeal proceedings, whether by a judicial or other body, its decision must be taken into account. In States that generally respect the rule of law,<sup>27</sup> the appellate/review body's decision typically would constitute the position of the State regarding the individual's nationality for the purposes of Article 1(1) if under the local law its decisions are binding on the Executive.<sup>28</sup> Thus, where authorities have subsequently treated an individual in a manner inconsistent with a finding of nationality by a review body, this represents an instance of a national's rights not being respected rather than the individual not being a national.

41. A different approach may be justified in countries where the executive is able to ignore the positions of judicial or other review bodies (even though these are binding as a matter of law) with impunity. This may be the case, for example, in States where a practice of discriminating against a particular group is widespread through State institutions. In such cases, the position of State authorities that such groups are not nationals would be decisive rather than the position of judicial authorities that might uphold the nationality rights of such groups.

42. There may be situations where the judgment of a court in a case not directly concerning the individual nevertheless has legal implications for that person's nationality status. If the judgment alters, as a matter of domestic law, such a person's nationality status, this will generally be conclusive as to his or her nationality (subject to the qualification regarding rule of law set out in the preceding paragraph). This may arise, for example, where in a particular

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<sup>25</sup> Indeed, other authorities may consult with this competent authority when taking a position on the individual's nationality.

<sup>26</sup> This situation must be distinguished from one where a non-national is merely treated to the privileges of nationality.

<sup>27</sup> "Rule of law" is described in the UN Secretary-General's 2004 Report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* as:

"... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards..."

<sup>28</sup> The exception would be where under the domestic law the judicial finding is only a recommendation and is not binding in nature on the authorities.

case the interpretation of a provision governing a mechanism for automatic acquisition has the effect of bringing a whole body of people within the ambit of that provision without any action required on their or the government's part.<sup>29</sup>

### *Temporal Issues*

43. An individual's nationality is to be assessed as at the time of determination of eligibility under the 1954 Convention. It is neither a historic nor a predictive exercise. The question to be answered is whether, at the point of making an Article 1(1) determination, an individual is a national of the country or countries in question. Therefore, if an individual is partway through a process for acquiring nationality but those procedures are yet to be completed, he or she cannot be considered as a national for the purposes of Article 1(1) of the 1954 Convention.<sup>30</sup> Similarly, where requirements or procedures for loss, deprivation or renunciation of nationality have only been partially fulfilled or completed, the individual is still a national for the purposes of the stateless person definition.

### *Voluntary Renunciation of Nationality*

44. Voluntary renunciation relates to an act of free will whereby an individual gives up his or her nationality status. This generally takes the form of an oral or written declaration. The subsequent withdrawal of nationality may be automatic or at the discretion of the authorities.<sup>31</sup> In some States voluntary renunciation of nationality is treated as grounds for excluding an individual from the coverage of Article 1(1). However, this is not permitted by the 1954 Convention. The treaty's object and purpose, of facilitating the enjoyment by stateless persons of their human rights, is equally relevant in cases of voluntary as well as involuntary withdrawal of nationality. Indeed, in many cases the renunciation may have pursued a legitimate objective, for example the fulfilment of conditions for acquiring another nationality, and the individual may only have expected a very short spell as stateless. The question of an individual's free choice is not relevant when determining eligibility for recognition as stateless under Article 1(1); it may, however, be pertinent to the matter of the treatment received thereafter. Those who have renounced their nationality voluntarily might be able to reacquire such nationality, unlike other stateless persons. The availability of protection in another State may have an impact on the status to be awarded on recognition and, as such, this issue is explored in the Status Guidelines.

### *Concept of Nationality*

45. In assessing the nationality laws of a State it is important to bear in mind that the terminology used to describe a "national" varies from country to country. For example, other labels that might be applied to that status include "citizen", "subject", "*nationale*" in French, and "*nacional*" in Spanish. Moreover, within a State there may be various categories of nationality with differing names and associated rights. The 1954 Convention is concerned with ameliorating the negative effect, in terms of dignity and security, of an individual not satisfying a fundamental aspect of the system for human rights protection; the existence of a national-State relationship. As such, the definition of stateless person in Article 1(1) incorporates a concept of national which reflects a formal link, of a political and legal character, between the individual and a particular State. This is distinct from the concept of nationality which is concerned with membership of a religious, linguistic or ethnic group.<sup>32</sup> As such, the treaty's concept of national is consistent with the traditional understanding of this term under international law; that is persons over whom a State considers it has jurisdiction on the basis of nationality, including the right to bring claims against other States for their ill-treatment.

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<sup>29</sup> For example, this would be the case where a court rules that a provision of the nationality legislation governing automatic acquisition of nationality by individuals born in the territory prior to a specific date applies to an entire ethnic group, despite statements to the contrary by the government.

<sup>30</sup> The same approach applies where the individual has not pursued or exhausted a remedy in relation to denial or withdrawal of nationality.

<sup>31</sup> Voluntary renunciation is to be distinguished from loss of nationality through failure to comply with formalities, including where the individual is aware of the relevant requirements and still chooses to ignore them.

<sup>32</sup> This meaning of nationality can be found, for example, in the refugee definition in Article 1A(2) of the 1951 Refugees Convention in relation to the phrase "well-founded fear of being persecuted for reasons of race, religion, *nationality*..." (emphasis added).

46. Where States grant a legal status to certain groups of people over whom they consider to have jurisdiction on the basis of a nationality link rather than a form of residence, then a person belonging to this category will be a “national” for the purposes of the 1954 Convention. Generally, at a minimum, such status will be associated with the right of entry, re-entry and residence in the State’s territory but there may be situations where, for historical reasons, entry is only permitted to a non-metropolitan territory belonging to a State. The fact that different categories of nationality within a State have different rights associated with them does not prevent their holders from being treated as a “national” for the purposes of Article 1(1). Nor does the fact that in some countries the rights associated with nationality are fewer than those enjoyed by nationals of other States or indeed fall short of those required in terms of international human rights obligations.<sup>33</sup> Although the issue of diminished rights may raise issues regarding the effectiveness of the nationality and violations of international human rights obligations, this is not pertinent to the application of the stateless person definition in the 1954 Convention.<sup>34</sup>

47. There is no requirement of a “genuine” or an “effective” link implicit in the concept of “national” in Article 1(1).<sup>35</sup> Nationality, by its nature, reflects a linkage between the State and the individual, often on the basis of birth on the territory or descent from a national and this is often evident in the criteria for acquisition of nationality in most countries. However, a person can still be a “national” for the purposes of Article 1(1) despite not being born or habitually resident in the State of purported nationality.

48. Under international law, States have broad discretion in the granting and withdrawal of nationality. This discretion may be circumscribed by treaty. In particular, there are numerous prohibitions in global and regional human rights treaties regarding discrimination on grounds such as race, which apply with regard to grant, loss and deprivation of nationality.<sup>36</sup> Prohibitions in terms of customary international law are not so clear, though one example would be deprivation on the grounds of race.

49. Bestowal, refusal, or withdrawal of nationality in contravention of international obligations must not be condoned. The illegality on the international level, however, is generally irrelevant for the purposes of Article 1(1). The alternative would mean that an individual who has been stripped of his or her nationality in a manner inconsistent with international law would nevertheless be considered a “national” for the purposes of Article 1(1); a situation seemingly inconsistent with the object and purpose of the 1954 Convention.<sup>37</sup>

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<sup>33</sup>Please note that it is the rights *generally* associated with nationality that are relevant, not whether such rights are actually observed in a specific individual’s experience.

<sup>34</sup>Historically, there does not appear to have been any requirement under international law for nationality to have a specific content in terms of rights of individuals, as opposed to it creating certain inter-State obligations.

<sup>35</sup>These concepts have arisen in the field of diplomatic protection that is the area of customary international law that governs the right of a State to take diplomatic and other action against another State on behalf of its national whose rights and interests have been injured by the other State. The International Law Commission recently underlined why these concepts should not be applied beyond a narrow set of circumstances, please see page 33 of its *Articles on Diplomatic Protection with commentaries*, 2006 available at [http://untreaty.un.org/ilc/guide/9\\_8.htm](http://untreaty.un.org/ilc/guide/9_8.htm).

<sup>36</sup>An example is Article 9 of the 1979 Convention on the Elimination of All Forms of Discrimination against Women which guarantees that all women should have equal rights as men in their ability to confer nationality on their children and with respect to acquisition, change, or retention of their nationality (typically upon marriage to a foreigner).

<sup>37</sup>The exception to the general approach may be situations where the breach of international law amounts to a violation of a peremptory norm of international law. In such circumstances, States may be under an obligation not to recognise situations flowing from that violation as legal. This may involve non-recognition of the nationality status, including perhaps, how this status is treated in an Article 1(1) determination. The exact scope of this obligation under customary international law remains a matter of debate.

**GUIDELINES ON STATELESSNESS NO. 2:  
Procedures for Determining whether an Individual is a Stateless Person**

UNHCR issues these Guidelines pursuant to its mandate responsibilities to address statelessness. These responsibilities were initially limited to stateless persons who were refugees as set out in paragraph 6 (A) (II) of the UNHCR Statute and Article 1 (A) (2) of the 1951 Convention relating to the Status of Refugees. To undertake the functions foreseen by Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, UNHCR's mandate was expanded to cover persons falling under the terms of that Convention by General Assembly Resolutions 3274 (XXIX) of 1974 and 31/36 of 1976. The Office was entrusted with responsibilities for stateless persons generally under UNHCR Executive Committee Conclusion 78, which was endorsed by the General Assembly in Resolution 50/152 of 1995. Subsequently, in Resolution 61/137 of 2006, the General Assembly endorsed Executive Committee Conclusion 106 which sets out four broad areas of responsibility for UNHCR: the identification, prevention and reduction of statelessness and the protection of stateless persons.

These Guidelines result from a series of expert consultations conducted in the context of the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness and build in particular on the *Summary Conclusions of the Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons*, held in Geneva, Switzerland in December 2010. These Guidelines are to be read in conjunction with the *Guidelines on the Definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons* and the forthcoming *Guidelines on the Status of Stateless Persons at the National Level*. This set of Guidelines will be published in due course as a UNHCR Handbook on Statelessness.

These Guidelines are intended to provide interpretative legal guidance for governments, NGOs, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff and other UN agencies involved in addressing statelessness.

## I. INTRODUCTION

### a) Overview

1. The 1954 Convention relating to the Status of Stateless Persons (1954 Convention) establishes the international legal definition of “stateless person” and the standards of treatment to which such individuals are entitled, but does not prescribe any mechanism to identify stateless persons as such.<sup>1</sup> Yet, it is implicit in the 1954 Convention that States must identify stateless persons within their jurisdictions so as to provide them appropriate treatment to comply with their Convention commitments. These Guidelines advise on the modalities of creating statelessness determination procedures, including questions of evidence that arise in such mechanisms.

2. Government officials might encounter the question of whether a person is stateless in a range of contexts, reflecting the critical role that nationality plays in everyday life. For example, consideration of nationality status is relevant when individuals apply for passports or identity documents, seek legal residence or employment in the public sector, want to exercise their voting rights, perform military service, or attempt to access government services. The issue of nationality and statelessness may arise when an individual’s right to be in a country is challenged in removal procedures. In refugee status determination, nationality is often key to identifying the country (or countries) in relation to which an individual’s allegations of a well-founded fear of persecution should be assessed. An assessment of statelessness will be necessary where an individual seeks the application of the safeguards set out in the 1961 Convention on the Reduction of Statelessness (1961 Convention). These examples illustrate that determination of statelessness is necessary in a range of judicial and administrative procedures.

3. These Guidelines address procedures that are aimed specifically, if not exclusively, at determining whether an individual is stateless. Moreover, the focus of these Guidelines is on the concept of stateless person as defined in the 1954 Convention and on the obligations of States that are party to the 1954 Convention. Some consideration is given to States not bound by this treaty and on the identification of *de facto* stateless persons. Although an individual can be a stateless person and a refugee as per the 1954 Convention and the 1951 Convention Relating to the Status of Refugees (1951 Convention) respectively, a stateless refugee will benefit from the protection of the 1951 Convention. The 1954 Convention was primarily developed to regulate the treatment of stateless persons who are not refugees.

4. Only a relatively small number of countries have established statelessness determination procedures, not all of which are highly regulated. There is growing interest in introducing such mechanisms. Statelessness is a juridically relevant fact under international law. Thus, recognition of statelessness plays an important role in enhancing respect for the human rights of stateless persons, particularly through access to a secure legal status and enjoyment of rights afforded to stateless persons under the 1954 Convention.

5. It is also in States’ interests to establish statelessness determination procedures. Doing so enhances the ability of States to respect their obligations under the 1954 Convention. In countries where statelessness arises among mixed migratory movements, statelessness determination procedures also help governments assess the size and profile of stateless populations in their territory and thus determine the government services required. In addition, the identification of statelessness can help prevent statelessness by revealing the root causes and new trends in statelessness.

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<sup>1</sup> The definition of a stateless person is found in Article 1(1) of the 1954 Convention: a “stateless person means a person who is not considered as a national by any State under the operation of its law”. For further information on interpretative issues relating to the definition in Article 1(1), please see UNHCR, *Guidelines on the Definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (“Definition Guidelines”)* available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

## **b) Determination of Statelessness and the Right to a Nationality**

6. Statelessness determination procedures generally assist States in meeting their commitments under the 1954 Convention. Their use, however, may not be appropriate in relation to certain stateless populations. Statelessness can arise both in a migratory and non-migratory context and the profile of statelessness in a particular country may fit one or the other scenario or might be mixed. Some stateless populations in a non-migratory context remain in their “own country” and may be referred to as *in situ* populations.<sup>2</sup> For these groups, determination procedures for the purpose of obtaining status as stateless persons are not appropriate because of their long-established ties to these countries. Based on existing international standards and State practice in the area of reduction of statelessness, such ties include long-term habitual residence or residence at the time of State succession. Depending on the circumstances of the populations under consideration, States might be advised to undertake targeted nationality campaigns or nationality verification efforts rather than statelessness determination procedures.<sup>3</sup>

7. Targeted nationality campaigns are undertaken with the objective of resolving the statelessness situation through the grant of nationality, rather than identifying persons as stateless to provide them with a status as such. A number of States have undertaken such nationality campaigns with regard to longstanding stateless populations in their territory, in some cases with the assistance of UNHCR. Even where States undertake nationality campaigns, it is still beneficial to establish statelessness determination procedures for stateless individuals who do not fall within the *in situ* population as the profile of stateless persons in a particular country may be mixed or may change over time.

8. Nationality verification procedures assist individuals in a territory where they have difficulties obtaining proof of their nationality status. Such procedures often involve an accessible, swift and straightforward process for documenting existing nationality, including the nationality of another State.

9. The procedural requirements of both nationality campaigns and nationality verification procedures will be similar to those used in statelessness determination procedures in practice, as they need to reflect the forms of evidence available in a country and the difficulties faced by applicants in proving their nationality status. Documentary evidence may sometimes be dispensed with and the sworn testimony of community members that an individual meets the relevant criteria under the nationality laws, such as birth in the territory or descent from a parent who was a national may instead suffice.

## **II. STATELESSNESS DETERMINATION PROCEDURES**

### **a) Design and Location of Determination Procedures**

10. States have broad discretion in the design and operation of statelessness determination procedures as the 1954 Convention is silent on such matters. Local factors, such as the estimated size and diversity of the stateless population, as well as the complexity of the legal and evidentiary issues to be examined, will influence the approach taken. For such procedures to be effective, though, the determination of statelessness must be a specific objective of the mechanism in question, though not necessarily the only one.

11. Current State practice is varied with respect to the location of statelessness determination procedures within national administrative structures, reflecting country-specific considerations. States may choose between a centralized procedure or one that is conducted

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<sup>2</sup> The phrase “own country” is taken from Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) and its interpretation by the UN Human Rights Committee.

<sup>3</sup> Please see paragraph 50 of *UNHCR Action to Address Statelessness: A Strategy Note*, 2010 at <http://www.unhcr.org/refworld/docid/4b9e0c3d2.html> :

“... resources should not be dedicated to a formal determination of statelessness where a realistic, immediate goal is the acquisition, reacquisition or confirmation of nationality by such a population. This will usually be the case for those protracted situations in which an entire population has significant ties only with the State in which they are resident.”

by local authorities. Centralized procedures are preferable as they are more likely to develop the necessary expertise among the officials undertaking status determination. Ensuring easy access for applicants located in different parts of a country can be facilitated through various measures: for example, permitting written applications to be submitted to local offices for onward transmission to the central determination body, which can coordinate and guide the appropriate examination of relevant facts at the local level, including the personal interview with the applicant.

12. Establishing whether a person is stateless can be complex and challenging but it is in the interests of both States and stateless persons that determination procedures be as simple, fair and efficient as possible. To this end, some States might consider adapting existing administrative procedures to include statelessness determination. Factors to consider include administrative capacity, existing expertise on statelessness matters, as well as expected size and profile of the stateless population. In any combined procedure it is essential that the definition of a stateless person is clearly understood and properly applied and that procedural safeguards and evidentiary standards are respected.

13. Some States might elect to integrate statelessness determination procedures within the competence of immigration authorities. Other States may place statelessness determination within the body responsible for nationality issues, for example naturalisation applications or verification of nationality requests. This would be particularly appropriate where the individuals concerned are likely to be longstanding residents of the State.

14. As some stateless persons may also be refugees, States may consider combining statelessness and refugee determination in the same procedure. Confidentiality requirements for applications by asylum-seekers and refugees must be respected regardless of the form or location of the statelessness determination procedure.<sup>4</sup>

15. Resource considerations, both financial and human, will be significant in the planning of statelessness determination procedures. Countries with statelessness determination procedures have experienced low numbers of applicants. The costs involved can be balanced against savings made from freeing up other administrative mechanisms to which stateless persons may otherwise resort, such as requests for other forms of immigration status.

## **b) Access to Procedures**

16. For procedures to be fair and efficient, access to them must be ensured. Dissemination of information, including through targeted information campaigns where appropriate and counselling on the procedures, facilitates access to the mechanism for stateless persons. Given that individuals are sometimes unaware of statelessness determination procedures or hesitant to apply for statelessness status, procedures can usefully contain safeguards permitting State authorities to initiate a procedure.

17. Everyone in a State's territory must have access to statelessness determination procedures. There is no basis in the Convention for requiring that applicants for statelessness determination be lawfully within a State. Such a requirement is particularly inequitable given that lack of nationality denies many stateless persons the very documentation that is necessary to enter or reside in any State lawfully.

18. There is also no basis in the Convention to set time-limits for individuals to claim statelessness status. Such deadlines may arbitrarily exclude individuals from receiving 1954 Convention protection.

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<sup>4</sup> For further details on coordinating refugee and statelessness determination procedures, please see paragraphs 26-30.

### **c) Procedural Guarantees**

19. Statelessness determination procedures should be formalized in law. Establishing procedures through legislation ensures fairness, transparency and clarity. Procedural guarantees are fundamental elements of statelessness determination procedures. The due process guarantees that are to be integrated into administrative law procedures, including refugee status determination procedures, are necessary in this context. States are encouraged, therefore, to incorporate the following safeguards:

- information on eligibility criteria, the determination procedure and the rights associated with recognition of statelessness is widely disseminated by the authorities in a range of languages; counseling regarding the procedures is provided to all applicants in a language they understand;
- there is a right to an interview with a decision-making official;
- applications are submitted in writing and assistance with this is provided if necessary;
- assistance is available for translation/interpretation in respect of written applications and interviews;
- it is the right of every member of a family to make an independent application;
- an adult may make an application on behalf of a dependent child and special procedural guarantees for unaccompanied children are also available;
- a child has the right to be heard where he or she has the capacity to form and express a view;
- applicants are to have access to legal counsel; where free legal assistance is available, it is to be offered to applicants without financial means;
- determinations are made on the individual merits of the claim with reference to country information regarding nationality law and practice in the relevant States, including information pertaining to the law and practice during periods in the past which are of relevance to the case under examination;
- if the determination is made in a judicial setting, the process is inquisitorial rather than adversarial;
- decisions are made in writing with reasons;
- decisions are made and communicated within a reasonable time;
- there is a right of appeal; and
- access to UNHCR is guaranteed.

20. To ensure that procedures are fair and effective, States are advised to refrain from removing an individual from their territory pending the outcome of the determination process.

21. The right to an individual interview, and necessary assistance with translation/interpretation throughout the process, are essential to ensure that applicants have the opportunity to present their cases fully and to provide and clarify information that is material to the claim. These procedural guarantees also permit the decision-maker to explore any ambiguities in an individual case.

22. It is in the interests of all parties that statelessness determination is conducted as expeditiously as possible, subject to reasonable time being available to gather evidence. Several countries have established time limits within which determination authorities are to



make a decision on a statelessness application. In applications where the immediately available evidence is clear and the statelessness claim is manifestly well-founded, fair and efficient procedures may only require a few months to reach a final determination.

23. In general, it is undesirable for a first instance decision to be issued more than six months from the submission of an application as this prolongs the period spent by an applicant in an insecure position. However, in exceptional circumstances it may be appropriate to allow the proceedings to last up to 12 months to provide time for enquiries regarding the individual's nationality status to be pursued with another State, where it is likely that a substantive response will be forthcoming in that period.<sup>5</sup>

24. An effective right to appeal against a negative first instance decision is an essential safeguard in a statelessness determination procedure. The appeal procedure is to rest with an independent body. The applicant is to have access to legal counsel and, where free legal assistance is available, it is to be offered to applicants without financial means.

25. Appeals must be possible on both points of fact and law as the possibility exists that there may have been an incorrect assessment of the evidence at first instance level. Whether an appellate body can substitute its own judgment on eligibility under the 1954 Convention or whether it can merely quash the first instance decision and send the matter back for reconsideration by the determination authority is at the discretion of the State. The choice will tend to reflect the general approach to such matters in its legal/administrative system. In addition, States may permit a further judicial review, which addresses questions of law only, and may be limited by the procedural rules of the judicial system concerned.

### **III. COORDINATING REFUGEE STATUS AND STATELESSNESS DETERMINATIONS**

26. When an applicant raises both a refugee and a statelessness claim, it is important that each claim is assessed and that both types of status are explicitly recognised. This is because protection under the 1951 Convention generally gives rise to a greater set of rights at the national level than that under the 1954 Convention. Nevertheless, there may be instances where refugee status ceases without the person having acquired a nationality, necessitating then international protection as a stateless person.

27. As a stateless person may also be a refugee or be entitled to a complementary form of protection,<sup>6</sup> States must ensure that confidentiality requirements for refugees who might also be stateless are upheld in statelessness determination procedures. Every applicant in a statelessness determination procedure is to be informed at the outset of the need to raise refugee-related concerns, should they exist.<sup>7</sup> The identity of a refugee or an asylum-seeker must not be disclosed to the authorities of the individual's country of origin. As discussed below in paragraphs 44 - 47, statelessness determination officials might be required to make enquiries with foreign authorities regarding applicants, which could compromise the confidentiality to which refugees and asylum-seekers are entitled. When this is the case, refugee status determination is to proceed and consideration of the statelessness claim to be suspended.

28. Where refugee status and statelessness determinations are conducted in separate procedures and a determination of statelessness can be made without contacting the authorities of the country of origin, both procedures may proceed in parallel. However, to maximize efficiency, where findings of fact from one procedure can be used in the other, it may be appropriate to first conduct interviews and to gather and assess country information for the refugee determination procedure.

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<sup>5</sup> This highlights the importance of applicants receiving an appropriate standard of treatment during the determination process. This matter will be dealt with in the forthcoming *Guidelines on the Status of Stateless Persons at the National Level* ("Status Guidelines").

<sup>6</sup> Please see UNHCR Executive Committee Conclusion No.103 (LVI) of 2005 on complementary forms of protection available at <http://www.unhcr.org/refworld/docid/43576e292.html>.

<sup>7</sup> Similarly, applicants for refugee status are to be informed of the possibility of applying for recognition as a stateless person.

29. Similarly, in a procedure that combines refugee and statelessness determination and an applicant raises both claims, it is important that the examiner conduct refugee and statelessness determination together.<sup>8</sup> If there is insufficient information to conclude that an individual is stateless without contacting the authorities of a foreign State, refugee status determination shall proceed.

30. In both separate and combined procedures, in certain circumstances it must be possible for an individual to re-activate a suspended statelessness claim. A statelessness claim may be re-activated in the event that:

- the refugee claim fails;
- refugee status is recognised but subsequently ceases;
- refugee status is cancelled because the inclusion criteria of Article 1A(2) of the 1951 Convention were not met;<sup>9</sup> or
- if additional evidence emerges that an individual is stateless.

Similar considerations apply to individuals with claims to both statelessness status and a complementary form of protection.

#### **IV. ASSESSMENT OF EVIDENCE**

##### **a) Types of Evidence**

31. Statelessness determination requires a mixed assessment of fact and law. Such cases cannot be settled through analysis of nationality laws alone as the definition of a stateless person requires an evaluation of the application of these laws in practice, including the extent to which judicial decisions are respected by government officials.<sup>10</sup> The kinds of evidence that may be relevant can be divided into two categories: evidence relating to the individual's personal circumstances and evidence concerning the laws and other circumstances in the country in question.

32. Evidence concerning personal history helps identify which States and nationality procedures need to be considered in determining an applicant's nationality status.<sup>11</sup> In any given case, the following non-exhaustive list of types of evidence may be pertinent:

- testimony of the applicant (e.g. written application, interview);
- response(s) from a foreign authority to an enquiry regarding nationality status of an individual;
- identity documents (e.g. birth certificate, extract from civil register, national identity card, voter registration document);
- travel documents (including expired ones);
- documents regarding applications to acquire nationality or obtain proof of nationality;
- certificate of naturalisation;
- certificate of renunciation of nationality;
- previous responses by States to enquiries on the nationality of the applicant;

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<sup>8</sup> Refugee status determination requires the identification of either an individual's country of nationality or, for stateless persons, the country of former habitual residence for the purposes of assessing an individual's fear of persecution. Please see paragraphs 87-93 and 101-105, UNHCR, *Handbook and Criteria for Determining Refugee Status* (reissued 2011), available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

<sup>9</sup> Please see UN High Commissioner for Refugees, *Note on the Cancellation of Refugee Status*, 22 November 2004, available at: <http://www.unhcr.org/refworld/docid/41a5dfd94.html>.

<sup>10</sup> This is discussed further in paragraph 41 of the *Definition Guidelines* available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

<sup>11</sup> Please see paragraph 40 below.

- marriage certificate;
- military service record/discharge certificate;
- school certificates;
- medical certificates/records (e.g. attestations issued from hospital on birth, vaccination booklets);
- identity and travel documents of parents, spouse and children;
- immigration documents, such as residence permits of country(ies) of habitual residence;
- other documents pertaining to countries of residence (for example, employment documents, property deeds, tenancy agreements, school records, baptismal certificates); and
- record of sworn oral testimony of neighbours and community members.

33. Information concerning the circumstances in the country or countries under consideration covers evidence about the nationality and other relevant laws, their implementation and practices of relevant States, as well as the general legal environment in those jurisdictions in terms of respect by the executive branch for judicial decisions. It can be obtained from a variety of sources, governmental and non-governmental. The complexity of nationality law and practice in a particular State may justify recourse to expert evidence in some cases.

34. For such country-related information to be treated as accurate, it needs to be obtained from reliable and unbiased sources, preferably more than one. Thus, information sourced from State bodies directly involved in nationality mechanisms in the relevant State, or non-State actors which have built up expertise in monitoring or reviewing such matters, is preferred. It is important that country-related information is continuously updated so that changes in nationality law and practice in relevant countries are taken into account. That being said, the country-related information relied on should be contemporaneous with the nationality events that are under consideration in the case in question. In addition, where the practice of officials involved in applying the nationality laws of a State appears to differ by region, this must be taken into account with respect to the country-related evidence relied on.

#### **b) Issues of Proof**

35. Authorities undertaking statelessness determination procedures need to consider all available evidence, oral and written, regarding an individual's claim.

36. The stateless person definition in Article 1(1) of the 1954 Convention requires proof of a negative – that an individual is *not* considered as a national by any State under the operation of its law. This presents significant challenges to applicants and informs how evidentiary rules in statelessness determination procedures are to be applied.

#### **Burden of Proof**

37. The burden of proof in legal proceedings refers to the question of which party bears the responsibility of proving a claim or allegation. Typically in administrative or judicial proceedings, a claimant bears an initial responsibility in substantiating his or her claim. In the case of statelessness determination, the burden of proof is in principle shared, in that both the applicant and examiner must cooperate to obtain evidence and to establish the facts. The procedure is a collaborative one aimed at clarifying whether an individual comes within the scope of the 1954 Convention. Thus, the applicant has a duty to provide as full and truthful account of his or her position as possible and to submit all evidence reasonably available. Similarly, the determination authority is required to obtain and present all relevant evidence reasonably available to it, enabling an objective determination of the applicant's status. This

non-adversarial approach can be found in the practice of a number of States that already operate statelessness determination procedures.

38. Given the nature of statelessness, applicants for statelessness status are often unable to substantiate the claim with much, if any, documentary evidence. Statelessness determination authorities need to take this into account, where appropriate giving sympathetic consideration to testimonial explanations regarding the absence of certain kinds of evidence.<sup>12</sup>

### **Standard of Proof**

39. As with the burden of proof, the standard of proof or threshold of evidence necessary to determine statelessness must take into consideration the difficulties inherent in proving statelessness, particularly in light of the consequences of incorrectly rejecting an application. Requiring a high standard of proof of statelessness would undermine the object and purpose of the 1954 Convention. States are therefore advised to adopt the same standard of proof as that required in refugee status determination, namely, a finding of statelessness would be warranted where it is established to a “reasonable degree” that an individual is not considered as a national by any State under the operation of its law.<sup>13</sup>

40. The lack of nationality does not need to be established in relation to every State in the world. Consideration is only necessary of those States with which an individual has a relevant link, generally on the basis of birth on the territory, descent, marriage, or habitual residence.<sup>14</sup> The finding of statelessness arrived at on that basis will stand unless the determination authority is able to point to clear and convincing evidence that the individual is a national of an identified State. Such evidence of nationality may take the form, for example, of written confirmation from the competent authority responsible for naturalization decisions in another country that the applicant is a national of that State through naturalization or information establishing that under the nationality law and practice of another State the applicant has automatically acquired nationality there.<sup>15</sup>

41. Where an applicant does not cooperate in establishing the facts, for example by deliberately withholding information that could determine his or her identity, then he or she may fail to establish to a reasonable degree that he or she is stateless even if the determination authority is unable to demonstrate clear and convincing evidence of a particular nationality. The application can thus be rejected unless the evidence available nevertheless establishes statelessness to a reasonable degree.<sup>16</sup> Such cases need, however, to be distinguished from instances where an applicant is unable, as opposed to unwilling, to produce significant supporting evidence and/or substantial testimony about his or her personal history.

### **c) Weighing the Evidence**

42. Where authentic documentary evidence is presented regarding an individual’s personal history in a statelessness determination procedure, this evidence typically takes precedence over that individual’s testimony in reaching a conclusion on statelessness. Where limited or no documentary evidence regarding an individual’s personal circumstances is presented, however, additional weight will be given to an applicant’s written and/or oral testimony,

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<sup>12</sup> Further flexibility is also warranted where it is difficult for individuals to obtain documents originating from a foreign authority properly notarized or fixed with official seals.

<sup>13</sup> Please see paragraph 42, UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (reissued 2011), available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. In the refugee status determination context, an individual can claim a well-founded fear of persecution by establishing “to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the [refugee] definition.” Please also see UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (December 1998), available at <http://www.unhcr.org/refworld/docid/3ae6b3338.html>.

<sup>14</sup> Please see paragraph 11 of the *Definition Guidelines* available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

<sup>15</sup> Please see paragraphs 20 to 37 of the *Definition Guidelines* on the treatment of evidence from other States, including from their consular authorities, available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

<sup>16</sup> Please see the section below on credibility.

available country information and any results of additional enquiries with relevant States. The guidance in the paragraphs below on the weight to be given to certain kinds of evidence that will commonly be under consideration in statelessness determinations must be read alongside guidance on this matter found in the *Definition Guidelines*.

## Passports

43. Authentic, unexpired passports raise a presumption that the passport holder is a national of the country issuing the passport. However, this presumption may be rebutted where there is evidence showing that an individual is not actually considered to be a national of a State, for example where the document is a passport of convenience or the passport has been issued in error by an authority that is not competent to determine nationality issues. In such cases the passport is not a manifestation of a State's position that the individual is one of its nationals. No presumption is raised by passports that are counterfeit or otherwise fraudulently issued.<sup>17</sup>

## Enquiries with and Responses from Foreign Authorities

44. Information provided by foreign authorities is sometimes of central importance to statelessness determination procedures, although not necessary in cases where there is otherwise adequate proof. Under no circumstances is contact to be made with authorities of a State against which an individual alleges a well-founded fear of persecution unless it has definitively been concluded that he or she is neither a refugee nor entitled to a complementary form of protection.

45. Flexibility may be necessary in relation to the procedures for making contact with foreign authorities to confirm whether or not an individual is its national. Some foreign authorities may accept enquiries that come directly from another State while others may indicate that they will only respond to requests from individuals.<sup>18</sup>

46. Where statelessness determination authorities make enquiries with foreign authorities regarding the nationality or statelessness status of an individual, they must consider the weight to be attached to the response or lack of response from the State in question.<sup>19</sup>

47. Where a response from a foreign authority includes reasoning that appears to involve a mistake in applying the local law to the facts of the case or an error in assessing the facts, the reply must be taken on face value. It is the subjective position of the other State that is critical in determining whether an individual is its national for the purposes of the stateless person definition.<sup>20</sup> Time permitting, statelessness determination authorities may be able to raise such concerns with the foreign authority in the hope of obtaining greater clarity about the individual's nationality status. Indeed, in some cases this may result in the foreign authority belatedly acknowledging that the individual is its national or accepting that he or she is entitled to acquire nationality.

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<sup>17</sup> On these issues, please see also paragraphs 38-39 of the *Definition Guidelines* available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

<sup>18</sup> States may wish to set up bilateral or multilateral arrangements for making nationality enquiries. An example of such an arrangement is the 1999 Convention on the Issue of a Certificate of Nationality, to which member States of the International Commission on Civil Status, the European Union or the Council of Europe can accede.

<sup>19</sup> Guidance on this issue is provided in paragraph 34 of the *Definition Guidelines*, available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

<sup>20</sup> Please see paragraphs 38-39 of the *Definition Guidelines* which note that an error as to the application of local law to an individual's case is irrelevant in determining the State's position, available at <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

## Interviews

48. An interview with an applicant is an important opportunity for the decision-maker to explore any questions regarding the evidence presented. Open-ended questioning, conducted in a non-adversarial atmosphere, can create a "climate of confidence"<sup>21</sup> encouraging applicants to deliver as full an account as possible.<sup>22</sup> Applicants must be reminded at the outset of the interview that they have a duty to cooperate with the proceedings. That being said, an applicant can only be expected to reply to the best of his or her abilities and in many cases even basic information may not be known, for example the place of birth or whether birth was registered. While one interview will normally be sufficient to elicit the applicant's history, it may sometimes be necessary to conduct follow-up interviews.

## Credibility Issues

49. The credibility of an applicant will not be at issue during statelessness determination procedures where a determination can be reached on the basis of the available documentary evidence when assessed in light of relevant country-related information. Where, however, little or no documentary evidence is available, statelessness determination authorities will need to rely to a greater degree on an applicant's testimony and issues relating to his or her credibility might arise. In assessing whether statements can be considered credible, the decision-maker can consider objective credibility indicators, including the sufficiency of detail provided, consistency between written and oral statements, consistency of the applicant's statements with those of witnesses, consistency with country of origin information and the plausibility of the statements.

50. An applicant can only be expected to have a level of knowledge that is reasonable taking into account factors such as the applicant's level of education and age at the time of relevant events. Nationality laws and their application can be complex. An applicant will not necessarily be able to explain clearly why a particular decision was made by authorities or what the nationality practice is in countries under consideration. Where an applicant's ethnic identity is material to the determination, testing his or her knowledge of cultural practices or languages must take account of differing levels of education and understanding of traditions. Persistent unexplained evasiveness on key questions may legitimately raise concerns about an individual's credibility. This is even more so where an individual refuses, without giving any reason, to answer certain questions.

51. When determining whether an applicant's account is credible, a decision-maker must evaluate whether the story presented is internally coherent as well as consistent with reliable information about nationality law and practice in relevant countries and whether it is corroborated by any documentary or other evidence available.<sup>23</sup> Credibility is not undermined by minor inconsistencies in the applicant's account, particularly where these relate to immaterial matters or events that took place many years ago. Where the applicant's testimony appears to conflict with evidence regarding the country in question, it is important to verify that there are no regional divergences in the application of the nationality mechanism in question by officials of that State.

52. An applicant's demeanour is generally not a reliable indicator of credibility. A stateless person may have endured significant discrimination as a result of lack of nationality, rendering him or her anxious, reticent or defensive in any interview. Cultural differences between the applicant and the decision-maker also often preclude an accurate interpretation of specific forms of demeanour.

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<sup>21</sup> Please see paragraph 200, UNHCR, *Handbook and Criteria for Determining Refugee Status* (reissued 2011), available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>.

<sup>22</sup> Interviewing techniques are discussed more generally in UNHCR, *Interviewing Applicants for Refugee Status (RLD 4)*, 1995, available at <http://www.unhcr.org/refworld/pdfid/3ccea3304.pdf>.

<sup>23</sup> Please see generally paragraph 11 of UNHCR, *Note on Burden and Standard of Proof in Refugee Claims* (1998), available at <http://www.unhcr.org/refworld/pdfid/3ae6b3338.pdf>.

53. Negative inferences are not to be drawn where an individual has not had the opportunity, in an appropriate interview setting, to comment on any apparent gaps, contradictions or discrepancies in his or her account.

54. Even where material elements of the applicant's statements are found to lack credibility, this does not preclude a determination of statelessness. An individual's testimony must still be evaluated in the light of all other evidence, such as that relating to the countries concerned, which may still support a finding of statelessness.<sup>24</sup>

## V. ADDITIONAL PROCEDURAL CONSIDERATIONS

### a) Group Determination

55. Given the nature of statelessness, individualised procedures are the norm as these allow for the exploration of the applicant's personal circumstances. Countries that have adopted statelessness determination procedures thus far have followed this approach. Most of them are parties to the 1954 Convention and are assessing nationality/statelessness in relation to individuals present in a migratory context.

56. It is possible, however, to grant stateless person status to individuals within a group on a *prima facie* basis,<sup>25</sup> that is, without undertaking a full individual status determination. This could be appropriate where there is readily apparent, objective information about the lack of nationality of members of a group such that they would *prima facie* meet the stateless person definition in Article 1(1) of the 1954 Convention. In the absence of contrary evidence, an individual's eligibility for protection under the Convention would therefore be based on whether he or she is a member of an identified group that satisfies the Article 1(1) definition.

57. *Prima facie* recognition is not a subsidiary category or lesser status, but rather reflects an efficient evidentiary assessment leading to recognition under the 1954 Convention. As stateless persons, they benefit from the rights attached to that status until such status ends. As with individual determination mechanisms, there must be an effective legal remedy for individuals in a group to challenge a negative *prima facie* finding on the question of status.

58. Group determination must allow for consideration of the exclusion clauses set out in Article 1(2) of the 1954 Convention on an individual basis. Persons falling within Article 1(2) would not be entitled to the protection of the 1954 Convention even though they meet the stateless person definition set out in Article 1(1) of that instrument.<sup>26</sup>

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<sup>24</sup> A similar approach applies in determination of refugee status. Please see paragraph 42 of UNHCR, *Handbook and Criteria for Determining Refugee Status* (reissued 2011), available at <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. Given the nature of the statelessness definition, credibility issues are less likely to prevent a finding of statelessness than they are in a determination of refugee status.

<sup>25</sup> The *prima facie* technique is used in refugee status determination, usually in a group context. But it has also been applied in individual determinations.

<sup>26</sup> Article 1(2) is concerned with persons undeserving of protection either because they have an alternative route to protection or because of their behaviour:

"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."



## b) Detention

59. Routine detention of individuals seeking protection on the grounds of statelessness is arbitrary.<sup>27</sup> Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess. Moreover, stateless persons are often without a legal residence in any country. Thus, being undocumented or lacking the necessary immigration permits cannot be used as a general justification for detention of such persons. Article 9 of the ICCPR, guaranteeing the right to liberty and security of person, prohibits unlawful as well as arbitrary detention. For detention to be lawful, it must be regulated by domestic law, preferably with maximum limits set on such detention, and subject to periodic and judicial review. For detention not to be arbitrary, it must be necessary in each individual case, reasonable in all the circumstances, proportionate and non-discriminatory. Indefinite as well as mandatory forms of detention are arbitrary *per se*.<sup>28</sup>

60. Detention is therefore a measure of last resort and can only be justified where other less invasive or coercive measures have been considered and found insufficient to safeguard the lawful governmental objective pursued by detention. Alternatives to detention – from reporting requirements or bail/bond systems to structured community supervision and/or case management programmes – are part of any assessment of the necessity and proportionality of detention. General principles relating to detention apply *a fortiori* to children who as a rule are not to be detained in any circumstances.

61. Where persons awaiting statelessness determination are detained they must not be held with convicted criminals or individuals awaiting trial.<sup>29</sup> Moreover, judicial oversight of detention is always necessary and detained individuals need to have access to legal representation, including free counselling for those without means.

62. For stateless persons, the absence of status determination procedures to verify identity or nationality can lead to prolonged or indefinite detention. Statelessness determination procedures are therefore an important mechanism to reduce the risk of prolonged and/or arbitrary detention.

## c) Role of UNHCR

63. UNHCR assists States in a variety of ways to fulfil its statelessness mandate.<sup>30</sup> Drawing on its comparative knowledge of statelessness determination procedures in a range of States and its own experience making statelessness and nationality assessments, UNHCR can

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<sup>27</sup> Please see, in regard to immigration detention generally, the position taken by the UN Working Group on Arbitrary Detention:

“58...it considers that immigration detention should gradually be abolished. Migrants in an irregular situation have not committed any crime. The criminalization of irregular migration exceeds the legitimate interests of States in protecting its territories and regulating irregular migration flows.

59. If there has to be administrative detention, the principle of proportionality requires it to be the last resort. Strict legal limitations must be observed and judicial safeguards be provided for. The reasons put forward by States to justify detention, such as the necessity of identification of the migrant in an irregular situation, the risk of absconding, or facilitating the expulsion of an irregular migrant who has been served with a removal order, must be clearly defined and exhaustively enumerated in legislation.”

UN Working Group on Arbitrary Detention, Report to the Human Rights Council (A/HRC/13/30), 2010 available at <http://www.ohchr.org/EN/Issues/Detention/Pages/Annual.aspx>.

In relation to stateless persons specifically, please see Executive Committee Conclusion 106 (LV1) of 2006, which “Calls on States not to detain stateless persons on the sole basis of their being stateless and to treat them in accordance with international human rights law...”.

<sup>28</sup> Please see the UN Human Rights Committee’s decisions in *van Alpen v Netherlands* (Communication No. 305/1988), 1990, *A v Australia* (Communication No. 560/1993) 1997 and *Danyal Shafiq v Australia* (Communication No. 1324/2004), 2006 at paragraphs 5.8, 9.4 and 7.3 respectively. In the context of refugees, Executive Committee Conclusion 44 (XXXVII) of 1986 states that detention of asylum-seekers should normally be avoided but if necessary should only occur on grounds prescribed by law in order to determine the identity of the individual; in order to obtain the basic facts of the case; where an individual has purposely destroyed documentation or presented fraudulent documentation in order to mislead the authorities; and/or where there are national security or public order concerns.

<sup>29</sup> Please see similarly guidance in relation to detention of asylum-seekers, *ibid*.

<sup>30</sup> In particular, under paragraph 4 of Resolution 61/137 the UN General Assembly:

“...notes the work of the High Commissioner in regard to identifying stateless persons, preventing and reducing statelessness, and protecting stateless persons, and urges the Office of the High Commissioner to continue to work in this area in accordance with relevant General Assembly resolutions and Executive Committee conclusions.”



advise on both the development of new statelessness determination procedures and the enhancement of existing ones.<sup>31</sup> In addition, UNHCR can facilitate enquiries made by statelessness determination authorities with authorities of other States and can act as an information resource on nationality laws and practices.<sup>32</sup> Access for applicants to UNHCR also plays a significant role in ensuring the fairness of determination procedures. Finally, UNHCR may conduct statelessness determination itself at an individual and/or group level if necessary.

#### **d) Exploring Solutions Abroad**

64. Some applicants in statelessness determination procedures may have a realistic prospect of admission or readmission in another State, in some cases through the acquisition or reacquisition of nationality. These cases, which tend to arise where individuals are seeking statelessness determination in a migratory context, raise the issue of cooperation between States to find the most appropriate solution. Efforts to secure admission or readmission may be justified but these need to take place subsequent to a determination of statelessness. Suspension of the determination proceedings, however, is not appropriate in this context as recognition of the individual's statelessness is necessary to ensure full protection of the rights to which he or she is entitled.

#### **e) Additional Procedural and Evidentiary Safeguards for Specific Groups**

65. Certain groups may face particular challenges in establishing their nationality status. Age, gender and diversity considerations may require that some individuals are afforded additional procedural and evidentiary safeguards to ensure that fair statelessness determination decisions are reached.

66. Children, especially unaccompanied children, may face acute challenges in communicating basic facts with respect to their nationality. States that establish statelessness determination procedures must follow the principle of pursuing the best interests of the child when considering the nationality status and need for statelessness protection of children.<sup>33</sup> Additional procedural and evidentiary safeguards for child claimants include priority processing of their claims, provision of appropriately trained legal representatives, interviewers and interpreters as well as the assumption of a greater share of the burden of proof by the State.

67. In certain circumstances, similar considerations may apply to persons with disabilities<sup>34</sup> who face difficulties communicating information about their nationality status. Decision makers need to take into account that owing to discrimination, persons with disabilities may be less likely to possess identity and other documentation.

68. It would be preferable if all claimants could be offered the choice to have interviewers and interpreters of the same sex as themselves. Interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education. As a result of discrimination, women might face additional barriers

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<sup>31</sup> As set out in Conclusion 106 (LVII) of 2006, the Executive Committee has requested UNHCR "to actively disseminate information and, where appropriate, train government counterparts on appropriate mechanisms for identifying, recording, and granting a status to stateless persons" and "to provide technical advice to States Parties on the implementation of the 1954 Convention so as to ensure consistent implementation of its provisions" (paragraphs (t) and (x)).

<sup>32</sup> States are also advised to consult nationality databases available through sources such as UNHCR's Refworld database, available at [www.refworld.org](http://www.refworld.org), or regional sources such as the European Union Democracy Observer (EUDO) nationality law database, available at <http://eudo-citizenship.eu/national-citizenship-laws> and the Africa Governance Monitoring and Advocacy Project (Afrimap), available at [www.afrimap.org](http://www.afrimap.org).

<sup>33</sup> All separated children are to have access to a procedure to determine their best interest. The outcome of a statelessness determination procedure, as with the result of an asylum determination, form part of best interests determination. With regard to asylum procedures and best interest determinations, please see UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008.

<sup>34</sup> The Convention on the Rights of Persons with Disabilities recognizes that "disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others", Preamble, paragraph (e).

in acquiring relevant documentation, such as birth certificates or other identification documents that would be pertinent to establishing their nationality status.

## **VI. STATELESSNESS DETERMINATION WHERE THE 1954 CONVENTION DOES NOT APPLY**

69. Many stateless persons who meet the 1954 Convention definition find themselves in countries not bound by this treaty. Nevertheless, a number of non-contracting States have introduced some form of statelessness determination procedure to address the situation of such persons in their territories, given their commitments under international human rights law. With respect to the latter, statelessness is a juridically relevant fact, for example in relation to protection against arbitrary detention (Article 9(1) of the ICCPR), the right of women to equal treatment with men with regard to nationality (Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women) and the right of every child to a nationality (Article 24(3) of the ICCPR and Article 7(1) of the Convention on the Rights of the Child).

70. *De facto* stateless persons also fall outside of the protection of the 1954 Convention. There is no internationally-accepted definition of *de facto* statelessness, although there is an explicit reference to this concept in the Final Act of the 1961 Convention and an implicit reference in the Final Act of the 1954 Convention.<sup>35</sup> According to recent efforts to define the term, *de facto* stateless persons possess a nationality, but are unable, or for valid reasons are unwilling, to avail themselves of the protection of a State of nationality.<sup>36</sup> Some States have incorporated the concept of *de facto* statelessness (in substance, if not always in name) into their statelessness determination procedures, examining eligibility for protection on that basis alongside the 1954 Convention criteria.

71. States are encouraged to provide protection to *de facto* stateless persons in addition to 1954 Convention stateless persons. Often *de facto* stateless persons are in irregular situations or in prolonged detention because they are unable to return to their country of nationality. States will take a variety of factors into account when deciding the type of procedure in which *de facto* statelessness will be determined. One consideration is that it will not be clear at the outset, even in the view of the applicant, whether he or she is stateless as per the 1954 Convention or within the *de facto* concept. Irrespective of where *de facto* statelessness is determined, the procedure must not prevent individuals from claiming protection as a refugee or as a stateless person in terms of the 1954 Convention, as recognition as such would trigger greater obligations for the State under international law than recognition as a *de facto* stateless person.

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<sup>35</sup> Paragraph 3 of the 1954 Convention's Final Act was drafted specifically to address the position of the *de facto* stateless. This recommendation requests that the benefits of the Convention be extended to individuals whom States consider to have had valid reasons for renouncing the protection of their State of nationality. As for the Final Act of the 1961 Convention, whilst not defining *de facto* statelessness, it sets out a recommendation that such persons benefit from the provisions in the 1961 Convention so as to obtain an "effective nationality".

<sup>36</sup> Section II.A. of United Nations High Commissioner for Refugees, *Expert Meeting on the Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010, proposes the following operational definition for the term:

"*De facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality."

The full text of the Conclusions is available at: <http://www.unhcr.org/refworld/pdfid/4ca1ae002.pdf>.

**GUIDELINES ON STATELESSNESS NO. 3:  
The Status of Stateless Persons at the National Level**

UNHCR issues these Guidelines pursuant to its mandate responsibilities to address statelessness. These responsibilities were initially limited to stateless persons who were refugees as set out in paragraph 6 (A) (II) of the UNHCR Statute and Article 1 (A) (2) of the 1951 Convention relating to the Status of Refugees. To undertake the functions foreseen by Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, UNHCR's mandate was expanded to cover persons falling under the terms of that Convention by General Assembly Resolutions 3274 (XXIX) of 1974 and 31/36 of 1976. The Office was entrusted with responsibilities for stateless persons generally under UNHCR Executive Committee Conclusion 78, which was endorsed by the General Assembly in Resolution 50/152 of 1995. Subsequently, in Resolution 61/137 of 2006, the General Assembly endorsed Executive Committee Conclusion 106 which sets out four broad areas of responsibility for UNHCR: the identification, prevention and reduction of statelessness and the protection of stateless persons.

These Guidelines result from a series of expert consultations conducted in the context of the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness and build in particular on the *Summary Conclusions of the Expert Meeting on Statelessness Determination Procedures and the Status of Stateless Persons*, held in Geneva, Switzerland in December 2010. These Guidelines are to be read in conjunction with the *Guidelines on Procedures for Determining whether an individual is a Stateless Person* and the *Guidelines on the Definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons*. This set of Guidelines will be published in due course as a UNHCR Handbook on Statelessness.

These Guidelines are intended to provide interpretative legal guidance for governments, NGOs, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff and other UN agencies involved in addressing statelessness.

## I. INTRODUCTION

1. Stateless persons are generally denied enjoyment of a range of human rights and prevented from participating fully in society. The 1954 Convention relating to the Status of Stateless Persons (“1954 Convention”) addresses this marginalisation by granting stateless persons a core set of rights. Its provisions, along with applicable standards of international human rights law, establish the minimum rights and the obligations of stateless persons in Contracting States of the 1954 Convention. The status of a stateless person in a Contracting State, that is the rights and obligations of stateless persons under national law, must reflect these international standards.

2. These Guidelines are aimed at assisting States to ensure that stateless persons receive such status in their jurisdictions. They address the treatment of persons determined to be stateless by a State under the 1954 Convention, the position of individuals awaiting the outcome of a statelessness determination procedure, as well as the appropriate treatment of stateless persons in States that do not have statelessness determination procedures.<sup>1</sup> The Guidelines also examine the position of stateless persons in countries not party to the 1954 Convention as well as those considered to be *de facto* stateless.<sup>2</sup>

3. The 1954 Convention has received relatively little attention and literature on State practice regarding implementation of the Convention is rare. These Guidelines nevertheless consider existing practice of States party to the 1954 Convention.

4. Statelessness arises in a variety of contexts. It occurs in migratory situations, for example among expatriates and/or their children who might lose their nationality without having acquired the nationality of a country of habitual residence. Most stateless persons, however, have never crossed borders and find themselves in their “own country”. Their predicament exists *in situ*, that is in the country of their long-term residence, in many cases the country of their birth.<sup>3</sup> For these individuals, statelessness is often a result of discrimination on the part of authorities in framing and implementing nationality laws.

5. While all stateless persons must be treated in line with international standards, their status can vary to reflect the context in which statelessness arises. These Guidelines therefore first address the relevant international law standards and then examine separately the scope of stateless person status for individuals in a migratory context and for those in their “own country”.<sup>4</sup>

## II. INTERNATIONAL LAW AND THE STATUS OF STATELESS PERSONS

### a) Parallels Between the Status of Refugees and Stateless Persons

6. The status set out for stateless persons in the 1954 Convention is modelled on that established for refugees in the 1951 Convention relating to the Status of Refugees (“1951 Convention”). Comparison of the texts of the two treaties shows that numerous provisions of the 1954 Convention were taken literally, or with minimal changes, from the corresponding provisions of the 1951 Convention. This is largely because of the shared drafting history of the 1951 and 1954 Conventions which both emerged from the work of the Ad Hoc Committee on Statelessness and Related Problems that was appointed by the Economic and Social

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<sup>1</sup> The considerations involved in setting up and operating a determination procedure are addressed in UNHCR, *Guidelines on Procedures for Determining whether an Individual is a Stateless Person* (“*Procedures Guidelines*”) available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html>.

<sup>2</sup> The term *de facto* stateless is considered further in paragraph 48 below. The definition of stateless person in the 1954 Convention is examined in UNHCR, *Guidelines on the Definition of “Stateless Person” in Article 1(1) of the 1954 Convention on the Status of Stateless Persons* (“*Definition Guidelines*”) available at: <http://www.unhcr.org/refworld/docid/4f4371b82.html>.

<sup>3</sup> The phrase “own country” is taken from Article 12(4) of the International Covenant on Civil and Political Rights (“ICCPR”) and its interpretation by the UN Human Rights Committee.

<sup>4</sup> Please see paragraph 23 below which examines the nature of an individual’s right to remain in his or her “own country”.

Council in 1949.<sup>5</sup> As a result, the *travaux préparatoires* of the 1951 Convention are particularly pertinent in interpreting the 1954 Convention.<sup>6</sup>

7. As with the 1951 Convention, the rights set out in the 1954 Convention are not limited to individuals who have been recognised as stateless following a determination made by a State or UNHCR. A person is stateless from the moment he or she satisfies the criteria in the 1954 Convention definition, any determination of this fact being merely declaratory. Instead, the rights afforded to an individual under the Convention are linked to the nature of that person's presence in the State, assessed in terms of degree of attachment to the host country.

8. Despite sharing the same overall approach, the 1954 Convention nevertheless contains several significant differences from the 1951 Convention. There is no prohibition against *refoulement* (Article 33, 1951 Convention) and no protection against penalties for illegal entry (Article 31, 1951 Convention). Moreover, both the right to employment and the right of association provide for a lower standard of treatment than the equivalent provisions in the 1951 Convention.<sup>7</sup> The scope of protection against expulsion also differs between the treaties.

9. A stateless person may simultaneously be a refugee.<sup>8</sup> Where this is the case, it is important that each claim is assessed and that both statelessness and refugee status are explicitly recognised. Similarly, where standards of treatment are provided for a complementary form of protection, including protection against *refoulement*, States must apply these standards to stateless individuals who qualify for that protection.<sup>9</sup>

## **b) Overview of the Standard of Treatment Required by the 1954 Convention**

10. Articles 12-32 of the 1954 Convention establish a broad range of civil, economic, social and cultural rights for States to accord to stateless persons. The 1954 Convention divides these rights into the following categories:

- juridical status (including personal status, property rights, right of association, and access to courts);
- gainful employment (including wage-earning employment, self-employment, and access to the liberal professions);
- welfare (including rationing, housing, public education, public relief, labour legislation, and social security); and
- administrative measures (including administrative assistance, freedom of movement, identity papers, travel documents, fiscal charges, transfer of assets, expulsion, and naturalization).

11. The 1954 Convention establishes minimum standards. Like the 1951 Convention, the 1954 Convention requires that States provide its beneficiaries with treatment along the following scale:

- treatment which is to be afforded to stateless persons irrespective of the treatment afforded to citizens or other aliens;

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<sup>5</sup> Resolution 248 (IX) (B) of 8 August 1949. Although the protection of stateless persons was initially intended to be addressed in a Protocol which would apply *mutatis mutandis* most of the substantive rights set out in the Refugee Convention, it was subsequently decided to adopt a standalone instrument, the Convention relating to the Status of Stateless Persons. For additional information on the drafting history, please see Nehemiah Robinson's detailed account of the *travaux préparatoires* of the 1954 Convention, *Convention Relating to the Status of Stateless Persons: Its History and Interpretation – A Commentary*, 1955, available at: <http://www.unhcr.org/refworld/pdfid/4785f03d2.pdf> ("*Robinson Commentary to the 1954 Convention*").

<sup>6</sup> Please see in particular, paragraphs 13-20 below on the scale of rights accorded to stateless persons depending on their level of attachment to a Contracting State under the 1954 Convention.

<sup>7</sup> However, like the 1951 Refugee Convention, the 1954 Convention calls on States to "give sympathetic consideration to assimilating the rights of all stateless persons with regards to wage-earning employment to those of nationals...". Please see Article 17(2) of the 1954 Convention.

<sup>8</sup> The definitions of stateless person under the 1954 Convention and that of refugees under the 1951 Convention are not mutually exclusive. Please see the *Definition Guidelines* at paragraph 7.

<sup>9</sup> For further information about how refugee, complementary protection, and statelessness claims are to be assessed in statelessness determination procedures, as well as necessary confidentiality guarantees, please see paragraphs 26-30 of the *Procedures Guidelines*.

- the same treatment as nationals;
- treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances; and
- the same treatment accorded to aliens generally.

12. States have discretion to facilitate greater parity between the status of stateless persons and that of nationals and indeed may also have an obligation to do so under international human rights treaties. The responsibility placed on States to respect, protect and fulfil 1954 Convention rights is balanced by the obligation in Article 2 of the same treaty that stateless persons abide by the laws of the country in which they find themselves.

### **Rights on a gradual, conditional scale**

13. The rights provided for in the 1954 Convention are extended to stateless persons based on their degree of attachment to the State. Some provisions are applicable to any individual who satisfies the definition of “stateless person” in the 1954 Convention and are either subject to the jurisdiction of a State party or present in its territory. Other rights, however, are conferred on stateless persons, conditional upon whether an individual is “lawfully in”, “lawfully staying in” or “habitually resident” in the territory of a Contracting State. States may thus grant individuals determined to be stateless more comprehensive rights than those guaranteed to individuals awaiting a determination. Nevertheless, the latter are entitled to many of the 1954 Convention rights. This is similar to the treatment of asylum-seekers under the 1951 Convention.

14. Those rights in the 1954 Convention which are triggered when an individual is subject to the jurisdiction of a State party include personal status (Article 12), property (Article 13), access to courts (Article 16(1)), rationing (Article 20), public education (Article 22), administrative assistance (Article 25) and facilitated naturalization (Article 32). Additional rights that accrue to individuals when they are physically present in a Contracting State’s territory are freedom of religion (Article 4) and the right to identity papers (Article 27).

15. The 1954 Convention foresees that stateless persons who are “lawfully in” a Contracting State (in French “*se trouvant régulièrement*”), are entitled to an additional set of rights. The “lawfully in” rights include the right to engage in self-employment (Article 18), freedom of movement within a Contracting State (Article 26) and protection from expulsion (Article 31).

16. For stateless persons to be “lawfully in” a Contracting State, their presence in the country needs to be authorized by the State. The concept encompasses both presence which is explicitly sanctioned and also that which is known and not prohibited, taking into account all personal circumstances of the individual.<sup>10</sup> The duration of presence can be temporary. This interpretation of the terms of the 1954 Convention is in line with its object and purpose, which is to assure the widest possible exercise by stateless persons of the rights contained therein. As confirmed by the drafting history of the Convention,<sup>11</sup> applicants for statelessness status

<sup>10</sup> The 1951 Convention also makes the enjoyment of specific rights to refugees conditional upon various degrees of attachment to the State, please see UNHCR, Note on International Protection, 7 September 1994, A/AC.96/830, at paragraph 29, available at: <http://www.unhcr.org/refworld/docid/3f0a935f2.html>. According to the *Robinson Commentary to the 1954 Convention*, note 5, above: “It is to be assumed that the expression ‘lawfully in the country’ as used in [the 1954 Convention] has the same meaning as the one in the Refugee Convention”. The concept of “lawful” stay for the purposes of the 1951 Convention has been interpreted as follows and, in light of the shared drafting history of the 1951 and 1954 Conventions, also applies in interpreting the 1954 Convention: “...‘lawful’ normally is to be assessed against prevailing national laws and regulations; a judgment as to lawfulness should nevertheless take into account all the prevailing circumstances, including the fact that the stay in question is known and not prohibited, i.e. tolerated, because of the precarious circumstances of the person”. Please see in this regard UNHCR, “*Lawfully Staying*” – A Note on Interpretation, 1988, in particular paragraph 23, available at: <http://www.unhcr.org/refworld/docid/42ad93304.html>. The UN Human Rights Committee has decided that an individual with an expulsion order that was not enforced, who was allowed to stay in Sweden on humanitarian grounds was “lawfully in the territory” for the purposes of enjoying the right to freedom of movement protected by Article 12 of the ICCPR. Please see *Celepeli v. Sweden*, CCPR/C/51/D/456/1991 at paragraph 9.2 (26.7.1994).

<sup>11</sup> Please see the *Robinson Commentary to the 1954 Convention*, note 5 above, in particular in relation to Articles 15, 18 and 31, 1997, available at: <http://www.unhcr.org/refworld/docid/4785f03d2.html>. Given the shared drafting history



who enter into a determination procedure are therefore “lawfully in” the territory of a Contracting State.<sup>12</sup> By contrast, an individual who has no immigration status in the country and declines the opportunity to enter a statelessness determination procedure is not “lawfully in” the country.

17. The 1954 Convention grants another set of rights to stateless persons who are “lawfully staying” in a Contracting State (in French “*résidant régulièrement*”). The “lawfully staying” rights in the 1954 Convention include the right of association (Article 15), right to work (Article 17), practice of liberal professions (Article 19), access to public housing (Article 21), right to public relief (Article 23), labour and social security rights (Article 24), and travel documents (Article 28).<sup>13</sup>

18. The “lawfully staying” requirement envisages a greater duration of presence in a territory. This need not, however, take the form of permanent residence. Shorter periods of stay authorised by the State may suffice so long as they are not transient visits. Stateless persons who have been granted a residence permit would fall within this category.<sup>14</sup> It also covers individuals who have temporary permission to stay if this is for more than a few months. By contrast, a visitor admitted for a brief period would not be “lawfully staying”. Individuals recognised as stateless following a determination procedure but to whom no residence permit has been issued will generally be “lawfully staying” in a Contracting State by virtue of the length of time already spent in the country awaiting a determination.

19. A final set of rights foreseen by the 1954 Convention are those to be accorded to stateless persons who are “habitually resident” or “residing” in a Contracting State. The rights accruing to those who are “habitually resident” are protection of artistic rights and intellectual property (Article 14) and rights pertaining to access to Courts, including legal assistance and assistance in posting bond or paying security for legal costs (Article 16(2)).

20. The condition that a stateless person be “habitually resident” or “residing” indicates that the person resides in a Contracting State on an on-going and stable basis. “Habitual residence” is to be understood as stable, factual residence. This covers those stateless persons who have been granted permanent residence, and also applies to individuals without a residence permit who are settled in a country, having been there for a number of years, who have an expectation of on-going residence there.

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of the 1951 and 1954 Conventions and the extent to which specific provisions of the 1954 Convention mirror those of the 1951 Convention, it is important to note the statement of the delegate of France in explaining the meaning of the term “lawfully in” as used in the text proposed by France which was later accepted by the drafting committee: “Any person in possession of a residence permit was in a regular position. In fact, the same was true of a person who was not yet in possession of a residence permit but who had applied for it and had the receipt for that application. Only those persons who had not applied, or whose application had been refused, were in an irregular position”. UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Fifteenth Meeting Held at Lake Success, New York, on 27 January 1950*, 6 February 1950, E/AC.32/SR.15, available at: <http://www.unhcr.org/refworld/docid/40aa1d5f2.html>.

<sup>12</sup> Please see the *Procedures Guidelines*, which set out in paragraph 20 that statelessness determination procedures are to have suspensive effect on removal proceedings for the individual concerned for the duration of the procedure until a determination is reached. The length of time an individual would be considered as “lawfully in” a country as a result of being in a statelessness determination procedure will often be short. As established in the *Procedures Guidelines* at paragraphs 22-23, manifestly well-founded applications may only require a few months to reach a final determination, with first instance decisions generally to be issued no more than six months from the application.

<sup>13</sup> Since 1 April 2010, all travel documents issued by States, including travel documents for stateless persons pursuant to the 1954 Convention must be machine readable in accordance with International Civil Aviation Organization (“ICAO”) standards. Please see ICAO, *Annex 9 to the Convention on International Civil Aviation, Facilitation*, July 2005 and *Document 9303, Machine Readable Travel Documents*, 2006.

<sup>14</sup> The concept of “stay” has been interpreted in the context of the 1951 Convention and is applicable to interpreting the 1954 Convention as follows: “‘stay’ means something less than durable residence, although clearly more than a transit stop”. Please see paragraph 23, UNHCR, *“Lawfully Staying” – A Note on Interpretation*, 1988, available at: <http://www.unhcr.org/refworld/docid/42ad93304.html>.

### c) International Human Rights Law

21. The status of a stateless person under national law must also reflect applicable provisions of international human rights law. The vast majority of human rights apply to all persons irrespective of nationality or immigration status, including to stateless persons.<sup>15</sup> Moreover, the principle of equality and non-discrimination generally prohibits any discrimination based on the lack of nationality status.<sup>16</sup> Legitimate differentiation may be permitted for groups who are in a materially different position.<sup>17</sup> Thus, States may explore affirmative action measures to help particularly vulnerable groups of stateless persons in their territory.

22. International human rights law supplements the protection regime set out in the 1954 Convention.<sup>18</sup> Whilst a number of provisions of international human rights law replicate rights found in the 1954 Convention, others provide for a higher standard of treatment or for rights not found in the Convention at all.<sup>19</sup>

23. Of particular importance to stateless persons is the right enshrined in Article 12(4) of the International Covenant on Civil and Political Rights (“ICCPR”) to enter one’s “own country”. This goes beyond a right of entry to one’s country of nationality.<sup>20</sup> It also guarantees the right of entry, and thus the right to remain, of individuals with special ties to a State. This includes, for instance, stateless persons long-established in a State as well as stateless persons who have been stripped of their nationality in violation of international law or who have been denied nationality of a State which has acquired through State succession the territory in which they habitually reside.

24. Even considering these developments in international human rights law, the 1954 Convention retains its significance as it addresses matters specific to statelessness that are not addressed elsewhere, notably the provision of identity papers and travel documents and administrative assistance to stateless persons. Moreover, the provisions of the Convention do not allow for derogation in times of public emergency unlike some human rights treaties and it

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<sup>15</sup> Please see Human Rights Committee, *General Comment No.15 (The Position of Aliens under the Covenant)*, 1986, available at: <http://www.unhcr.org/refworld/pdfid/45139acfc.pdf>, and Human Rights Committee, *General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)*, 2004, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f?Opendocument>. Please see also the UN Sub-Commission on the Promotion and Protection of Human Rights, Special Rapporteur on the rights of non-citizens, *Final Report (E/CN.Sub.2/2003/23)*, 2003, available at: <http://www.unhcr.org/refworld/pdfid/3f46114c4.pdf>. Please note though that full enjoyment of human rights is facilitated by the possession of a nationality, hence the need for specific protection for stateless persons in the form of the 1954 Convention.

<sup>16</sup> Please see, for example, Articles 2(1) and 26 of the ICCPR.

<sup>17</sup> Please see Human Rights Committee, *General Comment No. 18 (Non-discrimination)*, 1989, at paragraph 13, available at: <http://www.unhcr.org/refworld/pdfid/453883fa8.pdf>. Please see also Executive Summary and paragraph 23 of UN Sub-Commission Special Rapporteur on the rights of non-citizens, *Final Report (E/CN.Sub.2/2003/23)*, 2003, above at note 15.

<sup>18</sup> It also provides an alternate regulatory framework in countries that have not acceded to the 1954 Convention. This is considered further in paragraph 47 below.

<sup>19</sup> For example, protection against arbitrary detention as found in Article 9(1) of the ICCPR. Regional human rights treaties are also pertinent.

<sup>20</sup> Please see Human Rights Committee, *General Comment No.27 (Freedom of Movement)*, at paragraph 20 :

“The wording of article 12, paragraph 4, does not distinguish between nationals and aliens (“no one”). Thus, the persons entitled to exercise this right can be identified only by interpreting the meaning of the phrase “his own country”. The scope of “his own country” is broader than the concept “country of his nationality”. It is not limited to nationality in a formal sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have there been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them. The language of article 12, paragraph 4, moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence”.



sets out a number of standards that are more generous than their counterparts under human rights law.<sup>21</sup>

### III. INDIVIDUALS IN A MIGRATORY CONTEXT

#### a) Individuals Awaiting Determination of Statelessness

25. Although the 1954 Convention does not explicitly address statelessness determination procedures, there is an implicit responsibility for States to identify stateless persons in order to accord them appropriate standards of treatment under the Convention.<sup>22</sup> The following paragraphs consider the appropriate status for individuals awaiting the determination of their statelessness both in countries that have established determination procedures and in those without.

26. In countries with a determination procedure, an individual awaiting a decision is entitled, at a minimum, to all rights based on jurisdiction or presence in the territory as well as “lawfully in” rights.<sup>23</sup> Thus, his or her status must guarantee, *inter alia*, identity papers, the right to self-employment, freedom of movement and protection against expulsion.<sup>24</sup> As the aforementioned Convention rights are formulated almost identically to those in the 1951 Convention, it is recommended that individuals awaiting a determination of statelessness receive the same standards of treatment as asylum-seekers whose claims are being considered in the same State.

27. The status of those awaiting statelessness determination must also reflect applicable human rights such as protection against arbitrary detention and assistance to meet basic needs.<sup>25</sup> Allowing individuals awaiting statelessness determination to engage in wage-earning employment, even on a limited basis, may reduce the pressure on State resources and contributes to the dignity and self-sufficiency of the individuals concerned.

#### b) Individuals Determined to Be Stateless – Right of Residence

28. Although the 1954 Convention does not explicitly require States to grant a person determined to be stateless a right of residence, granting such permission would fulfil the object and purpose of the treaty. This is reflected in the practice of States with determination procedures. Without a right to remain, the individual is at risk of continuing insecurity and prevented from enjoying the rights guaranteed by the 1954 Convention and international human rights law.

29. It is therefore recommended that States grant persons recognised as stateless a residence permit valid for at least two years, although permits for a longer duration, such as five years, are preferable in the interests of stability. Such permits are to be renewable, providing the possibility of facilitated naturalization as prescribed by Article 32 of the 1954 Convention.

30. If an individual recognised as stateless subsequently acquires or re-acquires the nationality of another State, for instance because of a change in its nationality laws, he or she will cease to be stateless in terms of the 1954 Convention. This may justify the cancellation of a residence permit obtained on the basis of statelessness status, although proportionality considerations in relation to acquired rights and factors arising under international human

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<sup>21</sup> For example, protection against expulsion for persons “lawfully in” the territory is confined under Article 13 of the ICCPR to procedural safeguards, whereas Article 31 of the 1954 Convention also limits the substantive grounds on which expulsion can be justified.

<sup>22</sup> Please see the *Procedures Guidelines* at paragraph 1.

<sup>23</sup> As set out in paragraphs 15-16 above. This would also apply in States without dedicated determination procedures when an individual raises a statelessness claim in a different context.

<sup>24</sup> The importance of protection against expulsion for fair and efficient determination procedures is discussed in the *Procedures Guidelines* at paragraph 20. Specifically, statelessness determination procedures are to have suspensive effect on removal.

<sup>25</sup> Please see paragraphs 21-22 above.

rights law, such as the degree to which the individual has established a private and family life in the State, need to be taken into account.

31. Recognition of an individual as a stateless person under the 1954 Convention also triggers the “lawfully staying” rights,<sup>26</sup> in addition to a right to residence. Thus the right to work, access to healthcare and social assistance, as well as a travel document must accompany a residence permit.

32. Although the 1954 Convention does not address family unity, Contracting States are nevertheless encouraged to facilitate the reunion of those with recognised statelessness status in their territory with their spouses and dependents.<sup>27</sup> Indeed, some States have obligations arising under relevant international or regional human rights treaties to do so.<sup>28</sup>

33. The two provisions in the Convention that are restricted to individuals with “habitual residence” would not automatically flow from recognition as stateless.<sup>29</sup> These may be activated, though, if the individual can be considered to be living in the country on a stable basis.

### **c) Where Protection is Available in Another State**

34. Where an individual recognised as stateless has a realistic prospect, in the near future, of obtaining protection consistent with the standards of the 1954 Convention in another State, the host State has discretion to provide a status that is more transitional in nature than that described in paragraphs 29-33 above. Separate considerations apply for those who voluntarily renounce their nationality as a matter of convenience or choice.<sup>30</sup>

35. In these cases, care must be taken to ensure that the criteria for determining whether an individual has a realistic prospect of obtaining protection elsewhere are narrowly construed.<sup>31</sup> In UNHCR’s view protection can only be considered available in another country when a stateless person:

- is able to acquire or reacquire nationality through a simple, rapid, and non-discretionary procedure, which is a mere formality; or
- enjoys permanent residence status in a country of previous habitual residence to which immediate return is possible.

36. With respect to acquisition or reacquisition of nationality, individuals must be able to avail themselves of a procedure that is easily accessible, both physically and financially, as well as one that is simple in terms of procedural steps and evidentiary requirements. Moreover, the acquisition/reacquisition procedure must be swift and the outcome guaranteed because it is non-discretionary where prescribed requirements are met.<sup>32</sup>

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<sup>26</sup> Please see paragraphs 17-18 above.

<sup>27</sup> For an explanation of family unity in the context of the 1951 Convention, please see UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (reissued 2011), paragraphs 181-188, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. Whether dependents of a stateless person would be entitled to statelessness status is subject to an inquiry into the national status of each dependent to verify qualification as a “stateless person” under the 1954 Convention. Facilitating family unity, however, could also be achieved by granting residence rights to dependents of a stateless person in the territory of a Contracting State, even where the dependents are not stateless.

<sup>28</sup> For more on how international human rights obligations supplement those that arise from the 1954 Convention, please see paragraphs 21-24 above.

<sup>29</sup> Please see paragraphs 19-20 above.

<sup>30</sup> Please see further paragraphs 42-43 below.

<sup>31</sup> Moreover, safeguards are necessary to prevent the individual being left without a legal status anywhere and to ensure that any special circumstances justifying a residence permit are properly examined.

<sup>32</sup> An example would be a procedure through which former nationals can reacquire their nationality by simply signing a declaration at the nearest consular authority following production of their birth certificate or cancelled/expired passport, where the competent authority is then obliged to restore nationality. Similar procedures may also involve registration or the exercise of the right of option to acquire nationality.

37. By contrast, other procedures for acquisition of nationality may not present a sufficiently reliable prospect of obtaining protection elsewhere and would therefore not justify providing merely a transitional status to stateless persons. For example, it would not suffice that the individual has access to naturalization procedures which, as a general rule, leave discretion in the hands of officials and have no guaranteed outcome. Similarly, procedures with vague requirements for the acquisition of nationality or those that would oblige an individual to be physically present in a country of former nationality where legal entry and residence are not guaranteed would also not suffice.

38. As for an individual's ability to return to a country of previous habitual residence, this must be accompanied by the opportunity to live a life of security and dignity in conformity with the object and purpose of the 1954 Convention. Thus, this exception only applies to those individuals who already enjoy the status of permanent residence in another country, or would be granted it upon arrival, where this is accompanied by a full range of civil, economic, social and cultural rights, and where there is a reasonable prospect of obtaining nationality of that State.<sup>33</sup> Permission to return to another country on a short-term basis would not suffice.

### **Where statelessness results from loss/deprivation or good-faith voluntary renunciation of nationality**

39. In many cases an individual will cooperate in attempting to acquire or restore nationality or to make arrangements for return to a country of previous habitual residence. This might arise where an individual involuntarily renounced or lost his or her nationality. This could also arise where an individual renounced his or her former nationality consciously and in good faith with a view to acquiring another nationality. In some cases, on account of poorly drafted nationality laws such individuals must renounce their nationality in order to apply for another but are then unable to acquire the second nationality and are left stateless.

40. The best solution in such cases is reacquisition of the former nationality. Where a State determines that such individuals are stateless, but have the possibility of reacquiring their former nationality, the State would not need to provide them with a residence permit. Rather, they can be provided with some form of immigration status to allow the individuals concerned to remain briefly in the territory while making arrangements to move to the other State. Such temporary permission could be for as short a period as a few months and the rights to be enjoyed need not match those required when a residence permit is issued. Indeed, a status closer to that provided during the determination process may be justifiable.

41. States can extend temporary permission to stay where admission/readmission or reacquisition of nationality does not materialise through no fault of the individual. However, extensions can be limited in duration in order to strike a fair balance between facilitating the completion of admission/readmission or reacquisition efforts and providing a degree of certainty for the affected stateless person. If the time limit is reached and admission/readmission or reacquisition has not yet materialised despite the good faith attempts of the individual, it is then the responsibility of the Contracting State to grant the individual the status generally accorded upon recognition as a stateless person; that is, a renewable residence permit with a complement of rights, including the right to work and receive a travel document.

### **Where statelessness results from voluntary renunciation of nationality as a matter of convenience or choice**

42. Some individuals voluntarily renounce a nationality because they do not wish to be nationals of a particular State or in the belief that this will lead to grant of a protection status in

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<sup>33</sup> Paragraphs 20-22 of UNHCR, *Position on the return of persons not found to be in need of international protection to their countries of origin: UNHCR's Role*, 2010, available at: <http://www.unhcr.org/refworld/pdfid/4cea23c62.pdf>, are to be read in light of the criteria set forth in these Guidelines.

another country.<sup>34</sup> Re-admission to the State of former nationality, coupled with re-acquisition of that nationality, is the preferred solution in such situations. Where cooperation from the individual for readmission to another State or for reacquisition of nationality is lacking, the authorities are entitled to pursue their own discussions with the other State to secure admission of the individual concerned. In this context, other international obligations of the State of former nationality will be relevant, including those relating to prevention of statelessness upon renunciation of nationality and the right to enter one's own country.<sup>35</sup>

43. A Contracting State need not necessarily grant or renew permission for stay to such individuals. Nor would they be entitled to all of the rights foreseen by the 1954 Convention. Bar any other protection obstacles, involuntary return cannot be excluded in such cases, for example, where the former State of nationality is also the country of previous habitual residence and its authorities are prepared to grant permanent residence to the individual concerned.

### Consideration of local ties

44. Where an individual has developed close ties with a host State as a result of long-term residence and family links, conferral of the status normally granted upon recognition as a stateless person, that is a renewable residence permit with a complement of rights, would be appropriate, even where protection may be available in another State.<sup>36</sup> In some cases, this approach may be required to satisfy human rights obligations such as refraining from unlawful or arbitrary interference with privacy, family or home.<sup>37</sup>

## IV. INDIVIDUALS IN THEIR "OWN COUNTRY"

45. As noted in paragraph 23 above, certain stateless persons can be considered to be in their "own country" in the sense envisaged by Article 12(4) of the ICCPR. Such persons include individuals who are long-term, habitual residents of a State which is often their country of birth. Being in their "own country" they have a right to enter and remain there with significant implications for their status under national law. Their profound connection with the State in question, often accompanied by an absence of links with other countries, imposes a political and moral imperative on the State to facilitate their full integration into society. The fact that these people are stateless in their "own country" is often a reflection of discriminatory treatment in the framing and application of nationality laws. Some will have been denied nationality despite being born and resident solely in that State; others may have been stripped

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<sup>34</sup> International law recognises that every individual has a right to a nationality, but this does not extend to a right for individuals to choose a specific nationality. There is widespread acceptance of automatic conferral of nationality by States based on factors outside an individual's control, such as descent, birth on the territory, or residence in the territory at the moment of State succession.

<sup>35</sup> Please see, in particular, Article 7(1) of the 1961 Convention on the Reduction of Statelessness and Article 12(4) of the ICCPR. In addition, friendly relations and cooperation between States based on the principle of good faith require re-admission in such circumstances. Numerous agreements between States now facilitate this by providing for re-admission of stateless persons, including former nationals and former habitual residents. UNHCR may be able to play a role in this regard, please see paragraph (j) of UNHCR Executive Committee Conclusion No. 96 (LIV) of 2003 on the return of persons found not to be in need of international protection, available at: <http://www.unhcr.org/refworld/docid/3f93b1ca4.html>, in which the Executive Committee:

*“Recommends, depending on the situation, that UNHCR complement the efforts of States in the return of persons found not to be in need of international protection by:*

- (i) Promoting with States those principles which bear on their responsibility to accept back their nationals, as well as principles on the reduction of statelessness;
- (ii) Taking clear public positions on the acceptability of return of persons found not to be in need of international protection;
- (iii) Continuing its dialogue with States to review their citizenship legislation, particularly if it allows renunciation of nationality without at the same time ensuring that the person in question has acquired another nationality and could be used to stop or delay the return of a person to a country of nationality”.

<sup>36</sup> This is particularly so where the link with the other State is relatively tenuous. This is to be distinguished, however, from ties that are so profound that the individual is considered to be in his or her "own country".

<sup>37</sup> Please see paragraphs 21-24 above.

of their nationality because of membership of a section of the community that has fallen out of political or social favour.<sup>38</sup>

46. The appropriate status for such individuals in their “own country” is nationality of the State in question. As set out in the *Procedures Guidelines*, in these cases the correct mechanism for determining an individual or a population group’s status is one that is concerned with the restoration or conferral of nationality.<sup>39</sup> Recourse to a statelessness determination procedure will not generally be appropriate. If, however, individuals are expected to seek protection through such a mechanism, the status awarded on recognition shall include, at the very least, permanent residence with facilitated access to nationality.<sup>40</sup>

## V. STATUS FOR STATELESS PERSONS NOT COVERED BY THE 1954 CONVENTION

47. Many individuals who meet the stateless person definition in the 1954 Convention live in countries that are not party to this treaty. Nevertheless, the standards in the Convention and the practice of Contracting States may prove helpful to such countries in devising and implementing strategies to address statelessness in their territories, and regulating the status of stateless persons. In particular, States which are not yet party to the Convention may take note of the practice of providing identity papers and travel documents to stateless persons, measures which have already been adopted in several other non-Contracting States. In addition, all States would need to comply with their obligations under international human rights law, such as protection against arbitrary detention (Article 9(1) of the ICCPR) and, in the case of persons stateless *in situ*, the right to enter and remain in one’s “own country” (Article 12(4) of the ICCPR).<sup>41</sup>

48. *De facto* stateless persons also fall outside of the protection of the 1954 Convention.<sup>42</sup> Nevertheless, as *de facto* stateless persons are unable to return immediately to their country of nationality, providing them at the very minimum with temporary permission to stay promotes a degree of stability. Thus, States may consider giving them a status similar to that recommended above in paragraph 40 for stateless persons who have the possibility of securing protection elsewhere. In many cases an interim measure of this nature will prove sufficient as return will become possible through, for example, improved consular assistance or a change in policy with regard to consular assistance for such individuals.

49. Where the prospects of national protection appear more distant, it is recommended to enhance the status of *de facto* stateless persons through the grant of a residence permit similar to those granted to persons who are recognised as stateless pursuant to the 1954

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<sup>38</sup> Of relevance in this regard are the prohibition on arbitrary deprivation of nationality found, *inter alia*, in Article 15(2) of the Universal Declaration of Human Rights and the prohibition against discrimination found in international human rights law, in particular the *jus cogens* prohibition on racial discrimination. A *jus cogens* norm is a principle of customary international law considered to be peremptory in nature, that is, it takes precedence over any other obligations, whether customary or treaty in nature, is binding on all States and can only be overridden by another peremptory norm.

<sup>39</sup> Please see the *Procedures Guidelines* at paragraphs 6-9.

<sup>40</sup> Where States have created stateless populations in their territory, they may well be unwilling to introduce statelessness determination procedures or grant stateless persons the status recommended. In such cases UNHCR’s efforts to secure solutions for the population in question may go beyond advocacy to technical advice and operational support for initiatives aimed at recognising the link between such individuals and the State through the grant of nationality.

<sup>41</sup> Please see further paragraphs 45-46 above.

<sup>42</sup> There is no internationally accepted definition of *de facto* statelessness, although there is an explicit reference to this concept in the Final Act of the 1961 Convention and an implicit reference in the Final Act of the 1954 Convention. According to recent efforts to define the term, *de facto* stateless persons possess a nationality, but are unable, or for valid reasons are unwilling, to avail themselves of the protection of a State of nationality. Please see further Section II.A. of United Nations High Commissioner for Refugees, *Expert Meeting on the Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010, which proposes the following operational definition for the term:

“*De facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Protection in this sense refers to the right of diplomatic protection exercised by a State of nationality in order to remedy an internationally wrongful act against one of its nationals, as well as diplomatic and consular protection and assistance generally, including in relation to return to the State of nationality”.

The full text of the Conclusions is available at: <http://www.unhcr.org/refworld/pdfid/4ca1ae02.pdf>.

Convention. In general, the fact that *de facto* stateless persons have a nationality means that return to their country of nationality is the preferred durable solution. However, where the obstacles to return prove intractable, practical and humanitarian considerations point towards local solutions through naturalization as the appropriate response.

**GUIDELINES ON STATELESSNESS NO. 4:  
Ensuring Every Child's Right to Acquire a Nationality through  
Articles 1-4 of the 1961 Convention on the Reduction of Statelessness**

UNHCR issues these Guidelines pursuant to its mandate responsibilities to address statelessness. These responsibilities were initially limited to stateless persons who were refugees as set out in paragraph 6 (A) (II) of the UNHCR Statute and Article 1 (A) (2) of the 1951 Convention relating to the Status of Refugees. To undertake the functions foreseen by Articles 11 and 20 of the 1961 Convention on the Reduction of Statelessness, UNHCR's mandate was expanded to cover persons falling under the terms of that Convention by General Assembly Resolutions 3274 (XXIX) of 1974 and 31/36 of 1976. The Office was entrusted with responsibilities for stateless persons generally under UNHCR Executive Committee Conclusion 78, which was endorsed by the General Assembly in Resolution 50/152 of 1995. Subsequently, in Resolution 61/137 of 2006, the General Assembly endorsed Executive Committee Conclusion 106 which sets out four broad areas of responsibility for UNHCR: the identification, prevention and reduction of statelessness and the protection of stateless persons.

These Guidelines result from a series of expert consultations conducted in the context of the 50th Anniversary of the 1961 Convention on the Reduction of Statelessness and build in particular on the *Summary Conclusions of the Expert Meeting on Interpreting the 1961 Statelessness Convention and Preventing Statelessness among Children*, held in Dakar, Senegal in May 2011.

These Guidelines are intended to provide interpretative legal guidance for governments, NGOs, legal practitioners, decision-makers and the judiciary, as well as for UNHCR staff and other UN agencies involved in addressing statelessness.

## **I. INTRODUCTION**

### **a) Overview**

1. Article 15 of the Universal Declaration of Human Rights establishes the right of every person to a nationality. The Convention on the Rights of the Child (“CRC”) states that every child has the right to acquire a nationality. The object and purpose of the 1961 Convention on the Reduction of Statelessness (“1961 Convention”) is to prevent and reduce statelessness, thereby ensuring every individual’s right to a nationality, including every child’s right to acquire a nationality. The 1961 Convention establishes rules on acquisition, renunciation, loss and deprivation of nationality.

2. Articles 1-4 of the 1961 Convention principally concern acquisition of nationality by children. The cornerstone of efforts to prevent statelessness among children is the safeguard contained in Article 1 of the 1961 Convention. Article 1 gives a child who would otherwise be stateless the right to acquire the nationality of his or her State of birth through one of two means. A State may grant its nationality automatically, by operation of law (*ex lege*) to children born in its territory who would otherwise be stateless. Alternatively, a State may grant nationality to such individuals later upon application. The grant of nationality on application may, according to Article 1(2), be subject to one or more of four conditions as discussed in greater detail in paragraphs 36-48 of these Guidelines.

3. The 1961 Convention further includes provisions for acquisition of the mother’s nationality by descent if the child was born in the mother’s State and would otherwise be stateless (Article 1(3)), acquisition of the nationality of a parent by descent via an application procedure for individuals who do not acquire nationality of the State of birth (Article 1(4)), and on acquisition of the nationality of a parent by descent for individuals born abroad who would otherwise be stateless (Article 4). Article 2 contains a provision regulating nationality of foundlings while Article 3 establishes a rule regulating the territorial scope of the Convention. Article 12 sets out transitional provisions covering the temporal scope of Article 1. All of these provisions are discussed at greater length below.

4. As set out in Article 17 of the 1961 Convention, Contracting States are not permitted to make reservations to Articles 1-4. However, as noted above, some provisions permit Contracting States to make a choice between two or more ways to address statelessness amongst children.

5. These Guidelines are intended to assist States, UNHCR, and other actors to interpret and apply Articles 1-4 and Article 12 of the 1961 Convention.

### **b) General Considerations for the Interpretation of the 1961 Convention**

6. Articles 1-4 of the 1961 Convention are to be interpreted in good faith and in accordance with the ordinary meaning of the terms used in the text, in their context and in light of the object and purpose of the Convention.<sup>1</sup> Where relevant, these Guidelines also refer to the drafting history of the treaty and similarities or differences with corresponding obligations in other, in particular more recent, treaties.

7. With respect to interpreting the plain language of the text of the Convention, it is important to acknowledge that the Convention was drafted in five official United Nations languages (Chinese, English, French, Russian and Spanish) and that all five language versions are equally authentic. There are some minor discrepancies in meaning between the different language versions but these are resolved through application of the rules of treaty interpretation and, in particular, by recourse to the meaning which best reconciles the texts, having regard to the object and purpose of the treaty.<sup>2</sup>

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<sup>1</sup> Please see Article 31 of the Vienna Convention on the Law of Treaties, UNTS 1155, 331.

<sup>2</sup> Please see Article 33 of the Vienna Convention on the Law of Treaties, UNTS 1155, 331.



### **c) Impact of International human rights norms on the 1961 Convention**

8. The provisions of the 1961 Convention must be read and interpreted in light of developments in international law, in particular international human rights law. Relevant instruments include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (“CERD”), the 1966 International Covenant on Civil and Political Rights (“ICCPR”), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), the 1989 CRC and the 2006 Convention on the Rights of Persons with Disabilities. Regional human rights instruments, such as the 1969 American Convention on Human Rights (“American Convention”), the 1990 African Charter on the Rights and Welfare of the Child (“African Children’s Charter”), the 1997 European Convention on Nationality, the 2004 Arab Charter on Human Rights, the 2005 Covenant on the Rights of the Child in Islam, and the 2006 Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession are also relevant.

#### **Impact of the “best interests of the child” principle on the 1961 Convention**

9. Of paramount importance in determining the scope of the 1961 Convention obligations to prevent statelessness among children is the CRC. All (except two) United Nations Member States are party to the CRC. All Contracting States to the 1961 Convention are also party to the CRC. Articles 1-4 of the 1961 Convention must therefore be interpreted in light of the provisions of the CRC.<sup>3</sup>

10. Several provisions of the CRC are important tools for interpreting Articles 1-4 of the 1961 Convention. Article 7 of the CRC sets out that every child has the right to acquire a nationality. The drafters of the CRC saw a clear link between this right and the 1961 Convention and therefore specified in Article 7(2) of the CRC that “States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.” Article 8 of the CRC provides that every child has the right to preserve his or her identity, including nationality. Article 2 of the CRC is a general non-discrimination clause which applies to all substantive rights enshrined in the CRC, including Articles 7 and 8. It explicitly provides for protection against discrimination on the basis of the status of the child’s parents or guardians. Article 3 of the CRC sets out a general principle and also applies in conjunction with Articles 7 and 8, requiring that all actions concerning children, including in the area of nationality, must be undertaken with the *best interests of the child* as a primary consideration.<sup>4</sup>

11. It follows from Articles 3 and 7 of the CRC that a child must not be left stateless for an extended period of time: a child must acquire a nationality at birth or as soon as possible after birth. The obligations imposed on States by the CRC are not only directed to the State of birth of a child, but to all countries with which a child has a relevant link, such as through parentage or residence. In the context of State succession, predecessor and successor States may also have obligations.

12. States party to the CRC that are also parties to the American Convention or the African Children’s Charter have a clear obligation to grant nationality automatically at birth to children born in their territory who would otherwise be stateless.<sup>5</sup>

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<sup>3</sup> Please see Article 31(3)(c) of the Vienna Convention on the Law of Treaties, UNTS 1155, 331.

<sup>4</sup> Article 3(1) of the CRC reads: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

<sup>5</sup> Article 20(2) of the American Convention states that “[e]very 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.” Article 6(4) of the African Children’s Charter sets out that “States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child’s birth, he is not granted nationality by any other State in accordance with its laws.”

## Impact of gender equality norms on provisions of the 1961 Convention

13. The principle of gender equality enshrined in the ICCPR and CEDAW must be taken into account when interpreting the 1961 Convention. In particular, Article 9(2) of the CEDAW provides that women shall enjoy equal rights with men with respect to conferral of nationality on their children.

14. At the time of adoption of the 1961 Convention, prior to the adoption of the ICCPR (1966) and CEDAW (1979), many nationality laws discriminated on the basis of gender. The 1961 Convention acknowledges that statelessness can arise from conflicts of laws in cases of children born to parents of mixed nationalities, whether in or out of wedlock, on account of provisions in nationality laws that limit the right of women to transmit nationality. Article 1(3) of the 1961 Convention therefore establishes a safeguard requiring States to grant nationality to children who would otherwise be stateless and are born in their territory to mothers who are nationals. These children must acquire the nationality of their State of birth by operation of law immediately at birth.

15. Today, almost all Contracting States to the 1961 Convention have introduced gender equality in their nationality laws as prescribed by the ICCPR and CEDAW. The safeguard contained in Article 1(3) of the 1961 Convention, however, remains relevant in States where women are still treated less favourably than men in their ability to transmit nationality to their children. Although Article 1(3) of the 1961 Convention only addresses conferral of nationality by mothers, in light of the principle of equality set out in the ICCPR and CEDAW as well as other human rights treaties, children born in the territory of a Contracting State to fathers who are nationals are also to immediately acquire the nationality of that State at birth by operation of law, if otherwise they would be stateless.<sup>6</sup>

## II. WHEN WOULD AN INDIVIDUAL “OTHERWISE BE STATELESS” UNDER THE 1961 CONVENTION?

### a) Definition of “Stateless” under the 1961 Convention

16. Articles 1 and 4 of the 1961 Convention require States to grant their nationality to individuals who would otherwise be stateless. The 1961 Convention, however, does not define the term “stateless”. Rather, Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (“1954 Convention”) establishes the international definition of a “stateless person” as a person “who is not considered as a national by any State under the operation of its law”.<sup>7</sup> This definition, according to the International Law Commission, is now part of customary international law. It is relevant for determining the scope of application of the term “would otherwise be stateless” under the 1961 Convention.<sup>8</sup>

17. The exclusion provisions set out in Article 1(2)<sup>9</sup> of the 1954 Convention limit the scope of the obligations of States under that Convention. They are not relevant, however, for

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<sup>6</sup> This is relevant for those States which do not allow conferral of nationality by men to their children when born out of wedlock. Please see also the decision of the European Court of Human Rights of 11 October 2011 in the case of *Genovese v. Malta*, Application No. 53124/09.

<sup>7</sup> For further details on the interpretation of Article 1(1) of the 1954 Convention please see UNHCR, *Guidelines on the Definition of “Stateless Person” in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons (“Definition Guidelines”)*, available at: <http://www.unhcr.org/refworld/docid/4f4371b82.html> and UNHCR, *Guidelines on Procedures for Determining whether a Person is Stateless (“Procedures Guidelines”)*, available at: <http://www.unhcr.org/refworld/docid/4f7dafb52.html>

<sup>8</sup> Please see International Law Commission, *Articles on Diplomatic Protection with commentaries*, 2006, 49, available at: [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf).

<sup>9</sup> Article 1(2) of the 1954 Convention states that the 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;

determining the applicability of the 1961 Convention to particular individuals.<sup>10</sup> Rather than excluding specific categories of individuals who are viewed as undeserving or not requiring protection against statelessness, the 1961 Convention adopts a different approach. It allows Contracting States to apply certain exhaustively listed exceptions to individuals to whom they would otherwise be obliged to grant nationality.<sup>11</sup>

#### **b) Focus on the Situation of the Child**

18. The term “would otherwise be stateless,” means that the child would be stateless unless a Contracting State with which he or she has a link through birth in the territory or birth to a national of that State grants that child its nationality. To determine whether a child would otherwise be stateless requires determining whether the child has acquired the nationality of another State, either from his or her parents (*jus sanguinis* principle) or from the State on whose territory he or she was born (*jus soli* principle). Children are always stateless when their parents are stateless and if they are born in a country which does not grant nationality on the basis of birth in the territory. Yet, children can also be stateless if born in a State which does not apply the *jus soli* principle and if one or both parents possess a nationality but neither can confer it upon their children. The test is whether a *child* is stateless because he or she acquires neither the nationality of his or her parents nor that of the State of his or her birth; it is not an inquiry into whether a child’s parents are stateless. Restricting the application of Article 1 of the 1961 Convention to children of stateless parents is insufficient in light of the different ways in which a child may be rendered stateless and contrary to the terms of those provisions.

#### **c) Determination of the Non-Possession of any Foreign Nationality**

19. A Contracting State must accept that a person is not a national of a particular State if the authorities of that State refuse to recognize that person as a national. A State can refuse to recognize a person as a national either by explicitly stating that he or she is not a national or by failing to respond to inquiries to confirm an individual as a national.<sup>12</sup> A Contracting State to the 1961 Convention cannot avoid the obligations to grant its nationality to a person who would otherwise be stateless under Articles 1 and 4 based on its own interpretation of another State’s nationality laws where this conflicts with the interpretation applied by the State concerned.

20. In most legal systems, a claimant bears the initial responsibility of substantiating his or her claim. Because of the difficulties that often arise when determining whether an individual has acquired a nationality, the burden of proof must be shared between the claimant and the authorities of the Contracting State to obtain evidence and to establish the facts as to whether an individual would otherwise be stateless. The claimant and his or her parents/guardians have the responsibility to cooperate and to provide all documentation and information reasonably available to them while the relevant authority is required to obtain and present all relevant evidence reasonably available to it.

21. There is no universal standard for assessing evidence of whether a child would otherwise be stateless. The consequence of an incorrect finding that a child possesses a nationality would be to leave him or her stateless. Therefore, decision makers need to take into account Articles 3 and 7 of the CRC and adopt an appropriate standard of proof, for example that it is established to a “reasonable degree” that an individual would be stateless unless he or she acquires the nationality of the State concerned. Requiring a higher standard of proof would undermine the object and purpose of the 1961 Convention. Special procedural considerations to address the acute challenges faced by children, especially unaccompanied children, in

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(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.

<sup>10</sup> The same applies for reservations in respect of the personal scope made by some State Parties to the 1954 Convention.

<sup>11</sup> These conditions will be addressed below in paragraphs 36-48.

<sup>12</sup> Please see further the *Definition Guidelines* at paragraphs 16 and 34.

communicating basic facts with respect to their nationality are to be respected.<sup>13</sup> All relevant evidence needs to be assessed, including the statement of the applicant and/or his parents or guardians, legislation of the concerned State(s) (i.e. the State(s) of nationality of the parents), information on application of the nationality legislation in practice, the birth certificate of the individual, identity documents of the parents, responses from diplomatic missions of other States and oral testimony, including statements of third witnesses and experts.

#### **d) Classification of Children as of “Undetermined Nationality”**

22. Some States make findings that a child is of “undetermined nationality”.<sup>14</sup> When this occurs, States need to determine whether a child would otherwise be stateless as soon as possible so as not to prolong a child’s status of undetermined nationality. For the application of Articles 1 and 4 of the 1961 Convention, it is appropriate that such a period not exceed five years.<sup>15</sup> While designated as being of undetermined nationality, these children are to enjoy human rights (such as health and education) on equal terms as children who are citizens.

23. If a Contracting State has opted to grant its nationality automatically at birth to children who would otherwise be stateless, they are to treat children of undetermined nationality as possessing the nationality of the State of birth unless and until the possession of another nationality is proven.

#### **e) Possibility to Acquire the Nationality of a Parent by Registration**

24. Responsibility to grant nationality to children who would otherwise be stateless is not engaged where a child is born in a State’s territory and is stateless, but could acquire a nationality by registration with the State of nationality of a parent, or a similar procedure such as declaration or exercise of a right of option.<sup>16</sup>

25. It is acceptable for Contracting States not to grant nationality to children in these circumstances only if the child concerned can acquire the nationality of a parent immediately after birth and the State of nationality of the parent does not have any discretion to refuse the grant of nationality. States that do not grant nationality in such circumstances are recommended to assist parents in initiating the relevant procedure with the authorities of their State or States of nationality.

26. Moreover, the State is to grant nationality if a child’s parents are unable or have good reasons for not registering their child with the State of their own nationality. This needs to be determined depending on whether an individual could reasonably be expected to take action to acquire the nationality in the circumstances of their particular case.<sup>17</sup>

#### **f) Special Position of Refugee Children**

27. Some children are born to refugee<sup>18</sup> parents who are themselves stateless or cannot acquire the nationality of their parents owing to restrictions on transmission of nationality to

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<sup>13</sup> Please see further the *Procedures Guidelines* at paragraph 66, which advises that “[a]dditional procedural and evidentiary safeguards for child [statelessness] claimants include priority processing of their claims, provision of appropriately trained legal representatives, interviewers and interpreters, as well as the assumption of a greater share of the burden of proof by the State.”

<sup>14</sup> This term is used here as an umbrella expression for the classification of the nationality status as “unknown”, “undetermined” or “under investigation”. The term also covers cases where States do not classify a person as “stateless”, but rather use a specific term based on their domestic law.

<sup>15</sup> Five years is the maximum period of residence, which may be required under Article 1(2)(b) of the 1961 Convention where a State has an application procedure in place, please see below at paragraph 40.

<sup>16</sup> This issue was addressed during the drafting of the 1961 Convention. The representative of Switzerland stated: “The fathers of such children often deliberately caused them to become stateless [...] a procedure which his country could not tolerate”. Please see *Summary Record of the 9<sup>th</sup> Plenary Meeting of the United Nations Conference on the Elimination or Reduction of Future Statelessness*, A/CONF.9/SR.9 (15-4-1959), p. 2.

<sup>17</sup> This would be relevant, for example, where a parent or parents cannot be reasonably expected to register their children on account of their refugee status.

<sup>18</sup> The same would apply to persons eligible for complementary protection, for example, who fall within the European Union’s subsidiary protection regime set out in *Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection*

children born abroad. Where the nationality of the parents can be acquired through a registration or other procedure, this will be impossible owing to the very nature of refugee status which precludes refugee parents from contacting their consular authorities. In such circumstances where the child of a refugee would otherwise be stateless, the safeguard in Article 1 will apply. Depending on the approach adopted by the Contracting State of birth, the child either acquires the nationality of the State automatically at birth or at a later time through an application procedure.

28. The situation is different for children born to refugees who automatically acquire the parents' nationality at birth. Such children have often been viewed as *de facto* stateless persons.<sup>19</sup> The Final Act of the 1961 Convention contains a non-binding recommendation that *de facto* stateless persons should as far as possible be treated as stateless persons. States are therefore encouraged to offer the possibility to acquire the nationality of the State of birth in the manner foreseen under Article 1(1) of the 1961 Convention. However, where the child of a refugee has acquired the nationality of the State of origin of the parents at birth, it is not desirable for host countries to provide for an automatic grant of nationality under Article 1(1) of the 1961 Convention at birth, especially in cases where dual nationality is not allowed in one or both States. Rather, States are advised that refugee children and their parents be given the possibility to decide for themselves, whether or not these children acquire the nationality of the State of birth, taking into account any plans they may have for future durable solutions (e.g. voluntary repatriation to the State of origin).

### **III. GRANT OF NATIONALITY TO CHILDREN BORN IN THE TERRITORY OF A CONTRACTING STATE WHO WOULD OTHERWISE BE STATELESS (1961 CONVENTION ARTICLES 1(1) – 1(2))**

#### **a) Relation of Articles 1 and 4**

29. The 1961 Convention and relevant universal and regional human rights norms do not dictate the basic rules according to which nationality *must* be granted or withdrawn by States. In particular, the 1961 Convention does not require States to adopt a pure *jus soli*<sup>20</sup> regime whereby States grant nationality to all children born in their territory. Similarly, it does not require adoption of the principle of *jus sanguinis*, or citizenship by descent.

30. Rather, the 1961 Convention requires that in instances where an individual would otherwise be stateless, the Contracting State in which the child is born grants its nationality to prevent statelessness (Article 1). In the event that a child is born to a national of a Contracting State in the territory of a non-Contracting State, a subsidiary obligation comes into play and the State of nationality of the parents must grant its nationality if the child would otherwise be stateless (Article 4). As a result, the 1961 Convention addresses conflicts of nationality laws through an approach that draws on the principles of both *jus soli* and *jus sanguinis*.

31. The nationality laws of States which grant nationality to all children born in the territory will always be compliant with Article 1 of the Convention. Put differently, a regime of unrestricted *jus soli* renders Article 1 of the Convention irrelevant with respect to children born in the territory of that State. Similarly, States which grant nationality by descent to all children born to their nationals abroad will always be compliant with Articles 1(4) and 4 of the Convention (described in detail below at paragraphs 49-52). Where some restrictions apply to *jus soli* transmission of nationality, such as residence requirements, these need to be assessed on the basis of Article 1(2) (please see below at paragraph 36). The same applies to limitations on *jus sanguinis* transmission with respect to the conditions allowed for under Article 4(2).

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granted, which enters into force on 21 December 2013 and supersedes *Council Directive 2004/83/EC of 29 April 2004*.

<sup>19</sup> Please see on this term paragraph 8 of *Definition Guidelines* with reference to the *Expert Meeting on the Concept of Stateless Persons under International Law (Summary Conclusions)*, 2010.

<sup>20</sup> *Jus soli* means literally right of the soil; a person acquires the nationality of his or her State of birth.

## **b) Options for Granting Nationality to Comply with 1961 Convention Obligations**

32. Article 1 of the 1961 Convention provides Contracting States with two alternative options for granting nationality to children who would otherwise be stateless born in their territory. States can either provide for automatic acquisition of nationality upon birth pursuant to Article 1(1)(a), or for acquisition of nationality upon application pursuant to Article 1(1)(b).<sup>21</sup> Article 1(1)(b) of the 1961 Convention also allows Contracting States that opt to grant nationality upon application pursuant to Article 1(1)(b) to provide for the automatic grant of nationality to children born in their territory who would otherwise be stateless at an age determined by domestic law.

33. A Contracting State may apply a combination of these alternatives for acquisition of its nationality by providing different modes of acquisition based on the level of attachment of an individual to that State. For example, a Contracting State might provide for automatic acquisition of its nationality by children born in their territory who would otherwise be stateless whose parents are permanent or legal residents in the State, whereas it might require an application procedure for those whose parents are not legal residents. Any distinction in treatment of different groups, however, must serve a legitimate purpose, cannot be based on discriminatory grounds and must be reasonable and proportionate.

## **c) Acquisition of Nationality at Birth or as Soon as Possible after Birth**

34. The rules for preventing statelessness contained in Articles 1(1) and 1(2) of the 1961 Convention must be read in light of later human rights treaties, which recognize every child's right to acquire a nationality. Specifically, when read with Article 1 of the 1961 Convention, the right of every child to acquire a nationality (Article 7 of the CRC) and the principle of the best interests of the child (Article 3 of the CRC) require that States grant nationality to children born in their territory who would otherwise be stateless either (i) automatically at birth or (ii) upon application shortly after birth. Thus, if the State imposes conditions for an application as allowed for under Article 1(2) of the 1961 Convention, this must not have the effect of leaving the child stateless for a considerable period of time.

35. There are also regional treaties which give rise to a stricter standard for a number of States. Article 20 of the American Convention and Article 6 of the African Children's Charter establish that children are to acquire the nationality of the State in which they are born automatically at birth if they would otherwise be stateless.<sup>22</sup>

## **d) Permissible Conditions for the Acquisition of Nationality upon Application (1961 Convention, Article 1(2))**

36. Where Contracting States opt to grant nationality upon application pursuant to Article 1(1)(b) of the 1961 Convention, it is permissible for them to do so subject to the fulfilment of one or more of four conditions. Permissible conditions are set out in the exhaustive list in Article 1(2) of the 1961 Convention. These are:

- a fixed period for lodging an application immediately following the age of majority (Article 1(2)(a));
- habitual residence in the Contracting State for a fixed period, not exceeding five years immediately preceding an application nor ten years in all (Article 1(2)(b));
- restrictions on criminal history (Article 1(2)(c)); and
- the condition that an individual has always been stateless (Article 1(2)(d)).<sup>23</sup>

Imposition of any other conditions would violate the terms of the 1961 Convention.<sup>23</sup>

37. The use of the mandatory "shall" ("nationality *shall* be granted..."), indicates that a Contracting State must grant its nationality to children born in its territory who would otherwise be stateless where the conditions set out in Article 1(2) and incorporated in its application

<sup>21</sup> Compare with the similar approach in Article 4 of the 1961 Convention. Please see further paragraph 51.

<sup>22</sup> Please see paragraph 12 above.

<sup>23</sup> Similar lists of exhaustive conditions for the application procedures of Article 1(4) and Article 4(1) are given in Article 1(5) and Article 4(2) respectively. Please see a comparative table of those grounds for rejection of an application in the Annex to these Guidelines.

procedure are met. The exhaustive nature of the list of possible requirements means that States cannot establish conditions for the grant of nationality additional to those stipulated in the Convention.<sup>24</sup> As a result, it is not consistent with Article 1(2) to require that the parents of the individual concerned possess a specific type of residence in the State.<sup>25</sup> Similarly, providing for a discretionary naturalization procedure for children who would otherwise be stateless is not permissible under the 1961 Convention. A State may nevertheless choose not to apply any of the permitted conditions and simply grant nationality upon submission of an application.

#### **Application within a prescribed period at the end of childhood (1961 Convention, Article 1(2)(a))**

38. Pursuant to international human rights obligations,<sup>26</sup> Contracting States that opt to grant nationality upon application pursuant to Article 1(1)(b) of the 1961 Convention, are to accept such applications from children who would otherwise be stateless born in their territory as soon as possible after their birth and during childhood.<sup>27</sup>

39. Where Contracting States set deadlines to receive applications at a later time from individuals born in their territory who would otherwise be stateless, they need to accept applications lodged at a time beginning not later than the age of 18 and ending not earlier than the age of 21 in accordance with Article 1(2)(a) of the 1961 Convention. This provision ensures that these individuals have a window of at least three years after majority within which to lodge their applications.<sup>28</sup>

#### **Habitual residence (1961 Convention, Article 1(2)(b))**

40. States may stipulate that an individual who would otherwise be stateless born in its territory fulfils a period of “habitual residence” in the territory of the State of birth in order to acquire that State’s nationality. This period is not to exceed five years immediately preceding an application nor ten years in all. In light of the standards established under the CRC, these periods are lengthy. States which apply an application procedure and require a certain period of habitual residence are encouraged to provide for a period as short as possible.<sup>29</sup>

41. The term “habitual residence” is found in a number of international instruments<sup>30</sup> and is to be understood as stable, factual residence.<sup>31</sup> It does not imply a legal or formal residence requirement. The 1961 Convention does not permit Contracting States to make an application for the acquisition of nationality by individuals who would otherwise be stateless conditional upon *lawful* residence.

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<sup>24</sup> This also applies for the application procedures of Article 1(4) and Article 4.

<sup>25</sup> In this context the scope of the non-discrimination provision set out in Article 2 of the CRC is relevant, specifically paragraph 2: “States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the *basis of the status*, activities, expressed opinions, or beliefs of the *child’s parents, legal guardians, or family members*” (emphasis added).

<sup>26</sup> Please refer to paragraphs 34 and 35 above.

<sup>27</sup> This also applies for the application procedure of Article 4.

<sup>28</sup> Furthermore, Article 1(2)(a) of the 1961 Convention provides that the person concerned shall be allowed at least one year during which to make the application without having to obtain authorization of the parent or guardian to do so. This additional rule was important at the time when most States provided that the age of majority was 21, but is now less important where the age of majority is generally 18 years of age.

<sup>29</sup> Please see paragraph 11 above. This also applies for the period of habitual residence which may be acquired under Article 1(5) and Article 4(2).

<sup>30</sup> For example, the term is also used in the treaties prepared by *The Hague Conferences on Private International Law*, the drafters of which have sought to harmonize its’ usage. The term is found also in Article 1A(2) of the 1951 Convention relating to the Status of Refugees and according to the *Travaux Préparatoires* of that treaty it refers to “the country in which [the stateless applicant] has resided and where he had suffered or fears he would suffer persecution if he returned”. UN Ad Hoc Committee on Refugees and Stateless Persons, Report of the Ad Hoc Committee on Statelessness and Related Persons (Lake Success, New York, 16 January to 16 February 1950), 17 February 1950, E/1618; E/AC.35/5, p. 39, available at: <http://www.unhcr.org/refworld/docid/40aa15374.html>.

Please see also UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 103. Please see also Article 1 of the 2006 Council of Europe Convention on the Avoidance of Statelessness in Relation to State Succession and the Explanatory Report on that Convention, and Resolution (72)1 of the Council of Europe.

<sup>31</sup> This also applies for the term “habitual residence” in Article 1(5) and Article 4(2) of the 1961 Convention.

42. It follows from the factual character of “habitual residence” that in cases where it is difficult to determine whether an individual is habitually resident in one or another State, for example due to a nomadic way of life, such persons are to be considered as habitual residents in both States.

43. States may establish objective criteria for individuals to prove habitual residence. Lists of types of permissible evidence, however, are never to be exhaustive.

#### **Criminal history (1961 Convention, Article 1(2)(c))**

44. As set out in Article 1(2)(c), the permissible condition that an individual who would otherwise be stateless has been neither convicted of an offence against national security nor sentenced to a term of imprisonment for five years or more on a criminal charge refers to the criminal history of the individual and not to acts by his or her parents.

45. Criminal consequences due to irregular presence on the territory of a State are never to be used to disqualify an individual who would otherwise be stateless from acquiring nationality under Article 1(2)(c).<sup>32</sup>

46. Whether a crime can be qualified as an “offence against national security” needs to be judged against international standards and not solely on the basis of a characterization by the concerned State.<sup>33</sup> Similarly, criminalization of specific acts must be consistent with rights guaranteed by international human rights law (for example, freedom of expression, assembly and religion) and acts protected by such rights may not be considered “crimes” for the purposes of Article 1(2)(c).<sup>34</sup> Sentencing standards must also be consistent with international human rights law.

#### **Has “always been stateless” (1961 Convention, Article 1(2)(d))**

47. The final permissible condition in Article 1(2) of the 1961 Convention for granting citizenship through an application procedure allows States to require that an applicant has “always been stateless” (i.e. since birth). If a State does not explicitly require that a person has always been stateless, then a person born in their territory has the right to acquire that State’s nationality if, for example, he or she was born stateless, acquired a nationality but lost this nationality and is stateless at the time of the application.<sup>35</sup>

48. Where a Contracting State requires that an individual has “always been stateless” to acquire nationality pursuant to an application under Article 1(2)(d), there is a presumption that the applicant has always been stateless and the burden rests with the State to prove the contrary. An applicant’s possession of evidently false or fraudulently obtained documents of another State does not negate the presumption that an individual has always been stateless.

### **IV. GRANT OF NATIONALITY TO INDIVIDUALS WHO WOULD OTHERWISE BE STATELESS BORN ABROAD TO NATIONALS OF CONTRACTING STATES (1961 CONVENTION, ARTICLES 1(4), 1(5) AND 4)**

49. Article 1 of the 1961 Convention places primary responsibility on Contracting States in whose territory children who would otherwise be stateless are born. The Convention also sets out two subsidiary rules.

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<sup>32</sup> Please see also paragraphs 40-41 in relation to the fact that Article 1(2)(b) of the 1961 Convention only allows the State to require a period of *habitual* residence in the territory of the State of birth preceding the application and not a period of *lawful* residence. This obligation may not be circumvented by criminalising unlawful residence.

<sup>33</sup> This also applies for the corresponding requirement in Article 4(2). This condition of possible exclusion is in most cases of little relevance, because pursuant to international human rights obligations, nationality is to be acquired at a very young age, generally before criminal responsibility is attributable. Please see paragraph 11 above.

<sup>34</sup> Please see considerations of a similar nature in UN High Commissioner for Refugees, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, available at: <http://www.unhcr.org/refworld/docid/3f5857d24.html>.

<sup>35</sup> This also applies for the acquisition of the nationality of a parent under Article 1(5) and Article 4(2).



### **Children born in a Contracting State to parents who are parents of another Contracting State who miss the age limit to apply for nationality or cannot meet the habitual residence requirement in the State of birth**

50. The first subsidiary rule is found in Article 1(4) of the 1961 Convention and applies where a child who would otherwise be stateless is born in a Contracting State to parents of another Contracting State but does not acquire the nationality of the State of birth automatically and either misses the age limit to apply for nationality or cannot meet the habitual residence requirement in the State of birth. In such cases, responsibility falls to the Contracting State of the parents to grant its nationality to the child (or children) of its nationals. In these limited circumstances where Contracting States must grant nationality to children born abroad in another Contracting State to one of their nationals, States may require that an individual lodge an application and meet certain criteria set out in Article 1(5) of the 1961 Convention that are similar to those set out in Article 1(2) of the 1961 Convention.<sup>36</sup>

### **Children of a national of a Contracting State who would otherwise be stateless, born in a non-Contracting State**

51. The second subsidiary rule applies where children of a national of a Contracting State who would otherwise be stateless are born in a non-Contracting State. This rule is set out in Article 4 of the 1961 Convention and requires the Contracting State of the parents to grant its nationality to the child (or children) of its nationals born abroad. Article 4 gives Contracting States the option of either granting their nationality to children of their nationals born abroad automatically at birth or requiring an application subject to the exhaustive conditions listed in Article 4(2). These conditions are again similar to those set out in Article 1(2) of the 1961 Convention, with some distinctions.<sup>37</sup>

52. Like Article 1, Article 4 of the 1961 Convention must be read in light of developments in international human rights law, in particular the right of every child to acquire a nationality, as set out in Article 7 of the CRC and the principle of the best interests of the child contained in Article 3 of the same Convention. As a result, Contracting States to the 1961 Convention are required to provide for automatic acquisition of their nationality at birth by a child who would otherwise be stateless and is born abroad to a national or, for States which have an application procedure, to grant nationality shortly after birth.<sup>38</sup>

## **V. OTHER OBLIGATIONS IN ARTICLES 1 AND 4 OF THE 1961 CONVENTION**

### **a) Appropriate Information**

53. Contracting States that opt for an application procedure are obliged to provide detailed information to parents of children who would otherwise be stateless about the possibility of acquiring the nationality, how to apply and about the conditions which must to be fulfilled.

54. Information on how to apply needs to be provided to concerned individuals whose children born in the territory of a Contracting State would otherwise be stateless or of undetermined nationality. A general information campaign is not sufficient.

### **b) Fees**

Where Contracting States grant nationality to individuals who would otherwise be stateless upon application, they are encouraged to accept such applications free of charge.<sup>39</sup> Indirect costs, such as for authentication of documents, must not constitute an obstacle for individuals to make an application under Articles 1 and 4 of the 1961 Convention.

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<sup>36</sup> There are significant differences between paragraphs 2 and 5 of Article 1, however. Please see the comparative table regarding the grounds for rejection of an application in the Annex.

<sup>37</sup> Please see the comparative table regarding the grounds for rejection of an application in the Annex.

<sup>38</sup> Please see paragraph 11 above.

<sup>39</sup> The exhaustive lists of requirements allowed by Article 1(2), Article 1(4) and (5) and Article 4(2) of the 1961 Convention do not mention the payment of a fee.

### **c) Importance of Birth Registration**

55. In the legislation of most States, nationality is acquired at birth automatically by virtue of descent from a national or birth in the territory of the State. As a result, the rules set out in the 1961 Convention operate regardless of whether a child's birth is registered. Nonetheless, registration of the birth provides proof of descent and of place of birth and therefore underpins implementation of the 1961 Convention and related human rights norms. Article 7 of the CRC specifically requires the registration of the birth of *all* children and applies irrespective of the nationality, statelessness or residence status of the parents.

### **d) Implementation of Treaty Obligations in National Law**

56. Contracting States are encouraged to formulate their nationality regulations in a way that makes clear the procedures by which they are implementing their obligations under Articles 1- to 4 of the 1961 Convention and incorporate all relevant due process guarantees. This also applies for countries in which, according to their Constitutions or legal systems, international treaties are directly applicable.

## **VI. FOUNDLINGS**

57. Article 2 of the 1961 Convention establishes that children found abandoned in the territory of a Contracting State (foundlings) acquire the nationality of that State. The Convention does not define an age at which a child may be considered a foundling. The words for 'foundling' used in each of the five authentic texts of the Convention (English, French, Spanish, Russian and Chinese) reveal some differences in the ordinary meaning of these terms, in particular with regard to the age of the children covered by this provision. State practice reveals a broad range of ages within which this provision is applied. Several Contracting States limit grant of nationality to foundlings who are very young (12 months or younger) while most Contracting States apply their rules in favour of children up to an older age, including in some cases up to the age of majority.

58. At a minimum, the safeguard for Contracting States to grant nationality to foundlings is to apply to all young children who are not yet able to communicate accurately information pertaining to the identity of their parents or their place of birth. This flows from the object and purpose of the 1961 Convention and also from the right of every child to acquire a nationality. A contrary interpretation would leave some children stateless.

59. If a State provides for an age limit for foundlings to acquire nationality, the age of the child at the date the child was found is decisive and not the date when the child came to the attention of the authorities.

60. Nationality acquired by foundlings pursuant to Article 2 of the 1961 Convention may only be lost if it is proven that the child concerned possesses another State's nationality.<sup>40</sup>

61. A child born in the territory of a Contracting State without having a parent, who is legally recognised as such (e.g. because the child is born out of wedlock and the woman who gave birth to the child is legally not recognized as the mother), is also to be treated as a foundling and immediately to acquire the nationality of the State of birth.<sup>41</sup>

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<sup>40</sup> Please compare to Article 7(1)(f) of the European Convention on Nationality: if later the child's parents or the place of birth are discovered, and the child derives citizenship from (one of) these parents or acquired citizenship on account of his place of birth, the citizenship acquired pursuant to the foundling provision may be lost. However, according to Article 7(3) of the European Convention on Nationality, discovery of information on the parents may never cause statelessness.

<sup>41</sup> The same applies for legal systems which have retained requirements that mothers must recognise children born out of wedlock in order to establish a family relationship.

## VII. APPLICATION OF SAFEGUARDS TO CHILDREN BORN ON A SHIP OR IN AN AIRCRAFT

62. Article 3 of the 1961 Convention serves to clarify the scope of application of provisions of the 1961 Convention, in particular with respect to Article 1, 2 and 4. It provides that children born on a ship or in an aircraft, respectively flagged or registered in a Contracting State, are deemed to have been born in the territory of that State. The extension of the territory of a Contracting State to children born on a “ship” as prescribed in Article 3 of the 1961 Convention is to be interpreted as referring to all vessels registered in that Contracting State irrespective of whether the ship involved is destined for transport on the high seas. Consequently, smaller ships which are in practice used for transport of persons from one State to another could also qualify as “ships” under this provision. “Ships” used on international lakes and rivers also qualify. However, an essential condition in all cases is that the “ship” is registered in a Contracting State.<sup>42</sup>

63. It follows from the ordinary meaning of the terms used in Article 3 that the extension of the territory of a Contracting State to ships flying the flag of that State and to aircraft registered in that State also applies when ships are within the territorial waters or a harbour of another State or to aircraft at an airport of another State.

## VIII. TRANSITIONAL PROVISIONS

64. Article 12 of the 1961 Convention provides that if a State opts to grant its nationality automatically to children born in its territory who would otherwise be stateless, this obligation only applies to children born in the territory of that State *after the entry* into force of the 1961 Convention for that State.

65. On the other hand, if a Contracting State opts to grant its nationality to individuals who would otherwise be stateless upon application in accordance with the provisions of Article 1(1) and 1(2), the rules also apply to children born before the entry into force for the State involved. This is also the case for the application procedures foreseen in Article 1(4) and (5), and in Article 4. This transitory rule is intended to avoid a situation in which States opt to impose conditions for acquisition of nationality by application under Articles 1 and 4, and thereby avoid any grant of nationality to individuals covered by those provisions until many years after they become bound by the treaty.<sup>43</sup> In those States, persons born before the entry into force therefore also enjoy the benefits of the Convention. Consequently, if a State acceded to the 1961 Convention on 1 January 2012 and opted for acquisition of nationality by operation of law under Articles 1 and 4, this rule would only apply to children born on or after the date the Convention entered into force with regard to that State. However, if the State opted for an application procedure, Article 12 would require allowing the receipt of applications by stateless persons born before the entry into force of the Convention with respect to that State.

66. States that opt for automatic acquisition are encouraged to provide for a transitory application procedure for stateless children born before the entry into force of the Convention.

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<sup>42</sup> UN Convention on the Law of the Sea, Article 91 prescribes: “Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag”. This obligation affects ships on the high seas, but rules also exist in many States on the registration of ships which are destined for transport on (international) rivers and lakes.

<sup>43</sup> Please see *United Nations Conference on the Elimination or Reduction of Future Statelessness, Geneva, 1959 and New York, 1961. Summary Record of the 6th Meeting of Committee of the Whole, A/CONF.9/C.1/SR.6 (6-4-1959)*, p. 7 and *Summary Record of the 13th Meeting of Committee of the Whole, A/CONF.9/C.1/SR.13 (10-4-1959)*, p. 9.

ANNEX

COMPARATIVE OVERVIEW OF PROVISIONS IN ARTICLES 1 AND 4 OF THE 1961 CONVENTION WITH EMPHASIS ON PERMISSABLE CONDITIONS FOR APPLICATIONS FOR NATIONALITY

*(Differences between the conditions allowed by each provision are indicated in bold)*

Article 1 (2)	Article 1 (4) and (5)	Article 4 (2)
<i>Obligation falls on a Contracting State in which a child who would otherwise be stateless is born</i>	<i>Obligation falls on a Contracting State of which a child's parent is a national</i>	<i>Obligation falls on a Contracting State of which a child's parent is a national</i>
<i>Child born in the territory of that Contracting State</i>	<i>Child born in the territory of another Contracting State whose nationality the child has not acquired</i>	<i>Child born in the territory of another non-Contracting State</i>
<i>Nationality status of the parent immaterial so long as the child born in the territory of the Contracting State would otherwise be stateless (and has not acquired the nationality of his/her parents)</i>	<i>Child born to a parent of a Contracting State that is not the State of birth of the child</i>	<i>Child born to a parent of a Contracting State</i>
<i>a) application lodged during a period, beginning <b>not later than at the age of eighteen years and ending not earlier than at the age of twenty-one years. Period must include at least one year during which applicant does not need to obtain legal authorization to apply</b></i>	<i>a) application lodged <b>before the applicant reaches an age, being not less than twenty-three years</b></i>	<i>a) application lodged <b>before the applicant reaches an age, being not less than twenty-three years</b></i>
<i>b) habitual residence for a period not exceeding <b>five</b> years immediately preceding the lodging of the application nor <b>ten</b> years in all</i>	<i>b) habitual residence for a period immediately preceding the lodging of the application, not exceeding <b>three</b> years</i>	<i>b) habitual residence for a period immediately preceding the lodging of the application, not exceeding <b>three</b> years</i>
<i>c) no sentence because of an offence against national security <b>or sentence to imprisonment for a term of five years or more on a criminal charge</b></i>	<i><b>N.B. if application in State of birth was rejected because of criminal record, Article 1 (4) does not apply</b></i>	<i>c) no sentence because of an offence against national security</i>
<i>d) applicant has always been stateless</i>	<i>c) applicant has always been stateless</i>	<i>d) applicant has always been stateless</i>