

The International Protection of Stateless Individuals:

A CALL FOR CHANGE

Ezekiel Simperingham

June 2003

A dissertation presented in partial fulfillment of the requirements for the degree of Bachelor of Laws (hons), University of Auckland, June 2003

TABLE OF CONTENTS

ABSTRACT

I. INTRODUCTION

II. CAUSES AND CONSEQUENCES OF STATELESSNESS

A. A Definition of Statelessness

1. Two forms of statelessness

B. Causes of Statelessness

1. Conflict of laws

2. Transfer of territory or of sovereignty

3. Laws relating to marriage

4. Administrative practice

5. Discrimination

6. Laws relating to the registration of birth

7. Strict application of the principle of *jus sanguinis*

8. Denationalisation

9. Renunciation

10. Automatic loss by operation of law

C. Consequences of Statelessness

1. A legal problem

2. A problem for international relations

3. A human problem

D. Conclusion

III. THE EFFECTIVENESS OF THE CURRENT INTERNATIONAL LEGAL REGIME

A. The Sovereign Right to Regulate Nationality

B. Treaty Limits on the Right to Regulate Nationality

C. The Right to a Nationality

D. The Refugee Convention

1. What country of former habitual residence is to be assessed?

(a) The country of original persecution

(b) The last country of former habitual residence

(c) All countries of former habitual residence

(d) Any country of former habitual residence

(e) Any country plus the Ward factor

(f) The New Zealand approach

2. What constitutes a country of former habitual residence?

(a) A right of return

(b) A significant connection

(c) The New Zealand approach

IV. A CALL FOR CHANGE

A. The Case for Accession

B. An Alternative Interpretation of the Refugee Convention

V. CONCLUSION

BIBLIOGRAPHY

ABSTRACT

This paper addresses the issue of whether the current international legal regime is effective in realising the dual aims of protecting stateless individuals and reducing and eventually eliminating the causes of statelessness.

The paper begins with an exploration of the causes and consequences of statelessness. It is noted that there are a wide variety of circumstances and settings in which statelessness can occur, but that the catastrophic consequences of statelessness are universal. For the individual, being stateless results in a dramatically diminished status in domestic and international law. For States, statelessness proves to be an undesirable source of tension in their international relations.

In part two, the paper notes that the overriding consideration in an assessment of the effectiveness of the international legal regime in reducing the problems of statelessness is that the sovereign right of States to regulate nationality is near absolute. However, it is in the limitations to the sovereign right of States in matters of nationality that the international legal regime has been able to find success in both protecting stateless individuals and reducing the occurrence of statelessness. The paper notes that the two Conventions on Statelessness, although limiting the right of States to regulate nationality, do not provide effective protection to stateless persons nor a comprehensive mechanism to prevent future causes of statelessness. However, it is noted that they are a step on the right path and as such provide, as a minimum, that persons will not be arbitrarily deprived of nationality, that they will be granted nationality under certain circumstances in which they might otherwise become stateless and that adequate protection will be available to those who, nonetheless, remain or become stateless. It is further noted that the right to a nationality is also ineffective in reducing statelessness, however, with the assistance of the doctrine of the genuine and effective link it is possible that this right could in the future prove to be an important tool in solving the problems of statelessness. Part two concludes with an assessment of the relationship between stateless persons and the Refugee Convention. It is noted that not all stateless persons are refugees, but that it is important that those stateless persons with a well-founded fear of persecution are able to access the benefits of the Refugee Convention. In this regard, the interpretation of the Refugee Convention as it currently stands in New Zealand has the undesirable effect of all but excluding stateless persons from being able to access and enjoy the protection of the Refugee Convention.

The paper concludes by proposing two methods through which the international legal regime could be more effective in realising the dual aims of both protecting stateless persons and reducing and eventually eliminating the problems of statelessness. It is first proposed that an increase in State accession to the two Conventions on Statelessness would increase awareness of the problems of statelessness globally and would act as an impetus for all States to work towards the protection of stateless individuals and the reduction and eventual elimination of the occurrence of statelessness. The second proposal is that an alternative interpretation of the Refugee Convention could be adopted which would provide, in a practical sense, increased access to the benefits of the Refugee Convention for stateless individuals.

1. INTRODUCTION

This paper addresses the issue of whether the current international legal regime relating to statelessness is effective in realising the dual aims of protecting stateless individuals and reducing and eventually eliminating the occurrence of statelessness.

Part one of the paper addresses the causes and consequences of statelessness. This part begins by exploring the wide variety of circumstances in which statelessness can be created. This part then notes the catastrophic consequences that being stateless can have for individuals, whilst also noting that statelessness is a cause of tension for States in their international relations.

The second part of this paper assesses the effectiveness of the current international regime in reducing the problems associated with statelessness. It is noted that the principle aims of the international legal regime in relation to statelessness are the protection of stateless individuals and the reduction and elimination of future statelessness. The second part begins by noting that in principle nationality is within the domestic jurisdiction of States and that the international legal regime can only be effective in reducing the problems of statelessness insofar as it can limit the sovereign right to regulate nationality. This part assesses the effectiveness of the two Conventions on Statelessness in limiting the sovereign right to regulate nationality and in turn reducing the problems of statelessness. An assessment of the development of the right to a nationality is then undertaken in the same regard. This part ends by exploring the relationship between stateless individuals and the Refugee Convention, noting that the extent to which stateless individuals can access the rights and benefits of the Refugee Convention has an important impact on the degree to which the international legal regime can reduce the problems associated with statelessness.

The final section of this paper proposes changes through which the international legal regime could greater realise its aims in regards to the phenomenon of statelessness. It is first proposed that through increased State accession to the Conventions on Statelessness, that the minimum protection and rights contained within those Conventions could be greater afforded to stateless individuals as well as effecting a more global reduction of the causes of statelessness. This part concludes by proposing that an alternative interpretation of the Refugee Convention could be adopted which would afford greater practical assistance to stateless persons in accessing the rights and benefits contained within the Refugee Convention.

II. CAUSES AND CONSEQUENCES OF STATELESSNESS

A. Definition of Statelessness

The most widely accepted definition of statelessness is that contained in Article 1 of the 1954 Convention relating to the Status of Stateless Persons:¹

Article 1 – Definition of the term “stateless person”

1. For the purposes 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.

1. *Two forms of statelessness*

Statelessness comes about in two basic forms: *de jure* and *de facto*.² A person's inability to establish citizenship, or to be considered a national by any State under operation of law, creates *de jure* statelessness.³ *De jure* statelessness may result when a person fails, according to the law of a State, to acquire nationality at birth; this is known as "original" or "absolute" statelessness.⁴ *De facto* stateless persons are those that cannot establish their nationality, yet are not declared *de jure* stateless because the country in which they live believes that they hold, or should hold, nationality in another country; the other country in turn believes that the individual ought to have the nationality of the country in which they live.⁵ *De facto* statelessness encompasses what is known as "subsequent" or "relative" statelessness, whereby an individual loses their nationality without acquiring another.⁶

B. Causes of Statelessness

Globally, the prospect and occurrence of statelessness affects people as far apart as Bedoons of Kuwait, Vietnamese seeking asylum in Hong Kong, Kurds in Northern Iraq, Saami in Scandinavia, Roma in Eastern Europe and Palestinians.⁷ However, statelessness is not limited to the groups enumerated above as there are a wide variety of circumstances in which statelessness can be created.⁸

1. Conflict of laws

The conflict of laws between States is one of the more frequent causes of statelessness.⁹ For example, statelessness can result where in the State in which an individual is born nationality is granted by descent (*ius sanguinis*) and in the State in which the parents of the individual hold nationality, citizenship is granted by the fact of birth within its territory (*ius soli*) and not by descent.

2. Transfer of territory or of sovereignty

Statelessness can occur as a result of transfer of territory or sovereignty, including issues such as post-colonialism, State independence, States dissolution, States succession and State restoration. Following any of these events, where there is the adoption of new laws or decrees on citizenship, or where new administrative measures are introduced or old practices are reinterpreted in new ways, individuals may be denied the opportunity to gain citizenship or conflict of laws situations may be created which result in statelessness.¹⁰

3. Laws relating to marriage

The nationality practice of some States provides for the automatic loss of nationality for women who marry foreign nationals. Statelessness may be created in these circumstances where the woman does not receive the nationality of her husband or where her husband has no nationality. Statelessness may also be created if, after receiving the nationality of her husband, the marriage is dissolved and the woman loses the nationality acquired by marriage but does not automatically regain her original nationality. The nationality of children in these situations is also commonly unresolved.¹¹

4. Administrative practices

The acquisition, restoration and loss of nationality is often related to numerous administrative and procedural requirements. These practices can create statelessness where, for example, someone eligible for citizenship may not actually receive that citizenship due to excessive and unaffordable administrative fees, deadlines that cannot be met or where required documentation is in the possession of a former State of nationality and is unable to be produced.¹²

5. Discrimination

Statelessness can be created through discriminatory legislation and practice based on, for example, ethnicity, religion, gender, race and political opinion. Individuals are not automatically entitled to receive nationality in all States and as such States commonly have nationality legislation that is based on distinctions between individuals. It is the discrimination within a State between equally situated persons that can create statelessness.¹³

6. Laws relating to the registration of births

Evidence as to where and to whom a child is born is a principle criterion in establishing entitlement to citizenship based on either *jus sanguinis* or *jus soli*. The failure or refusal of a State to ensure the registration of births can lead to the inability to establish identity and therefore to establish the basis of a claim to citizenship.[14](#)

7. Strict application of the principle of *jus sanguinis*

Although the nationality laws of a large number of countries rests on a combination of *jus sanguinis* and *jus soli*,[15](#) it is clear that *jus sanguinis* is more prone to create statelessness as it is possible to result in the inheritance of statelessness. *Jus sanguinis*, without modifications based on place of birth, residency, or other factors, extends to children the nationality status of their parents. The result is that statelessness may be inherited and passed from generation to generation regardless of place of birth, cultural ties or the fact that in some cases the individuals concerned have neither entered or resided in another State.[16](#)

8. Denationalisation

Deprivation of nationality as an act of State, often based on discriminatory measures and often followed by expulsion, where an individual has no other nationality is a clear cause of statelessness.[17](#)

9. Renunciation

Statelessness may result where an individual renounces their nationality without the prior acquisition or guarantee of acquisition of another nationality.[18](#)

10. Automatic loss by operation of law

Statelessness may result where a State provides for the automatic loss of citizenship after a set period of absence from the State or residence abroad. This may be associated with administrative practices that fail to notify individuals of these practices.[19](#)

C. Consequences of Statelessness

1. A legal problem

Nationality has an important bearing on an individual's legal capacity in both domestic and international law as it effectively provides the link between an individual and a State.[20](#) Statelessness, therefore, is a problem of identity under the law resulting in the inability to enjoy the rights and freedoms afforded by the law.[21](#)

Statelessness can have a disastrous legal impact on an individual, including the inability to exercise the right to work, to own property, to access health care, to education and the ability to travel, including the vital right to leave and return.[22](#) A State's right to grant diplomatic protection and to represent an individual at the international level is also based on nationality.[23](#)

The serious legal predicament that statelessness causes has been noted in a number of judicial decisions, Chief Justice Warren stated in *Perez v Brownell* that:

“Citizenship is man's basic right for it is nothing less than the right to have rights”[24](#)

Justice Hammond stated in the High Court decision of *Yan v Minister of Internal Affairs*, that:

“The modern conception is that citizenship is a means to an end, that is, it is an instrument for securing the rights of the individual in both the national and international spheres.” [25](#)

Justice Hammond also noted that the greatest caution should be exercised before rendering a person stateless.[26](#)

The decision of *Trop v Dulles* further described statelessness as entailing a severe and dramatic deprivation of

power of the individual and denationalisation as the total destruction of an individual's status in organized society.[27](#)

The catastrophic legal effects of statelessness have also been noted extensively in academic literature, where the legal position of stateless persons has been described as precarious[28](#) and one of serious disadvantage and difficulty at every front[29](#) and stateless individuals have been characterised as *res nullius*,[30](#) void[31](#) and compared to vessels on the open sea not sailing under any flag.[32](#)

2. A problem for international relations

In a world governed by nation States and strict rules concerning nationality and citizenship, the international community has had problems dealing with the issues of statelessness.[33](#) As such, statelessness is not only undesirable to individuals but also to States and their international relations. In effect stateless persons are outcasts from the international legal order and the global system of States and their very existence has the potential to lead to friction between States.[34](#)

3. A human problem

Statelessness not only results in disastrous legal consequences for the individual and creates a source of tension between States in their international relations but it is also a human problem with human issues and realities.[35](#)

There are many potentially unforeseen complications and predicaments for stateless persons, including, for example, indefinite detention in a foreign State, where the detaining State cannot determine the individual's citizenship for the purpose of expulsion or where the country of former residence will not accept the individual's return.[36](#)

Chief Justice Earl Warren stated in *Perez v Brownell*:

“Remove this priceless possession [citizenship] and there remains a stateless person, disgraced and degraded in the eyes of his country men. He has no lawful claim to protection from any nation, and no nation may assert rights on his behalf. His very existence is at the sufferance of the State within whose borders he happens to be.”[37](#)

The opinion of Chief Justice Warren was cited with approval by Justice Williams in the High Court decision of *Lee v Deportation Review Tribunal*, claiming further that “citizenship is a fundamental human right”.[38](#)

D. Conclusion

Statelessness is a global phenomenon that affects a wide variety of people in an equally wide variety of settings and circumstances. For States, statelessness creates a source of tension in their international relations.[39](#) For individuals, statelessness creates a severely disadvantaged legal situation resulting in the inability to exercise the rights and freedoms afforded by law.

The global consensus on the undesirability of statelessness[40](#) has resulted in the establishment of international legal order relating to statelessness with two main aims: the protection of stateless persons and the reduction and eventual elimination of the occurrence of statelessness.

This paper now turns to an assessment of the effectiveness of the current international legal order in realising the dual aims of protecting stateless persons and reducing and eliminating the occurrence of statelessness globally

III. THE EFFECTIVENESS OF THE CURRENT INTERNATIONAL REGIME

A. The Sovereign Right to Regulate Nationality

The overriding consideration in assessing the effectiveness of the international legal regime is that as a manifestation of sovereignty nationality is closely guarded by States.⁴¹ The result is that, in principle, it is not international law but the domestic law of each State that determines who is and who is not to be its nationals.⁴²

The International Court of Justice stated in the *Nottebohm Case* that:

“...it is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality...It is not necessary to determine whether international law imposes any limitations on its freedom of decision in this domain...Nationality serves above all to determine that the person upon whom it is conferred enjoys the rights and is bound by the obligations which the law of the State in question grants to or imposes on its nationals. This is implied in the wider concept that nationality is within the domestic jurisdiction of the State.”⁴³

This principle was further confirmed by Manley O'Hudson who, as Special Rapporteur of the International Law Commission, expressed the view that “in principle, questions of nationality fall within the domestic jurisdiction of each State.”⁴⁴

However, it has also been noted that international law places some limitations on State sovereignty in this regard, with the result that the legislative competence of States in matters of nationality is not absolute.⁴⁵

As early as 1923, in its Advisory Opinion in the case concerning *Nationality Decrees Issued in Tunis and Morocco*, the Permanent Court of International Justice emphasised that:

“The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.”⁴⁶

The Permanent Court added that in respect of nationality matters, which in principle were not regulated by international law, the right of a State to use its discretion may be restricted by obligations undertaken towards other States, so that its jurisdiction would be limited by rules of international law.⁴⁷

Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws states further that:

“It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international Conventions, international custom and the principles of law generally recognised with regard to nationality.”⁴⁸

The result is that, despite the traditional acceptance that the conferral and recognition of nationality are matters for States to decide, it is an irresistible conclusion that international law currently places limits on the manner in which States regulate nationality.⁴⁹

It is within these limitations to State sovereignty in matters of nationality that international law is able to pursue its dual aims of protecting stateless individuals and reducing and eventually eliminating statelessness.

B. Treaty Limits on the Right to Regulate Nationality

International Law has developed limitations on the sovereign right to regulate nationality through a number of international Treaties and Conventions focusing on nationality and statelessness. The principle international instruments in this regard are the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness. These Conventions also provide an important indication of the dual aims of international law in relation to statelessness, namely the protection of stateless individuals and the reduction and elimination of the occurrence of statelessness.

The 1954 Convention on the Status of Stateless Persons focuses on the protection of stateless persons and to this end lays down the basic rights, obligations and standards of treatment for stateless persons.⁵⁰ For the most part, the 1954 Convention is the application of the provisions of the Refugee Convention to stateless persons.⁵¹ For example, the provisions relating to expulsion, Article 31 in the 1954 Convention and Article 32 in the Refugee Convention are almost identical. As the preamble notes, the primary purpose of the 1954

Convention was the regulation of treatment of stateless persons not protected by the Refugee Convention.[52](#)

However, as regards to the number of rights and benefits, the provisions of the 1954 Convention are less favourable than those of the Refugee Convention.[53](#) Whereas the 1954 Convention provides for the issuance of a uniform travel document in Article 28, unlike the Refugee Convention, the right of re-entry only has to be accorded to the holder when the country to which he or she proposes to travel insists on the document according to the right of re-entry.[54](#) Further, the Stateless Convention does not contain freedom from penalties for unlawful entry, as in Article 31 of the Refugee Convention.[55](#) The 1954 Convention also does not contain a provision prohibiting expulsion or return to countries of persecution, as in Article 33 of the Refugee Convention. However, the Final Act of the Conference notes that "Article 33...has been recognised as an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[56](#)

In an effort to strengthen the international commitment to the provisions of the 1954 Convention in 1961 the United Nations adopted the Convention on the Reduction of Statelessness.[57](#) As its name suggests, the focus of the 1961 Convention is the reduction of future cases of statelessness and the eventual elimination of the occurrence of statelessness.[58](#)

The 1961 Convention does not, however, require a Contracting State to unconditionally grant its nationality to any stateless person but rather bases the right to nationality on ties held with a State based on either *jus soli* in Article 1 or *jus sanguinis* in Article 4. The grant of nationality is further contingent on the fact that a person "would otherwise be stateless"[59](#)

Also, both Article 1 and 4 present a Contracting State with the opportunity to impose further conditions on the grant of its nationality to stateless persons, in addition to the *jus soli* or *jus sanguinis* links that exist. These conditions include: that an application under the Convention is lodged while the applicant is in a prescribed age range, Articles 1(2)(a) and 4(2)(a); that the person has habitually resided in the States territory for a fixed period of time, Articles 1(2)(b) and 2(2)(b); that the person has not been convicted of an offence against national security, Articles 1(2)(c) and 4(2)(c), Article 1(2)(c) also includes that a person has sentenced to imprisonment for five or more years on a criminal charge and that the person has always been stateless, Article 1(2)(d) and 4(2)(d).

The two Conventions on Statelessness in combination provide both a minimal level of protection to stateless persons and the opportunity to reduce and potentially eliminate the occurrence of statelessness. However, it is clear that although these Conventions provide a step on the right path to realising these goals, there are a number of issues where they fall short and as such they do not provide a comprehensive solution to the phenomenon of statelessness.

First, as noted, the 1961 Convention only provides for the grant of nationality in certain limited circumstances. In particular the 1961 Convention only provides for the grant of nationality to stateless individuals within a contracting States territory based on *de jure* stateless factors. These factors are further limited by the option for contracting States to impose further conditions on the grant of nationality. As a result there are a number of gaps in the prevention of statelessness that the 1961 Convention does not envisage or remedy. A clear example is that the Convention permits a contracting State to refuse nationality for an individual who is on its territory and who has either *jus sanguinis* or *jus soli* or both links with that State, simply because the individual is not of a predetermined age when he or she applies. It is clear that the circumstances in which statelessness is created are much wider and varied than that which the 1961 Convention attempts to prevent.

Secondly, in focusing on *de jure* statelessness, neither Convention includes *de facto* stateless persons in its formal text; *de facto* statelessness is instead consigned to a non-binding recommendation in the Final Act.[60](#) As a result, although there are currently thousands of people in a *de facto* stateless situation,[61](#) the two Conventions do not provide adequate protection to *de facto* stateless persons nor do they provide effective methods in which *de facto* statelessness can be reduced.[62](#)

Although, as noted, the two Conventions are a clear step on the path towards achieving both the reduction of statelessness and the protection of stateless individuals, as they currently stand there are many circumstances in which statelessness can still be created and many stateless persons, especially those who are *de facto*

stateless are not guaranteed access to the rights and benefits contained within these Conventions.

C. The Right to a Nationality

Another key development in the field of nationality and a tacit acknowledgement of the seriousness of statelessness has been the development of the right to a nationality. The aim of this right is not, however, to protect stateless individuals but rather it is focused on the prevention and eventual elimination of the occurrence of statelessness.

Article 15 of the Universal Declaration of Human Rights states:

1. Everyone has the right to a nationality
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.[63](#)

The development of the right to a nationality can be noted in a number of other international legal instruments, including: the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 1930;[64](#) the Convention on the Nationality of Married Women, 1957;[65](#) the International Covenant on Civil and Political Rights, 1966;[66](#) the Convention on the Elimination of all Forms of Discrimination against Women, 1979;[67](#) and the Convention on the Rights of the Child, 1989.[68](#)

The right to a nationality can also be noted in a number of regional instruments, such as the 1969 American Convention on Human Rights[69](#) and the 1997 European Convention on Nationality.[70](#)

However, although there has clearly been a widespread consensus on the right to a nationality, perhaps even to the stage where it could be said to have entered into customary international law,[71](#) the major practical limitation to the effectiveness of the right is that it does not prescribe which nationality there may be a right to in any given situation.

One of the methods that international law has developed to resolve this issue and thus make the right to a nationality more effective in resolving the problems of statelessness is through the doctrine of the genuine and effective link.[72](#)

The concept of the genuine and effective link was first enunciated by the International Court of Justice in the *Nottebohm Case* as a means of defining the nature of nationality:

“According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”[73](#)

The genuine and effective link has since been developed into a broader concept in the area of nationality legislation and practice based upon the principles embodied in State practice, treaties and case law.[74](#)

According to State practice, birth, descent or residence can each be presumed to support a genuine and effective link between the individual and the State.[75](#) While the choice of emphasis varies from region to region, one or more of the elements of the genuine and effective link, often in conjunction with one another, are utilised to some degree by all States in their nationality legislation and practice.[76](#) However, as most States do not grant nationality indiscriminately, these elements are not applied on an equal basis but, rather, preference is indicated by the State for either birth or descent, by basing national legislation and practice in either *jus soli* or *jus sanguinis*.[77](#)

Although the genuine and effective link is strongly evidenced in State practice and is an appropriate and effective tool in determining which nationality an individual may have the right to, the present state of international law does not support the conclusion that a State has the obligation to grant nationality to a citizen who has a genuine and effective link with that State.[78](#)

However, although at present, the right to a nationality is an ineffective method of preventing the occurrence of statelessness, it is clear that the right is developing, as evidenced in the increasing number of international Conventions and regional instruments that refer to it. As such, it is possible that in the future, through increased

State willingness to recognise the right to a nationality and subsequent State practice in granting individuals nationality on that basis, the right could be an effective tool in the reduction and elimination of statelessness.

D. The Refugee Convention

The extent to which the Refugee Convention applies to stateless persons has an important impact on the protection that international law offers to stateless individuals. As previously noted, the Refugee Convention contains more rights and benefits than the Conventions on Statelessness and as such the ability of stateless persons to access those rights and benefits has an important impact on the level of protection that international law offers to stateless persons. The extent to which the Refugee Convention applies to stateless individuals also has an important impact on the effectiveness of international law in reducing and eliminating statelessness, as individuals recognised as requiring protection under the Refugee Convention are often granted, in accordance with Article 34, the nationality of their country of asylum.[79](#)

However, the relationship between stateless individuals and the Refugee Convention is not clear.

There has been jurisprudential and academic support for the interpretation of the Refugee Convention that stateless persons need only establish that they are presently unable to return to their country of former habitual residence in order to qualify for refugee status.[80](#)

However, this is a clearly untenable argument that runs contrary to the language of Article 1(A)(2) of the Refugee Convention. To this end, this view has been emphatically rejected in New Zealand and other refugee law jurisprudence.[81](#)

A more widely recognised and supportable reading of the Refugee Convention is that not all stateless persons are refugees and that a stateless person must demonstrate a well founded fear of persecution under one of the five grounds enumerated in the Refugee Convention before acquiring protection as a refugee against any one country of former habitual residence.[82](#)

This view is supported by paragraph 102 of the UNHCR *Handbook*, which states:

“It will be noted that not all stateless persons are refugees. They must be outside their country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.”[83](#)

As such, it is appropriate to have a single test for refugee status, with the only modification in the case of stateless claimants being that they must show that they are unable, or owing to such fear, unwilling to return to their country of former habitual residence.[84](#)

However, there remains two issues of interpretation which impact strongly on the extent to which stateless individuals can access the benefits of the Refugee Convention. The first is a determination of what country, where the stateless refugee claimant has more than one country of former habitual residence, is the relevant country for an Article 1(A)(2) assessment. The second issue is as to what constitutes a country of former habitual residence.

1. What country of former habitual residence is to be assessed?

It is a necessary element of the refugee determination process in relation to stateless persons, where there are two or more countries of former habitual residence, to identify which of those countries is relevant to the determination of the refugee claim.[85](#) A number of different approaches to this issue have been identified, each with a differing impact on the protection that the Refugee Convention can offer to Stateless persons.[86](#)

(a) The country of original persecution

One approach is that the country of former habitual residence should be the State in which the stateless refugee claimant first experienced persecution, namely the “country of original persecution”.[87](#) This view suggests that a person becomes a refugee when he or she faces persecution and remains a refugee so long as the threat of that persecution remains in the original country.

The weakness of this view is that the appropriate question is not whether an individual faces persecution, but whether the claimant can be protected from that persecution, including that the individual is without a safe alternative.⁸⁸ Thus, while the country of first flight may be the State to which an individual retains the greatest formal ties, the claimant may have as strong or stronger ties with other countries, and as such, the assessment of refugee status by reference only to the first country ignores the possibility of havens in other States.⁸⁹

(b) The last country of former habitual residence

The Federal Court of Canada in *Thabet* ruled that the claimant had to make his refugee claim against the last country of former habitual residence.⁹⁰

This approach has a certain linguistic and logical coherence as well as the benefit of being easy to administer.⁹¹ However, when the IRB considered the law as set out in *Thabet*, it was noted that this interpretation could result in Canada committing *refoulement*.⁹² Where the claimant has fled from persecution in a first country and settled in a second country where he or she is not persecuted, if the person's claim is judged only with reference to that second country then the claim will surely fail, with the result that he or she may be returned to the first country. As such this approach could see a claimant being returned to a country where there was a genuine risk of persecution and with no hearing on the merits of that claim.⁹³

(c) All countries of former habitual residence

This approach requires stateless refugee claimants to demonstrate a well founded fear of persecution against all countries of former habitual residence in order to be accepted as a Convention refugee.⁹⁴

This approach is consistent with the need, in cases of multiple nationalities, to establish a claim against all countries of which one is a national, in this way, providing a degree of symmetry between the concepts of nationality and habitual residence.⁹⁵

However, it is not immediately clear where the benefits would lie in attaining symmetry between these two concepts, especially in the context of stateless refugee claimants. Whereas individuals with multiple nationality are characterised by an abundance of protection and a right to return to a number of States, stateless individuals are characterised by a conspicuous absence of protection, with the result that there is very rarely a State which they can in fact return to and which can in fact offer them protection.

Furthermore, this approach could create the result of returning a stateless refugee claimant who could not prove a claim against one country of former habitual residence to a country where they could be returned and where they faced a genuine risk of persecution. In this way, this interpretation also puts States at risk of committing *refoulement*.⁹⁶

(d) Any country of former habitual residence

The most generous of the alternatives available is that espoused by the United Nations High Commissioner for Refugees and has been adopted in a number of cases, including, *Martchenko et al v Canada (Minister of Citizenship and Immigration)*, *Maarouf v Canada (Minister of Employment and Immigration)*,⁹⁷ and the Australian decision of *Al-Anezi v Minister of Immigration and Multicultural Affairs*.⁹⁸

The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* states at paragraph 104:

“A stateless person may have more than one country of former habitual residence and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them.”

Further, paragraph 105 of the UNHCR *Handbook* states:

Once a stateless person has been determined a refugee in relation to “the country of his former habitual residence”, any further change of country of former habitual residence will not affect his refugee status.⁹⁹

However, this approach does not take sufficient account of the alternative protection options available to a claimant and insufficient regard of the requirement that a stateless person, like other refugee claimants, must establish unwillingness or inability to avail himself or herself of the protection of places of former habitual residence.[100](#)

(e) Any country plus the Ward factor

The approach adopted by the Canadian Federal Court of Appeal in *Thabet* requires that a stateless person must show a well-founded fear of being persecuted for a Convention reason in one country of former habitual residence, and that she or he cannot return to any of his or her other countries of former habitual residence.[101](#)

This approach more effectively deals with the issue of whether the claimant has other countries of haven and treats stateless persons as analogously as possible with those who have more than one nationality.

(f) The New Zealand approach

In a recent decision of the New Zealand Refugee Status Appeals Authority, it was stated that where a stateless person has habitually resided in more than one country, in order to be found to be a Convention refugee, such person must show that he or she has a well-founded fear of being persecuted for a Convention reason in at least one country of former habitual residence, and that he or she is unable or, owing to such fear, unwilling to return to each of his or her other countries of former habitual residence.[102](#) It is further noted that this approach requires the well founded fear of being persecuted for a Convention reason to be established in relation to each and every country of former habitual residence before a State party has obligations to the stateless person.[103](#)

However, the New Zealand decision further claims that this interpretation is consistent with the essential premise of the decision in *Thabet*.[104](#) This raises the issue of whether the effect of *Thabet* is that a stateless refugee claimant needs to prove that they have a well founded fear of persecution against any one country of former habitual residence and that they are unable to return to any of the other countries as they are stateless and have no right of return; or whether *Thabet* requires that the inability to return to the other countries of former habitual residence be based on a well-founded fear of persecution in all of them.

It appears clear that the former is the more likely effect of *Thabet* for two reasons: first, *Thabet* expressly disavows the “all countries” test and notes that the interpretation adopted is a variation of the “any country” test.[105](#) Second, the focus of the *Thabet* interpretation is on protection and not on fear of persecution, it is noted that “it will suffice to show that one State is guilty of persecution, but that both States are unable to protect the claimant.”[106](#) To this end it is clear that a country that will not allow a stateless person a right to return is not a country of protection.

As such, it is not entirely clear that the New Zealand approach is consistent with the essential premise of *Thabet*. The essential difference between the two approaches is that under the New Zealand formulation a stateless refugee claimant is effectively required to prove a well founded fear of persecution against all countries of former habitual residence, an approach previously noted as unsatisfactory, whereas the Canadian approach requires an assessment of well foundedness against only one country of former habitual residence and that the claimant cannot return to any of the other countries of former habitual residence.

This difference between the two interpretations that leads to this divergence is that the New Zealand approach requires the inability or unwillingness of a claimant to return to the other countries of former habitual residence to be based on a well founded fear of persecution, whereas under the *Thabet* formulation it is permissible that the inability to return can be based on the fact of statelessness, which can occur, as previously noted, in situations far removed from persecution.

It is thus clear that the two approaches offer an entirely different level of protection to stateless persons, the *Thabet* approach provides a mechanism to protect stateless persons who have a well founded fear of persecution and who have no place of safety,[107](#) whereas the New Zealand approach requires a far higher standard in requiring an academic assessment of whether an individual has a well-founded fear of persecution in countries where an individual has no nationality status, no right of return and therefore no access to protection.

There is however, a further issue of interpretation which could have the result of further limiting access to the benefits of the Refugee Convention for stateless persons.

2. What constitutes a country of former habitual residence?

The issue of whether a country can only be a country of former habitual residence if the claimant has a right of return to that country clearly has an important impact on the access to the benefits of the Refugee Convention that stateless persons have. This issue arises as the definition of country of former habitual residence is subjective and open to a wide variety of interpretations.[108](#)

(a) A right of return

One view, adopted in both case law and academic writing, is that a country is not a “country of former habitual residence” unless the claimant has a right to return to that country.[109](#)

The result is that a stateless person cannot qualify as a refugee if they are not returnable to a country of former habitual residence.[110](#) This interpretation of country of former habitual residence is premised on the argument that if a stateless individual has no right of right of return to any country of former habitual residence, then there would be no country from which protection needed to be granted, with the result that the individual would not require protection under the Refugee Convention.

However, this result is clearly controversial as the end result is that stateless individuals without a right of return to a country of former habitual residence are left in a legal limbo.[111](#) It would be legally impossible for stateless individuals without a right of return to any country to obtain protection under the Refugee Convention, in effect, a large proportion of stateless persons would be excluded from the benefits of the Refugee Convention irrespective of any well-founded fear that they might have.

(b) A significant connection

Another approach to this issue is that adopted in the Canadian decision of *Maarouf*, which states:

“The definition of “country of former habitual residence” should not be unduly restrictive so as to pre-empt the provision of “surrogate” shelter to a stateless person who has demonstrated a well founded fear of persecution...the claimant does not have to be legally able to return to a country of former habitual residence as denial of a right of return may itself constitute an act of persecution by the State. The claimant must, however, have established a significant period of *de facto* residence in the country in question.”[112](#)

(c) The New Zealand Approach

This issue was also considered in the New Zealand Refugee Status Appeals Authority decision, *Refugee Appeal No 72635*. This decision states that the issue of return to a country of former habitual residence is an issue of whether return is possible as a matter of fact, not as a matter of law. It was further noted, in answer to the claim that the denial of a right of return may constitute an act of persecution that once an individual is outside the relevant country and it is factually impossible for that person to return there, there is no well-founded fear of being persecuted in that country in the future.[113](#)

The end result reached in New Zealand is that there must be a prospective risk of persecution should an individual return to the relevant country and that such risk cannot exist where re-entry is, as a matter of fact, not possible.[114](#) The New Zealand decision also notes that the “resulting predicament” of the individual is to be assessed under the Convention relating to the Status of Stateless Persons and that if the country of intended refuge is not a party to that Convention, the individual is without remedy.[115](#)

It is difficult to see in practice how a stateless person could return to a country of former habitual residence in spite of not having a legal right to enter that country. The New Zealand decision claims that “it may be possible in practice to remove persons to a State which they are not legally entitled to enter”,[116](#) however, as noted States have a strong sovereign right to regulate nationality and could deny entry to an individual despite the

existence of even a genuine and effective link. As such, almost by definition, only a very limited number of stateless individuals would be able to return to a country of former habitual residence without any legal right to do so. The practical result of the approach adopted in New Zealand, as stateless persons almost by definition cannot in fact return to any country, is that the vast majority of stateless persons are excluded from the benefits of the Refugee Convention.

The result of the New Zealand approach, as outlined in *Refugee Appeal No. 72635*, is that in addition to requiring that a stateless refugee claimant prove that they have a well founded fear of persecution in all countries of former habitual residence, is that they must also prove that they can in fact return to those countries in order to access the benefits of the Refugee Convention. The combination of these two interpretations clearly has an incredibly limiting effect on the practical ability of stateless individuals to access the benefits of the Refugee Convention, despite any well founded fear and absence of alternative protection that they might have.

IV. A CALL FOR CHANGE

A. The case for Accession

As previously noted, the Conventions on Statelessness, in realising the aims of international law with regards to statelessness are a step on the right path, but are not, as they currently stand, entirely effective in either protecting stateless individuals or providing a comprehensive mechanism in which to reduce the occurrence of statelessness.

However, another issue in assessing the effectiveness of these Conventions especially as they limit State sovereignty in matters of nationality is that they only regulate Contracting States parties. As of August 2002, there were only 54 State parties to the 1954 Convention and 26 State parties to the 1961 Convention. It is further notable that New Zealand is not a party to either Convention.[117](#)

It is proposed that an increase in global accession to these legal instruments would increase their effectiveness and in applying to more States would provide both increased protection to stateless individuals and would further the aim of reducing and eliminating the occurrence of statelessness.

It is important from a number of perspectives that there is increased accession to these Conventions. First, accession is an essential step in the furtherance of international efforts towards reducing the problem of statelessness as these instruments, despite not being entirely effective, ensure, as a minimum, that persons will not be arbitrarily deprived of nationality, that they will be granted nationality under certain circumstances in which they might otherwise become stateless and that adequate protection will be available to those who, nonetheless, remain or become stateless.[118](#) Furthermore, the 1954 Convention provides stateless persons with many of the rights necessary to live a stable life and accession to the 1961 Convention would serve to resolve many of the situations which result in statelessness and provides a useful reference point for nationality legislation that could assist in resolving certain conflict of laws problems.[119](#)

Secondly, it is clear that the success of international efforts to reduce statelessness is dependent on nationality legislation and practice at State level. Although the UNHCR has a role in promoting accession to these Conventions and has been requested by the General Assembly to assist States in reducing statelessness;[120](#) that the International Law Commission has undertaken a Study on Statelessness[121](#) and that efforts have been undertaken at the regional level to reduce statelessness,[122](#) it is clear that neither the UNHCR, nor any other international or regional organisation, nor third States can pronounce authoritatively on nationality in one State or the other.[123](#) Whilst organizations and other States may promote the recognition of a genuine and effective link and encourage recognition of these links where they exist, only the State concerned can indicate whether it acknowledges these links.[124](#)

In this regard, one of the major obstacles to the success of the international regime in realising its aims towards statelessness is the level of general apathy towards the problem of statelessness, as witnessed in the relatively small number of States that have taken the step of acceding to the two Conventions on Statelessness. An increase in accession to and ratification of these instruments would increase awareness of the problems of

statelessness globally and would act as an impetus for all States to work towards the protection of stateless individuals and the reduction and eventual elimination of the occurrence of statelessness.[125](#)

B. An Alternative Interpretation of the Refugee Convention

As noted above, the practical effect of the New Zealand interpretation of the Refugee Convention as it relates to stateless individuals is to exclude all stateless persons, except those that can return to countries of former habitual residence, from the benefits of the Refugee Convention. This has an important impact, as although not all stateless persons are refugees and as such do not require protection under the Refugee Convention, it is important that those stateless persons with a well-founded fear of persecution can have the equivalent ability to seek protection as those individuals with nationality.

The approach adopted in New Zealand appears to be more limited than that which was envisaged in Article 1(a)(2) of the Refugee Convention, the preamble to the 1954 Convention and the interpretation[126](#) adopted by the UNHCR.[127](#)

The alternative approach proposed is that a stateless refugee claimant, if having more than one country of former habitual residence, must have a well-founded fear of persecution against any one of those countries and that they cannot in fact return to any of the other countries of former habitual residence. Further, a country can be interpreted as being of former habitual residence if the individual has a significant period of *de facto* residence in that country.

It is suggested that this approach is more in line with *Thabet* and avoids many of the difficulties noted above. It is important to note that the interpretation adopted in New Zealand is not an incorrect or impermissible interpretation of the Refugee Convention. However, it is suggested that this alternative approach would also be permissible and would include many practical advantages to stateless persons absent from the New Zealand approach. These would include, offering increased protection to stateless persons and excluding the undesirable result that the predicament of stateless individuals with a well-founded fear of persecution and no right of return to any country is to be addressed under the Stateless Convention and not the Refugee Convention and that if a stateless individual seeks refuge in a country that is not a party to the Stateless Convention, then the individual is without remedy.[128](#)

V. CONCLUSION

There are a wide variety of circumstances and settings in which statelessness can be created. However, the catastrophic consequences of statelessness are universal. For individuals, being stateless results in a severely diminished status in both domestic and international law with the result that access to the rights and benefits normally afforded by the law is difficult if not impossible. For States, statelessness creates an undesirable source of tension in their international relations.

The overriding consideration in assessing the effectiveness of the international legal regime is that State sovereignty in matters of nationality is near absolute. However, it is in the limitations to the right of States to regulate nationality that the international legal regime has managed to find the most success in reducing the problem of statelessness. This paper notes that the two Conventions on Statelessness, whilst providing a step on the path towards the protection of stateless individuals and the reduction of future statelessness, do not provide an entirely effective solution nor provide a comprehensive mechanism to prevent all causes of statelessness. It is further noted that at present, the right to a nationality, even with the assistance of the doctrine of the genuine and effective link, is not effective in reducing statelessness. However, it is clear that this right is developing and could in the future be an important tool in reducing the problems of statelessness. The application of the Refugee Convention to stateless persons is clearly an important element in the protection of stateless individuals. Whilst it is clear that not all stateless persons are refugees, it is important that those who have a well founded fear of persecution have the ability to access the benefits of the Convention. It is noted that the approach adopted in New Zealand in interpreting the relationship between stateless individuals and the Refugee Convention has the undesirable result of all but excluding stateless persons from accessing the rights and benefits contained within the Convention.

It is suggested that there are two methods through which the international legal regime could provide a more effective solution to the problems of the statelessness. The first is through increased State accession to the two Conventions on Statelessness. It is noted that with a strong sovereign right to regulate nationality, that change needs to occur primarily at the State level and that increased accession is an essential step in the furtherance of international efforts towards reducing the problem of statelessness. The second proposal is that an alternative interpretation of the Refugee Convention could be adopted which would provide, in a practical sense, increased access to the benefits of the Refugee Convention for stateless individuals.

BIBLIOGRAPHY

Articles

Batchelor, Carol A "Statelessness and the Problem of Resolving Nationality Status" (1998) volume 10 International Journal of Refugee Law.

Batchelor, Carol A "UNHCR and Issues Related to Nationality" (1995) volume 14 number 3 Refugee Survey Quarterly 91.

Batchelor, Carol A "Stateless Persons: Some Gaps in International Protection" (1995) volume 7 International Journal of Refugee Law.

Biancheria, Christine "Restoring the Right to Have Rights: Statelessness and Alienage Jurisdiction in light of Abu-Zeineh v Federal Laboratories Inc" (1996) American University Journal of International Law and Policy 195.

Blackman, Jeffrey L "State Succession and Statelessness: The Emerging Right to an Effective Nationality under International Law" (1998) volume 19 Summer 1998 Michigan journal of International Law 1141.

Chan, Johannes M.M "The Right to Nationality as a Human Right: The Current Trend Towards Recognition" (1991) volume 12 number 1-2 Human Rights Law Journal.

Corrigan, Edward C "The Legal Debate in Canada on the Protection of Stateless Individuals under the 1951 Geneva Convention" (2003) volume 23 part 2 Immigration Law Reporter.

Donkoh, Bemma "A Half-Century of International Refugee Protection: Who's Responsible, What's Ahead?" (2000) Berkeley journal of International Law 260.

Greiper, Ellen H "Stateless Persons and Their Lack of Access to Judicial Forums" (1985) volume 11 Brooklyn Journal of International Law.

Hall, Stephen "The European Convention on Nationality and the right to have rights" (1999) volume 24 European Law Review 586.

Khan, Irene "UNHCR's Mandate Relating to Statelessness and UNHCR's preventative strategy" (1995) 49 Austrian Journal of Public International Law 93.

Niraj Nathwani "The Purpose of Asylum" (2000) 12 International Journal of Refugee Law 354.

Sen, Sumit, "Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia – Part 2" (2000) volume 12 number 1 International Journal of Refugee Law 41.

Settlage, Rachel "No Place to Call Home: Stateless Vietnamese Asylum Seekers in Hong Kong" (1997) volume 12 Georgetown Immigration Law Journal 187.

Warnke, Adam M "Vagabonds, Tinkers, and Travelers: Statelessness among the East European Roma" (1999) Indiana Journal of Global Legal Studies 335.

Weis, Paul, "The United Nations Convention on the Reduction of Statelessness" (1961) Volume 11 International and Comparative Law Quarterly 1073.

Books

Battifol, Henri and Paul Lagard *Droit international prive* (Seventh edition, volume 1, Librairie generale de droit et de jurisprudence, Paris, 1981).

Brownlie, Ian *Principles of Public International Law* (Fifth Edition, Clarendon Press, Oxford, 1998).

Donner R *The Regulation of Nationality in International Law* (Second Edition, Irvington-on-Hudson, 1994).

Grahl-Madsen, Atle *The Status of Refugees in International Law* (Volume 1 AW Sijthoff 1966).

Guy S Goodwin Gill *The Refugee in International Law* (Second Edition, Clarendon Press, Oxford, 1996).

Hathaway, James C *The Law of Refugee Status* (Butterworths, Canada, 1991).

Holborn, Louise W *Refugees: A Problem of Our Time, The Work of the United Nations High Commissioner for Refugees, 1951 – 1972* (The Scarecrow Press Inc, New Jersey, 1975).

Jennings, Robert and Arthur Watts (eds) *Oppenheim's International Law* (Ninth edition, Longman House, Essex, 1992).

Lauterpacht Hersch *International Law and Human Rights* (Archon Books, USA, 1968).

Macalister, Peter and Gudmundur Alfredsson (eds) *Atle Grahl Madsen: The Land Beyond, Collected Essays on Refugee Law and Policy* (Martinus Nijhoff Publishers, The Netherlands, 2001).

Robinson, Nehemiah *Convention Relating to the Status of Stateless Persons, Its History and Interpretation: A Commentary by Nehemiah Robinson* (Institute of Jewish Affairs, World Jewish Congress, 1955, Republished by the Division of International Protection of the United Nations High Commissioner for Refugees, 1997).

Watts, Arthur *The International Law Commission, 1949 – 1998, Volume 1: The Treaties* (Oxford University Press, New York, 1999).

Weis, Paul *Nationality and Statelessness in International Law* (Second edition, Sijthoff & Noordhoff, The Netherlands, 1979).

Ziemele & Schram "Article 15" in Alfredsson & Eide *The Universal Declaration of Human Rights: A Common Standard of Achievement* (Martinus Nijhoff, 1999 page 297).

International Documents

A Study of Statelessness UN Doc E/1112, 1 February 1949.

Cordova, Roberto, Special Rapporteur International Law Commission *Report on the Elimination or Reduction of Statelessness* (UN Doc A/CN.4/64) 30 March 1953.

Human Rights Watch *The Bedoons of Kuwait: Citizens without Citizenship* (1995).

Mikulka, Václav, Special Rapporteur International Law Commission *First Report on State Succession and its Impact on the Nationality of Natural and Legal Persons* (Un Doc A/CN.4/467 17 April 199) (n45); *Second Report on State Succession and its Impact on the Nationality of Natural and Legal Persons* (UN Doc A/CN.4/474, 17 April, 1996) and *Third Report on Nationality in Relation to the Succession of States* (UN Doc A/CN.4/480, 27 February, 1997).

O Hudson, Manley, Special Rapporteur International Law Commission *Nationality, including Statelessness* (UN

Doc A/CN 4/50) 21 February 1953.

UNHCR *Training Package: Statelessness and Related Nationality Issues* (1 January 1998).

UNHCR Division of International Protection *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and The 1961 Convention on the Reduction of Statelessness* (June 1996, revised January 1999).

UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*.

Caselaw

Abdel-Khalik v Canada (Minister of Employment & Immigration) (1994) 23 Imm LR (2d) 262 Fed TD.

Advisory opinion on the Nationality Decrees Issued in Tunis and Morocco Permanent Court of International Justice, Ser. B, no. 4 (1923, 24; Whiteman, viii. 37-42).

Afroyim v Rusk 387 US 253; 18 L Ed 2d 757 (1967).

Lee v Deportation Review Tribunal [1999] NZAR 481.

Maarouf v Canada (Minister of Employment & Immigration) (1993) 23 Imm LR (2d) 163 (Fed TD).

Perez v Brownell 356 US 44.

Re Amendments to the Naturalization Provisions of the Constitution of Costa Rica (Advisory Opinion of 19 January 1984).

Refugee Appeal No. 72635/01 (A decision of the New Zealand Refugee Status Appeals Authority delivered by RPG Haines on 6 September 2002).

Thabet v Canada (Minister of Citizenship & Immigration) (1995) 105 F.T.R 49 (Fed T.D); (1998) 48 Imm LR (2d) 195 (n91) (Fed CA)

The Nottebohm Case (Liechtenstein v Guatemala) 1955 ICJ Reports 4

Trop v Dulles (1958) 356 US 86 at 101-102.

Yan v Minister of Internal Affairs [1997] 3 NZLR 450 at 456.

Ward v Canada (Minister of Employment & Immigration) (1993) 20 Imm LR (2d) 85 (SCC).

International Legal Instruments

American Convention on Human Rights 22 November 1969 O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

Convention on Certain Questions relating to the Conflict of Nationality Laws (in force since July 1st, 1937 in accordance with articles 25 and 26).

Convention on the Elimination of all Forms of Discrimination against Women adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 (entry into force 3 September 1981 in accordance with article 27(1)).

Convention on the Nationality of Married Women opened for signature and ratification by General Assembly Resolution 1040 (XI) of 29 January 1957 (entry into force 11 August 1958, in accordance with Article 6).

Convention on the Rights of the Child adopted for signature, ratification and accession by General Assembly

resolution 44/25 of 20 November 1989 (entry into force in 2 September 1990 in accordance with article 49).

Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council Resolution 526 A (XVII) of 26 April 1954 (entry into force 6 June 1960 in accordance with Article 39).

European Convention on Nationality opened for signature 6 November 1997 (entry into force 1 March 2000).

International Covenant on Civil and Political Rights adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 (entry into force 23 March 1976 in accordance with article 49).

Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

Websites

www.unhcr.ch

www.un.org

www.unhchr.ch

www.refugee.org.nz

www.refugeeappeals.org.nz

www.mfat.govt.nz

Endnotes

1 Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by the Economic and Social Council resolution, 526 A (XVII) of 26 April 1954, entry into force: 6 June 1960, in accordance with Article 39, "1954 Stateless Convention".

2 Paul Weis *Nationality and Statelessness in International Law* (Second Edition, Sijthoff & Noordhoff, The Netherlands, 1979) p161-165.

3 Ibid 161-162.

4 Ibid 161 - 162.

5 Carol A Batchelor "Statelessness and the Problem of Resolving Nationality Status" (1998) Volume 10 International Journal of Refugee Law, p 172, 178.

6 Paul Weis, *Nationality and Statelessness in International Law* above n 2, p161-162.

7 Adam M Warnke "Vagabonds, Tinkers and Travelers: Statelessness amongst the East European Roma" (1999) Indiana Journal of Global Legal Studies, p 352; see also Human Rights Watch *The Bedoons of Kuwait: Citizens Without Citizenship* (1995); Rachel Settlage "No Place to Call Home: Stateless Vietnamese Asylum-Seekers in Hong Kong" (1997) Volume 12 Georgetown Immigration Law Journal 187.

8 *Refugee Appeal 72635/01* (a decision of the New Zealand Refugee Status Appeals Authority, delivered by RPG Haines on 6 September 2002) notes that some of the possible causes are described by Manley O'Hudson, Special Rapporteur, *Nationality, Including Statelessness* (UN Doc A/CN.4/50) 21 February 1952; Roberto Cordova, Special Rapporteur, *Report on the Elimination or Reduction of Statelessness* (Doc A/CN.4/64) 30 March 1953; UNHCR Division of International Protection *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness* (June 1996, Revised January 1999) at 5; UNHCR *Training Package: Statelessness and Related Nationality Issues* (1 January 1998) at paragraph 22.

9 It is noted that statelessness as a result of the conflict of nationality laws is a 'more frequent cause', in Johannes MM Chan "The right to a nationality as a human right: The Current Trend towards Recognition" (1991) Volume 12 Human Rights Law Journal 13. It is further noted in *Refugee Appeal 72635* para [81] above n 8, that "even States with laws aimed at paying full regard to international law in the matter of nationality and the prevention of statelessness may have legislation which, due to conflict with another States legislation, or for other good reason, inadvertently results in statelessness".

10 *Refugee Appeal 72635* above n 8, para [80].

11 *Ibid* para [80].

12 *Ibid* para [80].

13 *Ibid* para [80].

14 *Ibid* para [80].

15 Ian Brownlie *Principles of Public International Law* (Fifth Edition, Clarendon Press, Oxford, 1998) p392.

16 Carol A Batchelor "UNHCR and Issues Related to Nationality" (1995) Volume 14 Number 3 *Refugee Survey Quarterly* 104.

17 *Refugee Appeal 72635* above n 8, para [80].

18 *Refugee Appeal 72635*, above n 8, para [80].

19 *Refugee Appeal 72635*, above n 8, para [80].

20 See for example: *Re Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (Advisory Opinion of 19 January 1984); Lauterpacht, Hersch *International Law and Human Rights* (Archon Books, USA, 1968) pages 346-350 as cited in Sumit Sen "Stateless Refugees and the Right to Return: The Bihari Refugees of South Asia - Part 2" (2000) Volume 12 Number 1 *International Journal of Refugee Law* p 41; see also Paul Weis "The United Nations Convention on the Reduction of Statelessness" (1961) Volume 11 *International and Comparative Law Quarterly* 1073.

21 Jeffrey L Blackman "State Succession and Statelessness: The Emerging Right to an Effective Nationality under International Law" (1998) Volume 19 Summer 1998 *Michigan Journal of International Law* 1141, p 1177; see also Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 182.

22 Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 159; Article 13(2) of the Universal Declaration of Human Rights provides that "Everyone has the right to leave any country, including his own, and to return to his country". It is noted in Warnke "Vagabonds, Tinkers and Travellers" above n 7, p 355-356 that although it is not a legally binding covenant, the Universal Declaration carries considerable weight. The near-unanimous adoption of the Universal Declaration by the United Nations General Assembly, and subsequent recognition by the international community, have elevated its status nearly to that of customary international law; See also Carol A Batchelor "Stateless Persons some gaps in international protection" (1995) Volume 7 *International Journal of Refugee Law* p 237.

23 Batchelor "Statelessness and the Problem of Resolving Nationality Status" above n 5, p 159.

24 *Perez v Brownell* 356 US 44 at 64; 2 L Ed 2d 603 (1958) (US:SC) at 616, Warren CJ (dissenting), the majority decision was subsequently overruled in the US Supreme Court decision of *Afroyim v Rusk* 387 US 253; 18 L Ed 2d 757 (1967).

25 *Yan v Minister of Internal Affairs* [1997] 3 NZLR 450 at 456.

26 *Ibid* at 459.

- 27** *Trop v Dulles* (1958) 356 US 86 at 101-102.
- 28** *Weis Nationality and Statelessness* above n 2, p 162.
- 29** *A Study of Statelessness* UN Doc E/1112, 1 February 1949, p 21-23.
- 30** Weis "The United Nations Convention on the Reduction of Statelessness" above n 20, p 1073.
- 31** *Ibid* p 1073.
- 32** *Ibid* p 1073.
- 33** Edward C Corrigan "The Legal Debate in Canada on the Protection of Stateless Individuals under the 1951 Geneva Convention" (2003) Volume 23 Part 2 Immigration Law Reporter, p 196.
- 34** Weis *Nationality and Statelessness in International Law* above n 2, 162; It is also noted in Batchelor "Statelessness and the Problem of Resolving Nationality Status" above n 5, p 157 that "statelessness has gained more attention in recent years as its potential as a source of involuntary displacement and regional tension has come to be recognised.
- 35** Weis "The United Nations Convention on the Reduction of Statelessness" above n 20, p 1090 notes that from a practical perspective the reduction and elimination of statelessness is first and foremost a humanitarian problem; see also Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 182.
- 36** Batchelor "Statelessness and the Problem of resolving Nationality Status" above n 5 p 159.
- 37** *Perez v Brownell* above n 24, at 64.
- 38** *Lee v Deportation Review Tribunal* [1999] NZAR 481, Williams J at 494.
- 39** It is also noted that Statelessness has presented the international community with complex economic, political and legal questions, in Corrigan "The Legal Debate in Canada on the Protection of Stateless Individuals under the 1951 Geneva Convention" above n 33, p 196.
- 40** Weis *Nationality and Statelessness in International Law* above n 2, p 161, noting that it has been held that statelessness is not to be presumed by the Swiss Federal Tribunal in *Von Fliedner v Beringen* (Off. Coll. of Dec. 72, vol 1, page 263; Annual Digest 1933-1934, Case No. 113) and by the Israel Supreme Court in *Hirschenhorn v Attorney General* (21 Int. Law Reports page 168); see also Chan "The right to a nationality as a human right" above n 9.
- 41** Chan *Ibid* p 2.
- 42** Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (Ninth Edition, Volume 1, Parts 2-4, Longman, London, 1992) p 852.
- 43** *The Nottebohm Case (Liechtenstein v Guatemala)* 1955 ICJ Reports 4 at 20.
- 44** O'Hudson *Nationality Including Statelessness* above n 8; note also that Brownlie *Principles of Public International Law* above n 15 at p 385 states that this is the preferred view.
- 45** Henri Battifol and Paul Lagarde *Droit international prive* (Seventh Edition, Volume 1 Librairie Generale de Droit et de Jurisprudence, Paris, 198), pages 69-70 as cited in Václav Mikulka, Special Rapporteur International Law Commission *First Report on State Succession and its Impact on the Nationality of Natural and Legal Persons* (A/CN.4/467 17 April 1995) p 22.
- 46** *Advisory opinion on the Nationality Decrees Issued in Tunis and Morocco* Permanent Court of International Justice, Ser. B, no. 4 (1923, 24; Whiteman, viii. 37-42) as noted in Brownlie *Principles of Public International Law* above n 15, p 385

47 Jennings and Watts *Oppenheim's International Law*, above n 42, p 852, notes two examples of treaty obligations conferring on questions of nationality an international character so as not to be exclusively a matter for the state concerned: first, the arbitration between Germany and Poland concerning the *Acquisition of Polish Nationality* (1924), RIAA, 1, page 401; secondly, the decision of the Inter-American Court of Human Rights in *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica* (1984), ILR, 79, which noted that while the conferment and regulation of nationality fell within the jurisdiction of the State, this principle was limited by the requirements imposed by international law for the protection of human rights.

48 The reference to three primary sources of international law in Article 1 of the Hague Convention was later encoded into Article 38 (1) of the Statute of the International Court of Justice

49 Weis *Nationality and Statelessness in International Law*, above n 2, pages 88-91, 121 notes that even if domestic law is found to be inconsistent with international law, the domestic law remains valid though unlawful and the national status of the individual concerned continues to be governed by that law.

50 *Convention relating to the Status of Stateless Persons*, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by Economic and Social Council Resolution 526 A (XVII) of 26 April 1954, (entry into force 6 June 1960 in accordance with Article 39), "1954 Convention"

51 Nehemiah Robinson *Convention Relating to the Status of Stateless Persons, Its History and Interpretation: A Commentary by Nehemiah Robinson* (Institute of Jewish Affairs, World Jewish Congress, 1955, Republished by the Division of International Protection of the United Nations High Commissioner for Refugees, 1997) p1.

52 The preamble of the 1954 Convention notes: "Considering that only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees...and that there are many stateless persons who are not covered by that Convention...consider that it is desirable to regulate and improve the status of stateless persons by an international agreement; also see Warnke "Vagabonds, Tinkers and Travellers" above n 7, p 354.

53 *Refugee Appeal No 72635* above n 8 para [92].

54 *Refugee Appeal No 72635* above n 8 para [92].

55 Article 31(1) provides that: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

56 *Refugee Appeal No 72635* above n 8 para 92.

57 Weis *Nationality and Statelessness in International law* above n 2, p 166.

58 Batchelor "Stateless Persons: Some gaps in International Protection" above n 22, p257 notes that the Convention was originally intended as a Convention on the elimination of statelessness and only after this was considered too radical a step was the focus changed to the reduction of future statelessness.

59 Article 1 provides: "A Contracting State shall grant its nationality to a person born in its territory who would otherwise be stateless". Article 4 provides: "A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person's birth was that of that State."

60 Batchelor "Stateless Persons: Some gaps in International Protection" above n 22, p 258 notes that the division of *de facto* and *de jure* statelessness was the result of two things. The first was a desire to extend protection to those who legally had a nationality but who had none of the attributes of a nationality. The second was a misconception regarding who would qualify, at the time and over the years, as a refugee."

61 Batchelor "Statelessness and the Problem of Resolving Nationality Status" above n 5, p 173 notes that there

are currently thousands of persons in a *de facto* situation.

62 Batchelor "Stateless Persons: Some gaps in International Protection" above n 22, p 257 notes that despite the efforts of a number of individuals and groups, *de facto* statelessness remained outside the definition adopted in the 1954 Convention; it is suggested that this occurred because it was presumed that *de facto* stateless persons would be protected by the Refugee Convention.

63 *Universal Declaration of Human Rights*, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.

64 *Convention on Certain Questions relating to the Conflict of Nationality Laws* (in force since July 1st, 1937 in accordance with articles 25 and 26).

65 *Convention on the Nationality of Married Women* opened for signature and ratification by General Assembly Resolution 1040 (XI) of 29 January 1957 (entry into force 11 August 1958, in accordance with Article 6), seeks to grant women equal rights with men to acquire, change or retain their nationality. The Convention also seeks to prevent a husband's nationality status automatically changing the nationality of the wife, thus rendering her stateless

66 *International Covenant on Civil and Political Rights* adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966 (entry into force 23 March 1976 in accordance with article 49), Article 24(3) provides for the right of children to acquire nationality.

67 *Convention on the Elimination of all Forms of Discrimination against Women* adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 (entry into force 3 September 1981 in accordance with article 27(1)), also aims for women to have equal rights with men with respect to the nationality of their children, avoiding both discrimination against the women and the inheritance, where applicable, of the father's statelessness.

68 *Convention on the Rights of the Child* adopted for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 (entry into force in 2 September 1990 in accordance with article 49), stipulates that children should be registered immediately after birth, a crucial factor in establishing both place of birth and descent for purposes of acquiring nationality.

69 *American Convention on Human Rights* 22 November 1969 O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), states in Article 20: "Every person has the right to a nationality. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality. No one shall be arbitrarily deprived of his nationality or of the right to change it."

70 *European Convention on Nationality* opened for signature 6 November 1997 (entry into force 1 March 2000), also provides a valuable reference point for contemporary consensus on issues of nationality and statelessness. The European Convention stipulates that account should be taken of the legitimate interests of States and of individuals with reference to nationality. The avoidance of statelessness, the right to a nationality and a prohibition concerning discriminatory distinctions are principles underlying all provisions of the Convention. Also, in proclaiming a general right to nationality, the European Convention endows this right with substance as a convention norm giving rise to specific obligations on State parties as noted in Batchelor "Statelessness and the Problem of Resolving Nationality Status" above n 5, pages 162-165.

71 Ziemele & Schram, "Article 15" in Alfredsson & Eide (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement*, above n 71, p321, claims that Article 15 has entered into Customary International Law, however, it has also been claimed in Stephen Hall "The European Convention on Nationality and the right to have rights" (1999) 24 *European Law Review* 586, p 588, that Article 15 is simply aspirational in nature, and that where it is one thing to declare a general right of persons to possess a nationality, it is quite another to impose a duty on a State to confer, or refrain from withdrawing, its nationality in particular circumstances, this latter view is cited with approval in Refugee Appeal No 72635, above n 8, at para [85] noting that this is the "better view". Refugee Appeal further notes at para [85] that Article 15 "co-exists with very widespread State practice of withdrawing nationality from persons in a broad spectrum of situations ranging from residence abroad to treason even where statelessness results for the affected person."

72 Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 182.

73 *The Nottebohm Case (Liechtenstein v Guatemala)* 1955 ICJ Reports as cited in Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 161.

74 *European Convention on Nationality*, above n 70 and the *Principles on Citizenship Legislation Concerning the Parties to the Peace Agreement on Bosnia and Herzegovina* (adopted by the Expert Meeting on Citizenship Legislation held in co-operation with the United Nations High Commissioner for Refugees, the Council of Europe, Office of the High Representative, and State party delegates from the five States on the territory of the Former Yugoslavia); both instruments refer explicitly to the genuine and effective link and request States to apply this doctrine in specific circumstances as cited in Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 161; it is further noted that "the genuine and effective link is a subtle and fluid concept, which can be evidenced in many factors, including social attachments, centre of interests and extended family ties. It is not limited to place of birth, descent or residence. The latter are, however, matters of fact, which makes them far easier to identify and apply in an objective and non-discriminatory manner than some of the more subtle signs of attachment which can be used as a supplementary means of determining ties; also in Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 161; The genuine and effective link has been used in recent times by the International Law Commission's Special Rapporteur as the basis for the ILC's work on nationality and State succession, Mikulka *First Report on State Succession and its impact on the Nationality of Natural and Legal Person*, above n 45, *Second Report on State Succession and its impact on the Nationality of Natural and Legal Person* (UN Doc A/CN.4/474, 17 April, 1996) and *Third Report on Nationality in Relation to the Succession on States* (UN Doc A/CN.4/480, 27 February, 1997).

75 Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 160.

76 *Ibid* p 157, noting that while many States tend to emphasise descent as the primary factor in nationality determinations, in the America's place of birth is an important factor in determining nationality.

77 *Ibid* p 161.

78 Weis *Nationality and Statelessness in International Law*, above n 2 , p 162.

79 Article 34 provides: "The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."

80 This is the view taken in *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107, 1115H; [1997] 2 All ER 723, 730f (CA) and at first instance in *Savvin v Minister for Immigration and Multicultural Affairs* (1999) 166 ALR 348 (Dowsett J). This position has also been espoused by Professor Guy S Goodwin-Gill in a report for the plaintiff in *Revenko v Secretary of State for the Home Department* [2001] QB 601 (CA).

81 As noted in *Refugee Appeal No 72635*, above n 8, para [67] that this view was rejected by the House of Lords on appeal in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293, 304C-E (HL) (decision of the Court of Appeal reversed) and by the Court of Appeal itself in *Revenko v Secretary of State for the Home Department* [2001] QB 601, 623C, 631G, 642B (CA). The argument has also been rejected in Australia, for example, *Rishmawi v Minister for immigration and Multicultural Affairs* (1997) 148 ALR 366, 372-373 (Cooper J); *Diatlov v Minister for Immigration and Multicultural Affairs* (1999) 167 ALR 313, 320-321 (Sackville J) and *Minister for Immigration and Multicultural Affairs v Savvin* (2000) 171 ALR 483, 484, 488, 494-518 (Spender, Drummond and Katz JJ) reversing the decision of Dowsett J. The reasoning of the English Court of Appeal in *Adan* was rejected in *Refugee Appeal No. 1/92 Re SA* (30 April 1992) 83-84. The position in Canada is the same: *Thabet v Canada* (Minister of Citizenship & Immigration) (1998) 160 DLR (4th) 666 at [16] & [17] (FC:CA) (Linden & McDonald JJA and Henry DJ).

82 Corrigan "The Legal Debate in Canada", above n 33, p 198; *Refugee Appeal No 72635*, above n 8, para [109] notes that today neither *de jure* nor *de facto* statelessness necessarily signifies the existence of a well founded fear of persecution under the terms of the Refugee Convention; It has been noted that there is no

correlation, either positive or negative, between refugee status and statelessness in Atle Grahl-Madsen *The Status of Refugees in International Law* (Volume 1, AW Sijthoff, 1966), p 77; That statelessness per se does not give rise to a claim to refugee status James C Hathaway *The Law of Refugee Status* (Butterworths, Canada, 1991) p 6; and that not all stateless people are refugees nor are all refugees technically stateless Guy S Goodwin Gill *The Refugee in International Law* (Second Edition, Clarendon Press, Oxford, 1996), p 42; *Refugee Appeal No. 72635*, above n 8, para [152] reaches the conclusion that statelessness *per se* does not give rise to a claim to refugee status and at para [152] that before a stateless person can be recognised as a refugee, that person must establish owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion, he or she is outside the country of his or her former habitual residence and is unable, or owing to such fear, unwilling to return to it; Sackville J in *Diatlov v Minister for Immigration and Multicultural Affairs*, above n 81, at [28] and [29] comments: "The Stateless Persons Convention...represented an attempt, as the recitals indicate, to regulate and improve the status of stateless persons. The Stateless Persons Convention proceeds on the basis that only those stateless persons who are refugees are covered by the Refugees Convention and that many stateless persons are not so covered."; Clarke LJ also comments in *Revenko v Secretary of State for the Home Department*, above n 81, at 628H-629B that: "It is, I think, clear that the purpose of the 1951 [Refugee] Convention was not to afford general protection to stateless persons. The Final Act of the 1951 UN Conference on the Status of Refugees and Stateless Persons resolved to refer the draft Protocol relating to stateless persons back for further consideration. The problem was subsequently met by the 1954 Convention relating to the Status of Stateless Persons..."; Further, the preamble to the Convention Relating to the Status of Stateless Persons, 1954 expressly acknowledges: "Only those stateless persons who are also refugees are covered by the Convention relating to the Status of Refugees of 28 July 1951, and that there are many stateless persons who are not covered by that Convention."

83 UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, para 102.

84 *Refugee Appeal No 72635*, above n 8, at para [68].

85 Corrigan "The Legal Debate in Canada", above n 33, pages 199-200 notes that the Supreme Court of Canada decision of *Ward v Canada (Minister of Employment & Immigration)* (1993) 20 Imm LR (2d) 85 (SCC) found that when there are two or more countries of nationality, the claimant must show a well founded fear of persecution against both (or more if there are more). Corrigan concludes that in a situation where individuals are stateless, there is no country of citizenship and no right of return and that as such *Ward*, which deals with citizens with nationality and who are vested with a right of return, is not binding on individuals who are stateless and are from countries of former habitual residence with no legal right of return and no effective national protection.

86 *Thabet v Canada (Minister of Citizenship and Immigration)* (1998) 160 DLR (4th) 666 at [18]-[30] identifies five possible approaches to the question of which country of former habitual residence is relevant to the determination of a refugee claim, as noted in *Refugee Appeal No 72635*, above n 8, para [118].

87 This is the view of Grahl-Madsen *The Status of Refugees in International Law*, above n 82, p 161 as noted by Corrigan "The Legal Debate in Canada", above n 33, p 199, Grahl-Madsen states: "It would seem to be best in keeping with the intention of the drafters if in the greatest possible number of cases application of the term 'country of former habitual residence' would lead to the same practical result as application of the term 'country of nationality'...the country from which a stateless person had to flee in the first instance remains the 'country of his former habitual residence' throughout his life as a refugee, irrespective of any changes of factual residence."

88 This is the approach adopted in the Canadian Supreme Court decision of *Ward*, above n 85. It is noted in *Refugee Appeal No 72635*, above n 8, at para [120] that the *Ward* decision "has long underpinned the jurisprudence of this [the New Zealand Refugee Status Appeals Authority] authority and in *Butler v Attorney-General* [1999] NZAR 205, 217 (CA) the New Zealand Court of Appeal expressly adopted the articulation by the Supreme Court of Canada in *Ward* of the rationale underlying international refugee protection, namely that international refugee law was formulated to serve as a back up to State protection. It was meant only to come into play in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home

State for protection before the responsibility of other States becomes engaged. The lynch pin is the State's inability to protect. The true object of the Refugee convention is not to assuage fear, however reasonably and plausibly entertained, but to provide a safe haven when fear of persecution is in reality well founded."

89 Hathaway *The Law of Refugee Status*, above n 82, p 62; The Federal Court of Canada also noted in *Maarouf v Canada (Minister of Employment & Immigration)* (1993) 23 Imm LR (2d) 163 (Fed TD), at 174-175 that: "A 'country of former habitual residence' should not be limited to the country where the claimant initially feared persecution."

90 The applicant in *Thabet v Canada (Minister of Citizenship and Immigration)* (1995) 105 F.T.R 49 (Fed T.D), was a stateless Palestinian who had been a student in the United States but had no legal status in the United States and no legal right of return or legal right of protection. The Federal Court ruled that the refugee claim must be made against the last country of former habitual residence, the United States, and not against Kuwait, a second country of former habitual residence and where a fear of persecution was also alleged.

91 *Thabet v Canada (Minister of Citizenship & Immigration)* (1998) 48 Imm LR (2d) 195 (Fed CA).

92 Corrigan "The Legal Debate in Canada", above n 33, p 204, notes that the IRB made the following observation in rendering a positive decision in a claim involving a stateless Palestinian who had a genuine fear of persecution in Syria and had the right to return to Syria but who also had Tunisia as a country of former habitual residence but had no right to return to Tunisia, according to the law set out in *Thabet* this claimant could not qualify as a Convention refugee: "In our opinion...such a result would be perverse. Were we to find the claimants not to be Convention refugees on that basis, the fact remains that they cannot be returned to Tunisia. They are returnable to Syria, but that is where they face a reasonable chance of persecution. How could Canada, a signatory to the 1951 Convention, commit *refoulement*? Can the *Maarouf* decision possibly mean that claimants are at risk of being sent to a country where they have a well founded fear of persecution simply because they do not have such a fear with respect to another country to which in any event they cannot be returned? Such a perverse result would not, in our opinion, be in keeping with Canada's international obligations."

93 Corrigan "The Legal Debate in Canada", above n 33, p 204.

94 *Ibid* p 202, notes that this was the approach adopted in a number of decisions of the Canadian IRB.

95 *Refugee Appeal No 72635*, above n 8, para [118].

96 Corrigan "The Legal Debate in Canada", above n 33, p 203, notes that "this approach creates a legal absurdity in that it could create the legal result of returning a stateless refugee who could not prove a claim against one country of former habitual residence to a country where they could be returned and where they faced a genuine risk of persecution."

97 In *Maarouf v Canada*, above n 89, at pages 174-175, Justice Cullen found that "a 'country of former habitual residence' should not be limited to the country where the claimant initially feared persecution."

98 *Refugee Appeal No 72635*, above n 8, at para [123] notes that *Al-Anezi v Minister of Immigration and Multicultural Affairs* (1999) 92 FCR 283 (Lehane J) "is also illustrative of this approach and that although *Thabet* was decided twelve months earlier, the Canadian decision appears not to have been drawn to the attention of Lehane J with the result that the compelling reasons given by the Canadian Supreme Court of Appeal for rejecting this approach are not addressed in the decision. Specifically the Australian judgment does not address the fundamental point made by *Ward*, namely if a person in danger of persecution has other protection alternatives, these must be exhausted before the claim can be determined under the Refugee Convention)."

99 Corrigan "The Legal Debate in Canada", above n 33, p 203 notes that the Supreme Court of Canada has commented on the persuasiveness of the UNHCR Handbook in *Ward*, above n 85, at 103: "While not formally binding on signatory States, the handbook has been endorsed by the States which are members of the Executive Committee of the UNHCR, including Canada, and has been relied upon by the Courts of signatory States."

100 As such, this approach was rejected by the Canadian Court of Appeal in *Thabet* on the basis that it takes no account of the existence of alternative protection options (ie the *Ward* factor), at 26: "If the claimant has available a place of former habitual residence which will offer safety from protection, then he or she must return to that country."

101 The Federal Court of Appeal in *Thabet*, above n 91, at para 16, states: "There is no reason why stateless persons should be any more or less accommodated in their claims to refugee status. There is no question that stateless persons may qualify as refugees; the definition acknowledges this explicitly. However, people are not refugees solely by virtue of their statelessness. They must still bring themselves within the terms of the definition set forth in the Convention. And they must still comply with those other sections of the Act which restrict access to the refugee determination process. Statelessness does not give a person an advantage over those refugees who are not stateless." As noted in Corrigan "The Legal Debate in Canada", above n 33, page 208. Further, Linden J writing for the Federal Court of Appeal in *Thabet*, at para 30, summarises the law on statelessness as follows: "In order to be found a Convention refugee, a stateless person must show that, on the balance of probabilities he or she would suffer persecution in any country of former habitual residence, and that he or she cannot return to any of his or her countries of former habitual residence."

102 *Refugee Appeal No 72635*, above n 8, para [121].

103 *Ibid* para [121].

104 *Ibid* at [122]: As Linden JA states...the Court [in *Thabet*] merely makes explicit what is implicit in *Ward* and in the philosophy of refugee law in general."

105 *Thabet v Canada*, above n 91, states: "The best answer to this riddle is really a variation of the 'any country' solution."

106 *Ibid* para 16.

107 Corrigan "The Legal Debate in Canada", above n 33, p 209.

108 *Ibid* p 198.

109 This legal viewpoint is based on the academic position adopted by Hathaway in his book *The Law of Refugee Status*, above n 82, p 61-63. Hathaway notes at 63, that: "a state is only a state of former habitual residence if the claimant is legally able to return there." Hathaway's view is that if a claimant is not at risk of return to persecution, assessment of the fear of returning to that country is a non-sensical exercise, as the claimant cannot be sent back there in any event, as noted in *Refugee Appeal No 72635*, above note 8, at para [126].

110 This is the view adopted in the decision of the Refugee Status Branch (published on 12 April 2001) that is on appeal in *Refugee Appeal No 72635*, which concludes that: a stateless individual has no legal right of return to any country and that, as a matter of fact, they are unable to return to any country, they cannot be persecuted with the result that they are unable to establish a well-founded fear of being persecuted, as noted in *Refugee Appeal No 72635*, above n 8, para [3].

111 Corrigan "The Legal Debate in Canada", above n 33, p 200, notes: "The position taken by Hathaway and those on the IRB who adopted his views on country of former habitual residence was contrary to the preferred IRB legal position paper on statelessness, namely Guy Goodwin-Gill "Stateless Persons and Protection under the 1951 Convention for Refugees: Beware of Academic Error!" (Unpublished paper) Director, Legal Services, 'Treatment of Stateless Refugee Claimants at CRDD', March 11, 1992.

112 *Maarouf*, above n 85, p 175; note that this view was supported by *Abdel-Khalikk v Canada (Minister of Employment & Immigration)* (1994) 23 Imm LR (2d) 262 Fed TD at para 3, the facts involved a stateless Palestinian from the United Arab Emirates who was out of that country during the Gulf War and prevented from returning due to the fact that she was a Palestinian. Madame Justice Reed stated: "In the case of a stateless person, one cannot look to the country of the person's nationality but considers instead the country of the

individual's former habitual residence. The applicant is a Palestinian. She was born and lived most of her life in the United Arab Emirates. A person born in the United Arab Emirates does not automatically become a citizen of that country. Citizenship depends on the nationality of the father. Both counsel for the appellant and respondent agree that the applicant is a stateless person and that the board applied the correct test and properly identified the applicant's country of former habitual residence as the United Arab Emirates. The denial of a right to return to that country can be an act of persecution." As noted in Corrigan "The Legal Debate in Canada", above n 33, p 201.

113 *Refugee Appeal No 72635*, above n 8, para [134], further noting that it is a first principle of refugee law that past persecution alone cannot satisfy the requirements of the refugee definition; if the person cannot be returned to the country of former habitual residence in which the harm is anticipated, then refugee status is not appropriate [131]

114 *Ibid* para [136].

115 *Ibid* para [136].

116 *Ibid* para [133].

117 The New Zealand Ministry of Foreign Affairs and Trade is presently considering these Conventions with a view to acceding to both instruments. As such, Both the 1954 Convention on the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness are on the list of "concluded multilateral treaties which New Zealand is considering for possible accession", this list can be found on the New Zealand Ministry of Foreign Affairs website at <http://www.mfat.govt.nz/support/legal/treatynegnewb.html>); If the New Zealand Government decides to become party to either of these Conventions, the treaties will be tabled in the House for scrutiny by the Foreign Affairs, Defence and Trade select committee under the treaty examination process provided in the Cabinet Manual and the Standing Orders, before any binding action, such as ratification or accession is taken. This procedure is noted on the New Zealand Ministry of Foreign Affairs website, located at <http://www.mfat.govt.nz/support/legal/treatynegnewb.html>.

118 UNHCR *Information and Accession Package: The 1954 Convention and The 1961 Convention*, above n 8, p 4.

119 *Ibid* p 4.

120 Article 11 of the 1961 Convention on the Reduction of Statelessness provides: "The contracting states shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to the appropriate authority", this responsibility and role was eventually extended to the UNHCR, as noted in *Refugee Appeal No 72635*, above n 8, para [97]. In 1974 the United Nations General Assembly asked UNHCR to provide limited legal assistance to stateless individuals and in 1996 mandated the agency to broaden its role by promoting the avoidance and reduction of statelessness on a global scale, UNHCR has thus been charged with a mandate that enables the agency to intervene on behalf of, and to promote solutions for statelessness, including cooperation with States and providing technical assistance on issues of nationality legislation and related matters, as noted in Bemba Donkoh "A Half-Century of International Refugee Protection: Who's Responsible, What's Ahead?" (2000) *Berkeley Journal of International Law* 260, p 267; To this end the United Nations General Assembly and the UNHCR Executive Committee have adopted resolutions and conclusions stressing the importance of the principles embodied in international instruments, and the need for States to adopt measures to avoid statelessness, including the United Nations General Assembly resolution 50/152 (9 February 1996) which calls upon States to adopt nationality legislation with a view to reducing statelessness, consistent with the fundamental principles of international law pertaining to nationality, as noted in Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 160.

121 The work of the International Law Commission on statelessness was all that survived from what began as a more ambitious project to tackle the broader topic of 'Nationality, including Statelessness' as noted in Arthur

Watts *The International Law Commission, 1949 - 1998, Volume 1: The Treaties* (Oxford University Press, New York, 1999), p 139. This book includes a more general and detailed discussion on the work of the International Law Commission in the area of nationality and statelessness at pages 139 - 142, including the comment at 140 that the Commission's attempts to deal with Nationality, including Statelessness, "can be seen not to have been resoundingly successful."

122 Batchelor "Statelessness and the Problem of Resolving Nationality Status", above n 5, p 158 notes that efforts to reduce and eliminate statelessness have been undertaken at the regional level by the Organisation of American States, the Organisation for Security and Cooperation in Europe and the Council of Europe.

123 Ibid p 174 notes that it is the State concerned which must indicate whether the individuals in question do or do not have its nationality as it is that State which has both the privilege and the obligation to determine who its citizens are in accordance with international law.

124 Ibid p 174.

125 UNHCR *Information and Accession Package: The 1954 Convention and The 1961 Convention*, above n 8, p 4.

126 See above n 82.

127 See above n 99.

128 See above n115.